

The Opportunity for Legal Education

A Symposium of the Mercer Law Review

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Morning Session

JAMANDA TURNER: Good morning. My name is Jamanda Turner, and I am the Lead Articles Editor of the Mercer Law Review. Welcome to the 2007 Mercer Law Review Symposium, “The Opportunity for Legal Education.” I want to thank several individuals who have contributed to the success of this event: Yonna Shaw, our Publishing Coordinator; Cherie Jump, our Administrative Secretary; Dean Daisy Floyd; the Mercer Law Review Editorial Board; and the members of the Mercer Law Review.

The morning session will go until noon, but we do have a break at 10:40. Right now, Stephanie Fuller is passing out cards, and if you have any questions for the presenters, please fill those out. We will collect them before the end of the morning session which is at 11:20.

Now I would like to turn the program over to Dean Floyd.

DEAN FLOYD: Let me add my thanks to Jamanda Turner who has coordinated events and really been one of the workhorses behind this event.

It is my pleasure to welcome all of you. My name is Daisy Floyd, and I am in the fortunate position of being able to serve as Dean of the Walter F. George School of Law. I welcome you on behalf of all of our faculty, staff, and students. We are delighted to have both our guests who are presenting, and our guests who will be an important part of this conversation today.

If this is your first visit to Mercer, I hope that you will take a few minutes to look around the building and get acquainted with us. We are a law school of about 445 students and 65 faculty and staff. We are built around the Woodruff Curriculum, which is a curriculum that emphasizes small class sizes, collaborative learning, and skills education. You may know that we have the number one legal writing program in the country, of which we are very proud, that emphasizes ethics, professionalism, and a commitment to public service.

I have had some questions this morning about this beautiful building so let me tell you a little bit about its history. It was built in the 1950s by the Insurance Company of North America as their regional headquarters. Because the Insurance Company of North America's national headquarters is in Philadelphia, they chose to build an oversized replica of Independence Hall. That may be the familiar look you have noticed. I think we are one of the few law schools in the country with a rocking chair porch, and I hope you will feel free to take advantage of that during the day. Just wander out this door to the right, sit in the rocking chair, and enjoy the beautiful day and the view of Macon.

I am really thrilled to be able to welcome you to this Symposium. It is our twentieth Law Review Symposium. The topic, as you know, is "The Opportunity for Legal Education." I think today we are marking a real change in legal education in a very exciting and provocative time for those of us in legal education and for those of us in the profession because, of course, what we do in legal education impacts the profession greatly.

Two new studies have come out, one by the Carnegie Foundation for the Advancement of Teaching called *Educating Lawyers*¹ and another one by the Clinical Legal Education Association called *Best Practices for Legal Education*.² Both of these studies pull together a number of conversations and movements that have been going on for several years. They represent both where we have been in legal education and a vision

1. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

2. ROY E. STUCKEY, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

for the future. Our speakers today are going to help us think about that vision for the future and how we get there.

You will notice that the schedule has some breaks built in. We have worked to accommodate the students' schedules with our schedule for today. Students, please feel free to come and go as you need to for class. Please understand that we will have other students coming in as their schedules permit.

We have three speakers this morning, and then we will have a panel presentation, which will be a time for questions and answers and conversations with those speakers. The cards to which Jamanda referred are for you to write down questions if you would like. If you will write those questions down and send them back to the ends of the row, I will collect those, and we will use those after the panelists have spoken. We will also, of course, be able to entertain questions from the group spontaneously.

I do want to give you a brief overview of our speakers. You are probably acquainted with them, but let me tell you a little bit about who they are this morning.

The first is William D. Underwood. Bill Underwood is President of Mercer University. He has been here a little over a year, coming to us in July of 2007. We are very happy at the law school to tell everyone that he is a lawyer. We claim Bill quite proudly. He holds his academic appointment in the law school coming to Mercer from Baylor University where he was president, but before that served on the law faculty at Baylor. While at Baylor, he held the Leon Jaworski Chair in trial practice at the school of law and was also honored by holding the title of master teacher and being named an outstanding university professor.

We will also hear from Dean Judith Wegner. Dean Wegner served as Dean of the University of North Carolina School of Law from 1989 to 1999. Following that, she served two years as senior scholar at the Carnegie Foundation for the Advancement of Teaching. She also has held the office of president of the Association of American Law Schools. She was the principal investigator for the study that has led to the report called *Educating Lawyers* and is, of course, an author of that study as well.

We will also hear from Dr. William M. Sullivan. Dr. Sullivan, as a senior scholar at the Carnegie Foundation for the Advancement of Teaching, worked on the preparation for the professions program which is behind the report *Educating Lawyers*, and he also is a co-author of that report. He is also the author of *Work and Integrity: A Crisis of*

Promise and Professionalism in America.³ He has made two trips to the east coast from California within a week to speak about legal education.

This afternoon we will hear from Professor Roy T. Stuckey who comes to us from the University of South Carolina School of Law. Professor Stuckey, among his other accomplishments, has served as director of the Nelson Mullins Riley and Scarborough Center on Professionalism at the University of South Carolina School of Law, and he is the principal author of *Best Practices for Legal Education: A Vision and a Road Map*.

We will also hear from Professor Alice M. Thomas who comes to us from Howard University School of Law where she serves as associate professor. Professor Thomas was named the Carnegie Scholar in 2001 and 2002, has been named a lead Carnegie Scholar for 2003, and has done very interesting work around teaching and legal education.

This Symposium promises to be thought-provoking, interesting, and I think inspirational today. I am particularly pleased to welcome our panelists to Mercer because every one of them has had a real influence on my own thinking about legal education and my own professional and personal development.

So, welcome all of you to Mercer. I am going to turn the program over now to President Underwood.

PRESIDENT UNDERWOOD: It is a privilege for me to be here among law students, legal educators, and lawyers. I am a lawyer. I think of myself first as a lawyer, second as a legal educator, and certainly last as a university administrator. It really is always wonderful to be back among members of my chosen profession.

I am proud of being a lawyer. I am proud of being a part of a profession that has produced leaders like Thomas Jefferson, Abraham Lincoln, and Franklin Roosevelt. I am very proud to be a part of a profession whose members accomplish so much great work every day all across the country in the lives of people who come to us in need, in the lives of people who entrust their personal crises to us, in the lives of people who come to us threatened with the loss of family, with the loss of health, with the loss of business, career, and aspirations, threatened with the loss of liberty, and in some cases even threatened with the loss of their lives. I am proud to be a member of our profession when I look and see what members of our profession are doing in a place like Pakistan where you see lawyers in the street standing up for the rule of law against a dictator. All these things make me proud to be a lawyer.

3. WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2d ed. 2005).

As an undergraduate student, I was inspired by what I learned about the role of lawyers in our society. I was inspired by what I learned about the role of lawyers in serving as guardians of our system of justice. I was inspired by what I learned about the role of lawyers in defending the rule of law in this country—so inspired that I decided I wanted to be a lawyer. I enrolled in law school with a very clear vision of what I wanted for my life. I wanted to be a trial lawyer. I was determined entering law school that I would become a great trial lawyer. I was serious about my studies as a law student. I was very committed to accomplishing everything I could in law school to achieve my aspiration of becoming a great trial lawyer. I was a hardworking student. I was a student who took very seriously the courses I selected.

When I graduated from law school after three years of trying to squeeze everything out of the experience that I could, I received a license from the State Bar of Texas to hold myself out to the public as a trial lawyer. But I had never interviewed a client or a witness. I had never drafted a pleading. I had never prepared or responded to a motion. I had never prepared or responded to a discovery request. I did not understand the purpose of an interrogatory. In fact, I do not think I even really knew what an interrogatory was. I had never taken or defended a deposition or even seen a deposition taken or defended. I had never prepared a jury charge. I did not know what a charge conference was. I did not know anything about preserving error in the charge. I had never examined or cross-examined a witness. I had never argued to a jury. I had never done any of these things after three years of hard work of preparing myself to be a great trial lawyer.

I knew a great deal about Fred Rodell and legal realism at Yale in the 1930s. I knew a great deal about the career and odyssey of Grant Gilmore who had drafted Article IX of the UCC. Gilmore was one of the heroes of my instructor in Secured Transactions, so we learned more about Grant Gilmore rather than the workings of Article IX. There were no questions on the bar exam about Grant Gilmore, so I picked up what I could from the bar review course.

I possessed very little understanding of what was required to be a trial lawyer. I certainly possessed very few of the skills required to be entrusted with the personal crises of my clients. When I look back, I think the educational experience I received reflected irresponsibility on the part of my law school. I think the fact that I was licensed to practice law and to handle the personal crises of my clients reflected irresponsibility on the part of the state licensing authorities.

I know that sounds like I have a negative view of my law school experience. But really, I do not. My classmates were bright, intelligent people who challenged me intellectually. I had some great teach-

ers—professors who inspired me intellectually and have been important role models in my professional life. When I was offered an opportunity to become a law school professor, it was in large measure because of my admiration for them that I found the opportunity to teach future lawyers appealing. The fact is that my law school experience was intellectually enriching to me, but I was not prepared to be a lawyer.

Fortunately, it would be several years before I was unleashed on clients. In the interim, I began to learn much of what I needed to know to be at least minimally competent as a trial lawyer. I clerked for a federal judge, and I learned a great deal about trial practice during that experience. I then went to a law firm, and I was very fortunate to have mentors at that firm who took a personal interest in teaching me what I needed to be a good courtroom lawyer.

My first day at the firm I was given a small case, and I asked one of the lawyers there at the firm if he had a form pleading that I could use. To his credit, he refused to give it to me. He told me go figure out how to do a pleading and to bring it to him to review when I thought I was done. He thought it was very important that I know what I was doing, why I was doing it, and why the various things that should be in a pleading were there. That was really how my first couple of years of law practice went. The lawyers at that firm were of the old school. They invested a great deal of time and effort in teaching me what I would need to know to be a competent courtroom lawyer.

I fear that many of my classmates were not so fortunate to have that kind of legal education following graduation. I fear that many of my classmates learned at the expense of their first clients.

Of course, I am not the first person to have noticed this problem. During her introduction, Dean Floyd mentioned two recent reports on reforming legal education. The reports she referenced are not the first reports addressing this need for reform. Lawyers, judges, students, and members of the public have been calling for reform of university-based legal education almost from the very beginning. As early as 1890, the Standing Committee on Legal Education of the American Bar Association cautioned that the rapid growth and success of law schools must not cause us to forget that there were also peculiar advantages in the older method of office instruction. Approximately twenty years later, in 1913, the Carnegie Foundation for the Advancement of Teaching issued its first report highly critical of the increasingly academic focus of legal education. The report made a number of suggestions on how we could reform legal education to produce graduates who had appropriate exposure to the knowledge and skills that would be required for them to represent real people with real problems. That was in 1913.

Some twenty years later, in 1930, Judge Jerome Frank and those legal realists that I learned about in law school began demanding “lawyer schools” that would expose students to what clients need and what courts and lawyers actually do. Judge Frank wrote in 1930: “The Law student should learn, while in school, the art of legal practice. And to that end, the law school should boldly . . . repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning law by work in the lawyer’s office and attendance at the proceedings of the courts of justice. . . . They must repudiate the absurd notion,” and I apologize to the law librarians here, “that the heart of the law school is its library.”⁴

Now, turning to what I think of as the moderate era of reports calling for legal reform, in 1979, the Report and Recommendations of the Task Force on Lawyer Competency was issued—the Crampton Report.⁵ The Crampton Report challenged law schools to assume greater responsibility for preparing students to actually practice law rather than simply preparing students to later learn to practice law at the expense of their first clients. Thirteen years later in 1992, the report of the ABA Task Force on Law Schools and the Profession, the MacCrate Report,⁶ challenged law schools to make education in lawyering skills and professional values central to their mission. And, of course, now we have the reports that Dean Floyd referred to in her opening remarks.

So, what has come of nearly 120 years of regular calls for reform by the profession, by the public, and by our students in our university-based law schools? I think it is fair to say that there has been some progress. We have seen the birth and development of the clinical movement in legal education led by committed teacher/lawyers like one of our speakers today, Roy Stuckey. I think a great deal of good has been accomplished by the clinical movement in legal education. I think that movement has resulted in significant benefit to thousands of students, and more importantly, significant benefit to their first clients following graduation. I think that educators like Professor Stuckey have a great deal to be proud of because of the positive impact they have had on legal education.

4. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 62 (second alteration in original) (quoting JEROME FRANK, WHAT CONSTITUTES A GOOD LEGAL EDUCATION? (1933)).

5. AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979).

6. AM. BAR ASS’N, SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

But there have been significant limitations on the clinical movement in legal education. At many law schools, even today, clinical faculty tend to be treated as second-class citizens. That is not true here at Mercer—to Mercer's credit. But at many law schools, clinical faculty members do not hold tenure track appointments. They are not eligible for the prestigious chairs on the faculty. There are few law schools where participation in a clinical program is required of students before graduation.

Perhaps we should ask ourselves why not, at least if we are serious about preparing our students to practice law? Would we even consider allowing someone to graduate from medical school without completing clinical rotations—without treating patients under the close supervision of an experienced and skilled physician? Are the responsibilities that we are preparing our students to shoulder somehow less important than those of medical students? Is what we do as lawyers somehow less important?

Our clinical programs tend to be relatively small. They are not available to all students. For those students who participate, I think they are too limited in scope. So, while our clinical programs have accomplished a great deal of good over the last generation, they have not gotten us to where we need to be.

I think it is fair to say that calls for reform of legal education have resulted in changes that are really nibbling around the edges rather than bringing about the kind of fundamental reform that is needed. One impediment to fundamental reform is the expense of doing what I think many people believe really needs to be done. I like the medical school model of professional education: two years of basic sciences training, two years of clinical rotation, and then at least three years of graduate medical education in a residency program. These last five years are on-the-job training for prospective doctors, ultimately resulting in specialized licensing. I like that model. I think our medical schools do a good job in preparing doctors for entry into the medical profession, but it is an enormously expensive model of education.

We spend several times as much money educating each doctor as is spent educating each lawyer. It is not possible to do without public funding of medical education. I think obtaining that level of public funding for legal education would be a very difficult problem. I think there is a perception that what lawyers do is either not as important as what doctors do, or not as difficult as what doctors do, and I think both of those perceptions are wrong.

I see that in the clients who have come to me through the years. Not long ago, a woman who was an illegal immigrant was being sued for divorce by her husband, who we believed to be a drug dealer. They had

three beautiful young girls, and the husband was demanding custody of those children. Their mother did not have any money to hire a lawyer, but she worked as a housekeeper for one of my students. My student asked me if I would take her case, and I did. And I can tell you that, for that woman, what was at stake in her case was far more important than her health—what was at stake was the future of her children. So, when people suggest to me that what doctors do is more important than what lawyers do, I know from my personal experience, that is simply not the case.

But the fact is I do not think that there are any realistic prospects for the kind of funding to support the education of lawyers that is available to support the education of doctors. So, I do not think it is realistic for us to think that we can fully replicate in our law schools the medical school model of education.

Another significant impediment to fundamental reform of legal education is faculty resistance to that kind of reform. I served for ten years as the chair of our faculty curriculum committee at my prior university, and I can tell you from that experience that there is no one more skilled and adept at defending turf than a law professor. We cannot realistically expect law faculties to reform themselves.

So, I think, there has been progress. I think there will be more progress. I think these reports will help bring about more progress. But for fundamental change to occur, control over the fundamental structure of legal education will need to be taken out of the hands of our law schools.

I am out of time. Once again, I am pleased that Mercer is able to sponsor a symposium on this important topic. I look forward to the remarks of others.

PROFESSOR WEGNER: It is indeed a pleasure to be here at Mercer. I have admired Dean Floyd for a long time. We have had a chance to work together over the years. I commend her and her students. I am sure she puts the students first, knowing her. Thanks to those of you who helped conceive and organize this program, including Dean Floyd, the Mercer Law Review staff, President Underwood, members of the faculty, and everyone in the law school community who helped bring this all together here.

Our topic is “The Opportunity for Legal Education.” I have pondered a good deal about what that opportunity is and how I might help it along. That is what I have been up to for most of my professional life. I wanted to focus today on two major dimensions of this theme. First, I would like to stress the varied perspectives of innovation that are being

brought to bear. I would also like to offer a few observations about change—why it is needed and how we might go about it.

It is very appropriate to have these conversations at Mercer. Mercer has a strong history, and an interesting range of disciplines—everything from music to engineering to pharmacy to law to the liberal arts.

Mercer also has highly esteemed alumni. One of my most satisfying professional experiences occurred when I was a young lawyer recently graduated from UCLA. I went to the United States Department of Justice, which was then led by Judge Griffin Bell. That was a fine Department of Justice, I want to tell you. Much of its quality had to do with Judge Bell's vision, values, and commitment. I was in an office that prepared the Attorney General's opinions and gave advice to federal agencies. Judge Bell would walk down the halls and talk to the young lawyers, as your partner did in your time, President Underwood. He talked about the importance of doing the right thing, about ethics and values, policy, law, and how all those fit together. It must be extraordinary for students to go to a school with that kind of legacy. I am sure that you will continue to carry on that fine tradition.

Let me turn first to the notion about perspectives and why they are worthy of our attention. We are at a moment in history when a number of people have written and compiled their best ways to go about constructive education change. We may walk into this moment with a focus on what has been written, and that is helpful. But as we know from our legal educations, perspectives from reality are also needed to craft a compelling vision, for example, by integrating the facts and the theory of the case.

The Carnegie study really brought to bear a variety of perspectives, much as we have a variety of perspectives represented here today. Could I ask how many of you are students? Could you raise your hands? How many are professors? And how many are lawyers and judges? How many are bar examiners or bar counselors or things like that? Good. Well, thank you all for being here.

One of my favorite sayings about perspectives pertains to situations like this, when one may be preaching to the choir. Rebecca West once inquired whether St. Francis really preached to the birds. She noted that, if he really liked birds, he would not have been preaching to the birds, but would instead have been preaching to the cats. I hope that there are at least a few cats out there, to keep us all on our toes and awake.

First, a word on perspectives that have been important in the work of the Carnegie Foundation, something I think my colleague, Bill Sullivan, will speak to as well. If you follow higher education history, you may

know of the Flexner Report,⁷ a study of medical education done by the Carnegie Foundation back in the early part of the twentieth century. That report played a role in encouraging the movement of medical education—and other forms of professional education—into the academy. In a way, it was a remarkable thing for those at the Foundation to put an idea forth and to see it really make a difference out in the world that way. On the other hand, perhaps in the current era, the Foundation is doing a bit of penance for having encouraged the movement of professional education into the academy, because here we are talking about the need to reduce the academy's isolation and to tie professional education more closely to the actual work of the professions.

In doing the study of legal education, we tried to bring to bear a variety of perspectives. To that end, we visited sixteen different law schools. Two were in Canada and two in each region of the United States. A couple were in New York City, a couple in Minneapolis-St. Paul, then others ranged from North Carolina to Tennessee, Texas, New Mexico, California, and Indiana. Some were religiously affiliated, others were public, and others were elite private schools. Some were in cities and some in more rural areas. We wanted to see schools of all different stripes because our goal was to understand what was going on with regard to teaching and learning from the inside. That meant that we needed to talk with people from different kinds of academic communities.

Generally, there were three of us on the visits to these sixteen schools. I went on all of them as the one legal educator involved in the study. One of the other senior scholars, either Bill Sullivan or Ann Colby, typically went along as well, along with a research assistant or associate. We generally spent two days at each school, working very intensively. We observed classes, including several first year classes, some upper division electives, and legal ethics or professional responsibility classes. We observed clinical teaching. We talked with the professors who taught in all these different settings and asked about what they were really trying to accomplish in their classrooms. We talked with deans, admissions directors, and placement directors. We talked with legal writing instructors. We also had focus groups with different sets of faculty, for example with those who might be developing a new approach to ethics or those involved in trying to integrate technology.

We talked with student focus groups including a group of first year students, then second and third year students, and evening program students if the school had an evening program. We were really very

7. ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1910).

committed to seeking a variety of viewpoints on what was happening in legal education.

The focus was consistently on teaching and learning. Let me say that again. The focus was not just teaching, but also learning. One of the major blind spots in legal education as well as higher education, more generally, is our tendency to assume that the focus should be on teaching, rather than on what students are learning. Learning is difficult to understand because it is often relatively invisible. Happily, the Carnegie Foundation has been led over the last decade by Lee Schulman, a very distinguished professor who did his doctorate work at the University of Chicago and taught there before moving to Stanford University where he really changed everyone's thinking about preparing K-12 teachers. He brought a wide-ranging intellect to this whole process and felt that if we were to understand legal education, it should not be done in isolation. Instead, the Foundation made a deliberate effort to look at several different fields of professional education, including education for the clergy, engineering, nursing, and medicine. The study of legal education was the first to engage in field work. However, the idea was to wait until some of the insights from those other fields were available so that the published report on legal education would itself reflect what one could learn by using these multiple lenses to understand both the strengths of legal education that might be useful to other fields and the gaps in legal education that might be remedied by insights from other contexts.

Thus, one aspect of the "opportunity for legal education" relates to the insights that can be gained from these multiple perspectives, brought to bear from different disciplines, schools, and participants in the process of legal education. I think we are ready to have a different kind of conversation than was the case with the American Bar Association's MacCrate Commission Report or similar prior efforts.

I now want to offer a few perspectives of my own based on the legal education field work so that you can appreciate opportunities available to us all. I am not going to repeat what is in the Carnegie Report because I know that Bill Sullivan will be speaking more about that. Instead, I am going to offer you some of my own thinking that is geared to the fact that we have an audience including many students here today. I want to highlight several opportunities that we need to attend: to engage more consciously with the notion of "thinking like a lawyer"; to work more intentionally with our "signature case-dialogue" pedagogy; to embrace the opportunities to develop more functional assessment strategies; to build a better sense of progression throughout students' law school experiences; and to pay greater attention to the development of professional identity and values.

One of the touchstones for legal education in the last century has been our commitment to teaching students to think like lawyers, particularly during the first year of law school. In our field work, we asked law students and faculty what they meant by “thinking like a lawyer.” We asked this question so we could understand what it was that seemed like the “center of gravity” that shapes the current system of legal education. We asked both first year and advanced students, what they understood about this business of thinking like a lawyer. How do you learn it? What does it mean to you? What we learned over the course of our field work was that there are many dimensions to thinking like a lawyer.

First of all, there is thinking in a very structured and organized way. That is a crucial dimension and a powerful goal we embrace in preparing law students to become lawyers. Indeed, I think lawyers often forget that they lacked these abilities by the time they have graduated. For the law students among us, I hope that you still remember that fundamental first year experience of feeling your mind changing, your capacity to understand shifting. I think sometime, that those who are in the midst of that process do not see it for what it is, and those who have been through it assume that their analytical abilities have always been there. It is a bit like we have become fish, and we are swimming in the water. Once we are in the thick of it, the water is invisible to us.

“Thinking like a lawyer” has multiple dimensions, however. There is the structured reasoning part of it, without doubt. But we need to recognize that there is also an effort to help students understand what we mean by “law” and the “rule of law.” There is also an introduction to lawyers and the language that they use.

Most of all, there is emphatically a change in the appreciation of the nature of knowledge and the nature of learning. Some of you are first year students. When you come to law school from your prior experience in education, you may have thought that studying law would involve mastering a set of rules. You wanted to know the code book, where to find it, and how to unlock all the secrets found there. And yet, what you are really up against is finding a different way to think about authority, where authority comes from, how authority bears on the nature of truth, the work you hope to do, and people’s lives.

There is very interesting research on this subject. People who are in their teens and twenties often have the impression that authority and knowledge is “out there” somewhere. It is as though they think they need to turn their heads to the side and ask that the knowledge be poured straight into their ears. In law school, however, the rules are very different. Instead of just memorizing rules, you are asked to “domesticate doubt.” You are really learning to deal with uncertainty in ways that make people very uncomfortable. Dealing with uncertainty

is likewise part of the fundamental process that we reference when we talk about thinking like a lawyer.

Dealing with uncertainty also lies at the heart of development for professionals in other fields. Dealing with uncertainty is inherent in the work of those who are professionals. They are people who are charged by society, educated, and prepared to deal with ill-defined problems of those who seek their assistance. They therefore need to be comfortable in working within the zone of uncertainty, mapping its contours, and learning the entrance and exit ramps.

So, the first “opportunity for legal education” we face is how to help students learn more readily how to “think like lawyers” by domesticating doubt and learning to navigate uncertainty. That is a powerful thing to do, but it is oftentimes not very visible to either faculty or students. We need to confront this reality and help students embrace it as they begin to walk down their professional paths.

Another “opportunity for legal education” concerns how we teach students to “think like lawyers.” How do we as faculty members engage with that challenge? As I think Bill Sullivan will mention later, one of the findings across the Carnegie set of studies on the professions has to do with what Carnegie calls “signature pedagogies,” distinctive ways in which faculty teach in the different professional fields. These are the distinctive tools or approaches to teaching and learning that seem to resonate with specific forms of professional education. For example, some of the students in the audience may be doctors or nurses, or know doctors or nurses. The signature pedagogy for doctors and nurses is probably tutoring at the bedside and case rounds, that kind of experience. For engineers it is probably the laboratory or design studio.

For legal education, I would call the signature pedagogy the “case-dialogue” method, a very powerful approach that we use in the first year. I do not call it “Socratic” because I do not think it involves a search for the philosophical “good” through dialogue in the way that Socrates proceeded. Nonetheless, in legal education, we do take distilled cases and use them as a template useful in instructing students about legal language, professional roles, and analysis in a new field. I am sure that the students here today will remember occasions in which your friends and family have caught you asking them structured questions when they describe a problem or speaking in legalese, which they find disconcerting. Sometimes people want you just to listen, not to engage in problem solving. Sometimes, you will start using your new terminology before realizing you need to switch to plain English at least every now and again. At least I hope that is the case.

Having a set of structured cases lends itself to building legal literacy (speaking, reading, and writing) to developing a crucial capacity to work

through problems in a careful analytical way. Indeed, our approach to case analysis in many ways parallels the type of education documented by Benjamin Bloom in his studies of top liberal arts colleges and comprehensive assessment systems half a century ago. Some of you who have taken courses in educational theory or psychology may know of his work often described as “Bloom’s Taxonomy of Educational Objectives.”⁸ In his efforts to understand the dimensions of comprehensive examinations at elite colleges, he demonstrated that there were several distinctive types of cognitive tasks required. Students needed to “know” content and to “comprehend it” (not just repeat back what they heard). They needed to analyze—that is, take things apart—and to apply their knowledge to novel settings. They needed to synthesize ideas, that is, to put them back together and see their connections. They also needed to evaluate ideas or strategies against some sort of meaningful criteria relevant to the work at hand.

The “case-dialogue” method takes students through these cognitive moves in rapid and demanding fashion. It is a very powerful strategy that prepares students to take on the intellectual challenges that lawyers face. Non-lawyer colleagues who observed law classes during our field work were incredibly impressed by how quickly law students develop analytical stances, a capacity to use language, and things of that sort.

Strikingly, however, across our very diverse set of schools, the approaches were not altogether uniform. First year faculty generally used the “case-dialogue” method as their basic approach, but the details varied from one school to the next depending on who the students were and what their prior background might have been. For a school with a fairly wide range of students, a substantial portion of whom were first generation college or law students, professors appeared to use a range of teaching approaches on top of the “case-dialogue” foundation. Some used concept maps or visual displays, while others incorporated problem-based scenarios rather than simple case reading to draw their differing students into the conversation. Some used teams or small group breakouts to modulate the instruction and engage the abilities of all the students in the class in ways that complemented the students’ differences.

In more elite schools, it was still possible to see techniques more reminiscent of movies. Some of you may remember Professor Kingsfield in *The Paper Chase*⁹ who used a very different approach to the “case-dialogue” method. He did some things that we did not see anywhere, for

8. BENJAMIN S. BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES (1984).

9. THE PAPER CHASE (Twentieth-Century Fox 1973).

example communicating to students that “I have the power and you don’t.” We did not see anyone trying to pepper students with questions in order to embarrass them. But in some schools with very strong students, faculty members would still spend a considerable time grilling a single student in ways that really stretched the student and made it clear to the student that he or she could really do what was needed. Gifted teachers can use the more classical form of the “case-dialogue” method to probe and poke students in order to help them become comfortable in dealing with uncertainty, and in response, student self-confidence can bloom.

That is the second observation I would offer. We have a very powerful signature “case-dialogue” pedagogy that does a good deal of good. The downside is that we love this approach and find it so powerful that we do not want to give it up after it has run its course. I imagine you know the saying “if you’ve got a hammer, everything’s a nail.” We use this method in the first year and then we do not want to get over it. Beyond the first year, using this method becomes diluted since students no longer want to play along and gain much less benefit than they did at the outset. We should think about moving on to other kinds of approaches that would free up resources and people to take a different path to engage students after the first year. I think increasingly that is going to be an “opportunity for legal education,” and an area where people will spend time imagining better and more engaging strategies in days to come.

We also need to think about another opportunity, one that would compensate for a shortcoming in the “case-dialogue” method that we have not really taken to heart. One downside of the “case-dialogue” method is the way in which it tends to remove questions about professional skills and strategies from the conversation since the focus is generally on appellate decisions. It is also not a particularly useful way to teach students to deal with statutes in the regulatory state, and it is definitely not a particularly useful approach to deal with teaching people about the identity of lawyers and the values of lawyers.

Thus, in a sense, we are both blessed and cursed by having this kind of powerful educational tool that lends itself to developing thinking and language skills, one that is closely aligned to what the profession is actually doing in the field. It does not go far enough, but it works within its limits to such a degree that we have not really said, “enough already, let’s try some additional things that build our capacity there.”

My third observation is about assessment. We are not very good at assessment. When I say “assessment” to people, they roll their eyes and they think, “oh, accountants and audits and all things beginning with A—that are awful.” But assessment is really something that we have to

think a great deal more about. We are lucky at this time in history that we can call upon the “learning sciences” to understand how learning really works. The learning sciences have led us to understand the development of expertise. If we understand the development of expertise we must in turn ask ourselves some challenging questions about how we use assessment in legal education.

Expertise has been studied with regard to chess masters, musicians, midwives, tailors, and all sorts of other different roles. You may know about expertise. Have any of you ever taken swimming lessons? If so, you will remember that you go through stages, as a beginner, advanced beginner, intermediate, and life guard. Your progression is not about testing your skill compared to the swimmer in the next lane but instead involves building a capacity for self-reliance and a combination of complex abilities and skills in breathing, pacing, stroking, and so forth. Musicians may have similar experiences. If you want to learn to play a sonata, you better have played scales first to tune your ear and increase your capacity to use your fingers. There are steps along the way, and it takes practice. That is the only way to develop expertise. You can not learn to ride a bike by reading a book unless you are very unusual. If any of you have done that, I hope you will tell me.

In any event, back to assessment. The Carnegie study said that legal educators need to be doing more with what is called “formative assessment” by giving people feedback in various ways that will allow them to really see where they are and continue building up their capacity. However, I think we need to do more than that. We have conflated some of what we do with our grading curves and approaches to grading. We are telling students about their comparative standing when that does not make much sense to them and does not help them build expertise, which is really the point. We confuse students because we do not give them meaningful benchmarks about the progress they are making toward the goal of being effective, talented lawyers. We need to do more about that.

There are ways that we could do better in this regard, but we may need help. I would ask the bar examiners in the midst to think about bifurcating the bar exam so that students could be tested on first year subjects at the end of the first year. We could use the multi-state exam or the California baby bar questions as a means to determine how well students have developed expertise in basic analytical approaches to first year courses at the end of the first year. For those who have difficulties, law schools could assist in helping students improve their skills beginning in the second year. Some students might realize that they could focus more effectively if they took a year off to work as a law clerk, returning to law school when they are more focused without running up

additional debt. Such an approach would also help law schools to think about what kind of education might be suitable beyond the first year, once students have mastered the basics of “thinking like a lawyer.” I think, therefore, that taking assessment more seriously is an important opportunity that we should not miss.

A fourth “opportunity for legal education” relates to the potential to build more progression into the second and third year curriculum and pedagogy. We are very good at embracing the “case-dialogue” method, but we are not good at what happens after that. Should not the second year be different? That is where things go off-track. Typically, by the third year, students think about taking clinical offerings, seminars, or advanced offerings after they have developed a certain level of expertise and gained experience in subject matter that interests them. They are lucky if they grasp the opportunity to focus and embrace a particular career path at this point, but many students are left adrift.

The Carnegie Report suggests that legal education has an opportunity to work more concertedly on educational progression. One way we might do that would be to help students develop a more considered understanding of their personal goals, professional identity, and values at an early stage in their education. If we did that, they might be better able to navigate the progression that is needed beyond the first year.

At the conference on “Legal Education at the Crossroads” hosted by the University of South Carolina last week, we talked a good deal about models for fostering a sense of professional identity, one of the stepping stones that could allow us to develop more meaningful progression beyond the first year. Students need to be able to see themselves in the big picture as they begin to make choices about the future. Some schools have been helping them do that by bringing students into closer, more meaningful contact with members of the bench and bar. For example, they are creating mini-Inn of Court opportunities through a weekly session on professional topics that bring students and practicing lawyers together. Others are considering the possible use of portfolio assessment as a means for having students take greater responsibility for their professional progression. Students can be asked to compile a portfolio in the way that a teacher or an architect might do in order to showcase their professional accomplishments. Students might be asked to include writings and reflections about what it means to be a professional as they go, as well as observations of judicial proceedings, summaries of pro bono work, papers for courses, and other types of written work and work product that would demonstrate their accomplishments.

Such an approach might be linked to more intensive and integrated advising that integrates academic counseling with career advice and self-assessment to prepare for the job search. Part of our problem with

progression in the second and third year relates to the lack of focus and responsibility that seems to exist when students can not see where they are trying to go. Law schools typically provide a cafeteria menu of courses that the faculty find interesting and that students may too, but it is often difficult for students to navigate this territory. They often take one course or another and then they walk out with a degree. That may not be true here at Mercer because of your Woodruff Curriculum, but I think it is true in many law schools. We need to work intentionally with individual students to help them understand that they need to take their lives in their own hands and choose what they want to study with an eye upon what they want to do in the future. There are now many more opportunities than when President Underwood, Dean Floyd, and I were in law school, and many more opportunities to develop professional skills. Students are often left in a wilderness without knowing how to shape their professional lives.

A fifth area of "opportunity for legal education" lies in our ability to address the development of professional identity and values. This is another area where there is a gap, which you will hear about more this afternoon. As I said earlier, professional values play a central role in every profession. I think students know that they need to develop a set of values and a sense of professional identity. They do their best to explore what it means to be a professional, often by participating in a host of extracurricular activities. Unfortunately their pursuit of such opportunities (and the sense of self-worth that they hope to find by doing so) pulls them away from the day-to-day academic work. Most law schools leave extracurricular activities to student leaders and student affairs professionals, without considering how more attention to these ventures might be harnessed and tied more closely to the curriculum beyond the first year. There may be other ways that development of professional values and identity can be incorporated into the curriculum itself, for example, through more meaningful courses in professional responsibility or incorporation of courses on lawyers and their work into the first year curriculum at the very start. There is an important opportunity here, in any event, one that needs to be addressed more self-consciously by legal educators, student affairs professionals, and students themselves.

As I come to the end of my time, let me comment just briefly on the dynamics of change. We are really at a point where we are going to have to make some choices. There are powerful forces at work at this point that I think will drive change. These forces are different from some that have existed in the past, and we need to attend to them.

The movement for public accountability in higher education is one driver of change that I am sure has drawn the attention of President

Underwood as well as other academic leaders. Regional accrediting entities responsible for undergraduate programs are asking colleges and universities to set quality enhancement goals and to assess outcomes for students enrolled in their programs. Although law school accreditors are generally not well informed or attentive to these changes, they will need to be in the future. All of us should keep our eyes on the prize, and determine whether we are really educating students in the ways that we need.

Student debt levels are also likely to drive change, as I suspect the students here would attest. In many aspects, our society is mortgaging the future. Legal educators need to find ways to be attentive to this change. That is one of the reasons that I am drawn to the notion of bifurcating the bar exam to allow students to know where they stand, and perhaps take a midcourse year off to work, reduce their debt load, and focus on what they really want to do before finishing law school. Law students need to graduate with manageable debt loads, or they will not have a chance to follow their dreams and their hearts.

The changing character of the profession is also a driver of change. I suspect that the kind of mentor you had rarely exists in large firms these days, President Underwood. Law firms increasingly say that they expect law schools to graduate beginning lawyers “practice ready” and raring to go. But the fact of the matter is there are some things you cannot learn in an academic setting. You really must be in the situation and learn tacit lessons from the context. You need to learn from someone who is there to provide a role model for you, and to illuminate key lessons as they present themselves, in the same way that medical and nursing students learn at the bedside. If preparing students to be “practice ready” is something that the profession expects of us, we will need to grapple more forthrightly with what the profession must contribute toward the end.

I want to end by stressing that the opportunities available to us will only be embraced, and the changes that are needed will only come about based on personal and institutional choices. You have all heard the saying that inaction that reflects a failure to decide really amounts to a decision in itself. We may think that if we do not decide we can postpone the inevitable by putting hard questions off. But the fact of the matter is that inaction is itself a choice, as we have come to see in recent days of droughts, hurricanes, and global warming. Legal educators need to take seriously our responsibilities as stewards of treasured educational institutions and a deeply respected profession. We need to leave legal education better than we found it. Members of the legal profession and law students need to help us by serving as opinion leaders who will keep up the drumbeat for needed change. I hope that, in the days to come we

will work together to develop and celebrate fresh models for addressing the opportunities facing legal education that I have identified. I look forward to seeing what Mercer and others will do to contribute to the needed dialogue in what I hope will be a time of fruitful change.

Thank you.

DEAN FLOYD: We are going to take a brief break to allow students to get to class and other students to come in. We will start in about six or seven minutes with Dr. Sullivan. If you have questions for the panelists, please remember to write those down and send them to the end of the row. We will hear more during the panel discussion.

(SHORT BREAK)

DEAN FLOYD: I hate to cut off good conversation because, of course, that is one of the real benefits of a program like this, but I do want to keep us as close as possible on schedule so that we will have time both to hear from our panelists and to have our common conversation around these issues. So, next is Dr. Bill Sullivan from the Carnegie Foundation. Welcome.

DR. SULLIVAN: This Symposium provides a timely opportunity to consider legal education, a subject I have come to learn a good deal about although I have never experienced it first hand. So, I am especially grateful for having been invited to take part today. I want to thank the editors of the Mercer Law Review, the organizers of this Symposium, as well as Mercer University's President William Underwood, and the Law School's Dean Daisy Floyd—all of whom have the very direct experience of the subject that I lack.

The subtitle of my speech, "Legal Education: The Academy, the Practice, and the Public," describes the focus of my remarks. I am concerned with how to understand legal education so as to do justice to the three interests it is pledged to serve: that of the academy, that of the community of practitioners, and that of the public that depends for much of its well-being on the workings of the rule of law. I suspect few will dispute the fact that there is real tension among these three interests, especially tension due to their expecting and valuing different things. The idea that an effective form of preparation for a life in the law somehow requires meeting the demands of all three is perhaps more controversial. But I think some reflection can show why law schools cannot ignore the challenge of "getting it all together" to educate students who can meet the standards of competent academic work,

effective practice skills, and responsible service to the interests of both clients and the larger public. This I will argue in three steps.

Step One: The Problem Defined

Centuries ago, the Greek philosopher Heraclitus developed the idea that the world makes sense; it manifests a kind of order he called *logos*—speech or discourse—although he famously insisted it was an order built out of the tension of clashing opposites. “Things which are put together are both whole and not whole, brought together and taken apart, in harmony and out of harmony.”¹⁰ Furthermore, people “do not understand that what differs agrees with itself; it is a back-stretched connection such as the bow or the lyre.”¹¹

Modern legal education, I want to suggest, has such a tension, “like the bow or the lyre,” stretched between the three conflicting interests I have invoked in my subtitle: the demands of the academy, the needs of practitioners, and the expectations of the public. To put the problem very simply: the academy admires analytic rigor; the bar and the bench want professionals competent to take up high standards of practice in a variety of areas; while the larger public wants both competence and integrity, professionals whom they have reason to trust.

The question we need to address, I believe, is really an application of Heraclitus’s basic question: is there a discourse, a *logos*, that can reveal how we might adjust and balance these contradictory pulls? Can we develop a way of understanding and practicing legal education that, as with a lyre, can produce a harmony among the discordant strings, a “bow” that can launch students on a consistent educational trajectory that arcs from their first encounter with law teaching into fulfilling lives as practicing legal professionals?

Like all professional education in the university setting, legal education is defined by a problem. The essential dynamic of the research university has been the specialization of knowledge and method, a progressive separation of concepts from the situations from which those concepts derive. Its ruling value is the promotion of conceptual knowledge and analytical thinking of which the sciences, and the application of knowledge and analytical thinking in technology have become model endeavors. The dynamic of professional practice, on the other hand, demands the blending of functions and perspectives so that knowledge, skill, and appropriate attitudes come together in situations requiring expert judgment. In professional practice, the elements of

10. Heraclitus, *Fragment* 10.

11. *Id.* at 51.

expertise—understanding, skill, and purpose—become interdependent aspects of the one activity. The practitioner cannot bring knowledge to bear without skill in performance, while the application of both knowledge and skill depend upon the exercise of proper judgment.

The need to bring together the holistic demands of practice with the specialized imperatives of academic instruction and research creates the peculiar character and defining nature of professional schools. Professional schools are therefore, by necessity, hybrid institutions with one parent, the historic community of practitioners deeply immersed in carrying on traditions of craft, judgment, and public responsibility. The other heritage is that of the modern research university, committed to an ideal of progress in knowledge through the application of analysis and criticism. The point in bringing professional preparation into the university is cross-fertilization: not to circumvent but to utilize the analytic strengths of the academy in order to sharpen and potentially broaden perspectives on professional knowledge, skill, and identity. However, the larger aim remains the encouragement among aspiring professionals of deeper learning and the improvement of practice.

The Metaphor of Apprenticeship

One of the signal intellectual developments of recent decades has been an expanded understanding of how learning occurs. The key idea, derived from the study of a variety of domains of thought and action, has been the discovery that all learning resembles the development of expertise. When educators study expert judgment in order to make its key features visible and available to novices for appropriation, they are opening access to the profession's defining practices. By giving learners opportunities to practice approximations to expert performance and giving these students feedback to help them improve their own performance, educators are providing an apprentice-like experience of the mind, a "cognitive apprenticeship." All this has become widely disseminated through work such as that by Ann Brown, John Bransford, and colleagues.¹² Seen from the perspective of the metaphor of apprenticeship, professional schools are complex organizations for initiating the next generation of practitioners into the several dimensions of the expertise, which defines a given profession. In this way, the idea of apprenticeship provides a valuable metaphor for thinking about the university model currently ascendant in professional schooling.

12. ANN BROWN ET AL., *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL* (1999).

Indeed, from the students' point of view, entrance into the professional school is still the beginning of apprenticeship, but one now decomposed into three largely separate dimensions. Students encounter a cognitive or intellectual apprenticeship, the practical or apprenticeship of skill, and the apprenticeship of identity formation. Professional education in the university context falls roughly into three large chunks each based in different facets of professional expertise as the particular school teaches these and each guided by differing pedagogical intentions.

The first apprenticeship could be called intellectual or cognitive. Of the three, it is most at home in the university context since it embodies that institution's great investment in quality of analytical reasoning, argument, and research. Here, students must meet the standards that define the academy's interest in legal education. In professional schools, the intellectual training is focused upon the academic knowledge base of the domain including the habits of mind which the faculty judge most important to the profession. This apprenticeship is driven by the question of what a competent member of the profession should know.

The students' second apprenticeship is to the often tacit body of skills shared by competent practitioners. Students encounter this skills-based kind of learning through quite different pedagogies, often from different faculty members than those through which they are introduced to the first, the intellectual apprenticeship. In this second apprenticeship, students learn to take part in imagined or simulated practice situations, as in case studies or actual "clinical" experience with real clients. This apprenticeship is guided by the issue of what to do as a competent practitioner. Its expectations embody the practitioner community's interest in the preparation of competent lawyers.

The third apprenticeship introduces students to the values and attitudes shared by the professional community, aiming to develop dispositions essential to professional identity and purpose. Like the second apprenticeship of practice, it is ideally taught through dramatic pedagogies of performance. In some fields, however, such efforts are primarily didactic, while in others more participatory. The essential goal is to teach the skills and traits, along with the ethical standards, social roles, and responsibilities which mark the professional in that field. Through learning about these and beginning to practice them, however, the novice is also being introduced to the meaning of an integrated practice of all dimensions of the profession, grounded in the profession's fundamental purposes. Here, the student encounters the expectations of clients and the public for legal professionalism. If professional education is to introduce students to the full range of professional demands, it has to initiate learners into all three apprenticeships. But it is the third apprenticeship through which the student's professional

self can be most broadly explored and developed. The guiding theme here is how to act and what to be as a competent practitioner.

These three types of apprenticeship provide a metaphor, an analytical lens through which to see more clearly how the business of professional training gets carried on in different fields and schools. They represent more than three elements in the curriculum served by different kinds of pedagogy. These dimensions of apprenticeship also reflect contending emphases within all professional education, a conflict of values which has deep roots in the history and organization of professional training in the university. That is why obtaining a balance among them is so often a challenge and the achievement of integration of the three is always a significant achievement.

The academic setting, however, clearly tilts the balance toward the cognitive. In as much as professionals require facility in deploying abstract, analytic representations—symbolic analysis—school-like settings are very good environments for professional learning. At the same time, however, professionals must also be able to integrate, or re-integrate, this kind of knowledge within on-going practical contexts. But in this area students learn mostly by living transmission through pedagogy of modeling and coaching. For all professional schools, it is this re-integration of the separated parts which provides the great challenge.

Step Two: Seeking a Discourse for Integration: Recovering the Idea of Formation

Different professional schools vary in the stance they have taken toward this challenge. The health fields, led by medicine and nursing, include all three apprenticeships, moving in a progression from the first to the second and third, with the greatest emphasis upon learning in the settings of practice. Increasingly, medical education is pushing experience with the actual practice of medicine closer and closer to the beginning of medical education, thereby bringing the apprenticeships into a tighter relationship.

By contrast, law schools stand at the opposite pole, with a heavy emphasis upon the first apprenticeship through Socratic or case-dialogue classroom teaching. All law schools add some measure of ancillary opportunities for the apprenticeship of skilled practice in legal clinics and simulation as well some attention to professional identity and purpose, usually in the form of “professional responsibility” courses. However, in contrast to medicine, there is typically little progression and rarely much effort to integrate among the three dimensions.

Until recently, neither legal nor medical education has had much in the way of a developed language that can make sense of these issues. They have lacked a discourse that could provide educators with a common way of approaching and talking about the integration of the three apprenticeships. However, in both fields, the language of “professionalism” has received renewed attention. The central issue in the professionalism literature in both fields stems from the realization that professional work centers on the exercise of expert judgment. As discoveries in the learning disciplines are making clear, the development of judgment in complex practices such as medicine or law requires the careful cultivation of profession-specific capacities of perception, skill, and of the practitioner’s self-understanding as a responsible member of that professional community. For articulating this perspective, the language of “formation” is quite useful.

Widely used today in seminary education of the Jewish and Christian clergy is the language of formation that can illuminate parallel processes essential to professional education in the law. Here, again, the literature on learning is helpful. In every field centered on a complex practice, certain kinds of teaching are intentionally formative. That is, formative pedagogy refers to teaching practices whose intention is to shape dispositions of perceiving, thinking, and judging.

Learning by doing is always intrinsically formative, but it is not necessarily self-consciously so. Learning by doing, as in the case of learning to play tennis, requires practice, response to feedback on that practice, and recurrent attention to the goals as well as the actions and understandings (such as the rules) that constitute the activities of tennis-playing—i.e. entrance into the practice of tennis. This is why learning tennis necessarily shapes the perception, imagination, and deportment of anyone who undergoes learning tennis. However, unless it also contains a reflexive dimension and is intentionally aimed at affecting the learner (or is so appropriated by the learner)—as in encouraging learning to learn or taking responsibility for one’s own development *as a tennis player*—the “taking” and “giving” of tennis lessons will not add up to a fully formative pedagogy.

In formal education, including higher education, formative pedagogies are marked by the same qualities that characterize intentional tennis instruction: entry into shared activities that together constitute participation in a given cultural practice, such as the “critical analysis of legal texts,” “mastery of practice skills,” or “developing professionalism.” Such pedagogies also require repeated practice; incorporation of feedback on performance; and conscious attention to the goals, constitutive activities, and understandings of the practice being taught. As with other kinds of learning by doing, initiation into a professional practice

necessarily shapes the perception, imagination, and deportment, including the verbal deportment, of all who undergo it. Such persons grow in a very concrete sense: they acquire abilities but also sensibilities that expand their repertoire beyond what that had been previously. In doing this, such education also influences individuals' sense of what the world is like, what is possible and worth doing, and of who they are and might become.

Step Three: Doing Justice to Legal Education's Three Dimensions

To do justice to such a many-sided educational enterprise of the preparation of lawyers, it can be very useful to adopt the perspective of formation. Formation provides a nexus in which to locate the educational efforts of law schools. Formation is both a descriptive and a normative concept; the "is" tends to call forth an "ought." Or rather, thinking in the metaphor of formation keeps both factual and normative questions in explicit relation to each other. More than a description of developmental processes, the idea of formation enables us to link, in principle, a number of disparate aspects of professional education, such as the cognitive and the experiential, the theoretical and the practical, as well as student experience and measurable outcomes.

What might this mean for legal education? As a start toward an answer, I want to draw directly from *Educating Lawyers*, the Carnegie Foundation for the Advancement of Teaching's 2007 study of legal education. Large-scale changes in the conditions of practice have washed away many of the institutional pilings that supported the ideals still expressed in the American Bar Association's *Model Rules of Professional Conduct*. Lawyer professionalism is still importantly defined with reference to ideals first announced by leaders of the bar in the early part of the twentieth century. These ideals include independent service of the public and requiring and supporting counsel to clients that would also be independent of possible benefit to the attorney or law firm. Over the last several decades, however, the relatively stable and secure relationships that characterized at least the upper levels of the bar in the mid-twentieth century have altered radically. Decades of major economic restructuring, along with social changes that have brought significant numbers of previously under-represented groups into the legal profession, have disrupted the old patterns beyond recovery.

We are currently in an era marked by a growing body of lawyers, trained by an increasing number of law schools, who enter unstable and highly competitive domains of practice. Under these conditions, it has

proven hard to make the old ideals of independent public service the basis of everyday legal practice. The result has been confusion and uncertainty about what goals and values should guide professional judgment in practice, leaving many lawyers, in Mary Ann Glendon's words, "wandering amidst the ruins of those [past] understandings."¹³ As one professor we spoke with in our research put it: "There is no one distinct role that is appropriate for lawyers. It all depends on the type of lawyering you do. There are many lawyers who do many things. Torts is basically litigation oriented. It would focus on questions like 'if you were a judge or in the legislature, how would you resolve or answer the question.' In contract drafting, it would be helping people draft documents to represent the agreement. It is concerned with *avoiding* litigation rather than creating it. So it would be a totally different perspective on what lawyers do." Students at least need to be made aware not only of the various sorts of lawyer they might become but also of the various kinds of approach they can take toward lawyering itself.

Not in spite of, but precisely because of these complexities in the many roles lawyers must take on today, legal education needs to attend very seriously to its formative potentials. The challenge is to deploy its formative power in the authentic interests of the profession and the students as future professionals. Under today's conditions, students' great need is to begin to develop the knowledge and abilities that can enable them to understand and manage the tensions inherent in practice so that they will sustain their professional commitment and personal integrity over the course of their careers. In a time of professional disorientation, the law schools have an opportunity to provide direction. Law schools can help the profession become smarter and more reflective about strengthening its slipping legitimacy by finding new ways to advance its enduring commitments.

To do this, however, law schools need to further deepen their knowledge of how the formative dimension of their curriculum—both manifest and hidden—actually works. That is, they must improve their understanding of their own formative capacity, including learning from their own strengths as well as those of other professions. Further, schools need to attend more systematically to the pedagogical practices that foster the formation of integrated, responsible lawyers.

Learning theorists emphasize the value of enabling learners to grasp the point and structure of what they are learning, of "going metacognitive" about the subject being learned. The perspective of formation can be thought of as metacognition for the enterprise of professional

13. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 37 (1994).

education. The very generality of the concept can encourage self-awareness and self-critique on the part of educators about how and to what ends various practices of teaching and learning function in professional preparation.

The university setting should provide a heightened and self-conscious setting for probing the efficacy of various forms of professional apprenticeship. It is the perspective of formation that can give sense and critical edge to such investigation.

Finally, to recover the formative dimension of professional education in law is to become aware of the responsibility and the adventure of handing on the defining aspects of this field to new generations. It is also, perhaps less apparently, to participate in the professional enterprise at its deepest level, by renewing the defining purposes for which the legal profession stands and to which it is finally responsible. Articulating legal education as a formative enterprise may help clarify the significance of another of Heraclitus's enigmatic expressions: "The unapparent connection is more powerful than the apparent one."¹⁴

DEAN FLOYD: Thank you, Bill. Thanks to all of our morning panelists. If you have questions, Jamanda is going to pick those up now and we will ask the panelists.

While we are waiting for those, let me ask the panelists, do you have some comments you want to offer based on each other's remarks and reactions. The first one is for you, President Underwood. When law schools are connected with main campuses like Mercer, should not the main campus display the same ethics to which the law school is demanded to adhere? I think the question is talking about the difference between professional schools and other units and how we get some commonality across those disciplines.

PRESIDENT UNDERWOOD: Well, of course, one of our real focuses at Mercer is on ethical training and interdisciplinary examination of ethical issues. So, I suppose in that sense, yes, I would agree with that. I have come to learn, from talking with people who know a great deal more about ethics than I do, that frequently ethicists on the undergraduate campus are talking about something different than the professional ethicists at the law school and the medical school. But, yes, I think that training is the same. I mean who could argue with that.

14. Heraclitus, *Fragment 54*.

DEAN FLOYD: Here is one for any of the panelists who would like to respond. How do you respond to the claims that teaching values, i.e., the formation of professional identity and purpose, is the illegitimate imposition of values or the interference with individual autonomy? I know all three of you have thought about that one.

DR. SULLIVAN: That is a direct response to my talk, I think. It is a good question, and it is one that actually all professionals face in their practice. But I think that the best way to go about responding to it is to question the question. One of the interesting things is that one of our important values in modern society is freedom of conscience, and that is really where this question derives. It is really worrying about whether infringement of conscience may be implied in this sort of a view. The other side, however, is how conscience is developed. The implication might be that individuals have consciences quite apart from their families, the world they are part of, and certainly apart from their education.

The question really is better phrased as, "What is required in the way of conscience for professionals such as lawyers?" If you enter a profession, we assume you are entering it freely, thoughtfully, and of your own accord, then you are, in effect, subscribing to the professed values of that profession. If you really disagree with those values in a fundamental way, then I think you should not enter such a profession. But by joining it, you are putting yourself forward publicly as a representative of what that profession stands for.

I think that is really the perspective that is most important. This is a great philosophical issue that I do not want to go into at any greater length, but it is certainly possible to discuss this from a variety of perspectives.

PROFESSOR WEGNER: I think that not talking about values in effect supports inattention to values. First, we need to raise that as a topic so that people are attentive to it. Second, there are some core values that derive from the fact that professionals in law and other fields hold a privileged position within society with obligations to people whose lives and well-being are at stake. Some of the core values of the profession are related to confidentiality, competence, continued learning, and respect for the people you are serving and commitment to service. If we do not bring those values to the surface for students while they are in law school, then in effect we are conveying to them that those concerns are not worth talking about, let alone caring about.

In addition, we need to remember that when we are teaching law students, they are at a crucial transition point in their lives. They have

been apprenticing as students and need to begin to apprentice as professionals with some important differences in the approach and allocation of responsibility. Nonetheless, they can build on earlier experiences. In my institution, the University of North Carolina, we have an honor system for our undergraduates and for all of our students. I had the privilege of helping revise our honor code and honor system a few years ago, and was proud that our students were committed to articulate a shared commitment to key values: do not lie, cheat, or steal; do not interfere with other people's educational opportunities; do not cause injury to other people or their well being; be respectful; and all those kinds of things. These values are implicit in the academic enterprise in the beginning. If we neglect them or fail to articulate our expectations, we make it seem that these principles can be ignored and students can go astray.

As members of the legal profession, we are serving our society. If we are not conscious of values, if we go out into the world without being mindful, we will not be good citizens. We will not be ready to assist our individual clients to face the ethical challenges that are going to confront them in their lives, and we will not be building a better and more just society.

I appreciate the question you have asked. I think similar questions come up these days among undergraduates who sometimes fear that faculty members are policing their intellectual choices. It is an ethical matter for a law professor to bring to the surface matters where there is disagreement.

Our job is also to help people evaluate choices with fair minded inquiry. So, I think we can not just leave these questions behind. They are front and center for all of us as human beings, as academics, as learners, and most definitely as legal professionals.

DEAN FLOYD: President Underwood, do you want to reply?

PRESIDENT UNDERWOOD: Well, I agree with everything that Professor Wegner just said. I am a real advocate of freedom of conscience and near absolute freedom in matters of belief, expression, and thought. But the fact is, as lawyers we are impacting the lives of others in our conduct of professional activities, and I think for that reason there is an important need for the regulation and some sort of external articulation of values and standards because it is not just about us. It is about our clients and others.

DEAN FLOYD: Thank you. President Underwood, your comments about clinical education and the cost of the medical school model have

generated several questions, and one of them actually was a question for Dr. Sullivan and Dean Wegner in response to that comment. President Underwood brought up a good point about potential funding problems for significant advancement in legal education. What are your thoughts? And, of course, we would like to hear as well from you, President Underwood, about your thoughts. How do we overcome that problem?

PROFESSOR WEGNER: I will jump in. I think first of all we can not let the best be the enemy of the good. I think we are mistaken if we assume there is only one way to provide clinical education and that the one way to proceed is to set up something similar to hospitals. In our context, members of the bar are not eager to have competing providers of law services before people are licensed except in instances in which those services are provided to people with limited means. We have to bear in mind that we do not have something that is akin to a tertiary level hospital where students are also providing labor needed to deliver requisite care. Live client clinics in one way or another have been put forth as a prototype that is the closest approximation of that model and they have a very important role to play. There are also other models, however.

Well-structured externships where students are placed under good preceptors can also be used. The externship model is beneficial if the learning goals are clear and the supervisors are well-trained and committed. This model typically gives students a wider range of options and professional settings in which to learn.

Stepping back further, there is more we could be doing in partnership with the bar. I am sure that Mercer uses adjunct professors for certain kinds of things. One common example exists in trial advocacy programs designed to allow a full-time teacher to supervise skilled practitioners who work with small groups of students in simulation formats.

In addition, there are ways that professors who may not be currently involved in practice or may not ever have practiced can expand their understanding and their capacity to incorporate real-life insights into their courses. For example, law schools might create opportunities for knowledgeable practitioners to co-teach core courses with full-time faculty members who are interested in enriching their classes and expanding their own perspectives.

There has also been important work done in the United Kingdom, particularly in Scotland and Wales. Professors there have developed simulations, virtual teaching, and learning opportunities for advanced students in the final stages before they are allowed to practice.

One of the things that I have admired about medical education is the commitment to develop virtual patient scenarios for use during licensure

examinations. It takes a great deal of funding to try to create that kind of thing, but a consortium of schools might be willing to do so and make the resulting models available to others.

DEAN FLOYD: Thank you. Other thoughts? Anyone?

DR. SULLIVAN: One of the great advantages of being a student of something is you can at various points claim that you do not have to answer because you do not know what the answer is. The cost question I think is a crucial one. Certainly some of it will have to do with rethinking staffing. The problem with medical education as a model, as President Underwood started us out this morning, is that it is so enormously expensive. Some of that expense would not necessarily be entailed in legal education because the technological dependency is much less, but certainly the core problem is that really good clinical education, and I think, frankly, really good formative education such as you do here in the legal writing program, is just very person intensive. It requires a lot of opportunity for modeling, practice, feedback, and assessment.

But I think that the idea of working with the bar in this is a very real and unexploited possibility. If anybody in this society has a very direct material interest in improving the capacities of law students, it is the practicing bar.

DEAN FLOYD: Thank you.

PRESIDENT UNDERWOOD: I think some reallocation of our existing resources in law school would be very helpful. For example, Mercer has done a good bit of that with the degree of resources that are committed to the legal writing program, and the degree of resources that are committed to training and professionalism, really learning what it means to be a professional. I think a lot more of that can be done. I think that most law schools today under-utilize the third year of law school and to some degree the second year of law school. I think both of Professor Wegner and Dr. Sullivan's remarks focusing on what happens in that second and third year of law schools are very important, and I think there can be some reallocation of resources, especially in those years.

I taught traditional law school courses for ten years, primarily first year courses; civil procedure in the first year and then I would teach a third year ethics class as well as an advanced course in federal courts. After ten years of that, I switched into clinical teaching, but it was not live client clinics. It was very, very intensive simulations required of every third year student.

Every student who graduated from the law school that I was teaching at had tried five lawsuits to verdict with real people as jurors before graduation. Every student who graduated had pleadings marked up by me, returned to them, and redone several times until they were right or at least right in my judgment. They had jury charges prepared, marked up, and returned to me over and over again. It was exhausting work. After five years of that, I was willing to be a university president to escape it. It, you know, was exhausting because there were not other resources available in terms of other faculty willing to move into that area.

But I think simulations can be efficient ways of doing some of what Dr. Sullivan suggested needs to be done in the second and third years of law school, and I think even though simulations have been around law schools for a long time, we can make more effective use of them, especially in that third year of law school.

PROFESSOR WEGNER: I wanted to flag another important difference between legal and medical education, however. That is the fact that federal Medicare funding is used to underwrite some medical training costs. While law students might be eager for additional intensive clinical offerings, I fear that we are at a point when we cannot keep hiking tuition.

One of the things I wonder about is whether we might involve trained third-year law students in ways that we have not typically done. We could provide more substantial formative feedback if we did that strategically. We might also shape the advanced curriculum as a set of lectures with discussion sessions and laboratories including advanced students as mentors to those at earlier stages of their development.

DEAN FLOYD: What questions are there from the audience that we do not have in writing, or comments? Professor Wegner encouraged us to be critical thinkers, so it is okay to disagree if you would like. Comments? Yes. I am going to repeat the question since we are recording it. I think the question is, "Does the bar exam or do accreditation requirements provide proper incentives for these changes?"

PRESIDENT UNDERWOOD: Well, I think there has been some movement on the part of bar examiners. I really do not know what is required for the bar exam in Georgia because I have never taken it, and I am not licensed here in Georgia. In Texas, we had moved in the direction of having a so-called skills component on the bar exam. I know Daisy and Tim Floyd were in Texas as well, and there had been a third day of the bar exam adopted, and at least a component of that third day

was a skills component where students were required to demonstrate their ability to perform some lawyering task.

Now, I have to say, it really was not a very impressive test of skills knowledge. Sometimes the students would be required to draft a legal memo. I think maybe one year they were actually asked to draft a will for the bar exam, but at least it was some step towards requiring some demonstration of the ability to perform the tasks that lawyers perform before you received a license.

DEAN FLOYD: Any thoughts?

PROFESSOR WEGNER: Let me add two things about that. I spoke earlier about bifurcating the bar exam. It would allow law schools and bar examiners to know at the end of the first year whether students had established a basic level of mastery in first year subject areas and had attained a core set of abilities to handle analytical work. It would be possible to use existing multistate bar exam essays and multiple choice questions to let students and their schools know about their progress, and if they had difficulty, they could take that part of the bar over again. This approach would also clear the way for different approaches to be incorporated into the portion of the bar exam that would be administered following graduation. While some basic courses might still be tested for everyone, the exam might include more sophisticated work in particular subjects using the kind of portfolio of test materials that is common in states where performance tests are used.

I also wish the American Bar Association and their accreditation committees would allow for waivers from uniform requirements in order to allow schools which want to do something innovative to opt to be assessed on that innovative effort. There is much that can be learned from regional accreditation organizations that oversee colleges. Generally this group of accreditors expects colleges to adopt quality enhancement goals geared to student learning outcomes and reviews the schools on their attainment of those goals. Right now there are not incentives for taking risks. Indeed, there are barriers to innovation. There is also an unfortunate dynamic in which many schools try to look like those at the top of the hierarchy in order to try to gain prestige. The problem is that students at the most elite schools may need different things than those elsewhere. For example, the more elite schools seem to have much weaker legal writing programs and more poorly integrated clinical offerings. These are programs that may be critical for those in other settings to learn core lessons and prepare themselves for a range of practice settings.

DEAN FLOYD: Thank you.

AUDIENCE QUESTION: The topic of today is the opportunity for legal education, and, of course, one question is there an opportunity? Is this, in fact, a moment for significant change? And the question I guess I would primarily direct to Bill Sullivan as a comparative scholar of the professions, the Carnegie Report that you and Professor Wegner have co-authored points out that legal education not only changes slowly, but it tends to change just a tiny bit at the edges. Are there other professions that have dramatically changed the way they prepare the members of the profession in a fundamental way, and if there are, can you give us examples of how those professions have really changed themselves and maybe that may give us some idea of how law might change itself?

DR. SULLIVAN: Well, the quick answer to that is no, there are not. It is striking that once professional education began to be essentially university based, a point that Professor Wegner was making earlier, much of the conservatism that is true of the academy as a whole also affected the professional schools. So, if you think about the big innovations, they occurred early in the twentieth century by and large, in the Flexner Report in medicine. That medical report became the model for almost everything else, though not really for law. But the notion that you start with the first apprenticeship and only after that do you move to skills and so on, really comes out of the Flexner model.

On the other hand, having said that, other fields, certainly medicine and more recently engineering, are fields where there has been a significant rethinking of those fundamental structures. And more than just tinkering around the edges.

To give an example: medicine about thirty to thirty-five years ago embarked on a whole series of reforms. They started creating new model medical schools, for example, and that was under direct federal initiative, which resulted in not only a new sort of medical school, but the development of medical education as a recognized sub-field. So, every medical school today has people on the faculty whose whole job is to study and improve, even if it is incremental improvement, the way they do things. That early development thirty years ago created, for example, the idea that is now standard in medicine, what they call problem-based learning. This is a kind of use of case studies that has some elements that look a bit like case-dialogue teaching, actually, but that really gives students from the very beginning a sense of the full range of medical problems.

In engineering, because of the National Science Foundation, the last decade or more has seen the development of new forms of collaborative

work among engineering schools, which was a big step. And then, secondly, the development of a whole new method of accreditation, which the ABA I think would be well advised to look at, that is called ABET, in which the method of accreditation is that schools define their own goals but then are measured against those goals. So, there are examples of a much more dynamic approach to these things, and I think that is really what is in the near future a possibility for legal education.

PROFESSOR WEGNER: I just wanted to add briefly that some of those differences reflect structural differences in national organizations that help stimulate change. For example, both Dr. Sullivan and I have spoken on different occasions with groups involved in medical education. Their national structure for overseeing residencies involves some very forward-thinking people who are trying systematically to innovate their programs to integrate professional values.

That is a different approach than that adopted by the American Bar Association and the Association of American Law Schools. I also admire the medical education journals and think that they demonstrate a more disciplined tradition of scholarship on teaching and learning. Medical educators seem more inclined to research questions and ask serious questions about the changes they introduce into their curricula and pedagogy. Unfortunately, legal education is very thin both in the methodology we generally bring to bear and in our willingness to assess and disseminate our work for critical review by others. We are thus limited in both our organizational infrastructure and intellectual rigor.

The character of the profession is to some degree reflected in the regulatory modalities here. While I respect the ABA and the accreditation process very much, I think the process is often used to hammer at the academy in order to force needed change. That tendency to regulate often drives out flexibility and innovation, and I think we need a better incentive structure that relies on carrots, not just sticks.

I have been thinking a lot about how we might design an incentive program that would stimulate needed innovation based on careful planning, analysis, and assessment. For example, we need a way for a school to take on a particular facet of its program—such as some feature of their legal writing program or professional responsibility training—then identify problems and find meaningful strategies to address them. We would need them to document, assess, and disseminate what they learned so that others could benefit from it and tailor other schools' programs to address similar problems existing elsewhere. At the moment, everyone tends to operate in isolation, and there is little real exchange of "best practices" based on meaningful assessment. We also lack a recognition system that would encourage schools to set their sites

higher in pursuit of excellence. Instead, we have many schools claiming in their brochures that they offer outstanding programs without providing any basis for knowing the difference between puffery and real results. We also need ways to recognize that there are no uniform solutions, since there are great differences in student bodies and circumstances across the country. I think we can do better on this front than we have in the past. We need to if we hope to seize the opportunities for legal education available right now.

DEAN FLOYD: Thank you all for your attention. There are a few more questions, but we will get to those in the panel discussion this afternoon. It is time for our lunch break. We will resume at 1:15. I do want to invite all of our guests on campus, our non-Mercer community members, to join the presenters, the Law Review editorial board, and the faculty for lunch in the Woodruff House that is next door. It is the antebellum home that you see slightly above the law school to the left as you walk out of the front door. Thank you all and thank you to our panel.