

## THE CARNEGIE EFFECT: ELEVATING PRACTICAL TRAINING OVER LIBERAL EDUCATION IN CURRICULAR REFORM

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The Carnegie Foundation issued its book-length report, *Educating Lawyers: Preparation for the Profession of Law* (*Carnegie Report*) in 2007.<sup>1</sup> Although there have been numerous responses to it, relatively few have engaged it with any degree of critical analysis.<sup>2</sup> Law schools across the country have enthusiastically mentioned the *Carnegie Report* in connection with curricular changes intended to “prepare” students, in the words of the *Report*, for the practice of law.<sup>3</sup> Mostly these changes amount to adding clinical options or even clinical requirements, adding units to legal writing programs, and updating professional responsibility courses. Very few, if any law schools, however, have publicly considered the full implications of what it means to be “prepared” for the practice of law, or what the *Report* meant by that term. For the most part, the legal education community has assumed

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1. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter *Carnegie Report*].

2. Critical responses include the following: Anthony V. Alfieri, *Against Practice*, 107 Mich. L. Rev. 1073 (2009) (criticizing *Carnegie Report* for overlooking alternative theoretical frameworks); Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching after the Carnegie Foundation’s Educating Lawyers*, 31 W. New Eng. L. Rev. 97 (2009) (criticizing *Carnegie Report* for its treatment of the Socratic method); Leonard J. Long, *Resisting Anti-intellectualism and Promoting Legal Literacy*, 34 S. Ill. U. L.J. 1, 20 (2009) (criticizing *Carnegie Report* being anti-intellectual). See also Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 German L.J. 717 (2009); Jess M. Krannich et al., *Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 Denv. U. L. Rev. 381 (2009); Patrick E. Longan, *Teaching Professionalism*, 60 Mercer L. Rev. 659 (2009); James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 Intl. J. Leg. Info. 1 (2007).

3. *Carnegie Report*, supra n. 1, at 1, 22; Karen Sloan, *Reality’s Knocking: The Recession Is Forcing Schools to Bow to Reality*, Recorder 1, 10 (Sept. 9, 2009).

this simply means more training in practical skills.<sup>4</sup> For the *Report*, however, being prepared for the practice of law means much more. As I will discuss in this Article, the *Report's* primary argument is that traditional legal pedagogy has overemphasized legal theory and underemphasized practical skills and development. By focusing on theory in the abstract setting of the classroom, the *Report* argues, traditional legal education undermines the ethical foundations of law students and thus fails to prepare them for the practice of law in not only the practical sense but also in the ethical sense. The *Report*, therefore, calls for law schools not simply to produce better-skilled practitioners, but rather to infuse lawyers with a highly developed sense of moral and ethical identity, which will then lead to a reform of the profession itself.

As I will discuss below, however, even if one accepts the *Carnegie Report's* vision of professional identity, it is not at all clear that reforming legal education, by itself, will have a significant impact on the profession as a whole. In this Article I will argue that, even if legal educators wish to embrace a more progressive vision of the profession, and even if we agree that legal education should take the lead in bringing it about, the *Carnegie Report's* perspective is far too narrow. Specifically, the *Report* failed to consider whether the erosion of professional ethics is symptomatic both of a much broader trend in higher education as a whole and of significant changes in the profession itself.

### I. THE CARNEGIE REPORT ON LEGAL EDUCATION

The *Report's* central conclusion is that, although traditional legal pedagogy is very effective in certain aspects, it overemphasizes legal theory and underemphasizes practical skills and professional development.<sup>5</sup> By focusing on theory in the abstract setting of the classroom, the *Report* argues, traditional legal education undermines the ethical foundations of law students and fails to prepare them adequately for actual practice.<sup>6</sup> Traditional legal

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4. Erwin Chemerinsky, *Why Not Clinical Education?* 16 *Clin. L. Rev.* 35 (2009); Leah M. Christensen, *The Power of Skills: An Empirical Study of Lawyering Skills Graded as the Strongest Predictor of Law School Success*, 83 *St. John's L. Rev.* 795 (2009).

5. *Carnegie Report*, *supra* n. 1, at 24

6. *Id.*

education is effective in teaching students to “think like lawyers,” but needs significant improvement in teaching them to function as ethical and responsible professionals after law school.<sup>7</sup> As I will discuss in greater detail below, in general, the *Report* recommends “contextualizing” and “humanizing” legal education by integrating clinical and professional responsibility courses into the traditional core curriculum.<sup>8</sup> In this way, students will learn to think like lawyers in the concrete setting of actual cases and clients.<sup>9</sup> The *Report* refers to pedagogical theories developed in other educational settings and argues that these theories show that teaching legal theory in the context of practice will not only better prepare students to be lawyers, it will also foster development of a greater and more deeply felt sense of ethical and professional identity.<sup>10</sup>

The first chapter of the *Report* focuses on a survey of typical law school first-year programs, contrasting the traditional approach with two law schools that have implemented more innovative curricula. The study identifies and describes the “signature pedagogy” of legal education, analogizing it with a concept borrowed from linguistics.<sup>11</sup> Like language, the authors explain, the signature pedagogy of law school has four “structures”: a “surface structure,” a “deep structure,” a “tacit structure,” and a “shadow structure.”<sup>12</sup> The “surface structure” is the most obvious and observable aspect of the Socratic Method—the instructor calls on students and leads them through the intricacies of a case by asking a series of questions.<sup>13</sup> The “deep structure” is the purpose behind the Socratic Method—teaching students to “think like a lawyer.”<sup>14</sup> The “tacit structure” is that a student’s personal sense of morality is not necessarily relevant to resolving legal problems.<sup>15</sup> Finally, “the shadow structure” is the absent or weakly developed part of legal education, which is clinical training.<sup>16</sup> The

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7. *Id.* at 29–33.

8. *Id.* at 115–122.

9. *Id.* at 79.

10. *Id.* at 79–81.

11. *Id.* at 23.

12. *Id.* at 24.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

weakness in legal education, according to the *Report*, occurs primarily in the tacit and shadow structures.<sup>17</sup>

Having described the traditional approach to legal education, the *Report* then examines legal education in the context of professional education as a whole, using the concept of apprenticeship as a metaphor for the three dimensions of professional education.<sup>18</sup> Students in professional schools are taught on three dimensions, namely thinking, behaving, and performing. Each of these dimensions is described in the *Report* as an “apprenticeship.”<sup>19</sup> During the first apprenticeship, students are taught a specific form of reasoning through the Socratic Method.<sup>20</sup> In the second apprenticeship, students learn the actual practice of law through simulation and clinical courses.<sup>21</sup> In the third, students develop a sense of professional identity.<sup>22</sup>

By using the metaphor of apprenticeship, the *Report* emphasizes that professional education is a formative experience and should therefore focus expressly—not just “tacitly”—on developing a law student’s sense of professional identity grounded in ethics. Reforming legal education is intended to facilitate reform in the legal profession as a whole because “[f]or professional education, the question is how to provide a powerful experience of the best sense of what it means to take up a profession.”<sup>23</sup>

Thus, the *Report* reasons, “professional education is . . . inherently ethical education in the deep and broad sense.”<sup>24</sup> And therefore fostering a sense of ethical identity literally means fostering *moral* identity: “The moral development of professionals requires a holistic approach to the educational experience that can grasp its formative effects as a whole.”<sup>25</sup>

Chapter Two of the *Report* focuses on the strengths and weaknesses of legal education’s “signature pedagogy,” which is the “case-dialogue method.”<sup>26</sup> Using the archetypal fictional ex-

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17. *Id.*

18. *Id.* at 27–29.

19. *Id.*

20. *Id.* at 28.

21. *Id.*

22. *Id.*

23. *Id.* at 30.

24. *Id.*

25. *Id.* at 31.

26. *Id.* at 50–51.

change between a frightened first-year law student and the notoriously intimidating professor dramatized in *The Paper Chase* as metaphor, the *Report* analyzes case dialogue teaching in terms of the “four dimensions” of pedagogy outlined in the first chapter.<sup>27</sup> The “surface structure” is the exchange between professor and student, but the “deep structure,” the purpose behind the method, is less obvious.<sup>28</sup> At its core, the underlying rationale for the case-dialogue method is teaching students to “think like a lawyer,” but, in the process of learning a new approach to reasoning, students are led to focus only on facts that are relevant to the abstract legal principles on which the case turns.<sup>29</sup> Thus, according to the *Report*, the link between the “surface structure” of the case-dialogue approach and its “deep structure” is that students, over the course of the first semester, if not the whole year, learn to reframe human conflict through the lens of legal principles and to redefine the human actors according to their posture as plaintiff or defendant in a given case.<sup>30</sup> This represents the third dimension, the “tacit structure.” Students are therefore encouraged through modeling and repetition to distance themselves from the human stories behind the cases they study.<sup>31</sup> They learn to see human actors and conflict in the purely abstract setting of the classroom, divorced from the “real world” context that gave rise to the disputes that are at the heart of the cases they study.<sup>32</sup>

The *Report* acknowledges that the case-dialogue method is very effective in teaching legal reasoning, but it identifies two missing components, which are therefore part of the “shadow structure” of first-year instruction. First, the abstract setting of the classroom teaches legal reasoning by focusing exclusively on cases without exposure to actual clients, which, leads to the second missing component, instruction without “ethical substance.”<sup>33</sup> To function effectively in the case-dialogue approach, students are often forced to separate their personal sense of fairness and justice from their understanding of legal rules and prin-

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27. *Id.* at 48.

28. *Id.* at 51.

29. *Id.* at 53.

30. *Id.* at 53–54.

31. *Id.*

32. *Id.* at 54–55.

33. *Id.* at 56–57.

ciples.<sup>34</sup> In other words, exclusive reliance on the case-dialogue method fragments legal education.<sup>35</sup> Traditional legal education, therefore, emphasizes the abstract and technical aspect of legal practice at the expense of a more holistic vision of the attorney as both private advocate and social regulator.<sup>36</sup>

Here again, the *Report's* critique of legal education is also a critique of the profession itself. According to the *Report*, American lawyers serve both private and public functions. In their public role, attorneys have an obligation as stewards of the legal system as a whole.<sup>37</sup> This public stewardship is what the *Report* calls "civic professionalism."<sup>38</sup> At the same time, however, "lawyers are themselves social actors, functioning within rather than above the perpetual clash" of interests.<sup>39</sup> This private-interest role represents the more familiar view of lawyers as zealous advocates for their clients.<sup>40</sup> The case-dialogue method, the *Report* argues, serves to prepare students for their role as private-interest advocates, which is only one side of their dual roles. Students are taught to be "legal technicians," with very little emphasis, at least during the first year, on the social and ethical ideals of the profession in its public role: "the first-year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales . . . away from cultivating the humanity of the student and toward the student's re-engineering into a 'legal machine.'"<sup>41</sup>

In Chapter Three, the *Report* shifts its focus from critique to a discussion of specific recommendations for bridging the gap between theory and practice. Returning to the metaphor of the "three apprenticeships," the *Report* argues that transition between the three is not a strictly linear process. Rather it is a dialectic, or as the *Report* puts it, an "iterative" process in which each of the three apprenticeships is informed by the others.<sup>42</sup> All three

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34. *Id.* at 57.

35. *Id.* at 81.

36. *Id.*

37. *Id.* at 82.

38. *Id.* at 4.

39. *Id.* at 82.

40. *Id.*

41. *Id.* at 84.

42. *Id.* at 98.

should be present and identified from the beginning.<sup>43</sup> The three apprenticeships, taken together, create a kind of synergy. Theory and practice inform each other so that engagement in solving actual legal problems will bring theory and practice together in a client-centered approach.<sup>44</sup> The *Report* refers to this holistic process as teaching case theory: “case theory calls attention to the important role played by the problems of particular clients in specific situations in giving impetus to the legal process.”<sup>45</sup>

“In actual practice,” the *Report* continues, “the parts are not attended to all at once or even sequentially in a once-and-for-all sense but iteratively, in a virtuous circle.”<sup>46</sup> “Each of the elements should be present from the beginning” of a student’s development.<sup>47</sup> To achieve this process of integration, the *Report* recommends three specific reforms.<sup>48</sup> First, writing and research classes taught during the first year should play a greater role in the overall curriculum.<sup>49</sup> Writing classes are well suited to the process of integration because they involve simulated practice, students get extensive feedback, and, in the best classes, writing pedagogy incorporates modern learning theory.<sup>50</sup> Second, classes in negotiation should also assume a more prominent role.<sup>51</sup> Negotiation involves problem solving in a non-adversarial context and thus including it as a central component of legal education reinforces a broader concept of the practice of law that goes beyond the traditional notion of the lawyer as zealous advocate in a purely adversarial system.<sup>52</sup> Finally, the *Report* calls for development of alternative dispute resolution (ADR) as a new science, distinct from negotiation.<sup>53</sup>

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43. *Id.* at 124.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See generally id.* at 104–111.

50. *Id.* at 107.

51. *Id.* at 111.

52. “[N]egotiation has raised its status through generating new legal theory. This development has been broadly linked to law firms’ promotion of innovative legal services, which also expands the range of roles for lawyers.” *Id.* at 113.

53. Although attitudes toward including ADR as a central part of legal education are changing, law schools have traditionally resisted teaching the topic as a distinct theory: “[m]ediation and other alternatives to adjudication . . . were less easily confined to legal

The *Report's* fourth chapter focuses on the “apprenticeship of professional identity,” and here the *Report* makes explicit that its critique of legal education is also a critique of legal practice. The *Report* argues that, especially at a time of professional disorientation, law schools can help strengthen the profession’s legitimacy by finding new ways to advance its enduring commitments to society as a whole.<sup>54</sup> Thus, the *Report* describes a lawyer’s identity not just in the traditional terms of being an advocate with an absolute fidelity to a client’s interests, but also puts forth the alternate and a potentially controversial view that a lawyer’s professional identity should be defined by a higher purpose than mere advocacy. An attorney ought to follow a course of action that would promote justice in a “broader sense.”<sup>55</sup> In order to prepare future lawyers for this broader role, the *Report* argues that law schools should teach morality as a central element of legal education.<sup>56</sup>

The *Report* acknowledges two possible objections to teaching moral or ethical conduct in professional education. First, the *Report* considers whether it is possible for graduate-level education to have a significant impact on the ethical and moral character of its students, and second, the *Report* examines faculty objections that moral education amounts to indoctrination of purely subjective points of view. At first glance, the *Report* concedes that the available research suggests that professional education has no significant effect on the ethical or moral development of its students.<sup>57</sup> The *Report* cites various studies that show no significant change in “moral thinking” between students entering law school and practitioners.<sup>58</sup> However, the *Report* notes that although the

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professionals and tended to shade off into quasi-legal, ‘lay’ activities, as exemplified by the successful dissemination of some of these ideas in popular literature—a problem of blurred professional boundaries that continues to hobble the full acceptance of ADR as a professional specialty.” *Id.* at 114.

54. *Id.* at 128.

55. *Id.* at 131.

56. *Id.* at 133. This subject has generated a body of scholarship including the following: James D. Gordon, *Religiously Affiliated Law Schools, Values, and Professionalism*, 59 *J. Leg. Educ.* 151 (2009); Joshua J. A. Henderson, *The Ethical Development of Law Students: An Empirical Study*, 72 *Sask. L. Rev.* 75 (2009); Nelson Miller & Victoria Kremski, *Who Is the Customer and What Are We Selling? Employer-Based Objectives for the Ethical Competence of Law School Graduates*, 33 *J. Leg. Prof.* 223 (2009).

57. *Carnegie Report*, *supra* n. 1, at 133.

58. *Id.*

data measures the degree of actual change, it does not indicate that there is no potential for change. In other words, the research does not show a “ceiling effect” on moral development.<sup>59</sup> Further, other research indicates that “moral identity,” as opposed to “moral thinking,” can continue to develop well into adulthood.<sup>60</sup> Thus, the *Report* concludes, the research overall indicates that graduate-level education can have an impact on the ethical development of its students.

Even if one accepts the possibility of impacting a law student’s ethical development, however, the question remains of how to teach—or even whether to teach—a particular set of values. As the *Report* acknowledges, many law school faculty “equate efforts to support students’ ethical development with inculcation, which they see as illegitimate and ineffective.”<sup>61</sup> According to this view, law school instruction, rather than teaching adult students what their values should be, should encourage students to bring their own sense of morality (whatever that might be) to legal education and practice.<sup>62</sup>

The *Report* notes, however, that faculty skepticism about teaching values is at least partially inconsistent with the view urged by the American Bar Association.<sup>63</sup> Since the 1990s, the ABA has argued that one required class on legal ethics is not sufficient and has called for law schools to develop a more thorough focus on professional responsibility.<sup>64</sup> The *Report* also cites the *MacCrate Report*, which, in 1992, called for legal education to “promote justice, fairness, and morality.”<sup>65</sup> A 1996 report from the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar found a decline in lawyer professionalism and called for significant reform in teaching professional responsibility and ideals.<sup>66</sup> Finally, the *Report* notes that many legal commentators have identified a

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59. *Id.*

60. *Id.* at 135.

61. *Id.*

62. *Id.* at 136.

63. *Id.*

64. *Id.*

65. *Id.* (quoting Sec. of Leg. Educ. & Admis. to B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 140–141 (ABA 1992)).

66. *Id.* (citing Sec. of Leg. Educ. & Admis. to B., *Teaching and Learning Professional-*

“crisis of professionalism” . . . manifest in a decline of civility and an increase in adversarialism, a decline in role of the counselor and in lawyers’ competence, including ethical competence, and a new sense of the law as a business, subject to greater competitive economic pressures and answerable only to the bottom line.<sup>67</sup>

Thus, the *Report* argues that legal education not only can affect the moral identity of students it inevitably will have such an effect.<sup>68</sup>

The *Report* concludes, therefore, that if legal educators acknowledge, as they must, the formative dimension of legal education, they should take a more active role in modeling a particular set of values that are central to the practice of law:

Insofar as law schools choose not to place ethical-social values within the inner circle of their highest esteem and most central pre-occupation, and insofar as they fail to make systematic efforts to educate toward a central moral tradition of lawyering, legal education may inadvertently contribute to the demoralization of the legal profession and its loss of a moral compass, as many observers have charged.<sup>69</sup>

## II. BEFORE LAW SCHOOL: THE DEMISE OF LIBERAL ARTS EDUCATION IN UNDERGRADUATE INSTITUTIONS

Although the *Report* calls for reforms in legal education to respond to what its authors see as a crisis in the legal profession, the *Report* does not discuss at length the factors that led to that crisis. In particular, the *Report’s* discussion of the ethical development of students in law school does not consider whether or how students’ experience before law school, at the undergraduate level, may affect the way students respond to legal education and ultimately how they practice as lawyers. This part discusses how undergraduate education has changed significantly in the last thirty years and how these changes have impacted student expectations of education in general.

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*ism: Report of the Professionalism Committee 5 (ABA 1996).*

67. *Id.* at 136–137.

68. *Id.* at 139.

69. *Id.* at 140.

Since the 1970s, undergraduate institutions in the United States have been shifting their curricular emphasis from liberal arts to more professionally oriented education.<sup>70</sup> This shift is due largely to enrollment concerns caused by changes in the labor market and corresponding changes in the expectations of entering students.<sup>71</sup> Furthermore, the shift from liberal arts education to a more utilitarian approach appears to relate directly to social status.<sup>72</sup> The change has been less pronounced in prestigious institutions for which declining enrollment has been of less concern, while it has been particularly strong in institutions that admit a large proportion of students with low test scores.<sup>73</sup> But even private liberal arts colleges have not been immune. For example, a study conducted in the 1990s found that, of the 540 colleges defined by the Carnegie Foundation as liberal arts colleges, most had in fact become “small professional institutions with a liberal arts tradition.”<sup>74</sup> Among second-tier public institutions, almost none have retained a liberal arts focus.<sup>75</sup>

The evolution of undergraduate education from liberal arts to vocational training appears to have had a significant impact of the moral and ethical development of college students. One study, for example, compared student responses in the 1990s with similar responses from the late 1960s and found a sharp decline in awareness of different philosophies and cultures, science, literature, and arts, and, most importantly, in the awareness of personal development.<sup>76</sup> Another study found a profound shift from the 1960s to the late 1980s in student expectations of college education.<sup>77</sup> Students “interested in attending college to develop a ‘meaningful philosophy of life’ declined by 45” percent during that period, while those who entered college for purely financial rea-

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70. Michael Delucchi, “*Liberal Arts*” Colleges and the Myth of Uniqueness, 68 *J. Higher Educ.* 414, 414 (July/Aug. 1997).

71. *Id.*

72. Steven Brint et al., *From the Liberal Arts to the Practical Arts in American Colleges and Universities: Organizational Analysis and Curricular Change*, 76 *J. Higher Educ.* 151, 173 (Mar./Apr. 2005).

73. *Id.*

74. W. Norton Grubb & Marvin Lazerson, *Vocationalism in Higher Education: The Triumph of the Education Gospel*, 76 *J. Higher Educ.* 1, 8 (Jan./Feb. 2005) (quoting D. Breneman).

75. *Id.*

76. Brint et al., *supra* n. 72, at 152.

77. Grubb & Lazerson, *supra* n. 74, at 6–7.

sons grew by 40 percent.<sup>78</sup> These studies reflect a significant change in how students view the purpose of education generally. Education is seen less as a function of self-development and more and more as simply a means to an end, which, for the most part, is enhancing earning potential. “The simple fact is,” one author writes, “that civic, intellectual, and moral purposes are not what most students think higher education is about.”<sup>79</sup> If we accept the *Report’s* view that legal education should focus more on fostering the ethical development of law students, the devolution of undergraduate programs and the corresponding changes in student perspectives about the role of education in general is a serious factor that deserves much more attention.

The value of liberal arts education lies precisely in its non-utilitarian purpose. “The essential paradox, or one might even say the miracle of liberal education,” Nicholas Lemann writes in his essay about the relation between liberal arts and professional education, “is that by being evidently impractical, it equips a student for life far more richly and completely, and across a far wider expanse of time and space, than does education whose sole aim is to be useful.”<sup>80</sup> “Liberal education,” he explains,

is best defined with its most literal meaning: It is education that liberates, that frees the mind from the constraints of a particular moment and set of circumstances, that permits one to see the possibilities that are not immediately apparent, to understand things in a larger context, to think about situations conceptually and analytically, to draw upon a base of master knowledge when faced with specific situations.<sup>81</sup>

Arguing that professional schools fit well within liberal arts universities, Lemann writes, “there is, or should be, a big difference between job training and professional education. The reason that liberal education and professionals make for a potentially good fit is because they have crucially in common a transcendent quality,

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78. Brint et al., *supra* n. 72, at 159.

79. Grubb & Lazerson, *supra* n. 74, at 9.

80. Nicholas Lemann, *Liberal Education and Professionals*, 90 *Liberal Educ.* 14 (Spring 2004) (available at <http://www.aacu.org/liberaleducation/le-sp04/le-sp04feature1.cfm>).

81. *Id.*

a commitment to a broad and not necessarily utilitarian perspective.”<sup>82</sup> He then describes three positive attributes of a successful professional program: First,

[a] professional school should not strive to be a miniature-entire of the professional workplace itself; rather, it should teach what the profession cannot. That is likely to be ‘liberal’ material, meaning material that induces long-term understanding, reflection—even wisdom.<sup>83</sup>

Second, professional schools should develop their own version of a liberal university’s research faculty, and, third, a professional school “should be a creator and upholder of standards for professional conduct that may seem unrealistic to practitioners who are caught up in the pressures of daily work in the field.”<sup>84</sup>

The *Report* appears to embrace this view by citing Lemann’s essay with approval:

[R]ecovering the formative dimension of professional education for the law lies in forging more connections with the arts and sciences in the larger academic context [and in] engag[ing] the larger academy around the perennial themes of liberal education, particularly focused on the formation of a life of the mind for practice.<sup>85</sup>

However, while the *Report* strongly agrees with Lemann that the value of liberal arts education and its value to professional education lies precisely in its *non*-utilitarian perspective, the *Report* responds by urging, or at least appearing to urge, a *more* utilitarian approach in law schools: “It is difficult to imagine a stronger emphasis on formation that does not also require schools to place more relative weight on preparation for practice . . . .”<sup>86</sup> Thus the *Report* sets up a structural tension between two of its central themes: (1) the importance of apprenticeship with the stress on clinical and other practical forms of preparation; and (2) the centrality of professional ethics as something resisting the reduction

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82. *Id.* at 15.

83. *Id.* at 16–17.

84. *Id.* at 17.

85. *Carnegie Report*, *supra* n. 1, at 32.

86. *Id.* at 33.

of law to practical concerns. At best, the *Report* assumes with hardly any analytical discussion that clinical and other practical preparation in legal education will be congruent with the centrality of legal ethics. At worst, the *Report* appears to dilute its commitment to the centrality of legal ethics by stressing various forms of practical preparation.

The *Report* attempts to resolve this apparent tension by describing the concept of “apprenticeship” in theoretical terms, not in the traditional sense of an actual apprenticeship with a practitioner, but as a metaphor for the various dimensions of professional education. But the *Report* is clearly focused on adding clinics and simulated practice to the law school curriculum. Even during the first year of legal education, the *Report* calls for integration of simulation exercises on the assumption that a greater focus on practical skills will “humanize” the process and thus lead students to a heightened sense of ethical and moral identity.<sup>87</sup>

There is very little evidence, however, to support this assumption. One article cited by the *Report* describes positive changes in “moral reasoning” in students who participated in an ethics course designed with a “student centered” experiential approach.<sup>88</sup> But that study used an approach to measuring “moral reasoning” that is highly controversial, and it only measured changes in student responses taken immediately before the course and shortly after.<sup>89</sup> Further, the study’s author acknowledges that there is no evidence that his measurements predict future ethical behavior, and he did not study the impact on moral development in clinical courses.<sup>90</sup> Another article cited in the *Report*, using the same controversial methods, suggests that legal education has no significant impact on moral development of its students.<sup>91</sup>

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87. *Id.* at 33–42, 77–84.

88. Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 Clin. L. Rev. 505, 533 (1995). Hartwell’s study relies on Lawrence Kohlberg’s theory of moral reasoning and development, which, as Hartwell acknowledges, has been criticized for confusing moral development with acceptance of “western liberal thinking.” *Id.* at 512.

89. *Id.* at 526.

90. *Id.* at 533–535.

91. Maury Landsman & Steven P. McNeel, *Moral Judgment of Law Students across Three Years: Influences of Gender, Political Ideology and Interest in Altruistic Practice*, 45 S. Tex. L. Rev. 891, 914 (2004).

Despite the lack of directly supporting data, the *Report* argues for moral development as a goal in legal education. The *Report* cites studies indicating there is still room for moral development in law students and argues that the available research does not at least foreclose the possibility of moral development in law school:

[L]ike moral judgment, moral identity is not established once and for all in childhood. It can be transformed quite dramatically in adulthood when individuals encounter conditions that are conducive to further growth. A number of studies have shown that moral identity and ethical commitment can change quite dramatically well into adulthood.<sup>92</sup>

However, by ignoring the significant changes in students' educational experiences before law school and by its persistent emphasis on practical training, the *Report* may have encouraged law schools to implement reforms that focus on only one of the three apprenticeships—the practical.<sup>93</sup> The *Report*, in other words, may have inadvertently encouraged reforms that risk aggravating the same problems it intends to address. At least one critic, for instance, criticizes the *Report* for being anti-intellectual:

[The *Carnegie Report*] is a political tract, a polemic on legal education. It is an offensive attack against the intellectual tradition in legal education. Though its authors, and those who embrace it, would reject this characterization, it advocates a return to the anti-intellectual tradition of legal education: "law school as apprenticeship to the profession of law."<sup>94</sup>

The *Report*, Professor Long argues, appears to embrace an already disturbing trend, "the creation of many competent practitioners perhaps, but few of whom are well-educated, well-rounded, and intellectually curious lawyers (and human beings)."<sup>95</sup>

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92. *Carnegie Report*, *supra* n. 1, at 134–135 (citation omitted).

93. *See supra* nn. 3, 4, and accompanying text.

94. Long, *supra* n. 2, at 20 (quoting *Carnegie Report*, *supra* n. 1, at 3).

95. *Id.* at 7 (emphasis omitted).

As Professor Long acknowledges, the authors of the *Report* would reject his characterization of their approach as anti-intellectual.<sup>96</sup> But even if it was not the *Report's* intent to advocate a utilitarian approach to legal education, the *Report* has at least provided law schools with a rationalization for embracing a mostly practice-oriented focus. This unfortunate trend is even further amplified by pressures resulting from changes in the profession itself, which I turn to in the next part.

### III. AFTER GRADUATION: THE ECONOMIC PRESSURES OF ACTUAL PRACTICE

For the past two or three decades, legal scholars have documented and criticized the increasing focus on profit motivations in the practice of law and the resulting ethical crisis within the profession.<sup>97</sup> Even in a good economy, new associates at corporate law firms face almost immediate pressure to generate profits for their employers.<sup>98</sup> In the current economy, things are even worse.<sup>99</sup> The rising cost of legal education combined with a shrinking market for legal services has created even more pressure on recent graduates to earn high salaries.<sup>100</sup> The corporate firms that pay those salaries feel similar pressures.<sup>101</sup> Incidents of ethical violations resulting in professional discipline and even criminal prosecution are on the rise.<sup>102</sup> Faced with declining profit margins, firms have been accused of “overworking files” and overstaffing projects in an effort to increase billable hours.<sup>103</sup> And they have bent the rules governing conflicts of interest.<sup>104</sup> One survey indicated that one-third of the 30,000 clients interviewed

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96. *Id.* at 20.

97. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press of Harv. U. Press 1993).

98. *Id.* at 302; see also Steven Harper, *Law School Deception*, AM L. Daily (Jan. 14, 2011) (available at <http://amlawdaily.typepad.com/amlawdaily/2011/01/harperdeception.html>).

99. David Segal, *Is Law School a Losing Game?* N.Y. Times (Jan. 8, 2011) (available at [http://www.nytimes.com/2011/01/09/business/09law.html?\\_r=1](http://www.nytimes.com/2011/01/09/business/09law.html?_r=1)).

100. *See id.*

101. *See Harper, supra* n. 98.

102. Ward Bower, *Law Firm Economics and Professionalism*, 100 Dick. L. Rev. 515, 518 (1996).

103. *Id.*

104. *Id.*

felt dissatisfied with the representation they received from their attorneys, citing primarily a failure to communicate and inadequate attention given to their cases, suggesting that law firms are under pressure to increase their case loads without hiring new associates to staff them.<sup>105</sup> The recent decline in professionalism is even further evidenced by a decline in pro bono commitment.<sup>106</sup> Thus, new graduates face even heavier workloads, increased pressure to meet high billable requirements, and fewer pro bono opportunities.

These pressures have affected legal education as well. In addition to attempting to attract employers who want greater profitability from their new hires, law schools now also have to market themselves to students worried about high debt and low employment.<sup>107</sup> As discussed above, law school reforms have mostly focused on preparing students for “practice,” without engaging in a discussion of what that means. It would appear that law schools are mostly using the *Carnegie Report* as a justification for what is really a response to market pressures squeezing law schools at both the entry and the exit level. The soaring cost of legal education combined with the shrinking market for law school graduates has resulted in increased competition for qualified students and increased pressure to “sell” them to law firms, who, enjoying a buyers’ market, demand more value—and thus less need for extensive training—in their new hires.

The market forces discussed above also reflect a deeper conflict over the lawyer’s role in modern society. Professor Gillian Hadfield distinguishes two different functions now served by the legal profession.<sup>108</sup> The first is the “democratic/political function,” which involves “protecting the architecture of democratic institutions, protecting individual rights, implementing the balance of power that promotes the normative goals of self-governance such as human dignity, autonomy, fairness and well being.”<sup>109</sup> This

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105. *Id.*

106. *Id.*

107. See Segal, *supra* n. 99 (responding to bad press and a poor economy, law schools feel more pressure to offer economic justifications for a law degree).

108. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Cost of Professional Control over Corporate Legal Markets*, 60 *Stan. L. Rev.* 1689, 1705 (2008).

109. *Id.* at 1702.

represents Justice Brandeis's ideal of the "lawyer-statesman."<sup>110</sup> In its stress on the lawyer's ethical duty to society as a whole, the *Carnegie Report* embraces this ideal.<sup>111</sup> Hadfield contrasts the other role of the law as "supporting efficient market transactions: establishing real and intellectual property rights, and facilitating contractual and organizational economic relationships in finance, innovation, production, and trade."<sup>112</sup> In this later function, Hadfield comments, "law is more appropriately judged not by how well it promotes the normative democratic goals of equality, autonomy, dignity and so on but rather how well it promotes economic activity and efficiency."<sup>113</sup> Because the "lawyer-statesman" function of the law has traditionally been seen as the primary if not sole model for the legal profession, the growth of the law's commercial function is regarded as a threat to the profession's core values: "So we see the commercialization of law," she writes, "as a struggle to keep the impressive tide of market incentives from swamping fidelity to 'the' profession's 'core values' of protecting individual rights and democratic goals."<sup>114</sup>

Hadfield's solution to this conflict is to "cut the ties between the two functions," and "begin to build differentiated legal professions that are not dragged under, in either sphere, by the weight of the other."<sup>115</sup> For Hadfield, the problem with failing to recognize these two very different functions is that regulation of the legal profession focuses primarily on the traditional role of legal practice in a way that harms them both. On the one hand, professional rules of conduct are designed to preserve the traditional vision, but, on the other hand, those rules are created by regulatory bodies dominated by corporate practitioners. Thus, in the field of traditional practice, regulations are inadequate because they tend to be less about ethics and more about the preservation of exclusivity of practice and the financial interests of lawyers,

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110. *Id.* at 1703. For recent discussions of lawyers as "public citizens," see W. Taylor Reveley, *The Citizen Lawyer*, 50 *Wm. & Mary L. Rev.* 1309 (2009), and Deborah L. Rhode, *Lawyers as Citizens*, 50 *Wm. & Mary L. Rev.* 1323 (2009).

111. *Supra* pt. I.

112. Hadfield, *supra* n. 108, at 1702.

113. *Id.*

114. *Id.* at 1705.

115. *Id.*

while, in the field of corporate practice, the rules stifle innovation and needlessly increase costs:

[t]he financial interests of lawyers should be reined in where access to legal services is necessary to protect democratic interests rooted in our normative goals of equality, dignity, fairness, and individual well being . . . . But where the interests at stake are the profit-making endeavors of entities, our primary concern in the design of regulation should be the efficiency of legal markets and their capacity to promote the efficiency of other markets.<sup>116</sup>

Professor Hadfield's concerns are focused on regulatory reform, but her observations are applicable to reforms in legal education as well. Her view of the role of lawyers in the corporate world corresponds with the *Carnegie Report's* view of the "legal machine" described in the first chapter, except that she calls for more focus on practical skills, not to "humanize" the process, but to increase efficiency and to reduce the homogeneity of legal skills that dominates the practice of law and, she argues, stifles innovation.<sup>117</sup> In a sense, she embraces the role of lawyers—at least for those who serve corporate interests—that the *Report* seeks to reform. And law schools, ironically, seem to be moving in that direction as well, and they are doing it even as they claim to be responding to the *Report's* call for change.

Although the *Carnegie Report* acknowledges economic pressures and their impact on the legal profession, it fails to consider the very different roles played by lawyers who serve individual interests versus those who serve financial entities. It is hard, for instance, to understand how "humanizing" legal education by adding context to the Socratic discussion of cases during the first year will have any real significance for graduates whose careers will be devoted to representing the interests of corporate entities whose goal is simply to maximize profits.<sup>118</sup> To be sure, the *Report* calls for more than just that, but by emphasizing apprentice-

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116. *Id.* at 1730.

117. *Id.* at 1722.

118. I do not mean to suggest that there is no room or need for ethics in corporate practice. My point is only that not all lawyers represent individuals seeking justice in the political sense and that humanizing law school may not account for all the realities of actual practice.

ship and practical training while giving inadequate attention to the demands of actual practice in a complex economy, the *Report* may have the unfortunate effect of contributing to the already disturbing trend in legal education toward purely economic objectives.

#### IV. CONCLUSION

The *Carnegie Report* urges law schools to engage in innovation and self-assessment. These are indeed important and laudable processes, but they are not ends in themselves and should not be undertaken without careful consideration of the goals they are intended to serve. Law schools are facing difficult and challenging questions about the role they should play and the impact they should seek to have in an increasingly complex and economically charged professional environment. Thus, in responding to the *Carnegie Report*, law schools should start by engaging in a critical examination of the *Report* itself and then consider, first, whether they agree that legal education should play a significant role in defining the profession, and second, if they do agree on that point, what it means to be “prepared” for the practice of law.

The discussion could be framed according to three alternatives. First, law schools might consciously embrace a purely utilitarian approach. Law schools choosing that direction would design their program to subordinate theory to practical training. Those programs would feature, for instance, clinical programs—as electives or even core requirements—externships, classes on negotiation, contract drafting, discovery, and trial advocacy. Choosing this approach would amount to at least a tacit admission that legal education does not define practice, it simply responds to the demands of market forces. This option for legal education embraces the *Carnegie Report’s* concept of apprenticeship, but the “cognitive” and “practical” apprenticeships are strongly emphasized over the apprenticeship of “identity” or purpose.

A second alternative would be to fully embrace the *Carnegie Report’s* vision of the lawyer as defender of social and political justice. Choosing this approach, however, would require much more radical changes than those urged in the *Report*. Law schools would have to design their programs in light of the significant changes in undergraduate education and the effect those

developments have had on the expectations of the students they admit. Law schools would also have to account for the very real economic pressures students now face upon entering the profession after graduation. This option for law schools would see professional education as more than just vocational training and thus would emphasize non-utilitarian courses at least as much as those that teach practical skills. For example, courses on legal theory, jurisprudence, history, and even literature would be featured as prominently as clinical training, simulation, and other skills-based courses. Further, rather than simply hoping that adding context and humanizing the process will impact the ethical development of their adult students, law schools would actively focus at the admissions level on attracting students who have already made some progress in establishing the kind of professional identity the school seeks to promote. This could be accomplished, at least in part, by considering, as a significant factor in admissions decisions, college transcripts that indicate a view of education as a form of personal (not just economic) development. The school's promotional materials should encourage students to address that point in their personal essays. In addition, such law schools should develop "pipeline" programs designed to reach students before they get to law school. These types of programs could have a significant impact on the education and personal development of students in a way that creates a more solid foundation for later professional and ethical training. Obviously, there are many possibilities, but the point here is that law schools choosing to commit to the *Carnegie Report's* call for a conscious focus on the development of ethical identity would need to do much more than simply add clinical education, simulation, and skills training.

A third alternative would be to design a hybrid program based on Professor Hadfield's notion of the two distinct functions of the modern legal profession. Under this option, a law school might offer two separate tracks, each with different requirements. One track would emphasize public interest and the traditional view of the lawyer as defender of political and social justice, while the other track would focus on a lawyer's role in facilitating business and corporate interests. Students choosing the latter approach would take required classes that emphasize practical skills, but that also focus on innovation. Externships and clinics

in this type of program might partner with corporate law firms as well as with the business community served by those firms. Professional responsibility courses would be designed to examine how the profession is regulated, how it is defined by regulations, and how new approaches might better serve the goal of economic efficiency. Offering two tracks at a law school has the advantage of attracting students who self-select a program with clearly defined goals and who are thus more likely to respond to the pedagogical purposes underlying each of the two tracks.

Sadly, most law schools have not made clear the model of professional identity for which that are preparing their students. An increasing number of law schools appear to have tacitly adopted a program of instruction that corresponds to the first alternative (the utilitarian approach) outlined above. In such programs, law schools seek to attract students by touting programs that promise clinical and “real world” experience and then sell those students to employers by promising better value in their new associates. Fostering a sense of professional identity understood in ethical and moral terms has not been a significant selling point to either practically-minded students or their future employers. As I have discussed, the *Carnegie Report* persistently emphasizes the concept of apprenticeship, but fails to consider adequately how changes in undergraduate education have impacted the attitudes of students entering law school and how changes in the legal profession have affected what law students will encounter after graduation. Ironically, the *Report* has thus unintentionally provided law schools with a rationalization to move toward purely economic objectives, and has contributed to the very problems it was intended to address.