

## **HARD CASES: AMERICA'S LAW SCHOOLS**

### **Bricks without Straw: The Sorry State of American Legal Education**

**Charles E. Rounds, Jr.**

**Charles E. Rounds, Jr.**, is professor of law at Suffolk University Law School, Boston, MA 02108-4977; [CRoundsJr@aol.com](mailto:CRoundsJr@aol.com). He is the senior author of *Loring and Rounds: A Trustee's Handbook* (Aspen, 2011). "Bricks without Straw: The Sorry State of American Legal Education," by Charles E. Rounds, Jr., appears in the Summer 2011 issue of *Academic Questions* (volume 24, number 2), the journal of the National Association of Scholars, a Springer publication ([www.springerlink.com](http://www.springerlink.com)).

While many law students and recent grads have come to feel that legal education is an expensive waste of time now that the job market for lawyers has collapsed, some seasoned law practitioners have their own concerns about the worth of a legal education. Their concerns, however, relate to product quality rather than product marketability. Newly-minted lawyers don't seem to write as well as they used to. Other complaints are more nebulous. In a recent edition of *The Economist*, Cravath, Swaine & Moore's presiding partner was quoted to the effect that law schools spend too much time and effort teaching students to think like lawyers and not enough inculcating the practical skills of lawyering. He decried "the difference between what law schools teach and what

lawyers do.”<sup>1</sup> He is in good company. Judge Harry T. Edwards’s “The Growing Disjunction Between Legal Education and the Legal Profession” comes to mind.<sup>2</sup> His article sent the legal academic community into a collective hissy fit.

For starters, everyone might read or reread *And Gladly Teach*, the autobiography of Bliss Perry (1860–1954)—editor of *The Atlantic Monthly*, a prolific author in his own right, and humanities professor at Williams, Princeton, and Harvard—particularly the passage on the marginal utility of teaching the mechanics of thinking and writing. On the limitations of “mechanical correctness,” his term, Perry wrote: “One cannot make bricks without straw or a work of art without materials, and very few undergraduates have read enough, experienced enough, pondered enough, to have even the raw material for a literary masterpiece.”<sup>3</sup>

Thank heavens law students are not expected to produce literary masterpieces. Memoranda of law that hold water will more than suffice.

Nor should they be expected to spring from the academic womb armed with a full complement of lawyering skills. Seasoned practitioners, of all people, should know that practice proficiency comes only after years of, well, practice. They should reconsider

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<sup>1</sup>“Trouble with the Law,” *The Economist*, November 11, 2010,

<http://www.economist.com/node/17461573>.

<sup>2</sup>Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession,” *Michigan Law Review* 91, no.1 (October 1992): 34–78.

<sup>3</sup>Bliss Perry, *And Gladly Teach* (New York: Houghton Mifflin, 1935), 254–55.

complaining to the law schools that newly-minted lawyers lack practical skills in favor of a more nuanced expression of dissatisfaction. The presiding partner of Cravath has the experience, competence, and judgment to handle a wide variety of litigation, including securities, shareholder derivative, intellectual property, general commercial, contractual disputes, and antitrust. Surely he does not expect that a first-year associate should be equipped to play in his league upon reporting for duty. No law school however structured could possibly turn out such a product in three years.

The academics' simplistic response to the practitioners' simplistic criticisms has been to offer less substantive doctrine and more clinics and courses in "legal writing" and "practice skills" such as the document drafting lab that I have conducted for almost thirty years now.<sup>4</sup> Still the complaints come, and for good reason. These expensive labor-intensive "practice skills" initiatives fail to address the root cause of the thinking and writing problem, which is that we are asking our law students to make bricks without straw. Great swaths of core legal doctrine have been scythed from the required law curriculum, a process of misguided reform that began in the 1960s. One of the justifications for creating this doctrinal wasteland has been that more credit hours need to

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<sup>4</sup> Most law school in-house clinics have a criminal/political focus. There are few that give students any real-world exposure to the civil/commercial side of the law, such as business incorporation, contract, power of attorney, or trust drafting, or real estate conveyancing. A law school clinical experience, in any case, can only give one a taste of what it is like to practice law. Moreover, when law schools do have active practitioners on their faculties nowadays, for the most part their focus is also criminal/political.

be freed up for legal writing instruction. The folly of the medieval practice of bloodletting comes to mind.

By core legal doctrine I mean the body of law that supports the nation's myriad statutory and regulatory regimes and supplies their context, namely, the common law as it has been enhanced by equity. And though the practice of law is becoming ever more specialized, a practice specialty does not exist in a vacuum. Each has its own common law context.

To connect invisible dots is asking an awful lot of newly-minted lawyers, even the best and brightest. One who lacks formal schooling in all the core legal and equitable relationships cannot help but struggle to identify those that prevail in a given situation. Sorting out how they interrelate will pose an even greater challenge. Just as medical students work with cadavers rather than skeletons in their anatomy classes, so also should law students be exposed to the full anatomy of the common law.

Discrete courses in the agency and trust relationships, knowledge of which is critical to an understanding of the mutual fund's legal structure, for example, are now elective, or not offered at all.<sup>5</sup> Ponzi schemer Bernard Madoff was an investment agent who had breached his fiduciary duty to his many principals. The business trust was the legal vehicle of choice for certifying the pools of subprime mortgages that are so much in the news today. The world economy is still reeling from the consequences of

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<sup>5</sup>See generally, E. Gordon Gee and Donald W. Jackson, *Following the Leader? The Unexamined Consensus in Law School Curricula* (New York: Council on Legal Education for Professional Responsibilities, 1975), which chronicles the looting of the credit hours that had at one time been allotted to instruction in core legal doctrine.

mispricing the bonds that were issued by those trusts. All this I have written about in law review articles.<sup>6</sup>

Equity's fiduciary principle, the lawyer's ethical lodestar, is now covered tangentially, if it is covered at all.<sup>7</sup> It is a wonder that the library still has a copy of the *Restatement of Restitution* (1937), even though restitution for unjust enrichment is the

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<sup>6</sup>See, Charles E. Rounds, Jr., and Andreas Dehio, "Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures," *NYU Journal of Law & Business* 3, no. 2 (Spring 2007),

<http://www1.law.nyu.edu/journals/lawbusiness/issues/uploads/3-2/roundsc.pdf>; Charles

E. Rounds, Jr., "State Common Law Aspects of the Global Unwindings of the Madoff Ponzi Scheme and the Sub-Prime Mortgage Securitization Debacle: Butressing the Thesis That Globalizing the American Law School Curriculum at the Expense of Instruction in Core Common Law Doctrine Will Only Further Provincialize It,"

*Wisconsin International Law Journal* 27, no. 1 (2009),

<http://hosted.law.wisc.edu/wilj/issues/27/1/rounds.pdf>.

<sup>7</sup>Just as the lymphatic system is marbled through out the human anatomy, so also is equity doctrine marbled throughout the common law. See Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada*, The Carnegie Foundation for the Advancement of Teaching, Bulletin 15 (Boston: Merrymount Press, 1921), 346n1.

principal judicial remedy for the infringement of intellectual property rights. I have written law review articles on these topics as well.<sup>8</sup>

The “Property” course is a politicized shell of its former self. Even “Evidence” is now elective. One could go on and on. A course in the contractual relationship does not a complete lawyer make.<sup>9</sup>

And what, besides skills offerings, has been filling this ever-expanding curricular vacuum? That topic was the subject of an article I recently wrote for the Pope Center

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<sup>8</sup>See Charles E. Rounds, Jr., “Lawyer Codes Are Just About Licensure, the Lawyer’s Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trusts and Property Principles That Regulate the Lawyer-Client Fiduciary Relationship” *Baylor Law Review* 60, no. 3 (Fall 2008), <http://192.138.214.75/faculty/addinfo/rounds/7Rounds.EIC.pdf>; “Relief for IP Rights Infringement Is Primarily Equitable: How American Legal Education Is Short-Changing the 21<sup>st</sup> Century Corporate Litigator,” *Santa Clara Computer & High Tech Law Journal* 26, no. 3 (2010), <http://www.chtlj.org/sites/default/files/media/articles/v026/v026.i3.Rounds.pdf>.

<sup>9</sup>See Charles E. Rounds, Jr., “The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism” *University of Richmond Law Review* 43, no. 4 (May 2009), <http://lawreview.richmond.edu/the-common-law-is-not-just-about-contracts/>.

entitled “Bad Sociology, Not Law.” It was reprinted in a Virginia State Bar publication.<sup>10</sup> The title says it all.

And then there is the problem of rampant grade inflation, which began in earnest in the late 1960s with the wholesale downgrading of courses in core legal doctrine from mandatory to elective status, and which is reaching absurd levels now that the market for newly-minted lawyers has collapsed.<sup>11</sup> Grade inflation is, by the way, a phenomenon that is not confined to the ivory tower. Today, even a ham sandwich could pass the Massachusetts bar exam.<sup>12</sup>

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<sup>10</sup>Charles, E. Rounds, Jr., “Bad Sociology, Not Law,” Commentaries, The John William Pope Center for Higher Education, January 4, 2010, <http://www.popecenter.org/commentaries/article.html?id=2281>; reprinted by the Virginia State Bar in *Education & Practice*, Section on Education of Lawyers for Practitioners, Judges, and Law Teachers 18, no. 2 (Spring 2010), <http://www.vsb.org/docs/sections/education/EP-2010Spring.pdf>.

<sup>11</sup>See, e.g., Catherine Rampell, “Law Schools Visit Lake Wobegone,” *Economix* (blog), NYTimes.com, June 22, 2010, <http://economix.blogs.nytimes.com/2010/06/22/law-schools-visit-lake-wobegone/>: “Now the legal job market has turned chilly, though, and schools are trying everything from literally paying employers to hire their students to retroactively inflating their alumni’s grades.”

All this pedagogical chaos and confusion was validated in The Carnegie Foundation for the Advancement of Teaching's slap-dash, rambling, superficial, and conclusory, but nonetheless extremely influential *Educating Lawyers: Preparation for the Profession of Law*,<sup>13</sup> which repeatedly cites *The Paper Chase* and its screenplay as authorities for how things are essentially done in today's law schools.<sup>14</sup> Were it only the case. Still, this sliver of a volume has become the American law academic's go-to leech book.<sup>15</sup>

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<sup>12</sup>See "Bar Exam Results," July 2010 Exam, Commonwealth of Massachusetts Supreme Judicial Court Board of Bar Examiners, <http://www.mass.gov/bbe/statisticsjuly2010.pdf>, especially the pass rate for first-time takers of the Massachusetts bar exam.

<sup>13</sup>William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007). The authors visited only sixteen of the 166 law schools in the Association of American Law Schools and apparently no law firms or bar association offices. See 15–16.

<sup>14</sup>The authors admit that the report is not even a comprehensive survey of law schools. Rather, it is an "attempt to interpret what law schools do and do not do, with a sketch of some of the consequences for the legal profession, for higher education, and for American society." *Ibid.*, 17.



Other than a trip to the movies, the five authors of *Educating Lawyers*, only one of whom is a lawyer, elected not to fact-find outside their academic bubble.<sup>16</sup> And the lawyer appears to have had little, if any, private practice experience.<sup>17</sup> It is no wonder that the report mischaracterizes “Civil Procedure” and “Constitutional Law” as common law courses.<sup>18</sup> *Educating Lawyers*’ simplistic conclusion is that contemporary legal education lacks only the right kind of practice-skills training.<sup>19</sup> It is as if a group of law professors had authored a report concluding that students of veterinary medicine could do with more trips to the zoo.

Enough is enough. Law practitioners never should have ceded control of the law schools to us full-time academics, a process that began in earnest just after the Civil War, and which was chronicled in the Carnegie Foundation’s *Training for the Public Profession of the Law* (1921). That report was a serious effort. Things can only get worse

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<sup>15</sup>In medieval times, leech books were consulted in order to determine what kind of bloodletting was appropriate for a given malady.

<sup>16</sup>See Sullivan et al., *Educating Lawyers*, ix–x and 15–17.

<sup>17</sup>*Ibid.*, ix–x. Judith Welch Wegner served briefly in the public sector as special assistant to United States Secretary of Education before entering academia.

<sup>18</sup>*Ibid.*, 63.

<sup>19</sup> *Ibid.*, 186–88. Otherwise, “law schools are impressive educational institutions.”

if the bar examination suffers a similar fate, which is a real possibility. Today, tenured law professors with a decade or more of full-time civil practice under their belts are few and far between.<sup>20</sup>

John Chipman Gray (1839–1915), a veteran of the Civil War, was the ideal practitioner-scholar. While serving as a full-time professor at Harvard Law School, he also practiced full-time at the law firm that still bears his name, Ropes & Gray. Gray was of the opinion that an active law practice would make for better teaching and scholarship.<sup>21</sup> And he was right. On both sides of the Atlantic, Gray’s scholarship has profoundly influenced the very evolution of the common law of property to this day.<sup>22</sup> He was also a great classroom teacher until ill health forced him to retire.<sup>23</sup>

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<sup>20</sup>See Harry T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript,” *Michigan Law Review* 91, no. 8 (August 1993): 2191–2219.

<sup>21</sup>“Gray believed that continued practice would make him a better teacher and possibly a more grounded scholar. His belief was not speculation; he had been teaching on a part-time basis as a lecturer and understood the contribution to teaching that practice provided.” Gerald Paul Moran, *John Chipman Gray: The Harvard Brahmin of Property Law* (Durham, NC: Carolina Academic Press, 2010), 108.

<sup>22</sup>“Sir William Holdsworth, the distinguished English historian of the common law, accurately described Gray as ‘pre-eminently the historian of the modern rule against perpetuities.’” *Ibid.*, 251.

Gray's tenure at Harvard was the golden age of the practitioner scholar. Judge Tapping Reeve had founded the first law school of national reputation in Litchfield, Connecticut, around 1784, essentially as an adjunct to his law practice.<sup>24</sup> He was succeeded by Judge James Gould. The private law school went out of business around 1833. By then Harvard had gotten into the business of teaching law (1817), as had Yale (1824). "Expansion by one or other of these two methods—by the new establishment of a law department conducted by practitioners, or by taking some already established school under the college wing—became the typical process by which American colleges succeeded in securing a foothold in legal education."<sup>25</sup>

In 1870, Gray began lecturing part-time at Harvard.<sup>26</sup> In 1875 he was offered a full-time appointment as the first Story Professor of Law contingent on the understanding

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<sup>23</sup>Ibid., appendix B, "Students' Letter to Gray (1913?)": "Dear Professor Gray, We were all very much surprised to learn that you could not teach us any longer in Property III and very much disappointed. This part of the law has become so closely associated with your name that we have looked forward all through the School course to studying it with you."

<sup>24</sup>See Reed, *Training for the Law*, 45.

<sup>25</sup> Ibid., 27.

<sup>26</sup>Moran, *John Chipman Gray*, 107.

that he would surrender the practice of law. That he refused to do and the university ultimately relented.<sup>27</sup> Gray's biographer explains why Gray's tenure at Harvard proved to be the beginning of the end of the era of the practitioner-scholar:

During these contractual negotiations, Dean Langdell, acting under the tutelage of President Charles W. Eliot, was leading the law school into what became the golden age of scientific legal analysis: the case method. Not surprisingly, Langdell was antagonistic to Gray's maintaining a dual career of teaching and the practice of law. Such an arrangement was completely antithetical to the law school design of Langdell....Adding to the concerns of Eliot and Langdell was the fact that the principal full-time professors (Parker, Parsons, and Washburn) of the past administration were practitioners of law. Because radical pedagogic innovation was the motivating factor for these two determined administrators, the appointment of Gray and his demand to continue his private practice like the law teachers of the past was quite problematic. Perhaps, the deciding factor in Gray's favor was that he had obvious potential to become an outstanding legal scholar and that his teaching record was a known positive commodity.<sup>28</sup>

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<sup>27</sup>Ibid., 108.

<sup>28</sup> Ibid., 109–110.

And as Harvard Law School went, so went the nation.<sup>29</sup> It has been ever thus. There is nothing more lemming-like than the behavior of the faculties of the lower-tier law schools, at least when it comes to matters curricular. Northwestern law professor Albert M. Kales, a former law student of Gray, also felt that it was critical that a law professor do at least some practicing, and he was not afraid to make his view known publicly. Imagine a professor of surgery who did not also do surgery on a regular basis? In 1911, Kales published “Should the Law Teacher Practice Law?” in the *Harvard Law Review*.<sup>30</sup> By then it was too late, the cause was lost. Harvard was institutionally and aggressively committed to lowering the curtain on the era of the practitioner-scholar. “On at least three separate occasions, the Review provided esteemed professors of the law school the opportunity of instantly criticizing Kales by addendums published to his articles.”<sup>31</sup>

The era of the practitioner-scholar came to an end once and for all in 1990 with the death of A. James Casner. A legendary property teacher and scholar at Harvard, Casner kept current from 1945 to 1958 by practicing law at, of all places, Ropes & Gray.

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<sup>29</sup>See Gee and Jackson, *Following the Leader?* 4, which discusses the profound influence Harvard has had on how law is taught in the United States.

<sup>30</sup>Albert M. Kales and Ezra Ripley Thayer, “Should the Law Teacher Practice Law?” *Harvard Law Review* 25, no. 3 (January 1912): 254–73.

<sup>31</sup>Moran, *John Chipman Gray*, 214.

Casner practiced robustly on his own thereafter. Our paths crossed professionally when I was a fledgling lawyer at the First National Bank of Boston in the late 1970s. We will not see his likes again, at least not in my lifetime.

In 1992, Judge Edwards wrote the aforementioned “The Growing Disjunction Between Legal Education and the Legal Profession,” which essentially urged the legal academy to be mindful that most law students would eventually be called upon to serve real human beings. He was inundated with responses, some friendly, many hostile. In 1993, he wrote a postscript law review article that reprinted an excerpt from a letter Edwards had received from a law school dean, dated 1992, explaining how American legal education had come to be in such a sorry state. The letter could have been written in 2011. Nothing has changed. Things have only gotten more so:

In my judgment, the problem began in the later ‘60s when an increasing number of individuals who aspired to become history professors or economics professors or philosophy professors or political science professors or literature professors discovered that there were few, if any, opportunities in those fields. After spending several years doing graduate work, they finally faced reality and attended law schools.

Most of these individuals had no real interest in law or in becoming a lawyer, but many were excellent students. As a result, they were hired by law faculties, particularly in the elite schools, in increasing numbers. After obtaining tenure, many of them began moving back towards their real academic interests—philosophy, political science, economics, history, literature, etc. This led to an

explosion of interdisciplinary work in law, *as well as to an increasing rejection of the importance of doctrinal analysis, even in mainstream courses.*

Today, this generation of scholars is dominant in legal education, and their priorities hold sway. Moreover, the problem is compounded by the fact that these very same academics tend to encourage only those of their students who are themselves interested in interdisciplinary work to consider careers in academia. And those students who are not interested in interdisciplinary work, but are merely extraordinarily talented lawyers, shy away from a career in the academy because they know that the kind of work that they would be interested in doing is not valued. As a consequence, virtually all of the applications law schools like ours receive for positions in teaching come from individuals with a strong interdisciplinary bent. *Although I regard interdisciplinary work as valuable, it should always be an enhancement of, rather than a substitute for, more traditional legal scholarship.* In any event, the problem becomes self-perpetuating.<sup>32</sup> [Emphases added]

As we approach the hundredth anniversary of Gray's death, it is high time that seasoned law practitioners again become fully engaged in the affairs of the legal academy. For starters, they need to take a good hard look *for themselves* at the doctrinal side of the law school curriculum, particularly at what is still required, what may be eschewed, and, most importantly, what today lies on the cutting room floor—out of sight and, for all too many, out of mind.

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<sup>32</sup>Edwards, "Postscript," 2191, 2198, quoting Dean #1, letter, December 4, 1991, 2.