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Keynote Address—The 21st Century Lawyer: Is There a Gap to Be Narrowed?

Robert MacCrate

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KEYNOTE ADDRESS—THE 21ST CENTURY LAWYER: IS THERE A GAP TO BE NARROWED?

Robert MacCrate*

This law school symposium on the Twenty-First Century Lawyer reflects a fundamental shift in the focus of legal education within the academy—from law in the abstract toward the reality of law in the daily work of lawyers. While holding firm to their scholarly mission, law schools are giving increasing attention to the world of lawyer performance and the needs of their students to be prepared to participate effectively in the legal profession.

The 1992 Report entitled *Legal Education and Professional Development—An Educational Continuum*, by a task force of the American Bar Association Section of Legal Education and Admissions to the Bar, which I was privileged to chair, helped crystallize this change in focus and is the precipitating cause for this symposium.¹ A glance at what has gone before can help place the discussion in context.

Seventy-five years ago, social scientist Alfred Z. Reed chronicled legal education in America in his seminal study entitled *Training for the Public Profession of the Law*.² Contemporaneously, Elihu Root, a former U.S. secretary of state and ABA president, chaired the Association's Section of Legal Education and led a movement within the ABA "to create conditions which will tend to strengthen the character and improve the efficiency of persons to be admitted to the practice of law."³ The result was the establishment of standards and the creation of a process for accrediting American law schools.⁴

These actions were, in a sense, the culmination of developments over more than a century, which led to the creation of a single profession of

* Chairperson of Task Force on Law Schools and the Profession: Narrowing the Gap, Section of Legal Education and Admissions to the Bar, American Bar Ass'n; Retired Member, Sullivan & Cromwell, N.Y., New York.

1. Section on Legal Educ. & 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*].

2. Alfred Z. Reed, *Training for the Public Profession of the Law* (1921).

3. Elihu Root, quoted in Susan K. Boyd, *The ABA's First Section—Assuring a Qualified Bar* 24 (1993).

4. *Id.*; see also Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 112–130 (1983).

law in America. It was and still is a profession of many dimensions. One central feature has been the notion of law as a public calling, reflected in the title of Reed's study. Eminent law teachers for two centuries have recognized the public mission of the law and have sought to nurture that public dimension in their students—from George Wythe at William and Mary to Francis Lieber at South Carolina and Columbia and Roscoe Pound at Nebraska and Harvard.⁵

Other salient features of the modern profession are of more recent origin. The organization of the bar into bar associations at the local, state, and national level began in the 1870s.⁶ With the authority of the courts standing behind the profession, requirements for admission to the bar were established, bar examinations and admission processes were provided for, ethical rules were promulgated, and the control of lawyer discipline and disbarment was exercised by the courts or delegated to the bar under court supervision.⁷

During this same period, the education of lawyers moved, with strong support from the judiciary in the several states, from apprenticeships in lawyers' offices to law schools.⁸ Legal education became a respected academic discipline that sought to impart a basic body of knowledge through a core curriculum. It was taught in a Socratic manner in order to develop analytical skills, commonly encapsulated in the phrase "to think like a lawyer."⁹

It is against this background that the publication of Professor Reed's study and the ABA's establishment of law school accreditation in the early 1920s can be seen as culminating the developmental stage in the creation of a single profession of law in America. What followed the publication of Professor Reed's study was a half century of epic change in the law and in the profession, during which the successes and shortcomings in the education of lawyers have been viewed from many different perspectives.

After a decade of teaching at Harvard, Felix Frankfurter in the late 1920s offered one perspective. He seemed well satisfied with what law schools were doing when, with a large measure of hyperbole, he wrote,

5. See Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 *Duke L. J.* 741 (1992); Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 *J. Legal Ed.* 339 (1992).

6. *MacCrate Report*, *supra* note 1, at 105–106.

7. *Id.* at 116–117.

8. *Id.* at 107–108.

9. *Id.* at 111–114, 233–234.

“In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”¹⁰

However, during the 1930s, Jerome Frank at Yale struck a discordant note, questioning how well law schools were preparing their students for the realities of lawyers’ work. He asked, “Why not a clinical law school?” to give law students greater direction in preparing them to participate effectively in a public profession.¹¹ Karl Llewellyn at Columbia Law School, writing about what was wrong with law schools, confidently asserted, that “no faculty, and, I believe, not one per cent of instructors, knows what it or they are really trying to educate for.”¹²

Later, during World War II, Llewellyn chaired the Curriculum Committee of the Association of American Law Schools that sought to promote in the law schools an awareness of the interconnectedness between the law and what lawyers do. To that end, Llewellyn urged the development of an inventory of the capabilities of working lawyers in order to determine how such capabilities might be taught to law students.¹³ Nonetheless, it was not until the 1980s that a systematic study was undertaken to identify the lawyering skills and the professional values that lawyers need to acquire.

In 1955, Dean Erwin Griswold observed that it was “no longer possible for a student to know all the law” and urged law schools to reverse the tendency to teach “less and less about more and more.”¹⁴ Noting that faculty and students were faced with great growth in law and its complexities, Dean Griswold called for new materials and new approaches “to teach more and more about less and less” with a focus upon the human relations element in lawyering.¹⁵ He also wrote of the need for law students to learn to address new matters, how to undertake things they had not done before (without being unduly frightened), and to accomplish results in the client-centered world of lawyering.¹⁶

10. Letter from Felix Frankfurter to Rosenwald (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), quoted in Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 156 (1989).

11. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933).

12. Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651, 653 (1935).

13. Committee on Curriculum, *The Place of Skills in Legal Education*, 45 Colum. L. Rev. 345 (1945).

14. Erwin N. Griswold, *Law Schools and Human Relations*, 1955 Wash. U. L. Q. 217, 230.

15. *Id.*

16. Erwin N. Griswold, *Legal Education: Extent to Which Know-How in Practice Should Be Taught in Law Schools*, 6 J. Legal Educ. 324, 326 (1954).

During the 1960s, increasing public scrutiny was focused on both the legal profession and the adequacy of its performance in distributing legal services, including legal services to those unable to afford a lawyer.¹⁷ It was a time when important court decisions and legislative enactments led the way for a great expansion in the delivery systems of both civil and criminal legal services.¹⁸ It was also the time when the concept of legal education for professional responsibility was brought forcefully to law schools by the Ford Foundation's Council on Legal Education for Professional Responsibility (CLEPR) and its ten-year program supporting the development of clinical legal education in law schools.¹⁹

The growth of the skills and values curriculum in law schools during the 1970s is unquestionably the most significant development in legal education in the post-World War II era. Clinical courses, both in simulated and live-client settings, came to occupy an important place in the curricula of virtually every ABA-approved law school.²⁰ Law schools, through their clinical programs, demonstrated their capacity to teach lawyering skills that had previously been considered incapable of being taught by means other than through direct practice experience.²¹

Nonetheless, despite the innovations and recognized improvement in lawyer education since the advent of CLEPR, disjunctions persisted between legal education and the needs of lawyers and judges.²² The principal focus within the law school community remained upon law in the abstract, and only slowly did the academy turn toward the reality of law in society and in the daily work of lawyers. When Harvard Law School launched the Program on the Legal Profession in the early 1980s, the chair of the faculty committee for the program acknowledged, "It is surprising that the role of lawyers in the United States and the role of law

17. See Murray L. Schwartz, *Changing Patterns of Legal Services, in Law in a Changing Society* (Geoffrey Hazard, ed. 1968) 109-124.

18. See *NAACP v. Button*, 371 U.S. 415 (1963); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See also *The Criminal Justice Act of 1964*, 18 U.S.C. §3006A (1988); Earl Johnson, Jr., *Justice and Reform* 39-70 (1978).

19. Council on Legal Education for Professional Responsibility, *Fifth Biennial Report 1977-1978 at 7-43* (1979).

20. See *MacCrate Report*, *supra* note 1, at 232-272.

21. *Id.* at 234, 267-268.

22. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).

in our business and politics has not been the focus of more sustained inquiry and analysis.”²³

A national conference on Professional Skills and Legal Education in 1987 celebrated twenty years of effort and achievement since the Ford Foundation, through CLEPR, set in motion the clinical education movement. At the conference, Justice Rosalie Wahl of the Minnesota Supreme Court, the Chairperson of the ABA Section of Legal Education and Admissions to the Bar, recalled the celebratory mood of a prior gathering in 1973 to celebrate the first five years of the CLEPR-stimulated movement. She described how participants had been “filled with heady exhilaration, because it seemed so clear that legal education could never again go back to the old approach of pure academic training.”²⁴

Justice Wahl asked participants to recommit themselves “to certain basic principles,” including that of teaching “students how to learn systematically from experience and simultaneously to educate them in a broader range of legal analysis and skills than have traditionally been taught.”²⁵ She proceeded to inquire rhetorically, “Have we really tried to determine . . . what skills, what attitudes, what character traits, what qualities of mind are required of lawyers?”²⁶ Justice Wahl went on to say that until the entire profession had a clearer vision of the answer to these questions, further progress in relating legal education to the needs of lawyers and judges and the advancement of the profession as a client-centered public calling would be thwarted.²⁷

The following year, Justice Wahl called our Task Force into being and charged us with finding answers to the rhetorical questions she had posed. We approached our task from a quite different direction than prior studies of legal education. We started by looking, not at law schools, but at lawyers—the total profession for which law graduates must prepare.

Part I of our Report sought to provide a comprehensive overview of the legal profession today: the explosion in the number of lawyers and in

23. Phillip Heymann, *The Program on the Legal Profession* (Harvard University publication) (on file with the Washington Law Review).

24. Rosalie E. Wahl, Remarks at the National Conference of Professional Skills and Legal Education (October 16–18, 1987), in *Occasional Papers of the Section of Legal Education and Admissions to the Bar*, No. 1 (1988) at 12.

25. *Id.* (quoting Anthony Amsterdam, Remarks at the McGeorge Conference on Legal Education and the Profession: Approaching the 21st Century).

26. *Id.*

27. *Id.* at 12–15.

legal services; the striking change in the gender make-up of the profession and its accompanying new gender perspectives; the belated opening of the profession to minorities and the elusive goal of equal opportunity; the great differentiation in the work lawyers do in diverse practice settings; and how the idea grew of a single profession of law through the organization of the bar, the common unifying experience of law schools, and the assumption by the judiciary of the role of the profession's gatekeeper.²⁸

We believed that our basic mission was to help build a better profession. Thus, against the background of an all-inclusive overview of the profession, we sought to extrapolate from the wide range of lawyer experience a conceptual analysis—set forth in Part II of the Report—of the lawyering skills and the professional values that lawyers should seek to acquire. We called it “A Vision of the Skills and Values New Lawyers Should Seek to Acquire.”²⁹ We urged that this statement of skills and values be continually viewed as a work in progress to promote discussion and reflection, both in the academy and in the profession at large—just as this symposium is doing.³⁰

In order to develop the best and most useful statement of skills and values possible, we widely circulated a tentative draft of the statement in the summer of 1991 for comment on both its content and the uses to which it might be put. With the benefit of the comments we received—some from participants in this symposium—we prepared the “Statement of Fundamental Lawyering Skills and Professional Values” set forth in the final Report.³¹

The statement first analyzes ten generic skills that the task force concluded were fundamental to competent performance by lawyers. The ten skills are:

- problem solving;
- legal analysis and reasoning;
- legal research;
- factual investigation;
- oral and written communication;
- counseling;

28. *MacCrate Report*, *supra* note 1, at 111–120.

29. *Id.* at 121–221.

30. *Id.* at 130–131.

31. *Id.* at 135–221.

- negotiation;
- understanding the procedures of litigation and dispute resolution;
- organizing and managing legal work; and
- recognizing and resolving ethical dilemmas.³²

The vision of lawyering underlying this statement recognizes that individual skills cannot be neatly compartmentalized, either in their teaching or in their use, nor can they be separated from one another nor from the doctrinal subject matter to which they are applied. There are numerous relationships among individual skills. For example, the skills of counseling, negotiation and litigation/Alternative Dispute Resolution, all may require application of the skills of legal analysis, legal research, factual investigation, and communication.³³ Thus in providing a conceptual analysis of separate skills, we were not suggesting a catalog of separate courses to be taught nor a catechism for students to memorize. Rather, we were offering a benchmark or checklist against which to judge the inclusiveness of a program of skills instruction or, for a student, the extent of one's exposure to training in the skills needed in practice.³⁴

The analysis of the ten generic skills was linked intimately in the statement to an exposition of four central professional values. These values rest on four cardinal responsibilities that generations of lawyers came to acknowledge as the legal profession developed its identity. The values identified in the statement and the responsibility related to each are:

- the value of providing competent representation—the responsibility to clients;
- the value of striving to promote justice, fairness, and morality—the public responsibility to the justice system;
- the value of maintaining and striving to improve the profession—the responsibility to the legal profession; and
- the value of professional self-development—the responsibility to one's self.³⁵

32. *Id.* at 138–140.

33. *Id.* at 136–137.

34. *Id.* at 127–130.

35. *Id.* at 140–141, 207–221.

There will undoubtedly be differences among the participants in this symposium as to when, by whom, and in what manner individual skills should be taught and as to the means and methods by which professional values are most effectively instilled. A recognition of the desirability of varied approaches and experimentation is the very basis for the educational continuum that the task force envisioned.

Early in their deliberations, the members of the task force concluded that the skills and values of competent and responsible lawyers are developed along a continuum that neither begins nor ends in law school. Rather, the development starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career.³⁶ Accordingly, the task force visualized legal educators, practicing lawyers, and members of the judiciary as being engaged in a common and continuing enterprise—the education and professional development of members of the legal profession.³⁷

The participants in this common enterprise have different capacities and different opportunities to impart to law students and lawyers the skills and values expected of them in the practice of law. As we strive to create a better, more competent, more responsive, more caring, and more inclusive public profession of law, I suggest that each member of the legal profession is presented with a challenge. The challenge is to examine—each in one's own sphere of responsibility—how to contribute to building the educational continuum.

The ABA Coordinating Committee on Legal Education is encouraging State Bars to bring together the law schools, the organized bar, and the judicial regulators in their states to explore the roles each can play in building the educational continuum of professional development. There is no single correct way to construct such a continuum. Planning must take account of available educational resources; the different educational missions of individual law schools; the reasonable expectations and professional needs of the law students and new lawyers with whom we deal; the potential educational value of the work experience of law students; the availability of transition education in law offices and in bar-sponsored programs; as well as the scope, quality, and availability to lawyers in practice of continuing legal education. It is essential that the bar be committed to the process—by sharing its experience; working constructively with the academy, the bench, and admitting authorities;

36. *Id.* at 3.

37. *Id.*

and accepting an appropriate portion of responsibility for the professional development of its current and future members.

I am very grateful to the University of Washington School of Law for promoting through this symposium the systematic examination of the education of lawyers from the perspective of building a better profession in the twenty-first century. Against the background of a profession experiencing epic change, the task force Report invites inquiry into the goals and methods of legal education along this entire continuum of the lawyer's professional development. The design of this symposium stimulates such inquiry and provocative responses.

The first segment directs inquiry into perceived gaps between law school curricula and professional training. Paul Brest and Linda Krieger respond by describing innovative law school instruction that seeks to teach professional judgment for problem-solving and decision-making.³⁸ In keeping with the notion of the Statement of Skills and Values that it is a work in progress, I welcome ideas such as these to contribute to its further development. Practitioner Lucy Isaki surveys the search for ways in which the practicing bar can contribute to the learning process in the transition from law school to practice, emphasizing the mentoring responsibility of every practicing attorney for those entering the profession.³⁹ Circuit Judge Harry Edwards reminds us of unhealthy tendencies among law faculties and among the practicing bar to subvert their shared responsibility for building a better profession. He warns law teachers against disdain for the practice of law and practitioners against a preoccupation with maximizing profit from what should continue to be a public calling.⁴⁰

The second segment of the symposium shifts the focus of inquiry to the future and to the skills and values of the twenty-first century lawyer. Thomas Morgan's speculation upon the economic realities of law practice and lawyering in the next century⁴¹ reminds us of the abiding conflict within a profession of service—between the aspiration to serve and the incentive to profit. Only a profession instilled with the values of both a private duty and a public calling, such as those set forth in the

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

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

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

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

Statement of Skills and Values, can hope to maintain a measure of equilibrium between the conflicting impulses and preserve the idea of a competent, client-centered, and caring professional of law. Phoebe Haddon underscores the importance of beginning in the first year of law school to seek to instill the values of a public calling.⁴²

Burnelle Powell focuses upon the changing environment in which law will be practiced which will require greater attention to interdisciplinary and multicultural issues.⁴³ From the perspective of an accomplished clinician, Carrie Menkel-Meadow looks forward to effective professional education of the future that will be all-inclusive: cognitive, experiential, affective, normative, and technical.⁴⁴

The focus of all participants on the role of lawyers as problem-solvers confirms the centrality of the skill of problem solving to the lawyer's calling and to the role of lawyers in society. It may well be in the end that the survival of a distinct profession of law in the United States will turn on how effective and enlightened the public perceives the profession to be in this fundamental skill of problem solving—both for clients and for society at large.

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

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

44. 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).