



Fall 2018

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Recommended Citation

Eduardo M. Peñalver, *The Role of Skills Instruction in Legal Education*, 13 FIU L. Rev. 229 (2018).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol13/iss2/7>

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THE ROLE OF SKILLS INSTRUCTION IN LEGAL EDUCATION

Eduardo M. Peñalver*

What I have chosen to focus on is a subject that has occupied a great deal of my time over the last year or so: the role of skills education. Over the past twelve months at Cornell Law School, we have focused a lot on the role of skills introduction in our curriculum. I should use scare quotes around the word skills because the word is a loaded and a very flexible one. A lot of people use it and yet it is clear that the word can have different meanings when it is used. I will try to discuss that definitional question a little bit further in the course of my talk.

The role of skills education in law schools has been a source of controversy and contention for many years. I think, in part, this is because—as professional schools—law schools struggle a little bit with insecurity about how we fit into the larger university. In the past, we legal academics sometimes labored under the fear that the kind of academic work that we do is not fully-respected by our colleagues in other departments on campus.

This insecurity is an old one that dates back to the beginning of law schools in the late 19th century. The 2007 Carnegie report on legal education attributed the rise of the Langdellian case-style on pedagogy that we use in most of our doctrinal classes and that dominates law school education to an effort to overcome that insecurity.¹ The pedagogy attempted to accomplish this by shifting legal education away from its origins in practical apprenticeship and toward a model that was more at home in the university setting, one that focused more on teaching abstract principles and developing analytic skills.²

The rise of the case-dialogue method can be seen as the legal academy's first effort to integrate itself into the university. What was the second? For all the continuing influence of this Harvard-Langdell model on legal education, the reality is that a disproportionate number of law professors were trained at a different school, a school in which the production of scholarship is elevated above most other pursuits, and in which interdisciplinary scholarship is the most highly valued form of scholarly production. I will let you guess which school I am talking about, but a hint: my Cuban aunt pronounces it “jail,” as in, “When are you going back to jail?”

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¹ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007).

² *Id.* at 4–6.

Because of the prestige of this school and the predominance of its graduates in law teaching, this particular model of legal education has exerted an oversized influence. We can think of this Yale model as the second act of the legal academy's effort to accommodate itself to the university. The pedagogy of this model can seem to elevate the preparation of future law professors over the preparation of future practicing attorneys. Within this model, faculty members who spend their time on things other than scholarship or who focus on the more practical sides of professional preparation are pushed to the margins.

There have been some benefits to the rise of the Yale model for legal education. When interdisciplinary legal scholarship has been done well, it gains for law faculty the admiration of colleagues and other disciplines. At Cornell, I have numerous colleagues who are as well regarded in departments across campus for their contributions to those disciplines as they are within the law school building itself.

It has become fairly common even when building a tenure file for a law professor to solicit letters from academics who are not even based in law schools. This is something that would have been unthinkable several decades ago. The letters that come back take the work produced by legal academics seriously, and even praise the work for making genuine contributions in these allied fields.

I have had numerous conversations with colleagues in other departments across campus who, far from viewing law professors as dilettantes, envy the rich intellectual engagement and disciplinary breadth that we are able to achieve in the law school. For this reason, I think law schools serve as a kind of interdisciplinary crossroads for their universities. They are places in which faculty from different disciplines can come together relatively unconstrained by artificial boundaries between disciplines and methodological prejudices. In law schools, like few other places in the modern university, historians can engage with political scientists, economists can learn from psychologists, and all those conversations can be grounded in an engagement with real world examples. The Yale model helps the profession as well. Students benefit from the insights that are generated when we look at legal problems through different disciplinary lenses.

But this shift towards successful interdisciplinary collaboration is not all gain. It comes with some costs. While it has left law professors feeling better about their place on campus and has provided some benefits for students and the profession, it has also indirectly contributed to a different sort of anxiety. This is an anxiety that law schools are not sufficiently engaged with legal practitioners, that law schools are not sufficiently or adequately preparing students for the practice of law. The idea is that legal academics are not sufficiently *legal* and have become too *academic*.

The tension between the legal and the academic strikes me to a certain extent as one that is always going to be with us. It is a tension that is unavoidable for any professional school that has to teach its students both to think and to do. However, the tension is particularly acute for law, a profession in which the doing part of the profession involves a lot of thinking. As my colleague, Brad Wendel has argued, the legal profession is a kind of discursive practice in which technical knowledge and analytical prowess are understood and exercised through the application of sound judgment.³ As the Carnegie report puts it, the legal profession is a form of engaged expertise. This close connection between legal thinking and legal doing is very different from other professions, particularly medicine. Teaching students to think like lawyers, the stated objective in doctrinal courses, also requires giving them opportunities to exercise judgment. But, that exercise of judgment is itself an intellectual act.

Notwithstanding the commingling of thinking and doing in law, it helps to occasionally try to disentangle the two. It is certainly possible, in thinking about the balance that we strike in law schools, for the pendulum to swing too far in one direction or another. Balancing instruction in thinking and doing is a fraught exercise and we will always have to grapple with how to accomplish that balance.

The concern that legal education has become too comfortable in the academy is related to criticisms of legal scholarship that we are now accustomed to hearing from practitioners and judges, in particular. As Chief Justice Roberts memorably put it, “pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic who wrote it, but isn’t much help to the bar.”⁴

Over the past few years, concerns about the prevailing model of legal education have been amplified by developments in the marketplace for lawyers, and most notably declining applications to law school and deteriorating job prospects for law graduates. This has led to a great deal of soul searching among law professors and law school deans about the value of the educational product that we are offering. One of the focal points of this soul searching has been the question of the proper place of skills instruction in the curriculum. Many recent conversations around legal pedagogy have linked poor employment outcomes with an insufficient emphasis on skills education. Those advocating for this point of view often point toward employer

³ See generally W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2012).

⁴ *Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship*, AM. CONST. SOC’Y FOR L. AND POL’Y (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship>.

discontent with the skills that we are teaching or with the skills of the law school graduates who they are employing.

But as much as some legal employers have bemoaned the lack of preparation for practice that law students receive, and as much as they have complained that the preparation they do receive is not aligned with what they need to see in their junior attorneys, there is little indication that employers actually hire on the basis of so-called “practice readiness.”

To be sure, large law firms are increasingly unable to bill their clients for work done by first year lawyers. This has led to significant gnashing of teeth about the amount of time law firms have to spend training young lawyers and about the firms’ inability to recoup the costs involved in that training. Yet, even that has not led to a fundamental shift in hiring practices at large law firms.

How can this be? Part of the answer lies in the ambiguity of the term “skill” and the different skills sought by employers in different segments of the legal market. Maybe there is a fundamental disconnect between the difficulty that some graduates are having finding jobs and what employers are looking for.

At the moment, the most important group of vectors for the growing attention to the role of skills instruction within law schools are regulatory bodies, notably, the American Bar Association and a few leading state bars. Over the past five years, these groups have begun to flex their muscles in order to force law schools to take “skills” instruction more seriously, but – tellingly – they have hesitated to define the term too narrowly.

The A.B.A., for example, now requires that all law school graduates take six credits of skills instruction before they receive their J.D.⁵ The state of California continues to consider a bar admission rule that would require applicants to have completed fifteen credits of experiential instruction in order to qualify for practice of law in that state.⁶ New York has come up with its own extremely complex rule. New York’s rule creates several pathways for ensuring that those seeking admission to the bar have obtained the appropriate skills.⁷ I was the member of the task force put together by the New York Court of Appeals that came up with this new requirement.

⁵ *ABA Standards and Rules of Procedure for Approval of Law Schools 2014-2015*, A.B.A. 16, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf (last visited June 9, 2018).

⁶ Joseph Dunn, *Task Force of Admissions Regulation Reform Phase I Final Proposals — Authorize Creation of Implementation Committee*, ST. B. CAL. 2 (Oct. 12, 2013), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000011256.pdf>.

⁷ *Frequently Asked Questions for New York’s Skills Competency and Professional Values Bar Admission Requirement (Rule 520.18)*, N.Y. ST. UNIFIED CT. SYS. 4–5 (Jan. 2018), <http://www.nycourts.gov/ctapps/news/skills.pdf>.

The main pathway that most J.D. graduates will take in New York, which has been called “pathway one,” requires individual law schools to define for themselves the skills that they aim to impart to their students.⁸ Then, before graduation, the school must spell out the particular courses in which those skills are acquired.⁹ Finally, the school must certify for each of its students who are applying to the bar in New York that that student has acquired those skills, as evidenced by the fact that the student took the course and achieved a certain grade in the course.¹⁰

These various regulatory actions have contributed to a climate in which the skills education has begun to move back toward the center of law school discussions about the curriculum, or at least away from the far edge of those discussions. For some, this development is unsettling. I have heard colleagues at more than one institution say that we are academic institutions not trade schools. Usually, when people express that point of view, they are drawing a contrast between the teaching we do in doctrinal classes and the hands-on learning that students undertake in the clinics and the like.

What these colleagues seem to be resisting is the notion that law schools ought to conceive of our primary mission as teaching students to do things like a lawyer as opposed to thinking like a lawyer. Taken in its most attractive form, adherence to this position argues that law school is about building the intellectual infrastructure that will allow students to practice law wisely and effectively. It is not about teaching them the nitty-gritty of the proper form for drafting a complaint, which is something they can learn in a few hours at most if and when they need to do so.

Put this way, the contrary position sounds like a strawman, but it is a strawman that has some actual champions. I have heard, on more than one occasion, practitioners and even some academics discuss the importance of graduating students who are prepared immediately upon passing the bar exam and obtaining their license to credibly represent clients either on their own or in a legal practice in which they would receive minimal training and supervision. To that end, some schools have discussed teaching their student’s skills, such as how to keep track of their time on billing sheets. If this is indeed what was meant by enhancing law school skills and instruction, I would object to it as well.

The problem I suspect is not with the concept of teaching students skills, but with the particular conception of what the skills are that we ought to be teaching. Understanding skills more broadly leads to a more nuanced position, and also blurs the line between doctrinal and skills instruction in

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

interesting ways. In doctrinal courses, students learn both legal content and important lawyering skills; skills of legal and policy analysis; skills of persuasive argumentation; skills relating to close reading and the distillation of large quantities of information into a readily digestible form. Conversely, in so-called “skills courses,” students experience not only the nuts and bolts of practice, but also when well taught, high level, strategic, analytic, and client counseling skills.

Twenty-five years ago, the MacCrate report correctly lamented the unfortunate tendency to define skills instruction too narrowly. The report provided, “as dealing with skills other than legal analysis and research has obscured the obvious fact that appellate-case analysis—the technique for teaching traditional courses—involves the teaching of important professional skills.”¹¹ It went on to affirm, “well-structured clinical programs also provides an important vehicle for the development of the skills of legal analysis and research.”¹² Whether the skill is taught in either of the sort of course law students need, and whether law schools have struck the right balance between doctrinal and the clinical curriculum are different questions; questions that cannot be answered simply by resorting to the trade school complaint.

The rigidity and narrowness of the skills discussion, as it often occurs in law schools, extends along several different dimensions. The first dimension is the narrowness lamented in the MacCrate report.¹³ This is the idea that skills instruction is something that is done outside of the doctrinal classroom. Examples include, clinics, practicums, simulation courses, courses usually taught by non-tenure track faculty or legal writing fellows, who in many schools have lower status within the law school faculty. Breaking out of this mindset can be hard to do, but I agree with the MacCrate report when it says that, “properly understood skills instruction is part of every law school classroom or ought to be.”¹⁴ Whether clinical or doctrinal faculty, we ought to understand ourselves as all imparting skills.

A second dimension of narrowness is the failure to acknowledge the breadth of legal practice, and therefore, the diversity of skills that law students will find useful in their careers after law school. For instance, when you look at the skills described as essential by the MacCrate report itself, it is clear that when the writers imagined lawyers they thought primarily of litigators.¹⁵ While some of the legal skills identified in the report transcend

11 AM. BAR ASS'N, LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 234 (1992).

12 *Id.*

13 *Id.* at 278, 283.

14 *Id.* at 300.

15 *Id.* at 135.

practice context, its conception of both the most crucial skills and the courses that impart those skills fails to give due weight to the skills that predominate in an area like business transactions. Litigation bias goes beyond discussions like the MacCrate report and is reflected in the structure of contemporary legal education.

In the doctrinal courses that dominate the first year, we tend to teach from appellate cases that are themselves the product of litigation and focus very much on the litigation process. For first year students, opportunities to read actual contracts, statutes, or regulations, are fairly rare. In addition, first year legal research and writing tends to focus on the kinds of legal writing that is done in the context of litigation, such as researching and writing memoranda and briefs. It is a rare student who gets the opportunity to draft a contract during her first year of law school.

We see the same slanting toward litigation in the clinical offerings. Clinics tend to be litigation clinics for the most part. Even in the upper level courses, as students get really deep into skills instruction, the skills that they are learning are litigation focused skills.

Over the past few years, we have begun to witness a gradual emergence of different models of skills instruction. For example, for several years now, Cornell has brought alumni back to campus to participate in a transactional lawyering competition, in which teams of students negotiate against one another. The students negotiate on teams of two, representing either buyers or sellers under the watchful eye of seasoned deal lawyers who come back to campus to participate in this.

A small but growing number of schools have opened transactional clinics, in which law students can engage in transactional work for live clients under the supervision of clinical faculty. These clinics take a number of forms. Some, like the University of Chicago's Kirkland & Ellis Corporate Lab, serve for-profit clients who are often Fortune 500 companies.¹⁶ Others, such as Harvard's Business and Non-Profit Clinic, adopt a more traditional clinical focus on providing legal services for needy clients, in this case, small businesses, startups, and non-profits.¹⁷ Cornell Law School will launch its own transactional clinic in the fall of 2018.

In addition to recognizing the diversity of legal practice, discussions of the sorts of skills law schools should be imparting to their students need to take into account the diversity of law schools themselves, and the different sorts of employment outcomes their students typically achieve. The failure to

¹⁶ See *Kirkland & Ellis Corporate Lab*, U. CHI. L. SCH., <https://www.law.uchicago.edu/corporate-lab> (last visited June 9, 2018).

¹⁷ See *Transactional Law Clinics: What We Do for Businesses and Non-Profit Organizations*, HARV. L. SCH., <http://clinics.law.harvard.edu/tlc/for-clients/businesses-and-non-profit-organizations/> (last visited June 9, 2018).

give due weight to this diversity constitutes a third kind of narrowness in these discussions.

Which skills are important for law schools to teach their students will depend on the career aspirations and outcomes of the typical student at that school. For example, it makes more sense for a regionally focused school to educate its students with an eye toward preparing them for a particular state's bar exam, or to inculcate in its students the norms and practices of a particular local legal culture. Those norms and practices vary considerably from region to region.

FIU College of Law has been a leader in preparing its students to pass the Florida Bar Exam, and its efforts have borne great fruit. As you well know, in 2015 FIU had the highest bar pass rate of any school in Florida.¹⁸ That is an impressive achievement. In contrast, a school that sends its students off to a dozen states each year necessarily has to take a different approach.

Certainly, most of Cornell's students take the New York Bar, but many go off to California or even down here to Florida. Similarly, for a school that sends the majority of its graduates to large law firms, the skills that we find valuable to teach will be different than a school whose graduates are likely to join small law firms, or work with local government agencies, or even start their own practices shortly after graduating from law school.

This kind of heterogeneity among the typical career outcomes that predominate at different law schools argues against the wisdom of regulators mandating overly specific prescriptions for skills education that would apply across the board to all law schools. I think New York's approach is a reasonable one in this regard. It includes in its skills instruction requirement a pathway that allows individual law schools to define for themselves the skills they want their students to acquire, and then to demonstrate how they accomplish that. It requires some thoughtfulness on the part of law schools, but it does not impose a one size fits all account of the particular skills that each school needs to impart.

This is not to say that the New York rule is perfect. If other state bars get in on the action, the prospect of a crazy quilt of fifty different state bars mandating fifty different curricular requirements becomes a very real and troubling one. This is especially problematic for schools whose graduates wind up all over the country. How we counsel students to prepare for those fifty different requirements presents a challenge.

¹⁸ *FIU Law Graduates Earn Top Bar Passage Rate on July 2015 Florida Bar Examination*, FIU L. (Sept. 21, 2015), <https://law.fiu.edu/fiu-law-graduates-earned-the-top-bar-passage-on-july-2015-florida-bar-examination/>.

No matter what the regulators do, if a law school actually does care about the employment outcomes of its graduates, or even if it just fears the public relations consequences of poor placement results, it has an incentive to pay close attention to the skills that employers are demanding from their recent law school graduates. So, the need for strong regulatory intervention in this particular regard seems limited.

As a Dean, I consider it an important part of my job to communicate with our alumni who are working in various parts of the legal profession in order to be sure that Cornell Law School is situating itself well in order to prepare our students to compete for jobs. It is important to listen to what alumni are saying about the preparation of our students in the workplace, and to listen to what they are saying about the skills that they demand from law school graduates in their own hiring process. As a law school Dean, there is already a strong incentive for me to do that.

For example, during my first year as Dean, several partners at large New York law firms told me that in their own hiring processes they were placing great weight on law students' familiarity with basic business concepts. Since most of the clients of these firms were large businesses, and since those clients wanted their lawyers to understand their business, law firms were evaluating job candidates by the degree to which, on day one, they could do things like understand the basics of the corporate form or grasp elementary accounting principles. These firms were making that evaluation in interviews that had been pushed earlier and earlier into the summer after the first year. We are now seeing some students get hired very soon after the grades come out in the spring semester, and the formal hiring conference takes place in early August before classes start in the second year. Consequently, any knowledge of business practices that our students have would be something they either brought with them to law school or something that we gave them during the first year of law school.

At Cornell, we responded to this information in a couple of ways. We introduced a one-credit, ungraded, optional course on basic business concepts for lawyers that we offered to our first-year students during the winter inter-session, and then again after the spring semester upon the conclusion of exams. At the end of the day, three quarters of our 1L students availed themselves of this course the first year we offered it. Last year, we put the course online. So now students can take it on their own schedule anytime before early July after their first year. We also reformed our first-year curriculum to permit first-year students to take a spring elective. This allows students to begin to specialize in the spring semester of their first year by taking some courses that guide them toward their practice goals, whatever they might be.

As we look to the future of legal education, the questions law schools should be asking themselves in connection with their own skills curriculum

are: what kind of lawyers will our graduates become? What skills would be valuable to them in those careers?

Some skills will be valuable only to lawyers if they wind up in a large firm, in a district attorney's office, in litigation, or in transactional practice. And other skills will be valuable no matter what area of practice they land in. For a school like Cornell, one that sends its students off into a wide range of careers, focusing on more transcendent skills makes a lot of sense. The question then becomes: what are they?

Let us return to the MacCrate report. That report identified the following ten skills as crucial: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR, organization and management of legal work, and recognizing and resolving ethical dilemmas.¹⁹ This is a good list, but it overemphasizes skills that are likely to be valuable primarily to those working in litigation. And it leaves a few important skills off the list or obscures them by commingling them with others on the list. For example, it omits certain skills associated with professional life, such as the norms of professional engagement that go beyond the rules of professional responsibility. Skills associated with professionalism, for example, are broadly useful to lawyers in all areas of practice, and not all students bring them to law school.

In addition, the MacCrate report is highly individualistic in its conception of legal work. The report seems to contemplate that each lawyer needs to have the full toolkit that it describes, and seems to envision lawyer-client interactions primarily as this kind of one-to-one interchange. In reality, however, most lawyers work on teams, and most clients are collective enterprises. Thus, legal representation is virtually always collaborative. Even the solo practitioner will often work with a paralegal, a legal assistant, and co-counsel at times. Additionally, the attorney-client relationship itself can be conceived as a kind of collaboration. Yet, outside the clinics, law schools teach and evaluate almost entirely on a highly-individualized basis; you do all the work on your own, you sit in the library and you come in, you are questioned in class on your own, and then you take an exam by yourself.

As a consequence, most of us acquire our collaboration skills through trial and error, and not through instruction we received in the law school classroom. At Cornell, we have begun to emphasize the importance of collaboration from the beginning of our 1L orientation program. We ask our students to spend their first few days as Cornell law students learning about how to bring their own strengths to bear on the process of collaboration. They then undertake a small group challenge in the classroom. On the third day, they spend a half a day working in groups on physical challenges on the

¹⁹ *Id.*

Cornell ropes course. We see this professional development orientation as just the beginning of something that will blossom into a fuller professional development curriculum throughout the three years of law school.

This year, we are conducting a comprehensive review of our skills curriculum. The review will facilitate a discussion of how we can build on the orientation experience to ensure that our students learn the importance of teamwork, and have a number of opportunities to practice and learn the skills involved in teamwork in different parts of our curriculum. Our goal is that over their three years of law school students will become more effective collaborators, and therefore, better and more effective lawyers.

Taking skills education seriously as part of the law school's core mission will require a shift in everyone's thinking. Clinicians have been at the forefront of the push for skills education, but as I said earlier, there is a good reason to think of doctrinal teaching as imparting skills. The analytic and rhetorical skills that students learn through well-executed Socratic dialogue are indeed vital to a successful legal practice. In the future, doctrinal faculty will need to become more comfortable with the gray area between doctrine and skills. We need to become more attentive to our own pedagogical choices and to their consequences for the learning outcomes that we hope to achieve for our students.

One thing we tried at Cornell this year, for the first time, was to incorporate a simulated contract negotiation into all of our first-year contract sections. Not all the contracts faculty were equally comfortable with this, but they all agreed to take part. Those who were more comfortable teaching this kind of simulation pitched in to help the faculty members who were less comfortable with this kind of exercise.

A shift toward greater emphasis on skills instruction will also require adjustment by clinicians. There has been a long-standing school of thought that viewed clinics as inherently serving a very strong social justice mission. I am not casting doubt on the value of that mission's access to justice and to the benefits of legal representation, as it is an important professional value for all lawyers and a proper goal for law school. But in the past, clinicians have been uniquely forceful champions of it, and have often identified clinics as the principle vehicle for imparting that value to our students.

In the view of some, a clinic like the University of Chicago's Corporate Lab is not a clinic in the true sense of the word because it serves corporate clients who have plenty of access to justice, and that clinic even charges the corporate clients fees.²⁰ However, considered from the point of view of the kind of work Chicago's graduates are likely to perform in the workplace, the corporate lab is far more likely to prepare its students for that practice than a

²⁰ See *Kirkland & Ellis Corporate Lab*, *supra* note 16.

corporate clinic that exclusively serves small businesses or nonprofits. Shifting skills education toward the center of legal education will require a correlative shift in our thinking about the deep moral commitments embedded in clinics.

The older access-focused clinics will continue, but as schools aim to broaden the substantive work done by clinics to match the work their students will do upon graduating, we are going to see a greater diversity of clinics. That is both good and appropriate. This may mean relaxing the tight identification that many clinicians have insisted on between the clinical instruction and a particular conception of social justice lawyering. This does not mean that law schools should relax their commitment to imparting the pro bono values that we have traditionally associated with clinical education, but it does mean that we will need to become more comfortable with a greater heterogeneity of clinical models.

To conclude, the decline in law school applications and the increase in the transparency about job outcomes for law school graduates has helped spark a discussion to reorient law schools toward their teaching missions, which I think is for the better. As we turn our attention toward how we can better prepare our students for the employment outcomes they are seeking, we have to grapple with the challenge of clearly defining the skills they will need to succeed as young lawyers and identify the best ways to ensure that they will acquire those skills during their three short years in law school. To do this well is going to require adjustments by all of us: doctrinal faculty, clinical faculty, and administrators. The result is bound to change how we deliver legal education in the future. If we are thoughtful about it, those changes will be for the better.