



# An Apprenticeship of Professional Identity: *A Paradigm for Educating Lawyers*

By Nelson P. Miller

Every so often, a profession faces an assessment or event that demands a new paradigm. The just-released Carnegie Foundation report titled *Educating Lawyers: Preparation for the Profession of Law*,<sup>1</sup> years in the making, may prove to be just such a watershed for legal education.

Watergate in 1972 was one such watershed event for the legal profession. For legal education, Watergate brought to life the current ethics emphasis and professionalism programs. Some, and perhaps many, would agree that lawyers are better for the influence of the Watergate-spawned ethics programs.

The American Bar Association's 1992 MacCrate Report,<sup>2</sup> identifying lawyer skills and values, established another paradigm for legal education. It gave new standing and life to the clinical and practical skills movement. The MacCrate Report's ten lawyer skills and four lawyer values continue to define the skills many law schools teach students. Many would agree that law schools produce more highly skilled lawyers as a result of the MacCrate Report's influence.

The 2007 Carnegie Report may have an equal impact. *Educating Lawyers* is the Carnegie Foundation's first in a series of studies it plans to publish on five professions: law, engineering, the clergy, nursing, and medicine. The fact that *Educating Lawyers* is one in a series of studies of the professions gives the report a breadth, insight, and credibility it might not otherwise have had. The fact that the report will be read widely outside of the legal profession is another reason that the report will demand attention within the profession. It is, at least, what the wider academic world, not a circle of insiders, thinks of lawyers and the legal profession.

Indeed, the refreshing thing about the Carnegie Report is that it is not a sour history of law school,<sup>3</sup> nor a critical judgment,<sup>4</sup> and not overtly ideological,<sup>5</sup> like other well-known and otherwise well-written books on law school. There are many books and articles charting the trends and judging the merits and demerits of law school. Many of them are highly critical, perhaps serving right an overly critical legal academy. Judge not, lest ye be judged.

For instance, one very recent article published in the psychology literature reports the “corrosive effect” of law school on law students’ well-being, values, and motivation.<sup>6</sup> Ouch. The three-year study of two different (thankfully unnamed) law schools attributed their corrosive effect to a “problematic institutional culture” that overvalued scholarship, undervalued teaching, employed unsound teaching and testing techniques, and overemphasized the abstract rather than training in the practical.<sup>7</sup> Ouch again.

That study’s psychological (hard not to say psycho-babble) recommendation to provide students greater “autonomy support” (defined as choice, rationale, and empathy) seems self-evident. Sure, law students would feel better if they were supported in doing as they wished. But just how in that comparatively less-restrained environment does one help them become better lawyers?

The Carnegie Report is different from most, if not all, of these other, more or less highly critical, works. It is instead so rich with helpful reflection and insight that it seems sure to have a long-term and positive influence on legal education and lawyers.

The Carnegie Report’s great helpfulness may in part be because it is written by educators—not ivory-tower academics most interested in adding to their scholarship, but real educators deeply interested in training better professionals. Only one of the report’s five co-authors holds a law degree. All five of its authors are recognized outside of legal education as scholar-educators. One of its authors, Lee Shulman, is arguably the single most distinguished educator of professionals of our time—but that, of educational psychologists and medical doctors, not lawyers. So these authors, primarily outsiders but with keen skills, should be able to give us some distinctly fresh insight into legal education.

As to its substance, the Carnegie Report is organized into three sections: knowledge, skills, and ethics.<sup>8</sup> The report’s knowledge-skills-ethics structure mimics the Thomas M. Cooley Law School’s practice-preparation slogan (yes, “Knowledge, skills, and ethics”) and the structure of its curriculum. The coincidence should not be surprising. Knowledge, skills, and ethics in essence reflect the what, the how, and the why of educating lawyers. Knowledge is the “what” or substance of law. Skill is its “how” or practical side, while ethics is its mysterious, ontological “why.”

Indeed, because American Bar Association standards now require skills (clinical) and ethics instruction, we should not be surprised that a law school curriculum or, for that matter, an assessment of law school (like the Carnegie Report) should be organized along the three dimensions.

On the other hand, various law schools unquestionably give greater or less emphasis to the other two dimensions of skills and ethics, while continuing to treat knowledge (doctrine) as supreme. Some law schools still undoubtedly treat ethics, for instance, as subordinate—nearly, it seems, as

an afterthought, or add-on if one considers the limited course credit and offerings, the placement of ethics instruction within the curriculum, and the status (meaning the lack thereof) given to the instructors who teach it. In other law schools, skills instruction might fare little better.

But really, for law schools, the dynamic should not be competition among knowledge, skills, and ethics proponents for equal (or superior) footing within the curriculum. Indeed, the great insight of the Carnegie Report is that it recognizes the value not only of balancing those three dimensions of law practice but of *integrating* them.<sup>9</sup> While the 1992 MacCrate Report encouraged the development of skills and ethics across a law school’s knowledge dimension (perhaps as an accompaniment), the Carnegie Report stresses more clearly that there must be an integration of knowledge, skills, and ethics.

In that respect, the Carnegie Report is an endorsement, not an indictment, of law school programs that sufficiently value skills and ethics instruction to make them an integral part of the curriculum. What is most likely to have a profound effect on law schools is the Carnegie Report’s assertion that law schools must better integrate the skills and ethics components into the traditional (and traditionally over-emphasized) knowledge dimension.<sup>10</sup> “Adding more requirements to the student’s curriculum fails to get at this problem,” write the report’s authors, “because it is precisely how to integrate the acquisition of conceptual knowledge and competence with ethical intention that is in question.”<sup>11</sup>

What is the problem that the report’s authors perceive? What do the authors mean by “integration”?

Think of your own law-school experience. Or think of Hart’s experience with Professor Kingsfield in the law-school movie *The Paper Chase*. The first-year torts, contracts, property, criminal law, and constitutional law courses are doctrinal (knowledge-dimension) courses. They are not skills or ethics classes, which are instead typically offered in the second or third years. By then, the law student’s approach to the law has largely been formed by the first-year experience. Law students understand what legal educators and lawyers value by what is first and dominantly offered to them.

#### FAST FACTS

*A groundbreaking study holds that for law schools to instill in students a healthy professional identity, they must integrate skills and ethics into instruction.*

*Some law students feel that the legal reasoning they are taught is intensely dehumanizing.*

But it is not only the order of the courses that creates an imbalance. It is also their conduct. The classic doctrinal-course questions posed in class by the fictional Professor Kingsfield and his not-so-fictional emulators in law schools still today have little or no direct practice context. The questions tend to be, “What does this case mean?,” “What is its holding?,” and “Was it rightly decided?” These are largely abstract questions—at least to anyone other than possibly the judge and law clerk. The questions are so abstract that lost are the skills and ethics dimensions with which the cases are actually laden.

Practical and ethical exercises in these first-year courses, drawn from the same case materials, would be more like, “You just lost this case. Explain why to your law partner and client.” Thus, with the slightest of alterations in perspective, the same venerable cases can come alive with considerations that force students not merely to analyze but to exercise interpersonal and strategic skills and develop an ethical identity. First-year doctrinal courses are rich with opportunity for the integration of skills and ethics. It is the Carnegie Report’s primary thesis that law schools should seize those opportunities if they are to train skilled and ethical, not to mention more whole and happy, lawyers.

The Carnegie Report points out that apprenticeship used to do the integration trick. By contrast:

Today’s law students encounter this once-unifying experience as three differentiated, largely separate experiences. Students encounter a cognitive or intellectual apprenticeship, a practical apprenticeship of skill, and the apprenticeship of professional identity and purpose, often through different faculty with different relationships to the institution.<sup>12</sup>

Of course, the problem with law schools is also their strength: that in the first-year curriculum they imprint students with an analytic framework that promotes legal problem-solving. Unlike many other, more critical judgments, the Carnegie Report does not stint on lauding law schools’ great work in this respect. It is just that at the same time, the so-purely analytical framework

dehumanizes the practitioners and participants. It removes the ethical, social, and moral roots of law while stripping the lawyer and client of professional and personal identity.

Thus it is that the Carnegie Report suggests how law schools’ great “triumph of formal knowledge” succeeds in raising law school above a mere trade school but comes at a significant price.<sup>13</sup> And what a price it is. The Carnegie Report cites studies suggesting, for instance, that law students’ moral development stops in law school and does not resume after graduation.<sup>14</sup> The disappointing contrast is that other studies show that moral development in non-lawyer adults and through other professional programs either can or does continue.<sup>15</sup> The most negative way of looking at these studies is that law school, while equipping graduates with substantial analytical skill, actually stunts too many graduates’ natural analogical, interpersonal, and ethical growth.

The Carnegie Report sees hope in “the teaching of practical judgment” as the “compelling focus” of legal education.<sup>16</sup> It is not an amoral, technocratic judgment law schools should continue to teach. Rather, practical judgment brings a client’s matter into “an illuminating relationship to the legal tradition’s central principles and defining commitments.”<sup>17</sup> While they make practice more comprehensible to students, law schools should do so “guided by astute legal and moral perception” reconnecting “what the positivist legacy in university education has sundered.”<sup>18</sup> “Because it always involves social relationships with consequences, practice ultimately depends on serious engagement with the meaning of the activities—in other words, with their moral bearing.”<sup>19</sup>

The report thus recommends “intense faculty conversation and experimentation around integrating their students’ educational experience.”<sup>20</sup> The report uses the law school at CUNY as an example, where all first-year students take a two-semester “lawyering seminar” that introduces them immediately to practice roles, writing, and other skills and ethics activities contextualizing course content.<sup>21</sup> Apparently, there is no need to divorce first-year instruction in legal analysis from the practical and humane sides of the law, because legal reasoning in its best form “provides a natural deep structure capable of uniting theory and practice.”<sup>22</sup>

Indeed, the Carnegie Report seems most to assert that, not only is there no need to so sharply divide knowledge from skills and ethics and grant knowledge priority, but moreover, law schools do so to the detriment of their students’ ability to acquire in a useful manner that very knowledge which the division and priority was presumably intended to promote. Teaching analysis independent of its ordinary skills and ethics context unwisely frustrates the inspiration, motivation, and connection the student most needs to succeed in this most challenging of academic environments.

The Carnegie Report sums up thus: that law schools should be seen as complex settings for apprenticeship. The schema that lawyers use in legal analysis are really theories of practice and of professional ethics or identity.<sup>23</sup> In that sense, skills and ethics are not divorced from knowledge, but a reflection of it—just as knowledge is a reflection of skills and ethics.

Ultimately, professional performance involves many more skills and a more complete professional identity than can be



learned in any pedagogical context.<sup>24</sup> There is simply a lot more to law practice than the ordinary classroom can offer. Students must also learn from the wisdom of practice. The knowledge, skills, and ethics domains must be re-connected through an apprenticeship of professional identity to complete the pedagogical cycle.<sup>25</sup> What is required is a highly interactive learning context connecting ethical theory with law practice.<sup>26</sup>

In so concluding, the report's authors considered the views not only of the law school hierarchy but of law students as well. Extensive field study inside and outside of the classroom at a range of law schools produced "a richly detailed picture of how law school goes about its great transformative work" of nurturing lawyers.<sup>27</sup> The authors' conclusion was that without effective ethics instruction, law students are left with a lack of a sense of meaning—one of their central concerns. One student observed that "law schools create people who are smart without a purpose."<sup>28</sup> Students simply feel that "[t]he model we are taught [of impersonal reasoning] is intensely dehumanizing."<sup>29</sup>

Law schools would teach more effectively if they kept "the analytical and the moral, the procedural and the substantive in dialogue throughout the process of learning the law."<sup>30</sup> Professors should not tell first-year students that their moral concerns are irrelevant to legal analysis, because law must be understood in the context of its social purpose. Sensitive teaching reminds students of that broader purpose. The goal "has to be holistic: to advance students toward genuine expertise as practitioners who can enact the profession's highest levels of skill in the service of its defining purposes."<sup>31</sup>

In the end, the Carnegie Report concludes, law school must prepare lawyers to sustain the United States as a free society worthy of its citizens' loyalty.<sup>32</sup> Just as law schools bear a responsibility to the soul of the professional and spirit of the profession, they also bear a responsibility to the survival of that which makes the United States a great nation. Law school fulfills that role best when it enlivens rather than retards its students' moral imagination.

The educator John Dewey wrote in his 1938 classic *Experience and Education* about the duty we owe to students to help them connect their learning to their most essential purpose:

There is, I think, no point in the philosophy of progressive education which is sounder than its emphasis upon the importance of the participation of the learner in the formation of the purposes which direct his activities in the learning process....<sup>33</sup>

Perhaps, in the end, that connection between learning and purpose is what the Carnegie Report asks law schools to continue, or once again, to make. The Carnegie Report is a profound reminder that good teaching is both marvelously simple and incredibly complex. ■

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#### FOOTNOTES

1. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (San Francisco, CA: Jossey-Bass, 2007), p 87 [hereinafter Carnegie Report].
2. American Bar Association, Section on Legal Education & Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum* ("MacCrate Report") (Chicago, IL: ABA, 1992) available at <<http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>> [accessed December 17, 2007].
3. See, e.g., Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill, NC: Univ. North Carolina Press, 1983).
4. See, e.g., Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* (Durham, NC: Carolina Academic Press, 2003).
5. See, e.g., Carrington, *Stewards of Democracy: Law as a Public Profession* (Boulder, CO: Westview Press, 1999).
6. Sheldon and Krieger, *Understanding the negative effects of legal education on law students: A longitudinal test of self-determination theory*, 33 *Pers & Soc Psychol Bull* 883 (2007).
7. *Id.*
8. See Carnegie Report, *supra* at 17–18 (plan of the report).
9. See *id.* at 12, 13–14, 22, 27–29, 58, 79, 81–82, 121, 124–125, 194.
10. *Id.* at 12, 34, 58, 59, 79, 189–191.
11. *Id.* at 58.
12. *Id.* at 79.
13. *Id.* at 5; see also 52–53, 55.
14. *Id.* at 133–134.
15. *Id.* at 134.
16. *Id.* at 8.
17. *Id.* at 8–9.
18. *Id.* at 9–10.
19. *Id.* at 11–12.
20. *Id.* at 34.
21. *Id.* at 34–36.
22. *Id.* at 42.
23. See *id.* at 101.
24. *Id.* at 104.
25. *Id.* at 104, 108.
26. *Id.* at 134.
27. *Id.* at 16.
28. *Id.* at 142.
29. *Id.* at 159.
30. *Id.* at 142.
31. *Id.* at 160.
32. *Id.* at 202.
33. Dewey, *Experience and Education* (New York: Macmillan Co, 1938), p 77.