

1-1-2011

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Recommended Citation

Erwin Chemerinsky, *Keynote Speech: Reimagining Law Schools?*, 96 *Iowa L. Rev.* 1461 (2011).

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Keynote Speech: Reimagining Law Schools?

*Erwin Chemerinsky**

Reconsideration and discussion of legal education is nothing new. It has occurred at regular intervals for over a century. I became a law professor in the fall of 1980, and since then there have been countless conferences and books about how to rethink law schools. In the early 80s, there was the effort by the critical legal studies movement, casting a new light on legal education. We have had the MacCrate report, and more recently, the Carnegie Commission. And yet, despite all of this, law schools remain largely unchanged.

Legal education today is very similar to that which I received in the mid-1970s, and I would guess that the legal education that I received in the mid-1970s is much like those in the mid-1930s. That is not to say there are no differences. If one would walk into a law school classroom today and compare it to that of the mid-1970s or mid-1940s, one would be immediately struck by the tremendous increase in the number of women students. As recently as 1970, only about five percent of law school graduates were women. My class of law school was twenty-five percent women. And now, at my law school, which I think is typical of many across the country, a majority of the students are women. The story is less successful, but still notable, with regard to the increase in the number of students of color at law schools around the country. And there are differences with regard to curriculum as well. Almost every law school has some form of clinical education. Every law school has some set of courses with regard to skills training. But overall, what goes on in law school and law school classrooms seems so unchanged, despite all the conversations and all the conferences on legal education.

In spending two days talking about legal education it is worth thinking about why it is so resistant to change. There is no easy answer to this question. In part, I think it is that because law schools are generally successful. Law schools have historically succeeded in preparing students to be lawyers, to meeting the needs of the bar and society. There is, thus, not a

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large call for change from the bar or the larger society. I think there is another reason why law schools are resistant to change; it is a very cost-effective model for education. Dean Christopher Columbus Langdell is credited with inventing much of modern legal education and putting one professor in front of a large number of students. It is very efficient for a university. Most law schools make money for their universities, and therein I think is part of the explanation for why change does not occur.

And there is another reason why law schools are resistant to change. If there is going to be change, it is going to have to largely come from law faculties, and they are the group with the least incentive to bring about change. Being a law professor is probably the best job on the planet. You get paid a great deal of money for relatively little in terms of required expectations, certainly when I compare it to what elementary or high school teachers have to do or even my colleagues across campus, let alone all the other jobs one can think of. Short of course of being shortstop for the Chicago Cubs, I cannot think of many better jobs.

The bar and universities are unlikely to be the impetus for change in legal education. Academic freedom is too deeply ingrained for universities to tell law schools to impose reforms. Also, law professors are products of legal educations that exist. Generally, law professors did very well in law school. They have reason to believe that legal education overall is successful. As I say, there is little incentive to bring about reform. For all of these and other reasons, despite all of the conferences and studies, law schools seem so resistant to change.

This conference is a wonderful opportunity, though, to rethink legal education. Certainly we are at a point in time when there are efforts across the country to do this. I think if we are going to do this, it is important to begin by asking the question, are law schools necessary at all? If we answer that question, then we can begin to talk about to what extent law schools succeed or fail, and then we can talk about what might a reimagined law school be like.

I confess to you that over the last few decades as a law professor, I have watched with some distance the discussions about reforming legal education. Over the years, I was fortunate enough to be invited to a number of symposia that wanted to talk about legal education, and I always declined because I thought I didn't have anything new or original to say on the subject. Four years ago, I was asked to interview for the deanship at a new law school being created at the University of California-Irvine. I was offered and accepted the position, and I have spent most of my waking hours over the last few years thinking about legal education.

We have a wonderful opportunity in that we have a blank slate. One reason that legal education is resistant to change is that *any* institution is difficult to change, especially institutions that have existed for a long time. We do not face that at the University of California-Irvine. We are brand new.

Our basic challenge is to be sufficiently traditional to be credible and sufficiently innovative to justify why we exist. I am not going to spend my time here today telling you about my law school; I want to talk more generally about legal education. But undoubtedly everything I am going to say is influenced by what I have been immersed in over the last few years.

So let me begin by asking you to think for just a few minutes about the question is law school really necessary? Now, to answer this, we have got to start by asking another question: what is it that law school is meant to do? My guess is that the least controversial thing I have to say, perhaps the least controversial thing to be said in all two days of this symposium, is why law schools exist. The answers are obvious. Most importantly, I believe, is that law schools exist to train future lawyers. Now what is interesting is that I think if you had gone to the administrators of the law school that I attended in the mid-1970s and asked them why does law school exist, training future lawyers would have probably been down on the list. In fact, if one studies the history of legal education in the United States, it is only the lower-ranked schools that traditionally have said that their primary objective is training lawyers. Every law school has acknowledged this responsibility, but hardly have they emphasized that as a primary objective. Perhaps the effect of the Carnegie commission, maybe the effect of the current reexamination of law schools, would be more emphasis on this, which I think is not only the first but the preeminent goal of law schools.

A second objective of law schools is to produce a body of scholarship to help influence judges, lawyers, and other policymakers. The reality is that judges, lawyers, and other policymakers do rely upon scholarship produced by law professors. Another objective that has more come to the fore over the last quarter century is producing a body of scholarship that examines the role of law in society and all of its dimensions—looking at the relationship between law and the economy, or psychology and law, or law and sociology. I separate this because this scholarship is less directly oriented towards influencing judges, lawyers, and policymakers, but there is no doubt that one of the most important developments in legal education since I was in law school almost forty years ago is the recognition of how inherently interdisciplinary law is.

And I would add to this list one other objective of law schools, and that is to increase the provision of legal services to communities and society. Through legal clinics, through pro bono work by faculty and students, law schools can make an important contribution, often providing representation where otherwise it would not exist.

But if we can all accept that these are the goals of legal education, and why we have law schools, then we have got to ask whether law schools are needed to achieve the objective. If there were not law schools, would the lawyers in this country be less able, less capable than they are today? The assumption behind state requirements that attorneys must graduate law

school is that it is a better way of training lawyers than it would be to have lawyers learn through apprenticeships as existed in American history until the late-nineteenth century. I know no way to empirically prove the assertion that law schools are better at training lawyers than, say, apprenticeship programs would be. I can point to benefits that law schools generate that would be lost without them.

Law schools do provide a minimum level of knowledge and competency that might not be there if there was just apprenticeship. Every law student, or virtually every one of them, graduates from law school knowing some contracts law, some tort law, some procedure, some constitutional law, and so on. There is no assurance that would be so in an apprenticeship program. Every law student, or virtually every one of them, learns certain basic skills—skills like how to read a case and how to develop or refute a legal argument. Apprenticeship would lack that standardization.

Apprenticeship systems would probably put much more emphasis on bar exams as screening in terms of who would become or not become lawyers. I have spent a great deal of time over the last twenty-five years lecturing to students getting ready for the bar and thus studying bar exams. A great deal of my family income has come from this sideline, and I am increasingly skeptical that bar exams really measure very much that relates to the practice of law. The ability to memorize a lot of rules and give it back in an organized fashion, or in response to 200 multiple choice questions, seems to be even less related to the practice of law than that which law school is measuring.

I think another important benefit with regard to having law schools rather than apprenticeships is opening up access to the legal profession. Law schools across the country have been committed to enhancing diversity, be it to gender, or to race and ethnicity, and with regard to other important characteristics in society. I worry that an apprenticeship system would be far more closed, as lawyers would be likely to take those they knew or those they had contact with, and thus, the tremendous increase that I mentioned with regard to women in the profession and the increase, though less dramatic, with regard to racial minorities would be lost through an apprenticeship system.

I think there are other benefits that law schools provide as well, in terms of the ability to train lawyers, that are probably lost with an apprenticeship program. Here I emphasize again the importance of interdisciplinary analysis. I do believe that lawyers who are doing corporate work benefit from knowing some economics; lawyers who are doing criminal work benefit from knowing some psychology; and so on. I think apprenticeship programs are much less likely to provide that kind of background knowledge and information.

If there were not law schools, there would be far less legal scholarship produced, and there are some who may say cynically that would be a better

thing. But overall, I think that lawyers, judges, and policymakers do benefit tremendously from legal scholarship, and it is unlikely that practitioners, who are already juggling so much, would be able to do the kind of sustained examination of the legal system and legal doctrines that law professors provide.

I have never seen a systematic estimate of the amount of legal services that law schools provide through clinics and pro bono work by students and faculty, but it is significant in the sense of populations that would not otherwise have legal services. Although, it is probably insignificant when compared to the overall need.

My hope is that over these two days, as we talk about legal education, we will also talk about this question: is law school necessary?

Well if you accept what I have said so far about why we have law schools, I can move to a second topic: do law schools succeed or do they fail with regard to these tasks? I can talk about each of the tasks individually. The first is in training lawyers. Here I believe the only fair answer has to be that law schools both succeed and fail. As I said in my introduction, legal education would not have continued in the form that is in for so long if law schools were not to a large extent a success. I reject those who look at legal education and see nothing but failure; I reject those who also say that law schools are an unqualified success. I think law schools succeed best at giving certain basic doctrinal knowledge to students and developing certain skills. It is most successful with the skills that every student acquires in the beginning, like the ones I mentioned: being able to read a case; being able to develop a legal argument; being able to refute a legal argument. I think where law schools fail is in terms of giving to lawyers a wider array of skills that they are inevitably going to need in practice. Think of all the skills that lawyers use on a regular basis: counseling of clients; interviewing of clients and witnesses; drafting legal documents of all sort; negotiating deals or settlements or plea agreements; advocacy in fora of all sorts, whether for arbiters, state courts, federal courts, agencies, and the like. I think we should be able to agree that when you look at this wider set of skills that all lawyers use, law schools do generally a poor job.

Each spring, if I am teaching first year law students, as I do now, when their first semester grades come out, I give them a talk about how little law school grades really measure. I talk to them about all of the skills that go into being a lawyer and how few of them are really reflected into what goes onto a law school exam. This I think is not just reassurance to first-year students to not take their grades too seriously but also an important indictment of legal education more generally that we are not giving to our students the vast array of skills that they really need. And I do not want to overestimate the knowledge that we are giving to our students. My first job out of law school was as a trial attorney at the United States Department of Justice in Washington, D.C. My first day on the job I was given an assignment

and told by my superior that the answer to my question could be found in the local rules of the federal district. I went to a fancy law school, but I didn't even know there were local rules of the federal district. And my guess is that still remains true of many law students today.

In terms of assessing how successful legal education is in training lawyers, it is worth considering why it succeeds where it does and why it fails where it does. Economics are the answer. Legal education is best in what can be done in a large classroom. Legal education does least with that which requires small student-faculty ratios and one-on-one instruction. It is easy to understand why. It is cost effective to put one teacher in front of a large group of students. It is very expensive to have small student-faculty ratios or have one-on-one instruction.

If it is hard to assess whether legal education is succeeding in training lawyers, it is even harder to assess the success of legal scholarship. How would we measure it? I am skeptical that citation counts tell us very much about the value of legal scholarship. Ideas are disseminated in a way that does not lead to quantification or statistical measure. I do note the trend towards legal scholarship becoming more theoretical, more interdisciplinary, less doctrinal over time. D.C. Circuit Judge Harry Edwards has written powerful articles lamenting this trend in legal scholarship. It is worth focusing on this development in law schools, and its advantages and disadvantages.

Over the time that I have been a law professor, I think one of the most important developments has been the recognition that law is interdisciplinary. That has meant that law schools are increasingly hiring those with PhDs in other disciplines and those with little, if any, practice experience. It enriches law schools in one sense, but it deprives law schools and legal scholarship in another sense. If our primary mission is training lawyers, how successful can we be if a substantial part of our faculty has never practiced law and is not engaged in the practice of law? How relevant can legal scholarship be for judges, lawyers, and policymakers if those who are writing it have little sense of what those worlds are about? I want to be clear: I believe there is a role for those in law schools with PhDs who have never practiced, just as I believe there is a role for those with extensive practice experience. I very much believe in a big tent, though I think increasingly legal education may be moving more in one direction than the big tent would ideally provide for.

And finally in terms of the success of law schools in providing legal services to communities, I would like to see a survey done of law schools of the percentage of law students who are doing pro bono work. I would like to see a survey done of the percentage of law faculties who are doing pro bono work. I would like to see a survey done of the number of clients who are presented at legal clinics across the country. My guess is the former would be terribly distressing to me, and the latter would be encouraging—that at most

law schools relatively few faculty and only some students are engaged in pro bono work. On the other hand, I think legal clinics are providing very important legal services to a large number of people, but I have never seen those statistical measures. I hope somebody will do them. One of the statistics that I am most proud of from my law school is that last year, out of sixty first-year law students, fifty-five did significant pro bono work—thirty significantly exceeding the minimum recommended number of hours that we set for our students. I think our challenge is going to be to continue that in the years ahead.

If you will accept what I have said so far about whether legal education is necessary, about the areas where legal education succeeds and fails, let me talk some about how we might reimagine legal education, how we might reinvent law schools. Let me here talk about some of the things I think need to be done if we are going to succeed. I will talk a little bit here about some of the things that my law school has done in this regard.

I think one thing that we need to do is focus much more on what skills we want to teach our students and how can we better teach them. We were lucky enough at my school to have the founding faculty present a year before any students arrived.

We begin by talking about what skills we want to impart on our students in the first year and in the three years of law school. And that began a yearlong discussion that led ultimately to a first-year curriculum. I think every law school needs to have that type of conversation about what skills we are trying to teach our students. We came up with a long list of skills, and then the focus in designing the curriculum was on how we were going to go about imparting those skills to our students.

I also believe we need to teach interdisciplinary perspectives, and I think a challenge for law schools is how to do this. If we leave it to each faculty member, it is going to be hit and miss across the curriculum. Some will teach economics; many won't. Occasionally a professor might teach psychology or sociology, but most won't. If we create an interdisciplinary perspectives course, will it seem too removed from the practice of law to be well received by students to be able to be incorporated?

Our solution—I am not sure whether it has worked—is to try to designate one course in the first year and have it be the vehicle for teaching some interdisciplinary perspectives. We chose a legal-profession course to do that. We want to teach something about law and economics and study the economics of the profession. We want to teach something about law and sociology and teach about the sociology of the profession. We want to teach something about law and psychology and teach about the psychology of the profession. We do this with the hope that other faculty to the curriculum will also impart these interdisciplinary perspectives.

I think the ideal law school will have law students engaged in real-world problems with real clients in all three years of law school. I strongly believe

that there are educational experiences that can come from representing real people that can never come from simulation or in any classroom. Simulations, no matter how many wrinkles, are just too neat and packaged. A real client exposes students to sociological and practical dimensions that otherwise cannot be gained.

The challenge for law schools is to think about how can we provide our students, in all three years of law school, real-world experience. Again, to give an example from my school, we have decided to have all of our first-year students, as part of their lawyering skills class, learn about interviewing and then go to legal aid or the public defender and watch experienced lawyers do intake interviews, and then they have to do intake interviews. We have no classes in the second semester for first year students on Tuesday morning or Thursday afternoon, and every student is required to actually go do the intake interviews. Many of our students, when we debriefed them at the end of last year, said one of the best experiences in their first year was having to do that. One of my students literally came to me in tears after such an experience and told me of a story that a prospective client who had come to legal aid and then having to tell the client that there was literally nothing that was going to be able to be done after consulting with the lawyer. No reading, no discussion in class, can duplicate experiences like that. I believe that there is no substitute over the course of law school for clinical education—clinical education with live clients. Could you imagine if medical schools had trained doctors where medical students had never seen patients? If medical schools said, “We will just teach our students to think like doctors,” none of us would want to be treated by such doctors. But that has been the mantra of legal education for such a long period of time. And so I think it is important to have every student be involved in clinical education. We are requiring this of all our students for graduation. The goal is to provide students a clinical experience that gives them primary responsibility for a case, a matter, whether it is transactional or litigation.

In fact, if I could reinvent legal education, I think it would be important to separate each of the three years and give them a separate function within law schools. There has been so much attention to the third year of law school and whether or not it is really necessary. If I could define the three years of law school, I would make the fewest changes with regard to the first year, because I think it is the most successful. I would have a second year that incorporates skills training, especially through simulations. I think so much more skills training can be brought into doctrinal courses. I taught a course when I was at Duke on civil-rights litigation where I had all my students draft a complaint, do a discovery plan, and do a negotiation exercise. It certainly takes more time from the faculty member, but those are the kinds of things we can bring in to classrooms. I think simulations, whether an appellate advocacy or trial advocacy or pretrial advocacy, play an important role, and I think it should be a core part of the second year. And I

would like to see the third year have as its centerpiece a clinical experience, where every student, as I said, has to provide representation to an actual client.

I think it is so important that students throughout law school have the opportunity to watch what lawyers and judges actually do. There is far too much of a gap between law schools and the profession. One of the first things that I did was to create a system where every first-year student is assigned an experienced-lawyer-mentor and has to spend twenty-five hours over the course of the first year just following the lawyer around. Our instructors in the legal profession class require those students to do a major paper about the experience. Again, many of our students when debriefed at the end of last year said among their very best experiences was being able to follow a lawyer around, just to get a sense of what lawyers really do. I wish it were possible for all of our students to do an externship, whether in a court, with an arbiter, or in a tribunal. Numbers will probably make that impossible over the long term, but the reality is one can get an understanding of the courts and how they function by being an intern or an extern, or being a clerk, that otherwise never can be gained. I think all law students should be required to spend a certain number of hours just watching trials, or watching appeals, or watching other forms of dispute resolution. I think it is so important that students be exposed to a wide array of practice areas. My experience in teaching has been that my students have such a narrow sense of what lawyers do. And so I was very pleased that the legal profession at my school brings in large panels of lawyers from a large array of practice areas over the course of the year just so that students get a sense of what lawyers do.

I think there are other dimensions to good legal education that are harder to achieve. I wish we could come up with a good way of teaching problem solving to our students. I think it is one of the most important skills that all lawyers use, and I have yet to see a good way of imparting that. I wish we could find a way of teaching judgment to our students. I think the single most important thing that determines who is going to be successful as a professional is good judgment, and yet, how do we go about teaching that?

As a new law school with the benefit of a blank slate, we have been able to try new things. We have been most successful in rethinking the first year, less successful in rethinking the upper level. With regard to the first year, we decided to have a first-year course in lawyering skills, that in addition to teaching basic skills like research and writing, also tries to teach skills like negotiations, interviewing, and fact investigation. We have created the yearlong course in the legal profession that I mentioned that in addition to teaching ethics, also teaches things like economics, psychology, sociology of the profession. We have redesigned the rest of the first-year curriculum to focus on methods of legal analysis. The key insight I think came at a faculty meeting where one of my colleagues said we always say what we are trying to

do in law school is teach people to think like lawyers, and then the question is, well, what does that mean. In the first year, our students take a course in the fall called Common-Law Analysis: Private Ordering, and, in the spring, a course called Common-Law Analysis: Public Ordering. Although we use contracts and torts, the real goal is to teach the common-law method. We teach a course in the fall on statutory analysis, and though it focuses on criminal law, the real goal is to teach students how to deal with statutes. There is also a course in the fall on procedural analysis. In the spring, there is a course on constitutional analysis and international legal analysis.

As we talk about rethinking law schools, I also worry about whether there have been some false starts. It seems that the emphasis right now on what is called "outputs" measures, rather than inputs measures, is not likely to improve legal education. There is an effort to change the A.B.A. accreditations standards to put more emphasis on the outputs of legal education than the inputs. I am a skeptic of that and question whether or not it will really lead to better legal education. I worry that outputs measures inherently value that which can be statistically measured over that which is qualitative. I do not know how you can measure the most important outputs of legal education. How realistically are we going to measure the skills that we impart on students? If you believe, as I do, that clinical education is invaluable in training lawyers then that is an input, not an output. I also would be a skeptic of a move away from accreditation and accreditation standards. I believe that accreditation does provide an assurance that all law schools provide a minimum quality of legal education to students.

More generally, I need to conclude though, as I began, on a skeptical note. I started by saying there have been so many efforts to reform legal education, and so little has changed. Why believe that these efforts will be successful? Can there be a different model of legal education that is made cost effective? Can we really change institutions that have existed for so long and are being so remarkably resistant to change? I think these are the central questions that need to be faced here over the next two days.