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MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values Symposium

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MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values

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The 1992 Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (the "Task Force"), Legal Education Professional Development – An Educational Continuum,[1] popularly known as the MacCrate Report (the "Report"), was the most ambitious effort to reform legal education in the past generation.[2] Some commentators have described the Report as "the greatest proposed paradigm shift in legal education since Langdell envisioned legal education as the pursuit of legal science through the case method in the late 19th century."[3]

Although the Report sought to promote education in both lawyering skills and values, its major influence has been in the

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1. A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report].

2. *See* Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying the Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 114-15 (2001). As Russell Engler notes, Robert MacCrate and others "placed the Report in the context of previous efforts including the Reed Report (1921), the writings of Jerome Frank in the 1930's and 1940's, and the Crampton Report (1979)." *Id.* at 115. *See* Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to be Narrowed?*, 69 WASH. L. REV. 517, 517-20 (1994). MacCrate expressly compared the work of the Task Force to the project of the "Llewellyn Curriculum Committee" of the "1940s" in seeking "to create a conceptual vision of the lawyering skills and professional values that lawyers should seek to acquire." Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1127 (1997).

3. Wallace Loh, *The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 505 (1994). Others have criticized the Report as unrealistic or wrongheaded. *See* Engler, *supra* note 2, at 117-19.

area of lawyering skills.[4] The Report has contributed little to promoting professional values.[5] This result is not surprising. The Report's treatment of values suffers from two basic flaws. First, the text makes values a low priority and then does not explain them coherently. Second, the Task Force fails to consider that the dominant values of the Bar and the Academy oppose those of the Report.

Despite these inherent flaws, the Report has succeeded somewhat in its goal of catalyzing reflection on values. While this reflection may yet yield important results, the Report's contribution could have been far greater. The Report missed the opportunity to focus the Bar and the Academy on the major changes in practice and legal education necessary to promote the very values the Report expressly endorses.

I. The MacCrate Report on Values

The Report describes a diverse profession united around core values and seeks only to identify those core values and ensure that they receive proper attention in legal education and legal practice.

A. *The Origin of the Task Force*

In 1987, at a conference "celebrat[ing] twenty years of effort and achievement since the Ford Foundation . . . set in motion the clinical education movement,"[6] Justice Rosalie Wahl of the Minnesota Supreme Court, the Chair of the ABA Section of Legal Education and Admissions to the Bar, asked those in attendance to "recommit themselves 'to certain basic principles,' including that of teaching students how to learn systematically from experience and simultaneously to educate them in a broader range of legal analysis and skills than have traditionally been taught."[7] She asked, "'[h]ave we really tried to determine . . . what skills, what attitudes, what character traits, what qualities of mind are required of lawyers?'"[8] In early

4. *See* Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 150 (2001).

5. *See infra* notes 91-93.

6. MacCrate, *supra* note 2, at 521.

7. *Id.* at 521.

8. *Id.*

1989, Justice Wahl created the Task Force to answer these questions.[9] After collecting data, holding public hearings, and conducting extensive deliberations over a period of almost three years, the Task Force issued the Report in July 1992.[10]

B. *The Report Praises the Legal Profession and Its Values*

The Report describes the progressive evolution of the legal profession to its current position of prominence. In the early nineteenth century, the Bar first began to develop the institutional framework for self-regulation: law schools, bar associations, and judicial supervision.[11] At the same time, in the "successive writings"[12] of the first American legal ethicists, Professor David Hoffman[13] in 1836 and Judge George Sharswood[14] in 1854, as well as in Judge Thomas Goode Jones's Alabama ethical code of 1887[15] and the 1908 ABA Canons of Professional Ethics,[16] "there gradually evolved a concept of professionalism for the American lawyer, based upon obligations and responsibilities both voluntarily assumed and required by society."[17] Professionalism required that lawyers have "a special body of learning and skills" and a "core body of values which . . . justifie[d] their claim to an exclusive right to engage in the profession's activities."[18] The modern expression of these values is contained in the preamble to the Model Rules of Professional Conduct,[19] which describes law as a "self-governing and learned

9. *See* MacCrate Report, *supra* note 1, at xi.

10. *See id.* at xi-xiii.

11. *See id.* at 105.

12. *See id.* at 110.

13. For a discussion of the context of Hoffman's contribution, see Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role,* 8 U. CHI. L. SCH. ROUNDTABLE 831, 388-89 (2001) [hereinafter CHICAGO ROUNDTABLE].

14. For a discussion of the context of the contribution of Sharswood, who was the father of our modern field of ethics, see *id.* at 389-92; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992) [hereinafter *Rediscovering*].

15. MacCrate Report, *supra* note 1, at 109; *Rediscovering*, *supra* note 14, at 243-44.

16. *See* MacCrate Report, *supra* note 1, at 109; *Rediscovering*, *supra* note 14, at 243-46; CHICAGO ROUNDTABLE, *supra* note 13, at 400 nn.174-80 and accompanying text.

17. MacCrate Report, *supra* note 1, at 110.

18. *Id.* at 108.

19. *See id.* at 111.

profession" and states that "[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."[20]

Despite the many changes in the Bar in the twentieth century, the core values represent a "loosely defined but distinct identity" that "[t]he profession has successfully created . . . [and] with which most lawyers can identify."[21] The Bar today is "larger and more diverse than ever before"[22] in terms of practice areas and practitioners.[23] Nonetheless, the legal profession is "more organized and unified . . . than at any time in its history."[24] The Report notes the dramatic increase in the percentage of lawyers belonging to the ABA and the "vast majority" who belong to any bar association,[25] together with "the unifying experience" of law school "as the common gateway to the profession and the universal control by the judiciary over entry."[26]

The Report rejects the notion inherent in the Task Force's title, *Narrowing the Gap*, that a serious gap actually exists between the Bar and the Academy.[27] The Report suggests instead that the problem is one of communication and perception that could be solved if academics and practitioners could appreciate more fully each other's role and contributions.[28] Indeed, the Report applauds law schools for "tak[ing] seriously their responsibilities with regard to the teaching of ethical standards and professional values."[29] While acknowledging potential for improvement, the Report seeks to assist law schools, the practicing bar, and the judiciary in enhancing what they are already doing well—fulfilling their shared responsibility for educating skilled and ethical lawyers.[30] The Report describes the task of "perpetuation of core legal knowledge together with the funda-

20. MODEL RULES OF PROF'L CONDUCT pmbl. (1993).
21. MacCrate Report, *supra* note 1, at 111.
22. *Id.* at 11.
23. *See id.* at 29-35.
24. *Id.* at 110.
25. *See id.* at 110-11.
26. MacCrate Report, *supra* note 1, at 111.
27. *See id.* at 8.
28. *See id.* at 4-6.
29. *Id.* at 235.
30. *See id.* at 8.

mental lawyering skills and professional values" as essential to survival of a single legal profession in the 21st century.[31]

C. *The MacCrate Report's Articulation of Values and Recommendations for Promoting Them*

Relying on the Statement of Fundamental Lawyering Skills and Values ("SSV"),[32] the Report identifies four fundamental lawyering values ("Fundamental Values") and two directly related skills ("Fundamental Skills").[33] The MacCrate Report draws its four Fundamental Values from the values found in the Preamble to the ABA Model Rules.[34] The first Fundamental Value, "Provision of Competent Representation,"[35] arises from the lawyer's duty as a representative of clients.[36] The competence value requires the commitment of any practitioner to develop and maintain the "Fundamental Skills" listed in the SSV.[37]

The second Fundamental Value, "Striving to Promote Justice, Fairness, and Morality,"[38] arises from the lawyer's position as "a public citizen having special responsibility for the quality of justice."[39] The standards for this value demand that the lawyer should incorporate these values "in one's own daily practice,"[40] in "contributing to the profession's fulfillment of its responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them,"[41] and in "contributing to the profession's fulfillment of its responsibility to

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31. MacCrate Report, *supra* note 1, at 120.
32. *Id.* at 135.
33. *See id.*
34. MODEL RULES OF PROF'L CONDUCT pmbl. (1993).
35. MacCrate Report, *supra* note 1, at 207.
36. *See id.* at 213.
37. It therefore requires little further attention in assessing the Report's contribution to the area of professional values. What is more interesting about the value of competence is how it imports the view, implicit in the Statement of Skills, that the conventional pedagogy of the law school classroom teaches only two of the ten skills necessary to competent lawyering (Skill 2: Legal Analysis and Reasoning and Skill 3: Legal Research). MacCrate Report, *supra* note 1, at 138-40. *See* Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 252 (2001).
38. MacCrate Report, *supra* note 1, at 213.
39. MODEL RULES OF PROF'L CONDUCT pmbl. (1993).
40. *Id.* at 213 (Standard 2.1) (capitalization and italics omitted).
41. *Id.* (Standard 2.2) (capitalization and italics omitted).

enhance the capacity of law and legal institutions to do justice."[42]

The third Fundamental Value, "Striving to Improve the Profession,"[43] is an obligation of membership in a "self-governing" profession.[44] The Value requires the lawyer to "participat[e] in activities designed to improve the profession,"[45] "assist[ ] in the training and preparation of new lawyers and the continuing education of the bar,"[46] and "strive to rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation, age, or disability, and to rectify the effects of these biases."[47]

The fourth Fundamental Value, "Professional Self-Development,"[48] refers to the obligations of the member of a "learned profession"[49] to "seek[ ] out and tak[e] advantage of opportunities to increase one's own knowledge and improve one's own skills,"[50] as well as to "select[ ] and maintain[ ] employment that will allow the lawyer to develop as a professional and to pursue his or her professional . . . goals."[51] "Professional self-development" obligates lawyers to do their best to fulfill the first three Fundamental Values.[52]

All Fundamental Skills, of course, relate to the first Fundamental Value of "Competent Representation" and the fourth Fundamental Value of "Professional Development."[53] Two of these skills are connected directly to the second Fundamental Value of "promot[ing] justice, fairness, and morality."[54] These are Fundamental Skill 6 on "Counseling"[55] and Fundamental Skill 10 on "Recognizing and Resolving Ethical Dilemmas."[56]

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42. *Id.* (Standard 2.3) (capitalization and italics omitted).
43. MacCrate Report, *supra* note 1, at 216.
44. *See id. See* MODEL RULES OF PROF'L CONDUCT pmbl. (1993).
45. MacCrate Report, *supra* note 1, at 216 (Standard 3.1).
46. *Id.* at 216 (Standard 3.2) (capitalization and italics omitted).
47. *Id.* (Standard 3.3) (capitalization and italics omitted).
48. MacCrate Report, *supra* note 1, at 218.
49. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (1993).
50. MacCrate Report, *supra* note 1, at 218 (Standard 4.1).
51. *Id.* at 219 (Standard 4.2).
52. *See id.* at 218.
53. *Id.* at 207-08.
54. *Id.* at 213.
55. MacCrate Report, *supra* note 1, at 176.
56. *Id.* at 203.

Fundamental Skill 6 expressly seeks to implement the second Fundamental Value.[57] Fundamental Skill Standard 6.4(d)(iv) requires a lawyer to counsel clients on "considerations of justice, fairness, or morality" to the extent "relevant" and "required or permitted by ethical standards."[58] Standard 6.1(a)(iii) requires a lawyer to the "extent to which it is proper" to "[a]ttempt[ ] to persuade the client to modify his or her decisions or actions to accommodate the interests of justice, fairness, or morality" and, if the client refuses, to "tak[e] action to safeguard the interest of third-parties or the general public" or "[w]ithdraw[ ] from representation . . . ."[59]

In contrast to Fundamental Skill 6, Fundamental Skill 10 does not acknowledge a direct connection to the Fundamental Values. Fundamental Skill 10 focuses primarily on "recognizing and resolving ethical dilemmas" arising under the ethics rules.[60] When Fundamental Skill 10 refers to "[t]he fundamental ethical rules that shape the profession and define what it means to be a legal professional,"[61] it does not refer to the Fundamental Values. Instead, Skill 10 mentions the ethics rules generally, and the duties of "competence," "zealousness," "loyalty," and "confidentiality" specifically.[62] Nevertheless, Skill 10, in fact, serves the goal of "promot[ing] justice, fairness, and morality"[63] by requiring lawyers to consider "[a]spects of ethical philosophy bearing upon the propriety of particular practices or conduct," as well as "[a] lawyer's personal sense of morality."[64] Of course, if following the profession's rule of ethics promotes "justice, fairness, and morality," or "improve[s] the legal profession," then Fundamental Skill 10 implements Fundamental Values.[65]

Many of the Report's sixty-one Recommendations refer to skills and values. These Recommendations ask law schools to

57. *See id.* at 177, 182, 184.
58. *Id.* at 181-82.
59. *Id.* at 177 (cross-referenced in Value Standard 2.1(a) - (b)).
60. *See* MacCrate Report, *supra* note 1, at 203-07 (capitalization omitted).
61. *Id.* at 205.
62. *See id.* at 205.
63. *Id.* at 213.
64. *Id.* at 204.
65. *See* MacCrate Report, *supra* note 1, at 203.

distribute the SSV, identify the SSV content of classes,[66] explain the "concepts and theories" underlying the skills and values,[67] use "permanent faculty" for skills and values instruction,[68] and assess how best to teach skills and values.[69] These Recommendations also ask the ABA to emphasize "skills and values instruction in the accreditation process."[70]

Only a few of the Recommendations exclusively concern fundamental values. The Report urges law schools to teach that these fundamental values are "as important in preparing for professional practice as acquisition of substantive knowledge"[71] and "convey to students that the professional value of the need to 'promote justice, fairness and morality' is an essential ingredient of the legal profession . . . ."[72] While "[l]aw schools should play an important role in developing the skill of 'recognizing and resolving ethical dilemmas,'" their effectiveness "is necessarily very limited compared to the variety and complexity of the dilemmas presented in practice."[73] Accordingly, the Report asks practicing lawyers to take responsibility "for inculcating professional values through contact with students in part-time work and summer jobs and as colleagues and mentors in the early years of practice."[74] They "should . . . impress on students that success in the practice of law is not measured by financial rewards alone, but by a lawyer's commitment to a just, fair and moral society."[75]

66. *Id.* at 331.
67. *Id.*
68. *Id.* at 333-34.
69. *Id.* at 330.
70. MacCrate Report, *supra* note 1, at 330.
71. *Id.* at 332.
72. *Id.* at 333.
73. *Id.* at 332.
74. *Id.*
75. MacCrate Report, *supra* note 1, at 333.

II. The MacCrate Report's Marginal Influence on Professional Values

A. *Ten Years After the Statement of Values and Recommendations*

Absent the disciplined data collection Russell Engler proposes,[76] an assessment of the MacCrate Report's impact must remain largely anecdotal and impressionistic. The Report has inspired numerous conferences and articles,[77] as well as an annotated bibliography which "group[s]" articles according to the MacCrate Report's 10 Fundamental Skills, and in non-skills courses alone lists "204 articles" on the subject of teaching skills.[78] The Report appears to have "provided an important impetus for the clinical and skills movement."[79] Professor Gary Munneke notes that since the MacCrate Report "[c]linics and skills courses in law schools have continued to proliferate[; b]ar associations have increasingly offered skills-oriented continuing legal education and 'bridge-the-gap' programs[; and s]ome states have added a skill component to the bar exam."[80] As a result of the MacCrate Report, the ABA modified accreditation standards for law schools, adding the requirement of "adequate . . . instruction in professional skills."[81]

The MacCrate Report's work on Fundamental Values has generated far less attention than its work on Fundamental Skills.[82] The attention on Fundamental Values appears limited to clinical scholars who either applaud the Report's commitment to social justice or find it "inadequate,"[83] and to the meet-

76. *See generally* Russell Engler, *From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade*, 23 PACE L. REV. 519 (2003).

77. *See id.* at 552.

78. *See id.* at (citing J.P. Oglivy & Karen Czapanskiy, *Clinical Education: an Annotated Bibliography*, CLINICAL L. REV. 36-37 (Special Issue No. 1, Spring 2001).

79. Munneke, *supra* note 4, at 130.

80. *Id.* at 135-36.

81. ABA Accreditation Standard 302(c) (1996); *see also* Roy Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648, 675-76 (1996). For a discussion of other accreditation changes related to the MacCrate Report, see *id.* at 655-59.

82. *See* Engler, *supra* note 2, at 144-49; Munneke, *supra* note 4, at 133.

83. *See, e.g.*, Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millenium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000); Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLINICAL L. REV. 411, 420 (1994); Antoinette Sedillo Lopez, *Learning Through Service in a*

ings of the ABA Section on Legal Education that sponsored the MacCrate Report.[84] While many law schools have emphasized the Fundamental Skills,[85] few schools report teaching the Fundamental Values.[86] Those institutions that have sought to instill the values, have made it a lower priority than acquiring skills[87] and have encouraged only public service and pro bono work, a narrow portion of the duty to promote justice.[88] The Report's broader goal of integrating the promotion of justice into

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Clinical Setting: The Effect of Specialization on Social Justice and Skills Training, 7 CLINICAL L. REV. 307 (1995). Many clinicians "criticized the SSV for . . . placing too great an emphasis on skills rather than values [and] giving inadequate attention to the ways in which the law and legal institutions negatively affect the poor and other disenfranchised groups." Mark Heyrman, *Regulating Law Schools: Should the ABA Accreditation Process be Used to Speed the Implementation of the MacCrate Report Recommendations?*, 1 CLINICAL L. REV. 389, 390 (1994).

84. ABA SEC. LEGAL EDUC. ADMISSIONS B., REPORT OF THE PROFESSIONALISM COMMITTEE, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

85. *See* Engler, *supra* note 2, at 144-47, 138-44; Engler, *supra* note 76, at 559.

86. Engler, *supra* note 2, at 146 (noting that "[i]t would be hard to identify a school at which dramatic curricular changes were triggered by the MacCrate Report"). One rare example is Engler, *supra* note 2, at 124, and Engler, *supra* note 76, at 559-66.

87. Russell Engler's account of the experience at New England School of Law is instructive. New England responded to the MacCrate Report by expanding skills training with "energy and creativity . . . but with little movement on the values portion of the report, and in particular on the values that related to Pursuing Equal Justice." Engler, *supra* note 76, at 556-57. Recognizing this, faculty advocates of public service used the MacCrate values to promote "the creation of a new Center for Law and Social Responsibility." *Id.* at 559. The Center has been the focus of efforts to encourage student and faculty initiatives. Engler concedes that "it remains to be seen whether these initiatives will comprise part of a lasting institutional change, or rather a burst of activity that will fade from view." *Id.* at 565.

88. *See* Stephen F. Befort & Eric S. Janus, *The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values*, 13 J. L. & INEQUALITY 1, 2 (1994) (suggesting that the MacCrate Report played a role in the development of a collaborative program between the Minnesota bar and law schools to promote public service). Surprisingly, however, the major efforts to promote pro bono and public service in law schools made little or no mention of the MacCrate Report. *See, e.g., Learning to Serve; The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities*, AALS COMMISSION ON PRO BONO AND PUB. SERV. OPP. (1999). Perhaps this is because the Report added nothing to the professionalism movement's commitment to promote pro bono and public service dating from the 1980s. *See, e.g.*, ABA COMM'N ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

all aspects of practice and legal education appears to have been largely ignored.[89] The Report has received little attention in the voluminous literature on professional values.[90]

B. *The Limits on the Report's Influence*

Major flaws in the MacCrate Report's treatment of values led to the Report's minimal impact in that area. The Report undermined its own commitment to values by making them a second priority and failing to express them as coherently as it did skills. Even had the presentation of values been more effective, the Report's influence still would have been circumscribed. The Report failed to confront obstacles in the dominant cultures of the Bar and Academy and to devise successful strategies for overcoming those obstacles.

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89. For example, only a few commentators have referred to the Report's recommendation that law schools teach that values are "as important in preparing for professional practice as acquisition of substantive knowledge." MacCrate Report, *supra* note 1, at 332 (Recommendation 17). A cursory Westlaw search revealed only the following mentions in a footnote or in passing: Edmund B. Spaeth, Jr., et al., *Teaching Legal Ethics: Exploring the Continuum*, 58 LAW & CONTEMP. PROB. 153 (1995); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993). Moreover, as Engler notes with regard to both skills and values, "there is little evidence to believe that the MacCrate Report transformed legal education, or led to sweeping changes when measured by the more ambitious criteria or goals . . . . It would [even] be hard to identify a school at which dramatic curricular changes were triggered by the MacCrate Report." Engler, *supra* note 2, at 146.

90. Munneke, *supra* note 4, at 134. For example, leading books on the legal profession published after the issuance of the MacCrate Report evidence almost no influence of the MacCrate Report's work on values. *See, e.g.*, MARY A. GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994) (no reference to MacCrate Report in index); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (same); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 126 (1994) (one reference to Robert MacCrate's perspective on legal education but with regard to skills and not values); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000) (no reference in index); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) (no reference in index). Notable exceptions to this general observation are the work of some clinical scholars and the ABA Section on Legal Education, *see* sources cited *supra* notes 82-84 and accompanying text.

1. *Problems in Presentation of Values*

a. *Values as Second Priority*

By listing the four Fundamental Values after the ten Fundamental Skills, the MacCrate Report signaled that values are a lower priority than skills.[91] Indeed, if the Report had followed a logical order, it would have started with values. The values are the goals. Once those were identified, the Report would have determined which skills were necessary to fulfill those goals.

Why then did the Report place values after skills? Perhaps the Report reflects the widely held perception that skills are more important than values. One common illustration is the situation of the star athlete who is caught up in a scandal.[92] While some commentators bemoan the athlete's failure to serve as a role model, the general conclusion is that so long as the athlete continues to star (and does not find himself in jail), the lapse is forgiven.[93] Skills are more important than values.

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91. As Heyrman notes, many clinical faculty "have criticized the SSV for . . . placing too great an emphasis on skills rather than values." Heyrman, *supra* note 83, at 390.

92. *See, e.g.*, Ronald A. Taylor, *For Sports Fans, A Season of Discontent*, U.S. NEWS & WORLD REP., Aug. 30, 1982, at 49; Mike Wise, *Talent Is Not an Excuse for Today's Bad Behavior*, N.Y. TIMES, Oct. 4, 2002, at D1.

93. For example, David Wells, a pitcher for the New York Yankees, wrote a book wherein he said, among other things, that he pitched a game while "half-drunk" and used ephedra, a legal, herbal stimulant, to make it through the season. As far as his fans were concerned, none of this mattered. One reporter covering a book signing for Well's book *Perfect I'm Not* stated, "Wells could have stumbled in and reeked from here back to Dorian's and fans who came for a signing and a sighting still would have applauded him, embraced him, [and] lauded him." Jon Heyman, *Not Perfect, but Loved*, NEWSDAY, Mar. 20, 2003, at A79. Also recently, Minnesota Vikings' football player Randy Moss "took unsportsmanlike conduct to a whole new level" after being arrested for using his car as a battering ram to run over a Minneapolis traffic control officer. Christian Red, *Daily News Special Report: Police Blotter*, N.Y. DAILY NEWS, May 5, 2003, at 57. Moss was also arrested for marijuana possession. Yet despite this criminal act and other previous run-ins with the law, some fans still refuse to see Randy Moss as a "bad guy." *See* Curt Brown, *Supporters See a Misunderstood Moss*, STAR TRIB. (Minneapolis), Oct. 6, 2002, at 1A. Many fans had a similar response to the recent discovery that Sammy Sosa had used a corked bat. A newspaper columnist supporting Sosa observed that, "[I]f Sosa hits the Cubs into the playoffs, he'll make a great story. And the outrage will be forgotten." John Kass, *Drop the Hollow Outrage; Sosa Deserves Better*, CHI. TRIB., June 5, 2003, at 2; *see also* Rick Telander, *The Wrong People for the Job; Why Expect Athletes to Be Role Models, When They Could Scarcely Be Less*

Similarly, in law school and law practice, the major awards, like law review editorship or law firm partnership, are awarded primarily on the basis of skills. While extremely bad values may be a disqualification, whether an individual's values are mediocre or excellent is generally irrelevant. Skills are more important.

b. *The Confusing Integration of Values and Skills*

Fundamental Skills 6 and 10, the two skills that should promote the value of promoting justice, fairness, and morality, do not succeed in providing adequate guidance for practitioners and students. Other skills, which implicitly promote particular values, fail to identify and explain those values.

Fundamental Skill 6 and Fundamental Value 2, which it implements, fail to provide a persuasive justification for requiring lawyers to engage in moral counseling. Most lawyers conceive of their obligation to further their client's goals as excluding moral considerations.[94] The Report's contrary conclusion[95] is never clearly explained. The Report cites the Roscoe Pound's general assertion that the "'primary purpose' of a profession is the '[p]ursuit of the learned art in the spirit of a public service,'"[96] but it's quite a leap from this general statement to requiring moral counseling. The Report also relies on provisions in the Model Code of Professional Responsibility that state either a non-binding aspiration to counsel on the morally just course or a binding obligation to refrain from prejudicing the administration of justice (which relates more to court appearances than client counseling).[97] The reliance on the Model Code, which has been superseded by the Model Rules, and the absence of citation to the Model Rules, suggests that the ethical rules do not support the Report's position. In fact, the Model Rules do have a provision closely on point, but that provision

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Suited to the Task?, SPORTS ILLUSTRATED, Dec. 23, 1991, at 108; Wise, *supra* note 92.

94. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 20 (1988); Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).

95. *See supra* notes 58-60 and accompanying text.

96. MacCrate Report, *supra* note 1, at 213.

97. *See id.* at 214.

only allows the lawyer discretion in advising a client to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[98] It does not require moral counseling.

In addition to failing to provide guidance on the source of the duty to counsel morally, Fundamental Skill 6 offers little guidance on when moral counseling is appropriate. Standard 6.4's limiting of moral counseling to occasions when it is "relevant" is confusing.[99] Although it would seem that "justice, fairness, and morality" would be relevant to all decisions, the use of the term "relevant"[100] suggests that some decisions do not implicate "justice, fairness, and morality."[101] Similarly, Standard 6.4 requires moral counseling when the ethical rules "require or permit" it.[102] Nowhere does the Report identify when the rules require moral counseling. Use of the term "permit" suggests that the Rules would bar moral counseling under some circumstances, but nowhere does the Report identify when this would occur.[103] Standard 6.1 similarly uses the phrase "to the extent to which it is proper."[104] If "proper" means required or permitted by the ethics rules, it suffers the same lack of clarity; if "proper" refers to a different standard of propriety, that standard is never identified.

Compounding the confusion is the facial inconsistency of Standards 6.4 and 6.1(a)(iii) with Standard 6.1(b)(ii)(B). The latter requires the lawyer to "guard against . . . be[ing] unable to . . . communicate to [the client] that the lawyer is committed to furthering the client's objectives and interests."[105] Any time a lawyer urges the client to seek what the lawyer considers just, fair, and moral, the lawyer communicates that the lawyer has commitments other than "the client's objectives and interests."[106] The specific requirements of Standard 6.1(a)(iii) go

98. MODEL RULES OF PROF'L CONDUCT R.2.1 (1993).

99. This phrase does not appear in standards for Value 2, which refers only to Standard 6.1 and not to 6.4.

100. MODEL RULES OF PROF'L CONDUCT R.2.1 (1993)..

101. MacCrate Report, *supra* note 1, at 177.

102. *Id.* at 213. In doing so, it tracks Fundamental Value Standard 2.1(a) - (b).

103. *Id.*

104. *Id.* at 177 (Skills Standard 6.1(a)(iii)).

105. *Id.* at 178.

106. MacCrate Report, *supra* note 1, at 176.

even further and require the lawyer to "persuade [the] client to modify his or her decisions" and to take actions to safeguard non-clients or withdraw if the client refuses to do so.[107] The standards suggest that the lawyer is, or may be, opposed to "the client's objectives and interests" and will act on that opposition.[108]

Fundamental Skill 10, "Recognizing and Resolving Ethical Dilemmas," creates a different type of confusion. Skill 10 addresses "ethical dilemmas," the "conduct of law as an ethical profession,"[109] and matters of conscience, as well as questions of applying the ethical rules.[110] Surprisingly, Skill 10 implies a separation between ethics and values. Skill 10 urges lawyers to consider ethical philosophy, personal morality, and "fundamental ethical rules that shape the profession and define what it means to be a legal professional," such as competence, zealousness, loyalty, and confidentiality.[111] Skill 10 does not even mention the obviously relevant Fundamental Values of "promoting justice, fairness, and morality," or of "improving the legal profession."[112] Whether this is just an oversight, or an indication that values are not important to resolving ethical dilemmas, is not clear.

Another source of confusion is the Report's failure to identify and explain values implicit in a number of the Fundamental Skills. For example, by placing knowledge of alternative dispute resolution procedures on a par with litigation in Fundamental Skill 8, the Report makes seeking alternative dispute resolution a priority.[113] Even though important commentators have challenged the merit of alternative dispute resolution,[114] the Report never acknowledges that it has made a value choice in encouraging this approach.[115] Similarly, implicit in Skill 6 are views (sometimes inconsistent) on the priority of client au-

107. *Id.* at 177.
108. *See id.* at 178.
109. *Id.* at 203.
110. *Id.* at 203-07.
111. *Id.* at 205.
112. MacCrate Report, *supra* note 1, at 333.
113. *See id.* at 191-99.
114. *See, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Andrew McThenia & Thomas Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).
115. *See* MacCrate Report, *supra* note 1, at 191-99.

tonomy in client counseling.[116] This question is also the subject of great debate in literature.[117] Here, too, the Report fails to identify or justify its value preferences.

Indeed, the entire skills section is in part an attack on the dominant values of legal education.[118] The Report identifies ten "Fundamental Lawyering Skills," only two of which—"legal analysis and reasoning" and "legal research"—are priorities of the pedagogy of the law school classroom.[119] While commentators have recognized the paradigm shifting implications of the Report's approach for legal education,[120] the Report does not openly acknowledge or explain the decision to minimize the value of skills gained in the Langdellian classroom.[121]

To be fair, the Report does invite "progressive[ ] refinement" of the SSV,[122] which could perhaps address these weaknesses in the text. However, even if that were done, major conceptual problems would remain.

2. *Conceptual Obstacles*

a. *Failure to Make a Persuasive Case for Promoting Justice*

The aspiration of promoting justice, fairness, and morality is an admirable one. It accords with the Bar's traditional understanding of lawyers as America's governing class charged with identifying and pursuing the public good.[123] In this view, lawyers played a key role in government and in the informal process of managing social and business relationships. In contrast to business people who worked to promote their own self-interest, lawyers worked to promote the public good.[124]

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116. *See id.* at 176-84.

117. *See* Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

118. *See, e.g.*, Weinstein, *supra* note 37, at 252.

119. *See* MacCrate Report, *supra* note 1, at 138-40, 213 (Standard 2.1).

120. *See supra* notes 81-83 and accompanying text.

121. *See* MacCrate Report, *supra* note 1, at 3-8. *See* Weinstein, *supra* note 37, at 252.

122. MacCrate Report, *supra* note 1, at 327.

123. *See* CHICAGO ROUNDTABLE, *supra* note 13, at 383.

124. *See id.* at 385.

Unfortunately for proponents of lawyers' commitment to the public good, the dominance of the governing class conception ended in the 1960s.[125] Since that time, the hired gun role has become the standard perception.[126] Most lawyers view themselves as advocates who pursue the self-interest of their clients single-mindedly.[127] The two primary characteristics of this conception are extreme partisanship on behalf of the client and "moral non-accountability" for the lawyer's conduct in pursuing the client's goals.[128]

The Report offers no strategy for countering this understanding.[129] Rather, with minor exception,[130] the Report ignores the overwhelming sense among commentators that lawyers have betrayed their obligation to serve the public.[131] In the face of this consensus among commentators, the Report made the incredible declaration that "promoting justice, fairness, and morality"[132] represented a universally held value of the bar.[133] This assertion relieved the Report's authors from the task of confronting the prevailing hired gun view and articulating a rationale for promoting justice that might appeal to lawyers and law students. This omission guaranteed the Report's irrelevance.

The only lawyers and law faculty who would embrace the value of promoting justice would be those who already accepted it. Those who viewed lawyers as largely self-interested hired guns would have no reason to change their view. Indeed, they

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125. *See id.* at 404.

126. *See id.* at 407.

127. *See id.* at 407-10; Russell G. Pearce, *Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1239 (1995) [hereinafter *Professionalism Paradigm Shift*].

128. LUBAN, *supra* note 94, at 52; Schwartz, *supra* note 94, at 672-73 (emphasis omitted).

129. *See* MacCrate Report, *supra* note 1, at 54.

130. Buried in the comments to Fundamental Value 2 are citations to Chief Justice Rehnquist and the ABA Commission on Professionalism for the proposition that "'profit maximization'" has caused "many lawyers [to] fail to honor [their pro bono] obligation." *Id.* at 215.

131. This sentiment dates at least from Chief Justice Burger's famous 1984 report to the ABA on the decline of professionalism. *See Professionalism Paradigm Shift*, *supra* note 127, at 1255, 1257.

132. MacCrate Report, *supra* note 1, at 213.

133. *See id.* at 110-11, 213-17.

would likely view proponents of the Report's values as elite lawyers and academics who were "hypocrites doing one thing while saying another, cynics manipulating for their own purposes an ideology they reject, or naïve fools unaware of what everyone else knows."[134]

Even the limited influence the Report has had in encouraging pro bono and public service programs in law schools[135] is not likely to make a major difference in lawyers' commitment to the public good. Historically, the growth of public interest law in the 1960s and the creation of the pro bono duty in the 1970s actually had the opposite effect.[136] These developments facilitated the transition from the governing class role to that of the hired gun. The rise of a public interest bar removed responsibility for the public good from law firms and conferred it on the public interest law community.[137] Similarly, the pro bono duty shifted the public good from its integral place at the center of regular firm practice to the marginal arena of pro bono work.[138]

Although public interest law and pro bono work add to the public good, proponents must be careful not to undermine lawyers' commitment to promote justice in all aspects of their work. The Report admirably avoids this error by placing public service and pro bono in the context of the more general duty to promote justice.[139] Nonetheless, by failing to confront the dominant culture of the legal profession and to explain the harm resulting from narrowly equating justice with public service and pro bono, the Report may very well encourage such short-sighted endeavors. Ironically, in one of few value areas where the Report could have made a valuable contribution, its influence may prove to be counter-productive.

b. *Failure to Acknowledge the Ideology of Legal Academics*

The Report also misses the ideological context of its proposals for implementation of teaching values to law students. The

134. *Professional Paradigm Shift*, *supra* note 127, at 1265.
135. *See* sources cited *supra* note 87.
136. *See* CHICAGO ROUNDTABLE, *supra* note 13, at 420.
137. *See id.* at 417-19.
138. *See id.* at 419-20.
139. *See* MacCrate Report, *supra* note 1, at 213-15.

Report starts from the view that law schools are doing an exemplary job of teaching legal ethics.[140] To make the teaching of the ethics rules and values more effective, the Report asks law schools to make clear to students that learning values is as important as substantive knowledge.[141] The Report also asserts that law schools are limited in their ability to teach values and accordingly makes practicing lawyers responsible for teaching values to young lawyers, especially "to impress on students that success in the practice of law is not measured by financial rewards alone, but by a lawyer's commitment to a just, fair and moral society."[142]

The Report's conception of lawyers and law students bears little resemblance to the reality others have described. As discussed above, it is absurd to ask practicing lawyers who, by and large, reject the primacy of a duty to the public good to take responsibility for teaching that duty.[143] Similarly, erroneous is the Report's assumption that law schools are committed to this goal.[144]

Contrary to the Report's glowing description of law schools' success in teaching legal ethics is the legal academy's widely noted disdain for the topic.[145] As Roger Cramton and Susan Koniak observe, despite the ABA's 1977 requirement to teach legal ethics and the resulting growth of scholarship and case law, "legal ethics remains an unloved orphan of legal education."[146] In the words of another commentator, legal ethics is "the dog of the law school [curriculum]—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds."[147] The teaching of legal ethics "occupies a minor aca-

140. *See id.* at 235 ("[A] rich body of teaching materials has emerged during the past fifteen years that has enriched both professional responsibility and clinical courses.").

141. *See id.* at 332 (Recommendation 17).

142. *Id.* at 333 (Recommendation 19); *id.* at 332 (Recommendations 15, 16, & 18).

143. *See supra* notes 97-103 and accompanying text.

144. *See* MacCrate Report, *supra* note 1, at 54.

145. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 156 (1996).

146. *Id.*

147. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40 (1992) (quoting Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics?*, STUDENT LAW., Oct. 1991, at 18-19).

demic role as a one- or two-credit required course in the upper-class years, often taught by adjuncts or by a rotating group of faculty conscripts,"[148] and "[s]erious scholarship in legal ethics is still considered somewhat of an oxymoron."[149]

The attitudes that underlie the disdain for legal ethics similarly undermine support for teaching the values of promoting justice and improving the legal profession. These attitudes fall within three perspectives. The first perspective consists of beliefs supporting the view that law school need not expressly teach values. Some commentators argue that the conventional classroom teaching using the socratic method develops moral character.[150] Others find teaching values unnecessary because they believe in the Business-Profession dichotomy fundamental to the ideology of professionalism. It assumes that lawyers work for the public good, unlike business people who seek to promote their own self-interest.[151]

The second perspective is the belief that values cannot be taught. Many in the Academy believe that students' values have been fully formed before law school and cannot be changed.[152] Under this view, teaching values is useless.

Third is the perspective that values should not be taught. This perspective has its origin in Christopher Columbus Langdell's introduction of a scientific approach to legal pedagogy.[153] The scientific paradigm "distinguished between facts, which could be taught, and values, which could not."[154] As I have noted elsewhere:

> While most law professors today would probably not believe themselves to be scientists, they continue to apply the same pedagogical approach as Langdell and to separate legal from ethical

148. Cramton & Koniak, *supra* note 145, at 147. *See also* Russell G. Pearce, *Teaching Ethics Seriously*, 29 LOY. U. CHIC. L.J. 719, 724 n.44 (1998) [hereinafter *Teaching Ethics Seriously*].

149. *See* Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, 58 LAW & CONTEMP. PROBS. 117, 117 (1995).

150. *See Teaching Ethics Seriously*, *supra* note 148, at 727.

151. *See Professionalism Paradigm Shift*, *supra* note 127, at 1231.

152. *See Teaching Ethics Seriously*, *supra* note 148, at 732-35.

153. *See id.* at 728-32; Russell G. Pearce, *Symposium: Recommitting to Teaching Legal Ethics—Shaping Our Teaching in a Changing World: Legal Ethics Must Be the Heart of the Professional Responsibility Curriculum*, 26 J. LEGAL PROFESSION 159, 162 (2001-2002) [hereinafter *Legal Ethics*].

154. *See Legal Ethics, supra* note 153, at 162.

> questions. The legal literature is full of stories of students who raise their hand to question the ethics of a particular legal doctrine only to be told by their professor that the subject of the class was law, not ethics.[155]

The Report's Recommendations offer no way to combat these perspectives. By assuming, contrary to reality, that the status quo supported teaching ethics and values, the Report never made a case that would respond to these deeply and broadly held views opposing the teaching of values. Without this change, the Report's specific suggestions (for permanent faculty to teach values[156] or for the law schools to make clear their commitment to values) would have difficulty gaining adoption and, even if adopted, would have the same fate as the ABA's requirement of ethics teaching. The Report's recommendation that teaching values be universal would suffer the same fate as the universal teaching of ethics becoming "little more than tokenism designed to satisfy the [ABA] accreditation requirement."[157] Values would remain, at best, a secondary concern.

III. Conclusion: The Roads Not Taken

The MacCrate Report offered the opportunity for a major rethinking of how to define and teach the fundamental values of the legal profession. By making values a distant second priority, and ducking the most significant challenges involved in defining and teaching values, the Report largely squandered this opportunity. What the Report has done is to inspire symposia, conferences, and articles. These efforts, though, appear to have had the same influence as the Bar's almost thirty-year campaign to promote professionalism through exhortations to lawyers and law students, conferences, required continuing legal education courses, and tinkering with legal education. Aside from generating a professionalism industry, the professionalism campaign has had little or no effect on how lawyers understand their role or how the public perceives lawyers.[158]

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155. *Id.*

156. MacCrate Report, *supra* note 1, at 33-34 (Recommendations 19 & 24).

157. Cramton & Koniak, *supra* note 145, at 148.

158. *See Professionalism Paradigm Shift*, *supra* note 127, at 165-67; CHICAGO ROUNDTABLE, *supra* note 13, at 407-10.

The effort to promote values need not be a dead end. Instead of relying on the assumption that the promotion of justice in legal practice represents either a mandate of the ethics rules or a consensus of the Bar, the Task Force should have accepted the reality of the Bar and Academy, and devised a strategy for changing attitudes. A more persuasive effort to influence the culture of the bar would move beyond the Business-Profession dichotomy of professionalism to an obligation to the public good grounded more generally in a responsibility that each person, whether in a business or a profession, has to consider the public good in their work.[159] As a result, lawyers are morally accountable for their actions, even in their representation of clients.[160]

In legal education, the only way to promote values effectively is to rethink the pedagogy that marginalizes them. Taking values seriously requires a curriculum of values that would begin with a first year, first semester course of at least three credits to provide the foundation for the student's understanding of her training as a student and future work as a lawyer.[161] Unless values and ethics rules are a primary focus of the first year curriculum, they become marginal to the student understanding of what it means to be a lawyer.[162] Requiring advanced courses in the second and third years would integrate the students' increasing legal expertise and work experiences into their appreciation of values and ethics.[163] Only then would the universal teaching of values, which the Report recommends, serve as a necessary complement to complete the teaching of values.[164]

Today, the task of defining and teaching values continues to be an important challenge to the Bar and the Academy. The opportunity the Report missed is still open. Perhaps the Report's goal of beginning a conversation—a goal that has suc-

159. *See* Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law as Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 16-23 (1994).

160. *See* Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM U. L. REV. 1805, 1806 (2002).

161. *See Teaching Ethics Seriously*, *supra* note 148, at 735-36; *Legal Ethics*, *supra* note 151, at 160.

162. *See Teaching Ethics Seriously*, *supra* note 148, at 735-36.

163. *See id.* at 737-38; *Legal Ethics*, *supra* note 153, at 160-61.

164. *See Teaching Ethics Seriously*, *supra* note 148, at 737-38; *Legal Ethics*, *supra* note 153, at 161.

ceeded—will provide the venue for developing more productive approaches for meeting these challenges. Signs of hope include the engagement of a large number of clinical education scholars, like Russell Engler, who are willing to reexamine professional ideology and legal pedagogy.[165] Many clinicians bring to this debate a sensibility that may offer a way to ground the development of a moral community among lawyers. Their commitment to pursue justice in their work comes not from professionalism but from a personal moral commitment.

Other sources of hope are innovative thinkers and bar leaders, like Gary Munneke[166] and Louis Craco,[167] who are open to thinking outside the narrow confines of the bar's dominant ideologies. To the extent that the MacCrate Report has played any role in helping to bring these fresh perspectives to the examination of professional values, it has performed a rather valuable function. Whether these perspectives result in any significant changes remains to be seen.

165. *See* sources cited *supra* note 2 and accompanying text.

166. Unwilling to rest upon the trite clichés of professionalism, he challenges the legal profession to transform itself in response to dramatic societal transformations. *See* Munneke, *supra* note 4.

167. Under his leadership, New York's Judicial Institute on Professionalism has indicated a willingness to explore a far broader range of issues than did the MacCrate Task Force. For example, see the range of issues discussed at the Summit on the Internet and the Practice of Law sponsored by the New York State Judicial Institute on Professionalism in the Law held on June 18-19, 2002. *See Summit on the Internet and the Practice of Law: Charting a Course for the Twenty-First Century*, 2 J. N.Y. ST. JUD. INST. ON PROFESSIONALISM IN THE L. 1, 132-64, 171-75 (Fall 2002) (openly acknowledging changes in the practice of law and considering innovative solutions).