

LAW AND ENDANGERED SPECIES: IS SURVIVAL ALONE CAUSE FOR CELEBRATION?

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I know that it is heretical to say so, but the spotted owl may not be in danger of extinction.¹ It seems that a wildlife biologist curious about why spotted owls would prefer old growth forest to new, went looking for the species in several places where old growth had been clear cut and new growth planted. To his astonishment he found the new growth forest alive with spotted owls. To explain this finding he noticed that the understory of an old growth forest is relatively dark and thus not noted for the lushness and variability of the plant growth, while the new growth forest is lighter and so has more and more varied understory growth. The understory of a new growth forest thus produces relatively more edible seeds for small rodents to feed on and so is home to more rodents per acre than is old growth forest. Given that spotted owls live on rodents, the relative scarcity of rodents in the old growth forest means that it takes more acreage to support one owl pair in old growth forest than in new. So the owls in old growth forest appear to be endangered when in fact they are just eking out a living under conditions that we see as glorious but that for them are harsh.

Why tell this story? I can't say that I hate owls and I love old growth forest, enough that I would support condemning vast tracks to preserve it from logging. So, I am not trying to take a position on the Endangered Species Act. No, my point is different. At the time of a centennial I think it is important to recognize the possibility that what may seem to be a great achievement—one hundred years of this law school and similar amounts for many others—indeed an achievement so fragile that it is worthy of preservation in its pristine beauty, when looked at in another light may be nothing of the kind, may indeed seem so unremarkable that clear-cutting might be appropriate. Put more bluntly, although many people lament the decline of the legal profession in general and of legal education in particular, I wish to suggest that it may be time to take the chain saw to the law school as we know it. It is just possible that were we to do so we would find that law students, and maybe even law professors, like spotted owls, might turn out to thrive in the new growth that would follow.

To focus my discussion I wish to begin by looking at one of the current responses to unease about the present condition of the legal profession, the so-called MacCrate Report.² Then I propose to look at selected events in the history of American legal education at three earlier times: in the years after the Civil War, after the turn of the

* Professor of Law, State University of New York at Buffalo. Many individuals helped me with this project. Had any of them known what I was going to say each would have asked for anonymity; despite each one's failure to request it, I have chosen to extend anonymity to them in the hope, probably vain, that they might all stay my friends.

1. Frank H. Easterbrook, *The Birds*, 210 NEW REPUBLIC 22 (1994) reports the information recounted in this paragraph.

2. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter cited as MacCrate Report without cross-reference].

century, and between the two World Wars. I look at these events to shed light on the Report. That done, I will return to the Report in an attempt to explain why this document continues to make mistakes that are over one hundred years old and so is part of the problem with legal education, and anything but the solution to present discontents that it sees itself to be. Of course, to implement a solution one would have to clear-cut an old growth forest. While there are clearly enough monkeys and enough typewriters to keep the law reviews going for generations to come, there is reason to doubt that there are enough chain saws and enough naked lumber jacks to take down that forest.

If one believes the literature, these are any but joyful times for the legal profession. "Poohbahs" of all stripes lament the decline of this or that. The new dean of the Yale Law School laments the loss of the lawyer-statesman ideal as law becomes a business—as if Paul D. Cravath were a social worker—and fears that there is no turning back.³ Earlier the Stanley Commission decried the decline in professionalism in the bar and noted that increased economic competition, brought about by an increase in the number of lawyers and the elimination of anti-competitive practices, together with a decline in profit margins and the absence of hortatory aspirations from the codes of professional responsibility, had either led to this decline or was symptomatic of it or both.⁴ Deans cry that law school budgets are being squeezed by rising costs and flat revenues and that diversity is threatened by excessively detailed accreditation standards⁵ while the accreditors worry that their autonomy is being eroded by an ever more intrusive federal bureaucracy.⁶ Law students are finding that jobs are scarce and poorly paid when found, while debts incurred to finance legal education are onerous in an anything but inflating economy. Law professors are surly as moving to a "better" school becomes harder, even though atherosclerosis abounds, since everyone "old" and in need of replacing is fifty and, thanks to Claude Pepper, never has to retire from a light lifting job. Into this black cloud-filled sky comes the MacCrate Report promising a brighter day. What might an historian make of such a promise?

The MacCrate Report, *Legal Education and Professional Development—An Educational Continuum*, to give it its proper name, is a product of the Task Force on Law Schools and the Profession: Narrowing the Gap of the Section of Legal Education and Admission to the Bar of the American Bar Association. The common name comes from the Chair of that Task Force, Robert MacCrate, a retired partner at Sullivan & Cromwell. As is usual in such matters, the Task Force was made up of a *melange* of deans, law professors, ex-law professors, judges and practitioners interested in legal education, clearly a peculiar subset of practitioners generally. The group did the standard Task Force number by collecting written submissions and holding numerous open hearings before producing its report. That report, like all such reports, is a curious mix of the interests of its dominant members. But it makes two basic points. One is quite sensible: that the

3. ANTHONY J. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

4. AMERICAN BAR ASSOCIATION, COMMITTEE ON PROFESSIONALISM, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* (1986).

5. John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of Legal Education*, 43 J. LEGAL ED. 757 (1993); Ronald A. Cass, et al., to "Dear 2," April 29, 1994, circular letter to "all ABA Deans" (on file with author).

6. One need only to hang around in the right corridors to hear this expressed in anguished tones.

educational development of a professional is a process that begins before law school and continues throughout practice. The other, quite odd: that the law school part of a professional's education would immeasurably benefit from the law school's emphasis on teaching its students a list of Task Force-supplied skills and values.

Accept for the moment the premise that there is a "gap" between what is provided to a student in law school and what that student will need to engage in the practice of law. Unless one believes that there is always a "gap" between intent and act—that the law in action is always and of necessity going to be something other than the law on the books, to use Pound's metaphor for the "gap"—then the only thing a proper Task Force can do is to work to close the "gap." And this is precisely what the Task Force did. As an effort to close the asserted "gap," its two basic points fit together quite well to reflect an interesting compromise. The practitioners and their allies agreed that it was everyone's job to close the "gap," since professional education was a lifelong process, and the law professors, content that they were not being asked to do all the gap filling, agreed that they would improve their teaching with respect to the items in the statement of skills and values.

It would be stupid to deny the existence of the "gap" between what the law schools provide and what the practice of law might demand, even for one who believes as I do that such gaps are inevitable, indeed a sign of health in human institutions, since gapless States are either totalitarian or morbid. Present and recent law students remind faculty of the gap every day with their complaints about law school's being too theoretical and not practical enough, their rush to fill the available clinical courses, and the gripes heard wherever recent graduates collect. Older alumni can be heard to make the same complaints, though often with less sophistication. All that said, however, the connection between the recurrent observations by students and alumni about a gap and the statement of skills and values offered by the MacCrate Report is in one sense not obvious at all, and in another sense too obvious and obviously wrong. To understand how these two contradictory things could be simultaneously true, one needs to examine the Report in some detail.

The Report starts out with a truly wondrous survey of changes in the practice of law over the past twenty-five years. It emphasizes the proportional increase in the number of lawyers, the number of female lawyers, and the number of minority lawyers.⁷ At the same time it canvases the equally startling changes in the conditions of practice, including the growth of the very large corporate firm and the development of legal services for the poor, legal clinics for the middle class, and advocates for group legal rights.⁸ Then, it turns to the more traditional division of the profession into solo practitioners and small firms in contrast to medium and large size firms.

For the former it documents the proliferation of specialties that render most general practitioners anything but general practitioners.⁹ Unfortunately, the concomitant decline of trial work as a percentage of the general practitioner's plate of activities gets suppressed. This is because data that suggests that lawsuits are filed in only ten percent of the disputes brought to counsel for resolution, and in only eight percent of those lawsuits is a trial actually held, gets crossed with data that emphasizes litigation-related

7. MacCrate Report at 13-28.

8. *Id.* at 47-87.

9. *Id.* at 35-46.

activities as a disproportionate part of the lawyer's time spent on dispute resolution.¹⁰ Unfortunately, both sets of data ignore all of the work that lawyers do that has nothing to do with disputes and disputing, as well as fails to notice the degree to which much litigation that may be part of a formal dispute—over an unpaid bill, for example—is largely administrative in nature. Most collections, foreclosures and divorces tend to be more like recording a deed than mounting a jury trial. But still the description of the world of the solo and small firm practitioner is vivid and enlightening.

In looking at medium and large firm practice, the Report emphasizes “the newly competitive, profit oriented environment,”¹¹ of departmentally-organized, really by sub-specialty, medium and large firms, and the proliferation of branch offices of these firms, most often out-of-state branches. Thereafter, the growth of the corporate law department is chronicled with its “stressful position at the center of the tension between company culture and professional ideals.”¹² And finally the “richly varied”¹³ work of the governmental practitioners at the local (and inferentially the state and federal) level is noted in modest detail.

It is not obvious how, given this vast diversity of practices, any Task Force could identify one set of skills and values that is necessary to all practices and practitioners. About the only thing common to the activities of a small family practitioner and a city prosecutor is the possibility that they may meet in the same courthouse; the only similarity between a large firm bond lawyer and house counsel engaged in contract review may be a common client. These four lawyers share little more than the fact that each possesses a license to practice law, though even here it is not necessary that, even if all carry on their activities in the same city, all must be licensed in the same state. So, the failure of fifty years of scholarship to produce agreement on a list of skills and values common to all kinds of practice¹⁴ suggests that it would require much luck for three years of work by part-time volunteers to have generated an adequate list.

In another sense, it is all too obvious how such a single list could be produced, as careful examination of the Report discloses. Toward the end of the Task Force's demonstration of the cornucopia of practice opportunities for lawyers and the accompanying extraordinary variation in the routine activities (practices in another sense) of lawyers today, the following assertion is made:

The professional ideal of a unitary profession with its core body of knowledge, skills and values, common educational requirements and shared professional standards has, to a significant degree, survived the profession's profound transformation in the 1970s and 1980s. It has survived despite the enormous pressures within and without the profession to capitulate completely to commercialization and to divide into a series of economic sub-markets in which

10. *Id.* at 39-40.

11. *Id.* at 80.

12. *Id.* at 95.

13. *Id.* at 97.

14. *Committee on the Curriculum, Association of American Law Schools, Report, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 168 (1944)* begins this search. Irvin C. Rutter, *Designing and Teaching the First Degree Curriculum*, 37 U. CIN. L. REV. 7 (1968) is its probable peak.

separate groups of lawyers sell highly specialized legal services to different consumer groups with little or no interaction among the various lawyer groups.¹⁵

This statement is later followed by two variations on this theme:

For a profession to create for itself an identity, it must not only claim as its own a specialty of learning and skills—for which the legal profession looked increasingly to the law schools—but it must also embrace a core body of values which sets members of the profession apart and justifies their claim to an exclusive right to engage in the profession's activities. "Professionalism" lies in adherence to such values.¹⁶

At its organizational meeting [in 1879], the ABA established a Standing Committee on Legal Education and charged it with developing a program which visualized a unitary legal profession with common admissions and educational standards.¹⁷

Thereafter comes an obvious conclusion:

If a single public profession of shared learning, skills and professional values is to survive into the 21st century, the law schools together with the bar and the judiciary must all work for the perpetuation of core legal knowledge together with the fundamental lawyering skills and professional values that identify a distinct profession of law throughout the United States.¹⁸

In short, if the profession is to continue to pursue the "ideal" (though not necessarily the reality) of a unitary profession, then it "must" continue to offer up a single set of skills and values that binds that profession together. As the tone of these excerpts suggests, the Task Force was not about to suggest abandoning the age old ideal.

Now, no one should infer that the Task Force was not aware of the relative incongruity of statements about the need for a unitary profession in a report that demonstrates that there is no such thing, for the Report offers an argument directed at this problem. It suggests that all lawyers need to be "well trained generalist[s]," even though few lawyers actually have general practices, because "any problem presented by a client . . . may be amenable to a variety of types of solutions of differing degrees of efficacy; a lawyer cannot competently represent or advise the client . . . unless he or she has the breadth of knowledge and skill necessary to perceive, evaluate, and begin to pursue each of the options."¹⁹ Whether that argument is persuasive or not is less important than the assertion that follows it.

Whether a lawyer is working alone or as a member of a team, substantive knowledge—and often highly specialized substantive knowledge—is necessary to complement the skills and values that are the subject of this statement. In

15. MacCrate Report at 86.

16. *Id.* at 108.

17. *Id.* at 106.

18. *Id.* at 120.

19. *Id.* at 124.

choosing to focus on skills and values, the Task Force did not ignore or underestimate the important role that substantive knowledge plays in the process of preparing for competent practice. The Task Force fully appreciated that attention has been, and surely will continue to be, given to the question of what aspects of substantive law should be included in a course of preparation for all new members of the profession. But, the Task Force concluded this issue is sufficiently distinct from an analysis of skills and values that the Statement should not attempt to address both.²⁰

Having thus put the greater portion of the existing law school curriculum aside, for the next hundred pages the report sets forth and analyzes the statement of the ten skills and four values for which it is justly famous.

The detailed text of the statement of skills and values is of little importance to me, though it has the feeling of the abstract unreality of a junior high school lesson in how to write a term paper or an overly clinical description of the child rearing practices of a particularly exotic species of birds. A brief summary of the structure of the statement of skills will suffice for present purposes. "It begins with two analytical skills that are the conceptual foundation for virtually all aspects of legal practice: problem solving . . . and legal analysis."²¹ There follow five skills "essential throughout a wide range of legal practice": legal research, factual investigation, communication (both written and oral), counseling and negotiation.²² Then comes litigation and alternative dispute resolution, seen as fundamental because "[a]lthough there are many lawyers who do not engage in litigation or make use of alternative dispute resolution mechanisms, even these lawyers are frequently in a position of having to consider litigation or alternative dispute resolution as possible solutions" to a client's problem, a task that requires "at least a basic familiarity" with the aspects of this skill.²³ Finally there are the skills of managing legal work effectively and recognizing and resolving ethical dilemmas.

In one sense it is silly for me to have read you all of this text from the MacCrate Report for most of it is unremarkably obvious, as I said before, and thus cannot be distinguished from the statement of skills and values. Since before the First World War it has been clear that there are at least two practices of law. Heinz and Laumann²⁴ and Zemans and Rosenblum²⁵ demonstrated that proposition about ten years ago with state of the art social science rigor and this Report undercuts their conclusion only to the extent that it demonstrates that two is too small a number. Yet, despite all of these well documented "facts," the number of assertions about the unitary nature of the bar continue to far outnumber the contrary assertions.

Similarly commonplace over an even longer time frame are assertions that the law schools, the bench and the bar should cooperate to improve the practice of law, despite

20. *Id.* at 125.

21. *Id.* at 135.

22. *Id.*

23. *Id.*

24. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

25. FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, MAKING OF A PUBLIC PROFESSION (1981).

good evidence that all three manage to do so somewhat less frequently than orangutans come together to mate and that such attempts at cooperation, like orangutan's liaisons, are about as lasting. Indeed, careful work would, I believe, show that calls for cooperation issued by any one of the three parties are most frequently heard when that party wants one of the others either to do something for the benefit of the calling party or to stop doing something that the calling party finds inimical to its interests. That is a peculiar basis for cooperation.

On the whole the list of skills set forth in the Report, though of much shorter lineage, is nothing but the standard litany of the majority of clinical instructors (and research and writing instructors, another group of second class citizens) in the law schools. The most forceful advocate of this view is Tony Amsterdam, not coincidentally a member of the Task Force and the most cited of the Report's sources on clinical education.²⁶ There are other views; Steve Wizner and Dennis Curtis have articulated one²⁷ and Frank Bloch, another.²⁸ But most clinicians talk about skills and indeed this particular group of skills. And it is this group of clinicians who earlier got assistance from the bar in securing their place in the law schools with the post-Watergate argument that clinical education is the best place to deal with ethical issues.

Even more telling, the entire project could be seen as a form of log-rolling by the participants. The clinicians get bar support for increasing clinical instruction; the bar gets students who are more practice-ready and therefore cost less to employ in a cost-conscious environment; the judiciary gets young practitioners who are minimally prepared for litigation despite the fact that many lawyers will last see a court room when they are sworn in, unless appearing as a party; and the ABA gets renewed affirmation of its central importance to the profession since it is the only possible representative of a unitary bar around, despite the fact that, as Ted Schneyer has so conclusively shown, the content of its own Code of Professional Responsibility shows exactly how fragmented even its own membership is.²⁹ Only the deans and the large class teachers get short sticks and even the deans get the promise that the statement of skills and values will not be magically transmuted into an accreditation requirement.

While all of this may be true, I do not think that either ho-hum or rampant cynicism is warranted in this case. For there is something to the ideas in the MacCrate Report that needs to be taken seriously.

I think it extraordinary that the analysis of professionalism in the Report tracks the standard academic understanding of that process; this, even though the originator of that analysis is obviously a bit of a Marxist.³⁰ To create a modern profession, one needs a

26. MacCrate Report at v. The basic cite for the Report is Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

27. Stephen Wizner & Dennis Curtis, "Here's What We Do": *Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673 (1980).

28. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982).

29. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY. 677 (1989). See also, Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ L. REV. 363 (1993).

30. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* (1977). A good review of the theoretical literature on professionalization can be found in Robert L. Nelson & David M. Trubek, *New*

separate area of knowledge and skill, usually provided for through education, and a set of values or standards that arguably support self-regulation by the group as against intrusive regulation by the State. Anyone conversant with the history of legal education knows that much of the point of the development of the American law school was to provide that core of knowledge, if not skill, exactly as the Report asserts.³¹

Now this process of professionalization is nothing more than an example of product differentiation of the kind that manufacturers of tooth paste, shampoo and detergent have mastered, but that fact should not stop one from recognizing that the question that the Report attempts to address is truly central to the profession *and the Task Force knows it*. This too is behind the assertion, however lame, of the unitary nature of the legal profession. To maintain the claim to self-regulation there must be a single body of knowledge, set of skills and shared values, at least unless one wishes to go about the task of justifying self-regulation for each specialty and sub-specialty of the law in the way that the medical profession has done through its panoply of specialist boards supported by extensive residencies. Such an approach is surely implausible for lawyers given the quite different elasticities of demand for legal as against medical services. The cost of a two year add-on residency in suburban real estate practice, to pick one of my favorite sub-specialties, could never be recouped out of future earnings; hell, it is arguable that, given the present employment market, many, if not most, students at any but the fanciest private law schools cannot pay off the cost of the existing three years of legal education within the standard loan repayment terms!

Thus, the recurrent use of the imperative verbal auxiliary “must”—the profession *must* claim special knowledge and skills, it *must* embrace a core body of values and the three branches of the profession *must* all work for the perpetuation of core legal knowledge skills and values—in the excerpts that I read to you is not accidental rhetorical overkill. Something significant is at stake here. It is the professionalization project itself.

Given the significance of what is at stake, the content of the intellectual center of the professionalization project bears close scrutiny. And again it is easy to dismiss that “core of legal knowledge . . . fundamental lawyering skills and professional values”³² that is trotted out every time one of these crusades is undertaken. Indeed, here one might argue that the skills listed are an example of imperialism on the part of the clinical instructors (or an attempt to co-opt the large class teacher), for, lo and behold, that supposedly quintessential first year, large class skill—thinking like a lawyer—turns up on the skills side of the equation as “legal analysis.” But such easy dismissal is no more appropriate here than it was earlier.

Problems and New Paradigms in Studies of the Legal Profession, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 15-22 (Robert L. Nelson, et al., 1991), a really interesting book of essays.

31. The standard cites here are JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) and ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983). The truly bored might look at John Henry Schlegel, *Between the Harvard of the Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL ED. 311 (1985).

32. MacCrate Report at 120.

Consider the structure that is cleanly produced when the Task Force sets aside the greatest portion of what is learned (whatever it is that is intended to be taught, at times at least a matter of willing self-delusion) in the traditional law school classroom in the interest of supposed convenience. With legal analysis moved to the skills side, the Report can be seen as having separated law study into theory—substantive knowledge—and practice—skills, a clean division that arguably fits perfectly with the ideology of the rule of law. Law is rules, even-handedly applied by lawyers who do not make, twist, warp or even shape them, but only apply them skillfully. One would have a hard time identifying a more obvious structure.

Given the internal dynamics of the Task Force, the choice to “not ignore or underestimate” but nonetheless set aside the importance of “substantive knowledge” for the “process of preparing for competent practice” made sense. The difficulty that the group had bringing into the fold the skills necessary for the work of the young associate in the medium or large firm made apparent that there was little point in attempting to identify a “core of legal knowledge,” to use the words of the truly awful, narrow-minded ABA accreditation standard.³³ In our fragmented profession such an attempt would have required the group either to expend Herculean effort or be content to produce true pabulum.

But, if so treating theory were so obvious and so easy, why then is it so obviously wrong? For the time being I wish to leave that question, indeed to leave the MacCrate Report, and look at several events in the history of American legal education that implicate questions of theory and practice. In doing so, I hope to build a case for understanding the way that the Task Force conceptualized both theory and practice, in order then to address the obvious wrongness of that conceptualization. Let me start at what most people think of as the beginning: Christopher Columbus Langdell’s Harvard.

Bill La Piana’s recent book, *Logic and Experience*, makes the extraordinary claim that Langdell’s reforms at Harvard, particularly the teaching of law from cases through dialog, succeeded because it was seen as more practical, fusing logic and experience, than the earlier way of teaching by lecture and recitation (whatever that practice was in fact).³⁴ The claim seems sensible; after all, who would undertake an intentionally impractical reform? Still, what then are we to make of the decision of a group of lawyers in Boston, including two teachers from the Harvard Law School, to establish the Boston University Law School just two years after Langdell’s innovations at Harvard? Their reason for doing so was, in the words of the School’s first historian, because “instruction . . . at Cambridge was particularly technical and historical, and when completed necessitated an apprenticeship in some good attorney’s office,”³⁵ a statement made still more peculiar because it follows close on to the assertion that “the best system” of legal education

33. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1992) in section 302 provides that all accredited law schools must offer “those subjects generally regarded as the core of the law school curriculum.” It is difficult to decide whether the vague *in terrorem* effect of such a rule is worse than the failure of thought that it represents. Due care is a much overrated solution to legal problems.

34. WILLIAM P. LAPIANA, *LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994).

35. George R. Swasey, *Boston University Law School*, 1 GREEN BAG 54, 55 (1889).

“embraced lectures in connection with the practical work of an office.”³⁶ It seems unlikely that this dispute was really over the timing of pieces of an education—apprenticeship after, as against apprenticeship during, classes—especially since the Boston faculty contained, as one of its core members, the best legal historian in the United States at the time, and even I would think twice before asserting that legal history was at the core of a practical education.

Justification for the practicality of Langdell’s system was offered by Jeremiah Smith of the Harvard faculty. “[T]he young man who studies and analyzes the cases is doing much the same thing as he will afterwards be called upon to do in practice. He is endeavoring to apply law to facts.”³⁷ To what practice is this activity practical? And James Coolidge Carter, a prominent New York lawyer and as such a rather potent witness, offered that, “[f]ar from producing theoreticians, study of law . . . [from cases] produced young men ‘of a great amount of actual acquirement, and—what is of more consequence—an accuracy and precision of method’” who knew how to do the “hard work that is needed to sift complex facts, identify the most important, and interpret them in the light of applicable rules and principles.”³⁸ In contrast, justification for the practicality of the Boston University program was more direct; it focused on the ability of students to combine the demands of clerking with late afternoon and evening classes and in the attempt of lecturers to offer “practical information; . . . while the theories of the law were ably expounded, the constant aim was to impart knowledge which would be of value in actual practice.”³⁹ Just which system was practical?

Part of the confusion over these rival claims can be eliminated by noting that in using “practical” all sides were really saying “good.” Even more can be eliminated by noting that the combatants were reflecting a shift in understanding of what each called “legal science,” the activity of determining what the law was and so how law was to be presented in litigation.⁴⁰ For early nineteenth century lawyers legal science was the activity of ordering the “principles” of law—no man shall profit from his own wrong, first in time is first in right, equity follows the law—which were seen as being in a kind of dialectical relationship with the cases and which were the basis for legal argument. These principles provided the doctrinal underpinning for a world that was still ruled by the common law forms of action. In contrast, for late-nineteenth century lawyers legal science produced principles that were more closely related to the cases (though not

36. *Id.*

37. LAPIANA, *supra* note 34, at 102 (quoting Jeremiah Smith, Remarks, in HARVARD LAW SCHOOL ASSOCIATION, ORGANIZATION AND FIRST MEETING 36-40 (referring to meeting held on Nov. 5, 1886)).

38. LAPIANA, *supra* note 34, at 101 (quoting James Carter, Remarks, in HARVARD LAW SCHOOL ASSOCIATION, ORGANIZATION AND FIRST MEETING 25-28 (referring to meeting held on Nov. 5, 1886)).

39. Swasey, *supra* note 35, at 56-57.

40. The literature on “legal science” grows daily. In addition to LaPiana’s book, one really ought to consult Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983); Duncan M. Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought*, 3 RES. IN L. & SOC. 3 (1980). My understanding of this topic has been immensely aided by discussion over the years with my colleague Fred Konefsky.

identical to the sum of the cases). These principles—consideration is detriment to the promisor or benefit to the promisee bargained for, to run with the land a covenant must touch and concern that land, to be actionable negligence must be the proximate cause of the injury complained of—explained the doctrinal categories that had replaced the forms of action as the organizing tool for legal thought.

The early nineteenth century sense of “principles” is the world of leading cases that survives in the *American Jurisprudence* series today; the later sense of “principles” is the world of full case reporting that thrives in the *West* key number system and on *WestLaw* and *Lexis*. The earlier is the world of the Boston University Law School’s founders who felt that excessive concern with doctrinal detail was “technical” and so unnecessary; the later is the world of the great treatise and casebook writers at Harvard—Ames, Beale Gray, Thayer and Williston—and elsewhere. And in-between is Langdell, who discarded most of the cases because they were “useless and worse than useless,”⁴¹ as would any early nineteenth century legal scholar searching for principle, but whose principles, like those of his contemporaries, were largely doctrinal.

Still, two questions remain: To what practice was either school’s education practical? What was the theory implied by either’s view of practical/practice? These questions are essential for understanding this dispute because “theory” and “practice,” “theoretical” and “practical” are “pair” words.⁴² Each is parasitic on the other, draws its meaning from what the other is and is not. The law is full of such words—“law”/“politics,” “public”/“private,” “law”/“equity,” “tort”/“contract,” “negligence”/“strict liability.” Each word in the pair relies on the other for help in defining the implicit boundary between the two. So to see practical value in the Harvard education as did Smith and Carter is to imply what proper theory is. But for the time being let us leave these questions and instead look at a battle in the early part of the twentieth century that bears on this question.

Fifteen years ago William Johnson wrote a history of the early years of legal education in Wisconsin.⁴³ The book concludes by focusing on disputes between the University of Wisconsin Law School, an old school but one of the earlier converts to Langdell’s case method, and the upstart Marquette Law School. Marquette was anything but a convert to the case method. It started as a wholly part time, proprietary night school program based on text and lectures given by practicing lawyers. When its owners sold the school to Marquette in 1908, that university then began a day program and so the school acquired its first full-time faculty member, its dean. The Wisconsin faculty opposed Marquette’s application for membership in the Association of American Law Schools and fought with the school over the diploma privilege, the right of a graduate to be admitted to practice without taking a bar exam. Wisconsin offered this right to its students and Marquette either wanted to obtain this right or deprive Wisconsin of it.

41. Christopher C. Langdell, *Preface to the First Edition*, in *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vii (2d ed. 1889).

42. I know of no one who has used “pair words” but the root concepts are explained in Kennedy, *supra* note 40, and Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985).

43. WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* (1978) [hereinafter *SCHOOLED LAWYERS*].

The precise, rather childish nature of these disputes is of no present importance. But it is interesting that both of the parties agreed that Marquette, which did not even offer degrees to its night school students, was the “practical” school. It advertised that the presence of its large corps of practitioner teachers made the “atmosphere more practical and less academic than is found in most law schools.”⁴⁴ By holding all of its day school classes in the morning it allowed students to “work and study in the afternoon,” particularly in “law offices where they will acquire familiarity with the practical points of law.”⁴⁵ Wisconsin’s dean agreed, though for him the appellation “practical” was more than a little pejorative. He found it important to note that Marquette did not stress techniques of legal reasoning and he denigrated “the sort of work they are doing there,” because, among other things, he was “skeptical as to the extent to which practice can be taught in a law school.”⁴⁶

Again, what can this dispute mean? What is practical about being taught by practitioners? What is wrong with a practical education? Clues to answering these questions can be divined. Again one sees “practical” being slung around as both an epithet—bad—and a merit badge—good—with little other content. However, here at least, unlike the dispute between Harvard and Boston University, there is agreement on where theory and practice lie, even if it is not precisely clear what each was. Elaborating on the story will help to clarify theory and practice.

At the same time that Wisconsin was fighting with Marquette, it was being harassed by a prominent member of the Wisconsin Board of Regents who explicitly wanted the school to offer more practical training. In response to this demand the school chose to offer “a course in drafting legal documents,” described as one that would “compel the student to apply the principles of law in a concrete way that he has picked up in the various courses in School.”⁴⁷ Similarly the school saw as “practice courses” “19 hours of instruction in adjective law 4 hours of Common Law Pleading; 4 hours of Evidence; 4 hours of Code Pleading; 1 hour of Brief Making [research and writing]; and 2 hours of Office Practice [the drafting course].”⁴⁸

What was practical about common law pleading in a code pleading state? Or about an evidence course? Or even code pleading, the early twentieth century equivalent of civil procedure? In this litany, adjective law and drafting are seen as courses that are about the application of the principles of substantive law, however odd may be that understanding of procedure courses. Under this view, theoretical study is study of the substantive law, at least when sufficiently admixed with work on techniques of legal reasoning. This admixture was apparently important. At least during the diploma privilege controversy,

44. MARQUETTE UNIVERSITY SCHOOL OF LAW, CATALOG, *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 136.

45. MARQUETTE UNIVERSITY SCHOOL OF LAW, ANNOUNCEMENT, *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 138.

46. Statement by Harry S. Richards to Henry Bates (March 4, 1911), *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 138.

47. Statement by Harry S. Richards to G.D. Jones (July 30, 1910), *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 139.

48. Statement by Harry S. Richards to Clair B. Bird (November 2, 1914), *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 139-40.

Wisconsin's lobbyist before the state's legislature denigrated schools without the privilege who, it was asserted, "would train for ability to pass the bar examination rather than to practice in fact."⁴⁹

In its emphasis on teaching "principles" of law and teaching techniques of legal reasoning, the Wisconsin faculty sounds like the Harvard faculty and its supporters twenty years earlier. Like Langdell's Harvard, the Wisconsin faculty advocated the case method because it trained students in how to practice law. It was the doctrinal structure of principles that the Boston University faculty thought to be too "technical" for the instruction of law students and that Holmes found to be too infused with "logic" (and thus too theoretical and so theological) and not enough with experience, as his famous aphorism goes.

Still, what was the "practice in fact" for which an avowedly non-practical education at Wisconsin was to prepare its students? It was the same practice that James Coolidge Carter had identified back at Harvard with his litany about sifting facts, identifying the most important, and interpreting them in the light of the "rules and principles." It was practice seen as law application, the world of litigation or adjective law, and the world of drafting pleadings and simple "legal" documents—if this is a will I must apply the Rule Against Perpetuities, The Rule in Shelley's Case and the Rule in Dumpsor's Case and see that I corral the necessary number of witnesses.

It is particularly important to notice, because it is so puzzling, that it is not obvious that the theory taught at any of these four law schools prepared a student for a particular type of practice—although preparation to pass the bar exam should not be sniffed at, even though one ought to worry about admitting to practice anyone who needs three years of full time study for that exam. That there be an identifiable practice—large firm corporate, small town general, civil litigation, etc.—was less important to these law professors and their practitioner allies than that there be an identifiable theory, a body of knowledge—legal doctrine—that would support the professionalization project that to some extent both shared. It was this theory that then defined acceptable practice—rule application—consistent with the theory. While litigation was arguably the dominant activity of American lawyers, theory could complement actual practice. Litigation later became a less significant part of American practice as lawyers occupied the former province of notaries, real estate agents, and bank officers (which was claimed through campaigns directed at "unauthorized practice"), and as the absolute size of commercial entities and government regulation grew. During this stage, theory could be fudged, if necessary, and papered over with modestly useful skills such as drafting, brief writing, and research and case analysis.

Two largely contemporaneous events reinforce the importance of this understanding of theory and practice in law. At least one person understood that it was problematic to identify doctrinal exegesis, even at a quite rarefied level, with theory. Wesley Hohfeld's plan, or more accurately, vision, for a Vital School of Law and Jurisprudence was a paean to the importance of the law professor's professional vocation largely as the faculty at Harvard and Wisconsin would have seen it.⁵⁰ Still, Hohfeld's school for lawyers, as

49. Statement by C.B. Bird to Chairman of Assembly Judiciary Committee (April 15, 1915), *quoted in* SCHOOLED LAWYERS, *supra* note 43, at 147.

50. Wesley N. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities*

opposed to his school for law professors and his school for citizens, sandwiched the doctrinal curriculum in between courses in office practice on the one hand and jurisprudence and legal history on the other. Yet, when it came time to act on Hohfeld's ideas the "leaders" of the bar and the law schools transformed Hohfeld's ideas into an enterprise that was neither a school for law professors nor a school for practicing lawyers, much less for citizens, but rather that quintessentially doctrinal oracle, the American Law Institute and its Restatement project.⁵¹

At about the same general time, the American Bar Association, disgruntled by the fact that despite its efforts to raise the standards of professional education, marginal schools were proliferating while the better types of law schools were barely holding their own, induced the Carnegie Foundation to undertake a study of legal education.⁵² Carnegie was selected because its report on medical education, known as the Flexner Report after its author Abraham Flexner, had been extremely successful in attacking and ultimately leading to the closure of the more marginal medical schools. The Carnegie study of legal education was undertaken by Alfred Z. Reed, a non-lawyer staff member. Reed visited dozens of law schools. From these visits he concluded that since there were really several legal professions arrayed between the extremes of major corporate practice and local service for the middle and lower middle class, there ought to be various types of law schools with varying types of curricula, not just schools like Wisconsin, but also schools like Marquette and proprietary schools where law was treated much like a trade as well.⁵³ The ABA, like Victoria, was not amused. In its response it stated:

In spite of the diversity of the human relations with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same. . . . All require high moral character and substantially the same intellectual preparation.⁵⁴

Variations in practice settings or even clientele were unimportant. What was important was the homogenous center of doctrinal education.

A brief discussion of three events between the World Wars involving prominent members of the realist movement seems sensible before returning to the MacCrate Report. Realism has been blamed and praised for all sorts of things, generally both and for the same things. Most known for their attacks on the nineteenth century doctrinal universe of certain, "logically" derived doctrine, at least some of the realists questioned related aspects of legal education. Most famous of these questionings is that of Jerome Frank who asked, *Why Not a Clinical Lawyer School?*⁵⁵ This article is usually seen as the precursor of contemporary clinical education, though clinic-like studies date back to 1893

Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 76 (1914).

51. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55 (1990), sets out the basic story.

52. STEVENS, *supra* note 31, at 112-23 tells this story well.

53. STEVENS, *supra* note 31, at 113-14.

54. STEVENS, *supra* note 31, at 116 (quoting ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931)).

55. 81 U. PA. L. REV. 908 (1932).

and were more fully developed by others, even in the thirties. Yet, it is particularly interesting how Frank's article participated in the world that it criticized. Its central prescription was a push to send students into trial courts to observe the fact-finding process as an antidote to the appellate opinion-centered class room. In fact, Frank's idea had an even more radical potential: Underhill Moore suggested that if the idea were to be taken seriously then the law schools should be shut down for a generation while the law professors learned something about practice.⁵⁶

Walter Wheeler Cook followed through on Hohfeld's ideas about the need for real theory in legal education, developing a course for law students that explored scientific method and legal reasoning.⁵⁷ The point of Cook's course was to suggest that "legal science" was no such thing and that legal reasoning was not an exercise in logic. Traditional law teachers reacted in horror. Wisconsin's dean was "rather skeptical of the benefit which . . . students got out of" the course because "[t]he list of readings suggested seems a greater burden than their immature shoulders can bear."⁵⁸ Rather than engaging in such studies students should spend time preparing "to practice law as it is practiced, to know the principles that are being daily applied in our courts."⁵⁹ Roscoe Pound and Joseph Beale of Harvard found the course to be useful for law teachers and "older" students, but surely agreed with William Draper Lewis, Dean at Pennsylvania and Executive Director of the American Law Institute, who was "fearsome" that "the man who comes to the law school, and wants to be turned out in three years a reasonably good lawyer . . . may not arrive where he wants to arrive" should he begin with Cook's course.⁶⁰

Last and most significant is a piece by Karl Llewellyn, *On What Is Wrong With So-Called Legal Education*,⁶¹ the text of a speech given to a group of Harvard law students, apparently as part of the 1935 student evaluation of the Harvard curriculum during the curriculum study of that year. While the students in their later evaluation attacked the case method as well as the overall blandness of the curriculum,⁶² Llewellyn attacked something more fundamental. He asserted that legal education was "blind, inept,

56. Statement by Underhill Moore to Jerome N. Frank (January 5, 1934) (Underhill Moore Papers, Sterling Memorial Library, Yale University). "My chief difference with you is that I doubt very much whether a law school has at present anything very substantial to offer the student of law. I should put the beginning student in an office and give the law professors a generation to get something to put in the curriculum of your 'Clinical Lawyer School.'" *Id.*

57. The course is described in Walter Wheeler Cook, *Modern Movements in Legal Education*, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 40-46 (1928).

58. Harry S. Richards, Remarks, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 49 (1928).

59. *Id.*

60. William Draper Lewis, Remarks, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 55 (1928).

61. Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 653 (1935).

62. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967* at 284 (1967).

factory-ridden, wasteful, defective and empty”⁶³ and offered as his ground for saying so this aphorism, “Not rules, but doing is what we seek to train students for.”⁶⁴ How far such a conception was from intelligibility for most law teachers can be seen from the fact that though the reaction to realism in the thirties was at time vituperative, none of the critics even bothered to respond to Llewellyn’s attack.

After this brief, episodic review of some points in the history of American legal education it ought to be possible to identify a certain continuity. For over a hundred years now the legal profession has seen as theory the substance and manipulation of doctrine, and as practice the application of that substance. Attempts to alter that identification by asserting the relevance of a different kind of theory—as Cook did directly and Hohfeld indirectly—will be attacked or normalized just as suggestions that practice is not law application—as Llewellyn did or as Moore believed Frank did—will be ignored or, worse, deflected into safely canonical innovation. And for over seventy years the profession has denied the fragmentation of legal practice with the same transparently flimsy argument to the effect that no matter what kind of law a lawyer practices, that lawyer needs the same base of legal knowledge and skill. The only redeeming feature of these assertions is their fit with the structure for the maintenance of professional privilege and autonomy that is the professionalization project. Asserting that all lawyers need to know both theory—identified with the “core” of knowledge that makes law a definable field—and practice—identified with the skill of law application, the mysterious ability to reason “legally” that one can only acquire through legal education—the basis for a claim of professional autonomy is at least formally secure.

I do not mean to be heard to claim that the referends for “theory” and “practice” have been the same for over one hundred years. Change in detail often comes while function stays the same. Theory is no longer the grand doctrinal edifices pieced together with logic that the late nineteenth and early twentieth century knew, though contemporary law and economics in its most imperial mode erects faintly reminiscent structures. Indeed, today theory is more fragmented than it was in even the fifties and sixties when legal process style policy analysis presented law as a neatly mowed lawn. And as the list of skills in the MacCrate Report shows, over the past fifty years there has been a shift on the practice side from a more to a less litigation centered view. More notable than this, however, is the shift of legal reasoning from being seen as “theory,” as it was at Wisconsin, to “practice.” Such a shift is the ultimate tombstone for “thinking like a lawyer,”⁶⁵ the late nineteenth and early twentieth century patch to the intellectual structure of professionalism necessitated by the choice to offer elective courses in the second and third year of law school. That choice undercut the claim that lawyers possessed expertise in a definable sphere of knowledge by making it obvious that to some extent it made little difference what courses a student took. Now, an undefined “core” of legal knowledge, itself a somewhat cynical compromise accreditation requirement agreed to by the law schools about the time that they were fighting off moves toward both a required curriculum along the line of Indiana’s and a required clinical experience, seems to be an

63. Llewellyn, *supra* note 61, at 653.

64. Llewellyn, *supra* note 61, at 654.

65. The phrase seems first to emerge in the literature from the mouth of James Barr Ames. See ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK AND PROCEEDINGS 16 (1907).

adequate patch, since at least it has the virtue of being a good, if indistinct, fit with the relevant hole.

The conclusion that if doctrine is theory then skills must be practice is nevertheless anything but obvious. Why this is so can best be approached by noting that the structure on the skills side is more than a little odd. It is hard to see how the skill of "problem solving" and the skill of "legal analysis" can properly be seen as being on the same plane. It is as if one were designing a chef's school and put meal planning and plate garnishing or vegetable sautéing on the same level. Indeed, it is this classic category mistake, reminiscent of Borges,⁶⁶ that got me interested in the MacCrate Report in the first place, that got me to see it as more than another attempt to upgrade clinical education and so give deans fits.

I doubt that one can really paper over the difference in the level of generality between the skill of problem solving and that of legal analysis by saying, as does the MacCrate Report, that both are analytical. Consider—I have a client who needs a zoning variance. I can solve this problem by bribing the members of the zoning board, or by buying off any neighbors who might object to the variance on the assumption that the board is asleep unless awakened, or by assembling a group of local heavy weights to testify as to the importance of the project to the community, or by concocting an argument as to why the variance is appropriate under the zoning ordinance. All of these are examples of problem solving. Only the last involves any semblance of legal analysis unless one wants to stretch that concept to understanding that bribery is criminal and thus better be done carefully or that neighbors may have a right to object or that testimony may be given. Indeed, one can find those facts in a *League of Women Voters'* handbook on local government, and stated there with far more clarity than in the statutes of any state. Thus, it is far more plausible to see problem solving as the master skill of lawyers to which legal analysis is a subordinate skill.

Now, I do not wish to be heard to argue that legal analysis is never central to the solution of a client's problem. In appellate work it is often central, so too in some kinds of government practice. And it was legal analysis that solved the problem of coordination of multiple small producers in a rapidly growing market by creating the business trust in the nineteenth century and, when that device proved to be unsatisfactory, the modern corporation. But centrality to solution does not make a skill fundamental. Appellate practice always centers on the question, "How can I get this court to reverse (or affirm) a matter considered once by a presumptively competent human?" Solving that problem may call for much or little legal analysis, much or little factual analysis, and occasionally even casting aspersions on the decision maker. Problem solving skills—collecting a wide range of information about legal doctrine, social institutions, customary ways of doing things and the strengths and weaknesses, including the financial capacities, of the parties and associated participants and then constructing and weighing alternatives—is the root skill to this or any other variety of practice. It is problem solving skills (or their lack) that allow a lawyer to say, "This is just another house closing," or "This is just a slip and fall," or "This business just needs a standard corporate charter"; and it is problem solving skills (or their lack) that turn those problems into complicated questions of unacknowledged

66. See Robert Darnton, *The Great Cat Massacre and Other Episodes, in FRENCH CULTURAL HISTORY* 191-92 (1984).

easements, defective products or complicated shareholder agreements funded with key person life insurance. It is thus problem solving that is common to all of the various parts of the legal profession that the Task Force so lovingly describes.

If the MacCrate Report is this wrong in its categorization of skills, in seeing problem solving and legal analysis as skills on the same plane, then I believe that its entire edifice falls. The recognition that problem solving is the pre-eminent skill reduces not just legal analysis but also substantive legal knowledge to a subordinate position. So reconfigured, one has no clean theory to set against and inform practice, only a practice with many subordinate bodies of knowledge and kinds of skills. Yet, I believe that while the Report fails in its attempt to offer a structure sufficient to bridge the "gap" that it sees between legal education and legal practice, one might develop a way of conceptualizing the relationship of theory and practice in law that seems better to fit with what practicing lawyers do and thus might be the basis for a better bridge.

To flesh out that alternative conceptualization, one might start by noticing that, if we train law students for *doing*—as Llewellyn asserts and that I must assert is the only activity that all of the varieties of legal practice so lovingly chronicled by the MacCrate Report have in common—then *How To Do Things With Rules*,⁶⁷ to steal William Twining's wonderful title, is only one of a list of theories—general explanations of the recurrent aspects of or patterns to a set of practices or institutions—that are relevant to understanding legal practice. Consider some others—how to do things with documents; how to do things with procedures; how to do things with private institutions; how to do things with public agencies. At the other extreme one can identify real legal practices: large corporate, small corporate, litigation, real estate. And in between are topics like rules for doing things with economic enterprises, rules for doing things with family life, rules for doing things with public agencies, rule for doing things in disputes between strangers, and rules for dealing with adjudicating agencies as well as equally substantive, but hardly doctrinal, topics like economic institutions, families in their many guises, public agencies in their many forms, disputing among strangers and judges, and the institutional practices of courts.

Such a schema would have several advantages. It would recognize, as Hohfeld did, that legal doctrine, no more than a schematic understanding of social institutions, was neither theory nor practice, but a knowledge base that is necessary for theory to produce a practice and for practices to generate theories. It would undermine the silly notion that skills are contextless and that contexts are transparent and so never need to be discussed in law schools. It would eliminate the truly divisive notion that there are substantive law teachers and there are clinical skills teachers, a notion that, because theory is always more important than practice in academic life, both guarantees that clinicians will always be second class citizens and that they will endlessly try to climb out of their low estate by developing "theories" about the skills that they teach, theories that will always be seen and dismissed as simple-minded by the substantive law teachers. It would expose students to actual practices of law so that they might sample them and thus make slightly more intelligent decisions when seeking employment. Even more importantly it might bring a modest decline in the alienation and anomie of law students—a large decline is

67. WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* (3d ed. 1991).

impossible; still being in school at twenty-five or twenty-six is a real bummer. For, instead of presenting students with an endless line of identical, seemingly only modestly relevant courses each asking the same two questions—Can you endure intense boredom? Can you learn this “crock” in less time and with less effort than the last “crock”?—law school might actually help students to see the coherence of a real practice emerge before their eyes and so to gain a sense that having seen one they might learn another. The faculty too might profit. The dispirited routine of doctrinal scholarship, fully as incoherent as Pierre Schlag says it is⁶⁸—an endless row of doll house tea pots, each fully capacious for the tempest thereof—might be replaced with the exploration of the activities of people doing things in a world that was alive with possibilities. It might even make cranky, cash-starved deans for whom the equation “skills = clinic = gobs of money per student”⁶⁹ a bit less cranky, for problem solving does not necessarily imply clinic; indeed it may imply a case method much more like the traditional case method in business schools. And it is all more than a little implausible.

Why implausible? Because of all the observations about professional identity and its formation that seem to be irrelevant to the MacCrate Report but are absolutely essential to it. There is nothing particularly legal about problem solving. How does one maintain the distinctiveness of being a lawyer if problem solving is the core of that identity? How does any plausible theory about problem solving define an identifiable sphere of knowledge separate and distinct from the knowledge of other social actors? After all, plumbers solve problems, physical therapists solve problems, landscape architects solve problems and what to serve for dinner is the classic problem that gets solved in every household, at least most nights. Making dinner out of what is left over in the refrigerator is a high level skill, but not likely a high paying one. If one does not need a high-powered professional to solve problems, why pay lawyers large amounts of money? And the most plausible answer to that question—“You pay me a large amount of money to solve your problem because the law says I have a monopoly here”—lurches perilously close to river piracy, an attitude not likely to garner much social support for the continuance of professional privilege.

However silly concerns like these about constituting and justifying a professional identity may seem, and they do seem silly—fully grown adults worrying about turf like movie gangsters and about embarrassment like a newly toilet-trained child—they are absolutely crucial to the professional project that is an organization like the American Bar Association. Thus one can understand the attraction for the Task Force of its neat division of law into theory and practice. Let me say it again; it is the doctrine taught in the law schools that identifies a distinct sphere of knowledge for the legal professional, the separateness of which is supported with the notion that there are distinctly legal skills that lawyers need to know. So, burying the skill of problem solving in an inappropriate place may be intellectually incoherent, but at least it is sensible. It solves a problem, as it were.

The conclusion that it is important, damn important, that there be a distinctively legal sphere of action receives unexpected and probably unintended support from a recent

68. Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre J. Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

69. See Costonis, *supra* note 5, for a good example of the species.

article by Bryant Garth and Joanne Martin.⁷⁰ In what is a superb piece of research, they report survey data about the skills and knowledge new attorneys feel they need in practice and where these young attorneys acquire both.⁷¹ The data show the traditional separate spheres of practice, rural and small firm city practitioners being more alike than small firm and large firm city lawyers.⁷² They also show how relatively unimportant knowledge of substantive law is and how much law is a matter of writing and speaking and of instilling others with confidence in oneself and only thereafter a matter of legal reasoning or legal drafting.⁷³ Yet in evaluating the data, Garth and Martin constantly focus on the distinctively legal: “the practical, but not particularly legal, skills of oral and written communication,”⁷⁴ “the teaching of negotiation—or better stated, legal negotiation.”⁷⁵ They assert that “[a]bility in legal reasoning remains the centerpiece of legal education,” an obvious point, but, despite their evidence to the contrary, they find it necessary to conclude their assertion with “and even legal practice.”⁷⁶ And finally they conclude that “the crucial importance of legal reasoning every step of the way is the key to defining the legal profession,”⁷⁷ a proposition nowhere supported by their data. They even note the importance of “the knowledge produced by academics within the domain of law”⁷⁸ and observe “ambitious” law professors want to do “legal scholarship, not merely teach practical skills.”⁷⁹ And these are good social scientists, not unreflective bar types.⁸⁰

70. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

71. *Id.*

72. *Id.* at 476-77.

73. *Id.* at 473-75.

74. *Id.* at 502.

75. *Id.* at 505.

76. *Id.* at 503.

77. *Id.* at 509.

78. *Id.* at 507.

79. *Id.* at 504.

80. One of the authors replies, “in the spirit of playfulness of the article”:

I am surprised that you think what we wrote was unintentional. We carefully thought out each of those statements, which are not at all meant to celebrate some “distinctively legal sphere.” The point we made, which your paper seems to agree with one hundred percent, is that the activities of the legal profession and of course, although you do not say it, the legal academy, depend on their ability to make problem solving, negotiation, writing, reasoning, talking, etc., part of their “expertise,” which is of course socially constructed out of the institutions that currently comprise the legal profession. What is striking about the success of negotiation in law schools is that it could not succeed in law schools—as a matter of the sociology of the legal profession—until academics who (knowing they must write “legal theory”) succeeded in “making it theoretical and legal.” If I dare say so, your analysis of problem solving as “using rules and many other things” fits perfectly. Lawyers and law professors seem even in their light criticism to assume that problem solvers must “use rules” even if to know when not to use them, thereby contributing to the view that problem solvers ought to be “expert in legal rules” or at least ought to legitimize the rules produced by lawyers by “taking them into account.”

Statement by Bryant Garth to John Henry Schlegel (Sept. 8, 1994) (on file with author).

So why did I bring this all to you at this time of celebration? My reason is simple, if not particularly appropriate for a guest. Simply surviving, getting older one year at a time, like every other law school, is not an obvious cause for celebration in these less than satisfying times. The MacCrate Report extends to you a seemingly enticing prospect—better practicing lawyers in a more value-sensitive practice. Will you accept the offer? I hope that my pointillistic foray into the history of American legal education will have convinced you that, while no means snake oil, the offer is best described by the sign over my daughter's desk—"SSDD, Same Shit, Different Day." The MacCrate Report is, as we used to say, not part of the solution, but part of the problem, a problem older than this law school.

At the same time rejecting the offer and traveling down another road, a road like the one I have sketched out, away from understanding law practice as rule application and toward law practice as problem solving using rules and many other things, should be done with caution. Should the idea have even momentary appeal, remember that I have outlined for you a reverse Faustian bargain. You get to keep, if not your soul, at least a coherent notion of what it is to be a lawyer, law professor or law student in exchange for your claim to social deference and the potential of earning a whole lotta cash! Are you ready to give up your professional identity and, as it were, run naked through the streets? If nakedness is at all attractive, remember what a good buddy of mine said to me a while ago: "Before you run naked through the streets, Schlegel, check the statutes to be sure they haven't criminalized unnecessary ugliness." To return to my original metaphor, do you have the courage to clear cut all those old oaks so that after planting seedlings and patiently tending them for a generation or so the students and faculty, like spotted owls, may thrive?

While you think about nakedness and chain saws—think of it as a video at your local rental outlet on the shelf next to my absolutely favorite title, "Buck Naked Country Line Dancing"—I should mention that I will think no less of you if you choose some watered down version of MacCrate's prescriptions. I don't own a chain saw dealership in Indianapolis and I ain't about to buy one.

