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SKILLS, VALUES, AND EDUCATION: THE MACCRATE REPORT FINDS A HOME IN WISCONSIN

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I. INTRODUCTION

In retrospect, the good old days of thirty-five years ago were a piece of cake. Law professors taught legal doctrine using casebooks; students learned operational skills in firms under the tutelage of partners and senior associates; most people even thought law was a grand profession. Then, of course, dramatic new trends shattered this placid existence. Within the academy, the social sciences and a variety of intellectual movements such as Critical Legal Studies and literary criticism pushed legal doctrine from center stage; the homogeneous culture of law schools began to dissolve; and theories of and about law became the dominant theme of academic discourse. Outside the academy, a surplus of lawyers competed for shares of a client base that was growing too slowly to provide the bar with the traditional assurances of economic stability. The price for partners who could develop and retain important clients went up, generating an unprecedented movement by successful lawyers toward higher economic ground. "Firm loyalty," once a hallowed principle, became an empty phrase. To make matters worse, cost-conscious corporate clients began shopping among firms for the best price, destabilizing traditional long-term relationships between client and firm. Professionalism and ethics, if not buried, were at least tarnished as sharp competitive practices developed, even among blue-chip law firms.

These trends registered with varying impacts in both the academic and professional worlds. But few law schools and few firms escaped altogether the influence of these currents. And, as with most upheavals, there were positive features—opportunities to be seized.

For the law schools, the increasing relevance of the social (and other) sciences for both the theory and operation of the law became apparent.¹

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1. I have elsewhere argued that some law schools, particularly the most influential ones, have overvalued the role of social sciences and theory. See Graham C. Lilly, *Law Schools*

Not only must students and practitioners continue to confront the traditional multi-dimensional legal problem (e.g., involving contracts, family law, real estate, and evidence), but they must now address those aspects of the problem involving neighboring disciplines (e.g., economics, psychology, mathematics, or scientific evidence). It is no surprise that interdisciplinary courses (serviced by an interdisciplinary faculty) began to play an important role in the education of young lawyers. Aside from—and in addition to—this development, there arose major new legal areas, such as health and environmental law, alternative dispute resolution, employment discrimination, and civil rights litigation.

For the practicing profession, the catalytic events of the last several decades served as a wake-up call: the business of law was becoming national and international in scope; the rapidly changing professional environment required new skills and new approaches to both clients and legal problems; the traditional practice of carrying unproductive senior partners at high salary levels had to be rethought and modified; and the new culture of law as both a business and a profession had to be frankly acknowledged and thoughtfully addressed. In short, traditional practice and traditional assumptions were challenged at their core.

In the wake of these jarring changes in the study and practice of law, legal commentators have given unprecedented attention to the training and practice of lawyers.² Two dominant themes have emerged in the course of this introspection: preserving and restoring the “professional” attributes of the practice, and modifying legal education both during law school and following professional entry.

II. THE MACCRATE REPORT AND THE WISCONSIN STATE BAR

The American Bar Association’s much-publicized MacCrate Report³ is an ambitious effort to redefine legal education and restore professionalism to the practicing bar. With minor modifications, the Wisconsin Commission on Legal Education, an arm of the State Bar, has endorsed

Without Lawyers? Winds of Change in Legal Education. 81 VA. L. REV. 142 (1995). I have never contented, however, that other disciplines were marginal or insignificant to the study of law. For me, the objective is to maintain the proper balance among various approaches to legal education.

2. For a sampling of the commentary, see Lilly, *supra* note 1, at 142-144, 150.

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

and adopted the principal tenets of this Report.⁴ The Commission, like the MacCrate Task Force, believes that law students and lawyers “can be taught a common set of professional skills and values”⁵ along an educational “continuum that begins in law school . . . and continues throughout a lawyer’s career.”⁶ Theoretical teaching, the Commission says, “loses much of its value when it is divorced from skills and values.”⁷ The emphasis should fall on “[e]xperiential learning” which is “learning by doing and by reflecting on experience.”⁸ This educational process, “requires the student to make a connection between the underlying theory and the practice of a particular skill.”⁹

In this brief commentary, I will focus on the role of the Wisconsin law schools in implementing the recommendations of the Commission on Legal Education. First, however, it is necessary to recapitulate and emphasize the core of the Commission’s Report pertaining to law school education.

The Commission adopted the ten lawyering skills and the four professional values set out in the MacCrate Report. It then added to the latter the values of professionalism, judgment, civility, and conservation of the resources of the legal system.¹⁰ It falls to Wisconsin’s law schools to impart all of the values and to teach five of ten of the skills, namely, (1) problem solving, (2) legal analysis and reasoning, (3) legal research,

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

5. *Id.* at 3.

6. *Id.*

7. *Id.* at 4.

8. *Id.*

9. *Wisconsin Commission Legal Education Report*, *supra* note 4, at 5.

10. *Id.* at 17-23. The complete list of skills and values reads as follows:

| <i>Skills</i> | <i>Values</i> |
|---|--|
| 1. Problem Solving | 1. Provision of Competent Representation |
| 2. Legal analysis and Reasoning | 2. Striving to Promote Justice, Fairness, and morality |
| 3. Legal Research and Morality | 3. Striving to Improve the Profession |
| 4. Factual Investigation | 4. Professional Self-Development |
| 5. Communication | 5. Judgment |
| 6. Counseling | 6. Professionalism |
| 7. Negotiation | 7. Civility |
| 8. Litigation and Alternative Resolution of Legal Work | 8. Conservation of the Resources Dispute Procedures of the Justice System |
| 10. Recognizing and Resolving Ethical Dilemmas | |

(4) communication, and (5) recognizing and resolving ethical dilemmas.¹¹ The second skill—legal analysis and reasoning—is at the core of traditional legal education and continues to be a major theme in contemporary legal training. Legal research is also a staple in the curriculum, although it receives varying degrees of attention among the nation's academic institutions. The remaining skills—problem solving, communication, and ethical resolutions—are developed, at least to some degree, in all American law schools.

The Commission Report may thus be read as calling simply for a modest shift in curricular emphasis, along with increased sensitivity to moral and professional values. This reading, though no doubt comforting to law schools deans and university bursars, seems to me vastly to underestimate the change to be wrought if the Commission's recommendations are fully implemented. Note, for example, that while the law schools do not have primary responsibility for teaching all ten skills, they "should offer an array of electives whereby students can learn those [remaining] skills to the degree they deem necessary to their own individual careers."¹² As to those skills for which the law schools have primary responsibility, the schools should recognize that "[t]he knowledge that law students seeks in law school . . . is not just knowledge of the *subject* of law, but also knowledge of the *performance* of law as a profession . . . [thus] they must know how to perform certain tasks, deploy certain strategies, and attain outcomes on behalf of their clients."¹³

As I read the Report, the Commission contemplates a major curricular review and restructuring "designed with a conscious awareness of how substance and performance coalesce in what students need to *be able to do* when they graduate."¹⁴ The Commission clearly and repeatedly specifies what it expects, but leaves to the law schools the precise curricular plan "that *coherently* integrates the learning of 'substantive' knowledge with the learning of 'practical knowledge.'"¹⁵ Courses in skills and values may be taught separately "or infused in the 'content' of courses already offered."¹⁶

11. See *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 31-35.

12. *Id.* at 31. See also *id.* at 33. The remaining skills are (1) factual investigation; (2) counseling; (3) negotiation; (4) litigation and alternative dispute resolution procedures; and (5) organization and management of legal work. *Id.* at 31-35.

13. *Wisconsin Commission on Legal Education Report*, *supra* note 4, 27-28.

14. *Id.* at 28. See also *id.* at 38.

15. *Id.* at 31.

16. *Id.* at 38.

I want to note, also, the Commission's view on teaching the eight values it identified and adopted.¹⁷ Here the Commission's charge to the law schools is explicit: "the Commission expects that, upon graduation, law students will be able to incorporate all of the values into their practices, their attitudes, and their dispositions and act accordingly."¹⁸ There is little guidance as to how these values are to be shared with, and imbued in, the student body. Indeed, it is not clear that a graduate school, no matter how conscientious, could inculcate these values in its students.¹⁹

III. A BRIEF REJOINDER

One can hardly argue against the worth of values—safer to disparage Mom and apple pie. There is little that I can add to the Commission's discussion of the importance of values, nor do I quarrel with the values they endorse. These are important both to the law schools and the profession. I also agree that these principles of decency should be made explicit in law school. I am not, however, optimistic about the long-term results of this mandate to instill values during law school. Just as the mandatory teaching of legal ethics has not transformed (or even raised) the moral conduct of the bar, the required teaching of values will have only a marginal effect on the activity of practice. The values that will count most heavily are the ones that are *observed* in practice, where the members of the practicing profession, not academic lawyers, set the tone. When church is over, the parson's solemn pronouncements begin to fade.

This brings me to a second major feature of the Commission's Report: skills training. I think it is an open question whether law schools should have a *major* responsibility to teach practice skills. Teaching skills is not, in any event, a *major* strength of most American law faculties. There is a natural division of labor between law schools and law firms, and, after many years of experimentation, it ought to be apparent that law firms have the edge in imparting professional acumen. There is also the very real problem of having to satisfy widely accepted university standards of scholarship and tenure. In the academic venue, operational savvy and practical skills are not highly prized.

The Commission surely must sense these difficulties, for while it singles out for special praise those law professors who teach their

17. See *supra* note 10.

18. *Wisconsin Commission on Legal Education Report*, *supra* note 4, at 32.

19. See *id.* at 17-23 (discussing the values and concluding that both values and skills "are teachable").

students how to identify and solve a client's problems,²⁰ it also recognizes that "Wisconsin lawyers and judges should support the law schools and their faculties in teaching skills and values"²¹ The Commission contemplates that lawyers and judges will "address law school classes on the finer points of practice in a given subject matter area, . . . guide out-of-class exercises, . . . critique written work, . . . provide feedback on students' performance [and, in general] help law schools teach students to think and perform more like lawyers."²²

While I am committed to collaborative education, I also know that successful collaborations require a great deal of prior planning and joint class preparation. I would thus temper somewhat the Commission's optimism regarding the ease with which Wisconsin's practitioners can pave the way for the law schools' entry into the new educational world of skills and values. This is a difficult and problematic transition.

There are related concerns attending the widespread deployment of practitioners as law faculty instructors. Some of the most able judges and lawyers are also the busiest and, in the case of lawyers at least, command the highest hourly rates. Thus, other commitments will, at some level, militate against the intensive use of professional faculty. There is, in addition, the touchy problem of teaching skills. Among too many members of the bar there is a dubious assumption that any judge or experienced attorney is capable of professorial office—like breathing and sex, teaching comes naturally. But, of course, as any lawyer who has participated with or served on a faculty will confirm, the price of good teaching is trial and error, self-critique, and years of hard work and diligent study. To put the matter differently, if I were suddenly made a senior partner in a law firm or appointed to the bench, I would no doubt be embarrassed by my initial performance. So, too, practitioner-turned-teacher can expect to share the travails of a neophyte.

The Commission Report does not say much about money—that green stuff that propels well-endowed law schools toward the top of the U.S. News and World Report rankings. But the Commission Report does frankly recognize that Wisconsin's law schools "face daunting fiscal restraints."²³ The Commission Report nonetheless concludes that "the

20. *Id.* at 38 ("Their teaching continues to make an impact on their students' practices long after those students have graduated.").

21. *Id.* at 41 (Recommendation No. 5).

22. *Id.* Other areas to which practicing lawyers can contribute are negotiation, counseling, and developing writing skills. *Id.* The Commission contemplates that much of the Bar's work within the law schools will be "volunteer labor." *Id.*

23. *Id.* at 31.

law schools should take primary responsibility for graduating students with a basic proficiency in the [designated] skills . . . [and] for graduating students who know the values and know that they should act according to the values."²⁴ Law schools, it is said, "have the concentrated time and attention of students and the faculty necessary to convey these skills and values."²⁵ In addition, the Commission believes that law schools have a comparative advantage in fashioning a curriculum that successfully integrates substantive and practical knowledge.²⁶ Whether or not this is true, the implementation of such a curriculum will require significant funding.

Thus, if I were the Dean of one of the Wisconsin law schools, I would spend more than the usual anguished hours worrying about the two major forces in the life of educational institutions: funding and personnel. Generally speaking, skills instruction requires small classes, frequent "performance" assignments, timely grading and critique, and the assistance of one or more collaborators. In either the clinical mode (where there are real clients) or the simulation mode (where control is easier and the range of problems and issues can be expanded), this is expensive instruction. If a faculty member is, for example, reassigned from a large lecture/Socratic class to a small skills-and-values class, someone will usually have to fill the vacancy. If this practical instruction is provided, at least in part, by a practitioner or judge, the associated costs typically range from modest (*e.g.*, travel expenses, telephone, copying) to substantial (*e.g.*, compensation for serving as a resident faculty member for a portion of the academic year). The critical point is that skills and values training will require additional funding and additional personnel. If this instruction is acquired on the cheap, the results will usually reflect the bargain price.

There is, next, the problem of appointments and tenure of full-time faculty, a separate aspect of the "personnel" problem. If the Wisconsin law schools are to commit fully to skills-and-values training, the hiring and promotion of regular faculty will almost surely be affected. The Supreme Court Clerk with both a J.D. and a Ph.D in philosophy may excite the University Provost, but probably will not be the preferred candidate for imparting skills and values. In an ideal world, of course, the law faculty would be a harmonious blend of doctrinalists, clinicians,

24. *Id.*

25. *Id.*

26. *Id.* at 31 (concluding that "law school graduates cannot afford to wait until later in their careers to learn these [designated] skills and values.").

theoreticians, and specialists from neighboring disciplines. But the constancy of inadequate funding and the vicissitudes of the appointments process ensure that reality will always fall below the ideal. Even the most practical lawyer should commiserate with a dean who is striving to ensure that he or she has an academically competitive faculty, that obligations to both the bar and university are met, that new areas of the law receive curricular attention, that there is an adequate budget for hiring new and visiting faculty, that resident distinguished faculty are not raided by other universities, and that there will be some resources for new initiatives.

It seems to me that the Commission underestimates or ignores the gravity of these difficulties and, in doing so, poses a risk that the competitive position of Wisconsin's law schools will be compromised. At least the Commission appears to be saying that academic law, as we have traditionally known it, will make its claim on what is left after skills-and-values instruction is fully implemented. What *is* left, I fear, will not be adequate to support academic teaching and research.

That leaves me with the question of how the Commission Report will be implemented. The issue is whether the Commission Report is a modest and constructive push toward the integration of what one might call "principles and practice,"²⁷ or whether it transforms legal education in Wisconsin by a major infusion of the law firm into the law school. After all, most law school graduates spend their professional lives in an operational context—improving skills, and one hopes, absorbing and reinforcing desirable values. What is missing in this environment is the opportunity to probe beyond one's immediate requirements, the time to see a problem as just a fragment of a larger whole, and a culture specifically designed to enrich the human mind. One should think carefully about educational reforms that could threaten these attributes. I am apprehensive that the external imposition of mandatory skills-and-values instruction will dilute the kind of broad educational experience that, in the long run, is likely to produce superior lawyers.

27. At the law school where I teach, courses that integrate theory and practice are so designated.