

# Challenging Carnegie

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“What lawyering skills don’t law schools teach that we should?” I put that question to a room full of eminent lawyers, judges and mediators who had come together to serve as the UC Berkeley School of Law Professional Skills Advisory Board. It is the question that has been on the minds of law teachers across the country since the 2007 publication of the Carnegie Foundation for the Advancement of Teaching’s report, *Educating Lawyers: Preparation for the Profession of Law*.<sup>1</sup> And the truth is that I expected to hear the same conversation that I have heard over and over again: Recent graduates know how to “think like lawyers,” but they lack practical skills; they need more experience writing; they don’t know how to interview a client, and so on. But the conversation that developed sounded different, deeper, richer. Rather than focusing on what tasks recent graduates can or cannot do—which is where much of the legal education reform talk has centered—these experienced, successful lawyers talked about how new lawyers do or do not think. Their many suggestions can be distilled into three main ideas. First, law students need to learn to recognize the complexity of their clients’ stories and desired outcomes.<sup>1</sup> The clients’ problems may be messy, with difficult-to-determine facts, legal and nonlegal aspects, and multiple potential outcomes that may differently serve

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1. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter *Educating Lawyers*]. Carnegie’s report coincided with calls for change from within the legal academy and profession itself. The Clinical Legal Education Association and the American Bar Association, for example, have been loud agitators for change. *See, e.g.*, Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and a Road Map* (CLEA 2007); American Bar Association Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report on the Task Force on Law Schools and the Profession: Narrowing the Gap* (American Bar Association, Section of Legal Education and Admissions to the Bar 1992) [hereinafter *The MacCrate Report*]. These reports and the calls for change that they represent come to many of the same conclusions as the Carnegie Report. But Carnegie made the biggest splash, and has come to represent the debate, which is why this essay centers on that document. I recognize, however, that it is certainly just one cog (if a major one) in this movement.

one or many of the clients' goals and aspirations. Second, law students should acquire a broad historical and contemporary sense of lawyers' varied roles in relationship to their clients, within and among institutions, and in society at large. A lawyer's ability to move the world closer to her client's desired end-state is intimately bound up with her ability to understand, and act within, these institutions and roles. Finally, students need to begin to develop the confidence and judgment that experience brings. For example, sharp analysis of the kind rewarded on an exam may suggest three lines of argument, but judgment might lead a lawyer to decide that her client's stated goals are better served by pursuing only one or two of them. Time and again the discussion around the table turned to the interplay of experience, analysis, understanding, and application—all in service of creating lawyers "who will contribute to the public good and who will serve their clients effectively and ethically."<sup>2</sup>

The Carnegie Report drew attention to legal education's open secret: Law school only half-heartedly and rather incompletely prepares students for the practice of law. This observation is far from new. In 1933, Jerome Frank famously called for transforming "law schools" into "lawyer schools."<sup>3</sup> During the 1950s that call was renewed.<sup>4</sup> Later, while critical legal theorists objected to typical law teaching as much on theoretical as professional grounds, they too noted the scant attention law school has paid to lawyering.<sup>5</sup> The 1970s and 1980s further saw clinical educators and those interested in problem-based teaching argue that the case method focuses too heavily on judge-centered thinking, and that law school ought to do more to expose students to lawyers' roles and

2. Legal Education Analysis and Reform Network (LEARN), General Description of Planned Projects, 2009–2010, at 8, *available at* [http://www.law.stanford.edu/display/images/dynamic/events\\_media/LEARN\\_030509\\_lr.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf). LEARN is a consortium of ten law schools (CUNY Law School, Georgetown Law School, Harvard Law School, Indiana University School of Law (Bloomington), New York University School of Law, Southwestern Law School, Stanford Law School, University of Dayton School of Law, University of New Mexico Law School, and Vanderbilt University Law School) that came together in the wake of the Carnegie Report in an effort to promote "innovation in law school curriculum, pedagogy and assessment." *Id.* at 10.
3. Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. Pa. L. Rev. 907 (1933). Frank was certainly not the only person during this era to raise questions about legal education's near-exclusive reliance on the case method. *See, e.g.*, John Dickinson, *Legal Education and the Law School Curriculum*, 79 U. Pa. L. Rev. 424 (1931), Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930) (Oxford Univ. Press 2009).
4. *See, e.g.*, Joseph Walter Bingham, *Law Schools and the Future*, 6 J. Legal Educ. 486 (1953); Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 Clinical L. Rev. 1 (2000); Robert W. Gordon, *The Geologic Strata of Law School Curriculum*, 60 Vand. L. Rev. 352 (2007) (describing the history of major curricular reforms); Laura Kalman, *Legal Realism At Yale, 1927–1960* (The Lawbook Exchange 1986) (describing the theories behind legal realism and its effects on legal education).
5. *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591 (NYU Press 1982). Richard Abel, *American Lawyers* (Oxford Univ. Press 1989).

thinking processes.<sup>6</sup> With time, each iteration of this standard complaint either faded or found itself cabined into marginal positions within the academy, yet it has never truly disappeared.<sup>7</sup> With publication of the Carnegie Report, we find ourselves, once again, in the middle of another change moment.

Because of the report's prominent place within the current reform movement, it is crucial to understand how it has framed the debate, and the limits imposed by that framing. In many ways, the report reflects and gives credence to the prevailing narrative about law school: Legal education is quite good at, but overly dwells in, the intellectual sphere. Law professors, the report suggests, excel at teaching case analysis, and the case method effectively immerses first-year students in lawyerly *thinking*. But, the authors find that instructors over-rely on the case method and standard doctrinal classes to the exclusion of teaching students how to engage in the day-to-day practice of law. As a result, students graduate without knowing how to *act* like lawyers. In order to remedy this deficiency, Carnegie calls for more and better-integrated practical and professional instruction into an otherwise highly successful intellectual program.<sup>8</sup> Many of the post-Carnegie changes have focused on

6. See, e.g., Frank I. Michelman, Report of the Committee on Educational Planning and Development (1982); Gary Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Methodology, in Council on Legal Education for Professional Responsibility, Clinical Education for the Law Student: Legal Education in a Service Setting 374-375 (Meilen Press 1973); David A. Binder & Susan A. Price, Legal Interviewing and Counseling: A Client-Centered Approach (West 1977); Anthony G. Amsterdam, Clinical Legal Education—A 21st Century Experience, 34 J. Legal Educ. 612 (1984).
7. Critiques of, and attempts to reform, legal education come from many stakeholders and many directions within the academy. In addition to the arguments cited above (and myriad others), see, e.g., Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 Vand. L. Rev. 515 (2007), David Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1981 (1993), Todd D. Rakoff & Martha L. Minow, A Case for Another Case Method, 60 Vand. L. Rev. 597 (2007), Angela P. Harris & Marjorie Shultz, A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education, 45 Stan. L. Rev. 1773 (1993), Austin Sarat, Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education, 41 J. Legal Educ. 43 (1991); Laura Kalman, To Hell with Langdell, 20 Law & Soc. Inquiry 771 (1995).
8. While the report generally praises legal education's work in the cognitive or intellectual sphere, it is very critical of the way we assess students' progress. See Educating Lawyers, *supra* note 1, at 162-184.

integrating more skills training into the curriculum.<sup>9</sup> Drafting, interviewing and negotiating are stand-alone courses at more and more schools,<sup>10</sup> and exercises on these subjects occasionally find their way into doctrinal courses.

This essay challenges Carnegie's conclusion that law school successfully teaches students to think like lawyers. The report's stress on the distinction between thinking and doing belies the inter-relatedness of understanding, experience, evaluating and creating. As a result, it defines "thinking like a lawyer" downward to encompass only the sharp, non-value-based doctrinal analysis and application in which law school so thoroughly immerses its students. This definition, however, is not consistent with fuller accounts of law and lawyering. Empirical analyses and lawyering theories recognize the recursive nature of knowledge and experience in a way that broadens our understanding of what it means to think like a lawyer. Again, not one lawyer around the table that morning in Berkeley said "students do not write persuasive briefs" or "new lawyers do not know how to draft an effective contract." Instead, they signaled that new lawyers struggle with thinking in deeply contextual and sophisticated ways about how they might—or might not—use the law to help a client solve her problem.

I suggest that the problem with law school is not insufficient practical training in the midst of successful intellectual education. It is true that the short shrift that law school gives to most experiential or applied learning<sup>11</sup> is

9. In truth, it is unclear just how much curriculum reform has actually occurred. While reform talk fills the air, it appears to me that change on the ground has been positive, but marginal. In May 2009, the Institute for Law Teaching and Learning published the results of a nationwide survey on legal education reform in light of the Carnegie and Best Practices reports. This survey shows that a number of schools have adopted a new course or two. Many schools now require a single "skills" course for graduation or have added interviewing and counseling or negotiation elements to the first-year legal writing courses. I label these changes positive because they expand students' learning opportunities. I call them marginal because, at all but a few schools, they represent only a tiny portion of a law student's coursework. The norm even at change-leader LEARN schools remains the same: a schedule heavily weighted toward doctrinal classes taught through the case method, relying on edited appellate cases and viewing the world through a judge's eyes. See, Institute for Law Teaching and Learning, *available at* <http://lawteaching.org/publications/IILTchartoflegaleducationreform200905.pdf>.
10. This stand-alone model is not consistent with Carnegie's proposed changes. The report calls for an integrated model—single courses that teach both doctrine and skills. *Educating Lawyers*, *supra* note 1, at 191–92.
11. I first adopted the use of the term "applied learning" after meeting with Deborah Cantrell of the University of Colorado at Boulder School of Law. The term seems to best capture the deeper learning that comes only through experience. "The concept of applied learning is often equated to 'hands on' or practical learning experiences. However, since the 1990's [sic] when increased attention was given to the links between education, training and the 'world of work' a broader definition of applied learning has emerged. This broader definition advocates an approach which contextualized learning in a way which empowers and motivates students, while assisting them to develop key skills and knowledge required for employment, further education and active participation in their communities." Lyn Harrison, *What is Applied Learning?: Exploring Understandings of Applied Learning*

problematic on a practical level, as Carnegie makes clear, because students graduate from a professional school largely unprepared for day-to-day practice. But law school may fall short in an even more fundamental way. Our pedagogy and curriculum—an over-reliance on neatly edited cases to the exclusion of working with messy, human facts, in ways that real lawyers might—obscures the inter-dependence of knowing and doing that is at the heart of thinking like a lawyer. It obscures the context and content that lawyers work within while, together with their clients, solving problems. Students' lack of applied learning opportunities may deny them the ability to write a fantastic brief. But the narrow focus on case-method learning may also deny students the opportunity to engage in sophisticated higher-order thinking about law and policy, problems, and goals, and about potential paths, obstructions, and solutions.

Four years have passed since the Carnegie Report's publication.<sup>12</sup> I propose that we stop for a moment to take stock and ask whether we are headed in the right direction. In Section I of this essay I suggest that the Carnegie Report's sometimes complex assessment of law school has been distilled into overly formalistic and largely unhelpful categories. Section II posits that this frame, the Carnegie diagnosis and prescription, substantively misses the mark. It is not true that we do a particularly good job of teaching students to "think like lawyers," at least not in the richest sense. Carnegie's claim is made possible by artificially separating thinking from doing, and thereby too narrowly defining what it means to think like a lawyer. In support of these assertions, Section III examines empirical and theoretical lawyering literatures that blend experience with knowledge to broaden our understanding of what it means to think like a lawyer. While but starting places, these literatures may provide a springboard to the rich conversation about curricular reform that is missing from the Carnegie Report. It is this discussion, I believe, that is crucial to any long-lasting and fundamental curricular change. Finally, Section IV begins to explore the kinds of curricular changes to which this conversation might lead us. The lawyering literatures discussed in Section III treat lawyering as but a version of the more general skills of human problem solving and persuasion. If this view is right, then what law school is missing is a conceptual framework for understanding these processes."

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Amongst Beginning Teachers, *available at* <http://www.aare.edu.au/o6pap/haro6844.pdf>.

12. It is certainly true that much of the current push for reform predates the Carnegie Report's publication. *See supra* note 1. I rely on the Carnegie Report as an organizing principle in this essay for two reasons. First, its approach strikes me as representative of at least major components of many of these other change loci. Second, the report has sufficiently captured the imagination of many in legal education, including those who might otherwise not have caught wind of the reform conversation, that it is now central to the debate.

## I. The Carnegie Report On the Status of Legal Education

The Carnegie Report was published as part of a series on professional education more broadly. The Carnegie Foundation set out to assess the state of professional education (including medicine, nursing, engineering, and clergy training), identify potential shortcomings, and offer suggestions for improvement. Each report relies on a common model. Professional education can be broken down into three apprenticeships of learning: the cognitive (which “focuses the student on the knowledge and way of thinking of the profession”); the practical (which exposes students to the “forms of expert practice shared by competent practitioners”); and the apprenticeship of identity (which “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible”). In the law school context, the cognitive apprenticeship is where a student learns to think like a lawyer, and the apprenticeship of practice, as described by the Carnegie authors, is where one learns to act like a lawyer.<sup>13</sup> The Carnegie Report suggests that legal education currently focuses almost exclusively on the cognitive apprenticeship. It finds that law school successfully teaches students the conceptual pieces of lawyering, but neglects the apprenticeships of practice and identity. In order to remedy this deficiency, the report recommends integrating simulated and actual lawyering responsibilities into the doctrinal curriculum.

### *A Look at the Case Method*

While the current shape and approach of law school is a well-worn and entirely familiar topic, it is worth looking at it through the Carnegie authors’ eyes in order to better understand their reform proposals. Carnegie claims that the vast majority of the law school curriculum works in the cognitive sphere. “Of the three, it is the cognitive apprenticeship most at home in the university context because it embodies that institution’s great investment in quality of analytical reasoning, argument, and research.”<sup>14</sup> It further asserts that the meat of this cognitive training is found in the case method and the doctrinal classroom. While the report takes for granted curricular divisions along doctrinal subject matters, it does spend time exploring the way we communicate that doctrine through the case method and Socratic-like dialogue.

The report’s attitude toward the case method largely tracks conventional wisdom. The case method, especially as deployed during the first year of law school, effectively and quickly transfers a massive amount of substantive

13. The report likewise claims that students are given inadequate schooling in the values and identity of the profession. *Educating Lawyers*, *supra* note 1, at 126–161. While I tend not to talk about the apprenticeship of identity in this essay, I do believe that my proposals would likewise go a long way toward teaching students to think about their roles and responsibilities as professionals.

14. *Id.* at 28.

knowledge to students, and perhaps more important, markedly shifts their habits of thought and argumentation. The report commends the case method as “a potent form of learning-by-doing”<sup>15</sup> and calls it “well suited to train students in the analytical thinking required for success in law school and legal practice.”<sup>16</sup> It defines lawyerly thinking as the ability to distill facts and problems into “the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client’s cause before a court or in a negotiation.”<sup>17</sup> And it is this process, narrowing and then framing the relevant facts in legally cognizable ways, that (especially first-year) doctrinal courses successfully teach.

But the report goes on to suggest three significant problems with legal education’s near-exclusive reliance on teaching through appellate cases. The first of these echoes the lawyers’ concerns explored at the beginning of this essay. The task of connecting the analytical process “with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method. Issues such as social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda. Being told repeatedly that such matters fall, as they do, outside the precise and orderly legal landscape, students often conclude that they are secondary to what really counts for success in law school—and in legal practice.”<sup>18</sup>

The second and third unforeseen consequences of legal pedagogy’s repeated reliance on case-method learning lie at the core of Carnegie’s critique of legal education. Students graduate with insufficient knowledge about what lawyers do on a daily basis, and even less experience doing any of it. Law school, the report notes, pays only “casual attention to teaching students how to use legal thinking in the complexity of actual law practice,”<sup>19</sup> which leads students to believe that “lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”<sup>20</sup> The report acknowledges that most law schools do offer courses in lawyering skills: courses like research and writing, trial advocacy, and negotiation. But they are typically taught by low status, nontenure-track faculty, frequently assumed by students to be less

15. *Id.* at 74. This is an interesting example of recognizing that it is the “doing” that leads to the learning (what the education literature calls transfer). See, e.g., *How People Learn: Brain, Mind, Experience, and School* 39–66 (Nat’l Academy Press 1999) (a review of the learning literature on transfer). But it is a limited version—the doing that is important in the cognitive apprenticeship all takes place through the class method as practiced in a doctrinal classroom.

16. *Educating Lawyers*, *supra* note 1, at 75.

17. *Id.* at 54.

18. *Id.* at 187.

19. *Id.* at 188.

20. *Id.*

rigorous and intellectual than their doctrinal courses,<sup>21</sup> and do not make up a very large fraction of the curriculum. Legal education's lack of seriousness with respect to teaching lawyering skills causes students to graduate with but the faintest sense of how to perform the practical stuff of lawyering. According to the report, this lack of rigorous practical training is a major, perhaps the major, shortcoming of law school as we know it.<sup>22</sup>

The final consequence of the over-reliance on the case method, as identified by the report, is a failure "to complement the focus on skill in legal analysis with effective support for developing the ethical and social dimensions of the profession."<sup>23</sup> The report notes that, while of course teachers' and schools' practices vary, questions of ethics are only lightly addressed in most law school courses. The big questions about the ethics of lawyering are reserved for an independent legal ethics class. And then, rather than engaging students as moral actors and future professionals, legal ethics classes tend to be taught as yet another case-method doctrinal course: this time the law of lawyering. Legal education, Carnegie claims, lacks sufficient opportunities for would-be lawyers to explore the moral, social, cultural and ethical boundaries and effects of the law and lawyering.

#### *Diagnosis and Prescription*

Consistent with the report's initial organizing principle, the authors conclude their assessment of the current state of legal education by placing its strengths and weaknesses into each of the three apprenticeships, or categories. As Judith Welch Wegner, one of the Carnegie authors, later put it,

The first 'cognitive' apprenticeship focuses on developing students' thinking skills in the specific context of legal materials and law-related content. It has both a knowledge context and an epistemological character. In short, students must learn 'what counts' by way of knowledge, and how to construct knowledge for themselves within this particular field. The 'cognitive' apprenticeship fits exceptionally well with the 'case-dialogue method' and with legal education's place in the academy. Not surprisingly, the Carnegie Report found that legal education handles the cognitive apprenticeship very well.<sup>24</sup>

21. *Id.* at 88.

22. *See, e.g., id.* at 190. Likewise, the post-Carnegie literature has particularly stressed the failure of law schools to include much practical training. *See, e.g.,* Judith Welch Wegner, Reframing Legal Education's "Wicked Problems," 61 *Rutgers L. Rev.* 867, 888 (2009).

23. Educating Lawyers, *supra* note 1, at 188.

24. Wegner, *supra* note 22, at 887.

The lack of attention to solving clients' problems is deemed a deficiency in the practical apprenticeship, and legal education's insufficient attention to the ethical and social dimensions of lawyering suggests a problem with the professional apprenticeship. Note, however, that these diagnoses represent an almost-immediate backtracking, or simplification, of Carnegie's more complex statements of law schools' imperfections. The relevant section of the report began by suggesting that the case method as taught in doctrinal classes limited students' ability to think about problems in complex factual and ethical ways. But that idea was virtually abandoned once the authors set out to think about strengths and weaknesses along the lines of the apprenticeships. Legal education fails to teach students how to "do and act" rather than how to "know and think."<sup>25</sup> Whether intentional or not, the simplified version fits far more neatly into the apprenticeship model, and this simplified problem leads to a too-simple solution.

In order to remedy the deficiencies in the practical and professional apprenticeships, the report calls on law schools to offer a three-part, integrated curriculum. The report itself offers few concrete examples of what these courses, especially after the first year, might look like, but over the years a kind of consensus Carnegie-based reform agenda has emerged.<sup>26</sup> In courses throughout the curriculum (maybe eventually most law school offerings, or at least most doctrinal offerings), traditional analytic training would be paired with practical training—on interviewing, counseling, negotiating, or writing a complaint or brief, for example—to give students a better feel for what it means

25. *Id.* I don't mean to accuse the Carnegie authors of not understanding the relationship between doing and thinking or the recursive nature of the two. In fact, Wegner goes on to say that "legal education has not really embraced the need for students to learn to 'do and act' or appreciated the ways in which 'doing and acting' are powerful means to fuel learning of substance itself." *Id.* Nonetheless, their use of separate thinking and doing categories necessarily simplifies the conversation.
26. *See, e.g.*, Peggy Cooper Davis, Desegregating Legal Education, 26 Ga. St. U. L. Rev. 1271, 1271 (2010) (coming to many of the same conclusions on the "segregated" view of legal education in the Carnegie Report that this essay does); Daniel Thies, Rethinking Legal Education in Hard Times: the Recession, Practical Legal Education, and the New Job Market, 59 J. Legal Educ. 598, 611-612 (2010); Stephen Gerst & Gerald Hess, Professional Skills and Values in Legal Education: The GPS Method, 43 Val. U. L. Rev. 513, 518 (2009); Leah M. Christensen, Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of our Law Students, 33 L. Psy. Rev. 57, 83 n. 151 (2009); Kate Nace Day & Russell G. Murphy, "Just Trying to be Human in this Place": Storytelling and Film in the First-Year Law School Classroom, 39 Stetson L. Rev. 247, 257 (2009); Jonathan Todres, Beyond the Case Method: Teaching Transactional Law Skills in the Classroom, 37 J.L. Med. & Ethics 375 (2009).

to deploy the legal principles they learn in practice. Ideally, the experiences would build on one another until a student had actual responsibility for live clients.<sup>27</sup>

## II. Carnegie's Diagnosis, and Therefore its Prescription, is Misdirected

Carnegie's stress on the distinction between the cognitive and the practical is a mistake because it belies the inter-relatedness of understanding, experience, evaluating and creating. The separate cognitive and practical categories are inconsistent with most everything we know about how people learn. Higher-order thinking skills come only after repeated opportunities to apply memorized and then understood information.<sup>28</sup> The Carnegie authors knew this<sup>29</sup> and they took pains to occasionally blur the lines between the categories in nuanced ways. It is the distinct categories themselves, however, that have carried the day.<sup>30</sup> In lawyering terms, the Carnegie categories suggest

27. Educating Lawyers, *supra* note 1, at 195. Influenced by Carnegie's report, as well as by and other documents critical of modern legal education, Washington and Lee University School of Law recently adopted a third-year curriculum that does in fact blend doctrine and practice. See Washington and Lee's New Third Year Reform, <http://law.wlu.edu/thirdyear/>. As of today, this innovation might come closest to the Carnegie prescription in practice. See posting of Peter Joy to Best Practices for Legal Education, <http://bestpracticeslegaled.albanylawblogs.org/2008/03/07/washington-and-lee-embarks-on-a-new-third-year-curriculum-embraces-the-carnegie-report-and-best-practices/> (Mar. 7, 2008). "Everyone in legal education is closely following the noble experiment in experiential learning for third-year law students being introduced this year at Washington and Lee," says Judith Welch Wegner, Burton Craige Professor of Law at the University of North Carolina and co-author, Educating Lawyers. "The innovative approach developed at W&L will provide students with important education in thinking, doing, and understanding professional roles. The school is to be commended for this exciting innovation." See Newswise.com, <http://www.newswise.com/articles/washington-and-lee-revamps-third-year-law-curriculum>.
28. The most concise statement of this principle is known as Bloom's Taxonomy. It arranges the six major categories that make up the development of intellectual skills into a pyramid. Knowledge forms the base, with comprehension on top of that, then, application, analysis, synthesis, and finally evaluation sits at the top of the pyramid. Each category must be mastered before a learner can move on to the next. In other words, knowledge and comprehension cannot lead to synthesis and evaluation without engaging in—mastering even—application. Benjamin Bloom, Taxonomy of Educational Objectives, Handbook I: The Cognitive Domain. (Addison Wesley Pub. 1984). The learning literature also discusses the concept of "transfer." See, e.g., How People Learn, *supra* note 15, at 39-66 (explaining the process of transferring specific content knowledge to more generalized analytic and evaluative knowledge through the process of application).
29. Several among them are prominent teacher-educators and education scholars.
30. The power of these categories is hardly surprising. First, they resonate with colloquial understandings of the ways in which thinking and doing are separate things. Second, they provide convenient heuristics for thinking about legal education going forward. Instead of remembering the complexity and fluidity of learning and lawyering, the categories allow us to conveniently file the report's descriptions and prescriptions into places full of pre-existing meaning and content. The fact that the categories resonate, the fact that they are meaningful to the average reader, makes it easy for that reader to impose order, through schemas or

that law schools owe their students the opportunity not only to learn to think like lawyers, but also to act like them. Yet this cognitive/practical divide is as untenable in lawyering as it is in learning. Is writing a motion for summary judgment in a multi-million-dollar copyright matter a cognitive skill, or a practical one? And imagine deposing a scientist employee of a corporate defendant in an environmental matter. Imagine further that the scientist is both reluctant and knowledgeable. Is it a cognitive task or a practical one to elicit useful information from him?

The result of these formal categories is to define “thinking like a lawyer” downward, limiting it to a decontextualized doctrinal analysis and application. This version looks more like law-as-puzzle than a serious attempt to solve complex human (or corporate) problems. It certainly does not reflect the more complex view of legal practice that lawyers or lawyering theorists recognize. This essay explores just two accounts that incorporate the iterative relationship between learned content and reflected experience in a way that broadens the definition of what it means to “think like a lawyer.” If, as these literatures assert, law is a manifestation of more general social and cultural forces, and lawyering is but a version of human problem solving and persuasion, then thinking like a lawyer is far more multi-faceted and content-laden than the doctrinal analysis and application most first-year law students master and Carnegie congratulates.

*Re-Entangling the Conceptual Pieces of Learning and Lawyering*

Education research makes clear the iterative nature of learning: One acquires content knowledge, “uses” that content in relevant ways, and thereby gains a deeper and more nuanced understanding of the original learned content.<sup>31</sup> To be sure, the report nods toward this more complex and recursive view of learning (and lawyering). For example, it recognizes the case method as a form of learning by doing. Students do not simply read about legal analysis, but learn to do it through the question-and-answer process in class.<sup>32</sup> And as law teachers we tend to believe that students become much better legal thinkers and arguers for having had to test the arguments and construct the doctrinal boundaries themselves.<sup>33</sup> But rather than allowing this view to complicate its

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stock stories about those categories; *see infra* text accompanying notes 50–56. For a fuller exploration of the interrelation of categories and schema, *see* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. Cal. L. Rev. 1103, 1133–1139 (2003); Jerome S. Bruner, Jacqueline J. Goodnow & George A. Austin, *A Study of Thinking* (Transaction Pub. 1956); George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal About the Mind* (Univ. of Chicago Press 1987).

31. *See, e.g., supra* note 28.

32. They get even further hands-on opportunities to learn legal analysis through research and writing in their first-year lawyering classes.

33. This was certainly the conceit of Christopher Langdell. He might not have said

diagnosis of legal education, the report consistently retreats into its cleaner, distinct categories. By dividing practical from cognitive, doing from thinking, the report avoids asking how lack of experience with “using” legal doctrine in messy, real-world-like situations denies students an opportunity to engage in higher-order lawyerly thinking.<sup>34</sup>

An example might be helpful here. A first-year student<sup>35</sup> in a contracts class reads a set of cases about the legal consequences of bargaining process defects. Among those readings are cases on mistake that ask “when does a misunderstanding by one or both contracting parties render the contract void or voidable?” Imagine one case asserts that “O was injured in an accident at work. The employer’s insurance company admitted liability and requested that O enter the hospital for tests on the extent of his injuries. At the conclusion of the hospital stay and after evaluating the doctor’s report, the insurance company offered O \$40,000 in full settlement of any and all claims under the policy. O accepted the offer and signed a release which, among other things, stated that it was a ‘general release of all claims for personal injuries, known or unknown.’ Later, O became seriously ill due to an internal trauma undetected in the medical examination. O claims that the release should be set aside for mutual mistake.”<sup>36</sup> The students in class will debate, analogizing to the cases they have read thus far, whether the later illness was covered by the “all

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“experiential” or “learning by doing”—but he did envision the case method as something like the scientific method. *See, e.g.*, Edward Rubin, What’s Wrong with Langdell’s Method, and What to Do About It, 60 *Vand. L. Rev.* 610, 630–635 (2007); Christopher Langdell, Harvard Celebration Speeches, 3 *Law Q. Rev.* 123, 124 (1887); Davis, *supra* note 26, at 1275–1282.

34. My concern is not simply one of semantics, an attempt to sneak practical education into law school by relying on different language. While skills courses and clinics unquestionably enhance a law student’s learning, and ought to be a larger part of most law students’ law school experience, my concern here is a slightly different one. As I describe later in this essay, recognizing the recursive relationship between learned content and experience might lead us to a broader understanding of what it means to think like a lawyer, and to an across-the-board curriculum that better reflected those many ways of thinking. This is not to say that the semantics of cognitive versus practical do not cause their own problems. While it is true that financial and structural limitations will hinder any attempt to rethink legal education, Carnegie’s cognitive/practical dichotomy makes it even more difficult by playing into an educational hierarchy that privileges thinking over doing and ideas over actions. To the extent that academics equate practical with anti-intellectual (or at least “not intellectual”), Carnegie offers little incentive to change the way we teach. Practical training may be good, it may be important—the thinking goes—but it is not at the center of the scholarly enterprise.
35. And here it might be worth thinking about who the typical first-year student is. While there is of course a huge variation, the average age of incoming law students hovers between 24 and 26. The median student in Berkeley Law’s class of 2013 was 25 at the start of his 1L year. This means that a large percentage of any 1L class will be students without much life experience with things like complex business transactions or workplace discrimination or the myriad other “problems” that casebooks confront.
36. Ian Ayres & Richard E. Speidel, *Studies in Contract Law*, (Foundation Press 2008) 511 (suggesting that students compare *Obaitan v. State Farm*, No. 14318, 1997 WL 208959 (Del. Ch. Apr. 17, 1997), with *Gortney v. Norfolk & Western Ry. Co.*, 549 N.W.2d 612 (Mich. Ct. App. 1996)).

claims for personal injuries, known or unknown” or whether the incomplete and inaccurate medical examination constituted a mistake that undermines the contract. The students will argue about which “blameless party should assume the loss,” and whether O’s agreeing to release “known or unknown” claims shifts the balance of equities on the assumption of loss. And these are of course important pieces of lawyerly thinking here.

But an expert lawyer, one actually trying to work with her client, O, to help resolve the problems of high medical bills, loss of income, physical suffering (maybe problems of defaulting on loans, inability to pay for his child’s schooling, maybe...) will also need to think about much more. Experience with interviewing and deposing might lead her to ask questions that effectively get at how mistakes like this happen, whether either the insurance company or O had reason to believe that undetected medical problems might still be lurking. Experience with interrogatories and document requests might lead her to garner empirical evidence about how often such releases are signed when a prior examination should have uncovered an ongoing injury or illness. Experience with personal injury plaintiffs might help her listen to her client in a way that uncovers multiple—and maybe even competing—goals, which in turn could affect the type of resolution she and her client pursue. Especially important for academic purposes, all of these experiences and the information and knowledge that come with them might lead her to reassess the mistake doctrine and the policy goals that support it. And almost none of that process or substance will be systematically uncovered in a first-year contracts class.

As the example shows, the result of drawing artificial boundaries between the cognitive and the practical is to limit what it means to think like a lawyer in a way that allows the report to say that legal education succeeds in the cognitive sphere, when it could be said that our pedagogy “sharpen[s] the mind by narrowing it.”<sup>37</sup> The case method, repeated over and over again, sacrifices complexity for precision, and as it stands, there is no systematic method for folding cultural, factual, contextual or procedural complexity back into the discussion. To be sure, this simplified approach reinforces students’ analytical abilities. We do successfully teach students to engage in fine distinctions of fact and language; to sort the legally relevant from less relevant; to cogently argue for a particular solution of a legal problem; and then to flip that analysis on its head and just as cogently argue its converse.<sup>38</sup> The daily work of the doctrinal classroom makes quick work of turning neophytes into something like experts at this narrower kind of lawyerly thinking. But it does so at a

37. LEARN, *supra* note 2, at 7, quoting Edmund Burke.

38. “The ability to think like a lawyer emerges as the ability to translate messy situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client’s cause before a court or in a negotiation.” *Educating Lawyers*, *supra* note 1, at 54.

cost. By narrowing students' thinking this way, we diminish students' ability to think about the knotty relationship among facts and culture and clients and law.

### III. Broadening the Definition of "Thinking Like a Lawyer"

Law teachers tend to think it is important that their students learn this narrow form of thinking; but at their best, legal educators strive not just to graduate sharp debaters, but to prepare lawyers who will "contribute to the public good and serve their clients effectively and ethically."<sup>39</sup> In recent decades, multiple lines of scholarship have reflected on just what that means: What is it that lawyers do? How do they go about doing it? What makes one lawyer better, more effective than another? The Carnegie Report either ignored or marginalized these literatures, and yet they may offer an important springboard for understanding what it means to think like a lawyer in its fullest sense, and what law schools might teach in order to better prepare effective, ethical, contributing lawyers.

For the purposes of this essay, I highlight just two different approaches to better understanding lawyering and lawyerly thinking, though there are certainly other options one could explore. Let me be clear: I do not purport to have "the answer" for improving legal education. In fact, I think that any proposed fix will be premature prior to a sustained dialogue around some fundamental threshold questions: Why law school? What do we hope to teach our students during their three years with us? What are our educational objectives? I offer these two literatures as starting places for several reasons. First, each resonates with the skills identified by the lawyers at the beginning of this piece. Second, neither diminishes the importance of the rigorous legal analysis that we have come to identify as central to legal education, but each also incorporates many other facets of lawyering. And third, each has room for the iterative relationship between learning and doing, knowledge and experience.

#### *An Empirical Analysis: What do Lawyers think Lawyers Do?*

The first approach I describe is an empirical analysis of effective lawyering by Marjorie Shultz and Sheldon Zedeck. In "Identification, Development, and Validation of Predictors for Successful Lawyering," Shultz and Zedeck aimed to identify testing methods that when "combined with the LSAT and Index Score, would enable law schools to select better prospective lawyers based on both academic and professional capacities, thus improving the profession's performance in society and the justice system."<sup>40</sup> In order to predict effective lawyering, Shultz and Zedeck first set out to define it. Through hundreds

39. LEARN, *supra* note 2, at 8.

40. Marjorie M. Shultz & Sheldon Zedeck, Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering 2 (2008), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353554](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554).

of interviews with lawyers, they identified twenty-six “Effectiveness Factors” related to competent lawyering. These factors were defined and redefined through an elaborate psychometric process designed to produce “fixable, relevant, and practical” assessment standards for each of these factors.<sup>41</sup> At the end of the process, Shultz and Zedeck had a range of behavioral examples for each factor that lawyers were asked to assess in terms of the “level of effectiveness” it showed.<sup>42</sup> The multiple illustrations of any given factor, when taken together, might be understood as defining that factor.<sup>43</sup>

While their ultimate goal is to develop or identify predictors of attorney competence useful to law school admissions,<sup>44</sup> I believe their list of effectiveness factors could also help better define what it means to practice law. Shultz and Zedeck break down lawyering attributes and learning objectives into finer, more concrete descriptions. Recognizing the individuality of one’s client—understanding the complex interaction of her story, the law, and her needs—is captured in many of the effectiveness factors as is a lawyer’s need to understand her role within institutions and society. Judgment and wisdom are also expressed throughout the list.

None of these competencies can be understood as separate from the rest or from the analysis and reasoning skills currently at the heart of our definition of “thinking like a lawyer.” Rather, they interrelate, inform, even define one another. Their interaction shapes the “thinking of a lawyer” beyond the narrow, hyper-analytical definition on which both the report and law school itself tends to rely.

Educators who hope to rely on these effectiveness characteristics to reform legal curriculum and pedagogy must explore both “what” and “how.” What would a student need to know to become a competent lawyer under this fuller definition? What does it mean to teach creativity? Problem-solving? Judgment? Influencing and advocating? And, second, how might we go about teaching these competencies?<sup>45</sup>

41. *Id.* at 15-16.

42. *Id.*

43. The twenty-six effectiveness factors Shultz and Zedeck identified are: analysis and reasoning, creativity/innovation, problem solving, practical judgment, researching the law, fact finding, questioning and interviewing, influencing and advocating, writing, speaking, listening, strategic planning, organizing and managing one’s own work, organizing and managing others (staff/colleagues), negotiation skills, ability to see the world through the eyes of others, networking and business development, providing advice and counsel and building relationships with clients, developing relationships within the legal profession, evaluation, development, and mentoring, passion and engagement, diligence, integrity/honesty, stress management, community involvement and service, self-development.

44. These effectiveness factors ought to be interesting to state bar examiners as well as law schools. To the extent that these are the competencies that lawyers tell us are essential to effective lawyering, they might well be worked into our professional licensing exam.

45. While I focus on just this empirical account of lawyering in this essay, multiple ongoing

Shultz and Zedeck's empirical work in part answers these "what" questions with descriptions of effective models of each competency. Theoretical work across disciplines, including the lawyering-as-problem-solving literature discussed below, has likewise explored many of them. Part of any robust reform conversation will have to be an attempt to flesh out lawyering competencies and attributes with an eye toward determining what content must be folded into the law school curriculum. Later in this essay I briefly lay out my view of what curricular and pedagogical changes might move us toward embracing this fuller definition of lawyering.

*A Theoretical Take: Lawyering As Problem Solving*

Psychology also offers insights into what it means to lawyer, how one moves from novice to expert, and how we might think about setting students on a path toward excellence. A body of literature has emerged from these insights that focuses on lawyering as problem solving.<sup>46</sup> The Carnegie Report cites this literature to develop "a theory for teaching practice,"<sup>47</sup> but only to remedy the perceived lack of intellectual heft behind practice-oriented courses. The report's reliance on psychology there is actually an interesting example of the way its categories get in the way. Carnegie limits cognitive psychology to a theory that supports practical training, when the truth is that it is capable of much more work than that. Indeed it is a theory that many have argued comfortably encompasses the doctrinal and analytic aspects of lawyering as well. By treating psychology's relationship to lawyering as a "practice" theory, Carnegie effectively limits the lessons we might draw from the field.<sup>48</sup>

Cognitive psychologists define a problem, simply, as any situation in which the current state of affairs varies from the desired end point. And solving that problem entails a series of decisions and actions, each building on the last,

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conversations on legal education have similarly considered and debated law school's emphasis on combative argumentation to the exclusion of other important lawyering skills and styles. See Susan P. Sturm, *From Gladiators to Problem-solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 *Duke J. Gender L. & Pol'y* 119 (1997); Austin Sarat, *supra* note 7; Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 *Wash. L. Rev.* 527 (1994); Susan Sturm & Lani Guinier, *supra* note 7.

46. This literature also finds antecedents in and resonates with similar explorations in anthropology, linguistics and literary theory, among other fields of study.
47. *Educating Lawyers*, *supra* note 1, at 100.
48. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions Of Theory*, 45 *J. Legal Educ.* 313, 329 (1995) ("Lawyers are, of course, not the only professionals concerned with making decisions and solving problems: those processes are at the core of every profession. In the legal academy however, such matters are generally relegated to the 'art of practice, of which the less said the better.'").

in order to move the world closer to the goal state.<sup>49</sup> In order to make these decisions, or encourage others to, we rely on stock stories, or schemas, familiar stories and arguments that act as heuristics and allow us to create meaning through narrative.<sup>50</sup>

Individuals develop mental databases of stock stories through experiences direct and indirect, individual and cultural. These stock stories become categorizing and ordering tools. When one encounters people, things, events, or ideas that share features with a stored schema, the mind overlays the schema's narrative onto the new objects, events or ideas to create meaning of them. Indulge me, for a moment, with an example. Imagine you see a person with a camera standing out in front of a church, and nearby are a woman in a white dress and a man in a tuxedo. You likely instantly draw on all of the weddings that you have been to (or seen in movies or read about in books) that have melded together in your mind as the story of "wedding" and you think, "They just got married, and are having their wedding photos taken. They'll be off to their reception in a moment where they will dance, visit with their guests, eat if they have time to, cut a cake and throw a bouquet. After that they're off on a honeymoon. How lovely." You could be wrong; they might be models taking photos, or maybe they were just married, but they won't have a reception. Each of these possibilities, or many others, could be true. But most of us would glance at the trio, apply our notion of "wedding" to the story, and thereby create meaning out of the sight of three people in front of the church.

As we move from novice to experts in any given area, we become better at sorting relevant from irrelevant features for classifying purposes. We develop this refined sorting ability through reflective trial and error. The better we get at sifting very relevant features from the less relevant, the more helpful our schema (or categories) are at helping us assess incoming information. In order to see how this works, we can return to the above scenario: The woman in the white dress holds a bottle of water in one hand and flowers in another. There is another man holding a camera. A few feet away, children kick a soccer ball around. Now imagine that instead of your adult, wedding-expert walking down the street it is you as a child. You have not been to a wedding, and you have not watched romantic comedies with the obligatory happy-ending wedding. When you walk by, you will still try to make sense of what you are seeing, but you have less expertise available to sort the more-relevant from the

49. *Id.* at 331.

50. *Id.* at 334 ("Simon and Newell suggested that the number of possible paths could be reduced to manageable size through the application of heuristic principles to the search process. Instead of searching all possible solution paths, an intelligent problem-solver would utilize heuristics, like subgoaling. Put simply, if we compare the current state to the goal state and determine that there are no legal operators available at present to narrow the difference between the two we can establish the 'subgoal' of getting to a state where such operators can be utilized.") (citing Allen Newell & Herbert Simon, *Human Problem Solving* (Prentice Hall 1972)).

less-relevant facts. So, you might wonder why a soccer game is being held in front of a building instead of at a park. And won't the white dress get dirty if the woman plays? And is the water for her flowers or to drink? Or maybe for the children to drink when they finish playing? Because you are a child, you are accustomed to someone taking pictures of everything that you do, so you do not even notice the camera. Once you develop expertise on weddings, you might notice the children and the water bottle but they would not factor in as relevant to your assessment of what was going on. You would focus immediately on white dress, tuxedo, flowers, and camera. Together, those data points lead inexorably to a story about a wedding.

Our stock stories, of course, depend on our experiences—both as individuals and as members of a culture. Perhaps you have been to so many weddings that you cannot help but think wedding when you see an elegant white dress. But your friend, with whom you are walking down the street, recently attended her cousin's *quinceañera*. She sees a beautiful gown and a photographer and immediately overlays a story not about a wedding, but of the *quinceañera*. You may be relying too heavily on some facts to create a story; perhaps she is ignoring others. But both of you are fitting the people you see on the street into pre-existing narratives that help you make sense of it. And this all happens in a moment.<sup>51</sup>

Not only do our stock stories allow us to make sense of our world, they also help us make choices, and persuade others to do the same. These past experiences suggest the efficacy of one path and the risks of another. They help us frame the problem, evaluate potential solution paths, and decide on a course of action.

The same cognitive and cultural processes lie at the heart of every form of specialized problem solving, including lawyering.<sup>52</sup> Lawyers rely on legal and cultural stocks in order to try to move the world in directions that benefit their clients. This movement involves persuasion of one form or another—whether it's persuading a court to find for one's client, an opposing party in litigation to see one's settlement offer as a good deal, or a collaborative party to undertake some kind of a joint venture.<sup>53</sup> The question of how to persuade through

51. For a detailed examination of this model of problem solving in an every-day circumstance, see Gerald P. López, *Lay Lawyering*, 32 *UCLA L. Rev.* 1 (1984).
52. The point is not that experts—here, expert lawyers—are better applicers of stock stories. A skilled lawyer would fare no better at solving a cooking problem, say, than would a nonlawyer. But within their fields of expertise, experts' experience appears to allow them to better organize their knowledge. Experts use this organization, and the concomitant ease of heuristic retrieval, to build better problem representations—leading to, hopefully, better solutions. Blasi, *supra* note 48, at 335.
53. See Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 309-331 (Univ. of Chicago Press 2001); López, *supra* note 51, at 2-3; Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 110-43 (Harvard Univ. Press 2000).

stocks in a legal context involves understanding empirical, instrumental, and normative questions.<sup>54</sup> On the most obvious level, legal precedent serves this function. But lawyering involves appealing to stories and arguments that are relevant and persuasive for larger empirical, cultural, and social reasons as well. Law is not an organic thing unto itself, but a reflection of broader cultural and social forces and understandings (mentally represented through stocks).<sup>55</sup> Effective lawyering must appeal to these broader forces and stories. And effective lawyers persuade by understanding and manipulating the stocks of the relevant arbiter.<sup>56</sup>

Like the Shultz and Zedeck work, this problem-solving model leads to a broader and richer definition of “thinking like a lawyer,” one that reflects everyday human processing and persuading and is infused with real-world content rather than the crisp yet flattened stories of edited appellate opinions.<sup>57</sup> And, similar to the Shultz and Zedeck work, this model leads educators to two sets of questions. First, what would a rich inventory of stock lawyering stories look like; and second, how might we help our students build it in ways that enables them to progress toward, eventually, expert status? With respect to the first question, today’s typical curriculum focuses almost exclusively on building a database full of complex doctrinal concepts applied to various (presented-as-true) factual situations. By graduation, students have built a mental library of potentially thousands of difficult doctrinal rules, standards and theories, and of available methods for applying them, from a judge’s point of view, to a set of presented facts. And these stocks are crucial analytical tools. They tell the stories and arguments of law,<sup>58</sup> and begin to set the boundaries of legally cognizable analysis.<sup>59</sup> What is missing is the context and its empirical, instrumental, and normative content. The recent graduate’s mental library largely lacks stock stories that help her assess how, and in what institutions, and by relying on what methods, she might—or might not—use the law to help

54. López, *supra* note 51, at 2.

55. *See generally* Winter, *supra* note 53; Chen & Hanson, *supra* note 30 (all discussing the cultural, social, and cognitive underpinnings of legal structures).

56. All these ideas have found voice in the lawyering scholarship generally for decades. But for some of the most thorough expressions of the cognitive structure behind lawyering, *see generally* López, *supra* note 51; Blasi, *supra* note 48; Winter, *supra* note 53; Amsterdam & Bruner, *supra* note 53; Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 *Stan. L. Rev.* 1161 (1995); Steven L. Winter, Making the Familiar Conventional Again, 99 *Mich. L. Rev.* 1607 (2001).

57. *See, e.g.*, Gerald P. López, Changing Systems, Changing Ourselves, 12 *Harv. Lat. L. Rev.* 15, 20–22 (2009).

58. Amsterdam & Bruner, *supra* note 53, at 54–110.

59. For one viewpoint on the essence of legally cognizable structures, *see* Duncan Kennedy, A Semiotics of Legal Argument, 42 *Syracuse L. Rev.* 75 (1991). *See also* Jeremy Paul, The Politics of Legal Semiotics, 69 *Texas L. Rev.* 1779 (1991); Jack Balkin, The Promise of Legal Semiotics, 69 *Texas L. Rev.* 1831 (1991).

a client solve his problem. A curriculum geared toward this view of lawyering must address this lack of context and content, asking, what are lawyers' stories? And what might a lawyer need to know about how to frame and manipulate them in order to serve her client?

The second question presented by this framework is, how does one build the organized library of stock stories and arguments, problem framings and solution paths that precede good judgment and assist in bringing about welcome outcomes? The answer, in short, is experience. An expert, quipped physicist Niels Bohr, is one "who has made all the mistakes that can be made in a very narrow field."<sup>60</sup> And there is some truth in the statement. Experience alone is not sufficient, of course,<sup>61</sup> and a novice will necessarily interpret her experience through her inventory of stock stories and arguments. But experience working with, recognizing, and defining problems, deploying legal arguments and tools while partnering with a client in order to resolve those problems, acting in the various roles and institutions a lawyer might position herself—experience of this sort is fundamental to gaining expertise.<sup>62</sup> Some of this experience will, and must be, direct. Lots of it, especially in the beginning, will be through simulation and analogy.<sup>63</sup> Legal problem-solving skills, in other words, can be learned in the classroom as well outside of it, so long as the classroom is designed to give students experiential chunks and

60. Jonah Lehrer, *How We Decide* 51 (Houghton Mifflin Harcourt 2009).

61. Blasi *supra* note 48, at 355; Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 *Wash. L. Rev.* 527, 543-549 (1994).

62. Again, experience is necessary, but not sufficient, for consciously building problem-solving skills. That experience must be, first, of the sort that develops the relevant and useful lawyering stock stories contemplated above. The classroom-based experiences should be designed with an eye toward building the lawyering database. Second, effective classroom-provided experience will be paired with guided reflective opportunities. Experience can either provide a path toward expertise, or be thoughtless repetition of the same successes and the same mistakes. Students who learn how to learn from experience while in school stand a better chance to become life-long learners, beyond graduation. Briefly, the reflective steps that turn experiences, both the successful and the missteps, into expertise-building blocks include: "having a goal and evaluation criterion [for each experience]; obtain[ing] feedback that is accurate, diagnostic, and reasonably timely; and review[ing] experiences to derive new insights and learn from mistakes." These steps seem obvious, but it turns out that cognitive and psychological barriers make them difficult to take. We engage in hindsight bias, exaggerating our confidence that a series of steps would lead to a particular outcome, when of course we had no such confidence when we embarked. We fail to get the necessary feedback, or we dismiss it and rationalize it rather than learn from it. We generalize from too little data, or fail to generalize from sufficient data. We selectively observe data—noticing it when it confirms our hypotheses, failing to see it when it might tend to disprove our thinking. All of these risks must be attended to when teaching students how to learn from experience. Paul Brest & Linda Krieger, *Lawyers as Problem Solvers*, 72 *Temp. L. Rev.* 811, 816 (1999) (citing Gary Klein, *Sources of Power: How People Make Decisions* 17 (1999)).

63. See Blasi, *supra* note 48, at 355.

to help them develop the “habits of thought inherent in the formal model [that] improves subsequent problem solving done at the naturalistic end of the spectrum.”<sup>64</sup>

#### IV. Curricular and Pedagogical Implications

Drawing from just these two accounts of lawyering, it seems clear that legal education as currently configured teaches a rather anemic version of “thinking like a lawyer.” I accept the conventional wisdom that for many, if not most, students, “the first-year experience typically results in a remarkable transformation: a diverse class of beginners somehow jumps from puzzlement to familiarity, if not ease, with the peculiar intricacies of legal discourse.”<sup>65</sup> But again, this ease, or at least familiarity, is with a narrow form of thinking. We provide students with the basics: the ability to learn, analyze, and make elementary arguments about and from doctrine and policy. But we come nowhere close to providing them with the richness of knowledge or applied-learning opportunities (actual or simulated) necessary to move beyond novice legal problem-solver status or to develop more than a few of the competencies of an effective lawyer. In short, law school does good work with what it does, but it does not truly teach students to think like lawyers.

If I am right that current legal education artificially narrows our definition of lawyerly thinking, then our reform goals might look toward fattening it back up. What exactly the fattening process should look like will necessarily vary across institutions with myriad interests and constraints. But here I propose some ways that this more capacious understanding of the conceptual piece of lawyering might translate into curriculum and pedagogy. If law is a manifestation of larger social and cultural forces, and if lawyering is a version of human problem solving and persuasion accomplished through a whole constellation of competencies, then what law school is missing is a sense of context that allows students to flesh out and conceptualize those systems. First, I propose that we infuse our curriculum with factual, empirical and normative content far beyond that which can be gleaned from appellate cases. In fact, my suggestions might be understood as moving legal education closer to a liberal arts education (rather than further away, as many, rightly or wrongly, view the Carnegie proposals). Second, I believe that legal curriculum ought to expose would-be lawyers to the cognitive processes that inform the persuasion and decision-making central to lawyering. Finally, I propose that, at least in part, we shift our pedagogy to give students more experience with understanding legal problems from the ground up. So much has happened in a case—lawyers and clients and judges have already made so many decisions—before it ever reaches the phase of an appellate opinion. Moreover, and perhaps more

64. Brest & Krieger, *supra* note 62, at 827–28.

65. Educating Lawyers, *supra* note 1, at 47.

important, most lawyering will never lead to an appellate opinion. We might develop new pedagogies that expose students to these many other forms of lawyering.<sup>66</sup>

*Lawyers' (and Clients') Stories*

Because much of legal education segregates “reasoning and analyzing” from the rest of lawyerly thinking, and then elevates it as the sine qua non of lawyering, students often believe that the elegance of the argument is more relevant than the real-world content that animates that argument. In order to remedy this, student learning must move beyond heavily edited appellate opinions to include real-world stories about complex human and social facts. For decades, scholars have acknowledged the richness gained by viewing the law and legal processes through lenses of other disciplines—economics, sociology, psychology, literary theory, and more. This same richness brought to the classroom stands to add context to and strengthen a student’s understanding of what it means to think like a lawyer. Just how we might accomplish this will almost certainly vary from subject to subject, and class to class. One might imagine that in some subject areas we would want students to take entire threshold courses. Tax students, for instance, might take courses that provide a working knowledge of accounting or behavioral economics. Yet in other areas it may be enough to work contextualizing material directly into individual courses. A business associations professor might lay a foundation in finance or the organizational psychology research on corporate governance. Legal arguments about corporate boards, for example, cannot help but sound different when the students have a sense of how board members behave and whether they are actually likely to provide rigorous oversight. In criminal law, one might introduce sociological analyses on the intersection of criminal law, race, and poverty. Students might feel differently about the policy goals of punishment if they understand the different ways in which divergent communities are policed.

Content and context add dimension not only to substantive law and arguments, but to lawyering processes as well. Lawyers are not, of course, autonomous decision-makers and problem solvers. They work, instead, with clients and within and among institutions. Yet, whatever knowledge students gain about working with clients, or the form and function and cultures of legal institutions, is mostly haphazard, slipped into lectures during the first year, or into a skills course or two. Law students do not tend to be systematically exposed to the institutions in which they will practice. Nor do they learn much about the value of or theories behind collaborative work.<sup>67</sup> These are

66. My proposals in this essay are not so very different, in the end, from Jerome Frank’s in 1933. See Frank, *supra* note 3, at 918–20. *Plus ça change...*

67. Some of the work on collaborative lawyering includes: Lucie E. White, Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice, 1 *Clinical L. Rev.* 157 (1994), Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 *Clinical L. Rev.* 427

further areas in which we could easily do a much better job. For instance, the first year might include a foundational course on American legal systems. Courses connected to clinics (or simulated work) might explore the history of legal institutions or the role of the lawyer in modern society, or they might prompt students to think seriously about how to collaborate with clients and other relevant community members. These, of course, are but examples. And many good teachers, I am certain, already incorporate multidisciplinary, contextualizing readings and lectures into the classroom to better prepare their students to think about their subject matter as a lawyer would. But we ought to undertake a serious inquiry into how we might methodically work context and content into the classroom to deepen students' thinking about the law and lawyering both within a subject area and in relationship to clients and institutions.

*Decisionmaking and Storytelling with Imperfect Information*

If my first curricular proposal involves determining the type of content that lawyers might understand and manipulate when solving a problem, the second deals with insufficient content or lack of relevant information. How do lawyers go about making decisions or helping clients make decisions when they do not know everything they might like to about a problem? In addition to learning methods for acquiring knowledge (legal research, fact investigation, effective uses of discovery, and interviewing techniques, for example) students might be exposed to the psychology around decisionmaking. Students (and thus lawyers) who understood cognitive biases,<sup>68</sup> for example, might frame their argument differently; they might choose one narrative over another; or they might push for an outcome that looks different than they would have otherwise.<sup>69</sup> “The promise of cognitive theory lies precisely in its ability to make explicit the unconscious criteria and cognitive operations that structure and constitute our judgment. It is by laying bare these cognitive structures and their impact on our reasoning that we can best aid legal actors—whether advocates or decisionmakers—who wish to understand the law better so that they can act more effectively.”<sup>70</sup>

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(2000); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 *Clinical L. Rev.* 541 (2006); Gerald P. López, *Rebellious Lawyering* (Westview Press 1992).

68. For a detailed look at cognitive biases, see Jerry Kang, *Trojan Horses of Race*, 118 *Harv. L. Rev.* 1489, 1497–1527 (2004); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 *The Handbook of Social Psychology* 357 (Daniel T. Gilbert et al. eds., 4th ed. Oxford Univ. Press 1998); Margaret Shih, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Qualitative Performance*, 10 *Psychol. Sci.* 80 (1999).

69. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *Md. L. Rev.* 213, 215–217 (1991).

70. See Winter, *supra* note 53, at xiii.

For example, a lawyer advising a client on whether to accept a settlement offer will influence the client's response "by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt."<sup>71</sup> If he is cognizant of these effects, "if he consciously understands the process that governs our decisionmaking,"<sup>72</sup> he will be a more effective advisor. A lawyer may believe that it is not his role to influence a client's judgment, but do so unwittingly if he does not know what to look for, how to think about his client's decision-making process. Or he may believe that he should educate his client as fully as possible, including about the decision-making process itself, in order to smooth his client's own path toward a decision.<sup>73</sup> All of this suggests that law students would be well-served by exposure to the cognitive structures of persuading and decisionmaking.

### *Experience*

Finally, I propose that we allow students to experience much more of lawyerly thinking than they currently do in the doctrinal classroom. Both the cognitive psychology literature and our own experience tell us that students learn best when they get their hands dirty. Law teachers know this, in part, because of the case method. Most of us believe that one learns legal analysis by engaging in guided legal analysis from the first day of classes.<sup>74</sup> But law students get little chance to experience the legal thinking that might occur at stages other than appellate litigation. They seldom experience the conflict of competing goals—some of which may be legal, some of which may not be. Appellate cases do not give students the opportunity to make out a story of "what happened" or, "what is likely to happen if." Law students get few chances to think about unknowable motivations (of opposing parties, collaborating parties, arbiters.) They rarely have the opportunity to rethink an argument or goal given previously unearthed information.

71. Simon, *supra* note 69, at 217.

72. López, *supra* note 51, at 10.

73. Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 *Tex. L. Rev.* 77, 113-124.

74. While law students may have little sustained opportunity to experience lawyering in role—and to develop the higher order analytical, problem-solving skills that might follow—they almost universally encounter repetition and first-hand experience as a teaching tool. See Blasi, *supra* note 48, at 359 ("[W]e do not expect first-year law students to ferret out the concept of 'consideration' or 'speech' from reading a single case in a casebook. And our resistance to pleas of 'just give us the rules' springs from a sense of how people learn, rather than mere sadism. It is the active process of comparing and contrasting appellate cases dealing with complex concepts that leads to an understanding of those concepts on a level deeper than one can get to from the propositional exposition of the hornbook or course outline. Langdell's 'legal science' stands on firm ground in human cognition and learning, at least insofar as lawyering entails understanding doctrinal concepts and applying them in new situations, with one qualification: even in learning from written cases, what one learns is affected by perspective.").

Well-run clinics certainly provide these invaluable experiences to our students. As it stands, however, clinical units merely supplement the steady diet of case-method and doctrinal courses.<sup>75</sup> Some reformers have argued that we alter the ratio of classroom learning to clinical learning by transforming the third year of law school into a clinical year,<sup>76</sup> thereby providing students with the kind of experiential training that would put them on the path toward expertise. And, were a clinical year to come on the heels of a first- and second-year curriculum that recognized and taught the fuller version of thinking like a lawyer that I lay out above, I, too, would favor of such a transformation.<sup>77</sup> But this is an incredibly expensive proposition, and strikes me as very unlikely at most schools in the near future.<sup>78</sup>

Expanded clinics, however, are not the only way to provide students with a variety of experiential opportunities. Many of the forms, or stages, of lawyerly thinking might be incorporated into the classroom. Again, there are options, from the time-intensive complete revamping of materials and syllabus, to the much more modest task of rethinking what types of questions one asks. Among the major changes a teacher might choose is a more inclusive notion of the case method, one that leans less heavily on appellate opinions and spends more time building a case from the beginning stages. Students would read case files that included client interviews, information elicited through discovery, and a series of cases that function as controlling and persuasive authority.<sup>79</sup>

75. The number of clinical units a student takes, or can take, of course varies tremendously across individuals and institutions. But even if a student spends an entire semester engaged in clinical work (which is on the high side) rather than classroom work, it still makes up but one sixth of his education, with the remainder likely heavily tilted toward traditional doctrinal analysis.
76. The new Washington and Lee third year, *see supra* note 27, is an experiment along these lines.
77. My personal bias is that expanded clinics would be beneficial not only to student learning, but would be important steps toward increased community engagement by students and faculty alike.
78. The primary obstacle is financial. The case method allows for very high teacher-to-student ratios—far higher than other graduate school models. Faculty-to-student ratios in law schools range from about 7.7:1 at Yale, to 14:1 at University of Missouri and beyond. Many schools hover in the 11–14:1 range. For comparison purposes, my school, the University of California at Berkeley School of Law claims a ratio of 11.4:1 (a number that includes part-time faculty who tend to teach very small classes and get paid only a nominal amount), whereas the ratio in UC Berkeley School of Engineering's Ph.D. program is 5.7:1; University of California at San Francisco's medical school (Berkeley does not have a medical school) boasts a 3:1 ratio. US News & World Report 2011, *available at* <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools>. These high ratios show financial benefits for both law schools themselves and the universities they are a part of.
79. This model might look much more like the Harvard Business School case method. This method, to be sure, is not without its detractors. And I do not mean to suggest that it, alone, should completely supplant our current pedagogy. But as one of a series of pedagogical tools, this fuller case method might provide students with a variety of experiences and intellectual challenges. Harvard Law School has experimented with a version of this method in its relatively new course, the Problem Solving Workshop. Elaine McArdle, *Beyond*

Or case files could set students up to think through transactional processes, providing a nice counterbalance to legal education's current litigation-heavy curriculum.<sup>80</sup>

Even smaller steps would enhance students' lawyerly thinking. Teachers might rely heavily on a casebook, but work one or two ongoing cases file into the course. Or they might rely wholly on a casebook but consistently work the lawyer's point of view into the classroom discussion. Teachers should ask questions like: Why might the lawyer have framed the question this way? Why do you think the client chose to pursue this? Would you have advised the client to do differently? Questions as simple as these help students to see the material slightly differently, to understand that hundreds or thousands of decisions were made about the case long before an appellate opinion was ever issued. And with that, especially when combined with the added context and content described above, students begin to understand that there is more to thinking like a lawyer than doctrinal analysis.

## V. Conclusion

While this essay begins to stake out a point of view on the direction that legal education might move, my preliminary goal is simply to call for dialogue. Does the current movement for greater infusion of practical and professional skills into our current curriculum best address what ails law school?

In the end, the Carnegie Report, and the scholarship that has followed on its heels, does not go as far as it could in identifying the problems in legal education. By accepting the conventional wisdom on lawyerly thinking, it stops short of seriously articulating a conceptual and empirical framework for what it means to lawyer. The empirical evidence presented here shows that the heavy emphasis on detached doctrinal analysis seriously undersells the kind of thinking that lawyers believe they need to master in order to effectively work on behalf of their clients. And problem-solving theory weaves context, content and process to present a complex picture of the cognitive structure inherent in lawyering. Were we as law teachers (and interested members of the community) to engage these visions of lawyering, we might find ourselves better prepared to ask: Why law school? What is lawyering? What do we hope to teach students during their three years with us? And if we began there, from informed first principles, I believe that our discussions around reform would both sound different and produce better outcomes.

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the Case Method: A First-Of-Its-Kind Problem-Solving Workshop Prepares 1Ls for The Realities of Law Practice, *Harvard Law Bulletin* 4 (Summer 2010). This course picks up where an earlier Harvard Law School creation, The Bridge, left off. See <http://cyber.law.harvard.edu/bridge/>.

80. In a smaller course, students could use a lawyer's tools to elicit some of this information: interviewing the client themselves, drafting briefs or memoranda, negotiating with partners to the deal. But even a large course could use this method without the simulated pieces by the students. The case files would then simply provide the context for the classroom discussion.