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## Of Rat Time and Terminators

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# Of Rat Time and Terminators

David Barnhizer

## The Problem

About twenty years ago Canadian scientists used a community of rats living in a glass cage to determine the effects of population growth within a finite system. As long as the rat population remained relatively low and resources were sufficient, the rats behaved well. But rats breed rapidly. As the population inside the closed system grew but the total food available stayed relatively constant, the per capita resources shrank. The rats exhibited increasingly aggressive behavior, including savagery and cannibalism. Eventually the population fell to a level that once again allowed the rat version of civility to emerge. When *rat time* hits and the population of a finite system begins to exceed the resources needed for basic sustenance, it is silly to expect rats—or lawyers—to behave civilly. When the rat population reaches extremely high levels, mother rats had better lock their doors and hide the little rats.

A version of rat time is being created within the legal profession as law schools pump 40,000 graduates a year into a saturated system. Understanding our present condition as a period of rat time can help us diagnose the problems of the legal profession, identify the future responsibilities of law schools and the profession, and create more effective solutions than the bandaids that have been proposed or applied thus far. This is particularly important because lawyers and law schools have lost their way. They are afraid to address their most troubling problems and to take the principled actions necessary for meaningful reform.

It is unclear what the ultimate effects of rat time will be. Lawyers, of course, are not rats. The system within which lawyers operate is not inevitably finite; we are not imprisoned in a glass cage with no power over the resources provided. Our system is at least relatively elastic, and we (lawyers, judges and legislators, law schools, businesses, and social institutions) have some control

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over the available resources. We can redefine our expectations. We need not be driven to behaviors that represent the functional equivalent of barbarism and cannibalism.

Lawyers and law schools are in a transitional period. The legal profession is being transformed as it adjusts to the shift in demands for its services. The influx of large numbers of new lawyers has meant that the profession is now filled with people who are neither near retirement nor financially able to retire. They will redefine what it means to be a lawyer, primarily because they have to. Many of these people will not be able to practice law in the traditional sense but will apply their legal skills and knowledge to other work. What they have learned in law school may be productive and useful in areas distinct from law practice.

This means that the apparent glut of lawyers is not necessarily bad, except for lawyers. It will make many lawyers more competitive, more efficient, and—simply—better. It will push down the price of legal services, and push up the quality. There will be shakeout and downsizing; unless law firms adapt the ways they do business, many will go the way of the dinosaur and the American steel industry. The less competitive lawyers may suffer, but many of the consumers of legal services will benefit from the process.

The MacCrate Report is a recent attempt to describe the problems of law schools and the legal profession.<sup>1</sup> Although many critics have seen it as an attack on law schools, it is in fact a critique of the profession. Its basic thesis is that the legal profession is beset by fundamental changes that are causing a decline in professionalism and the quality of legal services. A recurring subtext is that in order to retain any claim to being a profession, lawyers, including legal academics, must address the challenges and come up with workable strategies and solutions. Although the report offers a range of insights, its primary importance is in the dialogue it is generating.

Unlike many studies that only gather dust, the MacCrate Report has captured the attention of lawyers and, to a lesser degree, law faculty. I recently spent several days as a facilitator in a meeting organized around its themes. The meeting's purpose was to generate a realistic discussion among lawyers and legal academics about the quality, training, problems, and professionalism of lawyers. The best insights often came from members of the practicing bar. They confront the dilemmas of practice on the most intimate terms, and the best of them are trying to save the soul of the legal profession. Too many law teachers and deans, on the other hand, feel threatened by the report's implications or are oblivious to its implicit plea for help. For that reason, the dialogue never quite becomes fully joined, and the legal profession and the law schools are missing the opportunity to deal with the critical problems identified by the MacCrate Report.

The report is organized around a statement of skills and values (the SSV). Skills are tools—some technical, some larger in scope. Values are the strong principles that help us to know the ends for which the tools are properly used

1. *Legal Education and Professional Development—An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago, 1992).

and the limits of their usefulness and legitimacy. The values are the orienting principles representing the essence of the legal profession; they entitle lawyers to claim they are members of a *learned* profession rather than greedy, money-grubbing bloodsuckers (or *only* greedy, money-grubbing bloodsuckers).

One problem with the focus on specifically technical skills—which is what we tend to do—is that it divorces power from consequence, responsibility, and morality. There is great danger in that separation. Jacques Ellul pointed out in the 1960s the effects of the inexorable movement of our modern society toward “technique,” a process of dehumanization and self-absorption.<sup>2</sup> I argue that the legal profession and the law schools have moved in that direction and that only a major effort could change what has been created in the process. The problems of the law schools and the profession are deeper, more intractable, and much more pervasive than the MacCrate task force realized.

The severing of power from responsibility makes it frightening to consider the consequences of developing more highly skilled lawyers (or even incompetent lawyers) who are operating outside a moral and ethical context. The closest parallel might be the dismal world portrayed in the movie *Terminator II*: here the new and improved Terminator has such an incredible array of predatory qualities and destructive skills that it comes close to achieving its mission of killing Arnold Schwarzenegger, the one person who can save the human race from extinction. The Terminator is a high-tech *golem* without a soul; its only principled value is the completion of its mission. Many lawyers are becoming *terminators*. But they are not necessarily doing top-quality work for their clients. Too often these lawyer-terminators are pursuing their own self-interest at their clients’ expense—for example, overbilling or “churning” a case by fomenting conflict between the parties to maximize the fees, or failing to do the most basic work on a case, never properly evaluating its strengths and weaknesses, and then selling out when confronted by a tough opponent.

Since 1980, over 500,000 lawyers—the majority of American lawyers—have entered law practice in the United States. In my opinion, legal education is considerably better today in teaching a range of technical legal skills (in such areas as negotiation, interviewing, and trial advocacy) and exposing law students to considerations of professional responsibility, along with traditional doctrinal analysis, than it was fifteen or twenty years ago. The fact that client dissatisfaction with lawyers and lawyers’ own dissatisfaction with their jobs have risen despite the improvement that has already occurred only reinforces the conclusion that the problem goes much deeper than technical skills or even awareness of the values claimed to be the principled basis of the legal profession.

Skills are the refuge to which we flee because the real problems are much deeper. Increasingly extensive skills education has been offered in many law schools for years, and most states have continuing education requirements for lawyers. If *exposure* to technical skills education, or to changes in law and legal

2. The Technological Society (New York, 1964).

technique, were the answer, most of the legal profession should be performing satisfactorily. But evidently that is not the answer. So the problems must be a combination of what skills and principles are being taught, how the teaching is being done, whether the law students and lawyers are listening, and whether they care.

The problems may also result from the characteristics intrinsic to much modern law practice, including its economics and its unthinking competitiveness. Many lawyers who handle their clients' cases poorly know how to do the skilled tasks, they just don't bother. They have been exposed to the ideals of professional responsibility, they just choose to ignore them. This is an issue nobody really wants to confront. It has to do with lack of a professional ethic, with economics, and with our strange culture. Because the issue is intractable and potentially explosive, the dialogues almost always reach the safe conclusion that law schools have failed to educate lawyers in legal skills or professional responsibility. This ignores the real problems and diverts attention from lawyers—who are ultimately responsible for their own conduct—to law schools.

Lawyers do what they do because they want to or have to. Many of the lawyer's most vital skills could be classified as darker skills, ones we all know about but don't put on our lists of essential legal skills because we avoid confronting the real implications of a competitive adversary system, implications exacerbated by the increasingly harsh conditions of private practice. The darker skills include such things as the ability to achieve delay and obfuscation, and knowing how far you can go without being sanctioned or suspended from practice. They include knowing how long you can string a client out before an ethics complaint is filed, and how you can maximize your bill while minimizing the amount of time you actually spend on a case. Lawyers perform badly not so much from lack of skill as because of economic pressures, lack of commitment, laziness, burnout, or dishonesty, or because they are forced to deal with an opponent who is playing games, or because the judges don't make tough decisions or impose sanctions on dilatory lawyers.

Traditionally, we lawyers could get away with such behavior because most of what lawyers do is invisible, occurring in offices or hallways or over the telephone with no witnesses except other lawyers who behave similarly or who are unwilling to turn in another lawyer even for gross neglect or incompetence. Like police who condone and cover up brutality and corruption, the legal profession generally protects its own.

Increasingly, the profession's most serious problems reflect the economics of private practice. The earnings expectations of many law graduates have soared to levels that for most lawyers have become quite unrealistic. At the same time, the costs of developing and maintaining a practice have grown exponentially. Most lawyers want to make a great deal of money and have become frustrated either because they can't or because they can achieve their financial goals only by working seventy to eighty hours a week. The temptation is to cut corners, to give a case less attention than is needed for truly professional performance—and consequently to lose the sense of professional pride, of craft, and of connection with the client that is integral to true professionalism.

This does not mean that teaching lawyering skills and values is meaningless. It is in fact very important. But we need to be less simplistic when we talk about skills, and less embarrassed and abstract when we address values. Some of the most important legal skills have been ignored by law schools. Schools have not taught students about efficient office and case management systems, or about ways of setting up and operating a law practice that free maximum time for client needs. For a lawyer in solo practice or in a small-scale operation, such knowledge can make the difference between mere survival or shysterism and being a true professional.

Law schools should also begin to focus more explicitly and effectively on developing what might be called holistic and problem-solving skills—e.g., diagnosis, conceptualization, synthesis, problem definition, and problem-solving. These kinds of skills tend to be ignored even in law schools that offer a wide range of technical skills instruction. Yet these are the skills that allow lawyers to operate effectively.<sup>3</sup>

If the problem is not the absence of technical legal skills courses or required courses in professional responsibility, what is it? Although I have suggested that we tend to teach the wrong skills, or teach skills outside the context of diagnosis and problem-solving, the problem goes deeper. Much of the problem is *us*, and this is tied to the insights offered a generation ago by Ellul. By *us* I mean what we have become as people. I mean the increasingly intense and competitive nature of law practice, and the emotional climate of legal disputes. Stress and suspicion are dominant characteristics of practice, intensified by the fact that lawyers are no longer a homogeneous group. Lawyers now reflect the diversity of society, the full range of its values and attitudes. People who were long denied access have infiltrated the formerly-white-male legal country club, bringing new agendas, values, and approaches, which give rise to conflict. Many who treasured or benefited from the dying system lament the passing of what they consider in hindsight to have been the profession's more gentlemanly Golden Age. That the Golden Age may never, in fact, have existed for most lawyers doesn't prevent those fond memories of a paradise lost.

*Us* also includes our experiences and culture. I recently heard a law school dean describe Americans as participants in a "culture of lies." Who can dispute that description? The advertising and marketing schemes to which we are subjected from birth are grounded on deception. We are inundated by mindless propaganda that shapes our values, worldviews, and desires. Selfishness and unbridled ruthlessness characterize American culture. Preoccupation with material well-being dominates our television-influenced mentalities. The

3. I try to help students develop this sense in a course called Lawyers' Strategies, in which, through what I admit seems a strange process of immersion in Chinese and Japanese military strategy and martial arts materials, students learn how to perceive the totality of a case or situation as well as its specific components and technical elements. They come to some understanding of what a life spent in manipulating other people, which is an unavoidable element in much of law practice, does to you. We discuss the importance of understanding yourself as a moral being, the importance of making choices and drawing lines beyond which you cannot go without giving away too much of your soul and self-respect.

worst of Ellul's prophetic warnings about the dehumanizing nightmare of a technological society that derives all its values from *technique* seem to be fully realized. In such a society, why should we be surprised that lawyers lack the professional equivalent of family values? We may simply have to accept what we are and what we have become. Lawyers may have to be regulated like Justice Holmes's *bad man* rather than as members of an honorable profession. The implications are troubling and profound, but they may be realistic. The simple fact is that the society lawyers serve, and from which they emerge to become members of the profession, is neither consistently honorable nor filled with integrity.

### Some Broad Solutions

What can we do about a legal profession operating in rat time? Someone may suggest, "Kill all the lawyers," but I personally find that option unattractive. So how else might we keep lawyers from consuming each other and society? The remedy most attractive to lawyers is to increase the amount of the resources going to them. The health care industry has done quite well with that approach over the last forty years. But given the vast, inefficient, and unproductive redistribution of increasingly scarce economic resources that has been caused by soaring health care costs, it would be neither economically wise nor politically acceptable to attempt to create a similar welfare system for the legal industry.

If a redistributive strategy that provides public subsidies or increased insurance monies to lawyers is unacceptable, we need other ideas. We could reduce the number of lawyers in the system. Or retrain lawyers to engage in less wasteful styles of practice. In theory, alternative approaches to dispute resolution were intended to serve this purpose. But as lawyers and large clients learn how to manipulate the ADR mechanisms to their own benefit, the real savings may be illusory.<sup>4</sup>

There are several ways to do something about the population of lawyers and how they behave. By "behave," I am referring not to courtesy or civility, but to corruption, theft from clients, malpractice, and the like. A relatively small but still significant segment of the practicing bar is sufficiently venal or incompetent to provide easy targets for stricter discipline. If we need to reduce—and improve—the legal profession, going after the worst lawyers would send a quick and powerful message.

The problem is that the American legal profession has historically done a miserable job of disciplining incompetent and abusive lawyers and it is wishful thinking to imagine that it will change. But really bad lawyers can be identi-

4. For example, large institutions such as banks can force claimants into a mode of dispute resolution that insulates the defendants against their own vicious behavior and relieves them of any fear that they will be called to account before juries. Clauses arbitrarily inserted into the fine print of customer rules can create a binding arbitration process that works for the institution and against the individual claimant. Arbitrators who want to keep working will favor the organization over the claimant whom they will never see again. You can praise ADR as a way to cut litigation costs, but the real effect of ADR may be to allow behaviors that are immoral and reprehensible, yet legal.



fied, quarantined, and sanctioned relatively easily. A concerted effort by the legal profession over the next ten years could reduce the number of lawyers by as much as ten percent, eliminating the worst lawyers from all areas of practice (including the big firms that have traditionally concealed ethical breaches rather than suffer the harmful publicity). And removing the worst offenders would let the marginal lawyers know that they had better alter their ways of doing business.

Honest and effective lawyer discipline is only part of the solution. American law schools need to help the legal profession carry out some form of population planning. The screening mechanisms we have been using—bar exams, for example—just aren't working. Too many law schools can't get up the courage to dismiss borderline students, and the schools are locked into an expensive institutional structure that requires a steady flow of new students regardless of whether there is demand for law graduates. The only realistic way to keep from generating new lawyers is to restrict the numbers of students law schools can admit, perhaps by setting quotas or by closing or merging some schools. This is no more harsh than what other competitive industries are going through. If schools are not responsive to their markets, and if self-interest prevents both the legal profession and the schools from making hard decisions, those decisions will be made by a combination of legislative initiatives, the employment market, and the consumers of legal services.

These comments paint a picture somewhat bleaker than necessary. A law degree is a useful tool and credential that may be one of the last advanced generalist educational degrees in a far too compartmentalized world. There are serious problems with legal education but also some important successes. Done even reasonably well, its methods help students connect the ability to think and understand with the ability to make choices and to act effectively in the real world. This training is almost without parallel. While legal education can do so much more than it does, we need to respect its ability to inculcate a special perspective among many graduates. At its best it imparts a vital intellectual precision not often found in other disciplines.

As an alternative to restricting enrollments, law schools might focus more of their attention on preparing students for fields other than traditional law practice. A number of law schools are developing programs in public policy, for example, or offering joint degrees in business, medicine, or teaching. The next step in opening up the system requires that law schools reassess their curricula and consider how to educate productively for the meta-skills best suited to our world.

We also need to figure out how better to distribute access to legal services. It is primarily the traditional markets for legal services that are saturated; we have a maldistribution caused by the naturally distorting effects of the market system. Providers of services tend to gravitate to consumers who have the ability to pay. By now much of the existing demand by paying customers for traditional legal services has been met; it is a buyers' market. But traditionally underserved people still need access to quality legal services. Law schools and the legal profession can expand the legitimate demand for legally trained people by devising a strategy to redistribute legal services to underserved

areas. As described below, that might include an expansion in clinical programs as well as the creation of the legal equivalent of teaching hospitals around the country, permanently staffed and adequately funded. These law-teaching clinics would work closely with law schools to educate students and provide legal services.

### Some Specific Suggestions

A major shortcoming of the MacCrate Report is its avoidance of hard choices about funding mechanisms. Legal education is one of the least expensive forms of graduate education in the United States. Effective skills-and-values education is labor intensive and therefore much more expensive than traditional legal education. To achieve the MacCrate goals will require a significant infusion of resources, as well as the development of new institutions, better educational methods, and bridge programs that take new graduates from the academic world to that of law practice. The following recommendations show how the resources can be obtained to achieve those goals, and suggest new institutional approaches that would improve the teaching and delivery of the essential skills and principles, not only during law school but in the critical three-to-five-year period when the lawyer's real persona is formed.

*Recommendation 1: Do away with the core coverage and reduce the bar examination to no more than one day with perhaps three basic subjects.* (It would be even better to do away with the traditional form of the bar exam.) The bar exam has almost nothing to do with lawyer competence, and it distorts legal education. It makes law students and law schools think not about the practice of law, but about what will be tested on the bar exam. To some extent it prevents law schools from freeing up resources for courses that would develop a better conceptual framework for competence, because it encourages the business-as-usual and we-do-this-because-we-have-to rationalizations that prevent significant change.

I do not suggest or desire that we do away with required courses or with basic treatment of such subjects as torts, property, and contracts. But the schools are too much dominated by the structure of the traditional core curriculum—a structure that inhibits experimentation and change. Redesigned core courses, bringing several subject matters together, would better reflect how lawyers analyze and deal with clients' problems and would provide more intellectual stimulation than the dullness that permeates so much of current law teaching. The Langdellian or neo-Langdellian law school curriculum gives students the wrong message about what it means to "think like a lawyer." Its structure is little more than a historical artifact created to mimic the scientific disciplines of the nineteenth century, which were organized in steadily more specialized increments. But ultraspecialization has proved a problem even in science and tends to destroy intellectual coherence in a field as complex and ascientific as law.

*Recommendation 2: Use the bar exam preparation time and resources for Summer Inns of Court.* The bar examination process should be converted to a more meaningful learning opportunity. The ABA and the states should charge a fee

to new law graduates that would fund professional training academies in which they would spend up to three months after graduation. There they would be immersed in intensive skills courses designed to prepare them for practice. Many of the teachers would be law faculty, but a significant core would be practicing lawyers and judges who would help bridge the gap between the profession and law schools. Instead of spending the summer in generalized bar review courses—a dismal exercise in drudgery and redundancy—the new graduates would actually learn something useful.

Consider the economics of such a change. Law students are already expending resources that would pay for the proposed summer academies: 40,000 new law graduates each pay an average of \$1,000 or more as tuition for bar review courses. Many take more than one course. That is a significant reservoir of funds—at least \$40 million every year—and it could be much better spent.

*Recommendation 3: Charge all law students a skills-training fee.* The resources dedicated through such a fee would allow the legal profession and the law schools to offer a required skills curriculum to all students. It could also help fund live-client clinical programs—important but expensive elements of legal education.

*Recommendation 4: States should change their educational funding formulas to reflect the costs of expanded skills education.* A substantial portion of the income of publicly funded law schools is from state contributions for in-state students, typically geared to formulas that treat law students as ordinary master's degree candidates and fail to reflect the need for labor-intensive instruction. A moderate adjustment in the formula would generate resources that more realistically match what is expected of the law schools.

*Recommendation 5: Increase national and state bar association dues by \$100 to \$200 per year and earmark that money primarily for the Summer Inns of Court and live-client clinics.* Lawyers and judges criticize the law schools for their failures. It is time for them to match their rhetoric with their obligation and help pay for the changes they demand. The annual cost to each lawyer would be insignificant, could be graduated to reflect the ability to pay, and for many or most would be tax deductible.

*Recommendation 6: Establish a limited number of superlibraries and reduce or redirect law school library budgets.* The information revolution has vastly increased the possibilities for information sharing; advanced scholarly resources can be accessed from anywhere. Perhaps five to ten percent of law schools' budgets could be diverted to other programs—up to \$50 million, though that figure is likely to be overstated. The present structure of law libraries is essentially redundant in the electronic age. It is a byproduct of accreditation requirements, the predatory practices of the law publishing companies, and the time lag between the emergence of new technological capability and our ability to integrate it with our management processes. An alternative is to pursue even more aggressively what I believe enlightened law librarians are already thinking about—how they can be a leading force in the efforts to improve legal education, both technologically and informationally. Lawyers and law teachers should help them define what is needed.

*Recommendation 7: Create an independent nonprofit institution to administer the resources created by Recommendations 2, 3, 4, 5, and 6.* It would presumably have a board appointed by a combination of the ABA, state bar examiners, the judiciary, and the law schools. But it needs to be independent because of the conflicting interests of those groups. It should also have a representative sampling of clients as full-fledged participants in its decision-making. The institution, or perhaps several institutions with distinct purposes, should be a bridging mechanism with a limited lifespan. It would function as a grant-making foundation spurring innovation at all levels. That would include law schools, but also the continued education of lawyers *after* they begin practice. Much of skills-and-values education becomes fully meaningful only when one has some experience as a base of reference.

*Recommendation 8: Earmark some of the new resources for live-client clinical programs and legal equivalents of teaching hospitals.* The law schools have an obligation to fund clinical programs better, but within the current system they will never be able to do enough, particularly given the anticipated demise of federal funding for clinical programs. In any event, the federal funding has been inadequate and inconsistent, and has enabled the law schools and the profession to avoid a responsibility that rightfully should be theirs. The problem is that no amount of tinkering with law schools' existing resources could ever free up enough funds to do what is needed; the needs are simply too great. An equally serious problem is that law faculty are not fungible commodities who can be easily reassigned. Most law schools do not have the human capital for sophisticated skills-and-values teaching.

Legal education will never be able to replicate the model of medical education. But the resources created by these recommendations would make it possible to set up something similar to teaching hospitals—freestanding public interest law firms, around the United States, that would provide services to various sorts of clients. As permanent organizations, these teaching clinics would have a staff of exceptional lawyers and law faculty, paid and pro bono, full time and part time. Each could be associated with a consortium of law schools. These teaching clinics could ensure that fewer people with legitimate claims would suffer injustice because of economic considerations. Nor do they need to be the same as legal services and public defender offices restricted to poverty-level clients; many might fit that model, but others would undoubtedly choose a more diverse kind of law practice. These alternative teaching clinics could provide legal assistance to such underserved groups as new business entrepreneurs, or smaller political subdivisions besieged by legal threats to their legitimate exercise of power, as is happening in the takings area.

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There is, of course, much more that could be done in the process of innovation. This essay seeks only to raise some possibilities and show how resources could be generated to achieve them. If enough people agree that these approaches make sense, we need to begin a serious dialogue about how to move forward.

Obviously the financial figures suggested in this essay are hypothetical. But even if only fifty percent of the funding was realized, the proposals suggest ways to generate significant resources to fund the recommendations of the MacCrate Report, and to go beyond. With realistic options for expanded funding, law schools and their legions of critics could all stop complaining about resource limits and open a genuine dialogue with a specific agenda for reform. This is a challenge to the ABA, to the federal and state judiciary, and to the law schools. The recommendations described in this essay are reasonable and achievable though some may present political problems. They would enable us to develop more effective responses to undeniably serious problems. The challenge I am making to the powers in legal education and the legal profession is this: either conduct an honest dialogue about resources and create the opportunity to take the kinds of actions required for needed changes, or be quiet.

