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## A Tale of Two Case Methods

Benjamin H. Barton

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## A Tale of Two Case Methods

Benjamin H. Barton<sup>1</sup>

*This essay argues that law schools should adopt the business school case method. Business school cases are generally real life problems. They ask the students to read the files and then perform actual management tasks. The students also generally work in teams and are graded on their actual work throughout the semester. The students thus spend their time learning how to actually manage, instead of only learning dry management theory.*

*There are several advantages to the business school case method. The business school case method is much more focused on the actual process of being a business manager. By comparison, the law school case method focuses on the work of judges, not lawyers.*

*The team aspect of business schools is also preferable to traditional law school classes. Some lawyers practice solo, but a majority work in groups, and working on a team is a necessary (and largely untaught) legal skill.*

*Business schools also give students more regular feedback on their work, because each project/case is graded along the way. Business school grading is also much more rational than law school grading (and better approximates the experiences of MBA students when they graduate). This is because MBA students are graded on the strength of their actual work, not a single exam at the end of the semester. In sum, trading case methods with MBA programs might vastly improve the first year, and legal education as a whole.*

Legal education is approaching a crossroads of sorts. The Carnegie Foundation just released a quite critical review of American law schools.<sup>2</sup> Roy Stuckey released his Best Practices for Legal Education, which also points out the many gaps in law school coverage.<sup>3</sup> In particular both of these studies note how little law school does to prepare students for the actual practice of law.

Given these criticisms, now is an apt time to consider how other professional schools prepare students to practice their professions.<sup>4</sup> Law faculties tend to be rather insular,

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<sup>2</sup> See WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007).

<sup>3</sup> ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>4</sup> A cynic might note that it has been an apt time to discuss law school teaching for a while. Professors Peter Joy and Bob Kuehn show a lengthy history of one small front on this battle in their article The Evolution of ABA Standards for Clinical Faculty (1980-2007), \_\_ TENN. L. REV. \_\_ (2007). Another great

and insofar as they consider the work and scholarship of other disciplines, they tend to focus on the scholarship of other academic disciplines like economics, literary theory, or evolutionary biology, not the work of other professional schools.<sup>5</sup> This is a shame, because law schools can learn a lot about pedagogy from other professional schools.

This essay argues that adopting the business school version of the case method would be a substantial improvement to law school teaching. Part I presents brief descriptions of the business school and law school versions of the case method. Part II argues that the business school case method model would be a large improvement for law schools. Part III asserts that one part of legal education actually serves many of the goals of the business school case method admirably, legal clinics. Part IV contends that the root cause of the pedagogical differences between business school and law school are a result of market forces more than any underlying differences in the professions.

## I. Two Case Methods

The history of both case methods actually begins when Christopher Langdell became the Dean of Harvard Law School in 1870. He immediately instituted the case method as the educational model.<sup>6</sup> The law school case method in 1870 was remarkably similar to today: students read leading cases on their own in an effort to distill the fundamental principles of law. In class students were led in discussion of these cases in the “Socratic method,” a series of professorial questions that were meant to teach the students how to hone in on the rules of law found within the cases.<sup>7</sup>

Langdell saw the study of law as a scientific endeavor, and rejected the current model of lawyer training that was practice-oriented and based in the apprenticeship model.<sup>8</sup> From Harvard the model spread nationally, and by the early twentieth century the case method was the dominant model in law schools, and law school had largely replaced apprenticeships.<sup>9</sup>

A couple of features of the law school case method are worth noting at the outset. First, the law school case method sought to be a scientific or academic training, not a practical training. Second, the case method professors are explicitly academics, not necessarily practitioners, and are selected for their academic abilities and potential, not practice

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companion piece is ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921), an earlier Carnegie Foundation report that echoes some of the 2007’s reports concerns about preparing students for the practice of law.

<sup>5</sup> One notable exception is Roy Stuckey’s Best Practices which looks to other professional schools in creating best practices for law schools. See, e.g., STUCKEY, *supra* note \_\_, at 145 (discussing business schools).

<sup>6</sup> See Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 521-527 (1991).

<sup>7</sup> See Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During and After "The Law"*, 60 VAND. L. REV. 555, 561-63 (2007).

<sup>8</sup> See Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses*, 43 CAL WEST. L. REV. 267, 269-71 (2007).

<sup>9</sup> See Edward Rubin, *What's Wrong With Langdell's Method, And What To Do About It*, 60 VAND. L. REV. 609, 612-13 (2007).

experience. Third, the casebooks consist of selected appellate level cases, with little additional textual material. Lastly, the class grades are based on a written, final exam based upon hypotheticals.<sup>10</sup>

The history of the business school case method likewise starts at Harvard. Harvard Business School was founded in 1908, and from the outset it taught using the case method.<sup>11</sup> The original case method was partially inspired by the success that the Harvard Law School had with its case method.<sup>12</sup> Again, similar to the law school version, the business school case method spread from Harvard to other schools, and has now become the primary national model for graduate business education.<sup>13</sup>

Despite being based in the law school version, the business school case method is actually quite distinct. The single biggest difference is the meaning of the word “case.” In law school the case method concerns itself with written, appellate decisions. A business school case file is between five and twenty-five pages. The case files are by-and-large drawn from real life scenarios.<sup>14</sup> The cases ask the students to place themselves in the role of a manager. The case file presents a mass of (sometimes conflicting) data to the student, and asks the student to make a management decision on the basis of the information.<sup>15</sup> Because the cases are from real situations and the students are asked to make concrete decisions, management theory is rarely directly taught to the students. Instead, the students study management by actually practicing to make management decisions.<sup>16</sup>

Business school classes usually handle no more than one case file per day. The students work on the case files in teams before class. During class the case files are discussed and dissected. At the Harvard Business School class participation is 50% of the grade and the final exam is another case file.<sup>17</sup> Other schools place more of an emphasis on written, team created work.<sup>18</sup> Throughout each of these variations there is an effort to grade

<sup>10</sup> See, e.g., Menkel-Meadow, *supra* note \_\_ at 562-63.

<sup>11</sup> At the outset the case method was also known as the problem method. See MELVIN T. COPELAND, AND MARK AN ERA: THE STORY OF THE HARVARD BUSINESS SCHOOL 27-29(1958)

<sup>12</sup> See *id.* at 28.

<sup>13</sup> By 1959 the case method was already the dominant model of graduate business education. See ROBERT A. GOODWIN & JAMES E. HOWELL, HIGHER EDUCATION FOR BUSINESS 368 (1959).

<sup>14</sup> For a description of how case files are developed, see Harvard Business School, *Making a Case*, at <http://www.hbs.edu/corporate/enterprise/case.html> (last visited September 27, 2007).

<sup>15</sup> For an Enron case file, see Samuel E. Bodily & Robert F. Bruner, *Enron: 1986-2001*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=302155](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=302155) (last visited October 1, 2007).

For a description of a typical case file, see DAVID W. EWING, INSIDE THE HARVARD BUSINESS SCHOOL 21-23 (1990).

<sup>16</sup> See, e.g., EWING, *supra* note \_\_, at 19-36 (offering an excellent overview of the case method at Harvard Business School).

<sup>17</sup> See Harvard Business School, *The Case Method*, at <http://www.hbs.edu/case/case-work.html> (last visited September 27, 2007).

<sup>18</sup> See MICHAEL MASONER, AN AUDIT OF THE CASE METHOD 1-11 (1988) (describing diversity of teaching methods under the case method); see also Frances Fabian, *Management Policy Syllabus*, at <http://www.belkcollege.uncc.edu/fhfabian/MBA%20courses/MBAD6194Thurs.htm> (last visited September 27, 2007) (exam is 25% of the grade, class participation 15%, and the rest is written work); Syllabus, at [http://www.mcombs.utexas.edu/dept/irom/courses/syllabi\\_spg2006/MS%20386%201%20\(MAN386%201\)%20Service%20Mangement%20\(Fitzsimmons\)%20\(2\).pdf](http://www.mcombs.utexas.edu/dept/irom/courses/syllabi_spg2006/MS%20386%201%20(MAN386%201)%20Service%20Mangement%20(Fitzsimmons)%20(2).pdf) (last visited September 27, 2007) (team work

students on the quality of the work itself as much as their understanding of any underlying theories.

## II. The Advantages of the Business School Case Method

Despite the fact that the business school case method is a younger cousin to the law school version I think that the adoption of some of the features of the business school case method would immeasurably improve law school pedagogy. Many of these criticisms cluster around the idea that law schools could and should do more to prepare students for actual the practice of law than they do currently, so if you disagree with that premise, I will not expect you to be convinced.

### A. Role and Process

The single biggest advantage to the business school case method is that it teaches the students management by placing them in the role of a manager, and asking them to actually perform the tasks that managers do in practice. The classes are thus naturally more focused on the process of being a manager. There is obviously a certain artificiality to a classroom setting,<sup>19</sup> but outside of that limitation, the business school case method attempts to teach the necessary skills by simulating the actual work.

By comparison, the law school case method generally does not focus on any professional role in particular. The students are tasked with distilling the rule of law from cases, but they are not generally asked to put themselves in the place of one of the players in any actual case.

Insofar as any particular role is discussed or considered, it is generally the role of the judge or justices in the case, not the lawyers.<sup>20</sup> Professors regularly ask law students to consider how else a case might have been decided, or what's wrong with a certain decision. Professors almost never ask a student what a lawyer on the case could have done better.

To the contrary, reading appellate cases discourages students from thinking about the actual lawyering that underpins the cases, because appellate courts almost never talk about the strategic choices made on appeal by the lawyers, let alone the choices at trial. Similarly, the note cases, questions and answers that follow the main cases in case books mostly deal with the legal rules from each case, rather than any lawyering related issues.

Further, even if the students do think about the lawyering, it is usually the lawyering on appeal. The great bulk of the work of litigation occurs pre-trial. In fact, the vast majority of disputes never see trial, let alone appeal.<sup>21</sup> This means that law school classes focus on

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40% of the grade, 65% of the grade from written work).

<sup>19</sup> See C. ROLAND CHRISTENSEN & ABBY J. HANSEN, TEACHING AND THE CASE METHOD 24 (1987).

<sup>20</sup> See ANTHONY T. KRONMAN, THE LOST LAWYER 120-21 (1993).

<sup>21</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) ("The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the

a small, and in some ways anachronistic, set of materials that reflect a small subset of practice skills (handling appellate cases) that are rarely, if ever, necessary in actual litigation practice.

Moreover, this all assumes that what we want to teach is litigation skills. There is lots of lawyering (transactional, tax, IP, estate planning) that occurs outside the litigation context, and the law school case method does little to prepare students on that front.<sup>22</sup>

The law school case method DOES teach students to read legal cases and discern a legal rule. It also hopefully teaches students how to apply legal rules in alternate factual situations. Nevertheless, wouldn't it be possible to teach that skill in a case method that more closely approximates business school? Couldn't we give students a set of facts coupled with a portfolio of related law and a necessary legal task and then grade them on their actual work?

That would still teach our students to glean a legal rule from cases and apply it, but it would also do a better job of preparing students to be lawyers. Moreover, we could reach a broad range of skills from document drafting to negotiation to pre-trial litigation. In fact, the list of skills that could be covered in tandem with the substantive material is virtually endless, bounded only by the limitations of the classroom setting, and the professor's willingness to create and grade the new case files.

Lastly, the core claimed strength of the law school case method is that it teaches students to "think like a lawyer." The business school case method, however, teaches students both how to learn and how to make actual, hard decisions. Harvard Business School "emphasizes learning over teaching," *i.e.* the students learn from preparing, discussing, and acting out real life situations.<sup>23</sup> Further, business schools force students to get in the habit of actually making decisions and actually performing difficult managerial tasks. Business students thus learn not only the familiar law school lessons of gray areas and indeterminacy,<sup>24</sup> but the additional (more valuable lesson) that regardless of imperfect information actions must be taken.<sup>25</sup>

## B. Rational Grading and Team Building

Business school grading is also much more rational than law school grading (and better approximates the experiences of MBA students when they graduate). This is because MBA students are graded on the strength of their actual work, not a single exam at the end of the semester. Business schools also give students more regular feedback on their work, because written projects and class participation is graded along the way.

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60 percent decline in the absolute number of trials since the mid 1980s.").

<sup>22</sup> Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851, 851-54 (2000) (arguing that the traditional curriculum and the case method undersell transactional work).

<sup>23</sup> EWING, *supra* note \_\_, at 13-14.

<sup>24</sup> See Benjamin H. Barton, *The Quintessence of Legal Academia*, 92 CAL. L. REV. 585, 593-95 (describing the "siren song of indeterminacy").

<sup>25</sup> See EWING, *supra* note \_\_, at 25-29.

By comparison, the traditional law school class is graded based on a single, end of the semester written exam. The traditional questions on these exams require the students to “issue spot:” the students are given a lengthy factual scenario, and they are required to apply the law studied that semester to the given facts. Traditionally these exams are closed book.<sup>26</sup> While this traditional grading format has softened in the second and third years of law school, it is still the dominant model in the all important first-year classes.<sup>27</sup> This grading format has been widely criticized for failing to offer regular feedback, and even inflicting psychological distress on first years.<sup>28</sup>

Also worrisome is the fact that the traditional exams do not test on a skill that is particularly relevant in legal practice. I have often queried other professors whether they ever experienced the following in practice:<sup>29</sup> a person comes in with a crazy set of facts that hits all sorts of different and disparate legal issues. Without looking at notes or doing any research the lawyer must outline the different possible claims the person has in three hours. If this ever happens in practice, it is hard to guess when it might happen.<sup>30</sup> Yet every fall and spring semester it happens on most law school exams, and is standard procedure for evaluating law students.

The great bulk of legal work allows time for research and careful thought on the issue at hand. In Tennessee’s Advocacy Clinic we spend time every semester teaching the students the regular use of the phrase: “I don’t know the answer to that question off the top of my head, but I can research it and get back to you.” The Socratic method and exams encourages students to try to answer every question as quickly as possible, frequently regardless of whether they know the answer or not. Thus, emphasizing speed and snap judgments may do more than merely test only one legal skill, it may actually lead future lawyers to fly by the seat of their pants.

In fact, it is not an exaggeration to say that 80% or more of a first year law student’s GPA is based upon testing an activity that is basically never required in practice. It may

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<sup>26</sup> See Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”--“Do the Work!”*, 40 CAL. WEST. L. REV. 321, 349 (2004) (advocating a return to “traditional closed-book exams”).

<sup>27</sup> See, e.g., Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails “Objectified” Exams*, 34 NEW ENG. L. REV. 785, 786 (2000); Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone... A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822 (1997).

<sup>28</sup> See, e.g., Carol M. Parker, *A Liberal Education in Law: Engaging the Legal Imagination through Research and Writing Beyond the Curriculum*, 1 J. ASSOC. L. WRITING DIRECTORS 130, 138 & n. 46 (“[T]he traditional one-exam evaluation of first-year doctrinal courses may imbue students with a sense of powerlessness.”).

<sup>29</sup> This assumes the other professor has practiced, which is not always true of American law professors. See Rodney J. Uphoff, et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 397 (1997) (“Because a significant number of law professors never practiced law, or did so briefly in a large firm with minimal client contact, few law professors are familiar with or interested in the interpersonal aspects of lawyering.”).

<sup>30</sup> In a perverse way it is actually fun to think of scenarios where this might happen. Certainly thinking quickly on one’s feet is important in orally arguing before courts, either trial or appellate. My favorite hypothetical situation: a client comes in at 2 pm on the last day before the statute of limitations runs on a valuable litigation claim and the lawyer has 3 hours to write out a complaint. Needless to say, this is not an every day practical experience.



be that the skill tested (rapid legal analysis) is useful for lawyers, but the actual activity is quite unrealistic. Again, isn't it possible to test that skill in a more realistic setting? Moreover, aren't there other legal skills (such as research and carefully drafted legal writing) that should be tested along with rapid analysis?

Adopting the business school case method would allow additional and more important skills to be tested. These skills would also be tested in settings that much more closely track legal practice.

Even if an issue-spotting exam tested the most important practical legal skill, it would still be an odd way to test whether students had learned much in their first year classes, because traditional first year classes actually spend very little time on issue spotting. Some time is reserved for answering hypotheticals, but the first time many law students face a written question requiring issue spotting and legal analysis is on their fall semester first year exams. It is hard to argue that a rational examination relies heavily upon skills and activities rarely covered in the class, and yet the traditional law school exam does exactly that.

The business school case method avoids this irrationality. In many classes the majority of the grade is earned over the course of the semester and the final exam is just a reprise of what was required in class: the students receive another case to work on.

The business school case method requires the students to work in teams, and at least a portion of the grades frequently come from team projects.<sup>31</sup> This is rational for business schools because few (if any) business managers work completely solo. Moreover, it teaches MBA students the invaluable professional lesson that the "group's best effort is almost always better than the individual's best effort."<sup>32</sup>

Similarly, requiring law students to work in teams as part of their grade would be a much more realistic reflection of current law practice. Some lawyers still work as solo practitioners, but a great majority work in firms or multi-person government offices,<sup>33</sup> and teamwork is, therefore, an essential but largely untaught skill.

Lastly, many states are beginning to require the Multistate Performance Test ("MPT"), a practice-oriented case file exercise similar to what I'm recommending here.<sup>34</sup> Insofar as these skills are necessary for the bar exam, a precursor to practice, they should certainly be taught in law schools.

### C. Flexibility and Openness to Other Disciplines

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<sup>31</sup> See Mimi Wolverton & Larry E. Penley, *What It Takes to be Strategically Innovative*, in ELITE MBA PROGRAMS AT PUBLIC UNIVERSITIES 17, 31 (Mimi Wolverton & Larry E. Penley, eds. 2004).

<sup>32</sup> JEFFREY L. CRUIKSHANK, SHAPING THE WAVES: A HISTORY OF ENTREPRENEURSHIP AT HARVARD BUSINESS SCHOOL 349 (2005).

<sup>33</sup> See Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829, 831 & nn. 6-7 (2001).

<sup>34</sup> See, e.g., New York Bar Examiners, *Multistate Performance Test*, at <http://www.nybarexam.org/MPT.htm> (last visited October 1, 2007).

There has been a lot of talk about integrating more practical skills education into law school almost ever since the case method became the dominant law school model. More recently there has been much discussion about internationalizing law school, or at least opening law school classes to some of the realities of globalization.<sup>35</sup> There has also been a great deal of interdisciplinary scholarship in law schools, but law school classes remain generally focused on reading and analyzing cases without regard to other academic or professional disciplines.<sup>36</sup> There have been long standing efforts to create a context for professional responsibility and to teach the subject throughout the curriculum.<sup>37</sup>

It's worth thinking about why these various reforms have tended to flounder, and also about the message that the current structure of law school sends. By keeping the first year classes basically unchanged, every law school innovation has a "grafted on" feeling, and law schools send a clear message to students what they consider most valuable.

A large reason that these various efforts at reforming legal education have failed to make much headway, especially in the all important first year of law school, is the inflexibility of the law school case method. The law school case method requires the source materials to be leading appellate opinions. Because appellate opinions themselves rarely consider international law, the practice of law, legal ethics, or other academic disciplines law school classes are at a loss as to how to integrate these (or any other) sidelines into class. The cases themselves do not lend themselves to new or different approaches to legal education.

By contrast, the business school case method is remarkably flexible. The source materials are drawn from real life scenarios, and ask the students to make decisions that actual managers were also forced to make. Business school cases are limited only by the constraints of writing out the case itself. While it is difficult to realistically reduce the complexity of life to a 5-25 written case, the fact that the cases themselves can cover all different sorts of circumstances and can ask the students to perform any number of managerial tasks, makes the cases uniquely flexible teaching tools.

Moreover, the flexibility of the business school case encourages innovation and an interdisciplinary approach on several levels.<sup>38</sup> First, the professor herself is tasked to analyze each case from every possible perspective to try to develop the best possible

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<sup>35</sup> Cf. Alberto Bernabe-Riefkohl, *Tomorrow's [Law Schools: Globalization](#) and Legal Education*, 32 SAN DIEGO L. REV. 137 (1995) (theorizing about the (as of yet unrealized) effects of globalization on the law school of tomorrow).

<sup>36</sup> See Rob Atkinson, *Growing Greener Grass: Looking from Legal Ethics to Business Ethics, and Back*, 1 U. ST. THOMAS L.J. 951, 979 (2004) (noting similarities between business and law school case methods, except that "THE CASE METHOD IN BUSINESS SCHOOLS HAS TENDED TO FOSTER, RATHER THAN FORESTALL, INTERDISCIPLINARITY").

<sup>37</sup> See, e.g., DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed. 1998).

<sup>38</sup> See Edward J. Conry & Caryn L. Beck-Dudley, *Meta-Jurisprudence: A Paradigm for Legal Studies*, 33 AM. BUS. L.J. 691, 731 (1996) ("Business schools focus on broad, real-world tasks . . . and every business task is evaluated by psychology, law, economics, finance, sociology, ethics, history, and/or mathematics.").

response. Second, the class itself is student driven, and the perspectives of a variety of students, coming from different backgrounds, are critical components of a successful class. In fact, in Teaching and the Case Method the authors argue that each business school class provides the opportunity for a “new intellectual adventure” that “links instructors to the world of practice” and informs the faculty “research needs.”<sup>39</sup> By contrast, teaching students to “think like a lawyer” frequently asks the students to discard their previous life experiences and expertise.<sup>40</sup>

The business school case method lends itself much more naturally to globalization and consideration of international issues. It has been adopted all over the world, and American business schools have been much faster to partner with foreign business schools all over the world.<sup>41</sup>

Lastly, the business school case method is much better situated to discuss both professional practice and ethics. While reading an appellate opinion does little to encourage students to consider how they would have handled a particular case, ethical dilemma, or legal task, the business school case method would put each of those questions front and center.<sup>42</sup>

As a historical matter it’s interesting how long lasting Langdell and the law school case method’s break with practical training has been. From the outset law schools made every effort to be academic institutions more than professional institutions. At Langdell’s Harvard there was a conscious break with the practical side of legal education, and that schism has yet to heal. In fact, many law professors do not even see the schism to be a short-coming of legal education.

By contrast, business schools send the opposite message: the most important part of business school is to learn by doing and to prepare to become a business manager. Adopting the business school case method would allow for easier integration of ethics and skills into law school teaching, but it might also “unite the clans” by allowing practice to once again become central to law school.

#### D. Connecting Teaching and Scholarship

There is a growing body of empirical scholarship that addresses what connection, if any, exists between teaching and scholarship. I have drafted a study that shows that there is little or no correlation between teaching evaluations and scholarly productivity at

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<sup>39</sup> See CHRISTENSEN & HANSEN, *supra* note \_\_, at 24-25.

<sup>40</sup> Cf. Jerry J. Phillips, *Thinking*, 72 TENN. L. REV. 697, 735 (2005) (noting that a colleague told first years that “Your brains are mush right now; we are going to make you think like a lawyer!”).

<sup>41</sup> See, e.g., ROBERT R. LOCKE, *MANAGEMENT AND HIGHER EDUCATION SINCE 1940: THE INFLUENCE OF AMERICA AND JAPAN ON WEST GERMANY, GREAT BRITAIN, AND FRANCE* (1989).

<sup>42</sup> See, e.g., CHRISTENSEN & HANSEN, *supra* note \_\_, at 3 (“Lectures about judgment typically have limited impact.”).

American law schools.<sup>43</sup> This finding is consonant with the great bulk of studies from other disciplines.<sup>44</sup>

The lack of connection between scholarly productivity and teaching evaluations in American law schools has been quite puzzling for many legal academics who assume that an active knowledge of a field and a curious mind (two hallmarks of scholarly productivity) should translate well in the classroom. One possible reason for the disconnect, however, is how distinct teaching and scholarly writing are in today's law schools.

It is interesting to note, therefore, that proponents of the business school case method argue that it is "intellectually stimulating for the faculty" and helps meet "a faculty's teaching and research needs."<sup>45</sup> Some of the most influential recent works of business school scholarship (albeit popularized scholarship) look a lot like case studies.<sup>46</sup> Further, the enormously popular Harvard Business Review publishes one case study in each issue along with other scholarly articles.<sup>47</sup> By comparison, anyone who has read the Harvard Law Review (or most American law reviews) will know that teaching materials or teaching notes are hardly a regular feature.

#### E. Harvard Business School Versus Yale Law School

Both American law schools and business schools have a single, unquestioned lead institution. For business schools that is Harvard, and for law schools it is Yale. These schools are ranked first in multiple publications, are the hardest to get into for students,<sup>48</sup> and thus serve an important function as the "lead dog" in their respective areas.

As an American law professor (but not a Yale grad) I am relatively familiar with Yale from my colleagues clerking, in practice, and most of all in teaching. I have only a passing familiarity with Harvard Business School, however. I was thus amazed when I first began researching this topic. As many a lazy researcher has done before I started with a google search: "what is the case method?" The very first hit was a Harvard

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<sup>43</sup> See Benjamin H. Barton, *Is There a Correlation between Scholarly Productivity, Scholarly Influence and Teaching Effectiveness in American Law Schools? An Empirical Study*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913421](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913421).

<sup>44</sup> See *id.*

<sup>45</sup> See CHRISTENSEN & HANSEN, *supra* note \_\_ at 24-25.

<sup>46</sup> For example, former Stanford Business School Professor Jim Collins' well known books *Good to Great* and *Built to Last* are essentially large scale case studies reduced to unifying themes and presented in book form. See JIM COLLINS, *GOOD TO GREAT* (2001); JERRY I. PORRIS & JIM COLLINS, *BUILT TO LAST* (1994). Similarly, the Harvard Business Review

<sup>47</sup> See The University of Chicago Library, *Finding Case Studies*, at <http://www.lib.uchicago.edu/e/busecon/guides/casestudy.html>.

<sup>48</sup> See, e.g., U.S. News & World Report, *Top Law Schools*, at [http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank\\_brief.php](http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php) (last visited September 29, 2007); U.S. News & World Report, *Top Business Schools*, at [http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/mba/brief/mbarank\\_brief.php](http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/mba/brief/mbarank_brief.php) (last visited September 29, 2007).

Business School Site called, helpfully enough, “The Case Method.”<sup>49</sup> This area of the HBS web site features a full description of the case method, has a video of a class and a portion of an actual HBS case, and a glowing description of the case method, and how central it is to the HBS mission and experience. Similarly, the many books that have been written about HBS all centrally (and glowingly) feature the case method.<sup>50</sup>

By contrast, the Yale Law School web site says nothing about the law school case method or the Socratic method.<sup>51</sup> Both the YLS website and Anthony Kronman’s History of the Yale Law School spend a lot of time talking about Yale’s influence on legal academia and legal thought, but the silence on pedagogy, especially in comparison to the pride of HBS in the case method, is rather striking.<sup>52</sup>

In sum, the business school case method has also performed what a law school professor might think a miracle. It has made pedagogy a central element of an Ivy League professional school.

### III. Advantage Law Schools: Clinical Legal Education

There are areas of legal education where we use something that looks quite similar to the business school case method, and one in particular is worth mentioning here -- legal clinics. These classes are actually slightly improved from the business school case method because the greatest weakness of the business school case method (the difficulty of “canning” real life into a written brief) is avoided. Clinic students address real cases, with real clients, before actual tribunals. There is thus no need to try to capture the full complexity of life’s rich pageant; it appears before the students in each real case.<sup>53</sup>

Further, real cases keep the learning and teaching fresh for clinical professors and students in a way that surpasses even the business school case method. Business schools

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<sup>49</sup> See Harvard Business School, *the Case Method*, at <http://www.hbs.edu/case/> (last visited (September 29, 2007)).

<sup>50</sup> See, e.g., COPELAND, *supra* note \_\_, at 254-72; CRUIKSHANK, *supra* note \_\_, at 347-50; EWING, *supra* note \_\_, at 19-49; CHRISTENSEN & HANSEN, *supra* note \_\_, at 22.

<sup>51</sup> The University of Chicago’s law school web site does, however, have a separate “Socratic method” page. See The University of Chicago Law School, *The Socratic Method*, at <http://www.law.uchicago.edu/socrates/method.html> (last visited September 30, 2007).

<sup>52</sup> See, e.g. THE HISTORY OF YALE LAW SCHOOL (Anthony Kronman, ed. 2004); Yale Law School, *Intellectual Life*, at <http://www.law.yale.edu/intellecualife/intellecualife.htm> (last visited September 30, 2007) (describing the great variety of Yale’s centers and programs). Humorously, YLS does have a page entitled “law teaching,” but that page describes how many YLS grad are law professors, not anything about the teaching of law at Yale. See Yale Law School, *Law Teaching*, at <http://www.law.yale.edu/lawteaching.htm> (last visited September 30, 2007).

<sup>53</sup> Cf. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 388 (1995) (noting the similarities between law school clinics and the business school case method, but also noting differences).

have long featured field placements in their second years,<sup>54</sup> but a well done clinical experience offers a richer, more reflective experience than a field placement.<sup>55</sup>

Nevertheless, as long-time watchers of legal education will know, clinical legal education is relatively new, relatively less respected, and often seen as an add-on to the “core” mission of law schools.<sup>56</sup> The business school case method is thus clearly superior, because it forms the very core of what business schools are and hope to accomplish, instead of a grudging nod to the work the students will do once they graduate.

#### IV. Why is it Thus?

So why is business school so much more practical than law school? I think it is because of the different legal standings of the two institutions. Anyone who wants to be a lawyer in America must attend a law school as a pre-cursor to taking the bar and gaining a license.<sup>57</sup> Thus, law schools have a captive market entering the profession: no one can choose to skip law school and become a lawyer on her own.

Law schools are very inflexible in dealing with the desires of both incoming and current law students. The relative lack of differentiation or innovation among law schools is one of the most prevalent examples of this. Except for a few notable exceptions (like Northeastern) each American law school is quite similar.<sup>58</sup> We teach a similar first year curriculum, we hire similar looking candidates to become professors, and we teach in similar styles to how we learned. In fact, given the massive changes in the country as a whole since the late-nineteenth century it is striking how similar current law schools are to the Harvard Law School of the 1870s.<sup>59</sup>

The sameness of legal education makes a lot of sense for many of the various players involved. It makes sense for law professors, because innovation is hard, and at times painful. In fact, in researching this essay I came across several references to earlier consideration of using the business school case method in law schools. These calls were

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<sup>54</sup> See CRUIKSHANK, *supra* note \_\_ at 349 (noting that Harvard Business School uses field placements.

<sup>55</sup> This is because the clinic faculty have the time, energy, and training, to help the students unpack and reflect upon their experiences. See, e.g., Paulette J. Williams, *The Divorce Case: Supervisory Teaching and Learning in Clinical Legal Education*, 21 ST. LOUIS U. PUB. L. REV. 331 (2002).

<sup>56</sup> Except at Tennessee and a handful of other schools. Have I mentioned our Clinic’s 60<sup>th</sup> anniversary?

<sup>57</sup> See Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 441-50 (2001).

<sup>58</sup> 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) (noting the law school culture of conformity).

<sup>59</sup> Robert W. Gordon, *the Geologic Strata of the Law School curriculum*, 60 VAND. L. REV. 339 (2007).

either limited in scope,<sup>60</sup> or short descriptions of failed efforts.<sup>61</sup> Interestingly, the failed efforts basically floundered on what a hassle it would be to develop and teach business school type cases.<sup>62</sup>

It makes sense for law schools and universities as a whole because the traditional case law method is relatively inexpensive. A bare bones law school is inexpensive to staff and run and as a result many universities are able to make money on their law schools (which is not true of many graduate programs).<sup>63</sup>

The universities and the law faculties work together with the ABA and the AALS (the two licensing bodies for American law schools) to create detailed standards that limit variation or innovation within law schools.<sup>64</sup> This works to the benefit of law professors and the schools themselves because change is hard and expensive.

It is worth wondering why practicing lawyers don't object more strenuously to how little law schools educate new lawyers. First, some practicing lawyers, judges and bar associations have begun to complain.<sup>65</sup> Second, it actually benefits many practicing lawyers to have new lawyers poorly trained: it takes a while for a graduate to become an actual competitive threat to established lawyers.<sup>66</sup> The longer that start-up period lasts, the better for currently practicing lawyers. Third, every practicing lawyer came up

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<sup>60</sup> See, e.g., Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 12891305-1314 (2000) (describing the "CaseFile method" of teaching contracts); George J. Seidel, *Legal Complexity in Cross-Border Subsidiary Management*, 36 TEX. INT'L L.J. 611 (2001) (using the business school case method to explore cross-border legal complexity); Janet Reno, *Lawyers as Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5, 6-9 (1999) (arguing for the use of "transactional case files" to teach problem-solving).

<sup>61</sup> See Erwin N. Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 303-4 (1967) (describing failed effort to create business school type cases for law school teaching).

<sup>62</sup> See *id.* at 303-04 (describing the "difficulties" and expense of gathering the cases); William J. Carney, *Teaching Problems in Corporate Law: Making it Real*, 34 GA. L. REV. 823, 826 (2000) (noting that "few professors engage in teaching problem-solving in transactional settings" because "it is enormously costly" and "so time-consuming").

<sup>63</sup> See George Anaplasto, *Legal Education, Economics, and Law School Governance: Explorations*, 46 S.D. L. REV. 102 (2001).

<sup>64</sup> By comparison, the AACSB (Association to Advance Collegiate Schools of Business) has more flexible standards based upon each school's individual mission. See AACSB, *Accreditation*, at <http://www.aacsb.edu/accreditation/> (noting "mission-linked accreditation standards"); AACSB, *Accreditation standards*, at [http://www.aacsb.edu/accreditation/business/std\\_faq5.asp](http://www.aacsb.edu/accreditation/business/std_faq5.asp) (stating that AACSB standards encourage innovation and "are quite flexible in the construction of both content and delivery of education programs"). For an overview of the "mission linked" accreditation method, see Robert H. Jansen & James A. Yunker, *AACSB Mission-Linked Standards: Effects on the Accreditation Process: Doing Things the Hard Way--Problems with Mission-Linked AACSB Accreditation Standards and Suggestions for Improvement*, 75 J. ED. BUS. 343 (2000).

<sup>65</sup> See, e.g., AM. BAR ASS'N, SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (known as the MacCrate Report; describing shortcomings of current legal education).

<sup>66</sup> Cf. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who should Control Lawyer Regulation – Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1189-90 (2003) (noting the competitive advantage to existing lawyers of raising the standards for entry to the bar).

through the same system, so it may be that they cannot imagine another, better style of legal education.

By contrast, no one needs to go to business school. To the contrary, many business people will advise against going to business school if they can avoid it.<sup>67</sup> If you can get a good job without an MBA, skip the investment in time and money required.

Moreover, no business in particular has to hire MBAs. If an MBA is seen as valueless, businesses can always hire economists, or college graduates, or whomever they want.

Accordingly, business schools are very responsive to both sides of their customer base: they work hard to make the education worth it to the students who sign up, and they work hard to ensure that the MBA graduates will offer significant value to the employers who hire from them.

As an aside, I have gotten to know some of the fine professors and administrators at our College of Business well over the last years. In discussing their (relatively) stronger budgetary situation several mentioned the Business School's very successful and lucrative Center for Executive Administrative Education.<sup>68</sup> The Center's motto is "proven results faster" and they feature various short, but expensive, executive training programs.

My friends at the business school wondered whether there was anything similar we offered at the law school. We do offer CLE programs, but the folks who attend are basically required to by state law, and even with that relative advantage we are not the primary or even (in my opinion) one of the better CLE providers in the state.<sup>69</sup> That being said, no lawyer would pay the rates for law school CLEs that business executives pay for business school classes.

In thinking about whether we could package some kind of program for our alums I came to the conclusion that we had little to sell that was comparable to what the business schools sell. In fact, when I thought about it, we have a better chance of getting our alums to pay us not to teach them what we teach the law students than the other way around. That comparison alone between the law school and the business school here gave me pause about what we are teaching and doing in legal education.<sup>70</sup>

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<sup>67</sup> See, e.g., Louise Story, *Bye Bye B-School*, N.Y. TIMES, September 16, 2007, at F1 (describing hedge fund managers who were skipping business school altogether).

<sup>68</sup> See University of Tennessee, *Center for Executive Administration*, at <http://thecenter.utk.edu/> (last visited September 30, 2007).

<sup>69</sup> Two of our professors do teach in excellent CLE programs that are not affiliated with the law school: Professor Penny White is part of the Tennessee Justice Programs CLE, see *Tennessee Justice Programs*, at <http://www.tennjusticeprograms.com/> (last visited September 30, 2007) and adjunct professors Don Paine and Sarah Sheppard are the heart and soul of the Tennessee Law Institute. See *Tennessee Law Institute*, at <http://www.tnlawinstitute.com/> (last visited September 30, 2007).

<sup>70</sup> Interestingly, there are some legal programs that are expensive and somewhat similar to the Executive Education at business schools. The advocacy classes given by the National Institute for Trial Advocacy (NITA) are one example. See National Institute for Trial Advocacy, *Homepage*, at <http://www.nita.org/>. Once again though, the difference between the nuts and bolts skills training that NITA offers and what law



MBA programs have to justify their existence to both students and employers, and this fact alone makes them more innovative and leads to a focus on skills that people actually need. By comparison, law school is protected by the licensing requirement, and is thus quite hidebound and resistant to change.

V. Conclusion

I teach both Torts I and Torts II here at the College of Law, as well as teaching primarily on the Clinic. I use my semesters teaching the doctrinal courses as semesters to recharge and spend some needed time on my scholarship. When I am teaching Clinic it is just enormously hard to find chunks of uninterrupted time to write. Nevertheless, in writing this Essay I have unwittingly set a personal challenge to myself: if I am convinced that the business school case method is superior, how should I modify my torts courses? Given the time commitment necessary for a true, personal conversion to the business school case method, however, we shall have to see whether I am willing to put my money where my mouth is. If the 1-L readership of the Tennessee Law Review remains similar to earlier years I can at least rest easy knowing that few of my students will know how far I fall short of my own ideals.

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schools offer is quite instructive on what lawyers actually want out of continuing legal education.