The Craft of the Law:

An Essay After Forty Years as a Law Teacher

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I. AN IDIOSYNCRATIC HISTORY OF LEGAL EDUCATION: ART VS. SCIENCE

Until the beginning of the nineteenth century, common law lawyers were trained by doing, either as apprentices to experienced lawyers and judges in the United States or as pupils at one of the Inns of Court in England.[1] Their education was almost wholly of practical nature tempered by the study of the classics of legal literature which were themselves fundamentally case and practice oriented. Law was a profession in that it was limited to a small number of men who possessed esoteric knowledge not easily available to the general public both because of the language of the law (legal French and sometimes even more incomprehensible technical legal English) and because lawyers possessed a governmentally sanctioned monopoly on access to most courts. In many respects, the legal profession was a self-replicating social institution: younger lawyers shadowed more experienced lawyers, learned how to practice through observing and assisting these experienced lawyers, and eventually replaced these experienced lawyers when they ascended to the bench, retired, or died. Often, legal novices would share offices and, at times,

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1. ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (1983); M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 118 (1986) [hereinafter Hoeflich, *Law and Geometry*]; 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 9 (Steve Sheppard ed., 1999); DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 1 (2015); CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 502 (1908).

living accommodations with their seniors.[2] It was, in short, a closed homogeneous profession in which one entered, studied, practiced, and died without questioning either the merits of the system or such ephemeral notions as justice. In this, the nature of the legal profession was not all that dissimilar to other trades and professions that depended upon a period of apprenticeship and acquisition of practical skills, and the building of networks to attain professional success. The rewards of membership in the legal profession were many: social status, upward mobility, appreciative clients, and the opportunity to acquire wealth that might otherwise be unobtainable.

In the nineteenth century United States, a division in the legal profession came into being with the rise of university-based legal education.[3] University-affiliated law schools were upstarts; legal apprenticeships as the primary means of legal education were an old and venerable institution. University-affiliated law schools were a creation of the antebellum period and the result of small colleges seeking to expand their educational activities beyond undergraduate education and into professional fields like medicine and law. Nonetheless, in the antebellum period, university-affiliated law schools were very much in the minority as teachers of would-be lawyers and were forced to find ways to market themselves to potential students. This occurred at several different levels. These antebellum law schools were not above advertising in the popular press, for instance.[4] But they needed to find ways to distinguish and justify the education they offered from the education offered through law office apprenticeship. This was an uphill battle, to say the least. University-affiliated law schools were far more expensive than a typical law office apprenticeship. Much of the time, students had to leave home and family and travel great distances to attend these law schools. Living conditions were often not up to the standards the wealthy students were accustomed to. So why would an aspiring lawyer make the decision to travel to Harvard or Transylvania to attend law school rather than apprentice himself to a successful local lawyer or esteemed judge? This was the question that these early law schools had to answer if they were to survive

2. PAUL M. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 7–8 nn.25–26 (1939); *see also* JOHN Q. ADAMS, LIFE IN A NEW ENGLAND TOWN: 1787, 1788: DIARY OF JOHN QUINCY ADAMS, WHILE A STUDENT IN THE OFFICE OF THEOPHILUS PARSONS AT NEWBURYPORT (1903).

3. THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 6–9 (Michael H. Hoeflich ed., 1988) [hereinafter THE GLADSOME LIGHT].

4. Michael von der Linn, *Harvard Law School's Promotional Literature, 1829-1848: A Reflection of the Ideals and Realities of the Story-Ashmun-Greenleaf Era*, 13 GREEN BAG 2d 427, 440–41 (2010).

and prosper.

By and large, the arguments adopted by antebellum university-affiliated law schools to demonstrate that the education they provided was superior to that which a student could obtain through an apprenticeship was based upon a new fundamental conception of what a lawyer needed to know in order to succeed. This new conception was most often expressed by asking whether law was an "art" or a "science."[5] In using the term "art," the proponents of this new conception were not, I would suggest, attempting to suggest a connection to the fine arts such as painting or sculpture—fields that required creativity, if not genius. Instead, their use of the term "art" was connected to the notion of "artisan," or what today we would also call "craft."[6] I believe that these early proponents of scientific legal education were comparing the apprenticeship method in law to the apprenticeship method by which printers, cabinet makers, and other artisans were trained. This was an educational method centered upon learning by observation and by doing, not by cloistered study. Apprenticeship did not provide a systematic education in the law. Apprentices rarely had access to libraries the size or depth of those at law schools like Harvard. Of course, a good apprenticeship would usually involve the study of law books like Blackstone, Kent, Fearne, and other classic treatises as well as the study of cases and the compiling of commonplace book derived from that reading that would be useful throughout a lawyer's career.[7] But this was very different from the method of scientific legal education envisaged and marketed by the law schools.[8]

The new model of scientific legal education focused upon students learning the legal principles and doctrines underlying the cases they studied in a thoughtfully conceived and systematic order. Hence, proponents of the new scientific approach often referred to lawyers trained in more traditional ways as mere "case lawyers," i.e., lawyers who had learned specific cases and could cite these but did not understand the underlying, fundamental principles of those cases.[9] The new scientific legal methodology involved classification of the various areas of the law and the derivation of general principles of law within each categorization, a method intended to parallel the methodology used by natural scientists who were cataloguing and categorizing the world around them and then

5. THE GLADSOME LIGHT, *supra* note 3, at 7–8.

6. *Id.*

7. M.H. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87, 108–09, 120 (2002).

8. Hoeflich, *Law and Geometry*, *supra* note 1, at 116–21.

9. *Id.* at 116.

drawing truths from this activity. This new scientific method was quintessentially intended to be a science that imposed order on the chaos of the thousands of cases that comprised the common law.[10] According to its proponents, such a scientific approach had massive advantages. Students trained by this new method became "learned" lawyers and would comprise an elite class within the legal profession whose knowledge transcended local courts and usages and who could practice as well in Boston or New York as in Poughkeepsie or Altoona. These learned lawyers would also be able to adapt the law to changing social and business conditions because while case law was backward-looking, the study of general principles prepared lawyers to be forward-looking and able to adapt existing law to deal with changing conditions and needs.

From a historical perspective, much of what the proponents of the new scientific method of legal instruction stated was true and needed by the profession. During the antebellum period, the rise of legal publishing and the rapid proliferation of law books in the United States left many lawyers and judges almost shell-shocked. Justice Joseph Story, one of the greatest Anglo-American judges, complained bitterly that the multiplicity of legal sources would soon make the study and practice of law impossible. Categorization and the imposition of scientific order would reduce—if not eliminate—this problem. The average American lawyer who studied law in a law office learned the law only of his jurisdiction. This could prove to be a distinct disadvantage to a young lawyer. The United States was a federal union with a growing number of legal jurisdictions each with its own case law quirks and eccentricities. It was also a nation on the move, one with a "manifest destiny" to stretch from the Atlantic to the Pacific and to support the growth of the new nation as a global commercial power. Lawyers often would migrate from one state to another in search of professional success. University-affiliated law schools, with their extensive libraries containing case reports and treatises from multiple jurisdictions and law school professors teaching underlying principles and doctrines rather than the law of a single state would, in theory at least, enable law students to be prepared to practice in any state, even, as one Transylvania law professor stated, in the "courts of Westminster."[11]

The debate about whether law is an "art" or a "science" continues to

10. M.H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36, 62 (1985) (discussing Joseph Story's commentary on the chaos of the common law, discussed in his Commentaries on the Law of Bailments).

11. DANIEL MAYES, AN INTRODUCTORY LECTURE DELIVERED TO THE LAW CLASS OF TRANSYLVANIA UNIVERSITY ON THE 5TH NOVEMBER, 1832 (1832).

this day, specifically in terms of to what extent clinical education should be a part of the law school curriculum. But the basic debate about whether law students should be trained through the apprenticeship model or through the "scientific" university-affiliated law school model has long been settled.[12] The university-affiliated law schools and the "scientific" method of legal education as taught by these law schools triumphed by the beginning of the twentieth century and virtually eliminated all alternatives. However, how we conceive legal education and law practice has far wider impact than whether university-affiliated law schools teaching "scientific" law in a classroom setting should be the dominant mode for training lawyers. The debate over whether law is an "art" or a "science" also has relevance to how law students are socialized into the legal profession and how lawyers see their professional role in society and the extent to which they see the practice of law as a means of achieving external rewards or as a means of achieving internal satisfaction.

As university-affiliated law schools came to dominate legal education in the latter part of the nineteenth century and the beginning of the twentieth century, it was Harvard and the so-called Harvard method of legal education refined and promoted by Dean C.C. Langdell that spread rapidly across the nation.[13] That model, put briefly, is one that requires that law schools employ full-time law professors who both teach and publish legal scholarship. It requires that law schools have extensive libraries designed to foster both student learning and faculty research. It also requires that students spend several years studying at a law school before they take the bar examination and begin legal practice.[14] The bar examination itself concentrates on testing law graduates' knowledge of the legal principles taught in these schools. This model of legal instruction relies on what has come to be called the "Socratic method" in which law students study appellate cases and then the instructor, by deft use of questioning in class, leads the students to derive inductively the legal principles underlying each case and develop general legal doctrines that can be applied to other cases and, by a process of deductive reasoning, arrive at the "correct" resolution of future cases with similar facts.[15] While innovative in many ways, the Harvard method of legal education as refined

12. *See* THE GLADSOME LIGHT, *supra* note 3, at 145–64.

13. *See* Stevens, *supra* note 1; Hoeflich, *Law and Geometry*, *supra* note 1, at 95; Sheppard, *supra* note 1; Coquillette & Kimball, *supra* note 1; WARREN, *supra* note 1, at 299.

14. *See* M.H. Hoeflich, *The Bloomington Law School*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 203–17 (Peter Hay & Michael H. Hoeflich eds., 1988).

15. Hoeflich, *Law and Geometry*, *supra* note 1, at 95.

and promoted by Langdell and Ames had deep roots in the antebellum scientific method of legal education as well, including hostility to the more traditional apprenticeship model and the notion that law was an art or a craft.[16]

The Harvard model was particularly suited to the increasing number of students who sought to work at the new, larger, urban-based corporate law firms that saw their beginnings at the same time that Dean Langdell refined scientific legal education at Harvard.[17] It was a match made in Heaven. These law firms were quite different from their predecessors. Instead of carrying on the general practice of law on the antebellum model, these firms catered to the large corporations that were coming into being in the Gilded Age—corporations that owned and ran railroads, oil production facilities, steel mills, and all the other new American industries. These corporations wanted "one-stop" law firms that could provide a range of specialized services—tax, corporate, finance, antitrust, legislative—that these corporations needed. They were less interested in hiring the great trial lawyers of previous generations, men like David Webster or Rufus Choate, and far more interested in retaining specialized scientific lawyers like Paul Cravath or Victor Morawetz, men who could help these corporations deal with the new and rapidly changing legal, economic, and regulatory environment in which they found themselves.[18] The scientific method of instruction championed by Harvard and other schools was perfect to train such men.

The Harvard model of legal instruction trained lawyers to interpret appellate decisions and to use the doctrines derived therefrom to argue future appellate decisions or to draft documents that incorporated these doctrines and withstand future legal challenges.[19] It trained lawyers to adapt to new circumstances. It also trained law students in specialized legal fields like tax or corporate law and, at some schools, in the new "science" of economics. It was just the training the new generation of corporate lawyers would need. And it was training that lawyers who studied via the apprenticeship model could not get. It required specialist

16. *See* THE GLADSOME LIGHT, *supra* note 3.

17. *See* 1–3 DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (A.P. Sprague & Titus Munson Coan eds., 1884–1890); CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS (1871).

18. *See* 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 1819-1948, at 383, 590 (1946); *see also generally* JEREMIAH D. LAMBERT & GEOFFREY S. STEWART, THE ANOINTED: NEW YORK'S WHITE SHOE LAW FIRMS –HOW THEY STARTED, HOW THEY GREW, AND HOW THEY RAN THE COUNTRY (2021).

19. On the Harvard model, see, above all, COQUILLETTE & KIMBALL, *supra* note 1 and WARREN, *supra* note 1.

law faculty that no law firm or individual lawyer's office could provide. The Harvard method was (and is) not focused on training lawyers for small town or rural practices. But the large firms who would be clamoring for the graduates of Harvard and similar law schools were not concerned with that. Students who wished to become country lawyers or city solo practitioners could still learn some of the necessary skills at Harvard.[20] Practical law training at Harvard and similar law schools was left to moot court programs and eventually to clinics and other non-classroom activities. It was also assumed that the graduates of these schools would learn practical skills once they graduated while they served as associates at large law firms.[21] In effect, Harvard and schools using the Harvard method, formed an educational partnership with corporate law firms so that legal education began with the scientific instruction at law school and continued with the long period young lawyers served as associates at these firms. In many respects, this period of being an "associate" was a form of apprenticeship. This partnership between large firms and Harvard method law schools served both the law schools and the law firms well. It also served well those students who wished for a career in a large law firm. Students who wished to enter into solo or small firm practice, however, were not so well served. These law schools were far less interested in training lawyers to practice in small-town Kansas or rural North Dakota. Those destined for such careers either attended law schools with more of a focus on general practice or found that they had to learn their practical skills on the job—not always an easy task. Nevertheless, Harvard and the law schools that adopted and adapted its instructional methodology flourished and supplied newly minted lawyers to the great American law firms of the late nineteenth and early twentieth centuries as well as to state and federal judges who increasingly hired new law graduates as short term "secretaries" or clerks.[22] Harvard did not only offer a scientific methodology of legal education; it also offered the prestige of getting a Harvard degree. A Harvard law degree was, in effect, a "ticket" to a clerkship with a judge or an elite corporate law firm.

The almost total victory of the Harvard model of legal instruction in the first quarter of the twentieth century posed and poses certain fundamental problems for the legal profession. The Harvard model assumes that one form of legal education will serve all students.

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20. M.H. Hoeflich, *Plus Ca Change, Plus C'est La Meme Chose: The Integration of Theory & Practice in Legal Education*, 66 Temp. L. Rev. 123, 124–40 (1993).

21. *See* THE GLADSOME LIGHT, *supra* note 3.

22. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMANS. 119, 124 (1999).

Underlying this assumption is a false assumption that law students are relatively homogeneous and that the highest aspiration for a law graduate is to work for a large, elite law firm.[23] This leaves students who do not want to enter into large firm law practice without much of the training they need and with training in areas of the law that will not be relevant to their legal practices. These students need far more practical training so that they can be prepared for the often very different demands they will face in non-large firm settings. The methodological result of this separation of practical from doctrinal training and the dominance of doctrinal instruction has resulted in the separation of clinical from classroom teachers that was a mark of late twentieth century legal education, the hesitancy of most law schools to hire new law teachers who had spent more than two or three years in actual law practice, the relegation of clinical teachers and clinical courses to "second class" status at many law schools, and the fact that many law students graduate law school with little practical knowledge of how to actually practice law.[24] In addition, many law schools, while they require a significant number of credit hours of doctrinal classroom instruction, require little or no clinical training in order to obtain a law degree. In essence, the adoption of the Harvard model has resulted in legal education failing to prepare many law students for the legal careers they have chosen. And as students come to realize this, dissatisfaction sets in.

The Harvard method of instruction did, as mentioned, offer a number of significant advantages to some students. Students who were destined to practice in the new urban corporate law firms—such as the Cravath firm in New York—and students who would spend much of their time doing library research and structuring complex transactions for their corporate clients benefited from the Harvard approach to legal education and the prestige of having learned the law by the Harvard method. Indeed, schools which focused on training lawyers to practice law in smaller, non-elite firms came to be referred to as "trade schools," a term that carried and carries a significantly pejorative connotation to this day.[25]

There is, however, another aspect of the now dominant Harvard model

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23. *See* M.H. Hoeflich, *Dressing for Success: Lawyers & Clothing in Nineteenth Century America*, 69 U. KAN. L. REV. 527, 530–32 (2021) (describing early divides in social status and ambitions among working class lawyers and lawyers from the educated elite).

24. *See* Michael H. Hoeflich, *Rediscovering Apprenticeship*, 61 U. Kan. L. Rev. 547, 551–53 (2012) [hereinafter Hoeflich, *Rediscovering Apprenticeship*].

25. Merriam-Webster Dictionary defines "trade school" as "a secondary school teaching the skilled trades." *Trade School*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/trade%20school [https://perma.cc/TQC8-FTMC] (last visited Nov. 2, 2021).

of instruction and the context within American legal education in which it has flourished that goes beyond which students most benefit from this form of legal education. Most law students, and many (if not most) practicing lawyers, see the rewards of legal practice as externally generated: wealth, power, social status, or, more recently, a means of achieving social or political goals (often referred to as "cause lawyering").[26] This focus on the external rewards to be gained from law practice as opposed to the internally generated rewards of pride in accomplishing a task well or in the aesthetic of a well-wrought argument or document derives to a large degree, I would suggest, from the co-evolution of the Harvard method of legal instruction and the growth of large corporate law firms. Law school culture, as a result of this partnership between the scientific method of legal education and the privileging of large law firms, has resulted in a law school culture that deprecates traditional general practice and the traditional legal skills that such a practice requires, yet hurts the potential to maximize the lawyer's wealth.

At the end of the nineteenth century and the beginning of the twentieth century, law graduates who left law school for clerkships with large urban law firms oftentimes did not receive compensation for their work as clerks.[27] Thus, these young lawyers required an independent source of income, either from personal or family resources or, in a few cases, through other employment. This system of unpaid law clerkships ensured that the legal profession—or at least the elite large urban firms—were comprised of wealthy, often socially prominent young men seeking a "suitable" career. This is the world so well portrayed in the novels of Henry James or Louis Auchincloss.[28] Most of these young men entered into the law as a profession because it was a profession that had been followed by their fathers or because it offered a way of life that permitted them also to live a lifestyle they felt appropriate to their wealth and social rank. It was, like a career in a brokerage house, a career deemed suitable

26. For some cogent criticisms of the Harvard model, see Robert W. Gordon, *The Harvard Models in Their Native Habitat and Abroad: Reflections*, *in* AMERICAN LEGAL EDUCATION ABROAD: CRITICAL HISTORIES 370–381 (Susan Bartie & David Sandomierski eds., 2021).

27. Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. ARK. LITTLE ROCK L. REV. 593, 600 n.31 (1986).

28. Louis Auchincloss was a novelist and lead counterpart to the novelists Edith Wharton and Henry James. Louis Auchincloss wrote many novels, including: *The Rector of Justin* (1964), *Diary of a Yuppie* (1986), *Tales of Manhattan* (1967), *Skinny Island* (1987), *Tales of Yesteryear* (1994), *The Education of Oscar Fairfax* (1995), *Three Lives* (1993), *The Anniversary and Other Stories* (1999), and *Manhattan Monologues* (2002).

by their social peers.[29] To a very large extent, the students at schools like Harvard were of this same socio-economic class. Hence, there existed a perfect convergence of students, schools, and law firms. Law was a gentlemanly profession, and Harvard and similar schools taught the elite of the bar.[30]

However, Harvard and other schools of its ilk also admitted less wealthy, less socially prominent students. These students too were socialized to the advantages of elite large firm practice. These less wealthy students, however, would need to earn a living and many desired to achieve wealth and social prominence. But this too complemented the needs of large corporate firms. These firms needed lawyers who were willing to work hard and dedicate themselves to client service. Beginning in the early twentieth century, Paul Cravath revolutionized the practice of corporate law by seeking out the brightest young law graduates regardless of wealth or social standing and paid them to be firm associates, a practice that soon spread to other large corporate firms.[31] Cravath and the heads of other similar firms demanded loyalty, absolute commitment to the firm and its clients, and willingness to put the firm above all other aspects of one's life. This was the formula for success for a large firm associate. Success would lead to a partnership and a partnership ensured a secure financial future. Quite soon, large firms had both lawyers who came from socially prominent, wealthy families and those for whom a partnership was a means to achieve wealth and social prominence.[32] These young men were expected to compete with each other by their loyalty to their firms, by their hard work, and by billing as many hours as possible, thereby earning their way and proving to the partners that they deserved to be partners themselves. The lives of associates in these large law firms were completely dominated by their firms and the demands of their corporate clients.[33] Success was measured in the satisfaction of one's clients and the fees that they paid and the power and social standing that came to the members of the firms as a result. And there, in my opinion, lies the problem. The primary focus of law schools came to be on training their students for large corporate law firm life and placing these students as graduates into these firms. The rewards for all of this was achievement of

29. *See e.g.*, HENRY JAMES, THE AMERICAN (1877); HENRY JAMES, THE AMBASSADORS (1923).

30. *See* Messinger, *supra* note 22, at 130–31.

31. *See* 2 SWAINE, *supra* note 18, at 3–4; *see also* LAMBERT & STEWART, *supra* note 18.

32. *See id.*

33. Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2869–70, 2877 (2012).

a partnership which carried with it the potential for wealth and upward social mobility. When these graduates were successful, they understood that their loyalties lay with their firms and the law schools that made their professional success possible. These alumni partners would then recruit new associates from their former law schools and the cycle would begin again.[34] In theory, everyone was happy. The law schools trained students in doctrine, research techniques, and specialist subjects so that they would be most useful to the corporate firms which hired them. The corporate law firms expanded their pool of potential hires to include men who were neither rich nor socially prominent, thereby gaining a cadre of loyal and hard-working employees who eventually became partners. And the corporate clients of these firms had law firms that would do their bidding and assist them in their business endeavors. Again, in theory, everybody became rich and, in theory, everybody lived happily ever after. Unfortunately, it often did not—and does not—work out that way.

The lawyers in these large firms came to focus almost exclusively on the external rewards that they would gain from becoming partners: wealth, social prominence, etc. The time demands put on both associates and partners often left little time for family life or activities that did not feed into their law firm practice. For many lawyers in these firms, the dominant focus on external, material rewards led to many of them becoming discontented with or even abandoning the practice of law. Many fell into depression and substance abuse to counter such discontent and the stresses to which it gives rise.[35] The physical, emotional, and intellectual demands of large firm practice as it has developed in the United States since the late nineteenth century has also led, I believe, to many lawyers abandoning the highest aspirations of the profession and acting unethically in order to acquire the material rewards that have become the center of their lives.[36] Thus, we have moved away from a model of law practice as an honorable profession in which lawyers are trained by practicing lawyers in real world situations to seek professional satisfaction in a job well done and the

34. William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, ABA J. (July 1, 2012, 10:20 AM), https://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession [https://perma.cc/UE63-TAHL]; Lauren Rivera, *Firms Are Wasting Millions Recruiting on Only a Few Campuses*, HARV. BUS. REV. (Oct. 23, 2015), https://hbr.org/2015/10/firms-are-wasting-millions-recruiting-on-only-a-few-campuses [https://perma.cc/8FVC-4TQ8].

35. Michael H. Hoeflich, *Legal Ethics and Depression*, 74 J. KAN. BAR ASS'N 33, 33–36 (2005) [hereinafter Hoeflich, *Legal Ethics and Depression*].

36. *See generally* M.H. Hoeflich, *Ethics and the "Root of All Evil" in Nineteenth Century American Law Practice*, 7 ST. MARY'S J. LEGAL MAL. & ETHICS 160, 169–71 (2017) (describing the historical role that money has played in the unethical behavior by lawyers).

admiration of their colleagues, their clients, and the public and, instead, to a model in which even beginning law students are socialized to look to money, power, and position for job satisfaction and the rewards from professional practice.

For many lawyers, young and old, this latter model simply does not work. It is, for example, a reason why lawyers often move from firm to firm seeking higher compensation or leave the practice of law entirely when they see the greater opportunities for personal wealth waiting in the financial services industry. Loyalty to one's firm and colleagues and the job security that comes with it has been replaced by a one dimensional need to maximize personal wealth at virtually any cost. Praise from a client or a judge for a job well done often falls on deaf ears unless it translates into more and higher fees. Today, many lawyers even rank law firms not on the number of successful transactions they have concluded or the number of cases they have won, but rather, on the net earnings per partner.[37]

Many lawyers will read these statements and say "yes, that is precisely what is happening" and ask what is wrong with it. My response to this is, that for some lawyers, there is nothing wrong with the pursuit of wealth through professional success. However, for any other lawyer, this all-encompassing drive for wealth and position is not enough. They become emotionally hollowed out. It is to these lawyers that law is not simply a wealth maximizing business like any other, but rather, law is a profession with different ideals and for whom wealth and position are not the sole rewards. I would suggest that part of the idea of the law as a profession is that a member of the profession works not only to achieve the external rewards of wealth, power, or position, but works to do justice, serve her clients as best she can, serve the public at the same time, and do the best job possible precisely because that is what is expected of her as a professional. I would call this the artisanal or craftsperson's approach to legal work. A potter takes joy in shaping a lump of clay into something that is both useful and beautiful. Even if the potter cannot sell what she has produced, she still feels joy in the act of making her pot and appreciating what she has created out of clay and water. I would suggest that those lawyers who can achieve this artisanal view of their professional activities—whether it be drawing wills, establishing multinational businesses, or litigating criminal cases—will find satisfaction wholly

37. Placement on the American Lawyer's AmLaw100 has become a metric for success in large law firms. *The 2021 Am Law 100*, AM. LAW., https://www.law.com/americanlawyer/rankings/the-2021-am-law-100/ [https://perma.cc/MW59-PKN2] (last visited Jan. 19, 2022).

independent of their earnings from these activities. One of the great satisfactions of the legal profession has always been personal interaction with the clients and the sense that lawyers help clients achieve their goals in ways that they could not do on their own. This creates a sense of pride in the process of "doing" law. I believe lawyers who take satisfaction in these aspects of law practice will be far more satisfied in their professional lives and far happier in their lives as a whole than those who engage in the practice of law solely to acquire wealth, power, and position.

II. THE LAWYER AS CRAFTSPERSON

In the past several decades there has been an increased focus on the artisanal approach to work of all kinds.[38] As was the case in the Victorian period when men like William Morris and John Ruskin began to champion the value of hand-made craft over machine-made objects, more and more consumers are demanding "artisanal" products ranging from craft beers to hand-made clothing and jewelry to artisanal, farm to market food stuffs.[39] There are many reasons for the appeal of such human-made or refined goods, ranging from an appreciation for human input into the things we purchase to a genuine aesthetic appreciation of the differences between manufactured goods and hand-fashioned goods. The increasing marketability of artisanal goods and an appreciation for the craft that goes into producing them has also sparked what is often referred to as the "makers" movement—men and women who choose to build careers making things, whether it is beer or jewelry or wooden toys.[40] One of the very important aspects of this "makers" movement is that the rewards sought by the makers themselves are not simply financial. Many of these individuals have chosen to abandon well-paying jobs in industry or the professions in order to function as craftspeople not to get rich, but rather, because they derive satisfaction in the very process of doing their craft. In

38. *See* ALEXANDER LANGLANDS, CRÆFT: AN INQUIRY INTO THE ORIGINS AND TRUE MEANING OF TRADITIONAL CRAFTS 9 (2017); *see also* RICHARD SENNETT, THE CRAFTSMAN 9, 19–21 (2008); MARK FRAUENFELDER, MADE BY HAND: SEARCHING FOR MEANING IN A THROWAWAY WORLD (2010); Howard Risatti, A THEORY OF CRAFT: FUNCTION AND AESTHETIC EXPRESSION (2007); GLENN ADAMSON, CRAFT: AN AMERICAN HISTORY (2021).

39. *See* Robert Hewison, *Ruskin, John (1819–1900)*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004); THE WORKS OF JOHN RUSKIN (E.T. Cook & Alexander Wedderburn, eds., 1903); Aymer Vallance, WILLIAM MORRIS: HIS ART HIS WRITINGS AND HIS PUBLIC LIFE (1898); E.P. Thompson, WILLIAM MORRIS: ROMANTIC TO REVOLUTIONARY (1955).

40. Tim Bajarin, *Why the Maker Movement Is Important to America's Future*, TIME (May 19, 2014, 11:00 AM), https://time.com/104210/maker-faire-maker-movement/; Evgeny Morozov, *Making It*, NEW YORKER (Jan. 5, 2014), https://www.newyorker.com/magazine/2014/01/13/making-it-2 [https://perma.cc/Z9VX-7QQU].

effect, they abandon careers in which the rewards are primarily external—wealth, power, position—for careers in which the rewards are primarily internal—self-satisfaction of the creative urge to do something of value to themselves. Perhaps, more lawyers should begin to approach the practice of law as a craft and discover that lawyers, too, make "things" and can derive satisfaction from the making rather than solely from the external rewards that come from selling what they make.

Although many people speak of "craft," there is no generally accepted definition of the term. One that I find quite useful and particularly appropriate for the purposes of this essay, is provided by archeologist and BBC television presenter, Alexander Langlands. Langlands states that craft "has something to do with making—and making with a perceived authenticity: by hand, *with love*."[41]

Langlands also highlights the role that nostalgia plays in the current interest in craft.[42] Our world has very much become a world pervaded by inhuman and often inhumane technology—particularly digital technology—and many people no longer work with their hands or their minds making things. Work, for many, has become nothing more than an assembly line producing goods and services.[43] Even those whose work is primarily intellectual, so-called "knowledge workers," work within structured, bureaucratized office environments where the emphasis is on production of goods or provision of services as quickly and as profitably as possible rather than on goods or services that are of high quality.[44] The quality of the goods or services, so long as it is adequate, is not important. The satisfaction the workers feels in producing goods or providing services is of little importance.[45] The reward for these workers comes in the form of a paycheck and perhaps a bonus. In many cases, knowledge workers have become the modern analogy of Henry Ford's production line workers forced to produce cars in a mind and soul numbing process with no concern for the workers' mental or physical wellbeing.[46] Few factory production line workers love what they produce or the process by which they produce it. They work to earn income that allows them to do the

41. LANGLANDS, *supra* note 38, at 9 (emphasis added).

42. *Id.* at 10–11.

43. *See* Michael H. Hoeflich, *From Scriveners to Typewriters: Document Production in the Nineteenth-Century Law Office*, 16 GREEN BAG 2d 395, 399 (2013).

44. Sébastien Ricard, *The Year of the Knowledge Worker*, FORBES (Dec. 10, 2020, 8:20 AM), https://www.forbes.com/sites/forbestechcouncil/2020/12/10/the-year-of-the-knowledge-worker/?sh=600b6dc17fbb.

45. On the modern work environment and its dissatisfactions see, JAMES SUZMAN, WORK: A HISTORY OF HOW WE SPEND OUR TIME 362–88 (2020).

46. *See id.*

things they do love. I would suggest that, today, there is often very little love involved in the work that lawyers do. Lawyers, like automotive workers, find themselves on soulless production lines.

The structure of today's large law firms, the descendants of the firms that created the modern practice of law at the end of the nineteenth century, is such that love of one's work or self-satisfaction taken from one's work is rarely considered a necessary or even desirable result. Associates at many law firms are evaluated not primarily upon the quality of their work product but upon the number of billable hours that they produce each year.[47] Indeed, I would argue that the quality of the work produced—so long as it is minimally acceptable—is less important than the billable hours produced. Billable hours translate into profits for these firms' partners. Profits translate into salaries, bonuses, and ultimately partnerships for the associates. As the song goes, "money makes the world go round" at these large firms.[48] Pride in the work produced, attempts to do the best job possible, are often a distant second in importance. Such an attitude is antithetical to the notion of craft as Langlands defines it. A craftsperson does not work primarily for money. A craftsperson works for the pure joy of producing the objects she creates.[49]

If one looks back to the system of law office training as it existed in the United States in the nineteenth century, it becomes apparent that craft was a major part of the basis for educating lawyers in law office settings. A legal apprentice in a nineteenth century office learned by doing. The apprentice learned to draft documents by copying and modifying documents that the experienced lawyers in the office had originated. Certainly, there was some consideration given to how quickly a law clerk could produce a document, but this was less significant than it is today because lawyers rarely billed by the hour and also because lawyers took special pride in the appearance, form, and content of the documents they produced.[50] Even more significantly, a large part of a law clerk's time was spent observing established lawyers' courtroom performance. The diaries and letters of law clerks of the period are filled with observations on the quality of courtroom argumentation. Lawyers such as Webster and Choate gained national fame by the quality of their oratory. Young law clerks

47. Rachel Barnett, *Down with the Billable Hour*, GLOB. LEADERS IN L. (Feb. 4, 2021, 11:57 AM), https://www.law.com/global-leaders-in-law/2021/02/04/down-with-the-billable-hour/ [https://perma.cc/2TAQ-CH5H].

48. LIZA MINELLI & JOEL GREY, *Money, Money*, *in* CABARET (Allied Artists Pictures 1972).

49. Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2309 (2001).

50. *See, e.g.*, M. H. Hoeflich, *Legal Fees in Nineteenth-Century Kansas*, 48 U. KAN. L. REV. 991, 996–98 (2000) (describing the flat/minimum fee structures used in Kansas during the 1800s).

were urged to aspire to reproduce these performances and spent countless hour watching and listening and learning how to make an argument that would impress and sway a judge or a jury.

Another point worth noting about nineteenth century law office apprenticeships is that the clerks in a particular office were not in competition with each other as modern law students are today. Modern law schools foster competition among law students by the grading and ranking systems that they have established. I would venture to say that most American law students are primarily motivated on a daily basis by the quest for high grades and high class ranking because it is grades and class rank that produce the "best" job offers upon graduation. The stress produced by grade competition not only eliminates any joy most law students might take from learning the law, but also often leads to clinical depression and substance abuse.[51] Unfortunately, it is the rare law student who can say that she loves going to law school and that she takes great self-satisfaction from learning the intricacies of the law and legal research. In my experience, the one aspect of law school that does produce such a sense of joy and self-satisfaction are clinical and externship programs in which the students are freed from the dry, technicalities of doctrine, are evaluated on the quality of their work with clients, see real world positive results from their actions, and often do not feel the grade competition that they feel in traditional law school classroom settings. In effect, clinical and externship experiences are far closer to the nineteenth century law apprenticeships than they are to modern doctrinal classroom instruction. But for those students destined for large, elite law firms, grade competition is inevitable and soul-destroying.

I would suggest that there is another aspect of modern legal education that also provides students with self-satisfaction because they "make" something: law reviews, moot court programs, etc. When law students serve on a law review, they create law review notes and they edit articles. When students participate in moot court programs, they produce briefs and participate in oral arguments. And, not insignificantly, these law school activities are rarely graded in the same way as traditional doctrinal classes. Grade competition does not interfere with the learning and "making" process in moot court or law review activities to the degree that it does in doctrinal classes.[52] In my experience, I have noted that the large, elite

51. Hoeflich, *Legal Ethics and Depression*, *supra* note 35, at 33–36.

52. *See generally* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007) (describing the effects of competition, particularly grade-based competition, on law students).

firms often value grades and class ranks far more than moot court experience in the hiring process, although law review experience—once intimately tied to class rank—does matter to many firms.

For most of the forty years during which I have taught law I have taught the basic course in professional responsibility. Every time I teach this course, I am struck by the first of the rules in the Rules of Professional Responsibility. This rule is simply stated:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[53]

While I realize that the current Rules of Professional Conduct are regulatory and not aspirational in nature, I confess that I still find it rather sad that the standard that we set for lawyers is so pedestrian. When I teach Rule 1.1, I always spend time explaining to my students that the Rules of Professional Responsibility establish minimum standards of lawyer behavior and that, in the case of Rule 1.1, they should strive to be more than competent lawyers. Indeed, I usually remind them of a phrase that the United States Army once used in its advertising: "Be all you can be."[54] As professionals, lawyers should strive to be the best that they can be as lawyers. To me, this requires that they see their professional role as that of an artisan of the law—a craftsperson who drafts the best document that she can draft and makes the best courtroom arguments that she can make. Competence is too low a standard for a professional to strive for.

There is always the question as to what constitutes the "best" document or the "best" arguments. But again, the notion of craft and what a craftsperson does is a useful guide. To me, when a lawyer drafts a document or delivers an oral argument, the essence of the craft approach is that the lawyer takes joy and pride in producing the work product and knowing that it represents her best work. In this context there are both internal and external factors involved. At the most basic level, one must recognize that a lawyer's work product should conform to generally

53. MODEL RULES OF PRO. CONDUCT r. 1.1 (Am. Bar Ass'n 2021).

54. Tom Evans, *All We Could Be: How an Advertising Campaign Helped Remake the Army*, NAT'L MUSEUM OF THE U.S. ARMY, https://armyhistory.org/all-we-could-be-how-an-advertising-campaign-helped-remake-the-army/ [https://perma.cc/T2S5-6FMB] (last visited Jan. 19, 2022).

accepted principles of what constitutes good professional writing.[55] Poorly drafted documents with spelling and grammatical errors do not display craftsmanship. But good writing goes well beyond proper spelling and grammar. A lawyer can produce a written document or an oral argument that is competent but that is not good craft. To me, a craftsman-like argument is one that uses language to sway others through compelling language and narrative and that adheres to accepted standards of the truth and facts. A craftsman-like document is one that is clear and succinct and uses language to achieve the goals of a client to the greatest extent ethically possible.

III. HOW CAN WE RE-EMPHASIZE CRAFT IN LEGAL EDUCATION & LAW PRACTICE?

It is not enough to recognize that the conception of law as a craft or artisanal endeavor has been deemphasized, if not lost, in modern legal education and law practice. Once we understand this is so and the resulting cost to both lawyers and the legal profession, we must attempt to find some means to correct this. This will not be a simple task. The current model of legal education has remained relatively unchanged for more than a century. Further, it seems relatively unlikely that many lawyers will suddenly abandon the drive for increased fees and profits any time soon even though this does not bring them personal satisfaction. In spite of this, however, there are things that might be done. First, law schools could recognize that not all law students are destined for large law firm life. Many students balance work-life considerations and reject wealth maximization as the primary motivation for practicing law. Second, law schools should recognize that there is something wrong with the current system of legal education that creates so much stress for law students that they are driven to substance abuse or depression. We should reintroduce joy and self-satisfaction into the law school experience. The reintroduction of the craft ideal into legal education and into law practice in general may provide a means to do that.

The history of legal education, briefly outlined above, may give us some ideas as to how to reintroduce craft into legal education and law practice. The triumph of the scientific approach of the late nineteenth

55. *See generally* Bryan A. Garner, *Your Recipe for Effective Legal Writing*, ABA J. (Apr. 1, 2021, 1:00 AM), https://www.abajournal.com/magazine/article/your-recipe-for-effective-legal-writing [https://perma.cc/44FQ-EDQW]; Bryan A. Garner, *Polish Your Writing Skills with Bryan Garner's 2020 Advice*, ABA J. (Dec. 23, 2020, 10:14 AM), https://www.abajournal.com/news/article/bryan-garners-writing-advice-in-2020 [https://perma.cc/G4SR-AWP9].

century, the abandonment of apprenticeship, and the growth of corporate law firms who hired law school graduates, all helped to create the assembly line atmosphere of much of modern law practice. The emphasis upon billing and the focus on financial rewards exacerbated a practice environment that was already moving away from the slower-paced, more artisanal profession of the antebellum period. As the law became the handmaiden of industry, as the rewards of legal practice came more and more to be expressed in dollars and cents, and as law schools increasingly saw their role as "feeders" for large law firms, the older practice environment—one that emphasized the non-monetary rewards of law practice—became increasingly rare. From my perspective, the critical issue now before us as a profession is how we can restore this artisanal approach to law practice in the twenty-first century.

I believe that it is critical that law schools adjust their cultures and recognize that while some students may wish to practice in the large firm context and will need the specialized skills that such practice requires, many will not follow this path. Many students will seek out alternatives to large firm practice or use their legal training wholly outside traditional law practice. Thus, law schools should endeavor to create diverse curricula that serve these other students' career aspirations.

For the past decade, I have taught a course on law practice management. This course is designed to assist law students who intend to enter into solo or small firm practice. The subjects covered include finding, designing, and furnishing a law office, financial management of a small practice, how to set up professional bank accounts, professional liability, insurance, business planning, and how to acquire and keep clients, among others. The students do exercises that require them to design their first office in compliance with the Rules of Professional Conduct, choose furnishings, design a letterhead and business card, draft a five-year financial plan, pick out appropriate office equipment including computers, printers, software, and security, as well as draft a model engagement letter, a termination of representation letter, and a model invoice for services. The vast majority of students who have taken the class have told me that they found the course very useful and wish that the law school offered more courses designed to help them practice law as they planned to do so. I also have the impression that most of the students actually enjoyed the course and were far less concerned with the grades they would receive than actually mastering the material they wanted to learn.

Why is this course on law practice management successful? I believe that it is successful precisely because it not only directly speaks to the

needs of the students who take it, but also because the students "make" things. I am always surprised how much time and effort the students put into the exercises and the great pride they take in what they produce. They learn in this course that actually doing the things that lawyers do can be a source of satisfaction and joy.

During my years as a law teacher, I have occasionally taught law clinics. Once again, in these clinical courses I have witnessed students taking pride in the work they do, such as drafting documents, interviewing clients, arguing in court or testifying before legislative bodies. This type of active learning not only teaches important skills to students but also demonstrated to them that the practice of law can be enjoyable and rewarding independent of financial rewards.

Based on these and other experiences during my law school teaching career, I believe that most law schools with diverse student bodies with multiple career aims must break out of the century old scientific model, popularized by Harvard, that emphasizes doctrinal education and its concomitant emphasis on large firm practice needs and seek a new balance between teaching law as a craft and teaching law as a science. There is obviously a need for doctrinal instruction but there is an equal need for instruction in the craft of the law and allowing students to become "legal makers." The precise ways in which this may be done will differ for every school depending upon the demographics and needs of its students. We already have examples of schools that emphasize clinical education and externships. We simply need to recognize that offering only the old doctrinal model of teaching often makes for unhappy students and lawyers.

Another part of the culture of law schools that I believe must change is the often subtle privileging of large firm practice over all other forms of law practice in law schools. Much of this is unconscious. For instance, in my experience, career service offices at many law schools treat large firms differently from smaller firms. Often, large firms get the prime early spots in the interview schedule while smaller firms must wait until later in the recruiting season. While there is nothing inherently wrong with this (except perhaps the disadvantaging of smaller firms who recruit on campus), students understand that this is an instance in which law schools show their preference for placing graduates into larger firms. This sends out the message that working at a larger firm is preferable to working as a solo practitioner or in a small law firm.

In fact, there is simply no other reason that I can imagine (other than the expectation that favoring large firm practice will generate higher overall donations) why law schools should continue to feel bound to the doctrinal, large law firm approach to legal education. Indeed, if overall

student satisfaction and meeting the professional needs of most students is considered seriously, the overwhelmingly dominant role the scientific-doctrinal-large law firm model plays in American legal education ought to be recognized as inappropriate for many, if not most, law schools and their students.

My simple answer to rebalancing legal education is to recognize the diversity of students and the diversity of students' professional needs. There was a diversity in legal education in the early to mid-nineteenth century which was deliberately destroyed in the late nineteenth and early twentieth centuries.[56] Law schools should once again embrace diversity not only in their student demographics, but also in their approach to legal education and in their faculty hiring practices. Students who aspire to work in large, elite firms may continue to follow the traditional model of legal education and law schools should accommodate them. Students who aspire to work in other professional contexts and who would benefit from a more artisanal and hands-on approach should be permitted to limit their doctrinal education to two or three semesters and spend the remaining two or three semesters in clinical classes, externships, or paid apprenticeships, i.e., learning by doing the tasks that they will need to perform once they graduate from law school.[57] I would suggest that this would not only better prepare many students for their entry into law practice or related business, but also make for happier law students and lawyers. It will also make law schools and legal practice more appealing to a broader and more diverse population. Students should not feel pressure to fit into the scientific-doctrinal-large firm model of legal education and law practice that is not what they want in their professional lives. Students should not feel like second-class citizens because they want to engage in the general practice of law in a small town or rural setting where the rewards of such practice are not primarily financial. It is time to return the craft ideal to the legal profession. Lawyers and their clients will be better off for doing so.

56. *See* THE GLADSOME LIGHT, *supra* note 3, at 6–7.

57. *See generally* Hoeflich, *Rediscovering Apprenticeship*, *supra* note 24.