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CENTRAL PLANNING OR MARKET CONTROLS IN LEGAL EDUCATION: HOW TO DECIDE WHAT LAWYERS SHOULD KNOW

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The American Bar Association Task Force on Law Schools and the Profession issued a report in 1992, generally known as the *MacCrate Report*,¹ calling for a reassessment and changes respecting the education of lawyers. The major feature of the *MacCrate Report* is its characterization of the practice of law as a composite of certain skills and professional values, many of which are inadequately taught by the institutions responsible for the education of lawyers.² The *MacCrate Report* also emphasizes that legal education is a career-long undertaking and that the proper education of lawyers is not the sole responsibility of law schools.³

The State Bar of Wisconsin Commission on Legal Education publishes its Final Report and Recommendations⁴ in this issue of the *Marquette Law Review*. The *Wisconsin Commission on Legal Education Report* represents an important step in the formal response of the State Bar of Wisconsin to the *MacCrate Report*. Like its ABA parent, the Report contains many astute observations and sound views. It is clear, concise, and accessible. It makes an important contribution to a process that has spurred considerable discussion of the state of the legal profession. For the most part, these discussions are healthy because they are real: they often entail much more than the pious platitudes or ponderous pessimism too often heard when lawyers discuss their calling. Serious problems in the profession and in legal institutions are being discussed seriously in this process.

Having said this, I must also say that the *Wisconsin Commission on Legal Education Report* and the *MacCrate Report* have their problems. The State Bar Commission characterizes its Report as "a stimulus and

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1. *Legal Education & Professional Development— An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS [hereinafter *MacCrate Report*].

2. See generally *id.*

3. *Id.*

4. *Commission on Legal Education, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN (1997) [hereinafter *Wisconsin Commission on Legal Education Report*].

starting point for an ongoing exchange within the profession."⁵ In that spirit, and though I endorse much of what the Report says, my focus will be on two serious shortcomings that should be considered by those who may consider implementing the State Bar Commission's recommendations. These shortcomings can be summarized as follows: *First: While the professional performance of a lawyer depends in significant measure on the lawyer's skills and values, it also depends in significant measure on the lawyer's knowledge, and this third essential dimension of performance gets dangerously short shrift in the Wisconsin Commission's Report. Second: The Report correctly identifies a number of problems in the existing legal profession, but its recommendations unfairly burden persons who are not yet lawyers.*

Thus, my criticisms are directed at the Commission's views that professional performance can be adequately described in terms of skills and values and that remedies to today's problems principally should burden only future lawyers.

The first shortcoming in the *Wisconsin Commission on Legal Report* is its adoption of "the principle that the practice of law is built around a set of skills and values that can be identified, analyzed, and taught."⁶ The problem with this formulation is its relegation of other forms of knowledge to secondary status.⁷ Substantive legal topics have dominated legal education, both in law schools and in continuing education programs, because knowing the law has long been thought to be an essential part of quality law practice. The new characterization of the practice of law as a composite of skills and values challenges these popular perceptions and practices respecting the central role of legal knowledge.

The case for emphasizing skills and values at the expense of legal knowledge is unconvincing. The *MacCrate Report* refers to the current

5. *Id.* at 15 (quoting *Legal Education & Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR [hereinafter "MacCrate Report"]).

6. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 17.

7. The distinctions among "knowledge," "skills," and "values" are not, of course, very sharp. Legal knowledge, in my view, involves more than the ability to state accurately the controlling legal doctrine governing a particular legal question. At the least, it also encompasses a knowledge of the dominant economic, social, and moral concerns that shape doctrine and decision-making in the field as well as a general familiarity with the contexts in which issues in the field arise. "Substantive" law courses seem generally to be concerned with these dimensions of the subject, although a focus which is particularly "theoretical" or "practical" may ignore some of these dimensions of legal knowledge of a subject.

era as “an age of specialization,”⁸ which in its view is driven by “changing law and new complexities.”⁹ Responding to this phenomenon in law practice, law schools are constantly driven to add new courses to reflect substantive fields of practice that are experiencing rapid growth. Current examples can be drawn from fields such as intellectual property, health law, and international law. Specialization, which is increasingly the organizing principle around which law practices are built, provides powerful evidence that law practice is “built around” legal knowledge as much as around skills and values.

The characterization of professional practice as being based on skills and values flows from valuable research being done in the social sciences, some of which the Wisconsin Commission discusses,¹⁰ which suggests that behavior can be parsed into tasks and objectives which provide the best measures of performance. It represents a practical effort to objectify performance, so that it is most susceptible of being learned and evaluated.

Knowledge can be objectified as well, but the objectification of knowledge has been substantially tainted by its association with rote learning and because of the gender and cultural bias often reflected in decisions about what bits of knowledge “count.”¹¹ These phenomena may help explain the ascendancy of “skills” and “values” and decline of “knowledge” in the rhetoric of professional performance.

There are also reasons for de-emphasizing knowledge that are more specific to the legal profession. Lawyers who specialize in different fields will have legal knowledge that overlaps, but they will market themselves on the basis of *differences* in their legal knowledge. Specialization in law practice suggests that the profession is balkanized in terms of knowledge. A study of what lawyers must learn to be good practitioners that emphasizes legal knowledge must in large measure conclude “different strokes for different folks.” This leads to market controls on legal education rather than control through central planning. On the other hand, an emphasis on skills and values may, for many, paint a believable picture of a profession sharing common traits. This permits the form of central planning that lies at the heart of the Wisconsin Commission’s

8. *MacCrate Report*, *supra* note 1, at 46.

9. *Id.* at 40.

10. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 4.

11. Skills are frequently a type of knowledge; the knowing of how to perform certain tasks. Some skills, however, may depend on a trait that is substantially inherent in the individual and may, or may not, be notably improved (e.g., whether one’s speaking voice has a pleasing or irritating quality).

recommendations.

There are two very significant issues at work here. One is the issue suggested above of who is in charge. Will the market dictate what form legal education takes or will it be the product of central planning, with all that entails? The other is the issue of whether we are one legal profession or many, and, if we are many, how we are distinguishable from other occupations.

Whatever may be the answer to these two significant issues, what should not be ignored is that a lawyer's knowledge base, beyond skills and values, is crucial to the practice of law. When the *Wisconsin Commission on Legal Education Report* departs from the *MacCrate Report* by adding "Judgment" to the set of values that defines the profession, it notes the role of knowledge in making a good lawyer. "To exercise good judgment," the Wisconsin Report states, "one needs considerable knowledge about a wide range of subjects."¹² The Wisconsin Report further notes "the extensive information base that fine lawyers can bring into play."¹³

These points are well taken, but we should recognize that extensive knowledge is crucial to law practice in many ways in addition to being an attribute of judgment. It is central to many, if not most, of the skills and values identified in both reports as defining the practice of law. Problem solving, legal analysis, legal research, factual investigation, etc.—the skills identified in the *MacCrate Report*—cannot be employed effectively without knowing the law relating to a client's problem and the social and economic context in which that problem arises. Moreover, legal research in law practice does not by itself reliably correct knowledge deficiencies. Self-directed and independent book learning can teach a person a great deal over time, but in the complex, practical, and time-pressured world of law practice, it is no substitute for extensive prior study, reflection, and experience. Specialization underscores this fact with particular eloquence.

Professional drift by lawyers within their specialized fields away from a single legal profession may be a process, like continental drift, that cannot be reversed. Some lawyers may identify with their specialty more than with the legal profession as a whole, particularly when push comes to shove. Professor Ted Schneyer's work, for example, describes the conflicting visions of lawyering advanced by various specialized lawyer

12. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 18.

13. *Id.*

groups as those conflicts have played out in the making of ethics rules.¹⁴

If we are to be candid, we should recognize that generalizations about lawyers are always a risky business, whether they relate to knowledge, skills, or values. Even basic skills like legal research are not used regularly in all forms of law practice. Moreover, a professional value such as "striving to promote justice, fairness[,] and morality"¹⁵ will have markedly different meanings for different lawyers.

Notwithstanding these difficulties, the effort to identify our common traits and interests as lawyers is a worthy project. What we derive from such study is a sense of the extent to which one license, one educational path, and one regulatory regime fit reality. This is not an all-or-nothing proposition. A licensing scheme, an educational program, and a regulatory regime can be based on a recognition that there are both commonalities and differences within the profession. The Model Rules of Professional Conduct, for example, while establishing a regulatory scheme for all lawyers, speaks in certain provisions particularly to prosecutors,¹⁶ criminal defense lawyers,¹⁷ arbitrators,¹⁸ and lobbyists.¹⁹ Law school curricula typically require some courses, but leave most course selections to students' discretion within a wide range of options.

While identifying in some useful ways various common lawyer traits, the *MacCrate Report* and the *Wisconsin Commission on Legal Education Report* falter to the extent that fundamental differences are glossed over or ignored. This is most apparent and most troubling in the concept of law practice as consisting centrally only of skills and values. This skills/values concept of law practice is troubling in being almost exclusively lawyer-regarding and not adequately attentive to the context of the matters in which legal services are sought.

The Wisconsin Report offers greater balance and insight than its recommendations reflect. Consider this discussion of the role of the law schools:

A professional cannot learn "the law" in the abstract, divorced

14. See, e.g., TED SCHNEYER, PROFESSIONAL AND PUBLIC POLICY: THE CASE OF HOUSE COUNSEL (Institute for Legal Studies Working Paper No. 3, 1988); Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as A Case Study*, 35 ARIZ. L. REV. 363 (1993).

15. *Wisconsin Commission on Legal Education Report*, *supra* note 5, at 90.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1992).

17. See, e.g., *id.* Rule 1.2(a), Rule 3.1.

18. *Id.* Rule 1.12.

19. *Id.* Rule 3.9.

from how lawyers use the law, apply the law, research the law, advise clients about the law, and look to the law to solve problems. Likewise, one cannot function as a competent lawyer having learned merely the discrete tasks of lawyering (such as drafting a will or preparing a deed) without understanding the law that underlies those functions.

Knowing the law implies that one knows what to do with the law. The knowledge that law students seek in law school (and that the public and the profession expect them to acquire in law school) is not just knowledge of the *subject* of law, but also knowledge of the *performance* of law.²⁰

Thus, the *Wisconsin Commission on Legal Education Report* values "knowledge of the subject of law" as something "the public and the profession expect" lawyers to possess. When it comes to the Commission's action agenda, however, this knowledge component disappears, drowned in enthusiasm for the skills/values concept of lawyering.²¹

A new lawyer in a new job working for a new set of clients in a new field of law may well need to learn the law relevant to her work as a first priority. Learning the law means learning about the issues, values, goals, risks, and priorities for clients like her clients. Learning the law is a client-centered exercise in a way that learning skills and professional values is not. The substance of substantive law relates to client problems, client goals, and public goods; it relates to life beyond the law office and court house; it relates to the public that lawyers serve. This does not denigrate the importance of skills and professional values. It only emphasizes that lawyers know something worth knowing that lies beyond professional skills and values.

"Lawyer-regarding" concerns (*i.e.*, concerns that are unique to lawyers) must be attended to if we are to cohere as a profession. "Client-regarding" concerns must dominate our professional outlook, however, if we are to justify our professional role. The law itself is client-regarding in largest measure; our knowledge of it must be central to our work.

The *Wisconsin Commission on Legal Education Report* draws pertinent analogies between the legal profession and other professional groups in the context of skill development.²² Pursuing this analogy,

20. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 27.

21. Professor Lilly expresses similar concern about the de-emphasis of "academic law" in the Wisconsin Report. Graham C. Lilly, *Skills, Values, and Legal Education: The MacCrate Report Finds a Home In Wisconsin?*, 80 MARQ. L. REV. 751, 755-58 (1997).

22. See generally *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 4-5.

consider the weight we attach to the physician's knowledge of human anatomy, the forms that disease takes, and other kinds of knowledge that are "patient-centered." Skill in treatment is crucial, to be sure, as are the physician's professional values, but knowing what to treat is essential as well.

The Wisconsin Report says it rejects the dichotomies distinguishing substance from procedure, skills and values from substantive law, and even skills from values.²³ But the Report also adopts a set of recommendations that seriously de-value learning the law while substantially emphasizing skills and values. The Report's recommendations do not mention the words "knowledge" or "law" (except as part of the phrase "law school"), while mentioning "skills" ten times and "values" eleven times.²⁴ Perhaps this reflects a judgment that the legal education of lawyers with respect to knowing the law is already excellent and not in need of new strategies. But any "evaluation of the status of legal education in Wisconsin,"²⁵ which the Wisconsin Report claims to be, should not treat learning the law as secondary or unimportant. Nor should legal educators blithely assume that at least they do a good job of this.²⁶ Learning the law is too important.

Although the Wisconsin Report understates the importance of legal knowledge to law practice, its observations about the importance of professional skills and values are generally well taken. Law students and lawyers have too few opportunities to develop their skills and values through formal educational programming. The Wisconsin Report's response to this problem, however, is old hat in the tradition of organized bar appraisals of the status of the legal profession: impose additional requirements on persons seeking admission to the bar and leave licensed lawyers alone.

While obstacles to bar admission have been added throughout the century, obstacles to continued licensure have changed very little. Once in possession of a license to practice law, very few positive steps are required beyond an annual payment. The only significant additional burden beyond payment of fees is the continuing education requirement

23. *Id.* at 27.

24. *Id.* at xiii.

25. *Id.* at 3.

26. Professor Underwood, in his essay in this Symposium, criticizes legal educators who are too academic and research-oriented in their "substantive" courses. William D. Underwood, *The Report of the Wisconsin Commission on Legal Education: A Road Map to Needed Reform, or Just Another Report?*, 80 MARQ. L. REV. 771, 772-775 (1997) (text accompanying notes 7-22).

in Wisconsin and many states, and even that is limited to attendance and reporting responsibilities rather than evaluation and testing. (Imagine bar applicants being required to attend law school without being evaluated or tested in any manner while in school or in seeking admission to the bar.)

It is fairly easy to impose burdens on lawyers-yet-to-be, who have little if any voice in discussions of such matters and whose entry into the profession is not wholeheartedly welcomed.²⁷ It is a major risk to place additional burdens on licensed lawyers, who pay the bills and vote for bar officers. Thus, while the Commission finds that legal education is a career-long continuum²⁸ and that the practice of law is built around an identifiable and learnable set of skills and values,²⁹ the Commission recommends that new lawyers be *required* to take coursework in these areas,³⁰ but that experienced lawyers only have such programming made *available* to them.³¹

This disparity says a lot. For one thing, it seems to display considerable skepticism about the market's response to continuing education programming in the areas of skills and values. The requirement recommended for new lawyers implies that they would not enroll in skills and values courses if they were not required to do so. The absence of a requirement for experienced lawyers, given the one imposed on new lawyers, suggests that experienced lawyers already possess these skills and values, a conclusion undermined by the Wisconsin Report,³² or that they would revolt at being required to take skills and values courses.

The market in continuing legal education (CLE) programs suggests either that lawyers are not interested in skills and values courses or that CLE providers believe such interest is lacking. The *Wisconsin Commission on Legal Education Report* notes that "[v]irtually all current CLE programs emphasize substantive legal topics."³³ One supposes that this supply reflects demand, particularly considering that the State Bar itself

27. My colleague, Peter Rofes, points out that the courts take a dim view, from a constitutional perspective, of legislation targeted against persons excluded from the law-making process. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

28. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 1-2.

29. *Id.* at 17.

30. *Id.* at 49 (Recommendation No. 8).

31. *Id.* at 57 (Recommendation No. 11).

32. See *id.* at 57 (Recommendation No. 11) (recommending that additional CLE courses be offered to the existing offerings). If the proposed requirements are imposed on new lawyers, the absence of this imposition on experienced lawyers suggests that they already possess the requisite skills and values.

33. *Id.* at 50.

is a primary supplier of CLE programs and is dedicated to meeting the needs of its members.

There seems to be a tremendous gulf, implied in the Report, between the types of CLE programs that lawyers, particularly new lawyers, want and the type they need. This conclusion, though, seems markedly premature and may well be wrong. Until CLE providers, particularly the State Bar, offer such programming, it will be difficult to know the extent of the demand. The approach in the Wisconsin Report is to manufacture by legal compulsion a demand for skills and values CLE programs. This is the wrong place to start. The first step should be to supply courses of this type, aggressively market them, perhaps even subsidize their start-up cost with revenues from other programs in order that they may be competitively priced, and then see if the demand is there. This market perspective likely would have produced a very different Report, one focused on strategies for implementing skills and values CLE programming that would attract an enrollment of interested lawyers.

Lawyers acting within the CLE market might respond differently to skills courses than to values courses, were such courses regularly offered. Improving one's professional skills probably enhances one's market value as a lawyer (although perhaps to a lesser degree than improving one's legal knowledge, judging from the relative success of current CLE offerings). The effect of improved professional values on a lawyer's worth in the marketplace may seem less direct. Thus, values courses might prove to be less popular than skills course. Skills courses, it should be noted, generally draw good enrollments in law schools. Courses discretely devoted to professional values are rarely offered as law school electives. Thus, in the law school marketplace of courses, skills courses seem to do pretty well, though there is little experience to judge how values courses would do.

The strategy of the *Wisconsin Commission on Legal Education Report* is requirement-oriented rather than market-oriented and, thus, quite paternalistic. In a competitive market for jobs and clients, new lawyers are likely to choose CLE programs that are, in the main, *good* for them. Given the wildly diverse circumstances in which new lawyers find themselves and the wildly diverse objectives they seek, they probably know better what is *best* for them, as well. When the market has not been given a serious chance, it is premature to start imposing requirements. The State Bar and other CLE providers should look to themselves before looking to the rule-making powers of the Supreme Court, to improve the quality and relevance of CLE programming for new lawyers. New CLE requirements for new lawyers may be a quick

fix (or economic boon) to CLE providers, but it is a serious burden to new lawyers. In the CLE marketplace, if well-designed skills and values courses are aggressively marketed and competitively priced and still do not draw attendance, the set of premises on which the Wisconsin Report is based should be re-thought. In my view, neither the *Wisconsin Commission on Legal Education Report* nor the *MacCrate Report* has made an adequate case for imposing additional burdens on newly licensed lawyers. If the profession, acting as a whole in the CLE marketplace, does not see substantial merit in skills and values courses, perhaps the bar leaders got it wrong in deciding what type of post-law school education lawyers need.

The extent of the burden of the proposed requirement also needs to be seriously evaluated. Costs could be high in producing skills and values courses, particularly given the recommendation that faculty should be specially trained for these courses, that the methodology should be interactive, and that feedback should be provided.³⁴ The Wisconsin Report expresses some concern about costs, but concludes that new lawyers taking these courses should pay the freight.³⁵

The reasoning supporting the recommendation that new lawyers pay for the additional costs created by new requirements imposed upon them is strained. One reason given is that Marquette and Wisconsin graduates admitted under diploma privilege save the cost of the bar examination, so presumably their overall costs in securing a license will remain reasonable even with the added cost of a new skills and values education requirement. Reference is even made to "the former requirement of a six-month unpaid apprenticeship,"³⁶ though that requirement has been gone for decades. Cost projections are not substantiated, except for a reference to a single State Bar offering made four years ago.³⁷

Any way you cut it, the Wisconsin Report's recommendations would increase the cost and burden of becoming a lawyer in Wisconsin. And this is recommended notwithstanding the findings in the report that law school graduates are already burdened with increasing levels of educational indebtedness³⁸ and that those entering the profession face greater competition for employment than in the past.³⁹ This raises

34. *Id.* at 51 (Recommendation No. 9).

35. *Id.* at 55.

36. *Id.*

37. *Id.*

38. *Id.* at 7.

39. *Id.* at 6.

issues of fundamental fairness and access to the profession, issues not carefully addressed.

The rush to require more of new lawyers is flawed, therefore, in several respects. It is not even-handed, in that the burdens are, as usual, placed only on new lawyers. It is not timely because the market has not been given an opportunity to show that the proposal of skills and values courses is workable or desired. And it is paternalistic in assuming that new lawyers, who more than any other class of lawyers are sensitive to their professional inadequacies, are incapable of identifying those inadequacies and correcting them.

A variety of strategies are available to improve the quality of the profession. The organized bar offers too narrow a focus, in my view, when it seeks solutions to problems occurring throughout the profession by focusing so dominantly on the education of law students and new lawyers. Changes in the bar examination, periodic testing of experienced lawyers, and skills and specialization certification programs are some of the strategies that could make a difference in the quality of the profession generally. These solutions can be frighteningly intrusive, and so we tend not to discuss them, even when they are highly relevant to the issues at hand. Instead, we look to the voiceless, not-yet-members of the bar, hoping in good faith that, if we burden them further today, we will provide a benefit for all a generation from now. We should not forget, though, that these not-yet-members of the bar already shoulder a heavier burden than any generation of lawyers before them. Loaded with heavy debts, they encounter a crowded marketplace dominated by experienced specialists and driven by commercial goals and constraints. They need the freedom to make their way, and we should be wary of placing obstacles in their paths, unless we have proven the need for those obstacles.

