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ANALYZING CARNEGIE'S REACH: The Contingent Nature of Innovation

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Analyzing Carnegie's The Contingent

“Analyzing Carnegie’s Reach: The Contingent Nature of Innovation” a recent article, published in the *Journal of Legal Education* by ABF Research Professor Stephen Daniels (with Martin Katz and William Sullivan), explores curricular innovation and institutional change in American law schools between 2001 and 2011. Since the economic downturn of 2008–09 and the related contraction of the legal market, lawyers, journalists, legal educators and pundits have written and debated about the state of legal education and the need for change. Given rising levels of student debt, and shrinking job prospects, is law school “worth it”? Are law students well prepared to enter the market? Are the schools too beholden to the ranking system of *US News and World Report*, and other similar outlets? There has been discussion of “failing law schools,” even an influential book by that title by Brian Tamanaha, of Washington University School of Law (University of Chicago Press, 2012), but far too little systematically collected and analyzed data on what efforts law schools have or have not made to change the status quo.

In 2011, Daniels and co-authors conducted a survey-based research study of American law schools, in order to get a more systematic, data-rich and less crisis-driven view of the landscape of legal education. They designed the study in order to learn more about what law schools were doing in terms of curricular change, when they started doing it, and how

deeply committed the schools were to meaningful change. How much curricular change occurred before the economic recession of 2008–09, indicating that change has been ongoing and was not necessarily a reaction to the downturn? Or, did the recession and the pressures it brought on create a “window of opportunity” through which law schools could

push past institutional inertia to enact change? Have law schools explicitly encouraged faculty to experiment with curriculum? These are some of the questions the authors hoped to answer.

Daniels, Katz and Sullivan were most interested in looking at curricular change of the kind recommended in the 2007

Reach:

Nature of Innovation

Carnegie Foundation for the Advancement of Teaching's report, *Educating Lawyers: Preparation for the Profession* (of which Sullivan was the lead author).

This widely-circulated study reported that, while law schools did a good job teaching doctrine, and a fair job teaching skills, they were not very effective in creating professional lawyers; that is, practitioners who possess well-developed ethical and social skills and who understand and embrace professional responsibility. The Carnegie report concluded that law schools' heavy reliance on the case-dialogue method in teaching was largely responsible for this finding. The report recommended that law schools offer an integrated curriculum where legal doctrine and analysis were taught in concert with the practice of lawyering and an exploration of "the identity, values and dispositions consonant with the fundamental purposes of the legal profession." (See sidebar for the connection between ABF research and *Educating Lawyers*.)

Daniels, Katz and Sullivan's interest goes beyond curricular

change, however. Meaningful curricular change will happen only if it is backed up with broader changes on the institutional level, they argue. Thus, they explore curricular change within institutional contexts. Specifically, they focus on whether faculty, who must invest considerable time and effort when redesigning courses

Finally, Daniels et al. also try to explain why the institutions that have changed have done so. Do they share common characteristics? "Are higher ranked schools leading the way? Are different types of schools—private v. public or those with part-time programs or not—more open to innovation? Alternatively, has the external

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or modifying teaching methods, are offered sufficient incentives and rewards for changing. As they state "there must be a significant institutional investment in innovation... We are interested not only in the curricular innovations that may have been initiated, but also in whether there have been concomitant investments in faculty development and changes in incentive structures."

environment—the marketplace and the recent economic downturn with its impact on the job prospects for new lawyers—encouraged schools to pursue innovation regardless of rank and type of school?" the authors ask. As they state, "a key question... is whether the recent changes in external environment have provided... a window for the kinds of recommendations found in

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Educating Lawyers. Have external forces undermined—at least to a degree—the inertia on which much of Tamanaha’s critique is built?” Has the economic downturn pushed institutions beyond their normal inertia so that they are more open to change? The researchers designed their survey with these questions in mind.

The research team sent the survey to deans of law schools in the spring and summer of 2011. A total of 195 surveys were sent out, and 118 were completed, for a response rate of 60.5 percent. The survey asked about new initiatives made at the institutional level since 2001, focusing specifically on the idea of integration—the linking of doctrine, practice and professionalism in the curriculum—as well as changes in faculty development and faculty incentive structures to bolster and reinforce curricular change. As the authors state, the year 2001 was chosen “as the starting point in order to capture changes that pre-dated both the recent economic downturn and the publication of *Educating Lawyers*.” By choosing

this time frame, the authors hoped to “explore the possible influence of the changing external environment.”

Curricular Change

All schools that responded to the survey reported starting at least one new curricular initiative during the period under study, a finding “consistent with recent surveys by the American Bar Association and the American Association of Law Schools, which show law schools continually making changes—from big to small—in their curricula,” the authors note. The new curricular initiatives broke down into seven areas: lawyering (96 percent of responders), new clinics (81 percent of responders), 1st year (75 percent of responders), integrative (74 percent of

responders), 2nd year (65 percent of responders), professionalism (64 percent of responders), and 3rd year (60 percent of responders). The researchers found that neither eminence (rank) nor school type (public v. private) could be identified as an explanatory factor for degree of curricular change.

When looking at the timing of curricular change, the researchers found that 55 percent of general curricular reforms started before 2008. Regarding their interest in the specific changes recommended in *Educating Lawyers* they found that “most starts occurred before 2008: professionalism, 54 percent; integrative approaches, 60 percent; and lawyering, 63 percent.” Thus, the authors found that specific curricular changes were “not just a quick response to the economic downturn and its effects on the legal profession.” However, they did find that for each of the seven curricular areas they inquired about “the lowest percentage of starts is in 2002–04... and the highest percentage is in 2008–10.” These findings indicate that “the pace of change accelerated after

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2007, suggesting a potential window of opportunity for innovation” brought on by the economic recession. This pattern of curricular change held up regardless of school tier, or whether the school was public or private. In all cases the external environment appears to have created conditions favorable enough for change to overcome institutional inertia at least to a degree.

Faculty Development

In the area of faculty development the authors found that 78 percent of schools “reported at least one initiative... since 2001.” The researchers inquired about faculty development initiatives in the following areas: workshops (general), workshops involving integrative approaches to teaching and learning, development of adjunct faculty members, grants (general), and grants related to integrative approaches to teaching and learning. They found that most of the activity was concentrated in general workshops (54 percent), followed by general grants (37%), integrative workshops (36%), development of adjunct faculty (31%), and finally, integrative grants (27%). Thus, the authors note, law schools were more likely to offer workshops, and much less likely to offer grants to faculty. “The drop-off from workshops to the actual investment of money... is substantial, as is the drop-off to both workshops and

The pace of change accelerated after 2007, suggesting a potential “window of opportunity for innovation” brought on by the economic recession.

grants devoted to integrative approaches—a key concern of *Educating Lawyers*,” they state.

As in the area of curricular change, faculty development initiatives did not appear to be strongly related to school tier, or to school type. Again mirroring the pattern revealed in curricular change initiatives, the researchers found evidence of ongoing change since 2001. However, once again, “the largest percentage of starts for each faculty development area occurred in 2008–10.” Thus, the external environment, that is, the “window of opportunity” created by the economic recession, appears to have been a factor accelerating the pace of change in the area of faculty development.

Faculty Incentives: Evidence of Institutional Commitment to Change

Finally, the authors discuss findings in the key area of faculty incentives. The presence of meaningful faculty incentives for change is evidence of schools “putting their money where their mouth is” the authors

point out. “This is an especially important part of the institutional commitment to innovation because it deals with the kinds of activities that will be valued and rewarded—and, in turn, help shape professors’ careers in a particular direction,” they state.

They found that just over half of respondents reported an initiative related to faculty incentives “with initiatives involving hiring being the most prevalent and those involving tenure the least.” Twenty-four percent of respondents reported a new initiative related to hiring, 23 percent reported an initiative related to merit (raises and bonuses), 20 percent reported a new initiative related to promotion, and 19 percent reported a new initiative related to tenure. These figures also reveal that law schools engaged in much less new activity and innovation in the area of faculty incentives than in the areas of curriculum and faculty development.

This finding is not terribly surprising, according to the

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authors. “Changing the personnel process poses the greatest challenge to the legal academy,” they note, “because it changes what it means to be part of the legal academy.” The most activity occurred in new initiatives related to hiring, and the least activity in new initiatives related to tenure. Thus, it appears

that while schools took some action in hiring individuals who were already thinking in innovative ways about teaching, they did not yet value this trait to the same degree when it came to tenure. Again, this is not surprising. As the authors state, changing the criteria for tenure “may mean a

shift away from the kind of scholarly activity that has long helped to define what it means to be a member of the legal academy—the idea of scholarship on law itself, to scholarship activity on something completely different. That something involves how students learn rather than just what they learn, and in addition it involves different ways of thinking about what they learn.”

While fewer schools reported initiatives regarding faculty incentives than did curricular or faculty development initiatives,

the authors found that those schools that did address incentives did so in a more coordinated manner. That is, a significant number of schools reported initiatives in more than one of the four incentive areas measured (hiring, merit, promotion, tenure), indicating coordinated activity on the part of these schools. Hiring and tenure represent the two key ends of the personnel process, and are relatively strongly linked, the authors state. Overall, “the relationships among the four faculty professional initiatives are much stronger than those for the specific initiatives within the other two broad areas” of curriculum and faculty development, the authors note.

Continuing Questions: the Need for Future Research

As the authors conclude, “in general and in light of the kinds of recommendations found in *Educating Lawyers*, our findings send a mixed message. While there is much activity in the area of curriculum—including the key matters of lawyering, professionalism, and especially integration—there is much less in the important areas of faculty development and incentive structure. Without an institutional commitment in these areas as well, meaningful change is not likely. With this said... for at least a small proportion of respondents, there is evidence of the kind of coordinated



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activity needed across these three broad areas.”

Commenting on the research findings, Daniels states, “it was somewhat surprising that there were a number of schools that had started innovations well before the economic downturn,” especially in light of ongoing popular discussions in the media and elsewhere about law schools’ disinclination to change. The researchers found a number of schools that had engaged in ongoing change in the three important areas of curriculum, faculty development and faculty incentives, and who were doing so in an integrative fashion. While these schools were definitely in the minority, according to Daniels, the research shows that “common assumptions about all law schools just don’t hold up” when presented with evidence from systematic empirical research.

The researchers also found that a significant amount of innovation, though not necessarily coordinated efforts in all three areas, is happening in the “great middle”—the second and third tier schools, where most lawyers in the United States are trained. We tend not to hear as much about these schools, says Daniels, because they are not the most elite and are thus considered less influential. But though they are not in the elite, it does not follow that these programs are not successful,

Changing the personnel process poses the greatest challenge to the legal academy because it changes what it means to be part of the legal academy.

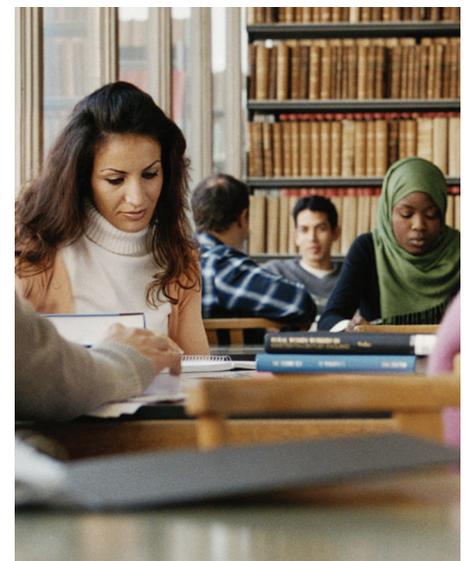
according to Daniels. The great middle tends to produce lawyers for regional rather than national markets. To assess the effectiveness of mid-tier schools we need to know more about how employers in regional markets regard their graduates, Daniels notes.

The researchers did not find clear indicators to predict which schools would be innovators. Law schools that innovate in all three of the areas studied don’t seem to have common factors; their willingness to innovate appears to be idiosyncratic. According to Daniels, “each school is a natural experiment in that they’ve done something different—why? What is it about these schools?” As the authors conclude, “targeted research is needed that looks at the process of change within particular schools, especially with regard to coordinated institutional strategies that foster and sustain innovation.” Daniels adds that care must be taken to ensure that the research is truly independent and not tied to any particular program or position in the debates over legal education. “Navigating

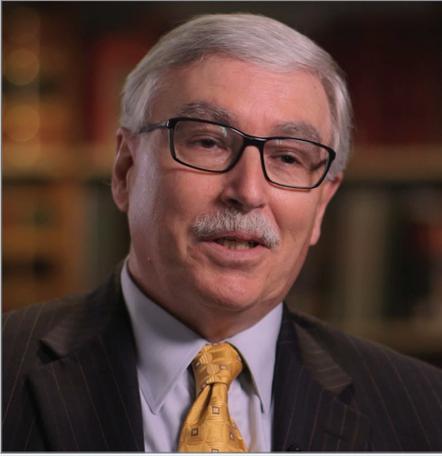
the politics of such efforts,” he says, “can be treacherous. It is unlikely that there is a magic bullet to fix the system, and we should refrain from claiming such. We are dealing with a diverse set of schools serving a diverse set of interests.” 🎓

Daniels, Katz and Sullivan report on their findings in “Analyzing Carnegie’s Reach: The Contingent Nature of Innovation,” 63 *Journal of Legal Education* 585 (2014)

If you are interested in supporting research on legal education or other important ABF initiatives, please contact Lucinda Underwood at 312.988.6573.



About the Authors



Stephen Daniels is a Research Professor at the American Bar Foundation. He researches law and public policy and the American civil justice system. He has published extensively on the delivery of legal services, trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform. He has testified before congressional and state legislative committees and served as an expert in cases dealing with large jury awards and/or constitutional challenges to civil justice reform. Daniels holds a Ph.D. in political science from the University of Wisconsin-Madison and has served as an adjunct professor in Northwestern University's Department of Political

Science. In 2011–2012, Daniels was a visiting lecturer at the Sturm College of Law, University of Denver, and in 2010–11 he was the Director of Research at the Institute for the Advancement of the American Legal System at the University of Denver.

Martin J. Katz is Dean and Professor of Law at the University of Denver, Sturm College of Law. He is a founding board member of Educating Tomorrow's Lawyers, a national consortium of law schools that serve as leaders in the experiential education movement. He also serves as a board member for the Institute for the Advancement of the American Legal System. In 2014 Dean Katz was elected co-Chair of the American Association of Law Schools Section for the Law School Dean. He also serves on the Association's Curriculum Committee. He has published widely in the fields of legal education, constitutional law and employment and labor law. Katz received his B.A. from Harvard College and J.D. from Yale Law School.

William M. Sullivan was Founding Director of the Educating Lawyer's Initiative, Institute for the Advancement of the American Legal System at the University of Denver. Sullivan is a former Senior Scholar at the Carnegie Foundation for the Advancement of Teaching, where he co-directed the Preparation for the Professions Program. He was the lead author of the Foundation's influential 2007 report, *Educating Lawyers: Preparation for the Profession*. Prior to working at the Carnegie Foundation, Sullivan was professor of philosophy at LaSalle University. He holds a Ph.D. in philosophy from Fordham University.

American Bar Foundation research influenced the 2007 Carnegie Foundation Report, *Educating Lawyers: Preparation for the Profession of Law*

Educating Lawyers built on authors William Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S. Shulman's own first-hand research and the wide-ranging literature on legal education. From that literature, empirical research done at the American Bar Foundation stood out for Sullivan, et al. ABF Research Professor Elizabeth Mertz' book *The Language of Law School: Learning to "Think" Like a Lawyer* (Oxford, 2007) had a particularly strong influence on them. Mertz's research on teaching in first-year classes played a key role in their examination of teaching and legal education's signature pedagogy—the case-dialogue method.

Sullivan, et al. built on Mertz' findings in making their case for integration—for integrating doctrine, skills, and professionalism into law school classes. Especially important were her findings on the lack of experience with or focus on clients in classes and her findings on ethical substance in classes. The authors noted, "Law students... are learning to live conceptually on what Mertz calls a 'legal landscape,' a conceptual space that is defined purely in terms of legal argument. Thus [quoting Mertz], 'People and problems are located in abstract individuals' who are seen as working in an oddly 'acontextual context.'" (p. 54)

Again turning to Mertz, the authors stated that the problem of ethical substance "seems especially salient in the kind of student reactions to the case-dialogue pedagogy that Mertz identified. In order to gain facility in legal reasoning, case-dialogue teaching often forces students to separate their sense of justice and fairness from their understanding of the requirements of legal procedure and doctrine." (p. 57).

Educating Lawyers drew from other ABF research as well. For instance, Sullivan, et al. looked to the work of former ABF Director Bryant Garth and former Associate Director Joanne Martin concerning the teaching of skills in law schools. They turned as well to the early findings of the *After the JD* project to explore the views of then-recent law school graduates on their legal education, especially with regard to law school and its role in the transition to practice.

Educating Lawyers' critique of legal education and its suggested changes echoed, in many ways, the earlier work of the ABA's 1992 *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*. That report—widely known as the MacCrate Report after Task Force Chair and former ABA (1987–88) and ABF President (1996–98) Robert MacCrate—appeared numerous times in the authors' discussion, especially in terms of bolstering the argument for more attention to teaching skills and the argument for more attention to professionalism and ethical substance. 

American Bar Foundation Hosts 2014 Summer Research Diversity Fellows



The 2014 Summer Research Diversity Fellows: Left to right, Pedro Alfonso, Jose Aguayo, Kaitlyn Williams, Elijah Porter, Jr.

The 2014 Summer Research Diversity Fellows arrived at ABF on June 9 to begin their eight-week residencies, studying law and social science. Chosen from a very competitive field of 200 undergraduates from across the US, the four finalists spent their summer working on research projects with ABF faculty and participating in an integrative seminar led by ABF Research Professor Stephen Daniels. In addition, the Fellows undertook a number of field trips to Chicago law offices, law schools, judges' chambers, the criminal courts and other real world venues that were the object of their studies.

Now in its 27th year, the program introduces a select group of talented undergraduates from diverse backgrounds to the rewards and demands of a research-oriented career in the field of law and social science. Most of the over 100 alumni to date have graduated from law school, and gone on to successful careers in law, academia, government and business.

For its financial support of the program in 2014,* ABF gratefully acknowledges AT&T. ABF is also grateful to receive funding from the Kenneth F. and Harle G. Montgomery Foundation, the Solon E. Summerfield Foundation, and the National Science Foundation in support of the program.

*As of August 5, 2014

Jose Aguayo, a native of Los Angeles, CA, is a rising junior at UCLA. He is a double major in History and Political Science with concentrations in American Studies and International Relations. Jose spent some time in Chicago before where he participated in a Pre-Law Institute at Chicago-Kent College of Law. Jose also served as an intern to Congresswoman Linda Sanchez (D-CA), and volunteered in Ms. Sanchez's re-election campaign. Traci Burch advised him on an independent project this summer, and he also worked with Victoria Saker Woeste on her project about speech and civil rights in the post-WWII era.

Pedro Alfonso, also from Los Angeles, is a rising senior at St. John's University in New York. He is a Government and Politics major with minors in Spanish and Rhetoric & Public Address. Pedro is very involved in writing associations and English societies. Among other responsibilities, Pedro serves as a Writing Fellow

at St. John's, in a faculty-student pedagogical program, which allows him to collaborate with a designated professor to develop writing assignments and methods of giving feedback to student writers. Last summer, he interned at the district office of Congressman Adam Schiff (D-CA), where he researched and wrote briefing memos for the Congressman and staff. Pedro worked with Robert Nelson this summer on his After the JD study of lawyers' careers.

Elijah Porter, Jr., from Atlanta, GA, is a rising senior at Fort Valley State University in Fort Valley, GA. Appointed one of 75 Historically Black College and University (HBCU) Ambassadors under President Obama's White House Initiative for HBCUs, he is majoring in English with a concentration in writing. Elijah is a drum major in the Fort Valley State Blue Machine Marching Band. He has interned in the Office of the Legislative Counsel in Atlanta, where he received firsthand experience of the

legislative process and drafted over 150 privileged resolutions for State Representatives and Senators during the 2014 Georgia General Assembly Session. Elijah worked with John Hagan this summer on Hagan's parental incarceration project.

Kaitlyn Williams, of Grand Prairie, TX, is a rising junior at Stanford University. She is a Public Policy major with a concentration in Law and the Legal System. Last summer Kaitlyn was selected to participate in Stanford's Public Policy Institute, and it was through this intensive seminar she became fascinated by the symbiotic relationship between law and public policy. Kaitlyn is a sprinter on the Stanford Varsity Track & Field team, and is a track team representative on the Cardinal Council, a coalition of scholar-athletes representing all of Stanford's varsity programs. She worked with Rebecca Sandefur this summer on her Access to Justice project.

The Summer Fellows visited the Center for Racial and Ethnic Diversity at ABA headquarters in Chicago.



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