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“The Lost Lawyer” Regained: The Abiding Values of the Legal Profession*

Robert MacCrate**

I. INTRODUCTION

Taken by itself, *The Lost Lawyer* could be a great discouragement to any student contemplating a career in the law: a lost profession bereft of ideals. In all fairness, students contemplating careers in the law must have something more than what Anthony Kronman provides. They need a broader and more inclusive picture of today’s profession and its abiding values.

While Kronman elegantly articulates central ideals of the legal profession, he links their survival solely to his Jeffersonian model of the lawyer-statesman without exploring how those ideals came to be associated with the legal profession in the first place, and how they have been nurtured to inspire successive generations of lawyers. He effectively catalogs some of the challenges in recent years to the profession’s ideals in law schools, in large law firms, and in the courts, but neglects the significant responses to those challenges by individuals and institutions that help to perpetuate those ideals. In short, Kronman’s discouraging appraisals of the legal profession’s future are flawed both by the selective segments of the profession that he views and by his failure to explore how the sense of a single profession developed and how a common body of values came to be associated not with particular segments, but with an entire profession.

* Originally published in 100 DICK. L. REV. 587 (1996). © 1996 Robert MacCrate

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Paul Carrington and Robert Stevens remind us that the professional ideals so well articulated by Kronman have reached a venerable age and are the product of generations of lawyers and scholars identifying the elements of the public calling of law to include those qualities that he identifies: practical wisdom, prudence, character traits of detachment and disinterestedness, forgetfulness about one's self, and sympathy for others, coupled with excellence in intellectual skills to deliberate about ends. Kronman rightly points out that law today is a combination of normative reasoning and the qualities he denotes as "practical wisdom," but he pays little attention to how this interconnection developed in American legal thought and action and the forces at work in the profession to preserve the linkage today.

II. THE EARLY ABSENCE OF ANY SENSE OF ONE PROFESSION

The evolution of the American legal profession is a remarkable story of self-creation. When the American colonies were settled, each was an individual entity. There was no single shared legal system and no single model of legal practitioner. Various colonies had laws like the Virginia statute of 1658, which provided that no lawyer should "profession in any courte of judicature within this colony, or give councill in any cause, or controvercie whatsoever, for any kind of reward or profit." Massachusetts and New York had similar statutes.

By the time of the Revolution, however, the lawyer in America had come in many places to occupy a position of esteem in the particular community. Lawyers had been instrumental in forming the colonial governments. They helped frame the issues over which the War of Independence was fought. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers, as were thirty-one of the fifty-five members of the Constitutional Convention.

The Federal Constitution gave explicit expression to the radical idea, already developing in the constitutions of the individual states, of a rule of law: law originating from the people, based on their consent, expressed through their chosen representatives and articulated in a written document. As expressed by John Adams, it was to be a government of laws and not of men.

In such a scheme of government, there was obviously an important role to be played by those learned in the law. But no one in 1788 was sure what an American lawyer should be, nor was there any one idea as to what a lawyer's education and training should be, how one became a lawyer, what regulation there should be of law-

yers, and just what role lawyers would play in the new Nation. The lawyers in America at the time of the ratification of the Constitution lacked any common educational experience. Any organization of lawyers was local, to the extent it existed; their position and status varied widely from state to state.

Throughout the thirteen colonies the concept of “legal education” as something distinct from the practicing profession simply did not exist. A few universities had early chairs in law, such as the one at William and Mary first held by George Wythe, but the training of lawyers took place almost exclusively in law offices. Whatever the neophyte’s training, or even if there had been no preliminary training, the decision to admit the applicant to the bar commonly rested with the lowest state court, which would apply standards for admission that varied not only from state to state but even within the same state. Bar examinations in some states were conducted by a court, in others by panels of judges, and in some by county bar associations. Some fortunate applicants were excused completely from examination.

It is difficult to imagine any common, uniform message about the legal profession being transmitted to new lawyers when each new lawyer is a product of their own educational background, law office training, attitudes of individual mentors toward their apprentices, regulation, and bar admissions. Thus, there was clearly no common body of professional values for the splintered American legal profession of the 1780s and 90s.

III. CREATING AN IDENTITY FOR THE PROFESSION

Nevertheless, a latent sense of the profession was present in various local legal communities. The study and acquisition of a special body of knowledge has frequently been accompanied by an attorney’s desire to be recognized as possessing special knowledge and skills to serve the public at large. This urge to professionalize calls for a close solidarity among members with an ethos of their own. This condition among those learned in the law has been present in varying degrees for more than 2000 years.

In the early years of the Republic and in some localities, standards for the profession were maintained, sometimes by legislative fiat. Responsibilities were acknowledged by individual lawyers and values were transmitted piecemeal to the new generation of lawyers. However, the historic urge to professionalize continued to run strong among individual lawyers in the young Republic.

On the other hand, the notion of a professional is inherently elitist. In America, there has been an inevitable and continuing tension between the elitism of the professional idea and the egalitarian populism that became a dominant quality of American society. Beginning with the presidency of Thomas Jefferson in 1801 and reaching its height in the Jacksonian period, any form of privileged activity from which other members of society were barred was viewed with suspicion and treated with hostility. For a time it appeared that any concept of a legal profession in America would disappear as Jacksonian legislatures sought to remove all barriers to the practice of law.

Given the tension between the democratic ideal of universal competence and the idea of restricted admission based on educational and examination requirements, democratic admission to practice might still have prevailed had not those in the law responded to create an identity for an American legal profession during the first half of the nineteenth century. This identity affirmed that the practice of law was more than a procedural craft; rather, it was a learned calling that embraced a body of professional values reflecting the essential role that the law and lawyers played in American life.

A. Augmenting the Training of Lawyers

One response was to augment the apprenticeship system by which the profession was trained. That system could neither fill the growing demand for lawyers in an expanding America nor satisfy the desire of an increasing number of Americans to learn the law. There were well-established lawyers with reputations as teachers who might have had as many as ten students working in their offices at one time and paying for the privilege of clerking.

The natural outgrowth of such overcrowded law offices and the dearth of opportunity for aspiring lawyers was the early proprietary school, of which Judge Tapping Reeve's Litchfield Academy in Connecticut was the prototype. Such schools represented the beginning of the transition from law office instruction to the structured legal education of the institutionalized law school that was to emerge in the second half of the century.

Tapping Reeve first opened his home in Litchfield to law students in 1774. His brother-in-law, Aaron Burr, was his first student. His classes became so popular that in 1784 he built nearby a one-room building to serve as a schoolroom and a law library for his books. Litchfield came to provide a complete technical legal educa-

tion for law students. It essentially operated as the Nation's first law school from 1784 to 1833.

Litchfield Academy had a great influence and a wide impact both on public affairs and in the early identity of the legal profession. Its alumni included the towering figure of John C. Calhoun of South Carolina, Andrew Jackson's Vice President, and the distinguished lawyer-educator, Horace Mann. Other notable alumni included three Justices of the United States Supreme Court, six cabinet officers, fourteen Governors, sixteen Chief Justices of State courts, twenty-eight United States Senators, and 101 members of the United States House of Representatives. The national character of Litchfield and its progeny had a significant effect on unifying the law, expanding the availability of training in the law, and promoting the idea of an American legal profession.

B. Articulating Professional Standards and Values

Another significant response to the Jacksonian attempt to democratize the bar came from individual lawyers who sought to articulate standards for the profession. A central value of these standards as then articulated was "objectivity," based upon the lawyer's personal detachment from the client and the client's problems. The "independence" of lawyers was to be furthered by their avoiding conflicting public and private obligations and personal self-interest that might detract from the objectivity of counsel. The various ethical standards articulated in these early models were to be assumed voluntarily by lawyers and were recognized as going beyond those required of the ordinary citizen by law. In addition, the standards visualized that the lawyer as an individual professional would assume a responsibility for all others in the profession upon whom the standards were equally binding.

In 1836, during the age of Jackson, David Hoffman's *Course of Legal Study* was published. This work was a bibliographical outline of readings arranged into thirteen titles that began with "Moral and Political Philosophy" and, following the final title, concluded with "Fifty Resolutions in Regard to Professional Deportment." The Fifty Resolutions often are identified as the seminal work for American codes of ethics and professional responsibility.

In the "Proem.," or introduction to his *Course of Legal Study*, Hoffman invoked Edmund Burke's view of jurisprudence: that it is the "pride of the human intellect; the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns." Hoffman went on to declare:

To be great in the law. . . it is essential that we should be great in every virtue; skilled in many, and somewhat improved in most of the departments of knowledge, for “it applies the greatest powers of the understanding to the greatest number of facts” and embraces nearly the entire extent of human action and concerns.¹

Paul Carrington tells us that contemporaneous with David Hoffman’s writing on professional ideals and deportment, a remarkable Prussian immigrant named Francis Lieber came to the United States. Despite the efforts of a few well-placed friends to find Lieber a teaching position in New England, he was shunned by the northeastern intellectual establishment. Thus, Lieber went in 1835 to teach at what was then the College of South Carolina and later the University of South Carolina. For twenty-one years Lieber lectured and wrote in South Carolina. He saw himself as educating the “lawyer-statesman,” speaking about the values of the law, the justice system, and the role of the lawyer. Based on his lectures and writings on constitutional law and political economy, Lieber published a volume, *On Civil Liberty and Self-Government*. This work went through four editions and came to be used in colleges throughout the United States. Lieber also published a major work on the ethical responsibilities of judges and lawyers.

At the center of Lieber’s law teaching was the concept of the lawyer as a “public citizen.” He sought to train his law students in “civic virtue,” which, in the classical sense, included persons who would fill public office and be accountable to those governed and limited by law. They were to value “disinterestedness”—the antithesis of self-interest—and would help create public trust in the institutions of our democracy. He was an advocate of “over-arching common values” that prized “independence of judgment”—the antithesis of bias and favoritism—and the acceptance of personal “responsibility for results.”

Lieber was a central figure in a line of eminent American law teachers who recognized the public mission of the law and sought to nurture that public dimension in their students. Carrington writes that by the time of Lieber’s death in 1872, he was the most renowned law teacher in America. Lieber also became the subject of more biographies than any American law teacher except for Jefferson’s mentor, George Wythe of William and Mary.

Meanwhile, in the 1850s, Judge George Sharswood, from his chair of law at the University of Pennsylvania, had given a series of

1. DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 26-27 (Joseph Neal ed., 2d ed. 1836).

highly influential lectures on *The Aims and Duties of the Profession of the Law*. The lectures were published in 1854 and subsequently had wide circulation around the United States among members of an increasingly self-conscious profession.

It was from Judge Sharswood's lectures that Thomas Goode Jones of Alabama drew that state's pioneering code of professional ethics. Jones was literally a "lawyer-statesman," serving successively as Speaker of the House and Governor of Alabama. While serving as a United States District Judge, he set forth in 1887 what he called a Code of Duties for Attorneys: duties to courts and judicial officers, to each other, to clients, and to the public, concluding with the duty to be a friend to the defenseless and the oppressed. It took another twenty years for the recently organized American Bar Association to develop the first national code of conduct for lawyers in 1908 as set forth in the thirty-two *Canons of Professional Ethics*.

Shortly before Judge Jones set forth his Alabama Code of Duties, including "the duty to be a friend to the defenseless and the oppressed," Arthur Van Briesen of New York City in 1880 assumed the leadership of the first legal aid society in America, a group formed—significantly in light of current attention to immigration—in response to the need to furnish the protection of the law to immigrants. He soon expanded the group's activity to assist all those unable to pay for legal services. Van Briesen forcefully articulated the bar's public service responsibilities and what became a basic tenet regarding legal assistance for those unable to pay: that such assistance is not charity, but justice; not a gift, but an entitlement under our rule of law. Throughout the decades that followed, legal aid societies were organized around the country and the voice of Reginald Heber Smith of Boston, in his 1919 book *Justice and the Poor*, was heard challenging the bar to take the lead in representing indigents and making the idea of justice a reality for all.

The professional standards and values articulated by individual lawyers from David Hoffman to Reginald Heber Smith have continued to be espoused by successive generations of lawyers right down to the present day. The ABA's *Canons of Professional Ethics*, first adopted in 1908, received continuing attention from the bar and were successively revised and supplemented in 1928, 1933, and 1937. It was a practitioner from Philadelphia, Henry S. Drinker, who in 1953, wrote and published the definitive commentary on the *Canons* in his book *Legal Ethics*. The *Canons* were then replaced in 1969 by the ABA's *Code of Professional Responsibility*. Nevertheless, the endless articulation by word and by action of professional

standards and values has helped to create a durable identity for the profession and affirms the abiding nature of its central values.

C. Organizing the Bar

During the first half of the nineteenth century, any organization of the bar into formal associations seems to have provided only a minimal response to the Jacksonian deprofessionalizing influence. Some associations, such as the Law Library Company of the City of Philadelphia (organized in 1802 and merged with the Associated Members of the Bar of Philadelphia in 1827) and the similar New York Law Institute (organized in 1828) were formed to bring the practical tools of the trade to local lawyers. But for the most part bar organizations, to the extent they existed, generally included all members of the particular bar and seem to have devoted themselves primarily to socializing among themselves and, as one observer suggested, to picnics, banquets, and memorializing the dead. In a few instances, with the blessing of the local court, bar organizations interviewed candidates for admission and recommended those to be added to their select circle.

Court rules and legislation during this period, which supported the professional ideal, were not the product of bar association agitation but the work of individually concerned members of the bench and bar, intent on preserving a body of professional values in the face of Jacksonian democracy. Some courts were particularly effective in doing this because they retained the power to pass upon individual applications for admission and the general qualifications of applicants, regardless of any elimination of educational and training requirements by the populist fervor. Nevertheless, throughout this period of general hostility toward the professions, the law and lawyers became even more prominent in American life. It is indeed ironic that many believe that the “Golden Age” of American law took place during the Jacksonian era—a time when great lawyers brilliantly advocated their causes and the basic form of our jurisprudence was conceived.

It seems clear, however, that the composite idea of a single American legal profession extending to all the states took form only after the Civil War. Its origin coincided with both the beginning of the modern organization of the bar and the emergence of the modern law school. It was a time when persons of goodwill sought in many ways to bring the Nation back together. It was also a time when governmental corruption was rife, the economy was dislocated and seriously troubled, and the country was just beginning to feel the full impact of industrialization. In addition, it was during

this period that the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were ratified (successively in 1865, 1868, and 1870) with profound implications both for the Nation and for individual rights. It was a time when the law and lawyers were challenged with an array of problems of national dimension.

But there was yet no common notion across the increasingly diverse and expanding country of what a lawyer was or how one became a lawyer. Educational standards and training for lawyers remained disparate. High standards were the exception not the rule. Local mores and culture still prevailed in the bar.

Against such a backdrop, lawyers began to organize first local and then state bar associations, in ever-widening concentric circles of lawyer organization during the 1870s. The Association of the Bar of the City of New York, formed in 1870, is generally regarded as the prototypical modern bar association. In addition to being formed in response to the dual impulse of fighting local political corruption and raising standards within the profession, it was narrowly selective in its membership, departing from the earlier idea of trying to include the entire bar in any association. Soon other city bar associations began to spring up—Cincinnati in 1872, Cleveland in 1873, St. Louis and Chicago in 1874, Memphis and Nashville in 1875, Boston in 1876. More than a dozen state bar associations were also organized during the 1870s and 80s.

In August 1878, some seventy-five lawyers from twenty-one states and the District of Columbia, came together in the upstate New York resort of Saratoga in response to a resolution adopted by the American Social Science Association at the instance of Simeon E. Baldwin, a Connecticut lawyer and Yale law teacher. The resolution commended the future of the legal profession to the emerging law schools of the country. In keeping with that admonition of the Social Science Association, the lawyers who gathered in Saratoga created the American Bar Association. This name was to embody an ideal of national unity born in part of an impulse to heal the scars of a recently divided nation and in part by the aspiration to an ideal which is comprehended in the word “professional.”

IV. TRANSFERRING TRAINING FROM LAW OFFICE TO LAW SCHOOL

At the Saratoga meeting, law teachers and others with academic credentials played an important role. The first action of the infant ABA was to establish a Committee on Legal Education and Admissions to the Bar and charge it with formulating a plan for

assimilating throughout the country the requirements for bar admission. The Association promptly became an ally of the law schools in their effort to move into the mainstream of American university education and out of their subordinate role.

Prior to the 1870s, the fledgling law schools and law departments in colleges (and later universities) had followed the Litchfield model of legal instruction guided by an individual judge who lectured on law and jurisprudence. Supreme Court Justice James Wilson, a Washington appointee to the Court, lectured at the College of Pennsylvania from 1790 until 1792, when land speculations led to his financial ruin and departure for North Carolina. In 1825, Supreme Court Justice Joseph Story began lecturing at Harvard, and in 1829 he accepted appointment as Dane Professor of Law, a position he held until his death in 1845.

Local judges following Judge Tapping Reeve's example started law schools all along the east coast. In 1834 in Carlisle, Pennsylvania, where Justice Wilson had lived, a local district court judge, John Reed, opened the Dickinson School of Law with the avowed purpose: "[T]o prepare students of law, thoroughly for the practice of their profession." Then there was Judge Sharswood at the University of Pennsylvania who played such a significant part in the early articulation of a body of values for the profession in the 1850s.

In the nineteenth century, law schools began to vie for a larger role in lawyer education and to win from state legislatures "diploma privileges" for their graduates, assuring them of admission to the bar. However, it was only the beginning and it would be almost a hundred years before there would be a virtually complete substitution of law school study for the traditional requirement of law office clerkships.

A. Developing a Common Educational Experience for Lawyers

When the American Social Science Association in 1869 commended the future of the legal profession to the emerging law schools of the country, there was little that linked one law school to another nor was there any dominant method of instruction. However, it was a time when the university in America was beginning to flourish; the intellectual community was infatuated with the "new sciences" that were driving industrial development, and technical training was becoming the badge of contemporary achievement. It was in such circumstances that Christopher Columbus Langdell left the practice of law in New York City to become dean of the Harvard Law School, where he introduced the "case method" and began the promotion of legal education as the study of a "science."

The case method provided the laboratory in which legal doctrines and principles could be explored and developed out of the opinions of appellate courts.

While some schools continued the earlier methods of instruction, Langdell reorganized legal education into an academic discipline generally acceptable to the university community. This reorganization assured law schools a place in the modern university at the same time that it presented the profession with an educational program for lawyers that could raise both the standing and the standards of the bar.

In 1881, the ABA initiated what became a century-long campaign to make attendance at law school for three years the norm and to have all states give credit toward required-apprenticeship for the time spent in law school. Bar association leaders advanced the notion that a common type of academic law school was needed to control entry into the bar, and a natural alliance developed between the newly organized bar and the burgeoning law schools.

Toward the end of the century, the ABA called for the establishment of an organization of “reputable” law schools, and in 1900 the Association of American Law Schools (A.A.L.S.) was founded with thirty-two charter-member schools. Membership was open to schools that met certain minimum standards. However, the leaders of A.A.L.S. soon realized that the schools could do little by themselves to raise requirements for admission to the bar and urged law faculties to work actively with the ABA to raise standards.

It was during these years, in the early part of this century, that the Carnegie Foundation commissioned a series of educational surveys, one of which was the Flexner work on medical education. The plan for the Study of Legal Education, initiated in 1913, first produced a study of the method of legal education by a distinguished Austrian jurist, Dr. Josef Redlich, entitled *The Common Law and the Case Method in American University Law Schools*. Redlich applauded the case method of instruction as superbly well-suited to the teaching of the “common law” that it sought to teach.

This was followed by the report of Alfred Z. Reed, in which he went beneath his charge to examine the law schools of the country to look for their purpose. Reed entitled his 1921 report *Training for the Public Profession of Law* and stated his conclusions as follows:

Whatever incidental purposes are cherished by particular law schools, the main end of legal education is to qualify students to engage in the professional practice of the law. This is a public function, in a sense that the practice of other professions, such as medicine, is not. Practicing lawyers do not merely render to the

community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political. . . [This] springs even more fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and to advise them. To this end lawyers were instituted, as a body of public servants, essential for the maintenance of private rights.²

Consonant with Reed's conclusion as to the main end of legal education in America, a special ABA committee on legal education, chaired by lawyer-statesman Elihu Root, reported in the same year that "only in law school could an adequate legal education be obtained," that two years of college should be required before admission to law school, and that the ABA should invest a council on legal education with power to accredit law schools. The Root report was approved by the ABA at its 1921 annual meeting and shortly thereafter the Association's accreditation process for law schools was instituted.

By the early 1930s, a common educational experience was assured for most American lawyers. Legal education had been wrested from the local control of the practicing profession and had been lodged in the law schools, subject in a great majority of states to their meeting accreditation standards that were established by the national organization of the profession. In the beginning, when state-wide admissions standards were first prescribed in the late nineteenth century by the newly-established boards of law examiners, it had been common to require at least one year of law school, preceded by two years of legal work experience. However, the growing sentiment among legal educators, which was supported by the organized bar, ultimately led to the general rule that the entire three years be spent in law school, providing a common educational experience for the vast majority of American lawyers.

B. Ferment in the Law Schools and in the Bar

The common educational experience of three years in law school was provided by faculties frequently engaged in debate as to whether law should be taught as a science. Dominant law schools directed their attention increasingly away from law practice and the practical applications of law to expounding legal theory, leaving the training in essential skills and values of the profession to others.

2. ALFRED Z. REED, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

The reaction within the academy in the 1930s to the scientific treatment of law came from a group referred to today as the “realists,” who perceived law to be an instrumentality or a means of getting things done. Jerome Frank argued for “lawyer schools” and Karl Llewellyn charged that not one percent of law faculties had any idea of what they were “really trying to educate for.” The future direction of the legal academy was unclear as enrollments shrank and faculty departed for wartime service.

Within the organized bar, a younger generation of lawyers in the mid-1930s began questioning the customarily narrow agenda of bar associations limited for the most part to maintaining high standards for the bar and improving the administration of justice. Some bar associations excluded young lawyers from membership until they had been admitted to practice for a period of years and then paid an initiation fee for the privilege of joining the “club.” Within the ABA, a Junior Bar Conference was founded that began to inject fresh ideas into the Association with a focus on engaging lawyers in public service programs and the emerging issues of individual rights, access to justice, and the exclusionary nature of the profession. The future direction of the organized bar, just as that of the legal academy, was being debated as the ranks of legal practitioners were thinned by the national mobilization for World War II. One thing was clear: following the War the legal profession would be significantly changed.

Nonetheless, by the outbreak of World War II, the American legal profession had clearly created for itself an identity in a special body of learning and lawyering skills that, together with a core body of values that generations of lawyers had come to acknowledge, set members of the profession apart and helped justify its claim to an exclusive right to engage in the profession’s activities.

V. A CHANGING PROFESSION AFTER WORLD WAR II

A. *Explosive Growth in Numbers and in the Law*

The growth in the profession since World War II has been phenomenal. In 1947-1948 there were 169,000 lawyers and a ratio of population to lawyers of 790 to 1. By 1990-1991 the number of lawyers had grown more than four-fold to 777,000 and the ratio had fallen to 320 to 1. However, the ratio of lawyers to population varied considerably from state to state, with the ratio ranging from a low of 21 to 1 in the District of Columbia to 658 to 1 in North Carolina.

A striking feature of the changes since World War II has been that the great growth in the number of lawyers was matched until the last several years by the growth in demand for lawyers' services, particularly from the business community. For most of the last forty-five years there were steadily increasing numbers of clients willing and able to pay for lawyers' services. New areas of law and regulation, largely designed by lawyers, created whole new fields for legal services, such as the environment, occupational health and safety, nuclear energy, discrimination and individual rights, health and mental health care, biotechnology, and the development and use of computers. At the same time, economic activity vastly expanded, new business enterprises multiplied, and the number of transactions in every segment of the economy proliferated. Individuals who had never before sought legal assistance began seeking help from lawyers, and groups of people began collectively to seek redress in the courts. During this time, courts declared that persons charged with serious crimes had the right to appointed counsel. The practice of law grew from a service activity estimated at \$4.2 billion per year in 1965 to an estimated \$91 billion in 1990.

B. Opening the Profession to Women and Minorities

Perhaps the most significant change in the profession during the 1970s and 1980s was the growth in the number of women choosing the law as a career. The number of women matriculating in ABA-approved law schools rose from four percent in the mid-60s to more than forty percent in the 1990s.

During the same period, a gradual and belated opening of the profession to minority lawyers began. The formal exclusion of black lawyers from membership in the American Bar Association remained until 1943, and it was not until 1950 that the first African-American lawyer was knowingly admitted to the Association. It was not until 1964 that the A.A.L.S. could state for the first time that no member school reported denying admission to any applicant on the grounds of race or color. The law schools and the organized bar were slow to recognize their essential role and responsibility for promoting equal justice for racial minorities. In recent decades, however, barriers have been lowered and exclusionary policies have been renounced. But racial minorities continue to be seriously underrepresented in the legal profession. The goal of equal opportunity within the profession is still a long way from realization.

C. Expanding the Concept of Lawyering

The greatest challenge to the unitary concept of what it means to be a lawyer has come from the proliferation of practice settings and the highly differentiated work in which today's lawyers are engaged. Historically, the lawyer in America was an independent professional who was neither employed by another nor dependent on others to assist in providing legal services. The lawyer was also a generalist, personally ready to render whatever legal service a private client might require. The vast majority of lawyers were sole practitioners, either as a full-time or a part-time occupation. Many supplemented their income and filled out their time in other activities such as real estate, banking, or political office. But the employment of lawyers by public agencies and private corporations and other organizations was virtually non-existent until the late nineteenth century.

Nor were law firms a usual practice setting. In urban centers some lawyers shared office space or entered into loose partnership arrangements, but this was not common. A study found that as late as 1872, only fourteen law firms in the entire country had as many as four lawyers and only one had as many as six. The gradual emergence of the law firm as a common mode of private practice began only toward the end of the nineteenth century to provide the legal services that were required by those leading the great expansion of industry, commerce, and finance.

The "large-law firms," upon which Anthony Kronman focuses his attention, are a phenomenon of the post-World War II years. The Commerce Department estimated in 1947 that about seventy-four percent of those in private practice were either in solo practice or were lawyers in firms of less than nine lawyers. The major growth in the size of law firms did not occur until the 1970s.

After 1970 there was, until around 1990, a steady movement of law firms of all sizes from smaller practice units into larger ones. Private practice became a spectrum of different practice units, differentiated not only by size, but by clients, by the kind of legal work performed, by the amount of specialization, by the extent of employment of salaried associates and other support staff, and by the degree of bureaucratization of the practice.

To a significant extent, firm size and practice setting have had a direct relationship to the kind of clients served, the type of law practiced, and the financial rewards of practice. Community-oriented solo and small firm practitioners of the traditional model work predominately for individuals. Lawyers in larger firms in ur-

ban centers work predominately for business clients. The financial rewards of legal work for individuals (except for personal injury claims) have in general been less than the rewards for representing business clients. Various studies of law practice show a clear relationship between the size of a firm and the source of its income: as firm size increases, the percentage of fees from business clients rises, and the percentage of fees from individuals drops. The larger the firm, the greater the concentration of work for business clients and the larger the average income of a firm's lawyers.

No sharp line can demark "small" from "large" among law firms; moreover, what is "large" has changed with place and time. During the 1980s, firms of fifty-one lawyers or more increased from five percent to 10.5 percent of the share of the profession in private practice, but the indications are that the percentage is declining during the 1990s.

How are the ninety percent of the lawyers engaged who are not engaged in large-firm practice? In addition to the one-third in solo practice, something over a quarter were with firms of two to fifty lawyers in 1988 and another ten percent were employed in private industry and associations as legal work was brought "in-house." A similar percentage were employed in federal, state, and local governments and the courts. Despite the increased number of lawyers serving as legal aid attorneys and public defenders during the past twenty-five years, only about one percent of the profession is so engaged today.

At the same time, new forms of organizations have been developed to provide legal services to individuals of modest means and new methods have been developed for financing such services. Increasing numbers of sole and small-firm practitioners participate in these new delivery systems of prepaid and group legal service plans that have been estimated to provide potential access to legal services for as many as seventy million middle-income Americans.

D. Preserving Professional Values

In a sense, the realist movement in legal education reached its culmination in the late 1960s when William Pincus and the Ford Foundation, in cooperation with the organized bar and the A.A.L.S., instituted the so-called C.L.E.P.R. program—the Council on Legal Education for Professional Responsibility—and spurred the attendant development of clinical legal education in the law schools.

Reginald Heber Smith challenged the organized bar in 1919 to make the idea of justice a reality for all by taking the lead in the

representation of indigents. The organized bar's cooperation in the C.L.E.P.R. program was a part of its quickening interest during the 1950s and 1960s in responding in a meaningful way to Smith's challenge. Legal aid societies and public defender's offices initiated by individual lawyers in the 1880s and 90s had grown slowly but steadily until the initiatives in the 1950s of the organized bar won funding to expand their work, first from private foundations, and a decade later from the Federal Office of Legal Services within the Office of Economic Opportunity.

The 1960s became a seminal period for the legal profession with respect to legal services for the poor. With the countrywide support of the organized bar during the years 1965 to 1973, the Federal Legal Services Program created a presence of lawyers in poor, urban neighborhoods and in rural areas for migrant farm workers, and began the representation of organized groups of the poor. Apart from services to the poor, the C.L.E.P.R. program brought the concept of legal education in professional responsibility forcefully to the law schools.

By the mid-1960s the need to update the 1908 *Canons of Ethics* was apparent, and the ABA undertook to replace the *Canons*, with the *Code of Professional Responsibility*, that separately set out Disciplinary Rules and Ethical Considerations. In 1969, reflecting the heightened sense at that time of ensuring equal access to justice, the ABA adopted the *Code*, which begins with Ethical Consideration 1-1: "[A] basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." The separate articulation of this and the other Ethical Considerations served to highlight the aspirational dimension of various professional values that lie beyond the disciplinary regulation of the profession.

Thereafter, with the organized bar nationwide acting as the leading advocate, the Legal Services Corporation (L.S.C.) was established in 1975. Throughout the 1980s the bar fought to preserve the L.S.C. and to obtain for it a level of public funding adequate to maintain civil legal services to all parts of the country. In addition, since the early 1980s, the work of staff attorneys in legal services offices has been supplemented by the work of more than 100,000 private attorneys, recruited by the organized bar, working with the staff attorneys and accepting legal referrals on a pro bono or a reduced-fee basis.

The role of law schools in legal services to the poor has been of a special character. While law schools could never be major provid-

ers of services to low-income clients and at the same time fulfill their basic educational mission, their contribution has been and continues to be highly significant. Developed principally in the last twenty-five years, the law schools' clinical programs not only provide training and experience with poverty law issues, but also include support for valuable research centers which contribute to a continuing improvement in the delivery of legal services to the poor. A significant element in the legal profession's greatly increased commitment to providing civil legal services to the poor has been the promotion at the law school level of clinical legal education with its focus on translating the needs of society for the profession's services and skills into their educational equivalents.

As part of the ongoing process to preserve the profession's ideals and values, and in the wake of Watergate, the ABA adopted an accreditation standard requiring in law schools "instruction in the duties and responsibilities of the legal profession" that should include "the history, goals, structure, and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility."

The ABA returned in the early 1980s to the subject of instilling professional ideals and values in members of the profession. After a multiyear discussion and debate, the ABA voted in 1983 to recast the profession's standards and values in the form of *Model Rules of Professional Conduct*. While the separate articulation of ethical considerations was dropped, the *Model Rules* sought not only to articulate rules of conduct, but also to convey a sense of the overall responsibilities of a lawyer in the late twentieth century, who must fulfill a variety of roles and confront vastly changed circumstances, both within the profession and in society at large. The opening sentence of the Preamble to the *Model Rules* sets forth the aspired-to identity of the profession in these words: "A lawyer is a representative of clients, an officer of the legal system[,] and a public citizen having special responsibility for the quality of justice."

Concerned that lawyers' devotion to professional ideals and values were nonetheless flagging, the ABA convened a study group of representatives from the law schools, the bench, and the practicing bar that published a report in 1986 directed at reinvigorating and preserving the profession's ideals. The study group, chaired by Justin Stanley, a former president of the ABA and a senior partner of a large, Chicago-based firm, entitled its report ". . . *in the spirit of public service: A Blueprint for the Rekindling of Lawyer Professionalism* drawing upon Roscoe Pound's defining model for the legal profession.

Thereafter, in the early 1990s, the ABA established the Center for Professional Responsibility, staffed by some eighteen lawyers, to support the work of the various ABA committees involved in the fields of legal ethics, professionalism, professional discipline, lawyer competence, and client protection. The Center maintains a clearing-house of information on ethical rules and standards throughout the United States, evaluates lawyer and judicial disciplinary systems throughout the country, and operates an ethics research service as well as the National Discipline Data Bank, a computer information system on lawyers who have been publicly disciplined by a court.

The voluntary participation by thousands of lawyers in bar association activities dedicated to preserving professional values has never been greater than it is today, not only in the ABA but also in scores of local, state, and specialty bar associations. The magnitude of this time spent by lawyers in the work of the organized bar effectively refutes any suggestion that lawyers are too consumed in the business of law to devote time to their professional responsibilities.

E. Continuing Lawyers' Education

The veterans returning from World War II stimulated the ABA Section of Legal Education and Admissions to the Bar to provide refresher courses around the country from 1944 through 1947. The success of these courses prompted the ABA House of Delegates in 1946 to direct the Section to initiate and foster a national program of continuing education of the bar.

Seeking to enlist the legal education expertise of the American Law Institute (ALI), the ABA asked the Institute to join with the Association in establishing a national program to continue lawyers' education following law school. A joint committee eventually called the American Law Institute- American Bar Association Committee on Continuing Professional Education (soon dubbed ALI-ABA) was created in 1947 and quickly went about its mission.

In the period 1947 to 1958, ALI-ABA sought with great success to encourage state and local bar associations to create sponsoring agencies that could put on CLE courses with ALI-ABA's help through co-sponsorship and the provision of literature and speakers. By 1958, ALI-ABA had participated in approximately 500 courses which drew an attendance exceeding 50,000 lawyers.

A national conference convened by the ABA and ALI in 1958 recommended that permanent CLE organizations, modeled after existing organizations in California and Wisconsin, be formed in many states. The conference also urged that emphasis on education in professional responsibility be increased and that special attention

be given to meeting the needs of newly admitted lawyers. The recommendations of the 1958 conference quickly took root; in the next five years twenty-two additional states established continuing legal education administrations, and the state administrators formed their own professional organization (now called the Association for Continuing Education of the Bar).

ALI-ABA began to directly and independently sponsor national programs of continuing legal education and, as bar-sponsored programs proliferated, private providers began offering CLE. In the mid-1960s, ALI-ABA engaged Professor Vern Countryman of Harvard Law School to prepare professional responsibility materials for use by state CLE administrators. Also in the 1960s the various substantive law sections of the ABA became major, national providers of continuing education courses, and by 1970 the non-profit Practising Law Institute in New York City was offering 338 courses in 21 cities in 18 states.

By the early 1970s continuing education of the bar had won what was widely recognized to be an essential place in the education of the profession. A movement was commenced to require CLE for all lawyers. In 1974 Iowa and Minnesota were the first states to adopt mandatory continuing legal education programs (M.C.L.E.) for all lawyers practicing in the two states. By the end of the 1970s, they had been joined by Colorado, Idaho, North Dakota, Washington, Wisconsin, and Wyoming. In 1986 the ABA House of Delegates adopted a resolution supporting the concept of M.C.L.E. for all active lawyers and urging the various states that had not yet adopted such a program to seriously consider doing so. Today, approximately forty states have adopted M.C.L.E. programs.

In 1981, ALI-ABA began transmitting by satellite live programs produced by ALI-ABA or by the ABA. Today, the American Law Network, under ALI-ABA management, but working closely with both the ABA and PLI, operates a dedicated satellite broadcast network that delivers CLE programs of the three sponsors throughout the country to more than seventy-five downsites, primarily at bar associations and law schools.

In response to the development during the 1980s of in-house training programs, ALI-ABA established the American Institute for Law Training within the Office (A.I.L.T.O.) in 1984. Today, A.I.L.T.O. has more than 190 member law firms, corporate law departments, and government agencies sharing its resource materials, workshops, special programs, and extensive roster of consultant faculty which delivers in-house programs on a wide variety of skills and substantive subjects.

There is today a plethora of CLE sponsors and providers of all sorts—large and small; local, state, and national; nonprofit, for-profit, law school, and in-house. They offer an immense number and variety of programs; printed course materials and books; television programming; video and audio tapes; computer-assisted and interactive video instruction; at a variety of locations—in classrooms, bar associations, hotel conference and convention halls, law offices, and at network sites. Self-study, at home, in-the-office, or on-the-road is also available. Post-admission legal education is now an integral part of the common educational experience of lawyers in the United States.

F. Expanding Law School Capacity

In the years immediately after World War II, when the 112 then-existing ABA-approved law schools accommodated record numbers of students by doubling-up and offering accelerated programs for returning veterans, admissions to law schools temporarily soared. However, enrollment fell back by the mid-1950s to their pre-World War II level and remained at lower levels until the early 1960s.

By 1963-1964, however, enrollments matched the post-World War II bulge, and there began a yearly increase in the number of law school enrollments. New law schools were established to accommodate the rising tide of applicants and the number of ABA-approved schools grew from 112 in 1948, to 136 in 1965, to 176 in 1991. Total enrollment in J.D. programs rose from 56,510 in 1965-1966, to 129,580 in 1990-1991. In the past several years, the number of ABA-approved law schools has remained approximately the same, as has the number of J.D. enrollments. It appears, however, that the costs of legal education have continued to rise, with the annual expenditure increasing from \$368 million in 1978, to over a billion dollars in 1988, to \$1.699 billion in 1992.

G. Unifying an Expanded Profession

In 1878 it was a mere 75 lawyers from 21 states and the District of Columbia who gathered to organize the ABA. Two years later, only 552 of the more than 64,000 lawyers in America were members of the ABA. Fifty years later, ABA membership had risen to 18% of some 230,000 lawyers. But since the 1950s, ABA membership has risen to nearly half the lawyer population.

With some 40,000 new lawyers entering the profession each year, the lawyer population today exceeds 800,000, and while the

percentage of lawyers who are ABA members has slipped during the last several years, the ABA remains the largest professional organization in the world. At the same time, the bar is organized at state and local levels, as well as in specialty bar associations, by legal subject area, or by gender or ethnic group. These various lawyer organizations are brought together in the National Conference of Bar Presidents, the National Association of Bar Executives, the National Organization of Bar Counsel, and the National Conference of Bar Foundations, all headquartered in the ABA's Chicago headquarters, which helps to assure a constant flow of information regarding professional activities and initiatives among all segments of the organized bar.

Moreover, since the late 1930s the ABA has been governed by a progressively more representative and inclusive House of Delegates that is now comprised of approximately 537 delegates elected by Association members in each state and territory. Delegates represent every state bar association, the large, local, gender and ethnic bar associations, and other national organizations of the legal profession. Delegates are elected by the twenty-seven sections and divisions of the Association, from Antitrust Law to Young Lawyers. The U.S. Attorney General and the Director of the Administrative Office of the U.S. Courts are members of the House by virtue of their offices.

By the mid-1980s the ABA could with confidence restate its mission in progressive terms in nine goals, subsequently enlarged to eleven in 1991, that strongly attest to the changing character of the ABA and of its aspirations for the profession in these words:

The Mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

Goal I. To promote improvements in the American system of justice.

Goal II. To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

Goal III. To provide ongoing leadership in improving the law to serve the changing needs of society.

Goal IV. To increase public understanding of and respect for the law, the legal process, and the role of the legal profession.

Goal V. To achieve the highest standards of professionalism, competence and ethical conduct.

Goal VI. To serve as the national representative of the legal profession.

Goal VII. To provide benefits, programs and services which promote professional growth and enhance the quality of life of the members.

Goal VIII. To advance the rule of law in the world.

Goal IX. To promote full and equal participation in the legal profession by minorities and women.

Goal X. To preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service.

Goal XI. To preserve the independence of the legal profession and the judiciary as fundamental to a free society.

Undergirding the work of the ABA and providing reliable bases upon which to plan to meet the ABA's goals are the respected, empirical studies of the American Bar Foundation. Founded in 1949 and operated since the 1950s as an independent research institute, the Foundation, through the work of its research scholars, is currently pursuing multiple studies in each of the following diverse subject areas: dispute resolution and litigation; internationalization of legal values and legal practices; the legal profession; discrimination; and administrative and regulatory process.

While the legal profession today is larger and more diverse than ever before, by engaging in an infinite variety of activities that are dedicated to maintaining professional standards and preserving its ideals and values, the profession has become more organized and unified than at any other time in its history.

VI. KRONMAN'S PERSPECTIVE ON THE CHANGES IN THE PROFESSION

Anthony Kronman rightly asserts that vast changes have transformed the teaching and practice of law in the United States since the 1960s. But by narrowly limiting both the segments of the profession that he examines and the changes in the profession that he explores, he has landed in what he describes as a "professional cul-de-sac" from which he can offer no way out.

Kronman narrows his focus to "intellectual and institutional developments" in what he refers to as "the upper reaches" of the two branches of the profession engaged in the teaching and practice of law, the elite law schools and the large law firms. To them he unconvincingly links certain changes that he perceives in the adjudicative process in some courts. He concludes that, since the main tendency of each of these particular segments of the profession has

been to weaken the authority of the lawyer-statesman ideal, by attacking the beliefs and practices on which it rests, the ideals of the entire profession are failing.

In the elite law schools, Kronman sees in the last quarter century the ideal of the scientist-scholar, who equates judgment with calculation, gaining ascendancy. Kronman perceives that law professors in these schools view themselves as theoreticians rather than as practitioners, find the scholarly side of law more important than the teaching side, and distance themselves from the practice of law while conveying an intellectual contempt for the common-law tradition and its prudential methods. He clearly exaggerates the influence upon the profession of both academic debates in elite law schools regarding legal theory and management decisions in large law firms regarding firm operations. His view is reminiscent of Professor Felix Frankfurter's hyperbole from 1927: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."

From the elite law schools, Kronman turns to examine the changes over the last twenty-five years in large law firms, where he finds a similar decline in the authority of the lawyer-statesman ideal. He attributes this decline to the great increase in firm size; the growing number of firms with branch offices; the change in the nature of the work lawyers in large firms do, becoming more specialized; the weakening of ties binding individual members to their law firms; the attenuation of the up-or-out policy leading to a differentiated firm hierarchy; a dramatic shift within the firms in the previous balance between business and professionalism; and finally, a highly debatable proposition, a substantial lengthening of the working day for lawyers in large law firms during the last twenty-five years.

Kronman recognizes that many of the changes in the profession were trumpeted, if not provoked, by the new legal press that began publication in the late 1970s. The *National Law Journal* and *Legal Times of Washington* first appeared in 1978 and the *American Lawyer* in 1979. Their emphasis on building readership on the more colorful and combative parts of lawyering, as well as on corporate law practice, gives a frequently distorted picture of what a scattered and diverse profession of close to 800,000 lawyers actually does. At the same time, the legal media's focus on the business aspects of law practice and competition for clients undoubtedly has had a significant acculturating effect upon many of today's lawyers.

From the perspective of a practitioner who entered a large law firm right out of an elite law school in 1948 and was favored with a

prime vantage point to view the profession for more than forty-five years, it seems to me that Dean Kronman has it largely right as to things that have been going on in elite law schools and at large law firms over the last twenty-five years. But when searching for lawyer-statesmen, he does seem to overlook the fact that both the present secretary of state and his predecessor in the Bush Administration, as well as the State Department's legal adviser in each Administration, all entered public service from large law firms, and that they are but a few examples of the new generation of lawyer-statesmen stepping from private law firms into positions of public trust and great responsibility. Moreover, by limiting his observations to these two segments of the profession and overdrawn the monolithic nature of large law firms, Kronman passes over significant developments and changes in the profession as a whole and the continuing contribution of individual lawyers in large law firms as well as throughout the profession that will be central to sustaining professional ideals and values into the next century.

VII. ESCAPING FROM KRONMAN'S CUL-DE-SAC

A. *Involving the Law Schools in the Profession*

Concerned by the low level to which participation by law school faculty in the activities of the organized bar had fallen, the ABA established in 1987 a membership program that enables full-time faculty members of law schools that have joined the program to become members of the ABA as a group without paying individual membership dues. The result has been that faculty involvement in the activities of the organized bar increased substantially and has never been greater than in the last seven years. The A.A.L.S. at its 1988 annual meeting took a similarly supportive step toward awakening in law faculties an interest in how law is practiced by choosing the theme: "The Law School's Opportunity to Shape the Legal Profession: Money, Morals and Social Obligation."

A recent critique by Michael Crosbie of how university schools of architecture are failing their profession by failing to train students in the practical application of their learning, concludes with observations of the late Ernest Boyer, of the Carnegie Foundation for the Advancement of Teaching. Mr. Crosbie's observations concerning the direction that schools of architecture should take are remarkably apposite to law schools today:

According to Boyer. . . institutions of higher learning are now moving away from the model of the ivory tower, and toward what has been described as the "engaged university." The idea is

that higher learning has a mission that goes beyond research. . . There's a resurgence in the scholarship of applied knowledge, and outreach from the university to the community, relating theory to practice. Good theory is based on good practice. I feel that this trend is powerful and will persist.

The coming back together of the teaching and practicing branches of the legal profession was given substantive expression when the ABA in 1994 selected a distinguished law school dean as its executive director.

B. Strengthening Instruction in Professional Skills and Values

In November 1987 the ABA Section of Legal Education and Admissions to the Bar convened the National Conference on Professional Skills and Legal Education. At the conference, Justice Rosalie Wahl, the then chair of the section, asked rhetorically: what skills, what attitudes, what character traits, and what qualities of mind are required of lawyers in a time of great change in the legal profession to sustain and preserve the profession as a respected, client-serving, problem-solving, public calling?

The section subsequently created the Task Force on Law Schools and the Profession, which I was privileged to chair, and charged it with responding to the questions Justice Wahl had propounded. The Task Force approached its task from a direction quite different from the direction from which prior studies of legal education had begun. It started by looking not at law schools but at American lawyers—all lawyers, the total profession in all its dimensions.

The Task Force traced the explosion in the number of lawyers and in the rendering of legal services since World War II; the striking change, beginning in the late 1960s, in the gender makeup of the profession and the gradual addition of a new gender-based perspective to the law; the belated opening of the profession to minorities and the continually elusive goal of equal opportunity; the enormous growth in the volume of law and the proliferation of legal theory; the disappearance of restraints on the marketing of legal services; and the accompanying growth in specialization and differentiation in the work lawyers do in ever more diverse practice settings.

The Task Force further took note that the traditional private practice serving individuals had been significantly supplemented by new organizations and methods for providing legal services to the poor and to persons of moderate means. The new organizations and

methods included not only publicly funded civil and criminal legal assistance for the poor, but also legal clinics and prepaid and group legal services plans for persons of moderate means.

The Task Force presented its overview of today's legal profession against the background of how the idea of a single profession of law had developed in America and how, over the decades, with the active support of the bar, organized in each of the fifty states and territories, the law schools became the unifying experience for the great majority of lawyers, and the judiciary in each state and territory became the profession's gatekeeper for that jurisdiction.

In direct response to Justice Wahl's charge to determine the skills, the attitudes, the character traits, and the qualities of mind required of lawyers today, the Task Force developed a conceptual statement of the skills and the values that the Task Force thought would promote the competent and responsible practice of law, and that all lawyers should seek to acquire, wherever a lawyer might work.

The statement first analyzes the following ten generic skills that my colleagues on the Task Force and I concluded were fundamental to competent performance by any lawyer: problem-solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, counseling, negotiation, understanding of the procedures of litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas.

In providing this conceptual analysis of ten fundamental lawyering skills, the Task Force was offering a benchmark against which law faculties, law students, and bar admissions authorities might consider the inclusiveness of programs of skills instruction, the adequacy of preparation to participate in the profession, and when, by whom, and in what manner a full range of skills instruction could best be provided to aspiring lawyers. At the same time, the Task Force expressed the view that it is unrealistic to expect even the most committed law schools, without help from the bar, to produce graduates that are fully prepared to represent clients without supervision.

On the other hand, the Task Force sought to discourage the notion that competence in the law is simply a matter of attaining proficiency in specified skills. The Task Force recognized that lawyering skills alone will neither sustain a true profession, nor, without ideals, promote cohesion and pride in a profession among its members. A profession, to endure, must be supported by a common body of values to which its members aspire, such as that which the

legal profession in America created out of the writings and teaching of Hoffman, Lieber, Sharswood, and other nineteenth century savants, the work of individual lawyers, and the work of the organized bar. Thus, in the Task Force's Statement of Skills and Values, the analysis of the ten lawyering skills was linked to four central, professional values, which the Task Force found that successive generations of lawyers had come to acknowledge, as the legal profession in America developed an identity and a shared sense of what it means to be a lawyer.

Each of the four values was seen to beget a special responsibility. Together they express the traditional ideals of the legal profession:

- the value of providing competent representation: the responsibility to clients;
- the value of striving to promote justice, fairness, and morality: the public responsibility for the legal system;
- the value of maintaining and striving to improve the profession: the responsibility to one's profession; and finally,
- the value of professional self-development: the responsibility to one's self.

The Task Force concluded that the skills and values of competent and responsible lawyers are developed along a continuum that neither begins nor ends in law school. Rather, the development starts before law school, reaches its most formative and intensive stage during the law school years, and continues throughout the lawyer's professional life. Thus, the Task Force entitled its report *Legal Education and Professional Development—An Educational Continuum*.

Seeking to overcome the tendency to separate the teaching of legal theory in law school from instruction in its practical application in society, the Task Force visualized law teachers, practicing lawyers, and members of the judiciary as engaged in a common enterprise to build an educational continuum for lawyers. At the same time, the Task Force recognized that participants in this common enterprise had different capacities and different opportunities to impart to law students and to lawyers the skills and values expected of them in the practice of law.

Lord Mackay, the Lord Chancellor of England and Wales, recounting his days at Cambridge, has told of the distinguished professor of mathematics who did not believe in any application of mathematics. If something was going to be applied, he lost interest in that particular area. Few law professors in the United States ever

went so far in separating theory from application, but as Anthony Kronman points out, there has been a persistent reluctance on the part of many academic lawyers to add instruction in how to apply theory to clients' problems to their teaching of theory.

Forty years ago, Dean Erwin Griswold of the Harvard Law School, concerned with the proliferation of teaching theory, urged law schools to reverse the tendency to teach "less and less about more and more." He called for new materials and new approaches "to teach more and more about less and less," with a focus upon the human relations element in lawyering. This accords with the vision that Kronman posits of a combination of intellectual and affective power constituting the virtue of practical wisdom. I suggest that a carefully conceived program of skills and values instruction may indeed be the way to teach prospective lawyers more and more about less and less, as they learn with their lawyering skills to address new matters, how to undertake things they have not done before, and how to exercise practical wisdom to accomplish results in the client-centered world of lawyering.

VIII. THE COMMON ENTERPRISE: BUILDING AN EDUCATIONAL CONTINUUM

Since the publication of the Task Force report in 1992, the Section of Legal Education and Admissions to the Bar and individual members of the Task Force have sought to promote discussion of the report in law schools, in bar associations, and with members of the judiciary in individual states. The attention given to the report and the response of those concerned have been most gratifying.

In September 1993 the ABA Section sponsored a national, invitational conference on "Building the Educational Continuum," promoting a scholarly evaluation of the central theme of the report. The ABA's consultant on legal education solicited the deans of all ABA-approved law schools in 1993, and again in 1995, for information concerning activities in each law school and in each state concerning the Task Force report.

On the motion of several state bar associations, the ABA House of Delegates in August 1993 adopted a change, recommended by the Task Force, in the accreditation standard regarding a law school's educational program to clarify the reference to qualifying "graduates for admission to the bar" by adding: "and to prepare them to participate effectively in the legal profession." Early in 1994, the ABA House of Delegates adopted a resolution broadly endorsing recommendations of the Task Force for specific actions by state, territorial, and local bar associations, by law schools, by

licensing authorities, by sponsors of programs of transition education, and by providers of continuing education of the bar.

As a result, many law schools over the past three years have undertaken self-studies to determine which of the skills and values described in the Task Force's Statement of Skills and Values are being taught in their curricula and to develop coherent agendas of skills instruction not limited to the traditional teaching of legal analysis and reasoning, legal research, writing, and appellate advocacy. Other law schools have significantly increased the opportunities for students, while in law school, to have clinical experience with clients. New teaching methodologies with interactive, learning-by-doing methods have been introduced into the teaching of core-curriculum courses, as well as into simulated client counseling and negotiation courses. One law school developed a syllabus for a lawyering course that is built on the Task Force's overview of the profession and the Statement of Lawyering Skills and Professional Values.

Reaching out to the bar and the judiciary, the University of Washington Law School in Seattle convened a national symposium on the Task Force report, while the University of South Carolina Law School conducted a day-long colloquium regarding implementation in that state. A number of law schools have invited a representative of the Task Force to visit them for a day or two to discuss the report with faculty, students, and alumni. The A.A.L.S. and the American Association of Law Libraries have both had programs at their annual meetings focused upon elements of the Task Force report.

Bar associations in various parts of the country, in cooperation with the law schools and the judiciary in individual states, have convened conclaves to discuss how an educational continuum can best be built in a state or in a region of states. In the recent past, there have been such conclaves in North Carolina, Oklahoma, Ohio, Wisconsin, Illinois, Pennsylvania, and Louisiana where systematic appraisals have been made of the states' existing legal educational resources and areas have been identified as needing special attention. One common result of these conclaves has been to focus on both the need for increased skills and values instruction, particularly in the transition from law school to practice, and the development of bar-sponsored programs to meet that need.

In New York State Chief Judge Judith S. Kaye established the Professional Education Project, chaired by a member of the state judiciary, to determine just how the fifteen law schools in New York State, the many bar associations, and the providers of continuing

legal education should respond to the recommendations contained in the Task Force report. In June 1996, the chief judge released the report submitted by the members of the project, entitled *Legal Education and Professional Development in New York State* and containing a number of recommendations for building the educational continuum in New York State. The New Jersey State Bar Association has convened a Commission on Professionalism in the Law, under the late Chief Justice Wilentz that is addressing many of the same issues.

The deliberations going on around the country today, stimulated by the Task Force report, evince not a profession that has lost its ideals, but a profession that has gained a heightened consciousness of the body of professional values that prior generations of lawyers have associated with the legal profession and that is determined to respond to the challenge of change by building an educational continuum that will sustain the abiding values of the legal profession.

BIBLIOGRAPHY

Abel, Richard L. *AMERICAN LAWYERS*. New York: Oxford University Press, 1989.

Alexander, Robert S., Peter M. Brown, Archibald Cox, and Robert B. McKay. *The Lawyer's Professional Independence—Present Threats, Future Challenges*. Chicago: A.B.A. Torts and Insurance Practice Section, 1984.

American Bar Association Commission on Professionalism. *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*. Chicago: American Bar Association (The Stanley Report), 1986.

American Bar Association Conference Proceedings. *The MacCrate Report—Building the Educational Continuum*. Eagan: West Publishing, 1993.

American Bar Association Section of Legal Education, Task Force on Law Schools and the Profession. *Legal Education and Professional Development—An Educational Continuum*. Chicago: American Bar Association (The MacCrate Report), 1992.

American Bar Association Section of Legal Education, Professionalism Committee. *Teaching and Learning Professionalism*. Chicago: American Bar Association, 1995.

Amsterdam, Anthony G. *Clinical Legal Education—A 21st Century Perspective*. *JOURNAL OF LEGAL EDUCATION* 39 (1984): 612.

Barnhizer, David. *Of Rat Time and Terminators*. *JOURNAL OF LEGAL EDUCATION* 45 (1955): 49.

Boyd, Susan K. *The ABA's First Section—Assuring a Qualified Bar*. Chicago: Section of Legal Education and Admissions to the Bar, 1993.

Brest, Paul, and Linda Krieger. *On Teaching Professional Judgment*. *WASHINGTON LAW REVIEW* 69 (1994): 527.

Carrington, Paul D. *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*. *DUKE LAW JOURNAL* 41 (1992): 741.

The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber. *JOURNAL OF LEGAL EDUCATION* 42 (1992): 339.

Costonis, John J. *The MacCrate Report: Of Loaves, Fishes, and the Future of American Education*. *JOURNAL OF LEGAL EDUCATION* 43 (1993): 157.

Cramton, Roger C. *Delivering of Legal Services to Ordinary Americans*. *CASE WESTERN RESERVE LAW REVIEW* 44 (1994): 531.

Crosbie, Michael J. *The Schools: How They're Failing the Profession (And What We Can Do About It)*. P/A, September 1995, 47-51, 94, 96.

Curran, Barbara A., and Clara N. Carson. *Supplement to the Lawyers Statistical Report, The U.S. Legal Profession in 1988*. Chicago: American Bar Foundation, 1991.

Edwards, Harry T. *Another "Postscript" to The Growing Disjunction Between Legal Education and the Legal Profession*. WASHINGTON LAW REVIEW 69 (1994): 561.

Frankfurter, Felix, to Rosenwald, 13 May 1927. Felix Frankfurter Papers, Harvard Law School Library, in MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS. eds. Rand Jack and Dana Crowley Jack. Cambridge: Cambridge University Press, 1989: 156.

Frank, Jerome. *Why Not a Clinical-Lawyer School?* UNIVERSITY OF PENNSYLVANIA LAW REVIEW 81 (1933): 907.

Galanter, Marc, and Thomas Palay. TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM. Chicago: University of Chicago Press, 1991.

Garth, Bryant G., and Joanne Martin. *Law Schools and the Construction of Competence*, JOURNAL OF LEGAL EDUCATION 43 (1993): 469.

Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery. CLINICAL LAW REVIEW 1 (1994): 443.

Glendon, Mary Ann. A NATION UNDER LAWYERS. New York: Farrar, Strauss and Giroux, 1994.

Griswold, Erwin N. *Law Schools and Human Relations*. WASHINGTON UNIVERSITY LAW QUARTERLY (1955): 217.

Haddon, Phoebe A. *Education for a Public Calling in the 21st Century*. WASHINGTON LAW REVIEW 69 (1994): 573.

Hazard, Geoffrey C., Jr. *Reflections on Judge Weinstein's "Ethical Dilemmas in Mass Tort Litigation."* NORTHWESTERN UNIVERSITY LAW REVIEW 88 (1994): 569.

Law, Morals, and Ethics. SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 19 (1995): 447.

Hoffman, David. A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY. 2d ed. in 2 vols. Baltimore: Joseph Neal, 1836.

Kronman, Anthony T. THE LOST LAWYER. Cambridge: The Belknap Press of Harvard University Press, 1993.

The Driker Forum for Excellence in the Law, Presentation, Wayne State University Law School, September 29, 1994.

Laub, Burton R. *THE DICKINSON SCHOOL OF LAW—PROUD AND INDEPENDENT*, Sesquicentennial Edition. The Dickinson School of Law, Carlisle, 1983.

Llewellyn, Karl N. *The Bramble Bush*. Dobbs Ferry: Occana Publications, Inc., 1930.

MacCrate, Robert. Legal Education and Preserving the Professional Paradox, Presentation, McGeorge Law School, April 13, 1984.

Remarks at the American Bar Association's National Conference on Professional Skills and Legal Education. NEW MEXICO LAW REVIEW 19 (1989): 85.

The Making of the American Lawyer. SOUTH DAKOTA LAW REVIEW 34 (1989): 227.

A Fresh Look at Lawyers' Education. UNIVERSITY OF RICHMOND LAW REVIEW 27 (1993): 21.

Preserving the Marden Legacy: Professional Responsibility in the 21st Century. The Record of the Association of the Bar of the City of New York, 1993.

Preparing Lawyers to Participate Effectively in the Legal Profession. JOURNAL OF LEGAL EDUCATION 44 (1994): 89.

Symposium on the 21st Century Lawyer: Keynote Address—The 21st Century Lawyer: Is There a Gap to be Narrowed? WASHINGTON LAW REVIEW 69 (1994): 517.

Lord Mackay of Clashfern. *Shaping the Legal Education—Leadership and Reform of the English Legal System*. SAINT LOUIS UNIVERSITY LAW JOURNAL 39 (1995): 437.

McDonald, Linda L. *Teaching Ethics: The Next Generation—The Application of the MacCrate Report and the Need for Practical Training in Ethics Education*, Symposium Issue of the Professional Lawyer. Chicago: A.B.A. Center for Professional Responsibility, 1994.

Menkel-Meadow, Carrie. *Symposium on the 21st Century Lawyer: Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*. WASHINGTON LAW REVIEW 69 (1994): 593.

Morgan, Thomas D. *Symposium on the 21st Century Lawyer: Economic Reality Facing 21st Century Lawyers*. WASHINGTON LAW REVIEW 69 (1994): 625.

Nathanson, Stephen. *Developing Legal Problem-Solving Skills*. JOURNAL OF LEGAL EDUCATION 44 (1994): 215.

Powell, Burnele V. *Symposium on the 21st Century Lawyer: Somewhere Farther Down the Line: MacCrate on Multiculturalism*

and the Information Age. WASHINGTON LAW REVIEW 69 (1994): 637.

Reed, Alfred Z. *Training for the Public Profession of the Law*. For the Carnegie Foundation for the Advancement of Teaching. New York: Charles Scribner's Sons, 1921.

Schultz, Nancy L. *How Do Lawyers Really Think?* JOURNAL OF LEGAL EDUCATION 42 (1992): 57.

Seron, Carroll. *THE BUSINESS OF PRACTICING LAW*. Philadelphia: Temple University Press, 1995.

Sharswood, George. *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW*. Philadelphia: T. & J.W. Johnson, Law Booksellers, Publishers and Importers (1854).

Smith, Reginald H. *JUSTICE AND THE POOR*. New York: The Carnegie Foundation for the Advancement of Teaching, 1919; reprint, New York; Arno Press, 1971.

Stark, Jack. *Dean Costonis on the MacCrate Report*. JOURNAL OF LEGAL EDUCATION 44 (1994): 126.

Stevens, Robert B. *Law Schools and Legal Education, 1879-1979: Lectures in Honor of 100 Years of the Valparaiso Law School*. VALPARAISO UNIVERSITY LAW REVIEW 14 (1980): 179.

Review of *The Lost Lawyer: Failing Ideals of the Legal Profession*. JOURNAL OF LEGAL EDUCATION 44 (1994): 152.

LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s. Chapel Hill: The University of North Carolina Press, 1983.

Sutherland, Arthur E. *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*. Cambridge: The Belknap Press of Harvard University Press, 1967.

Symposium on the MacCrate Report: Papers from the Midwest Clinical Teachers Conference. CLINICAL LAW REVIEW 1 (1994): 349.

Wroth, L. Kinvin, and Hiller B. Zobel, eds. *LEGAL PAPERS OF JOHN ADAMS*. Cambridge: The Belknap Press of Harvard University Press, 1965.

