Korea Speech

I deeply apologize that I was unable to come to Korea to be part of this wonderful program and to personally deliver these remarks. For family reasons, I needed to remain in Southern California. I am very grateful to my esteemed colleague and Senior Associate Dean, Song Richardson, for presenting my remarks.

I cherish UCI Law School's relationship with Korea and our Korea Law Institute. My colleague, Professor Summer Kim, has done an excellent job as its leader. I hope that our relationship with Korea will grow even stronger in the years ahead.

I would like to talk about American legal education. At the outset in doing so, I want to say that I think that it is a serious mistake to talk about American legal education as if American law schools are largely the same. They are not and never have been. There always has been a huge difference between the prestigious national laws schools – the most elite of which are Harvard, Stanford, and Yale – and local law schools.

But the events of the last few years have exacerbated these differences. There has been a dramatic decline in law school applications and law school enrollments. As recently as 2010, law school applications and law school enrollments were at an all-time high. Then perhaps because of the economic difficulties in the United States, applications fell dramatically. In 2010, there were 147,525 students in enrolled in American law schools. This past year, it was only 110,951, the lowest number since the early 1970s. Put another way, that is a 30% decline in law school enrollment since the beginning of this decade.

It has affected law schools quite differently. For the top echelon of law schools, the effects have been minimal. In fact, my law school – University of California, Irvine School of Law – had a 15% increase in applications this year and that was on top of a 30% increase the year before. The top echelon of law schools is continuing to hire faculty and to thrive in every way. Perhaps they have had had to lower their admissions standards a bit, but it has not been noticeable or significant. Often they have shrunk their first year classes to avoid this and have made up for this by taking more transfer students after the first year of law school.

There is a middle tier of law schools that are suffering more. They have needed to shrink their entering classes to avoid a significant decrease in qualifications. They cannot make up for this with transfer students. Many of these schools are shrinking the size of their faculties, not hiring new faculty, including to replace faculty who retire or leave the school.

But the schools that are suffering most are the bottom tier of law schools. These schools have had to dramatically shrink their classes or greatly lower their admissions standards or both. The difficulty is that as they take more students who otherwise would not be admitted to law school, their students will have more difficulty on the bar examination. Last summer, there were accredited law schools in California with bar pass rates of 38% and even 22%. By contrast, the most prestigious law schools in California -- Stanford, Berkeley, UCLA, University of Southern California, UC Irvine – all had bar pass rates above 80% on the California bar. We recently saw one of these lower tier schools close. It is the school that had a bar pass rate of

22%. Perhaps we will see a few other schools across the United States close, though I doubt it will be very many.

This is the context for discussing legal education in the United States. There is a growing recognition that law schools must do a better job of preparing students for the practice of law. The Carnegie Foundation for the Advancement of Education Report, which received substantial publicity and great attention in law schools, stressed the need for law schools to impart greater practical knowledge and skills. The economic crisis of the last decade changed the economics of law firms and made it harder for them to bill the time for young associates who do not have the skills needed for sophisticated legal practice. As a result of these and other forces, there seems to be a growing sense that legal education needs to do a better job of preparing students for the practice of law.

There is no better way to prepare students to be lawyers than for them to participate in clinical education. Clinics provide students the opportunity to practice law under close supervision and thus can provide students education in the lawyering skills and professional values that they will be using as attorneys, whether they practice in the private sector, government, or public interest organizations. Law, which is inevitably abstract in a classroom, becomes real when the student has to advise a client, negotiate a deal, or argue to a judge. My own ideal would be a model where the first year of law school taught basic legal skills, such as through a lawyering skills class. In addition to legal writing and research, students should learn skills that all lawyers use, such as negotiation, interviewing, and fact investigation skills. The second year should involve some simulation courses. The third year then would include a live-client clinical experience, at least for a semester and ideally for some students occupying all or almost all of their time. Ideally, students would have a choice among clinics, including both litigation and transactional clinics.

Clinics can take countless forms and deal with almost any area of law, but the key is that they are providing students the opportunity to practice as lawyers with close supervision. The analogy to training doctors is powerful. It is frightening to imagine medical schools training doctors who had never seen patients before their graduation. Yet, although most law schools have clinics, only a minority of students participates.

A core aspect of medical education is clinical education. Generally, third and fourth year medical students spend much of their time in clinical rotations through various specialties. They see patients and participate in their diagnosis and treatment. Some medical schools begin having medical students interact with patients even earlier.

The contrast to legal education could not be starker. Most law students in law school have limited exposure to the practice of law during law school. If they do not participate in their schools' clinics or complete an externship, their only involvement with law practice is a summer job or two. The majority of students, especially at elite law schools, spend their summers at large firms where the focus is often more on evaluation and recruitment than on training. Students rarely meet clients and usually do research projects on small aspects of large cases. They get a sense of life in the firm, but minimal actual training as lawyers.

In 2007, I was appointed as dean of a new law school at the University of California, Irvine. From the outset, I said that our core mission should be preparing students for the practice of law at the highest levels of the profession. As part of this, I said that I would urge our faculty to require a clinical course of all students as a condition for graduation. Only a small fraction of American law schools impose such a requirement. I was pleased when the faculty approved this proposal and we indeed require all of our students to participate in a one or two semester clinic during law school. I am hopeful that mire law schools will go in this direction.

But my optimism for the future of clinical education is tempered by some realities. This is not the first time that there has been an effort to reform legal education and make it more practical. In 1921, a study, supported by the Carnegie Foundation for the Advancement of Teaching, called for more professionally relevant training in law schools. In 1933, Yale law professor and later federal court of appeals judge Jerome Frank proposed the idea of a clinical law school. In 1944, a report for the Association of American Law Schools, edited by the eminent Karl Llewellyn, stressed the need for greater skills training for lawyers. In 1992, the MacCrate report, prepared for the American Bar Association (ABA), emphasized the same themes.

This history counsels caution in believing that now things will really change in a major way and that law schools will embrace clinical education. The question, and the one I want to focus on, is why not clinical education? What are the reasons that legal education has developed so differently from medical education and what might be done to change this?

The first and the most obvious reason why clinical education has been limited is its cost. The genius of the method of legal education created by Dean Christopher Columbus Langdell at Harvard Law School in the 19th century, emphasizing professors teaching from casebooks in relatively large classes, is that it is very cost effective. It is economically efficient to put a professor in front of 100 or more students. In fact, historically, some law schools have generated significant profits for their universities.

This approach certainly has some virtues besides cost or it would not have lasted for so long. It has taught countless generations of lawyers how to analyze issues and develop legal arguments. It is effective in teaching legal doctrine. It teaches students to “think like lawyers.” Yet, it cannot do everything. Skills rarely can be learned solely in a classroom setting. No one would dream of learning how to play tennis or suture wounds just by hearing it described in a large room. It is frightening to imagine if medical schools said that they simply wanted to train their students to think like doctors.

Clinical education inherently requires small student faculty ratios. Handling cases in a professionally responsible fashion necessitates that there be close supervision. Best practices indicate a student faculty ratio between one faculty member to six students to one faculty member to ten students, depending on the clinic and the availability for additional supervision (such as through fellows or adjuncts). Requiring a clinical experience of all students necessitates a commitment of substantial resources. Especially for the law schools that I discussed at the beginning that are financially hurting because of decreases in enrollment, expanding clinical education is very difficult.

There is a second, more subtle problem with expanding clinical education in law schools: law faculties that are ever more removed from the practice of law. Judge Harry Edwards wrote of this in a powerful article almost twenty years ago. My sense is that this has increased since then. The emphasis on inter-disciplinary study, which I applaud, means more law professors with a Ph.D. as well as a law degree, but with no practice experience. My sense is that over the thirty years that I have been a law professor there has been a trend against law professors engaged in legal practice. An ever smaller number of law faculty are actively involved in briefing and arguing cases or handling transactions. This, I fear, translates into less of an appreciation for clinical education and thus less willingness to bear its greater costs. It is interesting while law schools have become more different over recent years, their faculties have become much more homogeneous.

I would conclude with several modest suggestions in this regard. First, clinics in law schools must find ways of involving significantly more academic tenure track faculty. At many law schools there is a rigid divide between the clinical faculty and the academic tenure track faculty. Clinics are taught entirely by the former and the latter rarely have any involvement in clinical education. But this gives little reason for academic tenure track faculty to be directly invested in the clinics. This could change if academic tenure track faculty were personally involved in clinical education. Some might be consultants to the clinics in the areas of their subject matter expertise. Some, if they have the experience and requisite credentials (such as bar membership), might actually supervise students. Some might help conduct clinics, such as appellate litigation clinics, that take advantage of their skills as academics. The more academic tenure track faculty are involved in clinics the more they will understand their value and the more invested they will be in supporting them.

Second, attorneys must be enlisted to pressure law schools to expand clinical opportunities for students. Law schools are likely to respond to market pressure from employers as well as pressure from their graduates who are a key part of their donor base. I constantly hear lawyers lament how they were not taught to practice law when they were in law school and how law schools still do a poor job of this. These lawyers can, if they choose, make a difference. Law firms can decide that they only will hire students who have completed a clinic or at least give priority to students who have done so. If a significant number of law firms were to do this, clinical education would vastly increase.

Third, state bars should require skills training as a condition or admission to practice law. New York now requires 50 hours of pro bono work as a condition for admission to the bar. California is considering a requirement that students take 15 hours of skills courses. In fact, the American Bar Association could go so far as to mandate a clinical experience of all students, just as it now requires a skills course, an upper-level writing requirement, and a class in professional responsibility.

Fourth, new models for funding legal clinics need to be explored. One possibility is partnerships with law firms, government offices, or public interest offices that will allow students to participate in a law school clinic, but with help and resources from the outside entity.

These suggestions, of course, do not provide a complete solution. But they do offer some starting points for consideration of how to deal with the underlying obstacles to clinical education.

Twenty years from now will legal education be any different from today? Will the Carnegie Report have a better fate than the ones that preceded it? There is a wonderful opportunity to change legal education, but also enormous pressures against change, especially expensive change.

Again, I thank you for the opportunity to speak and wish so much that I could have been here in person.