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Daniel H. Foote
University of Washington School of Law

The Worlds of Academics and Legal Practice in the United States: A Widening Gap?

Daniel H. Foote
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Introduction

I prepared this paper for a symposium entitled, "Academics and Practitioners in Japan and the United States: Can the Two Worlds Ever Meet?" When I saw the symposium title, my first reaction was that it might seem strange to ask whether the worlds of academics and legal practice can ever meet in the United States. After all, to a large degree the history of the law school in the United States has been that of an institution dedicated to the training of legal practitioners; the vast majority of US law professors are members of the bar; and many, if not most, US law professors also practice or serve as legal consultants from time to time. In fact, of any nation in the world, in the US legal education probably has the closest connection to the world of practice. Still, in recent years, a number of observers have claimed that in the US, two worlds that used to meet regularly have begun to drift apart, with law schools becoming so academically and theoretically-oriented that they have started to lose touch with and relevance to legal practice.

The history of the modern American law school is generally traced to Christopher Columbus Langdell's development of the case method at Harvard in the mid-1800s. One aspect of Langdell's approach that is often forgotten is that it was intended as an academic

undertaking -- an attempt to express law as a science in which the governing principles could be induced from the data of cases.[1] Moreover, the rise of the law school also represented the relative ascendance of so-called "academic lawyers" over practitioners in the initial training of new entrants into the profession. Despite these aspects of an academic orientation, the law school's chief focus was always on education for the profession -- teaching of doctrine and, in particular, teaching students to "think like lawyers," as a popular saying goes. In a view that may be representative of what most law professors felt, in the late 1920s Felix Frankfurter stated: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."[2]

As Robert MacCrate has observed,[3] over the intervening years, there have been various waves of criticisms of the case method and other aspects of law school education. In 1933, Jerome Frank at Yale asked "Why Not a Clinical Law School?"[4] that would better prepare students for effective practice. In the 1940s, Karl Llewellyn also advocated greater skills training during law school.[5] He argued that a

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[1] See, e.g., Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report -- of Skills, Legal Science and Being a Human Being, 69 WASH. L. REV. 593, 598 & n. 25 (1994), and sources cited therein.

[2] Letter to Rosenwald (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), quoted in RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989) and in Robert MacCrate, Keynote Address -- The 21st Century Lawyer: Is There a Gap To Be Narrowed?, 69 WASH. L. REV. 517, 519 n. 10 (1994).

[3] MacCrate, supra note 2, at 519-521.

[4] Jerome Frank, Why Not a Clinical Law School?, 81 U. PA. L. REV. 907 (1933).

[5] Karl Llewellyn, The Place of Skills in Legal Education, 45 COLUM. L. REV. 345 (1945).

systematic assessment should be made of what skills practicing lawyers need, so that those skills could be better taught during law school. In fact, a few years later Llewellyn stated, "No faculty and, I believe, not one percent of instructors, knows what it or they are really trying to educate for."[6]

By the late 1960s, the Ford Foundation had also entered the debate, with a program that urged greater attention to clinical training and professional responsibility at law schools.[7] From what I've seen in both the US and Japan, it is undeniable that carefully targeted funding programs can help influence the direction of curricular reform. The Ford Foundation, by establishing a ten-year project for funding clinical programs, played a significant role in the spread of clinical offerings (with both simulated cases and representation of actual clients) at law schools across the US. And both the Ford Foundation's support and, at least as importantly, public concerns raised by Watergate and other scandals generated increased attention to legal ethics in law school teaching.

All of these criticisms, however, shared one central theme: a recognition that the primary role of the US law school is the training and education of lawyers, judges, and other legal practitioners. While the critics argued that the case method alone does not adequately serve that role, and therefore should be supplemented -- with clinical or other offerings -- or even reexamined as a teaching methodology, they

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[6]KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 139 (3d ed. 1960).
[7]See MacCrate, supra note 2, at 520-521.

agreed on the fundamental principle that the primary role of the law school is for training practitioners and providing guidance on major legal issues of the day.

The past few years have seen yet another wave of criticism. One aspect of the current criticism is that law schools are not doing an adequate job in training graduates for practice. Although the asserted inadequacies may be somewhat different than in past years, this criticism is similar in tone to those of the past. That theme has recently been joined, however, by strong charges that the law schools' own attitudes have changed. According to this argument, law schools, rather than viewing their primary role as the training of practitioners, increasingly view themselves as mere academic graduate schools, which look on legal practice with disinterest and even disdain. This, it is claimed, reflects a growing disjunction between law schools and the bar in the US. Needless to say, this aspect of the current wave of criticism is quite different in tone from the criticisms of the past.

In the past two years, two examinations of law school education have attracted much attention in the US. The first is a report published by the American Bar Association (ABA) in August 1992, entitled Legal Education and Professional Development -- An Educational Continuum (but widely known as the MacCrate Report, after Robert MacCrate, former president of the ABA, who strongly promoted the views contained in that report during his term as ABA

president and has continued to do so ever since).[8] The second is an article by Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit, published in the Michigan Law Review in October 1992, entitled "The Growing Disjunction Between Legal Education and the Legal Profession."[9]

I. The MacCrate Report

The MacCrate Report reflected the culmination of a three-year study. The study examined historical patterns and developments in law practice, the types of skills regularly utilized and needed by practitioners in various branches of the profession (e.g., large and small firms, in-house lawyers, lawyers in public agencies), and predictions for future directions of the legal profession, along with the implications of those future trends for skills that are likely to be needed.[10]

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[8] AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 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).

[9] Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34 (1992).

[10] One trend identified was the "explosion in numbers and use of legal services," MACCRATE REPORT, supra note 8, at 13. Others included increasing specialization and increasing diversity. The diversity includes the obvious aspect of more women and minorities in the legal profession, but also a greater diversity in forms of practice: a gradual decline in the percentage of sole practitioners, coupled with a doubling of the percentage in firms of over 50 lawyers, from 7.3% to 14.6%, in just the 8 years from 1980 to 1988; greater specialization; a growth in new types of providers of legal services for, e.g., the poor; along with large numbers of in-house counsel (holding steady at about 10% of the profession since the 1960s) and government lawyers, id. at 29-102.

Based on this examination of the legal profession, the ABA task force compiled a list of what it considered to be "the fundamental lawyering skills essential for competent representation."[11] This list, the so-called "Statement of Fundamental Lawyering Skills and Professional Values" (widely referred to as the Statement of Skills and Values, or SSV), forms the centerpiece of the MacCrate Report.

The Statement of Skills and Values identified the following ten skills it feels every practicing lawyer should possess: (1) problem solving ability; (2) legal analysis and reasoning ability; (3) legal research skills; (4) skills in factual investigation; (5) skills in oral and written communication; (6) counseling skills; (7) negotiation skills; (8) understanding of procedures for litigation and alternative methods of dispute resolution (ADR); (9) skills in organizing and managing legal work; and (10) ability to recognize and resolve ethical dilemmas.[12]

The SSV also identified four fundamental values of the legal profession, along with a corresponding set of responsibilities. These are, respectively: (1) the value of providing competent representation (with an associated responsibility to clients); (2) the value of striving to promote justice, fairness and morality (with an associated public responsibility to the justice system); (3) the value of maintaining and improving the legal profession (with an associated responsibility to the legal profession); and (4) the value of striving

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[11] Id. at 135.

[12] See id. at 138-140.

for professional self-development (with an associated responsibility to oneself).[13]

The full MacCrate Report contained over 80 pages of elaboration of these skills and values. A subsequent chapter then examined current law school instruction in skills and values. While acknowledging that many of the skills can and should be taught in traditional Socratic method courses, the Report's authors seemed to feel that the preferred means of teaching many of the skills lies in such explicitly focussed skills training courses as clinics, externships, and simulations. The Report found that "the majority of graduating law students had four or fewer skills 'experiences' (simulated skills, clinics, externships or others) while in law school,"[14] and emphasized that "professional skills training occupies only nine percent of the total instructional time available to law schools."[15] The Report also contained a set of 25 recommendations for enhancing professional development during the law school years.[16]

On its face, however, the Report took some pains to stress that it was not intended as a criticism of existing law school education. The task force that conducted the study was officially named: "The Task Force on Law Schools and the Profession: Narrowing the Gap." The study thus started from the assumption that there is a gap, and that it needs to be narrowed. In the very first two sentences of the Report,

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[13] See id. at 140-141.
[14] Id. at 240.
[15] Id. at 241.
[16] Id. at 330-34.

though, the authors stated: "At its birth this Task Force acquired a name that projects a distorted image of a legal education community separated from the 'profession' by a 'gap' that requires narrowing. As the Task Force proceeded to fulfill its mission suggested by its name and to narrow the 'gap,' it recognized that the image was false."[17] The "gap," the Report stated, is primarily one of mistaken perceptions about the respective responsibilities and roles of law schools and law firms in legal education.[18]

As the official Report's subtitle indicates, the Task Force concluded that legal education is "an educational continuum," beginning before law school and continuing throughout a lawyer's entire career. The SSV, the Report stressed, is simply a guide designed to serve as "a basis for discussion and further development. Any direct, compelled use of the Statement ... would be antithetical to its purposes and goals."[19] Yet in the very next sentence the Report added, "We do believe the Statement should be an essential reference in the accreditation process."[20] Given that and similar statements, it should come as no surprise that most law schools regarded the MacCrate

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[17] Id. at 3.

[18] Id. at 4.

[19] Id. at 267. See also Robert MacCrate, Preparing Lawyers to Participate Effectively in the Legal Profession, 44 J. LEG. EDUC. 89, 90 (1994) ("We intended [the SSV] to be read neither as a prescribed catalog of courses nor as a catechism that law schools must teach.").

[20] Id.

Report as a challenge, backed by the ultimate threat provided by the ABA's role as the accreditation body for law schools in the US.[21]

II. Judge Edwards' Criticisms

While the ABA Task Force disavowed any notions of a direct attack on existing legal education, Judge Edwards took an entirely different approach -- his article was an outright attack on recent trends in US legal education. In the first paragraph, he stated: "The [law] schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. ... But many law schools -- especially the so-called 'elite' ones -- have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."[22]

Based on his own experiences in five years as a practitioner, over ten years as an academic (at Michigan and Harvard from 1970 to 1980, followed by part-time teaching positions thereafter at six different "elite" institutions) and over ten years as a judge (on the D.C. Circuit since 1980), as well as on a survey of his current and former law clerks, Judge Edwards issued a series of harsh criticisms of what he saw as trends in legal education. Most of these reflected various aspects of what Edwards characterized as a trend toward a "graduate school" model of the law school, focussed on questions of abstract theory,

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[21]I might add that the very fact that the ABA is the responsible accreditation body provides a further reminder that the primary focus of US law schools has been and remains the training of the profession.

[22]Edwards, supra note 9, at 34.

rather than a professional school model focussed on the needs of the practicing bar.

This trend, he argued, is reflected in hiring patterns at law schools.[23] Whereas skilled practitioners were once valued as new faculty members, now they are scorned and rejected. Instead, he claimed, faculty hiring focuses on what he refers to as "impractical" scholars -- those with Ph.D.'s in esoteric subjects ("the more esoteric the better," he later remarked at a conference I attended), who advance abstract theories but do not focus on practical, doctrinal issues of concern to practitioners.

These same attitudes affect scholarship, as well, Edwards argued. Many of this new generation of "impractical" scholars do not wish to focus on practical issues of use to the bar. Rather, they choose to write only for a narrow range of other scholars. And even if a young professor wished to write for the practicing bar, such articles would be looked down on and dismissed as mundane and dull when the professor was considered for tenure. As a consequence, fewer and fewer faculty members are willing to write the doctrinal articles and treatises that are of such importance to the practitioners, judges, and legislators who previously looked to law professors for guidance on difficult issues: "The 'impractical' scholar ... produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner."[24] And "[b]ecause too

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[23] Id. at 34-37, 50-51.
[24] Id. at 35.

few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers."[25]

These trends, Edwards contended, are also reflected in the law school curriculum. Because law schools tend to defer heavily to what teachers want to teach, and because so many of the "impractical" scholars want to teach only the "impractical" subjects that interest them, course offerings are increasingly slanted toward interdisciplinary courses and highly theoretical offerings that are not of use to the practitioner. At the same time, advanced doctrinal offerings are being lost from the curriculum. As a result, "[n]ow ... law students receive a rudimentary doctrinal education, but ... often do not receive the full and rich doctrinal education they deserve."[26]

Edwards' criticisms were based heavily on his views of "impractical" legal scholars. He set forth two main categories of "impractical" scholars:

> Critical legal studies exemplifies the first kind of "impractical" scholarship. The CLS scholar does not demonstrate how authoritative texts constrain and guide a governmental decision. Rather, quite typically, the CLS scholar purports to 'show' the opposite: that the texts are 'indeterminate.' ... [Such] legal nihilism ... has little direct

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[25] Id. at 36. It is worth noting, though, that tremendous numbers of practice-oriented articles, along with treatises on a wide range of topics, are now being written by practitioners; and many of these articles and treatises are of quite high quality.

[26] Id. at 58.

> utility for practitioners, judges, administrators, or legislators.
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> Law and economics exemplifies the second kind of "impractical" scholarship -- the kind that is directly prescriptive but wholly theoretical. Although law-and-economics scholars are often concerned with practical problems, they also typically ignore the relevant law.[27]

To "law and economics," Edwards added such other "law and" disciplines as "law and literature," "law and sociology," and the like. In his view, law schools are increasingly becoming dominated by such "impractical" types, and the traditional doctrinal scholars are being crowded out.

Edwards reserved his most stinging attacks, however, for what he regarded as the "disdain" that many "impractical" scholars have for the world of practice and that they convey to their colleagues and their students. The consequences of this disdain, he argued, are profound, both for other professors and for law students: "The scholar who attends to legal doctrine will have difficulty completing fine, influential, important work if he or she is disdained by haughty peers. ... The atmosphere is also profoundly inhospitable for law students[, who] will have gained the impression that law practice is necessarily grubby, materialistic, and self-interested and will not understand, in a concrete way, what professional practice means."[28] Edwards later added: "The ivory-tower elitism all too common among many 'law and'

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[27]Id. at 47.

[28]Id. at 37-38.

proponents, and their concomitant disdain for law practice, are deplorable."[29]

At times Edwards' article reads as though he wished all such "impractical" scholars would move to other theoretical graduate schools, where they presumably belong; but in several places he emphasized that "these various nontraditional movements have the potential to be valuable additions to the law school."[30] The key issue, he argued, is one of balance. Accordingly, to all of these problems, Edwards' primary remedy is restoration of balance: "The [law] schools must seek a balance of 'practical' and 'impractical' scholars: by hiring more of the former; by creating a congenial environment for their work; and by assigning them to teach the doctrinal curriculum."[31]

III. Responses to the Criticisms

Not surprisingly, law schools and law professors were quick to respond both to the implicit criticisms contained in the MacCrate Report and, especially, to Judge Edwards' frontal attack. One of the most comprehensive sets of responses appeared in an August 1993 symposium issue of the Michigan Law Review,[32] which contained seventeen separate responses to Edwards. A second major set of responses to both the MacCrate Report and the Edwards article is

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[29] Id. at 51-52.
[30] Id. at 49.
[31] Id. at 62 (emphasis in original).
[32] Symposium, Legal Education, 91 MICH. L. REV. 1921-2219 (1993).

contained in a July 1994 symposium issue of the Washington Law Review.[33]

One might have anticipated that some scholars would agree with Edwards that law schools are becoming much more like many other graduate schools, but would argue that this is in fact desirable -- that law schools should not be practical training schools, but should focus primarily on academic theory. Not one of the respondents in either symposium took that approach. While many of the authors argued that an increase in theoretical offerings is desirable, none suggested that the law school's primary role should be anything other than training of legal practitioners.

Thus, the key debate is not over what role the law school should play, but rather over how best to meet that role. And on this point, respondents to Edwards and the MacCrate Report have raised numerous objections, some focussed on the factual assumptions of those works, others on the values reflected.

One set of responses is that little really has changed at law schools, and that the changes that have occurred -- as, for example, in the growth of clinical offerings -- have in fact resulted in greater practical skills training for law students than was the case when Edwards went to law school in the 1960s. Dean Paul Brest of Stanford Law School, for example, argued that most faculty today do the same sort of doctrinal work as in the past, and saw little sign that the teaching and scholarship by professors with advanced degrees in other fields is more

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[33]Symposium on the 21st Century Lawyer, 69 WASH. L. REV. 505-677 (1994).

theoretically oriented than that of their colleagues. He also argued that, while the curriculum today offers more electives than in the 1960s, law students for the most part take the same range of courses as in the past, with "the most significant change in pedagogy [being] the advent of clinical methods ... [which] introduce students to practical lawyering skills -- such as counseling, witness examination, and negotiation -- [that were not available] thirty years ago."[34]

In a similar vein, Robert Gordon of Stanford, based on a survey of articles in three leading law reviews in 1910 and every tenth year thereafter, found that doctrinal articles made up the clear majority of contents in each year surveyed, and that doctrine's share was the lowest in 1950 and rose somewhat in both 1980 and 1990.[35] Gordon's estimate was that only about 15 percent of total scholarly output is now devoted to theory and "law and" work.

Yet another respondent, James J. White of Michigan, argued that, in his experience, the "law and"-type of scholar with advanced degrees in other fields generally "teach conventional law courses in precisely the same way one would expect lawyers to teach those courses. ... [In fact, s]ome of our Ph.D.s [who do not have law degrees] are so conscious of their nonlawyer status that they are even more careful to be good lawyers than the lawyers themselves."[36]

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[34]Paul Brest, Plus Ca Change, 91 MICH. L. REV. 1945, 1946 (1993).

[35]Robert W. Gordon, Lawyers, Scholars, and the "Middle Ground", 91 MICH. L. REV. 2075, 2099 (1993).

[36]James J. White, Letter to Judge Edwards, 91 MICH. L. REV. 2177, 2180 (1993).

Thus, one theme in the responses is that Judge Edwards is simply wrong -- law school education remains largely unchanged, with doctrine and the training of lawyers continuing to predominate. A further theme in some of these responses is that the primary change has come not at the law schools, but rather at the law firms, in the form of reduced training for recent graduates during their early years in practice.

A second set of responses acknowledges an increase in faculty members with interdisciplinary and theoretical interests, as well as an increase in interdisciplinary and theoretical course offerings, but argues that these developments have in fact enhanced the training of legal practitioners, and have had a profound impact on the law itself, as well. Judge Richard Posner, not surprisingly, took issue with Edwards' criticisms of law and economics as a theoretical approach with little relevance for practitioners, noting the tremendous impact law and economics has had on antitrust, administrative law, and a wide range of other fields.[37] He and many others observed that such relatively new fields as feminist jurisprudence, law and psychology, law and society, and critical legal studies have also had a major impact on law and practice.[38]

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[37]Richard A. Posner, ship, 91 Mich. L. Rev. 1921 (1993).

[38]See, e.g., id. at 1926; Gordon, supra note 35, at 2086, 2092; Brest, supra note 34, at 1949; Paul Brest and Linda Krieger, On Teaching Professional Judgment, 69 WASH. L. REV. 527, 537-558 (1994).

Other respondents noted the great increase in clinical offerings, simulations, negotiating and counseling classes, trial advocacy classes, and other such explicitly practice-oriented courses. They pointed not just to increases in the number of such courses, but to the greater prestige and importance accorded to such education. (One way in which this is reflected is the hiring of full-time tenured faculty -- who are almost invariably skilled practitioners of the sort Edwards presumably was referring to -- to teach clinical courses, as opposed to the part-time adjuncts who previously dominated clinical positions.) These respondents argued that these changes have in fact addressed a number of the very concerns raised by Edwards and the MacCrate Report.[39]

Running throughout most of the responses was the theme that, to the extent there have been changes in the law school curriculum, those changes have for the most part enriched law school education and helped better prepare law students for work as practitioners than did earlier law school education. Taken together, the responses present the following picture: The rather uniform, case-method examination of appellate level decisions that previously dominated the entire law school curriculum has changed. The case method remains dominant in the core curriculum, especially in the first year -- but for other courses, law school curricula have expanded in two directions. Law schools now provide more concrete practical training courses (such as

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[39]See, e.g., Menkel-Meadow, supra note 1; Paul D. Reingold, Harry Edwards' Nostalgia, 91 MICH. L. REV. 1998 (1993).

clinics), at the same time that they offer more theoretical courses that will help broaden students' perspectives and give them new tools that will aid in legal practice.

Thus, at one level, this line of response is an argument that legal education is enhanced, not diminished, by the various clinical, interdisciplinary and theoretical work now being pursued. A further underlying theme, though, is a view that both the MacCrate Report and Judge Edwards' criticisms reflect an unduly narrow conception of the lawyers' role and the proper scope of legal education in preparing new practitioners. One of the most articulate statements of this view is offered by Carrie Menkel-Meadow of UCLA School of Law. She wrote that the MacCrate Report presents "a particular picture of the lawyer, as principally a litigator, [and] assumes ... a particular view of the legal system as an adversarial one ...."[40] She stated that the Report's treatment of such topics as counseling, negotiation, and even Alternative Dispute Resolution largely reflects the traditional adversarial mindset, and argued that law school education should also train students in the "'human arts of lawyering,'"[41] including the art of interacting with others. Notably, she did so not because she disagreed with the MacCrate Report about the role of law schools, but because she

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[40]Carrie Menkel-Meadow, supra note 1, at 594. Others expressing similar views include, e.g., Lee C. Bollinger, The Mind in the Major American Law School, 91 MICH. L. REV. 2167 (1993), and Burnele V. Powell, Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age, 69 WASH. L. REV. 637 (1994).

[41]Menkel-Meadow, supra note 1, at 619 (quoting Gary Goodpaster, The Human Arts of Lawyering: Interviewing and Counseling, 27 J. OF LEG. EDUC. 5 (1975-76)).

believed that such "human arts" represent important traits for legal practitioners that have been ignored by legal education in the past.

Despite these responses, Edwards himself has reported that he was "overwhelmed" by the number of oral and written messages he has received supporting his views.[42] This support, he stated, has been widespread -- it has come not just from members of the practicing bar and other judges, but from law students, deans, and even professors.

IV. Personal Views.

So who's right? Edwards and the MacCrate Report, or the defenders of the law schools?

Not surprisingly, I find myself somewhere in the middle. I will focus my comments mainly on Edwards' attacks, since they are more direct and incendiary. I agree with Edwards that there have been some shifts at US law schools, and that in some respects those shifts have produced undesirable consequences. On the other hand, I feel that Edwards has greatly exaggerated the degree of the problem, has understated the value of theory and interdisciplinary work, and has largely ignored developments that have made law schools more responsive to certain needs of practitioners. At the same time, I would highlight what I see as perhaps even more significant declines in on-

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[42]Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 MICH. L. REV. 2191, 2193 (1993); Harry T. Edwards, Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession", 69 WASH. L. REV. 561, 562 (1994)

the-job training at law firms, which have created new sets of demands on law schools from the practicing bar.

Edwards' first criticism relates to faculty hiring. He decries the increasing importance placed on theory, interdisciplinary interests, and advanced degrees in fields other than law, and the concomitant decrease in respect for practitioners in the appointments process. The experience at my own law school provides both some support and some counter-evidence to these contentions. In the past ten years, the University of Washington School of Law has hired eleven new tenure-track faculty members in non-clinical fields. Of these eleven, six have advanced graduate level study in some field other than law, and at least one of the others could be characterized as primarily interested in theory. Yet ten of the eleven had at least three years of practice experience before joining the faculty, and most had spent five or more years in practice. While lawyers might object that three years in practice is not enough to turn anyone into an experienced practitioner, it is sufficient, in my view, to provide one with a clear sense of the interests and needs of the practicing bar.[43] Thus, these figures suggest that we are not tipping to the purely "impractical" scholars Edwards refers to.

Even at the University of Washington, though, I have seen cases in which very able practitioners, with excellent experience and credentials, have been rejected from consideration for faculty appointments

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[43]Edwards himself had practiced for five years before joining the faculty at Michigan Law School.

because they were not "exciting" enough -- they were too doctrinal, and lacked a theoretical or interdisciplinary focus. That attitude is in the distinct minority at my school, yet it can affect hiring decisions. While virtually all of our recent hires have had considerable practical experience, it is often no longer enough simply to be an excellent practitioner who would teach well and write works of importance to the practicing bar; a candidate usually must have something more -- such as advanced degrees or strong theoretical views. And this tendency is almost certainly far more pronounced at the more "elite" law schools to which Edwards referred in his article.

This attitude also affects faculty scholarship. As Professor Gordon found, most law review articles even today do in fact address matters relating to doctrine. Yet Edwards is right that the purely doctrinal article -- one that addresses difficult cases or issues of law; analyzes those cases or issues on the basis of precedent, statutory interpretation and the like; and then seeks to guide practitioners, the courts, and perhaps the legislature in dealing with the matter -- is now widely looked down on in academic circles. The same is true for the treatise. These forms of scholarship are often treated as mundane or insignificant. In contrast, the preferred form of scholarship is one that attempts to do more, by bringing in a theoretical or interdisciplinary dimension.

This attitude may have the most impact on those who do not yet have tenure. Assistant professors often are reluctant to work on doctrinal pieces, out of fear that such work will not be given much

credit in the tenure review process, and may even be looked on as a negative. I regret to say that this fear is often justified. And these attitudes undoubtedly affect more senior scholars, as well. Regardless of tenure, if they feel that their colleagues are not likely to respect certain types of research and writing, they are likely to be less willing to undertake it.

By this, I do not mean to suggest that I disapprove of the more theoretical types of scholarship. To the contrary, I find the good theoretical pieces far more stimulating than most doctrinal work, and some of the theoretical work has had tremendous impact on the development of law in the US. Yet I agree with Edwards that it is regrettable that doctrinal work should face such disfavor in the academic community.

As far as teaching is concerned, though, I do not share Judge Edwards' concerns. My impressions closely track those of Professor White at Michigan: professors with strong theoretical or interdisciplinary interests tend to "teach conventional law courses in precisely the same way one would expect lawyers to teach those courses."[44] Faculty interests certainly have some influence over the curriculum; more specialized courses and seminars in interdisciplinary topics are offered today, with some concomitant reduction in the number of advanced doctrinal courses. But the core of the curriculum -- especially the first year curriculum -- remains largely unchanged,

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[44]White, supra note 36, at 2180.

and, despite style differences, most professors approach it in a similar fashion -- with a combination of the case method and some lecturing.

Finally, I do not detect the widespread disinterest and disdain for the legal profession that Edwards attacks. A handful of professors might convey feelings of disdain for practitioners, but the vast majority of law professors continue to regard the education of the profession as their primary role -- a role in which they are very interested and to which they are fully committed. Naturally, many law professors are critical of various aspects of the profession, but very few look with disdain on it.

Thus, I agree in part with some of Edwards' criticisms, and disagree wholly with others. Moreover, I feel that Edwards has ignored many valuable aspects of the recent trends. I agree with those, such as Posner, Gordon and Brest, who have emphasized the benefits that more theoretical and interdisciplinary approaches have for enriching legal education -- not just for prospective scholars, but for legal practitioners. The impact of law and economics goes without saying; it is important for lawyers to have skills both in analyzing economic consequences and in responding to economic arguments, even flawed economic arguments. Similarly, psychological, sociological, and, I would add, comparative perspectives help broaden students' education and provide them with tools for legal practice.

Edwards reserved some of his harshest criticism for Critical Legal Studies (CLS), arguing that the "nihilist" approach of CLS has no value for practitioners: "The nihilist scholar, who believes that texts are

infinitely plastic and subjective, can only teach students to destroy legal texts, not to construct them."[45] He would apparently keep all CLS scholars away from the first year curriculum, and assign only doctrinal scholars to teach those courses.[46]

From my own experience, that would be a grave mistake. By chance, two of my core first year courses at Harvard Law School -- contracts and torts -- were taught by CLS scholars. Both were among the most valuable courses I had for actual practice.

One of those courses was taught by Duncan Kennedy. Kennedy has long been an outspoken critic of many aspects of private practice. He has written of "the corruption and compromised impotence of corporate practice";[47] and he has even gone so far as to advocate that young associates in large corporate firms "should think of it as a requirement of moral hygiene that they defy the people they work for, and do it at regular intervals,"[48] by, for example, "fight[ing] with your [senior partners] -- sassing them, maybe; undermining them, maybe; hurting their feelings, certainly."[49] Not surprisingly, these comments have elicited bitter reactions from many corporate lawyers;[50] and, to

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[45]Edwards, supra note 9, at 59.

[46]See text accompanying note 31 supra.

[47]Duncan Kennedy, Rebels from Principle: Changing the Corporate Law Firm from Within, HARV. L. SCH. BULL., Fall 1981, at 36, 37.

[48]Id. at 39.

[49]Id. at 40. Another tactic Kennedy suggests elsewhere in the article is: "refusing to laugh at [senior partners'] jokes. Blank expressions where the oppressor expects a compliant smile can be the beginning of actual power," id. at 39.

[50]See, e.g., HARV. L. SCH. BULL., Spring 1982, at 30-35, 53 (reprinting numerous responses to Kennedy's article).

many of them, Kennedy has become the symbol of academics who scorn the legal profession and "brainwash"[51] students with that viewpoint.

Thus, although Edwards never cited him by name, Kennedy presumably was one of the academics Edwards had in mind when he spoke of those who "disdain" the legal profession. Nonetheless, in teaching first-year torts, Kennedy -- while making no secret of his disapproval of many aspects of corporate practice -- focused heavily on the key arguments that routinely are employed in private practice (what he called "killer arguments"). And, when I reached private practice myself, the single most important lesson for me from my law school education lay in Kennedy's "number one killer argument": before turning to theory, always carefully examine the facts; if your opponent has the facts wrong, or the facts don't support the claim being advanced, focus on the facts, not some unnecessary theoretical argument. Kennedy hammered home this highly practical lesson on the importance of facts over theory time and again throughout the course, yet Edwards presumably would exclude him from teaching the core curriculum, in part because he is too "theoretical."

As for Edwards' criticism of the "nihilism" of CLS, in my experience the CLS-oriented courses, in seeking to show that specific outcomes were "indeterminate" (in other words, that legal doctrine could be manipulated to justify a wide variety of possible decisions), also helped to train students in advocating positions and in creatively

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[51] See id. at 34 (letter from J. Edward Thornton).

seeking new approaches.[52] Thus, even for the traditional practitioner, these courses, in my view, have helped enrich the curriculum.

It is true that a greater number of advanced level theoretical and interdisciplinary courses are being offered now than in the past, with some consequent decline in the number of advanced doctrinal courses. But while I agree with Edwards that a proper "balance" is important, he and I would probably disagree on where that balance should be. At one point, Edwards concedes that most of what he considers crucial in law school could be covered in less than two years; and, in my experience, students who found the case method exhilarating in their first year tend to lose interest after repeating the same basic approach for three full years. For this reason, as well, the more theoretical offerings -- what I would call "perspectives courses" -- may enhance legal education without detracting from the basic core.

Furthermore, at the other end of the spectrum lies another recent trend that Edwards almost completely ignores: a great expansion in clinical offerings and other explicitly skills-oriented classes. Again using the University of Washington School of Law as an example, in the six years since I arrived, by far the single largest expansion has come in this area. We have upgraded our basic legal skills program (a required year-long course for all first-year students, which includes extensive research and writing assignments, as well as oral arguments, and for which we have three full-time instructors for a student body of 150 each year). We have also hired a new tenure-track professor to head

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[52]For an excellent elaboration of this point, see Gordon, supra note 35, at 2090-2096.

and expand our trial advocacy program, which consists of a two-quarter course covering, among other things, discovery, witness examination, and oral argument, with frequent videotaping of students, and culminating in a full jury trial before a real judge in a local court.

In addition, we have greatly expanded our clinical program, which now has one tenure-track professor and five full-time lecturers. We now have five clinics -- in criminal law, civil law, immigration law, housing law, and mediation. In all of these, students begin with intensive skills training and then progress to representation of actual clients, under the supervision of the instructors.

Other explicitly practice-oriented course offerings include: appellate advocacy, mediation, negotiation, alternative dispute resolution, interviewing and counseling, legal drafting, advanced legal research, and even law office management. For a school of our size -- with only about 150 JD students in each class, this may well be one of the largest sets of clinics and practice-oriented courses in the US (and, I might add, the faculty as a whole made the commitment to move in this direction shortly after I arrived, well before the MacCrate Report was issued). Yet the trend toward expanded clinical offerings is widespread in law schools across the US.

One further aspect of the clinics bears note. In past years, clinical instructors were typically treated as second-class citizens within most US law schools. They were hired on short-term appointments and frequently were not permitted to attend faculty meetings nor otherwise treated as regular faculty members. There are

still some class differences, but those are rapidly eroding. At the University of Washington, for instance, of the ten clinicians, two are on the tenure track and three more have long-term appointments, and all are included in faculty meetings and other faculty events.

These trends in clinics and other practice-oriented courses serve as a sharp counter-example to Judge Edwards' concerns over a growing disjunction between law schools and the bar.

Since Professor Carl Green's article in this symposium addresses issues of legal education at law firms,[53] I will not dwell long on this topic. But, as one who was formerly an associate at a law firm and now looks from the other side, my sense is that the concerns expressed in the MacCrate Report may stem more from changes in how law firms approach the training of new attorneys than from any change at the law schools. The traditional ideal of the apprenticeship model of the law firm, in which young lawyers regularly received careful mentoring from senior partners, is undoubtedly in part an idealized picture. Yet in my view there is no question that young attorneys today receive far less on-the-job training than they once did, and that law firms are increasingly expecting law schools to provide the sort of practical training that in the past would generally have occurred at the firm.[54]

One reason for this, I suspect, is the increasing specialization of law practice. Whereas attorneys once trained as generalists, and thus

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[53] Carl Green, Hogaku kyoiku: Kiki semaru?, 1995-1 Amerikaho 27.

[54] For an examination of this issue, with a focus on the situation in the State of Washington, see Lucy Isaki, From Sink or Swim to the Apprenticeship: Choices for Lawyer Training, 69 WASH. L. REV. 587 (1994).

would rotate among assignments -- and, in larger firms, among such departments as the corporate, litigation and tax departments, now more attorneys step straight into specialty areas, without receiving broad exposure to other fields.

Another factor -- and probably the most important -- relates to economic pressures and competition. As salaries have risen, pressures have risen for young attorneys, and, for that matter, partners, to pay their own way through increased billable hours. This has left less time for on-the-job training on both sides.

Yet another factor may be the expansion in law firms. When firms were small, with one partner or senior attorney for every younger attorney, regular mentoring may have been a realistic goal. During periods of rapid expansion, though, it is much more difficult to achieve this.

Finally, a related factor is simply the overall expansion of the bar. When I clerked for a district court judge in Maine, where the bar was still relatively small, the judge -- who had been on the bench for 25 years -- knew virtually all of the attorneys who practiced before him. When young attorneys came before him, he would often offer gentle guidance from the bench, and he would frequently supplement it later, in his chambers, with more specific advice on how they could improve their performance. In some cases, opposing counsel would also offer advice to younger attorneys from the other side -- after the trial had ended, of course. With the expansion in the bar, coupled with greater competition, fewer judges get the chance to know the attorneys

practicing before them, and much of this informal guidance also appears to have been lost.[55]

The Washington State Bar Association has had some discussion of this decline in on-the-job training, and has even considered a proposal for institution of an apprenticeship requirement for new attorneys -- a period of time following graduation but prior to receipt of a full license, during which they would receive low pay but careful training. As the State Bar has recognized, though, unless most other states adopt such a requirement, the likely impact of the low pay would be that the top graduates from Washington law schools would leave the state, and the top graduates from out-of-state law schools would not come to Washington to practice.[56] A further difficulty, of course, is ensuring that the training would be any more thorough than it is today. Thus, as a practical matter, this proposal is almost certainly dead; and, while many law firm partners acknowledge the importance of better training, most add that, in today's competitive climate, there is little they can do.

As an academic, I find it rather ironic to note that both the MacCrate Report and Judge Edwards' article contain recommendations for the bar, as well as for law schools. The MacCrate Report bore the subtitle, "An Educational Continuum," and emphasized that training of lawyers should be a shared responsibility of law schools and law firms; and Edwards, after stating that law schools have abandoned their

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[55]Isaki, id. at 588, describes very similar trends in Washington; and there is no reason to doubt that similar changes are occurring throughout the United States.

[56]See id. at 589-591.

proper place, immediately added: "Many law firms have also abandoned their place, by pursuing profit above all else,"[57] and included a section dealing with what he views as law firms' responsibilities in the development of young lawyers. Despite this attention to law firms in both publications, the sections on law schools appear to have gotten the bulk of the attention, while those on law firms have largely disappeared from sight.

I should not leave you with the impression, though, that the impact on law schools has been great. At least in terms of direct, concrete impact, I would have to say that the opposite is true, at least to date. Earlier this year, a professor sent out a message over electronic mail -- the Internet -- to a group of several hundred law professors, asking whether the MacCrate Report had had any impact at their law schools. Only two law schools responded, one of which was the University of Washington, and both said that they had already decided to undertake a major curriculum review, and the MacCrate Report was one source, among many, that they were considering.

At a less concrete level, though, I believe that both the MacCrate Report and Judge Edwards' article have had a great impact at law schools. At the very least, they have generated tremendous discussion, both within law schools and between practitioners and the law schools. My sense is that these discussions are, first, serving to reaffirm the view, on both sides, that the primary role of the US law school is the education of practitioners, and, second, leading to further discussion of

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[57] Edwards, supra note 9, at 34 (emphasis in original).

what that education should include. At that level, at least, the MacCrate Report appears to be having precisely the impact that its authors desired, even if the ultimate result may be a vision -- and a set of skills and values -- quite different from what either MacCrate himself or Judge Edwards might have envisioned.

V. Academics and Practitioners in the Transnational Context

In closing, I might add a few comments about the gap between law schools and practitioners in the US with respect to transnational practice issues. I frequently hear practitioners express the view that, as legal practice becomes increasingly global in nature, law schools should be providing students with more instruction in international and comparative law. Within law schools, as well, I frequently see rhetoric about the vital importance of international and comparative law study in this age of globalization.

Although this may seem like a shameless promotion for my law school, I'm proud to be able to say that the University of Washington has lived up to the rhetoric. Thanks to the efforts of Dan Fenno Henderson, John Haley, and others, we have had a wide range of offerings in comparative law for nearly thirty years. Twenty percent of our non-clinical faculty now specialize in either international or comparative law, and another twenty percent regularly teach comparative law courses. Moreover, many of those courses are explicitly oriented toward practice, including courses in comparative corporate, trade, and tax law; international commercial law; transnational litigation; and an international contracting course that uses simulated

negotiations (frequently involving teams of businesspeople from the Business School represented by lawyers from the Law School).

Furthermore, the comparative and international offerings continue to expand. In fact, next to the clinics, the international area has probably seen the greatest expansion in the six years since I joined the faculty. In addition to long-standing LL.M. programs in Asian Law and in Law and Marine Affairs, new LL.M. programs have been started in International Environmental Law and Law and Sustainable Development; a new center focussing on international intellectual property issues has been expanding rapidly; and we have just established a new International Commercial Law Institute. In addition, we have just instituted an Asian Law Concentration Track, through which JD candidates will be able to specialize in Asian law issues.

In all of these developments, our main goal is to offer a mix of practice-oriented and perspectives courses with an international dimension, which we hope will ultimately result in more capable practitioners for transnational business. In fact, a major concern in the recent expansion is that of balance. With as many course offerings as we now have, it is possible for a student to assemble a schedule for the second and third years consisting almost entirely of international and comparative law courses. By careful monitoring of students' schedules, I hope we can avoid that from happening; ; but I have no doubt that every two or three years a student will end up with a schedule so heavily weighted to either public or private international law that Judge Edwards could justifiably say the law school has not provided that student with enough in the way of doctrinal coursework.

Of course, the University of Washington is far from the only law school with wide offerings in international law. It goes without saying that many of the major law schools have long offered a wide range of courses in international and comparative law. And I am delighted to see reports that several of those schools, as well as a number of other schools, have recently undertaken major efforts to expand their programs in international and comparative law. Too often, though, I am afraid to say, the rhetoric of US law schools about the importance of international law ends up as just rhetoric. My sense is that at many schools, the number of comparative and international law offerings has, if anything, declined after reaching a peak in the 1950s and 1960s. Most law schools offer a course in public international law; and most also offer a course in international business transactions (sometimes taught by a full-time faculty member, sometimes by an adjunct from practice). Yet, at a majority of US law schools, there are only occasional other offerings in comparative and international law. And even at schools where there are many such courses, a frequent complaint from faculty members teaching in the international and comparative area is that they are perceived as a distinct group, separate from the rest of the faculty, and their courses are regarded as add-ons, not integral to the main curriculum. I find this regrettable. As our experience at the University of Washington has shown, a rich array of international and comparative law courses can provide both broader perspectives for students and the sort of valuable training for practitioners that both Edwards and the MacCrate Report seek.