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## Introduction: The MacCrate Report—Heuristic or Prescriptive?

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## INTRODUCTION: THE MACCRATE REPORT— HEURISTIC OR PRESCRIPTIVE?

Wallace Loh\*

There is a freight train gathering speed on the tracks of legal education, and it is called SSV—Statement of Skills and Values. This SSV stands as the centerpiece of the *Report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap*,<sup>1</sup> better known as the MacCrate Report, named after its chair, Robert MacCrate. The MacCrate Report has ignited a rational debate on curricular reform that is becoming increasingly intense. Viewed broadly, SSV may represent the greatest proposed paradigm shift in legal education since Langdell envisioned legal education as the pursuit of legal science through the case method in the late 19th century.

The disjunction between legal education and the legal profession is long-standing. It is rooted in the basic concept of academically strong, university-based law schools, which Thomas Jefferson conceived as the means for educating leaders for a republican society. As opposed to medical schools, where the clinical model of medical education is heavily supported by the federal government and teaching hospital revenues, law schools have developed a unique history, organization, and economics that prevents us from reasonably expecting American law schools to shoulder alone the responsibility of converting law students into full-fledged attorneys. The resulting gap between expectation and reality has long generated a nationwide litany of complaints and criticisms.

At the same time, when a law school turns primarily to the host university for identification, status, ideas, and criticism, it strains the symbiotic relationship between the academy and the bar. Practicing lawyers say legal education is too academic. Academic lawyers respond that university law schools are centers of learning and scholarship. Consider, for example, the different perspectives on appropriate curriculum articulated in a recent survey of University of Washington Law School alumni:

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1. Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter *MacCrate Report*].

A revolution in legal education is desperately needed. Class of '84.

I received a good education at UW, but the faculty spent too much time in useless theoretical discussion. Class of '88.

Need to focus more on lawyering skills. Develop a more practical curriculum. Class of '75.

I'm pleased to have graduated from a jurisprudential law school, not a trade school. Class of '78.

I do not approve of the trend towards an increasingly practice-oriented education. Class of '89.

Of course, the bedrock of legal education, the teaching of legal doctrine and analytical skills by the case method, has undergone significant change since the days of Langdell. Over the years, law schools have added skills instruction; clinics; jurisprudential, interdisciplinary, and comparative perspectives; and emerging fields of law, as well as alternative pedagogical methods. Much of this development has occurred in an evolutionary and ad hoc manner.<sup>2</sup> Law schools have tended to add to the curriculum rather than to restructure it fundamentally.<sup>3</sup> In the current era of budgetary constraints and the downsizing of higher education, however, any growth must take place primarily by substitution or consolidation, not by addition. Law schools

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2. See, e.g., Edward J. Imwinkelreid, *On Achieving Synergy in the Law School Curriculum*, 66 Notre Dame L. Rev. 739 (1991) (discussing the need to integrate clinical experience throughout the curriculum instead of adding isolated skills courses); Kristine Strachen, *Curricular Reform in the Second and Third Years: Structure, Progression, and Integration*, 39 J. Legal Ed. 523 (1989) (proposing a capstone-cornerstone program of progressive and integrated legal education).

3. An integrated planning approach would evaluate a proposal for a new course not only for the intrinsic value of the subject matter, but also for its fit into the curriculum as a whole. A curriculum committee considering the addition of, for example, an elder law course, would look beyond the demand for elder law expertise in the market. Is the topic currently unavailable or are portions taught in other classes such as trusts, wills, and estates or family law? Is it more efficient, both in terms of optimal learning and dollar expenditure, to teach the information dispersed through those other courses or consolidated into one? Will the new course create redundancies with other courses? Will the study of elder law require prior knowledge or skills suggesting it fall at the end of a prerequisite track? Are segments of the course appropriate for clinical skills training such as mediation? Of course, to undertake this type of thoughtful planning a law school must possess a clear vision of its curricular goals and must view each course—indeed, each piece of imparted knowledge—as a tool to achieve those goals through the interdependent, coordinated effect of all other courses and knowledge. See, e.g., David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. Legal Ed. 485 (1989) (outlining an integrated curricular model organized around the theme of legal ethics); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. Tol. L. Rev. 1 (1992) (advocating “holistic” curriculum reform).

need to effect a true division of intellectual labor by making disciplined choices about what they can do best.

Meanwhile, the ecology of the legal profession is also changing. The transformation in the demographic composition of the bar, the shifts in the supply and demand for lawyers in certain practice areas and geographic regions, and the public perceptions of lawyers all represent trends that fuel the debate sparked by the MacCrate Report on the substance and goals of the legal curriculum. At the center of that debate lies the concern common to both educators and members of the bar: Are law schools and the profession properly discharging their shared responsibility for the lifelong education of lawyers?<sup>4</sup>

## I. THE MACCRATE REPORT AND THE WASHINGTON LAW REVIEW SYMPOSIUM

The MacCrate Report represents the most comprehensive effort to date to bridge the perceived gap between law schools and the bar.<sup>5</sup> Because it is also the most important document on legal education of the past and probably of the next decade, the *Washington Law Review* organized on April 16, 1994, a symposium to discuss the issues raised by this Report. The Symposium posed the question: “The 21st-Century Lawyer: Is There a Gap to be Narrowed?”

The event commenced with a keynote address by Robert MacCrate,<sup>6</sup> whose summary of the Task Force’s work and the response generated by the Report provided the context for the discussions that followed. In the

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4. *MacCrate Report*, *supra* note 1, at xi–xii, 3. Most prominently voiced by Harry T. Edwards, this particular critical theme condemns the perceived “disjunction” between the skills and knowledge law students receive and those in fact required for the practice of law. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993). See also Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. Cal. L. Rev. 1231 (1991) (further blaming lawyer dissatisfaction on the perceived gap between education and practice).

5. Two prior studies of legal education, the 1921 Reed Report and the Cramton Report, created similar, yet more limited ripples in the professional community. See American Bar Association Section of Legal Education and Admissions to the Bar, *Lawyer Competency: The Role of the Law Schools, Report and Recommendations of the Task Force on Lawyer Competency* (1979) [hereinafter the Cramton Report]; Alfred Z. Reed, *Training for the Public Profession of the Law* (1921).

6. See Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap To Be Narrowed?*, 69 Wash. L. Rev. 517 (1994).

first of two panel sessions, Dean Paul Brest of Stanford Law School,<sup>7</sup> Lucy Isaki of Bogle & Gates in Seattle,<sup>8</sup> and the Honorable Harry T. Edwards,<sup>9</sup> took up the issue "Narrowing the Gap: Changes in Law School Curricula and Professional Training Programs." The second panel offered views from within the academy, as Professors Thomas Morgan,<sup>10</sup> Phoebe Haddon,<sup>11</sup> Carrie Menkel-Meadow,<sup>12</sup> and Burnele Powell<sup>13</sup> discussed "The Profile of a 21st-Century Lawyer: Skills and Values." The papers of these symposium panelists published in this special issue of the *Washington Law Review* provide a sampling of the rich discourse concerning not only the MacCrate Report, but also the general relation between legal education and the legal profession.

## II. SSV

The MacCrate Task Force approached its study inductively, first defining who the modern lawyer is and then determining what education was needed to produce that lawyer. This analysis mirrors the calls of Judge Harry T. Edwards for the need to closer align the education of law students with the actual practice of law, both as a means to ensure lawyer competence and to achieve the "ideal of ethical practice."<sup>14</sup> From its empirical studies, the Task Force formulated a compendium of ten lawyering skills and four professional values required of any "well-trained generalist . . . to practice law competently and professionally."<sup>15</sup> In brief, the "Fundamental Lawyering Skills" describe functions performed by lawyers in all or nearly all areas of legal practice: (1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4)

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7. Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527 (1994).

8. Lucy Isaki, *From Sink or Swim to The Apprenticeship: Choices for Lawyer Training*, 69 Wash. L. Rev. 587 (1994).

9. Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 Wash. L. Rev. 561 (1994).

10. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 Wash. L. Rev. 625 (1994).

11. Phoebe Haddon, *Education for a Public Calling in the 21st Century*, 69 Wash. L. Rev. 573 (1994).

12. Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 Wash. L. Rev. 593 (1994).

13. Burnele V. Powell, *Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age*, 69 Wash. L. Rev. 637 (1994).

14. See Edwards, *supra* note 9.

15. *MacCrate Report*, *supra* note 1, at 125.

factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute-resolution procedures; (9) organization and management of legal work; and (10) recognition and resolution of ethical dilemmas.<sup>16</sup> The “Fundamental Values of the Profession” formulate norms of ethical lawyering that call upon lawyers to: (1) provide competent representation; (2) strive to promote justice, fairness, and morality; (3) improve the profession; and (4) undertake professional self-development.<sup>17</sup>

The first three skills are basic skills, and it would be fair to presume that all law schools provide their students with a good grounding in these areas. The remaining seven skills are practice skills, and it would also be reasonable to assert that law schools vary widely in the extent to which they make training in these skills available to their students. Most schools today at least introduce some of their students to some of these practice skills.

At the same time, controversy continues as to whether law school is the best time and place to try to forge the complete lawyer as envisioned by the SSV. For example, the table below summarizes the responses of some 1,400 University of Washington Law School alumni as surveyed in 1992 regarding the skills and values that they deem important to their practice, as well as their assessment of the quality of law school instruction they felt they received in these areas.

	How important to your practice? (5 = very important)	How well did the Law School educate you? (5 = very well)
Critical thinking/analysis	4.70	3.91
Legal writing	4.40	3.78
Legal research	4.15	4.03
Knowledge of substantive law	4.14	3.98
Professional ethics	4.10	3.48
Advocacy skills	4.02	3.06
Interviewing skills	3.85	2.29
Leadership skills	3.78	2.41
Knowledge of procedural law	3.77	3.44
Social responsibility	3.62	2.61

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16. *Id.* at 138–40.

17. *Id.* at 140–41.

I would conjecture that the pattern—if not the absolute value—of these ratings would be consistent in most major law schools. That is, law schools are quite successful in teaching substantive law and the basic skills of problem-solving, legal reasoning, and writing, but they have not devoted comparable attention to practice skills and to the social and moral context of the law. The recognition of the need for both “theory/analysis” and “practice” as components of legal education has spurred much of the recent experimentation in teaching methods and curricula in the academy.

The Task Force argues, rightly, that the development of these skills and values neither begins nor ends with three years of law school. There is a continuum of education between law school and the bar, not a gap, and both share responsibility for the professional development of lawyers. Because SSV is deemed to represent the principal skills and values of the profession, the Report suggests that SSV provides a yardstick for examining the law school curricula. To implement SSV the Task Force thus proposes the creation of an American Institute for the Practice of Law, a § 501(c)(3) corporation for the development of model curricula and interchange between practitioners, continuing legal education providers, and academics.<sup>18</sup> It has also issued a free copy of SSV to every entering law student in the country as an aid in course selection.

### III. THE MACCRATE REPORT'S VISION OF THE PROFESSION

The Task Force accumulated an enormous amount of data regarding gender and ethnic diversity,<sup>19</sup> practice areas,<sup>20</sup> and practice settings<sup>21</sup> of the profession.<sup>22</sup> The Report thus constitutes a valuable resource on the

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18. The Association of American Law Schools has announced plans to co-sponsor with the ABA the proposed American Institute for the Practice of Law. *Statement of the Association of American Law Schools on the MacCrate Report 2* (May 18, 1992) [hereinafter *AALS Statement*]. See also Larry Smith, *Task Force Publishes Study, As Planners Ponder New Bridge-the-Gap Institute*, 12 No. 8 *Law. Hiring & Training Rep.* 10 (Aug. 1992), reprinted in *Westlaw Law Practice Index* (reporting Robert MacCrate's predictions an institute created by a merger of the ABA's Division of Professional Education and the ALI-ABA).

19. *Id.* at 18–27.

20. *Id.* at 40–46 (specializations), 52–57 (poverty law), 70–72 (public interest law), 95–102 (public law).

21. *Id.* at 29–102.

22. Prior empirical studies provide useful generational contrasts in not only the responses, but also in the questions. See Richard L. Abel, *American Lawyers* (1989); Frances Kahn Zemans & Victor G. Rosenblum, *The Making of a Public Profession* (1981). For empirical studies of specific segments of the bar, see Linda E. Davila; *The Underrepresentation of Hispanic Attorneys in*

sociology of the profession. The Report's conclusions from this data, however, present a narrow definition of the profession, and, in turn, its recommendations, formed in reliance on this definition, represent an equally limited view of legal education. Of further concern is the Report's elevation of its perspective above all others.

The Report relies on the traditional definition of the practice of law as a unitary profession.<sup>23</sup> Indeed, the Report argues that the uniform approach to legal education of the SSV is necessary to return the increasingly fragmented profession to this unitary model.<sup>24</sup> The notion of a unitary legal profession is, of course, a classic rationale for professional self-regulation and all the privileges that entails.<sup>25</sup> Nevertheless, the legal profession is in fact stratified and specialized in its functions, and not all lawyers are cut from the same mold.

As Menkel-Meadow points out in her symposium essay, the MacCrate Report vision is incomplete.<sup>26</sup> She argues that the SSV is predicated on an adjudicatory-adversarial model of lawyering, thereby magnifying "litigation-oriented" skills and miniaturizing other skills and values.<sup>27</sup> Morgan, meanwhile, emphasizes the need to create not a vision of what the legal profession is, but what it will become in the future.<sup>28</sup> Haddon goes a step further to assert a vision of what the legal profession should become.<sup>29</sup> Moreover, not only should we educate students in the skills and values necessary to succeed in that future legal profession, which is for her a vision of a public profession, but also law schools should act as

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*Corporate Law Firms*, 39 Stan. L. Rev. 1403 (1987); Cynthia Fuchs Epstein, *Women and Professional Careers: The Case of the Woman Lawyers* (1969); John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 Stanford L. Rev. 1209 (1988).

23. *MacCrate Report*, *supra* note 1, at 110–111.

24. If a single public profession of shared learning, skills, and professional values is to survive into the 21st century, the law schools together with the bar and the judiciary must all work for the perpetuation of core legal knowledge together with the fundamental lawyering skills and professional values that identify a distinct profession of law throughout the United States. *Id.* at 120.

25. The MacCrate Report relies on the history of the development of the bar to support its definition of a unitary profession, but fails to address whether such an ideal is either viable or desirable. *Id.* at 103–111.

26. Menkel-Meadow, *supra* note 12, at 8–10.

27. *Id.* at 13 n.54.

28. Morgan, *supra* note 10, at 8–10.

29. Haddon, *supra* note 11, at 1.



reformers of the legal profession by teaching skills and values to change the way we practice law.<sup>30</sup>

The variety of visions suggested by these authors underscore the value of the MacCrate Report in stimulating debate. By advancing its definition of the legal profession, the Report has succeeded in provoking thoughtful examination of what it means to be a lawyer and how that meaning will change over time. The dialogue on the preparation of lawyers, however, must be predicated on a broad conception of lawyers' roles.<sup>31</sup> Preparation must involve not only the acquisition of knowledge, skills, and values, but also theory and policy. Law schools must further create a seamless integration of these components so as to transcend the present dichotomy between "trade school" and "ivory tower." What we teach and how we teach it depends on each school's vision of the profession and of the world of tomorrow—a *fin-de-siècle* vision that takes into account current and anticipated trends in society, the bar, and scholarship, as well as fiscal retrenchment, the implications of information technology, the context of economic globalization, ethical preoccupations, and interdisciplinary, critical, and multicultural perspectives.

#### IV. USING SSV: THE RISK OF "MCDONALDS-IZATION"

At its best, the MacCrate Report stands as a seminal contribution to the continuing discourse among the academy, the bench, and the bar regarding the purposes and means of legal education. Whether one embraces or denounces SSV, it provides a stimulus for institutional self-reflection on the goal of developing competent and principled lawyers. In fact, an AALS Survey on Reactions to the MacCrate Report found that 92% of the responding law school deans were "likely" or "very likely" to use the Report for this purpose of self-reflection by their faculties and administrations.<sup>32</sup>

The concern regarding the formulation of the SSV lies in its focused conception of a single set of skills and values without sufficiently acknowledging competing visions based on different social priorities, pedagogies, and images of the profession. A second concern arises from

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30. *Id.*

31. See *AALS Statement*, *supra* note 18.

32. *AALS Survey on Reactions to the MacCrate Report, Analysis of Survey Responses*. Of the 175 AALS-member or "fee-paid" law schools deans receiving this two-page questionnaire, 67 responded. *Id.*

the potential misuse of the SSV in curricular reform and law school accreditation. Establishing the minimal competencies for practice is bound to put pressure on law schools to teach this set of skills, regardless of the opportunity costs of such instruction and of the capability and resources of law faculties to offer it.

The excellence of American legal education is due precisely to its diversity and relative autonomy. Standardization of the curriculum based on SSV would be short-sighted. One can suggest enhanced instruction in skills and professional values without racking such instruction to a Procrustean bed. Because of varying needs, missions, and resources, every law school should be, to paraphrase Justice Brandeis, a laboratory for curricular experimentation. Although it states that SSV is “not a blueprint for performance in the accrediting process,”<sup>33</sup> the MacCrate Report invites law schools to address SSV in their self-study reports for accreditation, and it urges reference to the SSV in the Interpretations of the ABA Standards.<sup>34</sup> The Report itself is heuristic, a welcome invitation to self-assessment, but some of its recommendations for the implementation of SSV are prescriptive in tone and create an implied canon for accreditation.

Given the conflicting signals with the Report, it comes as no surprise that, within a year of its publication, attempted regulatory initiatives have arisen from misuses of or the adverse implications from the Report’s recommendations. The Delaware State Bar tried (and failed) to condition bar admission upon SSV training. The ABA House of Delegates in February 1994 adopted a resolution of the Illinois State Bar Association—over the objections of the ABA’s own Section on Legal Education and Admission to the Bar, the AALS, and Robert MacCrate himself—that recommended amendment of law school accreditation standards to incorporate SSV.<sup>35</sup> Among law school deans, more than one-half of the respondents to the AALS Survey reported that they were likely (43.9%) or very likely (15.2%) to use SSV as a measure of performance in the accreditation process, despite the feeling among 64.2% that such use was undesirable.<sup>36</sup>

The challenge to the academy and the bar is to find ways of making the Report a useful and meaningful document. As such, the Report

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33. *MacCrate Report*, *supra* note 1, at 128.

34. *Id.* at 267, 331.

35. See Ken Myers, *Timing Questioned as Bar Group Calls for Accreditation Change*, Nat’l L.J., March 8, 1993, at 4.

36. *AALS Survey on Reactions to the MacCrate Report, Analysis of Survey Responses*.

becomes an opportunity for reexamining education along the entire continuum from law school application to practice as an experienced attorney, rather than a potential source of intrusive and stifling regulation. A further challenge lies in financing widespread skills instruction in law schools, undoubtedly a far more expensive approach to education than traditional doctrinal teaching. Making this challenge all the more daunting are the most wrenching budget cuts in higher education generally, including legal education, in over a generation and the expectation that no increase in resources will become available in the foreseeable future.

Perhaps, as Burnele Powell's essay observes, "the future rests in the hands of those who can best adapt to it."<sup>37</sup> It is a measure of progress that the academy's objections to SSV are more pragmatic than intellectual. So long as law schools and bar associations do not narrowly construe SSV as the criterion for a standardized curriculum or as the baseline for minimum competency, it can serve an invaluable role as a catalyst for self-examination and innovation within legal education. For example, Paul Brest and Linda Krieger have developed an innovative curricular model, "an experiment in educational engineering,"<sup>38</sup> that expressly aims at developing "non-legal" skills and values through "non-legal" teaching tools.<sup>39</sup> While their interdisciplinary approach to lawyering skills does not exactly comport with the SSV model, it surely complements and enriches it by inviting creativity in curricular development.

## V. SSV: A JOURNEY, NOT A DESTINATION; A PROCESS, NOT AN OUTCOME

Some academics and practitioners will undoubtedly hail the MacCrate Report as the Magna Carta of clinical legal education; others will pillory it. Regardless of one's agreement with the Report's recommendations, however, the force of its views in promoting and shaping debate within the profession is undeniable. No other major report on legal education has succeeded in creating an impact as profound as the MacCrate Report.<sup>40</sup> Amidst the brewing ferment of criticism within and about the legal profession, the Report has provided a much needed impetus for

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37. Powell, *supra* note 13, at 11.

38. Brest & Krieger, *supra* note 7, at 30.

39. *MacCrate Report*, *supra* note 1, at 3-5.

40. *See supra* note 5.

critical discourse on the education of the next generation of lawyers. The great accomplishment of the Report lies simply in the discussions surrounding it. There is no magical fix or formulaic solution. But to the extent that the Report brings together scholars, practitioners, teachers, and judges in forums such as this Symposium to debate the future of legal education, the Report has more than succeeded.

I conclude these comments on the debate stimulated by the MacCrate Report with a Chinese parable. There once was a farmer who on his deathbed told his children that he had buried a treasure in his fields. The children went out into the fields and dug and dug in search of the treasure. They found none, because there was no buried treasure. But in the course of their digging, they turned over and improved the soil, so that the harvest was bountiful, and the farm prospered.