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Who Cares?: Reflections on Law, Loss, and Family Values in the Wake of 9/11

Carlin Meyer

New York Law School, carlin.meyer@nyls.edu

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SKILLS AND VALUES EDUCATION: DEBATE ABOUT THE CONTINUUM CONTINUES

RICHARD A. MATASAR*

I. INTRODUCTION

Revelation!¹ Graduating from law school, passing the bar examination, and getting a license does not make a student a lawyer. Merely understanding doctrine through reading casebooks, participating in Socratic dialogue, and engaging in legal research does not cut it when lawyers need real knowledge of law as it is applied to facts that are constantly evolving and they must understand that the nuances of human nature make even certain things shaky under some circumstances. Lawyers need well-developed skills as fact investigators, negotiators, and litigators — more than they can get in law school clinics, moot court, and trial advocacy courses. Even if they have taken the best Professional Responsibility courses and have had a “live client” clinic, a student’s professional values have not yet been challenged by the extraordinary pressures of serving actual clients, working for demanding bosses, and needing to pay bills. Law school simply is not enough.

This is not a novel thought. As any dean can testify, it has spurred generations of lawyers to be angry at their law schools (or at least to use their frustrations regarding the “inadequacy” of their education as an excuse for refusing to give a gift). This has led legal education critics to call for more skills and less theory courses, better teachers, longer education, shorter education, more drill work, more practical

* Dean, President, & Professor of Law, New York Law School. University of Pennsylvania, B.A. 1974; J.D. 1977.

1. Actually, “revelation” is probably not the right word, since what is revealed is already known by almost all of us. Perhaps the right expression is “guess what I figured out.” Or, if that seems a bit flip, maybe it is a more complex thought. Before I went to law school, I assumed that a degree would make me a lawyer. But sometime during school, maybe even as early as the first week, I figured it out. I am still in school. Even after I graduate I have to take a big test. The big test is only marginally related to the thing I want to do after graduation, being a lawyer. Worse yet, most of my teachers have not been lawyers for a long time. Some of them did not like being a lawyer. School seems somewhat theoretical. What the heck? No degree, no bar exam. No bar exam, no lawyer. I will make the best of it and figure it out later.

material, and so on. This has sometimes led regulators to change accreditation rules, call for better use of adjuncts, and seek to bring the academy to task for its shortcomings. In a sophisticated critique, it is said that we must bridge the gap between law school and the profession; as the theory goes — law school must accelerate the process of becoming a lawyer and then the profession must take over.² The goal is to narrow the gap between these two worlds.³

Ten years ago, the *MacCrate Report*⁴ carefully analyzed the state of law schools⁵ and the legal profession,⁶ documented the knowledge, skills, and values needed by professionals,⁷ and recommended several steps to improve legal education and narrow the gap between student and lawyer.⁸ The *MacCrate Report* moved many to write⁹ (including

2. As stated by one group of commentators, "It has long been apparent that American law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers Thus, a gap develops between the expectation and the reality . . ." American Bar Association Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4* (1992) [hereinafter *MacCrate Report*]. This gap, of course, accounts for the finger-pointing between lawyers and academics, "resulting in complaints and recriminations from legal educators and practicing lawyers." *Id.* As the Commentators put it, "The lament of the practicing bar is a steady refrain: 'They can't draft a contract, they can't write, they've never seen a summons, the professors have never been inside a courtroom.' Law schools offer the traditional responses: 'We teach them how to think, we're not trade schools, we're centers of scholarship and learning, practice is best taught by practitioners.'" *Id.* I argue in this Essay that we have made great progress in closing the gap between practice and the profession, but that the gap can never be closed. I conclude that the major responsibility for shaping the professional destiny of each lawyer's career rests in their learning acquired after law school.

3. Bridging the knowledge gap between law students and lawyers has spawned its own cottage industry of bar review courses, bridge-the-gap continuing education courses, and seminars. Sometimes these are joined by courses in "professionalism" or other attempts to accelerate the maturation of new lawyers. These efforts are always valiant, sometimes valuable, and almost always well-intentioned. As discussed below, however, they ultimately cannot succeed in bridging the gap because they are misdirected as short-term solutions to a long-term problem. The problem is that the gap between legal education and the profession continues in a different form throughout the career of a lawyer. As I argue below, there is a need for life-long "gap filling" that is not currently being met. To bridge that gap, the profession simply must do more.

4. *MacCrate Report*, *supra* note 2.

5. *Id.* at 233-72.

6. *Id.* at 9-120.

7. *Id.* at 121-221.

8. *Id.* at 325-38.

me),¹⁰ influenced legal education, and may even have improved relationships between members of the academy and the profession. The *MacCrate Report's* Statement of Skills and Values ("SSV") has had a profound impact on the discourse in legal education and has helped to shape curricula, the status of clinical faculty, and our understanding of legal education. While legal education still has many improvements it can make, there is no doubt that the *MacCrate Report* has received high marks in the academy.

Unfortunately, the *MacCrate Report's* impact on the profession has been negligible. It set out to create a formula for bridging the gap between student and profession. The authors hoped to create within lawyers a life-long commitment to learning, a method for skills training, and a legal profession that would embrace agreed-upon core values. For these goals, the *MacCrate Report* certainly gets low grades.

Time to 'fess up. This essay does a bit of cheerleading for law schools. It addresses our response to the *MacCrate Report's* call for improved teaching of skills and values. It speaks of the massive attitudinal change of law teachers toward each other and toward the broader training mission imagined in the *MacCrate Report*. In the best tradition of the hometown announcer who cheers for the home team, I will criticize the response of the profession to *MacCrate Report's* call for their involvement. The *MacCrate Report* speaks of an "educational continuum."¹¹ The reality is that the continuum is broken soon after law school. This essay concludes with a call for the legal profession to pick up the challenge to educate for life.

I begin in Part II with a brief review of the *MacCrate Report*, focusing on its analysis of the core skills and values required of lawyers. In Part III, I turn to the SSV and assess the progress of law schools in bringing skills and values training to students. Next, in Part IV, I discuss trends in the legal profession and analyze the influence of those trends on the continuum of training imagined in the *MacCrate Report*. Finally, in Part V, I make some modest proposals for involving the profession in the continuum of skills and values training.

9. See Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLIN. L. REV. 109, 115-125 (2001) (discussing the impact of *MacCrate Report* and noting extensive scholarship following its publication).

10. Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLIN. L. REV. 457 (1994).

11. See generally, *MacCrate Report*, *supra* note 2.

II. A MACCRATE PRIMER

The *MacCrate Report* is divided into four parts: (1) "The Profession for Which Lawyers Must Prepare," which addresses the evolution of the practice of law, the growth and diversity of practice settings, the evolving diversity of the legal profession, the organization of the Bar, and the evolution of legal education;¹² (2) "A Vision of the Skills and Values New Lawyers Should Seek to Acquire," which sets forth the statement of skills and values ("SSV") that all lawyers must possess to be effective professionals;¹³ (3) "The Educational Continuum Through Which Lawyers Acquire their Skills and Values," which addresses steps that may be taken to instill the SSV from pre-law, through law school, through the transition from law student to practitioner, and then during the rest of a lawyer's career after admission to the bar;¹⁴ and (4) "Recommendations of the Task Force," which outlines the actions that should be taken to implement the *Report*, including recommendations on dissemination of the SSV, on how to choose a career and a law school, on what law schools should do, on what can be done in the profession, and on the creation of a new Institute to bridge the gap between law school and the profession.¹⁵

Each of these sections has made a valuable contribution to the dialogue concerning the move from student to practitioner. And, while each might warrant an extended discussion, for purposes of this essay, my focus is on the SSV, the core of the *MacCrate Report's* substantive contribution.

III. THE SSV

In addressing the question of how to improve the preparation of lawyers for practice, the MacCrate Task Force "felt the need to develop a conception of the object of this preparation, in the form of a compendium of the skills and values that are desirable for practitioners to have."¹⁶ This alone would have been useful, but the Task Force felt that its statement would be even "more useful as a jump-off point and stimulus for thinking within the profession as a whole."¹⁷ The SSV

12. *Id.* at 9-120.

13. *Id.* at 121-222.

14. *Id.* at 223-304.

15. *Id.* at 325-338.

16. *Id.* at 123.

17. *Id.* The members of the task realized that they could not hope to write a statement that would be universally accepted as definitive. However, they believed that

then begins with several underlying assumptions: that the statement must take account of the increasing “specialization and division of labor within law firms;” that it should require every lawyer to remain a “well-trained generalist;” that the list of skills and values be minimally concerned with what it takes to practice law “competently and professionally;” that the statement recognize that “a lawyer functioning as a member of a team need not be familiar with all of the skills and values . . . so long as the team as a whole can mobilize and effectively apply the full range of skills and values in representing a client and making professional judgments;” and that sometimes specific “substantive knowledge – is necessary to complement the skills and values” of the statement.¹⁸

The SSV consists of three parts: a description of the “Organization of the Statement,”¹⁹ an “Overview of the Skills and Values Analyzed,”²⁰ and an “Analysis of Skills and Values.”²¹ The first two sections are short and descriptive: the “Analysis” section provides the underpinnings for the success of the SSV.

The ten fundamental skills set forth in the SSV are: (1) problem solving, (2) legal analysis and reasoning, (3) legal research, (4) factual investigation, (5) communication, (6) counseling, (7) negotiation, (8) litigation and alternative dispute-resolution procedures, (9) organization and management of legal work, and (10) recognizing and resolving ethical dilemmas.²² The four fundamental values are: (1) provision of competent representation, (2) striving to promote justice,

“putting together the best comprehensive statement” and by “disseminating the statement, the task force would encourage the profession to examine it critically and to improve upon the thinking that went into it.” *Id.* at 124.

18. *Id.* at 124-25.

19. *Id.* at 135-37.

20. This section is divided into two parts. The first covers “Fundamental Lawyering Skills.” *Id.* at 138-40. The second sets forth “Fundamental Values of the Profession.” *Id.* at 140-41.

21. *Id.* at 141-207 (discussion and commentary on lawyering skills); *Id.* at 207-21 (discussion and commentary on values of the profession). As I discuss below, the great disparity in the length of the discussions of skills and values may reflect the far greater difficulty of influencing the profession of law than the training of law students. The skills training envisioned in the SSV can be introduced well in the law schools, which are centrally regulated and resemble each other closely. The values promoted in the SSV require a life-long commitment in every lawyer that depends in great part on the actions of legal employers, who are notoriously difficult to regulate and control in a centralized fashion.

22. *Id.* at 121-222.

fairness, and morality, (3) striving to improve the profession, and (4) professional self-development.²³

While I cannot speak for the success of the SSV at every law school, as I reflect on my experiences as the dean of three very different law schools (Chicago-Kent, the University of Florida, and New York Law School), I am confident of its positive impact in a number of settings. As I discuss below, the SSV, especially the teaching of the fundamental skills of lawyering, has had a major impact in legal education.

A. *Personal Reflections on the SSV*

Before distributing the SSV, the Task Force suggested two possible uses for it in legal education.²⁴ First, it presumed that students could use the SSV as an “aid . . . in preparing for practice.”²⁵ Furthermore, having the SSV would enable law students “to play a more active role in shaping the educational opportunities available to them,” and would “be able to participate more thoughtfully in their law schools’ curricular planning.”²⁶ Second, it suggested that law schools use the SSV as an aid “in curricular development,” as “a focus for examining proposals to modify their curricula to teach skills and values more extensively” and in conducting self-study.²⁷ As I discuss below, the Task Force captured the uses that have been made of the SSV by law schools.²⁸

23. *Id.*

24. The Task Force also envisioned use of the SSV by developers of continuing education programs, by law offices in designing in-house training for new lawyers, and by individual lawyers in self-evaluation and self-development. *Id.* at 128-29. As I discuss below, the law schools seem to have made better use of the SSV than have practicing lawyers.

25. *Id.* at 127. (“Students will be encouraged to seek out opportunities to develop these skills and values while they are in law school (in law school courses, extra-curricular activities, and part-time and summertime employment).”).

26. *Id.*

27. *Id.* at 128. In particular, the Task Force imagined that the SSV would spur discussions of revising “conventional courses and teaching methods to more systematically integrate the study of skills and values with the study of substantive law and theory,” revising existing skills courses “to better achieve pedagogical goals,” and developing “courses or programs concerned with professional values.” *Id.*

28. In my view, the SSV has been far less successful in providing a theoretical underpinning for Continuing Legal Education, uses by law offices for in-house training, or for use by lawyers in their self-evaluation and self-development.

1. The SSV has had a Significant Impact on Curricular Discussions

In the early part of my career as a law professor, most discussions of curriculum consisted of a faculty member proposing a course that would further his or her research agenda, the curriculum committee approving the course automatically, and the faculty as a whole agreeing to add the course. If there was a discussion, it might involve whether the course would add costs that would prevent other faculty members from doing what they wished to do or whether it would create unfair teaching load differentials between otherwise productive equals. Rarely would the proposals stir a conversation about pedagogy or broader value to students beyond the content of the proposal. Even rarer still, were discussions of curricular proposals made with reference to larger institutional goals, such as the mission of the law school or whether the proposals would deepen students' education about any of the matters outlined in the SSV.

After the *MacCrate Report*, the tenor of most of these discussions changed. Although sometimes the discussions have been animated by direct reference to the *MacCrate Report*, more often they were influenced by the substantive contributions of the report which focus on lawyering skills and values. Even more important, however, curricular decisions are increasingly being made with reference to broader institutional and professional goals.

Four recent curricular initiatives from New York Law School's long-term planning process illustrate the point nicely. The Law School's plan evaluates the needs of its students,²⁹ assesses the skills

29. There are really three separate student bodies at New York Law School: students at the top of the class, those at the bottom, and those in between. The needs of students in each group are substantially different. The top students are likely to find professional employment in larger organizations with training programs. They are in need of advanced and specialized work in law school, but do not need special training in legal analysis. They have a capacity to take on many extra and co-curricular projects. Those in the bottom of the class are unlikely to find employment as lawyers for an organization. They may practice in unsupervised settings. While in school, they need special training in basic legal analysis, writing, research, and communication. They also need extra assistance in preparing for the bar examination. Students in the middle of the class will be employed by others (although some may decide on smaller practice settings) and often will have a mentor in practice. It is less likely that they will be in specialized practice settings, but most of them will be exposed to litigation. They may need more advocacy training than other students. They may also need to continue to diligently work on analytical skills throughout law school.

and values desired by those who employ the Law School's graduates,³⁰ and develops a program that will improve the skill level of every graduate. We call this project "The Right Program for Each Student." In essence, the Law School's plan depends upon pairing each student's program with the set of skills and values he or she can expect in the professional settings he or she enters. Of course, since no one knows in advance of a student's actual law school career and choice of profession exactly what any particular student will need, the Law School has utilized four curricular strategies that are responsive to the aggregate needs of similarly situated students. The first demands a uniform, school-wide effort to help students develop a professional identity. The second, third, and fourth strategies are responsive to the special needs of top, bottom, and middle performing students.

a. The Professional Development Project

Every student at New York Law School needs to develop a professional identity, solid skills, and firmly held values. The Professional Development project responds to these needs by requiring every student to gain a basic understanding of legal reasoning in the Applied Analysis course. This training is reinforced by a required two-semester legal research and writing course and upper-level writing requirements. Further, each student must take Lawyering, a course that begins the process of skills and values training that is picked up later in the professional responsibility course, clinical courses, and other skills electives. Finally, the remainder of the required curriculum builds on these courses and ensures that students will have a working understanding of the knowledge, skills, and values that are basic to practice.

These classroom experiences are supported by the Law School's career planning office and extra and co-curricular programs. First, to better understand every student's goals as a lawyer, the Office of Career Planning will meet with every law student to create an Individual Career Plan.³¹ Second, every law student will engage in a continuing

30. Different practice settings require differing levels of training. Thus, students destined for larger organizations with extensive in-house training programs have less need for hands-on training than those who will be self-employed or who work with little supervision. Those who will work for larger organizations may need training in a specialized area, while those who will work in general practice settings may need more breadth and less depth. Similar analyses may be made about training in business practices, special training in accounting, management training, etc.

31. Even prior to this, upon entry to the Law School, every fifteen law students will have been assigned to a "liaison," a staff member designated as the students' consultant

professional development program consisting of courses, seminars, colloquia, and other meetings outside of the standard law school curriculum. Third, every student will have the opportunity to do volunteer legal work and to otherwise engage in community service; the Law School will recognize and reward this service with work study support, certificates celebrating student participation, and other recognition of student volunteers. Finally, all extra and co-curricular student organizations will be devoted to building each student's portfolio of skills and values. These related efforts will give every New York Law School student the ability to develop his or her skills and values and are responsive to the traits desired by clients and others who will use the students' services after graduation.

b. The Harlan Scholars Program

During the last 20 years, New York Law School has learned that its top performing students sometimes do not feel that they have been sufficiently challenged in law school. Much like the old adage goes: they were sufficiently scared in year one and performed well enough to erase fear; they worked hard during second year at tasks relatively unrelated to their career goals; and they were bored to death by the time they reached their third year. Under the Law School's plan, to maximize their experience and maintain the value of school for all three years, top entering and performing students at New York Law School will qualify for an honors program. They will be required to choose a law school curricular specialty in a public or private law setting. They will each be expected to serve on a journal and write scholarship. They will work closely with a faculty member and take employment, as an extern, volunteer, or for pay, in an area related to their proposed specialty. They also will finish a project before graduating that will require putting together several skills as a capstone to their law school careers. In sum, the program should provide both challenging and rewarding advanced work that will challenge these students to maximize their

for navigating through Law School policies and procedures. This program has evolved as a response to weaknesses among entering students, many of whom have never had the obligation of following institutional rules, reading directions, and taking responsibility for their own actions. The liaison program ensures that the Law School will prod students into more professional habits – checking their calendars, reading official notices, meeting deadlines, etc. In essence, the program's philosophy is to move "From Personal Attention to Personal Responsibility."

abilities and not merely rehearse skills they acquire in the first year of law school.

c. The Comprehensive Curriculum

An analysis of the experiences of students at the bottom of the class at New York Law School reveals a different set of needs. Many, sometimes most, of these students have difficulty understanding legal doctrine and applying legal analysis to new problems as they arise. They may have writing difficulties. They often do not pass the bar examination on the first try. To build their professional portfolios, these students need more training in fundamental aspects of lawyering skills. Therefore, the Law School adopted a curriculum for these students consisting of the following elements: (1) at the end of the first semester of law school, students in the bottom of their sections will be diverted into a special legal reasoning class in their second semester, Principles of Legal Analysis; (2) at the end of the first year, the students who have made sufficient academic progress to be retained will be divided into three groups – those who have made substantial progress, who could progress with students in the middle of the class; those who have done well enough to progress at a normal pace through law school, but who will be required to take a series of courses for their final two years of law school that are geared to building their analytical skills; and those still remaining at the very bottom of the class, who not only will be required to take certain courses, but who will also be required to take an extra semester to complete their studies; (3) in their last two semesters, students taking this curriculum will be required to take two courses that comprehensively review all basic substantive course material that will be tested on the bar examination.

The Comprehensive Curriculum allows little room for a student to hide. It consists of difficult courses. The students in the program will take their courses with colleagues from both the top and the middle of the class. Under this structure, the goal is to produce graduates from the bottom of the class who have performed under intense pressure, been exposed to major substantive areas of law, and been encouraged (and drilled) to bring up their skills to an acceptable level that will make them more “practice-ready” than their counterparts who graduated from the Law School a generation ago.

d. Those in the Middle

Students in the middle of the class have less well-defined needs than those at the top or the bottom. Nonetheless, the faculty also has begun a project aimed at developing specific programs that will disproportionately benefit and be responsive to the needs of students in the middle of the class. It appears that many of these students will be required to have general lawyering skills. Many will also be called upon to be advocates. Over the years, many of these students have also held leadership positions in various student groups. Together these characteristics suggest that the students in the middle of the class may need more extensive advocacy training than other students and that a higher percentage of the Law School's limited clinical teaching resources should be expended on the students in the middle of the class.

These four projects illustrate the power of using central principles to inform curricular design – one of the primary aims of the *MacCrate Report*. While the Law School did not explicitly rely on the *MacCrate Report* as a justification for the curricular initiatives, it is clear that each of the changes is animated by matters at the core of the SSV. Hence, a professional development program that sets out to build the analytical skills of every student and to have each student work to establish a professional identity is at the heart of the skills and values recommendations of the Task Force. Similarly, specifying a curriculum for students depending on their individual needs and the likelihood that they will receive further training, is responsive to the *Report's* call for a continuum. It is a necessary corollary to the SSV, that a school should provide the right program for each student depending on their educational needs and the professional path that they are likely to follow.

2. The SSV Means that “Practitioner” is No Longer a Dirty Word

Several years ago, during a faculty meeting I attended, the discussion turned to whether the law school should hire a candidate for a teaching position. Various faculty members spoke of the candidate's qualifications, his academic credentials, writings, and work experience. Finally, a senior member of the faculty spoke the words that were the kiss of death. “How,” he asked, “could we offer a position to this person – he's merely a practitioner?”³² The conversation reflects an atti-

32. As pronounced by my colleague, the word is pronounced “prac-TI-(and here one has to spit out the syllable)-tioner.” It wasn't that the colleague didn't think that

tude about lawyering (often attributed to law faculty members) that has reached mythic status among lawyers. It goes something like this: academics think we are stupid, they don't care about law, they failed at being lawyers themselves, they have no idea how the real world works, and therefore, the law schools fail to really train students to become practicing lawyers.

I am confident that as with most myths, this one has an element of truth. Unlike many myths, however, changes in the world have made the myth more like a folk tale of a past that may soon be forgotten. Simply put: the *MacCrate Report* has validated the importance of lawyer training, elevated the status of lawyers and clinical teachers, made the study of lawyering skills and values critical to the scholarly agenda of the profession, and brought the academy closer to the profession. Throughout the country, law professors are studying real lawyers to better understand the profession for which their students are preparing.³³ Members of law faculties are helping to design the professionalism programs of state bars. Law firms are working closely with faculty members on projects. Law schools are sponsoring bridge the gap programs, participating in CLE programs, creating externships for their students, and employing leading "practitioners" (pronounced softly, and with a smile) to become adjunct and full-time faculty members.

3. Curriculum, Governance, and Participation in the Profession

Since the *MacCrate Report*, law schools have made profound changes to their curricula, altered the ways that they govern themselves, and become more involved in professional service. While these changes might be wholly independent of the *MacCrate Report*, the trend has certainly accelerated since its publication.

When I attended law school 25 years ago, my school provided the students with a small clinic, taught largely by adjunct faculty and a few full-time young faculty, with no job security and low status in the insti-

being a lawyer was a worthwhile endeavor, it was only that he could not imagine that merely practicing law could be a sufficiently challenging intellectual enterprise on its own to warrant trust that someone would become a good law teacher. Being a lawyer would only ensure that the colleague could contribute to building lawyers skills, not the tools to become a great scholar or thinker about the law.

33. This trend is reflected in New York Law School's Center for Professional Values and Practice, which takes as its mission to gain a better understanding of what lawyers do and takes as its vision the need to train lawyers in what they ought to do.

tution. There might have been a trial advocacy course, but it had relatively low enrollment. Legal writing was taught by third-year law students and recent graduates. There was an internal moot court competition, but the law school did not have any “teams.” Almost every course was taught in a Socratic style. More radical teachers had problem sets that were discussed in class. Regular practicing lawyers and judges rarely spoke at the law school, unless they were quite famous, rich, on the Supreme Court, or all of the above. Faculty members rarely could give intelligent advice about practicing law, except in a large firm setting, or for the radical lawyers on the faculty, in the justice department honors program or an elite public interest setting. Clients were rarely mentioned. Studying appellate records was the norm. Professional responsibility was a recently added required course (coming after the embarrassment of Watergate and the role of lawyers in covering-up illegal governmental acts). Alternative dispute resolution was an exotic concept.

The law school today has retained almost every strong feature of the law school of 25 years ago. However, since that time the curriculum has expanded greatly to embrace wider visions of law and values training. Clinics exist in varying shapes and sizes. Some schools take on “impact” litigation. Others do advocacy related to critical social issues. Some help small business. Some do criminal law. Some do civil rights. At some schools, virtually every student takes a trial advocacy course. Legal writing is taught by professionals, often in small class settings. Students take required courses in lawyering. Students can learn how to conduct a fact investigation, negotiate, and counsel. Alternatives to litigation are presented. Some courses use case files, not case books. Some courses study trial records. Many courses use simulations, computer exercises, or other audio-visuales. Students solve problems, participate in externships, perform community service, and have the opportunity to meet with a mentor. Lawyers and judges are welcomed to the law school to speak. In short, many of the skills and values that the *MacCrate Report* cites as fundamental are being embraced in the law school.

Not too long ago, clinical education was a step-child at the law school. Clinical teachers had little job security, few participatory rights in governing the law school, and were given lower salaries and benefits. This situation persists today at some schools, but throughout legal education, clinical and stand-up classroom teaching are reaching parity. Moreover, new types of faculty positions are also being created.

Schools are creating positions for full-time legal writing instruction. Schools are developing centers and institutes that are managed by practicing lawyers. The centers are neither clinics, nor extra-curricular projects, but are integral parts of training students to solve particular problems in special subject areas.

Faculty members occupying these positions are increasingly important to law schools. They exercise governance rights nearly on par with the tenure track faculty, often voting on every matter but tenure track hiring or tenure and promotion. Whether clinician, writing instructor, or center director, these new faculty members are given titles identical to tenure track faculty, often serve as the heads of major committees, and are important to the intellectual and social life of law schools.

Students are increasingly participating actively in professional and other volunteer activities in post-*MacCrate* law schools. Several schools have opted for mandatory pro-bono programs. Others have extensive voluntary public interest programs like the Serving our Society ("SOS") program at Chicago-Kent or the projects supervised by the Office of Public Interest and Community Service at New York Law School. Some schools have begun extensive professionalism programs like Professionalism Day at Chicago-Kent or the Professional Development Program at New York Law School. Many schools make extensive use of federal work study funds to promote public interest. Many schools have adopted loan forgiveness programs. The majority of schools have funded summer public interest programs (or if the positions are not funded, they have credited courses that promote public interest and community service). In essence, law schools have become a force to promote public interest work. Finally, with the adoption of an explicit accreditation standard making it a responsibility of a law school to prepare its graduates for the practice of law, there has been greater attention paid to skills and values training.³⁴

B. *A MacCrate Report Card*

Even with the many significant changes to legal education since publication of the *MacCrate Report*, law schools still must make significant improvements if they wish to give every student a complete preliminary education in each of the skills and values set forth in the SSV.

34. See Engler, *supra* note 9, at 145 (discussing ABA accreditation standard 301(a) flowing from the *MacCrate Report*).

For what it is worth here is my subjective report card on *MacCrate* skills and values:³⁵

Skill: Legal Analysis and Reasoning, A-

That law schools have done reasonably well in providing legal analysis and reasoning training should be no surprise. Law schools have always been very good at preparing students to “think like a lawyer.” However, even in this area, much has been done to improve training in analysis and reasoning; through computer aided instruction in substantive areas, students have developed a feel for how rules are built; through academic assistance, even the weakest law students experiencing real difficulty in understanding legal analysis, have improved their performance; through special upper-level review courses, students have been given better grounding in legal reasoning to help them prepare for the bar examination and the transition to practice. On balance, law schools do very well in providing training in analysis and reasoning.

Skill: Legal Research, B+

Skill: Communication, B+

Law schools have also done reasonably well in providing research and communication training, although there is much more variation in the performance of different schools. In the last 10 years, most law schools have made significant improvements to their legal writing instruction and have made stronger efforts explicitly to teach written and oral communication. For example, at Chicago-Kent, every student has a small section in legal writing both semesters of the first year, taught by a full-time faculty member. At Iowa, these courses were taught by full-time tenure track faculty members. Similarly, at Iowa and at New York Law School, students could use a language laboratory and work directly with tutors on their writing. Furthermore, most schools have

35. As discussed below, in general, law schools have been far more effective in skills training than in values training. This reflects a problem similar to the *MacCrate Report* itself, which devotes significantly more attention to the fundamental skills of lawyering than the fundamental values of the profession. It also represents a distribution of effort issue; simply put: the values of the profession require life-long commitments, the duration of which will fall during a lawyer’s professional days after law school. Worse yet, as I develop in the final sections of this paper, the profession has not effectively participated in values training.

greatly expanded the training of students in advocacy courses, moot court competitions, and in journal writing.

Skill: Recognizing Ethical Dilemmas, B-

Since Watergate, law schools have become increasingly aware of their responsibility to help young lawyers learn their ethical responsibilities. Professional Responsibility courses or courses in the Legal Profession have become prevalent. Preparing students for the Multi-State Professional Responsibility Examination is an important part of most law school curricula. Moreover, many schools have adopted "ethics across the curriculum" approaches to professional responsibility that make ethics an important part of basic courses. Almost every simulation course requires some type of ethics component. Further, in many states, continued training in Ethics ensures that law teachers will be deeply involved in CLE programs. For example, the University of Florida organized an annual "professionalism" conference, bringing faculty, members of the local bar, and students to the law school for an all-day symposium. Nonetheless, no matter how sophisticated many of these initiatives have been, they do not give students the real dilemma that is caused by the conflicts between the needs of real clients, the need to place food on the table, and the personal struggle to balance these needs. That training awaits the practice of law.

Skill: Problem Solving, C-

Skill: Counseling, C-

Skill: Negotiation, C

Skill: ADR, C

Training students in this constellation of skills has been spotty. Many law schools, like New York Law School, offer courses in Negotiation, Counseling, and Interviewing. Or, schools offer courses in pre-trial litigation, estate planning, or small business organizations, all geared to training for problem solving. Other law schools, such as the University of Missouri, have aggressively begun training students in the art of Alternative Dispute Resolution. Schools like the University of Florida College of Law have formed dispute resolution centers. But, on balance, most law schools still concentrate on the reading of appellate files to train their students. Few have more than a handful of opportunities for advanced training in any of these disciplines. Moreover, much of the problem solving strategies that become a daily

part of the practice of law are never addressed in law school. There is much room for improvement.

Skill: Factual Investigation, D

Skill: Organization and Management of Legal Work, D

These two skills require a tremendous commitment to understanding the actual bases of real legal work. Law schools simply have relegated these skills to the practice of law. At best, some schools have begun to offer law office management courses or have introduced fact investigation into clinical courses. Sometimes these matters are touched upon in substantive courses. On balance, however, law professors do not spend much time thinking about how to investigate facts or organize legal work. I do not think that law schools will make much of an organized effort to improve on the training of factual investigation. My guess is that given the increasing likelihood that many law school graduates will be forced into business for themselves, many law schools will improve their training on the business and organization of legal work, and will coordinate their efforts with bar courses in bridging the gap between school and practice.

Value: Provision of Competent Re-presentation, Incomplete

In some ways, all of legal education is concerned with the value of training students to focus on the value of providing competent representation. However, law school rarely treats competence as an end in itself. Rather, it is taught as a means to an end – competence means higher grades, better jobs, more fame and glory, etc. This is not a surprise since law students rarely are exposed to clients and those in need of competent service. To clients, competence is expected. Lawyers must be competent regardless of whether there is a reward for the behavior. Moreover, we rarely define competence. Doing so requires each of us to search for an adequate way to convey the value of competence. In my scheme, I urge students to define competence by the highest standard of all – getting it right, one hundred percent of the time, as efficiently as possible, and at the lowest cost. Until we in legal education can find better ways to give students an urgent need to provide competent representation in every context, this will remain a work in progress.

Value: Promotion of Justice, Incomplete

There is much talk about “justice” in law schools, but often it is quite abstract. Many law schools treat justice and fairness as individual matters to be defined by each student, faculty member, and lawyer. This approach sometimes leads to a commitment to “justice” as whatever best serves one’s clients’ ends. Under this approach, the individual student or lawyer can leave it to the aggregation of collective efforts to bring fairness to our system. The problem with this approach, however, is to do little to instill in students a life-long commitment to justice issues. New York Law School has tried to address this problem by placing “Justice for a Diverse Society” within its mission statement. It has created an Office of Public Interest and Community Service to give students a chance to do volunteer legal work and other public service. It has created the Justice Action Center, an academic honors program that engages in projects for students to use law to improve society. Yet, even with these initiatives, the law school does little to monitor the activities of its students, staff, faculty, and graduates, and probably insufficiently provides incentives to embrace justice goals for a life in the law. Until law schools embrace justice goals and incorporate them into the curriculum, this value is not likely to be reached in law school.³⁶

Value: Striving to Improve the Profession, Incomplete

Professionalism training cuts across skills training (recognizing ethical problems and knowing what to do with them) and values training (a passion to improve our profession). While law schools have been reasonably good at the former, we have not done much to give students a commitment to making their profession better. Self-reflection is not generally taught. Moreover, in most law schools, we do not

36. Law schools have done much better on the aspects of this value that relate to diversifying our profession. Women now make up more than fifty percent of the students at most law schools. At each of the five law schools I have worked – the University of Iowa, the University of Michigan, Chicago-Kent College of Law, the University of Florida, and New York Law School – the schools have had a deep commitment to diversity, with persons of color making up from fifteen to thirty percent of the student body. These numbers greatly exceed those achieved in practice. Further, students of color at each of these law schools have taken on positions of leadership, been successful in the journals, moot court, and trial teams, and have graduated with honors and taken prestigious jobs. These achievements have helped to instill in every student the sense that our profession can serve all people and spread success much more widely than was expected a generation ago.

often study our own profession and critically analyze its structure or practices. At New York Law School, we are attempting to deal with this problem through two avenues. First, in our Professional Development Program we hope to instill in every student the skills and values of the finest practitioners – from the mundane (how to treat others, get along well, dress for success, instill confidence) to the most ambitious (how to improve our profession, make it more humane, improve our treatment of clients and each other). Second, the law school has created a Center for Professional Values and Practice in order to study the legal profession, evaluate its practices, and give every student the tools to become first-rate lawyers who will demand improvements by their colleagues.

Value: Professional Self-Development, Incomplete

Law schools have done very little to promote self-development in their students. In part this reflects a sensible distribution of responsibility between law schools and the profession. During law school, students are acquiring basic skills, knowledge, and values. It is only after they join the profession that they will need to develop the life-long quest for continued education and self-development. Nonetheless, some schools have aggressively worked with their students on their self-development, helping students to join bar associations or providing them with attendance rights at CLE's given at the law school. New York Law School has gone even further in its Professional Development Program. Each student will be required to adopt an Individual Career Plan. In furtherance of the plan, each student will be required to attend a certain number of "law school CLE" programs – courses outside of the credited curriculum, but still responsive to developing the student's professional portfolio. Under this approach, students will learn in law school the need for continued training even outside of those things immediately required to complete current work.

* * * *

While this report card is mixed, it does suggest that law schools are making a serious attempt at teaching the skills and values of the *MacCrate Report*. Several of the skills are already taught at a high level. There are strong efforts to improve the teaching of several of the other skills. Nonetheless, on balance, legal education only scratches the surface of teaching every skill well. It has done even worse in the teaching of values.

These shortcomings should be expected. As I often say to groups of lawyers, "We have them for three years; you have them for the next forty." Some of the skills contemplated in the *MacCrate Report*, and all of the values are matters that can best be learned as a lawyer, not as a law student. This is appropriate, especially since the skills and values of the *MacCrate Report* are said to be matters to address in a continuum from pre-law to law school to post-bar admission. Unfortunately, as I argue below, the continuum contemplated in the *MacCrate Report* is at best often interrupted and at worst is non-existent. For the remainder of this essay, I will assess the effectiveness of the legal profession in furthering knowledge of the skills and values of the SSV.

IV. THE LEGAL PROFESSION AND THE FAILURE TO FULFILL THE PROMISE OF THE CONTINUUM ENVISIONED BY THE MACCRATE REPORT

The core of the *MacCrate Report* is the development of the SSV. Yet the soul of the *MacCrate Report* is its commitment to the life-long pursuit of the ten fundamental skills and the four fundamental values set forth in the SSV. On this score, the *MacCrate Report* has been relatively unsuccessful. In the discussion that follows, I assess the factors that have made the *MacCrate Report* more successful as a unifying guide in legal education than in the practice of law. I then discuss ways that the SSV might be more successfully made a part of the profession of law.

As discussed above, many law schools have both implicitly and explicitly made the SSV part of their educational missions. This is not a surprise. Law schools are regulated uniformly by the American Bar Association. Their faculties meet annually at meetings of the Association of American Law Schools. Their deans meet twice a year at meetings scheduled by the American Bar Association. Their new faculty are herded together at a common hiring conference and attend a new teachers workshop together. Their clinicians have organized into a separate association, as have their writing directors and librarians. Every faculty has special professional development opportunities. Many schools have pedagogy workshops or committees. In law schools, several forces are at work to unify their voices and create comparisons between them.³⁷

37. Often, the only comparisons made between law firms concern their relative income, their size, their summer associate programs, and their profits per partner.

The legal profession is significantly more diffuse. Government lawyers are in a different business than private firm lawyers who differ substantially from public interest lawyers. Sole practitioners operate in yet another milieu. Big firms and small firms occupy separate worlds. Criminal and civil lawyers see each other as members of foreign cultures. International lawyers operate in a global context that often excludes domestic counterparts. Office practitioners, tax lawyers, and transactional lawyers more closely identify with their clients' frames of reference and practices than mind sets of their colleagues who are litigators. Regulation of the profession is loosely governed by model disciplinary rules, but those rules are interpreted differently in each jurisdiction. Each state's rules of admission vary from other state's rules. Some states require continuing education, while others do not. Those practicing in state courts have unique practices alien to the rituals of their counterparts in federal courts. These forces, therefore, make it difficult to create a unifying structure for lawyers and certainly do not promote adherence to any prescribed set of goals. Moreover, where law schools use grades as currency and might make acquisition of the SSV the metric for assessment, law firms are firmly rooted to high monetary returns (which may only be tangentially related to the SSV) as a measure of success.

In the sections that follow, I discuss trends in the legal profession that stand as impediments to a life-long commitment to training and learning fundamental professional skills and values. I then set forth some modest suggestions to improve the performance of the profession.

A. *Trends in the Profession*

One of the most significant contributions of the *MacCrate Report* is its analysis of the shape of the legal profession, trends in its development, and predictions about its future.³⁸ In these sections, the *MacCrate Report* describes the evolution of the relationship between legal education and the legal profession. Where legal education once was in the form of in-house clerkships preparing lawyers for small, loosely-related organizations, it has moved to university-based theoretical training for lawyers in corporate firms that are "created to meet the complex needs of institutional clients."³⁹ The *MacCrate Report* suggests

38. See *MacCrate Report*, *supra* note 2, at 13-102.

39. *Id.* at 4.

that trends during the last century to aggregate business entities and provide service to them may

account for the parallel development . . . of three interrelated entities – the modern American industrial and financial corporation functioning within the complex administrative state, the multi-service corporate law firm structured to service its corporate clients, and the university-based law school that emphasizes analytical skills and the ability to deal with complex legal issues.⁴⁰

The *Report* goes on to speak about other significant trends: the substantial growth in the number of lawyers,⁴¹ the increasing number of women lawyers,⁴² growing diversity in the profession,⁴³ and the varied types of practice settings.⁴⁴ Its summary of these trends rings as true today as ten years ago:

Since 1970 there has been a steady movement of law firms of all sizes from smaller units into larger. Private practice has become a spectrum of different practice units, differentiated not only by size but by clients, by the kind of legal work performed, by the amount of specialization, by the extent of employment of salaried associates and other support staff, and by the degree of bureaucratization of the practice.⁴⁵

In commenting on these trends, the *MacCrate Report* suggests that what happens at the larger firms has a significant “ripple effect” on the practice of law. In good times, these firms drive demand for lawyers. The type of law they practice, especially its complex matters, affects the need for special knowledge in lawyers and the need for special training. Further, when times are bad, these firms demand fewer lawyers and therefore can affect the demand for law school graduates. In sum, their actions have a huge impact on the legal profession.⁴⁶

The *MacCrate Report* goes on to speculate about the future of the large firm. Driven by the downturn in the economy when the *MacCrate Report* was written, the authors concluded that firms might not grow

40. *Id.*

41. *Id.* at 13-18.

42. *Id.* at 18-22.

43. *Id.* at 23-28.

44. *Id.* at 29-82.

45. *Id.* at 31.

46. *Id.* at 82-85.

any larger, that the profession would not further segment, and that the large firms would continue to have a major influence on legal education.⁴⁷ In the last ten years, some of these prognostications missed the mark completely. The economic downturn gave rise to boom years for the economy and great growth in law firms. Even in 2002, as the economy made another downward turn, major law firms have prospered, remained profitable, and continued to grow. Similarly, firms continue to segment. New specialties have arisen in intellectual property, international business transactions, bankruptcy, and other commercial fields. Real estate development has surged. Boutique practices have been built and then absorbed by larger firms. Yet, even with these differences the central observation of the report remains true: big firms and their practices dominate the consciousness and have a major impact on law schools whose students are working to join large firms.

The trends discussed above, however, only signaled the advent of even more changes that have occurred in the last ten years. Many law firms, including venerable practices in existence for more than a hundred years, have merged. Other firms, even major practices, have closed. The giant firms have grown internally, but also have expanded through mergers, acquisitions, and moves to new cities. Many firms have become international. The multi-disciplinary practice movement grew and receded in the face of organized opposition and the Enron debacle. But with its death has come a new, inexorable march to multi-jurisdictional practice; lawyers simply cannot let state or international boundaries prevent the efficient representation of their clients in an interstate and international economy.

To this list one might add new issues such as: the continued demand for higher salaries (to cover the growing debt of new graduates); the demand for ever higher billable hours to maintain law firm profitability (and keep junior lawyers chained to their jobs); the advent of lawyer multi-millionaires, who have profited from class actions, product liability law suits, and creative uses of the regulatory system; the legislative backlash against lawyers; the lack of loyalty of lawyers, who move from firm to firm like sports free agents; the growth of law as popular culture; the advent of lawyers as media stars; and the continued growth of law as a business. Change in the profession has continued unabated since the publication of the *MacCrate Report*.

47. *Id.* at 86-88. As the authors conclude, “[t]he rise, growth and prominence of the large firm has had a profound effect not only upon the legal profession but also upon legal education. Law schools shaped their curricula to respond to the needs of the corporate practice of large law firms, while law students viewed the large firm as the pathway to success Nowhere in the law is the interdependence of law school with the practice of law more starkly apparent.” *Id.* at 87-88 (footnotes omitted).

On the softer side, the last ten years have seen the growth of the professionalism movement. At its most trivial level, the movement seeks to address issues of “civility.” At its most important level, the movement is trying to address issues of malpractice and incompetency. Some have blamed law schools for sending out too many lawyers, with high debt, no jobs, and no real skills. Some have blamed the profession, which no longer has the time or inclination to “mentor” newly minted lawyers. The remedies range from the draconian, raising bar admission standards in ways that significantly reduce the numbers of new lawyers, which often initially fall disproportionately on minority lawyers, to the silly-like – requiring every lawyer to sign a professionalism pledge. Whatever its origins and prescribed cures, however, the professionalism movement has identified a real problem: many lawyers do not enjoy their work, do not like other lawyers, and find the practice of law unsatisfying.

It is against this backdrop of radical change that one must assess the performance of the profession in creating life-long learning about the SSV. Not surprisingly, as with the law schools, successes have been primary in developing fundamental lawyering skills. However, the profession has failed in fulfilling the aspirations embedded in the fundamental values set forth in the *MacCrate Report*.

B. Grading the Performance of the Profession on the SSV

Let’s face it, the fundamental skills of lawyering are a matter of life or death to most lawyers, although many lawyers become so specialized that they neither acquire nor use many of the skills envisioned in the SSV. Conversely, the fundamental values of lawyering are more amorphous, less related to law firm profits or personal professional achievement. Below I share my impressions about why skill development in the profession has been adequate, but values development has not.

1. Fundamental Lawyering Skills

It is to be expected that lawyers have accepted skills training more than embracing a life-long commitment to fundamental professional values. First, law practice, especially in a large law firm, is a sink or swim environment. Young lawyers are paid significant salaries, many making more than \$100,000 to start. To recoup this investment, employers increasingly expect strong performance and have little tolerance for failure by young lawyers. There are simply so many new law school graduates (and young lawyers willing to move to any law firm that will buy their talent) that beginning lawyers are becoming fungi-

ble. A firm can replace one with another and rarely lose anything, but often upgrade performance without needing to engage in costly training programs or inefficient on-the-job training. The consequence of this is that law firms will demand and receive lawyers with excellent lawyering skills, but will often do very little to train weaker lawyers to improve their skills. The investment is simply not worth the gain. With only better lawyers left at the firm, it can get a much higher return on its training investments. As most law teachers quickly come to understand: teaching the best students is easier, and often more personally rewarding, than working with weaker students. Consequently, the performance of lawyers at larger firms remains strong. Weaker lawyers move into other practice-settings, often smaller settings, that are even less willing to pay for training their lawyers. This may account for some of the claims that lawyer competence is weak.⁴⁸

Second, large government offices often cannot devote resources or time to training their new lawyers. Instead, these lawyers learn to develop their skills through on-the-job training. The system functions by assigning new lawyers to simpler cases, to routine matters, or to disputes involving lower stakes. The successful young lawyers then progress and take on greater responsibility. They may become senior lawyers and even become supervisors. The less successful lawyers remain in place doing simpler work or leave their jobs. Training takes place in mentoring relationships that arise through the serendipity of younger and more experienced lawyers working together, rather than through systematic planning.⁴⁹

48. I am painting with a broad brush here. Many large firms, certainly many of the most profitable and elite firms, continue to invest in training their lawyers. They develop extensive in-house training programs. They hire consultants, law professors, and other experts to train their new lawyers in every aspect of the practice. They demand high levels of performance and give lawyers the resources they need to become better. However, many larger firms eschew these models. Worse yet, even in the best training settings, many lawyers do not take advantage of the training they are offered. Some reject the need. Others claim that they do not have the time to train because of the substantial billable hours they must fulfill. In any event, many lawyers to whom I have spoken suggest that the ability to train young lawyers has declined in recent years, driven by the growing size of the firms and the unwillingness of clients to foot the bill for "training" expenses.

49. This bleak picture is overdrawn. Many government offices are well-funded, well-organized, and offer substantial continuing development opportunities for every lawyer. Other offices have generous training allowances to give lawyers a chance to take seminars outside of the work place. However, many offices are underfunded and overworked. Those offices do not invest in organized training of their lawyers.

Third, many new lawyers begin work as solo practitioners or in small firm settings. These lawyers cannot expect training in lawyering skills to happen as a regular course of employment. For them, training in the fundamental skills of lawyering must take place in bridge-the-gap programs between law school and admission to the bar, continuing legal education programs, local bar mentoring programs or those sponsored by sections of the bar like the law office management section, or through the trial and error of learning while working on behalf of clients.

In the three scenarios envisioned above, even in the best setting, only some of the lawyering skills are emphasized. Nothing in the structure of most practice settings ensures that a lawyer will become more familiar and comfortable with *alternative dispute resolution* procedures. Certainly few younger lawyers receive explicit training in the *organization and management of legal work*, other than instruction in billing practices, although the Law Office Management sections of many bar associations have developed excellent programs in this aspect of the SSV. Some offices, like criminal law practices, are terrific at training lawyers about *factual investigation*; other practice settings pass this work off to others or give lawyers assumed sets of facts to work from. *Communication, legal analysis and reasoning, legal research, and negotiation* training all tend to be well-done where training takes place; similarly, most practicing lawyers pride themselves as being effective problem-solvers, although I am uncertain how effectively lawyers train each other in this skill. Most offices seem to be less effective in training their lawyers as *counselors* – especially given our profession's bias toward the intellectual, rather than the emotional side of practice. Finally, there is little uniformity in post-law school training in *recognizing and resolving ethical dilemmas*. The organized bar in many states mandates continuing legal education in legal ethics, professional responsibility, or professionalism, but such programs do not ensure that lawyers can recognize issues that they confront, or resolve them well when they are confronted. Many law offices pride themselves on highly developed ethical practices; others pride themselves for their slash and burn approaches. Ethical training, much as values training in general, has been relatively ineffective.

2. Fundamental Professional Values

Competence. The SSV contemplates that lawyers will have a commitment to competent representation.⁵⁰ Of all of the values promoted by the *MacCrate Report* this would seem to be the most straightforward and the most likely to succeed. On even this value, however, the profession has not developed systematic training for every lawyer; nor has it developed a method to ensure that lawyers competently represent their clients.

Entry to the Bar is based upon a test that takes a snapshot of only one aspect of the legal profession – the ability to retain in short-term memory information about basic legal topics and apply that knowledge in timed-test conditions to novel fact situations. At best, this examination reinforces skills learned in law school. At worst, it fails to account for most of the fundamental lawyering skills contemplated in the SSV.

Continued service as a lawyer does not depend upon a lawyer demonstrating current competence – even at the skills tested on the bar examination. Once certified, a lawyer can continue even if they do not keep up with new legal developments. Thus, if knowledge of substantive law were deemed an essential element of competence—as the bar examination seems to suggest – one would expect periodic reexamination of that knowledge. The law surely changes over time. Yet, there is no testing of lawyers about their substantive knowledge. The assumption seems to be that lawyers have learned how to learn and will continue to do so over the course of their careers.

This assumption would suggest that mandatory continuing legal education (“MCLE”) would be expected of every lawyer. In fact, some states persist in making continuing legal education voluntary. Perhaps they are influenced by the fact that so many lawyers, even in MCLE states, take the obligation as one to avoid. Many lawyers look for the simplest way to fulfill their requirements: on-line courses, courses on tape, massive programs at vacation spots, etc. Worse yet, anyone who has spoken at a CLE event to an audience reading a paper, getting up to make phone calls, or doing work from their offices, may doubt the commitment of every lawyer to maintenance of their competence. If

50. In this context, competence implies: attaining a level of competence in one’s own field of practice; maintaining that competence; and representing clients in a competent manner. *MacCrate Report*, *supra* note 2, at 207-10. While the *MacCrate Report* does not define competence, it suggests that hard work on behalf of the client, realizing one’s limits, and making realistic assessments of the client’s needs and the lawyer’s talents are important steps in competent representation. *Id.*

law school teaches anything, students (and probably lawyers too) will work hard if they are graded. CLE rarely requires testing and grading of performance.⁵¹

Justice, Fairness, Morality. The SSV suggests that every lawyer be committed to justice, fairness, and morality.⁵² There certainly are stories of heroes in the legal profession who have dedicated their professional lives to justice, fairness, and morality. However, in an Enron/World Com/Global Crossings kind of world, many have questioned the commitment of lawyers to advising their clients to do what is right.

One can add to the list the many doubts that the public have about the criminal justice system, the tort compensation system, the loss of civil rights and liberties under the guise of national defense, the treatment of the poor by the government in benefits cases, the apparent disparity in treatment that may be received by the rich and poor, the commitment of lawyers with power to use it to bury opponents with fewer resources, and the general sense of mistrust of lawyers and the legal system that is reported daily in the popular press. And, as if this list were not enough, lawyers have their own grievances against each other: their incivility, their untrustworthiness, their poor treatment of clients and members of the public, their worship of the dollar as the only measure of worth, and so on. It seems that one of my classmates in law school was prophetic in his assessment about the primary ethical standard for our profession. When asked if a particular practice was ethical, he responded, "Is it billable?" Apparently when the answer to that question is "yes," we lose sight of higher goals.

As a teacher and dean, one of the saddest moments each year is the conversation I have with students returning from their first sum-

51. I do not mean to suggest that all lawyers resist becoming competent or that the profession does not value this commitment. Most lawyers are deeply committed to serving their clients well. Every bar association offers a full array of courses devoted to competency. Increased enforcement of ethical rules, malpractice suits, and interventions shows a push for increased competence. However, these desires aside, our profession has not organized to create true competence – a desire in every lawyer to maximize their service to a client, minimize the cost to the client, and perform as efficiently as possible. Nor do we assess competence by those measures. Thus, we are left with a desire, but with little systematic method to push the value forward.

52. This value includes: that consistent with ethical rules lawyers should act in conformance with considerations of justice, fairness, and morality; that they counsel clients about such matters; that they treat others (clients, other lawyers, and support personnel) with dignity and respect; that they ensure that legal services are provided to those who cannot afford to pay; and that they contribute to the profession's fulfillment of the promise of law and legal institutions to do justice. *Id.* at 213.

mer of work at a law firm or in a government setting. Too many come back cynical about the “ethics” they have learned, upset at the values of their employers, and wondering whether they have made the wrong choice to become a lawyer.

Our profession has not adopted mandatory pro bono service. And, as many deans will testify, lawyers rarely are philanthropic without some strings attached, so they are unlikely to buy out their obligation to help the poor. In short, we claim a desire for justice, fairness, and morality for all, but have not put into action our noble thoughts.⁵³

Improving the Profession. In some ways the value of improving the profession is the most removed from the individual responsibility of the individual lawyer. After all, being competent is related to being successful; being just is related to sleeping at night. Committing to one’s profession, however, is significantly more abstract.⁵⁴ Improving the legal profession simply is not high on the agendas of lawyers who are consumed with making a lot of money or becoming famous. Further, training young lawyers takes time away from practice, costs real resources, and is difficult to do. For these reasons, many lawyers stay away from activities designed to improve the profession. At best, they justify this behavior by arguing that by performing to the top of their ability for their clients (and expecting the same of others) the aggregate behavior of lawyers will improve the profession. At worst, this is

53. Justice, fairness, and morality are not self-defining. There is a strong tradition in American society of “living, and letting live.” In legal education, we are often accused of being moral relativists—ones who can condone almost every behavior. At some level these complaints, if true, make it extremely difficult to search for justice. But, at another more fundamental level, the complaints cover a deeper problem. Even moral relativists have preferences that they can promote. Our failure as a profession to act in just ways is tied into our rewards system. We are compensated for performing on behalf of our clients. We are required to provide zealous representation within the limits of the law. We are devoted to making a living. And, we are unwilling to tax ourselves for the larger good. Individual lawyers demonstrate extraordinary commitments to justice. The organized bar takes efforts to promote fairness and morality. But, in aggregate, even if we do better than most segments of the economy, law is a business and the imperative of business is to make a profit—a goal that sometimes conflicts with our higher values.

54. The SSV suggests that as a member of a self-governing profession, every lawyer should participate in activities designed to improve the profession, assist in the training and preparation of new lawyers and in continuing education at the bar, and strive to rid the profession of bias on the basis of race, religion, ethnic origin, gender, sexual orientation, age, or disability. *MacCrate Report*, *supra* note 2, at 216. Further, the SSV states that every lawyer should strive to rectify the effects of these biases. *Id.*

NIMBY (not-in-my-backyard) behavior.⁵⁵ Understanding why the profession's commitment to eliminating and rectifying biases in the bar has been relatively modest requires a different analysis. First, there is deep ambivalence about non-discrimination among lawyers and the general public. Lawyers, as do country club members, scouting organizations, or old boy networks, ask the questions of why they should not be allowed to practice with whom they wish, associate with whom they wish, and work with whom they wish. Second, there is ambivalence by some of the scope of non-discrimination contemplated by the SSV. While race and gender discrimination is no longer acceptable in polite society, discrimination on age, disability status, or sexual orientation is often acceptable. State governments may do so without the threat of lawsuits. Military recruiters may discriminate in their employment practices. And, tacitly, society condones these choices. Third, there is societal ambivalence of committing to rectify the effects of discrimination – at least if that implies a commitment to affirmative action.

C. *What Accounts for the Failure to Promote Professional Values*

As discussed above, in general, training about values is more difficult than skills training. It requires a commitment to abstract concepts, the validity of which are contested and controversial. Moreover, unlike the regulation of law schools, which are centrally regulated, it is difficult to police the diverse and multifarious practices of a legal profession that varies across the country.⁵⁶

55. Of course there are legions of lawyers deeply committed to the self-reflective behavior necessary to improve our profession. They give freely of their time as teachers, donors, participants in bar activities, social activism, advocacy, law reform, etc. That some do these things primarily as networking activities to generate better reputations or status does not matter. Most of the activities, done for whatever reasons, elevate the profession. But, as most bar leaders will testify, it is difficult to motivate the average lawyer to engage in any of these activities.

56. The failure of one of the *MacCrate Report's* most concrete recommendations underscores the difficulty of effectively motivating the legal profession as a whole to undertake training. The *MacCrate Report* recommends the creation of "The American Institute for the Practice of Law." *Id.* at 319-23. It would be an umbrella organization that would "promote excellence in the practice of law, addressing the entire process by which lawyers acquire and refine the lawyering skills and professional values required for competent and responsible practice in a changing profession of increasing diversity." *Id.* at 413. To date, there has been no groundswell in the profession to make this Institute a part of every lawyer's training. And, without a national mandatory push for such training, it (or any alternative) is unlikely to become an effective training device for all lawyers.

One consequence of the values dilemma is that the profession increasingly relies upon the law schools to build professionalism among its students and to build their life-long commitment to professional values. If this is to be the path we follow, however, I know I speak on behalf of all law school deans when I say, "Hey, profession. Put your money where your mouth is. If you won't do it, pay up and give us the private philanthropic resources necessary to train every student and to weed out those that should not be lawyers!" The legal profession is not professional baseball, but law schools are treated as if they are the farm team for the majors. If that's the case, then schools need to be compensated, especially if they are not doing as well as the parent club demands.

Perhaps the biggest problem with the implementation of the *Report* is that we treat skills as if they are separate from values. No matter how skillful, a lawyer is not a true professional without a commitment to fundamental values as well; the two aspects of lawyering are inseparable. As expressed in the *MacCrate Report*:

The whole thrust of the Task Force effort is at odds with isolating "the ideology of technical competence" The Statement of Skills and Values emphasizes the essential linkage between lawyering skills and professional values. It is hoped that this holistic approach to lawyering will be in the future help to avoid the perpetuation of the notion that competence is simply a matter of attaining proficiency in specified skills.⁵⁷

It is now ten years after the *MacCrate Report* and we still seem far from a holistic approach in law schools and perhaps are even further away in the law firm. Skills are simply easier to convey and values too amorphous to expect that they will be taught and learned together. The question that remains is: what will we do about this?

V. A MODEST PROPOSAL FOR SELF-IMPROVEMENT

In the absence of a uniform regulatory structure that would mandate SSV training for every lawyer, it has been difficult to fulfill the promise of a continuum of training from law school through the profession. Nonetheless, at the state and local levels, there have been ex-

57. *Id.* at 317.

citing experiments.⁵⁸ However, it appears unlikely at this point that requirements will be enacted that result in a massive commitment by the legal profession to sustain SSV training.

This is disturbing because it raises questions about the commitment of the profession to the core values of the SSV. It raises implicitly the question of what the profession of law stands for. What is our ethos? Our value proposition to members of the public? It begs the question of whether the profession has earned its continued monopoly over the legal system and whether we are entitled to public respect. It is in the spirit of pushing the continuum forward and further building public trust in the profession that I suggest an approach to training issues that is not dependent on regulation or unified national, state, or local efforts. I call this proposal "Professionalism is Personal."

A lawyer builds his or her professional ethos through a personal commitment. For some, it may be a commitment to greed, which is not my preferred course of action or the one contemplated in the *MacCrate Report*. For others, it might be a commitment to justice or other outside ideals. In my view, most young lawyers have not formed a personal ethos when they first become members of the bar. Their values instead are formed in their jobs, especially those they take right out of law school. This places a very high responsibility on legal employers, especially those employing many young lawyers. Whether a government agency or a big law firm, the values of the organization will "teach" the SSV to their new employees.

I would propose a grassroots organizing campaign by young lawyers, law schools, leaders of the bar, justices of state supreme courts, legal commentators, and other folks influential on law firms and government agencies.⁵⁹ The campaign would take as its purpose to have

58. For example, in Florida, the Supreme Court created a Professionalism Commission whose members included the deans of every law school in the state, the Chief Justice and several trial and intermediate court judges, and leading lawyers throughout the state. Through its subcommittees for the bar, academia, the bench, and diversity, the Commission works closely with every local judicial district to create local programming for lawyers in every part of the state addressing professionalism issues. These include skills and values training as well as issues of proper management of the law office. Even with this elaborate and effective structure, however, Florida has reached only a handful of lawyers in their workplace.

59. This process might begin with a request from local law school deans – especially from the elite schools – to large local law firms, the state attorney general, and the local U.S. Attorney requesting that the organizations participate in a project to fulfill the promise of the *MacCrate Report* of a continuum in training on fundamental lawyer skills and values.

these organizations make professionalism personal by adopting missions for their organizations that explicitly embrace the skills and values of the SSV. Each organization should describe its mission, which would help to define values like competence, fairness, etc. Each should also explicitly create a plan to: (1) do training in the SSV, (2) define professionalism within the organization, (3) create a mentor system linking younger lawyers with experienced lawyer role models, (4) link the organization to law schools, CLE programs, or other organizations engaged in lawyer training, (5) describe the organization's internal training system, (6) describe how it will monitor progress and performance on the programs it creates, (7) describe hero stories for the organization in order to help it define its mission, ethos, and purpose, (8) create methods for fulfilling service obligations to the public and helping to provide lawyers to the poor, (9) describe steps it will take to ensure justice, fairness, and morality as well as eliminate bias in the profession and rectify the past results of bias, and (10) appoint a senior respected member of the organization to monitor its progress on this plan.

I am not optimistic that this idea will be embraced with wild enthusiasm by the profession.⁶⁰ First, without some sense of urgency or felt need to participate, a proposal by me (not shared widely by the deans of prestigious law schools, leaders of elite law firms, or highly placed judges or government lawyers) is not likely to stir the passions of bar leaders. Second, there is no regulatory body to compel participation. Third, taking the ten suggested steps is unlikely either to increase a law firm's profitability or a governmental office's productivity. Finally, unless someone in an organization takes personal responsibility for this project, and believes in its purposes, it cannot succeed over the long-run.

Thus, I am left believing that even the modest proposal I have made is not destined for success. Nonetheless, I am not ready to throw in the towel. Even if one large employer were to adopt the ten steps advocated above, one could monitor its performance and model its successes. Building an educational continuum requires at least this much.

60. A similar proposal, while adopted by the Florida Professionalism Commission, was never administered in either the large firms or major government agencies.

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Rant almost over!

As I have suggested, the commitment to skills and values education advocated over the last ten years has had a measurable impact on legal education. It has changed our rhetoric, affected our curriculum, and altered our way of dealing with each other. We have made real improvements in skills education and even begun to address the fundamental values of the profession. However, the need for an educational continuum between law school and the profession has not lessened over the last ten years. Even though lawyers are developing at least some skills, there is only a situational commitment to training. Unfortunately, the level of commitment to fundamental lawyering values is even more attenuated. Moreover, there is no strong enforcement mechanism to ensure that the profession addresses these weaknesses in training. Thus, unless each legal organization adopts an individual personalized commitment to life-long skills and values training, it is unlikely to occur. My modest ten step approach to making an institutional commitment may have some impact, but is unlikely to spur to action large numbers of firms.

Therefore, taking seriously that each organization must make its own commitment, New York Law School has adopted a plan for its future that will build stronger skills and values in its students. We have said that students will "Learn law and take action." In essence, this is our commitment to teach students to use the skills and knowledge they are gaining as lawyers to do something valuable for others. We ask our students to "embrace innovation," contemplating that they must continue to learn, to make changes in their behavior when change is required, and to adapt to new situations as they arise. We have organized the program to "foster integrity and professionalism," and through our Center for Professional Values and Practice hope to instill in students a pursuit of improvement of our profession. The purpose of our education is to build within each graduate a desire to "advance justice for a diverse society," an explicit institutional reminder that law ultimately is about justice, fairness, and morality. These goals are our beginning steps to make the SSV a part of every student's education. What remains for us, remains an imperative for every lawyer: take good intentions and make them a way of life.