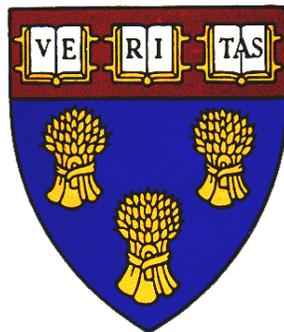


HARVARD LAW SCHOOL
PROGRAM ON THE LEGAL PROFESSION



MAKING GLOBAL LAWYERS
FOR THE 21ST CENTURY

**Keynote Address to the FutureEd 2 Conference
at Harvard Law School**

A Blue Paper

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FOREWORD

The Harvard Law School Program on the Legal Profession was founded in 2004 to:

- ❖ Conduct and publish world-class empirical **research** on the structure, norms and evolutionary dynamics of the legal profession;
- ❖ Innovate and implement new methods and content for **teaching** law students, practicing lawyers and related professionals about the profession; and
- ❖ Foster broader and deeper connections **bridging** between the global universe of legal practitioners and the academy.

This manuscript by Harvard Law School Dean and Jeremiah Smith, Jr. Professor Martha Minow is part of a new “blue paper” series of substantial essay, speech and opinion pieces on the legal profession selected by the Program for distribution beyond the format or reach of traditional legal and scholarly media channels. We thank you for your interest and look forward to your feedback.

Dean Minow wishes to thank David Wilkins for his inspired leadership on these issues, and Catherine Claypoole, Vicki Jackson, Andrew Kaufman, Todd Rakoff, Joseph Singer, and David Wilkins for their truly helpful comments.

MAKING GLOBAL LAWYERS FOR THE 21ST CENTURY

This is an incredibly exciting time in legal education—a time of innovation, a time of renewal. New law schools are starting from scratch, and some with the new mission of creating global lawyers who plan to operate globally, across legal systems, dealing with transborder issues, multinational companies, global problems and opportunities. Existing law schools are exploring reforms more seriously and intensively than in any time since the past 50 years, and in some cases, more dramatically than since the past 100 years.

I hesitate to make any predictions about the future; “You can trust a crystal ball about as far as you can throw it,” said Faith Popcorn—who makes a living forecasting the future for businesses. And I always remember what American baseball hero Yogi Berra said: “The future ain’t what it used to be.” But computer scientist Alan Kay said perhaps what is most relevant to us: “The best way to predict the future is to invent it.” I think that’s why we are here: we all want to take up the challenge of making lawyers for this new time.

What makes this time new? There’s an immediate crisis: the shockwaves due to the global economic crisis, raising real questions about the value proposition of legal education. Is the cost worth the benefit, given constricted job opportunities and refashioning how big global law firms bill, train, and work? The 2007 publication by the Carnegie Foundation for the Advancement of Teaching of its report called *Educating Lawyers: Preparation for the Profession of Law* has stimulated much discussion about how to better tackle the cognitive, ethical, and practical dimensions of making lawyers. But I think there are deeper patterns of change that bring us here.

There are longer-term trends:

- ❖ the globalization of markets, business, litigation, arbitration—in the economy, in the provision of legal and professional services, in the spread of biological and computer viruses—with heightened interconnections, mass movements of capital and people, collisions in cultures, mores, and values amid shifting geo-political and economic power relations, growing strength and global presence of China, Russia, India, Brazil;
- ❖ national and regional governmental restructuring, whether after conflict, after regime change, or in pursuit of multilevel governance as in the European Union;
- ❖ the digital revolution, altering prospects for communication and education of any sort because of the speedy transmission of the written and visual, interactive communication live

and asynchronic, all scrambling older understandings of ownership, privacy, security, and reliability;

- ❖ and persistent and accumulating issues of injustice. Mass disparities in wealth and health; corruption and abuse by governments and companies; burdens from global climate change and pollution, violence within the home, within cities, across regions and between nations, these and other developments pose not merely difficulties and misfortunes, for us, now. Someone once said that a civilization advances when what was once viewed as misfortune becomes seen as injustice.

I salute the foresight of those who planned this conference and the larger efforts it represents. The specific proposals developed for this conference are important and promising. When the history of this event is written—and it shall be written—this will be remembered, I believe, as a critical tributary to the rivers of change in law and education of lawyers.

Yet we're not yet ready to write the history—and indeed, at this moment, the directions of change are not even clear. This conference and a few others preceding it unite people in the call for change but not in the form it should take.

Thus, some call for shortening the time spent in formal education while others urge adding to the training to permit time for joint degrees, units on business and finance, or other disciplines. Some urge moving legal training or preparation for it into the years following high school—while others urge moving it from those years to a second higher degree. Still others suggest adding new masters' degree programs or other post-graduate studies or executive education programs. All in some sense indicate that the variations around the world make all of us think the grass on the other side is greener. Many of the recommended changes emphasize tighter ties between legal training and practice, whether the focus is on writing skills, decision-analysis, management, business and financial literacy, time management, or multi-cultural competence. Techniques include case studies, partnerships between schools and practice organizations, clinics where students serve real clients under the supervision of experienced lawyers, and new practice-oriented courses. Preparation for the real world—that is the mantra uniting many of the proposals but there are striking contrasts in the picture of the real and the preparation people think is most crucial. Specialization? Or broader education? Greater attention to ethics and identity, professionalism and independence—or tighter focus on service and compliance with client demands? Yet many proposals pull away from practice toward critical perspectives, tools and insights from psychology, economics, political science, philosophy, and others disciplines, resources for imagining and pursuing social change and inventing new solutions.

So many current ideas address internationalization but here, too, ideas diverge: semesters studying abroad? Video-conferencing, telepresence, or other forms of distance learning? Greater numbers of comparative law courses, or courses and even whole schools located, say, in China with teachers and courses interchangeable with ones offered, say, in Michigan? New trans-systemic courses, generating concepts underlying the treatment of commercial relations or economic institutions across legal systems?

In some real ways, the tensions across current proposals recall longstanding dilemmas for legal education. William Twining wrote in 1994, in "all Western societies law school are typically caught in a tug of war between three aspirations: to be accepted as full members of the commu-

nity of higher learning; to be relatively detached, but nonetheless engaged, critics and censors of law in society; and to be the service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society's messes."¹

Such tensions can be healthy. Creativity emerges from unique position of law schools as a bridge between theory and practice, between law and justice, between ideals and needs. We want purely academic inquiry, engaged critique of law operating in society, and assistance to a profession. The profession is itself caught between doing well and doing good, serving the haves and the have-nots. Like law itself, law schools have the capacity to retain traditions and to enable change, to protect expectations and to inspire reform.

Although I count myself as an educational reformer, when I conducted interviews with alumni and other practitioners before undertaking recent curricular reform here at Harvard Law School, one of the big surprises to me was how many people stressed, "don't stop doing what you already do so well." This came from people in finance and private equity as well as people in litigation and commercial law. Sharp analysis, teaching people to think hard through a problem by taking it apart, questioning assumptions, tracing consequences of potential avenues of response—these are the hallmarks of legal education.

In many ways, the case method as developed initially right here at Harvard and now used around the world gets something profoundly right. It puts intensive interaction at the core of the teaching and learning experience. Recent research on learning underscores the significance of interaction to engagement and memory, key elements of learning. Similarly, this kind of instruction cultivates the habit of looking for competing arguments and anticipating and understanding "the other side" of a claim. This method helps students consider fair processes as well as substance in the treatment of arguments where people of good will may nonetheless long disagree.

Crucially, traditional legal training has done pretty well in equipping lawyers to listen to clients and given the client advice in dealing with trouble. More can be done to develop students' abilities to interview, communicate, and strategize in the course of their representation of clients. That representation is a privilege as well as an obligation that comes with the expertise of lawyer, officer of the court, and expert on the ways of government, business organizations, and tools of justice. New innovations should not divert students from focusing on this aim.

One of my predecessors, Dean Erwin Griswold—who graduated from Harvard Law School in 1928, described the educational goals in ways that remain relevant:

"You go to a great School not so much for knowledge as for arts or habits,
for the art of expression,
for the art of entering quickly into another person's thoughts,
for the art of assuming at a moment's notice a new intellectual position,
for the habit of submitting to censure and refutation,
for the art of indicating assent or dissent in graduated terms,
for the habit of regarding minute points of accuracy,
for the art of working out what is possible in the given time,
for taste, for discrimination, for mental courage, and mental soberness."²

These are qualities 21st century global lawyers need—and what law schools have often cultivated well. Let us not lose what we do well; do no harm with your reforms.

But we are here to be frank about what we *don't* do well and to consider and evaluate new directions and new proposals. Dean Griswold's list, as good as it is, gives little hint of many crucial tasks. Designing and retooling institutions; working in diverse teams to devise creative and sometimes negotiated solutions; incorporating feedback and criticism; and making judgments even in the face of great uncertainty or controversy. Some of the proposals generated for this conference target some of these goals or others not named on Dean Griswold's list. So how do we assess contrasting proposals and multiple goals?

I invite everyone here to consider three techniques I learned while working with the folks who brought us "Sesame Street." This is not just because, as I am fond of saying, a core legal skill is taught in that children's television show. The show has long had an episode, sung to music: which one of these things is not like the other?³ Look at, say, a bed, a book, a chair, and a table? Got it—which one is it?

Great! [The book is not a piece of furniture; the bed is not used for studying—or is it?]

Drawing analogies and distinctions, comparisons and differentiation—the lesson teaches 2-7 year olds something we all teach in law school too. But the lessons I learned from the makers of Sesame Street--the Children's Television Workshop—more than 30 years ago. I learned three great lessons from the creative team:

1. Separate "yes" sessions from "no" sessions when discussing new ideas. Literally have some meetings where criticism is out of bounds; for brainstorming, helping to make every idea better. And only later, at a separate time, go through each idea critically, testing, probing, rejecting. Otherwise, good ideas don't get better and change, new directions, don't get started.
2. Engage in continual retooling, reassessment, and improvement research that feeds into the design and implementation of your efforts as well as research assessing results. So over time, Sesame Street itself revised "which one of these things is not like the other" to teach that "it depends" on what is the underlying point of comparison? Furniture? Used for studying?
3. Think about the relationship among parts and wholes. In designing a Sesame Street episode—or law school course—that may mean paying attention to how many times to repeat a 1 minute idea within a 30 minute period to reinforce a point. Attending to parts and wholes also means remembering that the student is an entire person—who thinks, feels, relates, and laughs, and to their context, social, economic, psychological—whether the person is a student, teacher, or co-worker.

These are valuable lessons for any creative enterprise, but I actually think there are some specific analogues highly relevant to our focus on making 21st century lawyers.

First, in thinking about "yes" and "no," let's elevate attention to judgment. Judgment, as defined by Noel Tichy and Warren Bennis, is the ability "to make decisions and take effective actions" even "in the face of ambiguity, uncertainty, and conflicting demands."⁴ This is the quality of distinguished lawyers that is most prized and yet it is usually thought of as something that cannot

be taught. Perhaps you've heard a version of the story of a new associate seated at lunch next to a senior partner at a law firm. The associate asked the partner, "How did you gain your reputation for great judgment?" The partner replied, "I guess by making the right decision enough times." The younger lawyer continues, "If you don't mind my asking, how did you come to make the right decision so often?" The older lawyer says, "Experience." And the younger one persists, "What kind of experience?" Now says the older one, "Making wrong decisions."⁵

We have reached the time when we cannot afford young lawyers going out and making many mistakes. Let's make the subject of judgment as a serious one for instruction. It's not going to be easy to teach, but there is emerging research on decision analysis, and bounded rationality; there are biographies and case studies; there are new efforts to identify the skills involved in judging people, thinking in advance of a crisis, devising effective teams that share expertise and diverse points of view in productive dynamics. If we're not there yet, ok—then let's put judgment on the table for serious attention so ideally, we can learn from other people's mistakes, not just our own.

Second, and this would be a significant change, we should insist on ongoing research and retooling of our teaching in content and method, whatever educational reforms we pursue. Evidence-based work is what allowed medicine to move from superstition to science, with dramatic shifts in lives saved, and errors reduced, and more improvements still underway. Systematic empirical work has begun to transform other fields. Outcome measures and performance accountability have become the norm in engineering, policing, elementary education, and legal education can advance only if we employ rigorous empirical assessments of the effects of what we do.

Law schools are comparative infants when it comes to what we know and do in terms of rigorous research and review of how we teach and the effects of our teaching. We don't even really know why the traditional case method seems to develop talents relevant far beyond litigation. We do not know how much is needed or how best to adjust it for transactional work. My colleague David Wilkins reminds me, "we don't even know enough about the actual practice of law to know what we should be teaching students to do" so "empirical research about the profession is crucial to connecting legal education to the profession — as well as serving the profession at a time of tremendous uncertainty."⁶

Unlike with medicine, where good and poor outcomes are relatively easy to discern, we have basic work to do in constructing the normative base against which to measure success in lawyering, as well as success in educating lawyers. The qualities Dean Griswold celebrated—entering quickly into another's thoughts, working out what's possible in a given time—how, when we teach them, do we do so? Can we do so better? How do we cultivate judgment? Imagination? Teamwork? It's an awfully good time to take up the task of figuring out what kind of teaching works for each of these and other goals. We can draw on rich research on how adults learn. There are great questions and much learning ahead. Fundamentally, though, the point is not to shift to some new courses or even a whole new legal education but instead to commit to a process of continual reform and re-evaluation of legal education to reduce the risks of misalignment with practice—and misalignment with ideals, like pursuing justice.

Third, we need help students become experts in relating parts and wholes. What do I mean by that? Students need to understand individuals and groups, specific instances and systems design. Macro and micro perspectives need to be developed so students can know to look for trends while also attending to particular dynamics and exchanges. The context within which a

client is operating is as relevant to fact-finding as how the client get into trouble or what deal the client hopes to make. Similarly, we in the legal education business need to attend to the student as a whole person with psychological and economic needs, knowledge outside of law, aspirations and anxieties. Only if their humanity is central can we hope that they can turn law to serve humanity. For those who fear that is soft squishy stuff, I say, no, this is the demand that we design practice settings and regulatory structures for society with as much as we can know about the real motivations, hopes, and fears of real people. Ethics in this view is not merely nice-if-you-can-afford it but instead central to the meanings people make of their lives as well as to the bottom-line effects of risk and risk reduction, sanctions, and long-term reputation. We need every tool we can find or make to produce legal work settings that are sustainable economically, psychologically, and morally—and laws that allow people to create and thrive.

Felix Frankfurter, once a professor here, once wrote: “We fail in our important office if [practitioners] do not feel that society has breathed into law the breath of life and made it a living, serving soul. We must show them the law as an instrument and not an end of organized humanity. We make of them clever pleaders but not lawyers if they fail to catch the glorious vision of the law, not as a harsh Procrustean bed into which all persons and all societies must inexorably be fitted, but as a vital agency for human betterment.”⁷

As we think about parts and wholes, this means revisiting the business model of legal education. How does the way we pay for legal education affect who has access to enter the legal profession? How much do lawyers and legal educators think about financing legal services and law schools beyond reliance on paying clients? How can students with desires to do good as well as do well perceive opportunities to do so? The answers to each of these questions are shaped by the terms of financial aid, loan forgiveness, and other funding to cover the costs of legal education. These parts influence the whole of students’ experiences, aspirations, and life choices.

Here, finally, is why the future of legal education matters even for nonlawyers. Lawyers are skilled in recognizing and translating complex and abstract human values and goals into institutions and practices. We find ways to accommodate competing interests and to resolve conflicts. We repair the boat of the law at sea and even find ways to design a new ship while already on the voyage. We do something right already: we teach people how to deploy analysis and also common sense as we work together to meet the challenges we face. We recruit, educate, and guide the next generation of leaders—for this country and around the world. More than in any time of recently memory, lawyers need to lead in the creation of solutions to pressing problems that affect us all. We need professional and ethical norms for global lawyering that respect differences while allowing collaboration across borders. This work matters because the problems the world faces are stark and we lawyers have tools that can help.

We are at an inflection point in world history—when the ways we learn and teach, do business, pursue freedom, equality, and security are transforming before our eyes. I am confident that we can together play a vital role in these changes. Legal education is already good, but it could be exceptional. Fear of the imperfect must not halt innovation.

A great hockey player and coach, Wayne Gretsky, once said, “You miss 100% of the shots you don’t take.” To make global lawyers who pursue justice, with judgment, business with acumen, it’s time to take a shot.

ENDNOTES

- ¹ WILLIAM TWINING, *BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL* (1994).
- ² 1991 speech, quoted in IRWIN E. RUSSELL, *COMMON SENSE: FOR A SOCIETY OUT OF CONTROL* 30-31 (2010).
- ³ Music by Joe Raposo and Jon Stone:
- One of these things is not like the others,
One of these things just doesn't belong,
Can you tell which thing is not like the others
By the time I finish my song?**
- Did you guess which thing was not like the others?
Did you guess which thing just doesn't belong?
If you guessed this one is not like the others,
Then you're absolutely...right!**
- Another version:
- Three of these things belong together
Three of these things are kind of the same
Can you guess which one of these doesn't belong here?
Now it's time to play our game (time to play our game).**
- Bonus Version:
- Three of these kids belong together
Three of these kids are kind of the same
But one of these kids is doing his (her) own thing
Now it's time to play our game
It's time to play our game.**
- ⁴ NOEL M. TICHY & WARREN G. BENNIS, *JUDGMENT: HOW WINNING LEADERS MAKE GREAT CALLS* 4 (2007).
- ⁵ For a version of this story, *see id.* (quoting Ted Sorenson, advisor to President John F. Kennedy).
- ⁶ Email from David Wilkins, Lester Kissel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession, and Director of the Harvard Law School Program on the Legal Profession (Oct. 13, 2010) (on file with author).
- ⁷ Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A. J. 532 (1915), reprinted in *II THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 673-677 (Steve Shepperd, ed., 1999).

ABOUT THE AUTHOR

Martha Minow, the Dean and Jeremiah Smith, Jr. Professor of Law, has taught at Harvard Law School since 1981, where her courses have included civil procedure, constitutional law, family law, international criminal justice, jurisprudence, law and education, nonprofit organizations, and the public law workshop. An expert in human rights and advocacy for members of racial and religious minorities and for women, children, and persons with disabilities, she also writes and teaches about privatization, military justice, and ethnic and religious conflict.

Besides her many scholarly articles published in journals of law, history, and philosophy, her recent books include **In Brown's Wake: Legacies of America's Constitutional Landmark** (2010); **Government by Contract** (co-edited, 2009); and **Just Schools: Pursuing Equality in Societies of Difference** (co-edited, 2008).

She served on the Independent International Commission Kosovo and helped to launch Imagine Co-existence, a program of the U.N. High Commissioner for Refugees, to promote peaceful development in post-conflict societies. Her five-year partnership with the federal Department of Education and the Center for Applied Special Technology worked to increase access to the curriculum for students with disabilities and resulted in both legislative initiatives and a voluntary national standard opening access to curricular materials for individuals with disabilities. She currently works on the Divided Cities initiative which is building an alliance of global cities dealing with ethnic, religious, or political divisions.

Her honors include: the Sacks-Freund Teaching Award, selected by the Harvard Law School graduating class of 2005, the Holocaust Center Award, 2006, an Honorary Doctorate of Law, University of Toronto, 2006 and an Honorary Doctorate of Education, Wheelock College, 1996.

In August 2009, President Barack Obama nominated Dean Minow to the board of the Legal Services Corporation, a bi-partisan, government-sponsored organization that provides civil legal assistance to low-income Americans. The U.S. Senate confirmed her appointment on March 19, 2010 and she now serves as Vice-Chair. A fellow of the American Academy of Arts & Sciences since 1992, Minow has also been a senior fellow of Harvard's Society of Fellows, a member of Harvard University Press Board of Syndics, a senior fellow and twice acting director of what is now Harvard's Safra Foundation Center on Ethics, and a fellow of the American Bar Foundation.

Minow co-chaired the Law School's curricular reform committee from 2003 to 2006, an effort that led to significant innovation in the first-year curriculum as well as new programs of study for second- and third-year J.D. students.

After completing her undergraduate studies at the University of Michigan, Minow received a master's degree in education from Harvard and her law degree from Yale. She clerked for Judge David Bazelon of the United States Court of Appeals for the D.C. Circuit and then for Justice Thurgood Marshall of the Supreme Court of the United States. She joined the Harvard Law faculty as an assistant professor in 1981, was promoted to professor in 1986, was named the William Henry Bloomberg Professor of Law in 2003, and became the Jeremiah Smith Jr., Professor of Law in 2005. She is also a lecturer in the Harvard Graduate School of Education. She enjoys watching and talking about movies and keeping in touch with current and former students.