Legal Education Reform: An Analysis of the Current State of the American Legal Education System Post MacCrate

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LEGAL EDUCATION REFORM: AN ANALYSIS OF THE CURRENT STATE OF THE AMERICAN LEGAL EDUCATION SYSTEM POST MACCRATE

By
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A thesis submitted to the faculty of the University of Mississippi in partial fulfillment of the requirements of the Sally McDonnell Barksdale Honors College.

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Approved by
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I dedicate this thesis to my father Todd “Ike” Kiefer

who is a good man, a great father, and an excellent editor.
Acknowledgements

I credit Chuck Smith for inspiring the idea for this thesis. It has been a long endeavor that has brought me on an exploration of the legal field and given me some insight into what my future may hold. Special thanks to John M. Czarnetzky for advising my thesis. It’s not an easy or small task to guide an undergraduate student through the process of formulating, creating, and editing such a document. Lastly, I would like to thank Robert MacCrate, John Burwell Garvey, and all the other legal scholars and professionals that have worked and continually work to improve American legal education. Their work and legacy will be appreciated and remembered.
ABSTRACT

MATTHEW TODD KIEFER: Legal Education Reform: An Analysis of the Current State of the American Legal Education System Post MacCrate

(Under the direction of John M. Czarnetzky)

The legal education continuum in the United States is under scrutiny from external and internal forces. This thesis examines a wide range of legal reports that focus on the current state of the most important part of the continuum, law schools. It specifically asks the question whether there is need for significant and possibly comprehensive change in law schools and if so what those changes would need to be. The thesis first explores the history and formation of legal education in America and its regulatory associations. Then it focuses on the MacCrate Report as comprehensive tool for understanding the legal profession and its legal education system. Afterward, current legal reports in support of change or against change to law schools are reviewed, analyzed, and presented. The case for significant change to the system far outweighs the cries to keep law schools the same. In summation, law schools need to more appropriately balance theory, practice, skills, and value elements throughout law school teaching. Right now, theory is too heavily pushed within the classroom at the cost of developing the other elements. Newer instruction methods and education policies should be put in place to better the system. A myriad of recommendations are promulgated including implementing a different model for legal education and fostering more genuine student mentoring programs.
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Legal Education Reform: An Analysis of the Current State of the American Legal Education System Post MacCrate

The goal of the Legal Education Continuum: “To promote excellence in the practice of law, addressing the entire process by which lawyers acquire and refine lawyering skills and professional values required for competent and responsible practice in a changing profession”

- MacCrate, 413

Focused Thesis Question: Do law schools adequately prepare their students to practice law and be client ready, and if not, what can be done to “narrow the gap?”

I. Executive Summary

This thesis is an examination of the American legal education system, namely law schools. It attempts to answer the question of whether they are currently structured to best prepare law students to competently and responsibly practice law, or if significant, possibly institutional-level change is needed to achieve that objective. The examination is a three-pronged approach that first reviews the history of legal education, then the MacCrate Report, and finally Post-MacCrate developments. In summary, this paper concludes that law schools do prepare students for certain aspects of practicing law such as approaching a situation from a proper legal perspective, but fail to adequately prepare most law students for responsible and competent practice. Legal education does need significant and institutional-level change to shift from the current paradigm of Langellian case method theory-centric instruction to fully-integrated theory, practice, and values-
blended instruction. There are many already successful alternative models, such as the Daniel Webster Scholars Honors Program, that better prepare future law professionals, and that the ABA and member law schools should emulate. Additional specific recommendations to improve U.S. legal education include more appropriate assessments of students, more law faculty who regularly practice, more specialization in law schools, and more skills, values, and ethics training during all three years of law school. Shifting the balance to less theory and more practice is the better, smarter solution.
II. Brief History of Legal Education & Important Legal Associations in the United States

a. Early American Legal Education

Before the U.S. was an independent nation, legal professionals in the colonies were trained in England. By the 1730s a formal apprenticeship program was created in New York, but its format was completely unique. At first it was a seven-year clerkship program. In the 1750s this changed and the requirement became a four year college degree followed by a five-year clerkship and examination. This system required the students to teach themselves and study the law through experience with the guidance and mentoring of the lawyer in charge. Clerks of this system were very well-versed in day-to-day law office operations, but this system did warrant some serious criticisms. A problem with this system that still rears its head today is the use of clerks for menial tasks that are time-consuming and do little to develop the student’s skills. Originally, such tasks might include copying documents by hand all day instead of learning legal maxims and analytical reasoning. This system depended upon the lawyers being diligent mentors who taught their clerks thoroughly and cared for their futures, which often was not the case.

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2 Id. at 439
This particular system of apprenticeship was eventually deemed insufficient to produce capable lawyers.³

Many of the first formal law schools started out of the offices of successful lawyers who had proved themselves to be effective mentors and therefore were in high demand.⁴ To serve this demand, many of these lawyers spent more time teaching law than practicing it. The next evolutionary step came with the development of formal law faculties at universities starting with William and Mary College in 1793.⁵ This first law degree called a Bachelor of Law. Many if not all early law programs were primarily focused on instruction through study of the philosophical teachings of great works including the Bible, Cicero, Aristotle, Adam Smith and many more.⁶ Study of these early law programs has led some legal professionals and historians to believe that they were tailored more in preparing their students to be statesman first and lawyers second.⁷

By the mid-1800s two types of law schools existed. The first type were practical law schools which were composed of legal practitioners teaching apprentices the necessary skills and values that the law field demanded to practice effectively. The second group comprised theory and philosophy-based schools that existed at universities who believed that practical skills would come from subsequent experience on the job. A divergence of thought regarding the approach to be taken in teaching law had its genesis in Harvard

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⁶ Moline, supra, at 794
⁷ Id. at 794
lectures by Supreme Court Justice Joseph Story. He vocally promoted a more scientific study of law in America.8

b. Langdell’s Revolutionary Influence on American Legal Teaching

American legal education has been shaped by many prominent figures, but none more instrumental or important than Christopher Langdell. Born in New Boston, New Hampshire to a family of no special social standing in 1826, Langdell went to college from 1848-50 and law school from 1851-54, both at Harvard. After being a practicing lawyer in New York City for about 16 years – though neither prominent nor well-known – he was appointed to the faculty of Harvard law in January of 1870. He quickly rose to the position of Dean later that year, and it was from this position that Langdell went from being an unknown legal mind to the father of legal education in America.

As Dean of the Harvard Law School, Langdell forever influenced the structure and format of the American legal education system. During the 1870s he remodeled the administration and instruction format of the law school. He specifically changed the philosophy of how professors and students should think, research, and understand the law. Prior to Langdell, law was conceived of as a technical craft to be mastered, and students were taught the body of law and its historical origins and underpinning logic. It was a straightforward, engineering-like approach to law that could be summarized in three words: “here it is.” Langdell’s revolutionary contribution was to view law as a progressing science worthy of experimentation and innovation, not just application. He proposed a pragmatic and empirical approach with principles of philosophy and logic to guide innovation in law. He then instituted a new style of teaching law that used the

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8 Moline, supra, at 800
Socratic method, where dialectical reasoning, debate and inference could be weighed along with the traditional method of studying actual judicial decisions. This style and structure of teaching is today called the “case method” and was his greatest contribution to American Law.⁹ No other law school utilized this method of teaching until 1890.

Not only was Langdell the man who fundamentally changed the way law was taught, he also changed how law students were graded. As Dean, Langdell helped rectify a common problem of equity in the grading of students. Students who came from more privilege and social standing than their peers often received higher grades than merited solely by their work. To fix this, Langdell implemented the policy of blind grading. Blind grading removed students’ names from their work so that professors could grade impartially.

What may be most impressive about Langdell’s work is that it has stood the test of time. Even though it took the case method about thirty years to become dominant in American law schools (broadly adopted by the early 1900s) it still continues to be the primary structure and method of legal education today, over 100 years later. For example, the standard first-year curriculum of Civil Procedure, Criminal Law, Torts, Property, and Contracts remains almost completely the same since Langdell first implemented it at Harvard. Blind grading is the norm at most, if not all ABA law schools. His legacy is legendary.

⁹ Hugh Chisholm, "Langdell, Christopher Columbus". Encyclopædia Britannica 11th ed. 1911. Cambridge University Press
c. National Legal Societies: The American Bar Association, AALS and the Formalization of American Legal Education

Founded in 1878, the American Bar Association (ABA) is a professional community of lawyers that is not tied to a jurisdiction but has the very important job of setting the academic standards for law schools, as well as the setting of ethical codes for the legal profession. Simeon Eben Baldwin was the guiding figure behind the formation and organization of the ABA. The purpose of the ABA was “to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among members of the American Bar.” The ABA has risen in membership, power, and influence over the past 130 year to the point where it is now one of the most well-known and important American professional societies. With over 410,000 members, the ABA is also one of the largest voluntary professional societies in the world. The current mission of the ABA is to be the national representative of the legal profession, promote excellence in law, and to promote justice in the United States and abroad.

The ABA played a major role in the formation of the Association of American Law Schools (AALS) in 1900. The AALS is a regulatory organization that enforces requirements that law schools must meet for membership, but is not an accrediting

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11 ABA Historical Timeline, ABA, http://www.americanbar.org/about_the_aba/timeline.html
12 About the ABA, ABA, http://www.americanbar.org/about_the_aba.html
agency according to the Department of Education. This organization’s stated purpose is to promote the improvement of legal education. There is no jurisdiction that requires its potential members to have graduated from an AALS member law school in order to be eligible for the bar. This organization is much less powerful than the ABA and often follows its lead.

In 1921 the ABA published their first “Standards for Legal Education.” Leaders of the ABA wanted higher and more uniform standards for law schools, and held the hammers of bar admission eligibility over students and accreditation over the schools in order to get their standards adopted. It did not happen overnight, but the ABA won the fight of controlling law school standards and is now the accreditation entity for law schools – a practice that has been universal since 1923. This is extremely important because graduating from an ABA-accredited law school is a prerequisite to being allowed to take the state bar and practice law in most states. Another notable standard established by the ABA is the requirement of potential law students to have an undergraduate degree before being eligible for an ABA-accredited law school.

d. Current Criticism of the ABA & AALS

As with many powerful institutions there usually comes some serious criticism. The ABA has historically been criticized for being an elitist, white-male dominated, racist organization.\textsuperscript{15} It wasn’t until the 1960s that diversity of race within the ABA was socially acceptable and until very recently there was little diversity in the leadership of the ABA. The first female ABA President was elected in 1993 and the first African-

American ABA President in 2003.\textsuperscript{16} Serious questions persist from many states, legal professionals, and academics about how ABA requirements negatively impact the quality, necessity, and innovation in accredited law schools. An important development that validates such criticism is a recent Department of Education (DoE) committee review of accreditation organizations like the ABA. DoE grants academic accreditation authority to organizations such as ABA and may revoke such authority. The DoE panel that reviews the ABA and other accreditation agencies is called the National Advisory Committee on Institutional Quality and Integrity. They make recommendations to the Secretary of Education who has the final word, thought the Secretary usually follows the committee’s recommendations.\textsuperscript{17} During the latest DoE review of the ABA, “several members of the committee expressed reservations about approving [accreditation] status for the ABA, which was out of compliance with 17 regulations, including the need to consider student-loan default rates in assessing programs…and needing to set a standard for job placement by its member institutions.”\textsuperscript{18}

The ABA is not without significant controversy either as they have recently taken questionable and unnecessary stands on issues that are arguably not pertinent to their mission and are a divisive influence on the unity of the profession. Most notably, the ABA has taken public political positions on the extremely controversial issues of abortion, gun-control, and same-sex marriage; toeing the liberal political ideological line

\textsuperscript{16}ABA Timeline, ABA, http://www.americanbar.org/about_the_aba/timeline.html
\textsuperscript{17}National Advisory Committee on Institutional Quality and Integrity, U.S. Department of Education, Boards and commissions, http://www2.ed.gov/about/bdscomm/list/naciqi.html
in all three.\textsuperscript{19} This has brought great criticism upon the ABA because these issues are not at the heart of the ABA’s mission. Their inappropriate focus on divisive political issues instead of the betterment and integrity of the profession and the improvement of law schools is concerning and disappointing when considering the ABA’s original mission.

The AALS is in a similar situation. Unfortunately many of its current activities have been politically motivated and not focused on improving the quality of their 170 member and 25 non-member fee paying institutions. They require, recommend, and encourage their members to have ethically questionable policies that single out the military and military recruiters for special “ameliorative” measures.\textsuperscript{20} These measures are essentially negative treatment and undue discrimination in the use of law school facilities and services that they would not regularly do to of recruiters from other employers. An AALS memo to all law school deans in the U.S. about the military is directly quoted as “reasonable access does not dictate equal access.”\textsuperscript{21} This denying of equal benefits to military recruiters is seen by many as unpatriotic, distasteful and unethical. Even with Don’t Ask Don’t Tell ended and the President calling on campuses to welcome military recruiters the AALS has not issued an end to its distasteful and unpatriotic

\textsuperscript{21} AALS Section on Gay and Lesbian Legal Issues (Now the Section on Sexual Orientation and Gender Identity Issues), September 15, 1998. Can also be found in “Solomon’s Shames: Law as Might and Inequality, Spring 1998, Marshall L. Rev. 351.
recommendations. This same organization that is biased against the military plays host to AALS Faculty Recruitment Conference where about half of the faculty hired by law schools in the U.S. happens each year. Because of these and several other policies, the agenda and leadership of the AALS is in question by critics who say that the AALS is not focused on the right issues.

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III. MacCrate Report: Summary – What was it? What did it find? What were the Recommendations for Moving Forward.

[Author’s Note: This report was used as an interpretive tool to garner a functioning understanding of the profession and its educational process. As such, the approach taken on this report is very different than the approach and analysis done to the other reports. Each chapter of the 430-page report has been reviewed, analyzed, and reduced to one applicable chapter in this thesis. The MacCrate report was key to understanding the critical structures, guiding principles and policies, and the realities of the American legal education continuum.]

In July 1992, the ABA published a report on legal education and professional development that comprehensively examined the legal profession and the legal educational continuum in the United States. Entitled “Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,” the report is widely considered one of the most important ABA documents in the last 50 years. Hereinafter, referred to as the “MacCrate Report.” (All statistics are circa 1991)

a. Overview of Profession

The MacCrate Report states that the “legal profession for which law students prepare is larger and more diverse than ever before and yet more organized and unified than at
any time in its history.”24 It goes on to say the practices and forms of legal services are continuing in their differentiation, while the entirety of the profession is still bound by the one accrediting body, the ABA, and is still identified by the same set of values. This would be as if all American professional sports associations (NBA, NFL, MLS, etc.) were run by one governing body, not terribly dissimilar to the NCAA facilitating and supervising all intercollegiate sports. The key findings of the MacCrate Report include: “an extraordinary growth in the number of lawyers and demand of lawyer services, a change in the gender and ethnic makeup of the profession, a great growth in the complexity, specialization, economic, and technological advances of law.”25 Also discerned from the study of the profession was the power structure and organization of the profession, the various practice settings, the proper vision for new lawyers, and the fundamental skills legal professionals need. Next the committee members highlighted the need for a National institute that would focus on continually strengthening the development of legal professional post law school. Lastly, the MacCrate report found and recommended in its examination of the law schools, that there is a need to for the enhancement in the professional development of students during the law school years.

Change in Lawyers & Services – Three points of interest were determined in the first chapter of the MacCrate Report: First, the explosion in numbers and use of legal services, second, the change in gender make-up, and third, the belated opening to minorities and diversity.26

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25 Id. at 11
26 Id. at 12
The legal services industry has grown exponentially in the past 60 years. “In 1990, the legal profession was a $91 billion a year industry employing over 940,000 people with a ratio of one lawyer for every 320 Americans compared to one for 780 Americans from 1880-1940.”27 The number of ABA law schools increased from 112 in 1948 to 176 in 1991 and the number of people taking the LSAT from 1965-1991 increased from 39,406 to 152,685 with J.D. enrollments more than doubling in this time from 56,510 to 129,580.28

The gender make-up of the profession has changed just as drastically as the number of people participating in the profession. Women went from being only 4.2% of total J.D. Enrollments and 2.5% of the total lawyer population to 42.5% of total J.D. enrollments and 22.0% of the total lawyer population in just over 25 years (1965-1991).29 Woman lawyers have been credited with the reexamination of the legal reasoning of many interpersonal issues including pregnancy, rape, sexual harassment, judicial treatment of domestic violence, sexual relations between attorney and client, stereotyping, and discrimination in practice setting. The key thought of this feminist jurisprudence is that through life experience as woman, there are some issues that women are better able to identify with the disenfranchised rather than the traditional creators and interpreters of the law, men.

The final development was the full opening of the legal education system to minorities, especially blacks, which took even longer than the opening to woman. Blacks made up only 443 of the 50,000 law students enrolled in the 1964-65 academic year.30

27 Id. at 12
28 Id. at 13
29 Id. at 18
30 Id. at 24
1991, largely due to increases in financial aid for black students, the number of black students in the mostly white law schools rose from 1% in the 1960s to 6.3% in 1991-92. Black lawyers still are underrepresented compared to the population and to other minorities comprising only 3.3% of the profession and 12.1% of the population.31

b. Various Legal Practice Settings

The MacCrate report organizes the many different practice settings into five distinct categories:

1. sole practitioners and small firms
2. new providers of legal services
3. large and middle-sized firms
4. in-house counsel
5. lawyers for government

“The great variety in practice settings and the highly differentiated work in which lawyers are engaged in today present the greatest challenge to law schools and the profession in maintaining the unitary concept of being a lawyer.”32 The legal profession in the U.S. has undergone significant changes in its 200 years. In the beginning of America law, most lawyers were generalists who practiced on their own and we’re responsible for a myriad of legal services. Different from today, many lawyers then had significant work outside the legal profession ranging from managing farms to political office. The rise of the American economy, especially the industrial revolution and the rise of corporations, brought with it the beginnings of American law firm. Although the movement from individual practices to firms became steady, it was not until the 1970s that we saw the rise of large law firms. The size and location of law firm is directly

31 Id. at 24
32 Id. at 29
related to the clients and services rendered.\textsuperscript{33} Larger urban firms tend to focus primarily on businesses while smaller or solo firms in more rural areas tend to focus primarily on individuals. Generally, lawyers who represent businesses garner more financial benefits that lawyers who represent individuals excluding personal injury claims.

1. Sole Practitioners and Small Firms

This group of the legal profession remains the largest and most traditional in its community-based general practitioner style. Such lawyers serve individuals of the community and deal with a wide array of services including real estate, wills and trusts, family matters, commercial law, and even criminal matters. They are regarded as the truer generalists because their work has the largest scope of practice in the spectrum.\textsuperscript{34} They do not limit themselves to a specific type of client and represent plaintiffs, defendants, public agencies, and private entities. One characteristic common to solo practitioners and small firms no matter what level of urbanization they resided in, is the increase in the specialization in order to maintain competence.\textsuperscript{35} In summarizing the state of solo and small firm practitioners, the ABA task force stated that the biggest problem these practitioners have is isolation. The taskforce also noted that smaller the practice setting, the more lawyers relied on their legal education in forming their practice skills. An important and common complaint by this group is that law schools give more time and attention to the lawyering skills needed in serving businesses rather than individual

\textsuperscript{33} Id. at 31
\textsuperscript{34} Id. at 35
\textsuperscript{35} Id. at 40
clients. This is a very important issue given this group comprises more than 46% of the profession.\textsuperscript{36}

2. New Providers of Legal Services

New organizations are helping expand legal services to the poor through publicly funded programs. These organizations are further identified as a new form of poverty law that is extended to criminal proceedings.\textsuperscript{37}

3. Large and Middle-Sized Firms

Large and Middle sized firms number more than 4,400 firms and are really diverse. Considering these firms as a collective structure that share characteristics with all other firms within this group would be a mistake.\textsuperscript{38} One in every four lawyers practices in a medium sized whose membership ranges from 11-50 lawyers. These firms more often have a mix of businesses and individuals as their cliental, and have lower overhead than the large firms. The members of the large firms are the leading figures of the profession. They are the members of the 600 largest firms and they have their business interests and cliental in Wall Street serving the largest most powerful businesses. There are 75,000 members in this powerful group. Noted in the report these members have the greatest ability to change the profession.\textsuperscript{39}

4. In-house Counsel

Lawyers created the corporation and corporations now employ much of the legal business in America.\textsuperscript{40} The legal needs of the artificial persons known as corporations

\textsuperscript{36} Id. at 36
\textsuperscript{37} Id. at 47
\textsuperscript{38} Id. at 73
\textsuperscript{39} Id. at 75
\textsuperscript{40} Id. at 88
were great and reshaped law in according fields of business. Many lawyers were hired to work full time as general counsel in these burgeoning corporations to support the greatly increasing workload.

5. Lawyers for Government

Almost every government unit requires some legal services. In the U.S., according the 1987 census there were more than 83,000 governments or government structures which include county governments, municipalities, towns, school districts, and special taxing districts along with the obvious national and state governments.\(^{41}\) Work for governments vary from each level with over 30,000 lawyers working for local and state governments. The lawyers for the Federal Government number 20,000+ with the largest distribution of lawyers in the Department of Justice, the Internal Revenue Service, and the Department of Defense and Armed Services.\(^{42}\)

c. Power Structure and Organization of the Profession

1. This section is a history of legal education in America. See Chapter II of this thesis for a more in depth view and analysis on the subject.

2. The Bar’s Identity in Learning, Skills and Professional Values. In the 1870s, This section is a recapitulation of the history of the ABA and Christopher Langdell which was explored in Chapter II.

3. Law School: The Unifying Experience. In 1920, less than half of America’s 143 law schools were members of the AALS and their students represented only a minority of the 27,000 total law school students. One problem was that member schools

\(^{41}\) Id. at 95
\(^{42}\) Id. at 100
of AALS did not fare well against more practical and less academic based law schools.\(^{43}\) To change this, the ABA and the legal advisors of the AALS set about raising both law school admissions standards and bar admissions in their favor. This gave power to the schools who focused academically and not practically giving control to entry to the profession to AALS member institutions. It wasn’t until after World War II and the GI Bill that academically inclined school became the norm and law school had to conform to AALS standards or perish.

4. The Judiciary: the Profession’s Gatekeeper. Early judges commonly were lay persons and were by nature political actors popularly elected. But, with the rise of the organized lawyer profession and its increased professionalism, the judiciary quickly followed and lay judges disappeared. The Judiciary and the bar essentially became one entity with the judiciary lawyer judges as the heads of the court and the practicing lawyers the officers of the court. A self-regulated system, the Judiciary is a branch of government where some lawyers rule over other lawyers and in the process create legal doctrines, principles, and requirements for the whole profession. The Supreme Court is at the top of this lawyer centric judicial pyramid self-proclaiming its absolute power over lower Judiciary members and all non-judiciary lawyers.\(^{44}\)

5. The Survival of a Single Public Profession. Lastly, this McCrate Report subsection details the importance of the rules of professional conduct within framework of a self-regulated profession. It is the job of the law schools and the bar to pass on the importance of the profession’s relationship to the American legal system to future

\(^{43}\) Id. at 111  
\(^{44}\) Id. at 114
generations of legal professionals. In doing so they should perpetuate the values and core legal knowledge of this one shared public profession.\textsuperscript{45}

d. Proper New Lawyer Vision Statement

The members of the Task Force wanted a vision statement that brought together the skills and values necessary and desirable for practitioners to possess.\textsuperscript{46} They found that such a comprehensive statement could not be perfectly defined and maybe was not even possible. But, it was because of this reason that the task force wanted to put together the best possible statement they could in order to have the most proper guide to improving the preparation of lawyers for practice (including law students).\textsuperscript{47} By setting forth a practical framework statement, future discussion could build, adjust, or reframe the statement in order to best suit the improvement of lawyer preparation. The Task force made clear that the statement is not to be interpreted as a standard for law school curriculum, but a statement directed at ensuring a minimum level competency in the field of practice.\textsuperscript{48}

e. Fundamental Skills & Professional Values

The following is the list of 10 fundamental lawyering skills and 4 fundamental professional values that the Task Force promulgated that are necessary to responsible and competent legal practice.\textsuperscript{49} This ‘Statement of Skills and Values’ represents the most important section of the MacCrate Report in terms of value and impact on legal education.

\textsuperscript{45} Id. at 119
\textsuperscript{46} Id. at 123
\textsuperscript{47} Id. at 124
\textsuperscript{48} Id. at 132
\textsuperscript{49} Id. at 135
Skills:

1. Problem Solving. The components of legal problem solving and objective achievement are simple and straightforward. Lawyers need to be able to identify the problem or goal, produce solutions or strategies to achieve them, develop a plan of action, implement the plan of action, and finally be open to new information and ideas along the way.\textsuperscript{50}

2. Legal Analysis. Lawyers need knowledge of legal rules, principles, and concepts in order to analyze, criticize, and apply them in their work. The five points of legal analysis highlighted are identifying legal issues, formulating legal theories, elaborating the theories, evaluating the theory and criticizing and synthesizing a legal argument.\textsuperscript{51}

3. Legal Research. Lawyers need to have knowledge of the nature of legal rules and institutions and the ability to use the tools of legal research. They must also be able to understand the process and implementation of clear and effective research design.\textsuperscript{52}

4. Factual investigation. Lawyers should be able to determine the need for factual investigation, plan the investigation, and implement it. They then need to be able to coherently organize the information in an accessible manner.\textsuperscript{53}

5. Communication. Lawyers must be able to communicate effectively whether it is orally or in writing. Lawyers should assess the recipient of communication and then use the proper and effective method for communication.\textsuperscript{54}

\textsuperscript{50} Id. at 138  
\textsuperscript{51} Id. at 138  
\textsuperscript{52} Id. at 138  
\textsuperscript{53} Id. at 138  
\textsuperscript{54} Id. at 139
6. Counseling. Lawyers need to be able to establish counseling relationships that adhere properly to the role and boundaries of being a lawyer. Lawyers must also be able to gather relevant information from their clients, analyze it, counsel the client, and then implement the client’s decision.\textsuperscript{55}

7. Negotiating. In both dispute-resolution and transactional negotiation, lawyers should prepare for negotiation, be able to conduct a negotiation, counsel the client about the terms obtained from the other side, and finally implement the client’s decision.\textsuperscript{56}

8. Litigation/alternative dispute resolution. Before advising a client about the options of litigation or alternative dispute resolution, a lawyer needs to thoroughly understand the functions and possible consequences of these actions. Lawyers must then specifically have working knowledge of trial-court litigation, appellate level litigation, administrative advocacy forums, and the proceedings in other dispute-resolution forums.\textsuperscript{57}

9. Administrative capability. Lawyers need to have administrative capability in order to practice law effectively and efficiently. The key tenets in doing so are: formulating goals and principles for management, putting in place systems and procedures that ensure resource/effort efficiency, responsible and timely completion of work, effective procedures for working with others, and effective systems and policies for the administrators.\textsuperscript{58}

10. Recognizing & resolving ethical dilemmas. The last fundamental skill lawyers need to have is the knowledge of the ethical standards and their sources, the means by

\textsuperscript{55} Id. at 139  
\textsuperscript{56} Id. at 139  
\textsuperscript{57} Id. at 138  
\textsuperscript{58} Id. at 140
which they are enforced, and the processes for recognizing and resolving ethical
dilemmas.

Values:

1. Competent representation. The first value needed in the legal profession is competency. Lawyers need to reach a level of competence that is maintained within the field of practice chosen and is evidenced in the representation of clients.\(^{59}\)

2. Striving to promote justice, fairness, and morality. The four pillars of the second value are inherent to all good professions but are especially highlighted in the legal profession because of the power vested in law. The importance of lawyers upholding and ensuring these pillars is best illustrated by the ramifications of lawyers who pursue and promote the opposites of the pillars in the name of self-gain. Special focus is set on providing adequate legal services for those who cannot afford to pay for them as part of this value.\(^{60}\)

3. Striving to improve the profession. Much like in a democracy, the participation of members in a self-governing entity is essential. Members need to be committed to participation in attempts to improve the profession and assist in the training of new lawyers. Striving to improve the profession also includes ridding the profession of bias based on certain factors like race and gender.\(^{61}\)

4. Professional self-development. Professional self-development has always been a fundamental value of this profession. Each member of the profession should seek out and seize opportunities to improve the quality and ability of their skills.\(^{62}\)
f. Process Pre Law School

1. Self-assessment and commitment to self-development. As with any career, each individual is responsible for the assessment of their ability to pursue and practice the legal profession. Each person is responsible for judgments also regarding the likelihood of experiencing a satisfying and rewarding professional life. Full consideration of the costs, risks, commitments, and consequences of pursuing a legal career are extremely important and should, along with the self-assessment, start before law school and continue throughout one’s legal career.63

2. The need for informed choice. Decision making is the core of the legal profession. How decisions are made are therefore critically important. Being fully informed from start to finish in the pursuit and practice of the legal profession is a must and is not necessarily easy. Ironically, as part of the development and training of a lawyer’s ability to make critical decisions, the aptitude to decide the most important questions about one’s participation in the profession most commonly occur after one has made the most important decisions of their legal careers.64 Specifically, the question of whether to enter the profession at all, and which field to focus study on are best decided after having experience with both the profession and the particular field of law, but are usually decisions made well in advance of any real experience of either. It lies with the law school administrators to candidly inform their students and prospects of the strengths, weaknesses, and realities of their institutions, and of the different legal fields in order to reduce misinformed decisions by students and prospects. Unfortunately, perfect information output by all the law schools in a competitive market cannot fully happen.

63 Id. at 225
64 Id. at 227
when law schools have an interest in self-preservation, but they can and need to do better. A list of information that the MacCrate Report believes should be publicly published information about each law schools that previously was confidential or not fully published includes but is not limited to: admissions data, tuition, costs, and financial aid data, enrollment and graduation data, composition of faculty and administration, curricular offerings and class sizes, library resources, physical plant, housing availability, financial resources available to support education program, placement and bar passage, and many more. Much of the aforementioned data is now released by law schools annually on their website.

g. Professional Development During Law School

1. Law Schools Roles. The role of law schools has primarily been “to teach analytical skills, substantive, law, and the techniques of legal research.” This has been adjusted slightly since the 1960s with the increase of taught professional skills and through the use of clinics. The MacCrate report denotes that the teaching of important skills and values is the joint responsibility of the practicing bar and law schools. The report, as it has done repeatedly before, slightly criticizes and reaffirms the current system by stating that professional skills and values need to be taught but that the current methods of teaching like the Socratic method and use of clinics support the conceptual underpinning of these necessary skills. They argue that law schools cannot often accurately recreate the stresses and pressure of real world practice and therefore should primarily stick to teaching students how to think like a lawyer. Law schools need to set the foundation for future lawyers by instructing students in the rules of their focus,

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65 Id. at 229  
66 Id. at 233  
67 Id. at 234
teaching the ethical and moral values of being a lawyer, and teaching a certain level of professional skills.

2. Assessing the Current System. The sharpest criticism of the system is stated at the end of the “role of law schools” section of the MacCrate Report, but for assessment purposes it makes more sense for it to be placed here instead. The criticism goes as follows: “Too often, the Socratic method of teaching emphasizes qualities that have little to do with justice, fairness, and morality in daily practices. Students too easily gain the impression that wit, sharp responses, and dazzling performance are more important than the moral values that lawyers must possess [and that the profession demand].”\footnote{Id. at 236} This less than tactful statement criticizes a shortcoming of the primary method of instruction that law schools employ; the Socratic method approach of teaching appellate case analysis. The Report’s assessment of American legal education system states that its strength is in the teaching of substantive law and developing analytical skills. They found no problem with law schools making their students knowledgeable about the fields students want to practice in. The problems arise in the teaching of other lawyering skills or possible lack thereof. They also discovered that the vast majority of students either do not take or have access to a full range of skills courses. Many take the four common skills classes [Introduction to Lawyering, legal writing, trial advocacy, and moot court] but outside of these four, students do not usually take more than one or two other skills classes. It goes without saying that the quality and attitudes of the faculty are also key to skills instruction. The taskforce encourages the continued creation of new methods to teach lawyering skills and professional values in ways that exhibit determination and creativity.
3. Employment Experience as a Complement to Law School. The MacCrate Report is skeptical of students working part time while attending law school. They, like many law faculty, worry that employment outside of the educational experience of being a student can detract from students’ studies. They fear that priority of time and energy of students may go to work obligations rather than their studies. The secondary concern is that employers in the legal field often use students as cheap labor for assignments that do not complement or enhance the development of the students. Many students need to work and others use work as an attempt to “get their foot in the door” and pursue career goals. The ABA’s rule in order to hedge the possible negative effects of excessive work while attending law school is a cap of 20 hours a week of employment on full-time students. This rule is mainly unenforced.

Again the Task Force promotes the cooperation of the Bar, law school faculty, and practitioners to enhance the education of the lawyers in training through a more cohesive system of continuing legal education. This lofty idea sounds nice but the practice and teaching of law is still a business driven by profit. Getting cooperation from separate entities is hard in the best times and impossible in worst times when each entity is looking out for themselves. This thesis purports that such cooperation is possible and many times does happen but that rather it is highly motivated individuals of high morals and mature skills that go above and beyond themselves rather than their entire institutions. The MacCrate report apportions more weight of lawyer preparation to the Bar and legal practitioners than it should. There should be more weight on the law schools to educate students and prepare them for the profession.

69 Id. at 268
70 Id. at 268
71 Id. at 269
Next, the writers emphasize the importance of law schools being involved in the structure and support of students pursuing clerkships, externships, and internships.\textsuperscript{72} They even promote the idea of mandatory externships regulated between the law schools and firms. This does not go without some criticism towards the system of summer clerkships. As a background, clerkships are used by many practitioners as the main way of hiring new lawyers. The criticism relies in the same logic about students who work while attending law school. The fear is the potential use of the internships as a form of cheap labor that does not further the legal education of the students.

From the teaching side, The MacCrate report supports and encourages the use of faculty who practice and practitioners who teach.\textsuperscript{73} Having either or both gives legal education a more real experience and allows for a heightened development of students, teachers, and even practitioners in the larger theme of continuing legal education at all levels and structures of law.

h. Transition for Law Student to Practitioner

1. Licensing. The basic two components in the transition of student to practitioner are passing the state bar and demonstrating the strong moral character needed in the practice of law. The goal of this system is to ensure a certain level of competency and morality are possessed by all law practitioners. There has been talk about adjusting the bar tests or requirements to include ways of measuring professional skills.

2. Curricular Requirements for Bar Admission. Two states, Indiana and South Carolina, have certain curricular requirements that all law students or persons wanting to take the state bar must first meet. The driving idea behind these requirements is that new

\textsuperscript{72} Id. at 270
\textsuperscript{73} Id. at 271
lawyers should be required to be exposed to substantive and procedural law that is commonly to be used by practitioners within the state. The ABA and allies have not been supportive of such requirements asserting that “public authorities should not dictate curriculum content…the bar is used to determine if upon admission, he or she will be able to adequately serve the public.”\textsuperscript{74} Advocates of skills instruction in many states have proposed many changes to their respective state bars in the types and number of classes law students have to take that are skills based. The classic response to skills based testing is a zero-sum argument that law schools would lose significant time and ability to teach legal theories and maxims in favor of legal skills. The Task Force believes that such concerns are imbalanced and that enhanced instruction in legal skills can be established without seriously hurting the current teaching style.

3. The Bar Examination. Most law school curricula are influenced indirectly through the subjects tested on the bar exam and the methods used for testing.\textsuperscript{75} The traditional bar examination is a closed book written test that includes multiple choice and essay questions. It can include a test of many skills, but its primary focus and value is on the knowledge of legal rules drawn from a broad variety of subjects.\textsuperscript{76}

The task force is very critical of traditional bar examinations because they do not encourage law schools or students to teach or learn many of the fundamental lawyering skills presented earlier in the MacCrate Report. They purport that law schools put an overemphasis on substantive areas that are tested by the bar rather than integrating more courses geared for lawyering skills. Students are also influenced by this because even if law schools have lawyering skills courses, many will shy away in favor of courses that

\textsuperscript{74} Id. at 275
\textsuperscript{75} Id. at 274
\textsuperscript{76} Id. at 277
cover material that is tested by the bar.\textsuperscript{77} The long term concern with the current system is that it will cause the approach to legal education will become excessively narrow. Some have recommended a change in emphasis from comprehensive knowledge of rules to skills-testing.

Three states, Alaska, California, and Colorado, have added performance tests to their bars that are meant to test measure legal analytical skills.\textsuperscript{78} They also ask testers to demonstrate proficiency at tasks that would be performed in actual practice. The supporters of these added performance tests state they measure the ability to give competent legal assistance in the real world practicing form.

The major criticism of these performance tests is that they test the same lawyering skills that traditional bar tests only in a different method. They also do not go as far as they need to in order to effectively test the other lawyering skills necessary, according the task force. Realistically, the performance tests need to be more in-depth and the number of subjects included on the test reduced to properly change the bar in a way that the task force would favor. Counter arguments are that performance tests may be more expensive and harder to grade than traditional question.\textsuperscript{79}

An offshoot issue from the current bar exam structure is that the development of professional values is underwhelming in law schools across the country. Even the schools that require the Multistate Professional Responsibility Exam (MPRE) do not do enough because the test is not a test of one’s commitment to professional values. It focuses on professional regulation at the cost of professional values, which makes it ineffective for measuring professional values. Also, the current character and fitness regulation of

\textsuperscript{77} Id. at 277
\textsuperscript{78} Id. at 280
\textsuperscript{79} Id. at 282
admission to bar is deemed as not as fully functioning and effective as it could be because it is only negative focused.

4. Building the Continuum. In this short section the task force gives recommendations about how to strengthen the training of skills and values within the current continuum. They specifically recommend that licensing authorities should not set specific curriculum requirements for law schools and should instead modify the bar examinations to properly test the appropriate amount of skills, values, analytical and substantive law knowledge. They cede that even the best law schools without help from the bar cannot produce graduates who can full represent clients without supervision. The proposed remedy is teamwork from law schools, the practicing bar, and licensing authorities to better the transitioning education for new lawyers entering the profession.

5. Transition Education for Bar Applicants and new Lawyers. It’s noted that in the early 1960s that law schools were not teaching certain practical skills appropriately. The answer they came up with was to defer these skills training to the profession with the label of continuing legal education. Now many of the transitioning education programs for bar applicants and new lawyers are called bridge-the-gap programs and in most instances are voluntary. They vary widely in quality, style, and content due to the large number of jurisdictions. The McCrate report criticizes these programs because they do not instruct fundamental lawyering skills and values. A newer advent to this idea has arisen within law firms where they have formal in-house new lawyer training programs.

Apprenticeship programs are also a way to build skills but are uncommon and only required in Vermont and Delaware. The basic idea is to learn by doing. Bridge-the-gap

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80 Id. at 284
81 Id. at 285
82 Id. at 286
programs have replaced many apprenticeship programs in other states as the norm program for new lawyers. These programs are found in approximately two thirds of states with some being mandatory but more being voluntary. Usually the programs focus on substantive law in a myriad of fields that often times include state-specific practical information. Special notice of excellence is given to the Washington Practice Skills program for its small-group, learn-by-doing format that covers many important skills like counseling, open statements, and organizational skills.\textsuperscript{83}\textsuperscript{84} This format is strong because it is not a passive learning like the lecture method that most programs utilize.

Transition education in the U.S. is inadequate and made clearly apparent when compared to Commonwealth programs geared for the same purpose. Commonwealth programs last much longer than U.S. programs ranging from ten weeks to seven months. The focus is to develop a complete lawyer with training in drafting, legal research, interviewing, etc. Active involvement is the norm instead of passive participation.

Even though transition education in the U.S. is not as good as it is in Commonwealth jurisdictions, many U.S. jurisdictions have taken steps to improve their existing systems.\textsuperscript{85} Seven states now require special and/or specific training for new attorneys. The amount, intensity, and type of requirements vary significantly per state. In-house lawyer training is on the rise as well with the commonly known moniker of ‘on-the-job’ training. These formal OTJ program are geared to fit the needs of each particular law office but usually include many important qualities like mentoring, skills and value training, and many more. The criticism of this form of transition education is not of the actual programs themselves, but rather a criticism of the amount of new lawyers that do

\textsuperscript{83} Id. at 292
\textsuperscript{84} Id. at 294
\textsuperscript{85} Id. at 295
not have access to such training because they are on their own. The profession needs ways to ensure and promote a level of minimum competency of all lawyers and not just those who get the good OTJ programs. The recommendation by way of the Kestin Report is to create and utilize a hybrid bridge-the-gap program that would be divided in two parts. The first part would be to train lawyers to know what “constitutes professionally acceptable work.”86 The second part would be introduced after the new lawyers had some experience and would focus on basic skill development through the use of modules. Some of these skills modules would be on areas of development like listening and observing, organizing information, identifying and evaluating relevant facts and so on.

The review of existing programs of transition education have led to the task force to believe that all new lawyers should have access to effective skills and values instruction during law school or after during transition programs.87

i. Development Post Law School

Continuing development programs have been around as a serious legal form for the last 30 years.88 Starting in the 1970s and continuing into the late 1980s more and more states adopted Mandatory Continuing Legal Education as way to hedge concerns regarding lawyer competence. By 1991 more than 37 states had MCLE.89 The issue is there is little evidence that MCLE positively effects competence. CLE programs are very diverse, with more than 300 programs in existence. The main tiers of instruction for CLEs fit into the three following categories of advanced specialist courses, refresher courses, and new court decisions courses. Bridge-the-gap programs are less than 10% of the total CLEs.

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86 Id. at 301
87 Id. at 304
88 Id. at 305
89 Id. at 310
In house training programs are the rising star of legal training for law firms. Private law firms tend to prefer in house training rather than CLE programs because the in house training is set for the needs of the firm and prepare new lawyers to be productive in their law firm environment.

There was much discussion about the quality of CLEs and the goal to improve them even more. The Task Force, on the results of an ALI-ABA study, concluded that CLEs could improve if they focused more on principles of good practice in continuing education from the 1984 International Association for Continuing Education and Training.

The next step the Task Force believes is needed, is the creation of a National Institute. It would focus on the interrelationships and linkages between the different phases of lawyer education, law schools and the practicing bar. The institute would also be a supporting structure for the education of lawyers throughout their careers.90

j. MacCrates Task Force Recommendations

1. Discussing Skills and Values. The Task force recommends that the statement of skills and values be published by the ABA and spread throughout the legal community.91 It should be utilized by all factions of the legal community including law schools, the bar, practicing lawyers, CLEs, students, and prospective students to improve themselves, the processes they use and the quality of what they do.

2. Choosing a Legal Career & School. The Task force recommends that potential and future law students be diligent in their decision making by being as informed as they can and be able to honestly self-assess their development at each step in the legal

90 Id. at 321
91 Id. at 327
education continuum. They also recommend that more information be released publicly about the law schools and the bar so that students can make better and more informed decisions.

3. Enhancing Profession Development During Law School Years. The task force recommends that the legal community recognize and act proactively as a team in the promotion of development of lawyers. It is in the shared interest of the community and law schools to develop better lawyers which increases the overall quality of services. Heavy emphasis is put on law schools to reevaluate, reform, and improve themselves and the processes, methods, curricula and structures utilized in the teaching of law students. The task force is essentially asking each level of legal education continuum to be diligent and self-disciplined in their work, ethics, values, and skills.

4. Placing the Transitioning Process in the Continuum. The task force recommends that the power structure interplay between law schools and licensing authorities stay the same. They do however kindly encourage licensing authorities to modify their bar examinations if they do not have the appropriate distribution and weight of material and skills testing according to the lawyering skills and values set forth earlier in this report. The task force encourages all levels of the legal education continuum to reevaluate their systems and processes based on the standards and needs set forth in the skills and values section of the report. Next, they want successful transition education programs including CLEs, In-house, etc. to share their successful technique, programs, and experience with the community. Lastly the task force specifically wants the

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92 Id. at 328
93 Id. at 330
94 Id. at 334
organized bar, with the help of the proposed national institute to provide material and instruction to all new lawyers in lawyering skills and values at an affordable price.\textsuperscript{95}

5. Striving for Excellence After School. The task force recommends that all states put in place more requirements on all attorneys to participate in exercises that promote the lawyering skills and values. They also ask all attorneys to look at themselves and their training programs and make changes that better exercise and train the skills and values set forth by this report.\textsuperscript{96}

6. Establishing an American Institute for the Practice of Law. The task force, as mentioned earlier, wants a new national institute that would be a 501(c)(3) corporation whose purpose would be the promotion of excellence in the practice of law. It would address the entire legal community and its varying process and would also promote the Statement of Skills and Values as set forth in this report.\textsuperscript{97} The institute should be sponsored by ABA, AALS, and ALI.

Moving Forward—My Interpretation of the MacCrate Report

The clear central theme of the McCrate report recommendations is for all levels of the legal education continuum, both vertical and horizontal, to reevaluate themselves and their entities according to the Task Force’s Statement of Skills and Values set forth in the report and make changes that will better promote what is set forth in the statement. The task force believes this will, in the long-term, improve the quality and competency of lawyers and lawyer services, especially of new lawyers and single practitioners.

\textsuperscript{95} Id. at 335
\textsuperscript{96} Id. at 336
\textsuperscript{97} Id. at 337
IV. Support of the Current System of Teaching at Law Schools Post-MacCrate

a. Strong Support for Current System: Ideological & Role Appeal

Although there is significant and continuing public criticism of American law schools, there are those who claim that the law schools are doing exactly what they need to be doing quite well, and that they should not change. One such person who is coming to the defense of the current system of teaching employed at law schools is University of Miami School of Law Professor Anthony V. Alfieri. Alfieri, along with being a law professor, is the Dean’s Distinguished Scholar Director, founder and director of the Center for Ethics and Public Service, and the founder of the Historic Black Church Foundation. He has published more than 70 articles, essays, and editorials, on many topics including ethics, criminal justice, and the legal profession. His work has been cited more than 3,000 times in books, law journals, and the media. He is also a member of the American Law Institute and winner or director of myriad legal awards from organizations like the ABA and many more. Alfieri is a very strong supporter of the current system and style of teaching at law schools. He believes that the role of law school is narrowly tailored to teach future law professionals how to properly and effectively think like a lawyer and learn the theories that guide American law.

His most notable article in defense of the current system of teaching at law schools is called “Against Practice.” In it, Alfieri vehemently supports the current system of theory centric study of law. He states in his opening line that in regards to arguments for more

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98University of Miami School of Law Faculty & Administration, Anthony V. Alfieri http://www.law.miami.edu/faculty-administration/anthony-alfieri.php?op=1
clinical instruction in law schools that “legal education is against practice.” He believes that the most important job of legal teaching is the elevation of formal knowledge and case-dialogue pedagogy over practical judgment and policy analysis. Alfieri argues that the movement towards more practice orientation “reinforces conventional roles and relationships and fortifies the socioeconomic inequalities of entrenched civil and criminal justice systems.” He also states that this animus preserves the disparate treatment of woman and minorities in the legal services marketplaces. This is a rather broad sweeping liberal perspective claim as to the role and relationships of the legal community. This rather intense belief that teaching law students more practical skills will somehow create in them the animus to entrench themselves from the rest of society and treat woman and minorities worse does not quite match up cohesively. What Alfieri is also arguing conversely, from a liberal academic worldview, is that the current theory and case dialogue pedagogy somehow promotes and teaches cross cultural community building and increases the fair treatment of woman and minorities in the legal community. This is simply not the case, purpose or by-product of legal education. This non sequitur argument is interesting but ultimately lacks merit because his claims are attached to political ideologies of human interaction and not methods of legal education instruction. His entire article is a response to the Carnegie Report 2007 and its supposed failings according to him and the strengths of the current system.

The strength of Alfieri’s argument for upholding the current system is in his insights into the possible failures that change to the legal education could bring. Specifically,

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100 id. at 1073
101 id. at 1074
102 id. at 1074
Alfieri is afraid that changes will leave students without critical pedagogies and leave them as legal workers rather than legal justice pursuers. Alfieri sees lawyers as the defenders and protector of the socially and economically cast down or weak. He believes that even small changes that increase the practical skills of law students will harm the integrity of teaching students to ask questions and address and interact with people of difference based history. This view of legal education as a creator of legal protectors is not necessarily wrong but over expansive of the reality of legal education. Although lawyers should treat all people fairly and with due process under the law, legal education is not an education that teaches people to fix social ills but an education for being a legal practitioner.

In one line, Alfieri believes “changing legal education policy will have more negative outcomes than positive outcomes.”

Proscriptively, he argues, while citing the Carnegie Report, that the predominance of case-dialogue pedagogy in law schools is evidence enough for its success. He believes that law schools have reached that peak format of education and that any turns from the current system would be a downward trend in quality and would take the focus off the right form of training. There is a strong belief that there is a set amount of time that it takes to “turn minds of mush into sharp legal minds.” Rushing the practice and practical training of law prevents this process from completing. This belief about the role of law schools is popular and has its supports. This belief fleshed out entails that law schools shape the mind and pen of lawyers while firms and actual practice train the practical skills. Clinical programs and lawyering cases can be seen from this perspective

103 The Paper Chase, 20th Century Fox, 1973
as intellectually cheap and against the more university undergraduate style of theory experiment that supporters of this view hold. They hold that putting in place practical experience clinics and courses takes out the ability to think experimentally and can lock participants into a box of legal thinking. Such classes might teach students to view certain situations from a singular viewpoint and cause students to form a singular opinion. This opinion of certain skills could become a habit for the student in practice and en masse such skills classes could reinforce social norms and not promote [their plan for] social growth. This fear of reinforcement and of narrow thought is what drives academics away from practical classes and clinics.

Continuing this vein of reasoning, legal education does not support practical training because that is not its first goal. Law schools should continue to teach the case-dialogue pedagogy as much as they can and not transition to more practical based education classes or clinics. Doing so prematurely interrupts the legal mind training that is so crucial to the development of lawyers. Continuing the undergraduate animus of formal knowledge and experimentation is extremely value to the legal community and to the developing minds of young legal professionals. Law is not a settled science. Law will grow and change as more is gleaned from the experiences and study of man and his reactions to different stimuli. Neglecting to fully focus on the development of practical judgment, professional identity, and theoretical legal study will harm the legal profession. Short selling the instruction of intellectual development in the name of non-intellectual or low level intellectual skills is a travesty to what the legal education system stands for.
b. Generally Agreed upon Positive Aspects of the Current System

Alfieri isn’t the only one who believes that the current system of legal education is doing quite well. An important study that both supports the strengths of the current system and highlights its shortcomings is “Educating Lawyers: Preparation for the Profession of Law.” Commonly known as and hereafter referred to as the Carnegie Report, this article is one of the most prominent and well respected papers in the post-MacCrate era. For the purposes of this section, the generally agreed upon pros of the current system will be examined and the criticisms will be save for the next chapter.

The Carnegie Report was a two year study of legal education that took a comprehensive look at teaching and learning in American and Canadian law schools.104 It specifically focused on the rethinking of the “thinking like a lawyer” legal education construct that is the primary and paramount tool of legal instruction. It examined the intellectual tools that are garnered from this system while also looking at the benefits of integrating more pragmatic practice based instruction as well balancing the two styles. The results of the study were five observations and seven recommendations.

Before giving the observations and recommendations, the report states the core challenge for legal education is “linking the interests of legal educators with the needs of legal practitioners with the public the profession is pledged to serve.”105

In support of the current system, the authors of the Carnegie Report state in their first observation that law schools are impressive education institutions. “In a relatively short period of time they impart distinctive habits of thinking that form the basis for student

105 Id. at 4
development as legal professionals.”106 This intense process of socialization into the standards of legal thinking has been effective in its implementation in teaching students to understand legal processes, see both sides of arguments, use precise language and for learning the applications of legal rules. Essentially, law schools do a good job of teaching future lawyers to think like lawyers which is the first step in becoming a legal professional or legal service provider.

In observation three, the report extols the strengths of the case-dialogue method of teaching. By teaching students to view every situation from a legal perspective they are teaching students to dissect complicated situations and find the relevant information and the essential question at hand. Case-dialogue instruction allows students to learn many central aspects of legal competence and simplification of legal reasoning. Students are taught this through reinforcement theory of constant repetition.107 The game is verbal combat with faculty members where the primary weapons utilized on both sides are reason, fact, and precedent.

There are relatively few other reports in the post-MacCrate era that extol the benefits of law schools current system and/or argue for the system to stay the way it is. The reports that do are less notable, less cited, and say basically the same thing as purported by the these two articles. There may be other reasons for this. One reason may be that given the current nature of academic legal writing to encourage publishing articles that challenge norms or introduce new reasonings, there will not be many articles that argue in full support of a current system because it is the norm. Many articles though, argue for much of the system stay the same but offer varied nuanced changes.

106 Id. at 5
107 Id. at 6
V. Critiques of the Current System of Teaching at Law Schools, Alternative Models and Recommendations for Better Law Schools Post-MacCrate

There have been recurring calls for significant change in the legal education system in the past twenty years. Although there is a wide variety of suggestions and recommendations, they share similar threads. The goal of law school is to make law students as client ready as they can and the common belief is that law schools are not doing as well as they could to prepare their students for practice. The following is a list of prominent and pragmatic reports that offer ways law schools could improve their ability to prepare students for the practice of law. Each offers a different perspective of legal education and a set of recommendations many of which are very similar to each other. Several reports also have alternative education models that law schools could utilize. The last section about Robert H. Jackson serves as a reminder that great success is possible outside of the current structures of the ABA accredited and regulated law school system.

a. “Making Law Students Client-Ready: A New Model in Legal Education” John Burwell Garvey & Anne F. Zinkin

First up is John Burwell Garvey’s and Anne F. Zinkin’s critique of the system, call for institutional change, and offer of a new legal education model. Garvey is a Professor of Law at the University Of New Hampshire School Of Law where he also serves as Director of the Daniel Webster Scholar Honors Program. Anne F. Zinkin has a J.D. from NYU and is the permanent law clerk to Senior Associate Justice (now Chief Justice)

108 John Burwell Garvey, UHN School of Law Faculty, http://law.unh.edu/about/personnel/faculty/john-garvey
Linda S. Dalianis of the New Hampshire Supreme Court.\footnote{Anne F. Zinkin, N.H. Supreme Court Law Clerk, http://www.linkedin.com/pub/anne-zinkin/18/43a/558} What makes this report special is that it comes with the support and behest of the N.H. Supreme Court. The Court wanted and initiated a new legal education program that would better prepare students for actual practice of law. In a collaborative effort under the directorship of Gavery, the Court, the New Hampshire Bar, the New Hampshire Board of Bar Examiners, and the University of New Hampshire School of Law pioneered a new way of educating future lawyers. This program is called the Daniel Webster Scholar Honors Program. Before jumping into this new program lets first look at what Garvey and Zinkin have to say about the current state of the law school instruction. For the purpose of brevity and clarity of reference, Garvey, being lead author, will be the only named author in the following summation and analysis.

Garvey starts fast and strong in his criticism of the current system of law school instruction. He states that Landgell’s case method with Socratic questioning is an important part of legal instruction but by itself fails to make law students client-ready.\footnote{John Burwell Garvey, and Anne F. Zinkin, Making Law Students Client-Ready: A New Model in Legal Education. Duke Forum for Law & Social Change, Vol. 1, No. 1, 2009; Association of Law Teachers (ALT) 2009 44th Annual Conference, 102} Garvey cites the Carnegie Report of 2007 and reaffirms that although Langdell’s method “does meet the needs of future law clerks, judges, and legal scientists, it does not meet the needs of new lawyers who are going to represent common people with common legal problems.”\footnote{Id. at 102} Ordinary problems need lawyers who have the knowledge, skill, and readiness to practically deal with their problems, not lawyers who primarily only know how to academically analyze their situation.
This problem in legal education can be remedied as there are many comprehensive and authoritative reports that say it is time to integrate the Langdellian method with practical, professional skills training. A very important claim that Garvey makes is that the Langdellian method undertrains students and disproportionately alienates traditionally underrepresented groups in law school, including women and minorities. The duty of law schools is to the students and society. They must adequately train law students to represent clients for the benefit of the law students who pay for such training. They must also adequately train law students because society must use the lawyers available to them. Garvey also argues that the Langdellian Method is not a proper or adequate substitute for apprenticeships and again cites the Carnegie Report as support. The focus of legal education should be on clients and providing proper and competent services, not focused on old case dialogue.

To frame this in terms of another profession, the medical training equivalent would be like focusing exponentially more on disease processes than patient care for all future doctors. Although both processes are important to aspects of the medical community, not all doctors are going to be medical research professionals. Many doctors will have jobs that focus on more the general service aspects of the medical field like patient care and should receive a proper amount of training in this area. This same argument holds true for lawyers. Some lawyers will indeed become legal researchers but many, many more will become general practitioners and/or will regularly provide general legal services. These general practitioners need general service training in skills, values, and

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113 Id. at 102
114 Id. at 103
115 Id. at 106
116 Id. at 106
information that will help them provide common legal services. These lawyers do not need the ability to explain points of high legal analysis and doctrine to their common clients as a judge might in delivering a holding in a complicated and highly nuanced case.

All legal professionals must go to law school regardless of the end goal they seek. Consequently, law schools should appropriately balance what they teach to fit the respective legal communities that law students want to join. One dominant method of teaching is not appropriate for all when it highly favors one legal community like law clerks but fails to get another community like general practitioners up to adequate client-ready competency.

A continuation of earlier criticisms, Garvey restates with supporting papers that the Langdellian method alienates some women and persons of color, and is demeaning, dehumanizing and destructive of positive ideological values. Garvey closes his criticisms by explicating that many prominent legal professional groups, associations, lawyers, judges, and academics have concluded that most law school graduates lack the minimum competencies required to provide effective and responsible legal services. The Langdellian method of legal instruction is only one aspect of legal education and a more integrated system employing other methods that teach professional skills and values is needed.

What Garvey offers as a viable model for law schools to emulate is the Daniel Webster Scholar Honors Program at Pierce Franklin Law Center in New Hampshire. Its mission statement is “Making Law Students Client-Ready,” and they live up to their claim. This honors program makes new lawyers, better lawyers faster by increasing

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practical experience, and having classes that reflect the reality of today’s practice. The new courses or modified courses would emphasize the MacCrate Report’s ten fundamental skills and four fundamental values. Incentivized, this program also serves as an alternative bar exam. Students who have at least a B- in all DWS courses, complete the two year program and have at least a 3.0 cumulative grade point average, pass the Multi-State Professional Responsibility Exam are certified by the board of bar examiners and admitted to the New Hampshire bar upon graduation.

In closing, Garvey states that “after thousands of hours of analysis from many different groups, the overwhelming consensus is that law schools can and should do much better in doing their ethical and moral obligation of adequately preparing students to succeed as professionals.” Change is not only necessary, but as the Daniel Webster Scholar Honors Program and others have demonstrated, change is possible.

b. University of Wisconsin Law School Assessment 2000 (Self-Assessment)

Introduction

The University of Wisconsin Law School performed a self-assessment of their law school in 2000 where they evaluated their curriculum as part of a larger strategic planning effort. The “goal was to identify curriculum that will continue to enable their graduates to competently and ethically handle the realities of their first few years of practice while also building a firm foundation for their careers and responsibilities as members of the legal profession.” This report goes by the common name of Assessment 2000.

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119 Garvey supra. at 118
120 New Hampshire Supreme Court Ruling 42 (13)
121 Garvey supra. at 129
122 Garvey supra. at 129
Findings

The report first notes before getting into specifics that the results of this assessment are consistent with most findings and empirical research on legal education and that the same themes and recommendations from earlier studies are reinforced. The results of this study come from empirical research involving a cross-section of 204 employers, and recent graduates.

The most pressing findings of Assessment 2000 are that “the most important skills for a lawyer’s success are legal reasoning, and written and oral communication.” Employers and law graduates expect law students to bring these skills from law school and believe the law school can teach these skills. Simply put, the assessment states that the basic focus of legal education is to adequately and competently train practicing lawyers and that the Law School should integrate the theoretical and the practical at all levels of the curriculum.

More specific findings about what employers and law graduates “expected all new lawyers to bring from law school include: computer-assisted research, professionalism & civility, ability to write legal briefs & memoranda, good professional judgment, treating staff and clients with respect, traditional legal research, statutory interpretation, and time management including meeting deadlines.”

What is interesting about these skills is that many of them are not specifically legal. Even though law students should have these skills both employers and graduates were

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124 Id. at 4 (referencing the MacCrate Report)
125 Id. at 2
126 Id. at 4
127 Id. at 4
128 Id. at 6
unsure of the ability of Wisconsin Law to teach them. This was not the case however in regards to the ability of the law school to teach specific legal skills. All respondents agreed with some varying degrees of faith that the law school can teach the specific legal skills like statutory interpretation. Other interesting findings included that “students of color and older students have lower satisfaction ratings for first year curriculum than other students.” When asked about the balances of curriculum between theory and practice 61% of graduates said that there was too much emphasis on theory and not enough on the practical application of law, while only 35% of graduates thought a good balance existed. The assessment notes the importance of theory but calls for an integration of theory and practice at all levels of curriculum.

Conclusion

The assessment closes with six major findings and recommendations. For the purpose of applicability to the greater legal education community only four of the findings/recommendations are important. First, as stated in the beginning, legal analysis and oral and written communication are the most important skills for beginning lawyers. New lawyers are expected to have these skills when they come to work, and the collective belief is that law schools can effectively teach all three. Next, graduates, especially those of color or older students, are least satisfied with first year curriculum compared to second and third year curricula. “Third, law school[s] should place more emphasis on and devote more resources to practical skills and writing and should consider these areas in revising curriculum. Lastly, other areas of curricula that need revising or additional focus

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129 Id. at 6
130 Id. at 8
131 Id. at 8
132 Id. at 15
are in the areas of practical orientation, e-commerce, computers in the practice of law, ADR, and multi-disciplinary practice.” 133


As earlier noted in chapter four of this thesis, the Carnegie Report was a two year study of legal education that took a comprehensive look at teaching and learning in American and Canadian law schools. The results were five specific observations and seven recommendations. The authors also offered a summary overarching opinion on the state of legal education about how it can and needs to get better. It is as follows: “The dramatic results of the first year of law school’s emphasis on well-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding. If legal education were serious about such a goal, it would require a bolder, more integrated approach that would build on its strengths and address its most serious limitations. In pursuing such a goal, law schools could also benefit from the approaches used in education of physicians, teachers, nurses, engineers, and clergy, as well as from research on learning.” 134

With that in mind the report’s specific critiques and recommendations start with observation number two. “Law schools rely heavily on one way of teaching to accomplish the socialization process.” 135 This observation only carries an undertone of criticism by stating in their explanation that many other professional fields use many forms of teaching to accomplish their education training goals. An aside the authors find

133 Id. at 16
135 Carnegie Report at 5.
notable is that because of this heavy one way teaching style, there is a striking conformity in outlook and habits among legal graduates.

In observation three, the report transitions to an analysis of the primary method of teaching in law school, the case-dialogue method, and its consequential strengths, weaknesses and unintended consequences. The first weakness of the case dialogue method is its limited scope. It does not afford students the complexity of real practice situations or the social and ethical consequences and considerations. “Moral and social justice ideals are often set aside or suppressed in teaching first year students as addenda and are only reintroduced haphazardly after the first year which leaves students without the knowledge of when moral concerns may be relevant to their lawyering work. This often conveys a cynical impression of law that is rarely intended.”136 Legal education is unlike many other prominent professional educations in that compared to say medical school; law schools give little attention to direction training for professional practice.137 What happens because of this is law students are more like competitive scholars than attorneys learning how to deal with the problems of their clients. Another key problem with the case-dialogue method is that it fails to engage the “moral imagination” of students on a consistent basis even though the other professional educations put serious effort into this idea of professional responsibility. The serious lack of focus on actual practice training and the lack of focus on professional responsibility are the direct consequences of relying so heavily on the case dialogue pedagogy.

Observation four criticizes law schools for their use of summative assessments as tools of ranking, sorting, and filtering students instead of using formative assessments

136 Id. at 6
137 Id. at 6
that focus on supporting students in learning and making the process better. Using summative assessments is a good tool but should not be the only tool in the law school garden for nurturing the growth of students’ legal minds and practice ability.

Observation five takes aim at the approach legal education takes towards change and improvement. Instead of thinking comprehensively about systems, styles, and methods, legal education leaders think only in small incremental changes. There cannot be much progress made in the battle for better legal education if every school uses the same tools to compete against each other as they have since before mechanized warfare. Law schools should be seeking out innovation instead of stagnating in the same habits that were started when segregation was still legal and woman could not vote. American law has changed greatly in the 140 years since Langdell first introduced his method and 100 years since it became the standard in the early 1900s; it’s time legal education changed too. His method is good but has its weaknesses that could be addressed by introducing other teaching methods. I believe it’s past time to start looking at legal education change comprehensively instead of just piecemeal.

The first recommendation of the Carnegie Report calls for integrated curriculum. Specifically the report recommends a three-part curriculum: (1) the teaching of legal doctrine and analysis, (2) introduction to practice and responsibility for clients, and (3) exploring identity, values, and fundamental purposes of the legal profession. The second recommendation is the implementation of the first, which calls for joining lawyering, professionalism and legal analysis from the start. The third recommendation calls for law schools to make better use of the second and third years. Again referencing

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138 Id. at 7
139 Id. at 8
the locked in, innovative squashing structure of law school, the Carnegie report is asking for specifically the third year to be far more flexible. The fourth recommendation is to encourage law faculty to work across curriculum. Having faculty who work together to better their teaching as well as the learning experiences of their students will always be better than faculty who isolate themselves from each other. Recommendations five through seven focus on uniting students and faculty in legal education programs, recognizing the common purpose of legal education, and uniting the legal education community to work together for the better.


The Best Practices Project of the Clinical Legal Education Association published the “Best Practices for Legal Education” in 2007, under the chair leadership of Professor Roy Stuckey. Commonly called the Stuckey Report, the project was originally started in 2001 with the premise that “there is a compelling need to change legal education in the U.S. in significant ways.” The aim of the project was to promulgate a “statement of best practices.” The secondary goal was to illuminate what legal education could be if legal educators re-considered how to most effectively prepare students for the practice of law. The evidence for compelling change is “the reality that most law school graduates lack the minimum competencies required to provide effective and responsible legal services.”

As with other reviewed articles the main focus of this report is for the improvement of law schools within the legal education continuum. As with all professional training

140 Roy T. Stuckey, Best Practices for Legal Education: A Vision and a Road Map. New York: Clinical Legal Education Association, 2, 2007 (Hereafter referred to as the “Stuckey Report” or “Best Practices”)  
141 Stuckey at 2  
142 Id. at 2
programs, the Stuckey Report states that the primary goal of legal education should be to develop competence. Law schools must prepare their students to enter the legal profession and that means law students need to be trained in how to: work with clients, evaluate risk and merit, advise clients, progress civil and criminal matters, draft agreements and other legal documents, and plan and implement strategies responsibly and ethically.143

The most important recommendations that Stuckey offer are quite similar to the MacCrate and Carnegie recommendations. First, law schools need to refocus on the primary goal of legal education which is developing competence and finding ways to develop competence more effectively. Second, law schools need to integrate a balance of theory, doctrine, and practice while incorporating professionalism throughout all years of law school instruction. Third, law schools need to utilize context based instruction. Lastly, and as specifically called for in the Carnegie Report, law schools need to use multiple methods of assessment including both formative and summative assessments instead of just summative.

e. Reminder that Success is Possible Outside of the ABA System

A number of significant legal figures did not go through the standard ABA legal education process but still attained prominence in the legal community. The most notable such figure is Robert H. Jackson who was U.S. Attorney General, chief U.S. prosecutor at the Nuremberg Trials, and an Associate Justice of the Supreme Court. He did not go to college or graduate from law school but is considered one of the best writers on the court and was known for his commitment to due process protections from overreaching federal

143 Id. at 9
agencies.‡‡‡‡ Jackson’s story and others like him are important because they highlight the fact that great lawyers do not necessarily have to come from the ABA system. Some of the requirements of the ABA, such as having an undergraduate degree as a prerequisite for attending law school greatly increase the sunk overhead costs in the training to practice law. Some critics of the ABA argue that such policies are cost prohibitive, promote elitism, and are exclusionary to those who come from lower income homes. Does the system need to be adjusted if a person from a poor family who apprentices in a law office [who could not afford an ABA style legal education] becomes a better lawyer than someone who has enough family money to attend undergraduate and law school? Are we excluding potentially great lawyers because they cannot afford the ticket of legal education even if they have the ability? Jackson did not attend college and went to an apprenticeship teaching style law school and did very well for himself.

‡‡‡‡ U.S. Supreme Court Media, OYEZ Project, http://www.oyez.org/justices/robert_h_jackson
VI. 20 Years after MacCrate: ABA’s Review of the Current State of The Legal Education Continuum (2013)

The same ABA committee once chaired by Robert MacCrate recently published a follow-up report on the state of legal education in the United States 20 years after the release of their original monumental report.\(^{146}\) This new report has a much different and more defensive tone than that of the original MacCrate Report. In regards to the criticism that there is currently a problematic gap between legal education and legal practice, this ABA committee concluded that such criticisms are based mostly on anecdotal evidence instead of empirical research.\(^{147}\) They accuse the critics of selectively picking data and making unfounded claims. The report also consistently devalues any criticism of legal education that originates from outside the profession. It is interesting that, rather than being a positive statement of ABA objectives and achievements it is more a denial that there is any significant problem, and a set of excuses as to why things are the way they are and are too hard to change.

To escape the full criticism of the public, the committee has tried to change the responsibility for legal education. They make the excuse that the education and preparation of new legal professional is not solely on the shoulders of law schools, but balanced across a legal education continuum. Although it is true that legal education is a

\(^{146}\) The ABA Committee is called the “Section on Legal Education and Admissions to the Bar”

\(^{147}\) “Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary.” Committee on the Professional Educational Continuum, Section on Legal Education and Admission to the Bar. American Bar Association. 2 (2013)
continuum that starts before law school and continues throughout practice, this does not absolve ABA of problems that do exist within law schools. Furthermore, ABA has already begun to make some changes response to the 20 Year Post-MacCrate Report. Specifically they modified several ABA Standards for approval of law schools and interpretation including Standard 301(a) and Standard 302. Standard 301(a) was expanded from “[the educational mission of law schools is to] qualify…graduates for admission to the bar” to also include “and prepare [their graduates] to participate effectively in the profession.” Standard 302 was reformed to include the phrasing that law schools must devote sufficient attention to skills training and have real life practice experiences. This semantic change has little effect on schools that have long held their accreditation.

The ABA committee report does perform a valuable service in summarizing the views and recommendations of several other major legal education reports. They give special credence to the Carnegie Report and its recommendation for the three essential apprenticeships: cognitive, expert practice, and identity/purpose. The other major report that receives emphasis “Best Practices” report by Stuckey. The ABA committee accurately summarizes the central message of Best Practices and the Carnegie Report in that they call for “law schools to broaden the range of lessons, reduce doctrinal Socratic dialogue pedagogy, integrate teaching of knowledge, skills, and values, and give more attention to professionalism.”

Further along in their report, the ABA committee enumerates the challenges currently facing legal education and the profession. The pattern of excuses and blaming others and

\[148\] Id. at 3
\[149\] Id. at 3
\[150\] Id. at 3
criticizing the critics is pervasive here as well. The first example of this is the committee’s rather weak redirect response of a New York Times (NYT) article that they set up to cut down. The NYT article questions some of the educational methods that law schools employ and gives recommendations similar to the Carnegie Report on how to improve the quality, effectiveness and efficiency of legal education. The committee’s reply is to state that these questions are being raised at a bad time because the legal profession is still recovering from the recession like everyone else. Instead of looking at the merits of the article, the committee draws attention away from their practices, rules, and policies and blames the situation on the state of the economy without even answering the questions. While it is true that the recession is hurting the career prospects of new graduates, it highlights rather than excuses the current system where “average student debt exceeded $120,000 and only 68% of these graduates found jobs where a J.D. is required and less than 51% were in private firms.”151 This is only the first situation where the committee blames an external factor for internal deficiencies in legal education.

The next target for the ABA committee’s defensive criticism is the U.S. News ranking of law schools. The premise of the criticism is that prospective students put emphasis on the rankings in deciding where to attend law school, and, as a result, law schools emphasize practices and design their curriculum to achieve higher rankings rather than higher quality graduates. The ABA goes so far so far as to imply that law schools are charging more and being less cost efficient than they could be because the ranking formula correlates prestige with cost. These excuses are easily deflated. First off, the U.S. News ranking of law schools is not a good system and most prospective law

students know this. Second, the idea that law schools would allocate their resources to garner rankings rather than empirical outcomes is tantamount to arguing that NCAA college football programs would play the game to please certain sports writers rather than seeking wins on the field. Real law school rankings are based on the quality of legal professionals that each law school promulgates and the success that law schools have in helping their graduates pass the bar and achieve legal employment.

Law schools have another systemic problem to deal with that is influencing their actual decision making processes. After forty years of growth, the legal education market is experiencing a serious downturn. From 1970-2010 the number of law schools increased from 144 to 200 and the number of students doubled from 64,000 to 145,000. In the past two years, applications have dropped by double-digit percentages. Many schools are lowering the number of students they accept or are reaching much deeper into their applicant pools. The reduction in applicants hurts in two principal and competing metrics by which law schools assess their student bodies: undergraduate academic achievement and diversity. The positive in this situation, as noted by the ABA committee, is that law schools are looking at different predictors of potential success in law school such as work experience and personal qualities. The insulting part of their review, however, comes in their exposition that those law schools who must reach deeper into their applicant pools must make the hard decision about whether their program and faculty can meet the [special] needs of students who are less prepared [read “less intelligent”] then they are used to serving. What’s wrong here is that the focus is not even on the students, but on the faculty. Instead of espousing the virtues of higher education in the elevation of the mind through professional and academic training, we see the attitude

152 “Twenty Years after the MacCrate Report...” at 5
that if you can’t make a certain grade on one test and have a certain UGPA, our faculty cannot work with you. This value system ignores factors beyond LSAT or UGPA such as life skills or experience that may translate very successfully into the law profession such as business or military experience.

In the same breath it bemoans the reduced pool of the most qualified applicants, the ABA committee criticizes the move by some schools to shift from needs-based to merit-based scholarships to attract students with the highest GPA and LSAT scores, arguing that this sacrifices diversity.\(^\text{153}\) This argument is based on white middle to upper-class prospective students statistically scoring higher on the LSAT than lower socioeconomic classes and minorities. The report’s acknowledgement that there is not enough diversity in law schools is ironic considering that the GPA and LSAT score-based system of accepting students disfavors diversity and minorities right from the start. The questions of how to properly measure merit, and how to prioritize merit vs. diversity are difficult ones that are as yet unresolved. Nevertheless, they do not excuse the ABA or AALS or the schools themselves from making positive changes in legal education today.

The ABA report then transitions to the law school curriculum itself. The legal community, not surprisingly is very risk-averse. Even though the MacCrate, Carnegie, and Best Practices reports all urge law schools to move from doctrine and theory to more emphasis on skills and professionalism, most law schools are still struggling with the question of whether to change anything at all.\(^\text{154}\) The ABA committee takes a generally negative view to change as has already been shown. They call “change to integrate doctrine, theory, skills and ethics as a seismic shift” that may be “practically impossible”

\(^{153}\) Id. at 7
\(^{154}\) Id. at 7
to do in three years.\textsuperscript{155} The stated primary barrier to such change is the lack of faculty who possess recent practice experience and can provide a clinical alternative to pure theoretical instruction. They also falsely claim that there is no consensus about the skills necessary for new practitioners, despite the fact that the 20-year old MacCr\-\-\-\-\textsuperscript{ate Report} clearly established ten skills and four values that have been supported by almost all significant subsequent critiques of legal education. To their credit the ABA committee acknowledges that many schools have shifted from an exclusive use of the Socratic method and lectures to incorporating more discussions and labs. Yet, this is presented as an argument for preserving the status quo rather than for innovating and improving.

The committee actively criticizes experiential education and notes that there are dissenters who downplay the value of experience-based education and “externships.”\textsuperscript{156} They also submit that costs will rise to prohibitive levels if there is significantly more practical learning. Thankfully they do acknowledge that “most legal educators agree that there is no substitute for a learning experience in which a student is in the role as a lawyer, making professional judgments under the supervision of a faculty member.”\textsuperscript{157}

In summary, the ABA committee believes law schools are doing quite well at their job of training future legal professionals and that only small changes should be considered, if any at all. The most solid recommendation they offer is for law schools to consider incorporating an educational model that puts students in collaborative, cross-discipline, and problem-solving situations as they would encounter in real practice.\textsuperscript{158} They believe in their model of legal education and cannot fathom a successful model that

\textsuperscript{155} Id. at 7
\textsuperscript{156} Id. at 9
\textsuperscript{157} Id. at 10
\textsuperscript{158} Id. at 24
diverges from their mold. Their prescription for future action does not address the rising cost of legal education nor the rising competitiveness of other career paths for their traditional applicants. It is true that law schools today are putting greater emphasis on skills and professional training than they have in many decades, but there is still much more they can do to better attract, educate, and train law students for the practice of the profession.
VII. Recommendations

American Legal education – specifically our law school system – is at a crossroads. A law school’s primary job is to produce the most competent and responsible lawyers possible. Part of that task is recruiting, part is education, and part is training. Continuing the analogy of the legal profession to professional sports, there is no substitute for hands-on training and hours and hours of practice in the arena. There are no points for just knowing the rules – even the referees must practice their skills on the field. We need to be training players, not armchair quarterbacks. It’s time to elevate the training of legal professionals to the next level. The following are specific recommendations.

a. Change how law schools evaluate future and prospective students for admission and scholarship consideration. Far too much weight is given to the LSAT and not enough weight is given to other metrics of forecasting potential success. Implement a better system of evaluation that embraces more aspects of performance and life experience than academics in assessing the potential for legal profession success. These would include integrity, interpersonal skills, professional achievement in other fields, a history of public service, and other aspects that make a good resume and indicate exceptional potential. The weight of admission and scholarship considerations should holistically favor more balance across the mental, moral, and physical domains.

b. Incorporate the ten fundamental skills and four fundamental values of the original MacCrate Report into the core curriculum of AALS schools and the accreditation
standards of the ABA. The intent is not academic instruction in these, but training in practical application using case studies and clinics and supervised field work.

c. Increase the number of graded activities per course. There should be several opportunities for formal feedback in the form of grades for each class, not just a final exam grade. These should be tied to activities where the student is able to demonstrate proficiency in skills, not just regurgitate knowledge. Having more graded activities allows the professors to gauge the strengths and weaknesses of their students as well as their own teaching, and to steer the course to a better final outcome.

d. Institute a more appropriate law school ranking/value system. Schools should be ranked only in the areas of the law they offer, and by a value criteria that considers the success of graduates versus the cost of the education and the quality of applicants. The information that informs the rankings should be made available to all prospective candidates in the vein of the public information-sharing approach of the Law School Transparency website which provides a far better service to prospective law school students than the annual U.S. News law school rankings.159

e. Introduce more programs like the Daniel Webster Scholars Honors program that incorporate theory, practice, and values throughout and have a bar-alternative incentive. Dynamic programs like this are the future of great law schools.

f. Increase the availability of two-year legal education programs. The cost of a 3-year law school program on top of a 4-year undergraduate education can be cost-prohibitive and needlessly discriminate against those who have less financial resources and discretionary time in their career paths.

159 http://www.lawschooltransparency.com/
g. Dispense more career and market information about the current realities of the profession before students specialize or even apply to law school. Many students make the most important decisions of their early legal careers (e.g., which school to attend, what to specialize in) before they have the necessary information or insight to properly evaluate their options.

h. Hire more faculty that practice on a regular basis. More students will practice law rather than study or teach it, so at least half of the faculty that teaches them should have recent or continuing significant practice work that qualifies them to mentor students in real-world applications of their education.

i. Increase the specialization of law schools. Having 200 law schools that all have similar programs is not as valuable or desirable as a system where some law schools focus on general education and others have very strong specialty focus strengths such as tax law, or space law, or health care, etc. Specialization allows a more intensive exploration of the practical as well as theoretical dimensions in an apprenticeship style, and dovetails nicely with pulling in more actively practicing faculty.

j. Develop more genuine student mentoring programs. These can involve internal programs with school faculty or external internships and clerking opportunities. The human element is the key to moving from the sterile environment of classroom theory to the more instructive world of experiential education and training. More than any other recommendation, this one is the key to improving the quality of American law schools.
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