

# REGENT UNIVERSITY LAW REVIEW



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FORMATION STRATEGIES IN LEGAL EDUCATION  
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## LAWYER, FORM THYSELF: PROFESSIONAL IDENTITY FORMATION STRATEGIES IN LEGAL EDUCATION THROUGH “SOFT SKILLS” TRAINING, ETHICS, AND EXPERIENTIAL COURSES

*Susan Swaim Daicoff\**

### INTRODUCTION

Professional identity formation as a learning objective in law school<sup>1</sup> may appear to be nontraditional, and perhaps even innovative. It is likely not a new concept, but at least it has not traditionally been an explicit goal of legal education. In informal discussions among law professors, these ideas often emerge: law students develop their professional identities either in their families of origin or through life experiences prior to law school, and therefore, any such characteristics are set, ingrained, and perhaps immutable; law students develop their professional identities through interactions with supervisors during summer clerkships and after graduation—“on the job” so to speak; or professional identity is an unteachable, untrainable, and intangible concept, and law professors are unable to address it.

However, empirical data finds that many law students do change as a result of law school. For example, studies conclude that during law

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\* Professor of Law and Director, Clinical Programs, Arizona Summit Law School, M.S. (Clinical Psychology), J.D., LL.M. (Taxation). Thanks are due to Professors L.O. Natt Gantt, II and Benjamin V. Madison, III for inviting me to present this paper at the Southeastern Association of Law Schools’ annual conference in August 2014, in Amelia Island, Florida, and to Robert Neal Baskin, Jr., for always supporting and informing this work.

<sup>1</sup> L.O. Natt Gantt, II & Benjamin V. Madison, III, *Cultivating Professional Identity Formation in the Doctrinal Course*, Handout at Institute for Law Teaching and Learning Summer 2013 Conference on Hybrid Law Teaching 1, 3 (June 7–9, 2013), *available at* <http://lawteaching.org/conferences/2013/handouts/4d-ProfessionalIdentity.pdf> (setting forth several excellent definitions of professional identity as well as exercises that can be used in law school courses).

school, law students become more cynical about the legal profession (but also more protective of it);<sup>2</sup> less philosophical, less introspective, and less interested in abstractions, ideas, and the scientific method;<sup>3</sup> and less focused on intrinsic satisfactions, while more motivated by external rewards.<sup>4</sup> They become less interested in helping their communities and more interested in image and attractiveness, a shift which is linked to a decline in well-being.<sup>5</sup> Law students' moral and ethical decision-making also changes in law school; they tend to shift away from relational, contextual decision-making and an ethic of care towards more rational, logical, rule-oriented approaches.<sup>6</sup> Law school is therefore likely to impact law students' professional development. It is time to be sure that impact is soundly planned and coordinated.

"Professional identity" here is meant to encompass one's values, preferences, passions, intrinsic satisfactions,<sup>7</sup> emotional intelligence,<sup>8</sup> as

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<sup>2</sup> See Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 179–80 (1994) (relaying examples of students' increased cynicism towards the legal profession); Don S. Anderson et al., *Conservatism in Recruits to the Professions*, 9 AUSTL. & N.Z. J. SOC. 42, 44 (1973) (identifying that certain professionals become more protective of their profession after a professional education).

<sup>3</sup> See James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 791, 836–37 (1979). Hedegard suggested, based upon the results of his empirical research on the effects of legal education, that one could expect law students to become more realistic and pragmatic as graduation and legal practice approached. *See id.* at 837.

<sup>4</sup> Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 122–23 (2002) (reporting the results of an empirical study linking intrinsic values to law student well-being); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 281 (2004) (linking this shift in values to a decline in the emotional well-being of law students and thus concluding that intrinsic values are key to maintaining satisfaction and well-being in law school); *see also* Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 J. ASS'N LEGAL WRITING DIRECTORS 258, 260 (2002) [hereinafter *Psychological Insights*].

<sup>5</sup> See sources cited *supra* note 4.

<sup>6</sup> Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 226–27 (1991); *see also* SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 46 n.55 (2004) [hereinafter *DAICOFF, LAWYER, KNOW THYSELF*].

<sup>7</sup> See ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 60 (2007); *see generally* sources cited *supra* note 4.

<sup>8</sup> Emotional intelligence ("EQ") is a concept developed by psychologist and researcher Daniel Goleman in contrast to intellectual intelligence or intelligence quotient ("IQ"). *See* DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 5, 13 (1998). It consists of five categories of traits that have been found to correlate to lifelong success in a variety of areas, and it can be a better predictor of all-around success than IQ. *See id.* at 26–

well as one's preferred professional best practices. "Emotional intelligence" here is used to refer to five areas: intrapersonal (self) awareness, self-management competencies, awareness of and ability to "read" others, interpersonal relational skills, and drive or motivation.<sup>9</sup> Professional identity, therefore, includes the "soft skills" of the law, such as client relations, self-directed learning, and strategic planning, but goes further and encompasses other concepts as well.<sup>10</sup> Many of these "professional identity" concepts have been empirically demonstrated to be important to one's effectiveness,<sup>11</sup> well-being, and satisfaction as a lawyer.<sup>12</sup> Therefore, legal education would be foolish to ignore the development of law students' professional identities or entrust it to chance occurrences and experiences, particularly given the data suggesting that personality changes do occur in law school. Medical schools have realized the importance of teaching similar concepts—including emotional intelligence—to medical students to enhance their effectiveness as

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27. Irene Taylor conducted four studies on the emotional intelligence of Canadian lawyers. See generally Irene Taylor, *Canada's Top 25 Corporate Litigators*, LEXPERT, July 2002 [hereinafter Taylor, *Litigators*] (assessing traits differentiating "top" corporate litigators from other lawyers); Irene Taylor, *Canada's Top 30 Corporate Dealmakers*, LEXPERT, Nov.–Dec. 2002 [hereinafter Taylor, *Dealmakers*] (assessing traits differentiating "top" corporate dealmakers from other lawyers); Irene Taylor & Stephanie Willson, *Carpe Diem! Canada's Top 25 Women Lawyers*, LEXPERT, Sept. 2003 [hereinafter Taylor, *Women Lawyers*] (assessing traits differentiating "top" women lawyers from other women lawyers); Irene E. Taylor, *Top 40: 40 and Under 40*, LEXPERT, Nov.–Dec. 2004 [hereinafter Taylor, *Top 40*] (assessing traits differentiating "top" lawyers age 40 and under from other lawyers).

<sup>9</sup> GOLEMAN, *supra* note 8, at 26–27 (grouping Goleman's five competencies into two categories: personal (self-awareness, self-regulation, and motivation) and social (empathy and social skills)).

<sup>10</sup> See Edith L. Curry, *The Secret Skill of Relationship Marketing*, GPSOLO, May–June 2012, at 42, 43–44. The "soft skills" of the law refer to all of the lawyering skills, competencies, and abilities a lawyer needs besides the more traditionally visible "hard skills" like marshalling facts, reading, briefing, synthesizing cases and statutes, legal analysis, legal research and writing, oral advocacy, and written advocacy. See *id.* at 43. It can be controversial to use the terms "hard" and "soft" to differentiate between skills that are traditionally taught in law school and those that are traditionally overlooked in law school; "soft" suggests those skills are somehow easier or less important. However, corporate managers frequently use the term "soft skills" to refer to important but non-analytical abilities. See Linda Klein, *Professional Development: Now More than Ever*, 40 LAW PRAC., Nov.–Dec. 2014, at 72, 70. It is in that spirit—of excellent corporate management—that this term is used.

<sup>11</sup> Twenty-six abilities or competencies were linked to lawyering effectiveness in Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 630 (2011). These twenty-six skills include both "hard" and "soft" skills. See *id.*

<sup>12</sup> Intrinsic values and satisfactions are important to one's well-being as a lawyer. See sources cited *supra* note 4.

physicians.<sup>13</sup> Many law professors are actually well-positioned to help law students link professional identity concepts to the practice of law, particularly given legal educators' current emphases on practical skills training in law school.<sup>14</sup>

Since 1988, at least nine empirical studies have investigated the skills and competencies that make lawyers most effective.<sup>15</sup> Their findings are generally consistent with each other. Each study includes findings about *nontraditional* skills and competencies (or "soft skills") that make lawyers most effective; these findings coalesce into the following lawyer competencies, which can be grouped into four categories: (1) intrapersonal (self) awareness, values, and abilities;<sup>16</sup> (2) intrapersonal management competencies;<sup>17</sup> (3) interpersonal (other) awareness;<sup>18</sup> and (4) interpersonal management competencies.<sup>19</sup>

About a decade ago, a focus group of student leaders in the author's law school underwent an invitation-only leadership training offered by the law school. During this training, the student leaders asked for the

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<sup>13</sup> See Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 JAMA 1200, 1202 (2008).

<sup>14</sup> See, e.g., INST. FOR ADVANCEMENT AM. LEGAL SYS., AHEAD OF THE CURVE 1 (2015) (evaluating the Daniel Webster Scholar Honors Program, a two-year experience-based legal education program that replaces sitting for the New Hampshire bar exam).

<sup>15</sup> See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 508–09 (1993); Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 523–25, 548 (2009); John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11, 17–19 (1988); Shultz & Zedeck, *supra* note 11, at 623–25; John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*, 26 WM. MITCHELL L. REV. 327, 329–30 (2000). See generally Taylor, *Dealmakers*, *supra* note 8; Taylor, *Litigators*, *supra* note 8; Taylor, *Top 40*, *supra* note 8; Taylor, *Women Lawyers*, *supra* note 8.

<sup>16</sup> See Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 826 (2012) (including, among other skills and competencies, practical judgment, motivation, diligence, self-confidence, integrity, honesty, adaptability, maturity, passion, engagement, drive for achievement, focus, concentration, optimism, self-knowledge, reliability, independence, and practical creativity/innovation).

<sup>17</sup> See *id.* at 827 (including, among others, organizing and managing one's work, self-development, stress management, continued professional development, and managing one's general mood).

<sup>18</sup> See *id.* (including, among others, understanding human behavior, the ability to see the world through others' eyes, tolerance, patience, and the ability to read others' emotions).

<sup>19</sup> See *id.* at 827–28 (including, among others, interviewing, advocating, speaking, listening, organizing and managing others, mentoring, working cooperatively with others as part of a team, negotiating, mediating, developing relationships within the legal profession (networking), community involvement and service, problem solving, strategic planning, influencing others, counseling and advising others, asking questions, client relations, and assertiveness).

inclusion of professional identity development strategies throughout the curriculum. Specifically, they wanted to see these concepts taught in orientation, professional responsibility courses, upper-level electives, and practice-oriented courses such as clinics, interviewing and counseling, negotiation, and dispute resolution. The student leaders' passion for this inclusion was remarkable, yet implementation of their requests has taken years.<sup>20</sup> This Article sets forth some of the author's strategies for developing one's self-awareness, values, preferences, preferred professional role, best practices, judgment, interpersonal skills, and professional communications skills in law school. Many of these were influenced by the student leaders' requests.

#### I. STRATEGIES IN ORIENTATION: EMPIRICAL RESEARCH AND EXTEMPORANEOUS ROLE PLAY

At orientation, an hour can be set aside for presentation of the research on two relationships: the link between professional competencies and lawyer effectiveness and the link between one's intrinsic values and one's professional satisfaction and well-being.<sup>21</sup> After a short presentation of this research, two volunteers can be solicited from among the new law students to role play a commonly-arising situation in front of the class. Specifically, after a short explanation of the unlicensed practice of law rules, the students can role play a friend asking a law student for legal advice and a law student politely declining to answer, even when the friend presses for an answer. This is interactive and can be engaging. Most importantly, it usually generates a lively discussion about the law (Surprise! One cannot render legal advice while in law school!<sup>22</sup>); one's self-awareness (how to handle one's impulses and desires to ignore the law to help out a friend or deal with feelings of incompetency, anger, obligation, or guilt);<sup>23</sup> and one's interpersonal skills (such as how to handle social pressure and maintain personal boundaries with others).<sup>24</sup>

It is helpful to *label* these insights and skills for new law students. It is equally important to *model* for new law students the importance of

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<sup>20</sup> The training course was co-taught by the author and Professor James Cataland, Florida Coastal School of Law, Jacksonville, Florida. Upon receiving this feedback from student leaders, Professor Cataland and I petitioned the school to teach a class incorporating these ideas. See James Cataland & Susan Daicoff, Proposal to Teach Leadership, Teambuilding, Problemsolving, & Communications Skills for Lawyers at Florida Coastal School of Law (Fall 2010) (on file with the Regent University Law Review) (noting that a catalyst for this petition was the student feedback received during the leadership training). Our proposal was accepted, and in 2010 we taught a course emphasizing these ideas.

<sup>21</sup> See sources cited *supra* note 4.

<sup>22</sup> It would constitute the unlicensed practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013).

<sup>23</sup> See GOLEMAN, *supra* note 8, at 26.

<sup>24</sup> See *id.* at 27.

self-awareness, self-management, and awareness of others' motives in handling interpersonal interactions—while abiding by the rule of law—in professional situations. It also begins to establish a cultural expectation in law school of integrating one's personal and interpersonal competencies with legal rules, and it gives new law students a vocabulary for the new professional skills they will need to develop or hone in law school.

## II. STRATEGIES FOR PROFESSIONAL IDENTITY FORMATION IN PROFESSIONAL RESPONSIBILITY COURSES

Almost all aspects of professional identity formation can be touched on in a professional responsibility course. It can be helpful to devote part of the course to professional identity formation and explicitly state, for example, that two-thirds of the course focuses on the ethical rules and one-third of the course focuses on assisting each student in developing his or her preferred professional identity, practical skills necessary for professional behavior, and personal and professional values. Learning objectives for the course can set forth expectations such as these: the student will “understand and be able to articulately describe his or her preferred professional role and values; and . . . demonstrate, via written assignments, skills exercises, and role play simulations, his or her acquired professional communications and judgment skills.”<sup>25</sup>

While there may not be sufficient time for an in-depth exploration, three to five short graded assignments can address the professional identity learning objectives in addition to the more traditional learning objectives. These assignments also function to provide a practice-oriented, experiential component in the course and an opportunity for honing one's writing skills.

Each assignment is limited to one to two typed pages, is worth one to two percent of the course grade, and is graded on a competency basis without a curve; it is expected that any student can rewrite the assignments repeatedly until 100% credit is achieved. By the end of the semester, all students in the class can achieve full competency on these assignments as an iterative process.<sup>26</sup> Rewrites offer an opportunity for students to interact with the professor about clarifying their values and preferences and an important opportunity for the professor to sharpen students' writing skills. Each of these assignments (personal essay, memorandum, script, role play, and court or field observation) is explored below.

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<sup>25</sup> Susan Daicoff, Professional Responsibility Syllabus (Spring 2014) [hereinafter Daicoff, Syllabus] (on file with the Regent University Law Review).

<sup>26</sup> *See id.*



### III. STRATEGY FOR DEVELOPING INTRAPERSONAL AWARENESS: THE “PERSONAL ESSAY”

Intrapersonal awareness can be explored through a personal essay on one’s professional preferences and values. One or more law review articles are assigned as reading, introducing professional role diversity (such as hired gun, zealous advocate, moral lawyer, wise counselor, or true believer),<sup>27</sup> and on the link between intrinsic values and professional satisfaction.<sup>28</sup> For example, Rob Atkinson’s taxonomy of professional roles of the lawyer,<sup>29</sup> Lawrence Krieger’s empirical work on lawyer and law student autonomy and well-being,<sup>30</sup> and Marjorie Silver’s work on the “affective assistance of counsel”<sup>31</sup> are particularly helpful.<sup>32</sup>

To foster autonomy,<sup>33</sup> preserve personal privacy, and provide maximum input, students choose three of about eight topics on which to write. Millennial students<sup>34</sup> particularly appreciate positive feedback,

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<sup>27</sup> Rob Atkinson gives a great description of this professional role diversity in arguing that not all lawyers function as neutral partisans (amoral representatives of their clients). See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 303–17 (1995).

<sup>28</sup> See sources cited *supra* note 4.

<sup>29</sup> Atkinson, *supra* note 27, at 303–12.

<sup>30</sup> See Krieger, *Psychological Insights*, *supra* note 4, at 260–61.

<sup>31</sup> See generally MARJORIE A. SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL* (2007) (discussing the negative effects that a lack a self-awareness can have on lawyers).

<sup>32</sup> One can also assign as reading Susan Daicoff, *On Butlers, Architects, and Lawyers: The Professionalism of The Remains of the Day and The Fountainhead*, 17 J.L. BUS. & ETHICS 23 (2011).

<sup>33</sup> Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 894–95 (2007) (summarizing the results of their multiple studies of law students’ well-being and emphasizing the importance of autonomy support in law schools for law student well-being).

<sup>34</sup> Millennial law students were generally born after about 1983. Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 259 (2009) (placing the birth years of the “Millennial Generation” between 1982 and the mid-2000s); see also Leslie Larkin Cooney, *Giving Millennials a Leg-Up: How to Avoid the “If I Knew Then What I Know Now” Syndrome*, 96 KY. L.J. 505, 505–06 (2007–2008) (noting characteristics of Millennials as collaborative, technology-minded, achievement-oriented, team-oriented, ambitious, demanding, questioning of everything, and more); Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 988–89 (2009) (describing the characteristics of the Millennials). Researchers Howe & Strauss are generally credited for identifying the Millennial Generation and placing it in context with regard to older generations based on their study of 500 years of history. See generally NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* (2000) (discussing the characteristics of the millennial generation); WILLIAM STRAUSS & NEIL HOWE, *GENERATIONS: THE HISTORY OF AMERICA’S FUTURE, 1584 TO 2069* (1991) (discussing the rise of the millennial generation).

clear directions, samples of good work, respectful input, and choice.<sup>35</sup> It is important not to permit students to simply write in vague, generic, aspirational terms; clarity about one's values requires concrete, specific, individualized preferences and plans.<sup>36</sup> Feedback on drafts and permitting rewrites are helpful in this regard. Students should be warned not to simply pontificate on vague concepts (such as "justice") or reiterate concepts in the Model Rules of Professional Responsibility (such as "competence" and "diligence");<sup>37</sup> they should be urged to take the discussion deeper into specific personal values and attributes.

Prompts for writing may be:

1. Describe your personal working definition of "professionalism" based on Rob Atkinson's taxonomy of lawyer types: Type I (zealous advocate); Type II (wise counselor); and Type III (true believer).<sup>38</sup> What kinds of cases will you most enjoy taking as a lawyer, and why?

2. What skills do you think are most important for professional behavior as a lawyer, and why?

3. What are your intrinsic values? At what do you excel? What are your strongest assets? What do you like to do even if you are not being paid for the work? How can you integrate these values into your work as a lawyer or in the future?

4. Describe your professional strengths and areas of challenge.

5. Describe your plan of action to continue to develop your professional identity (including a plan for overcoming any personal areas of challenge).

6. Describe how you manage and deal with stressful situations, including disappointment and conflict with others in the workplace.

7. "Wild Card": Write and answer your own thoughtful question about professionalism and/or your role in the legal profession.

8. Find a reported case or one currently in news media. Do you agree or disagree with how the lawyers are approaching the case from a professional ethics or representation standpoint (not their legal strategy)? Why?

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<sup>35</sup> See Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 13, 32 (2013) (emphasizing structure, certainty, and transparency in training Millennial law students); see also Melody Finnemore, *Meet the Millennials: Young Attorneys Prompt Need for Firms to Explore New Ways of Doing Business*, OR. ST. BAR BULL., Nov. 2005, at 9, 9–13, available at <https://www.osbar.org/publications/bulletin/05nov/millennials.html>; Melissa H. Weresh, *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 360, 364–65, 367, 371, 384–85 (2009) (discussing how to work with and teach those in the Millennial generation).

<sup>36</sup> See Gantt & Madison, *supra* note 1, at 3–8.

<sup>37</sup> See MODEL RULES OF PROF'L CONDUCT RR. 1.1, 1.3 (2013).

<sup>38</sup> Atkinson, *supra* note 27, at 303–12.

Here is a sample personal essay that reflects an excellent response to this assignment:

Cognizance of your own behavior and attitude is probably the most important skill. The entire practice and clientele base depends on how lawyers interact with clients and other lawyers. Reflecting on how others view you, how you interact with others, and how you react to what others do is valuable because that is how you successfully interact and attract others. If you can recognize when your choice of words or expression of opinion is alienating others, you can change to try to make a positive turnaround.

Instead of having a “take me as I come” approach where others either [will not] listen or go out of their way not to hear, a more tailored approach can earn friends, clients, and respect. Knowing the audience, how different responses might affect others, and in what situations you can loosen up is also helpful. A lawyer who is cognizant can tailor an approach that casts the widest net, earns a large amount of respect and meets a wide range of people.

My professional strengths come from my willingness to self[-]reflect and evaluate my performance. I tried to hone those skills in [military service], where my duties included attending monthly counseling sessions where I discussed job performance with a leader/counselor. It was a time to reflect and I always tried to take advantage of it. I later became a leader/counselor, and tried to emulate the good qualities of my counselors, as well as learn from the bad. I would always try to self[-]reflect and even sought the opinions of those I counseled. Later, a teacher in one of my classes had each student complete a different self-evaluation from a different source each week. The entire class was dedicated to professional development, and the reading all focused on managerial self-reflection. I put a lot of effort into it because I am constantly striving to self[-]improve.

I sometimes have a lack of focus because I try to do [too] many things at one time and then prioritize or deprioritize in an unorganized way. I lose focus on things I deem less helpful or accidentally spend less time on things that are important. I am also impulsive and everything sounds like a good idea. Life is too short, so I constantly strive to accomplish so many things and never feel like I can wait on any of them. I say yes to things I should not because I fail to recognize my workload or the time it takes to complete everything[.]

My plan is to focus on my strength of self-reflection and use it to try to overcome my weaknesses. I will try to plan a better schedule and ensure more time to do the things I need to do. In the future I will try to reevaluate my workload and level of dedication on the first of every month. In practice I will try an evaluation weekly, and will look to work productivity to decide whether my plan worked or not.<sup>39</sup>

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<sup>39</sup> Student 1, Personal Essay (on file with the Regent University Law Review) (used with permission).

#### IV. STRATEGY FOR DEVELOPING APPLIED PROFESSIONAL IDENTITY AND INTERPERSONAL SKILLS: THE “SCRIPTED ROLE PLAY”

For the learning objective of developing professional communications and judgment skills, it is very effective to have students develop and role play a professional hypothetical situation. First, they apply the rules of ethics to their developed scenario, reach a conclusion about what the lawyer must and can do in the situation, and write a memorandum of law.<sup>40</sup> Finally, they develop a script to perform for the whole class, portraying what must be done and what a “best practice” would be in the situation.<sup>41</sup> Written or oral graded products are the memorandum of law, script, and role play.<sup>42</sup> All students are grouped into teams of two to four, unless they strongly prefer to work alone, and instructed to develop a unique professional dilemma involving the ethical rules of law.<sup>43</sup> Collaboration is expected on this assignment to foster teamwork competency.<sup>44</sup> Dilemmas may include situations involving the interplay of the ethical rules with personal values and morals, such as:

- communicating the end of the lawyer-client relationship;
- having the fee discussion with a new client;
- explaining the settlement to a plaintiff client at the end of the case;
- dealing with a nosy friend;
- breaching confidentiality due to imminent harm;
- obtaining informed consent to a waiver of privilege and confidentiality;
- representing two co-clients where one develops a secret;
- dealing with a difference with your client;
- withdrawing from a case because of a conflict;
- asking a former client for consent to current representation of another client;
- ending the lawyer-client relationship because of a conflict;
- negotiating a job offer from a private firm while working for the government;
- moving to a new law firm and dealing with conflicts of interest;
- dealing with a conflict between co-defendants;
- dealing with the perjuring client or witness;
- the temptation to lie in settlement negotiations;
- confidences inadvertently disclosed in a misdirected email;
- a client who steals information from the opposing counsel;

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<sup>40</sup> Daicoff, Syllabus, *supra* note 25.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

- dealing with a non-supervising senior partner; and
- confronting an impaired or wrongdoing lawyer or judge.

Each role play requires the team to imagine a fact scenario for application of the assigned rule of law, write a one-page memorandum of law applying the rules of professional responsibility to the situation, write a one- to two-page script for a client conference or lawyers' meeting in the scenario, and then role play the script as a three-minute long simulation in class.<sup>45</sup> Most important to professional identity development, the memorandum must contain an analysis of best practices, which involves going above and beyond the rules to determine what to do in the situation based on the students' values and preferences.<sup>46</sup> Each team is required to meet with the professor before presenting in class for further feedback about professional communications skills and to be sure the scenario, memorandum, and script are appropriate and workable.<sup>47</sup> After the class presentation, the class provides feedback to each team; this feedback should focus on strengths and offer a few suggestions to foster a positive learning environment.<sup>48</sup> The team then rewrites their memorandum and script based on the class's feedback and the professor's individual feedback to improve it and optimally reach 100% credit.<sup>49</sup> Skills development like this should permit students to revise their work repeatedly and should foster an environment of success in the final resultant grades.<sup>50</sup>

This skills assignment is designed to develop four areas of emotional intelligence: self-awareness, self-management, awareness of others' motives and needs, and interpersonal interactional skills.<sup>51</sup> More specifically, it aims to develop teamwork; collaboration; professional judgment; professional communication skills; the ability to handle difficult conversations and difficult people; one's preferred style of interaction with clients or opposing counsel; client relations; the ability to give, receive, and implement feedback; and an awareness that best practices in law practice often exceed the minimal requirements of the ethical rules. This assignment may model the ability to effectively "script" difficult conversations that will take place in professional settings after graduation before those difficult conversations take place. It is particularly effective to move from discussing in theory what one might say or do in a professional setting to role playing with words, gestures,

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<sup>45</sup> *Id.*

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See* GOLEMAN, *supra* note 8, at 26–27 (discussing the concepts and components of emotional intelligence).

tone, body language, and actions. Developing the script allows students to experiment with how they want to present themselves in professional interactions. It also affords an opportunity to discuss one's instinctive reactions, such as anger or outrage, and how to manage and contain them in professional settings. Finally, the best practices section of the memorandum challenges students to go beyond the rules to resolve ethical dilemmas based on their explicit personal and professional values. A sample memorandum that can be given to students is contained in Appendix A.<sup>52</sup>

#### V. STRATEGY FOR IDENTIFYING PROFESSIONAL IDENTITY CONCEPTS IN THE FIELD: THE "COURT OBSERVATION"

Finally, in any doctrinal course, it is often instructive to assign students to observe at least one hour of court proceedings, or perform other fieldwork, and write about their observations and reflections.<sup>53</sup> Traditionally, students are asked to write about the application of substantive rules of law to the observed cases,<sup>54</sup> but to foster professional identity development, more focused questions can be assigned instead. The sample instructions contained in Appendix B set forth such questions; they could be further improved by asking whether the student would behave in the same way as the observed lawyers and judges behaved.<sup>55</sup>

Specific learning objectives for this work can include students' gaining real world insight into the law of professional responsibility and professionalism in practice; observing the operation of the law, lawyers, and judges in action; developing or improving skills of self-reflection and writing; and developing the ability to identify and comment upon professionalism and best practices in ethics.

Finally, this assignment often gives students an opportunity to interact with practicing lawyers and judges. This affords a chance to practice interacting in a professional environment—and possibly even network, which is one of the lawyering competencies cited in the lawyering effectiveness studies.<sup>56</sup>

Students often comment on either inspiringly gracious professional behavior or disappointingly unprofessional and unprepared behavior that they observe in lawyers and judges. They often use the experience to reaffirm their commitment to their own preferred professional identity.

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<sup>52</sup> See *infra* Appendix A.

<sup>53</sup> See Daicoff, Syllabus, *supra* note 25.

<sup>54</sup> See James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 77 (1996) (noting that the "case method" is a beneficial and enduring aspect of traditional legal education).

<sup>55</sup> See *infra* Appendix B.

<sup>56</sup> See, e.g., Gerst & Hess, *supra* note 15; Shultz & Zedeck, *supra* note 11.

Critiquing the behavior of practicing lawyers can assist students in clarifying their intentions for their own professional behavior.

#### VI. STRATEGIES FOR PROFESSIONAL IDENTITY FORMATION IN CLINIC AND EXPERIENTIAL COURSES: “TRANSLATION” AND “LABELING”

Of course, opportunities for professional identity formation abound in clinical (live-client) and experiential (simulation-based) courses.<sup>57</sup> However, students need professors to “translate” these experiences into concepts that relate to professional identity formation; otherwise the experiences, while wonderful and exhilarating, may not result in lasting connections to students’ values and competencies.<sup>58</sup>

An introductory assignment in these courses may be a self-assessment of one’s strengths, values, preferences, biases, and the like. These can be anonymous to preserve students’ privacy.

A “professionalism contract” signed by the clinic student at the outset of the clinical course can be an important anchor for the student’s professional identity development. It can set forth expectations of the clinical professor for the student’s professional behavior and assist both the student and professor in monitoring joint accountability to maintain those standards.

Simulations, mediations, and live client interactions are often debriefed by the professor and reflected upon by the student, but these opportunities can be more explicitly linked to professional identity formation when they are grounded and couched in explicit terms relating to values or to the empirical research on competencies of an effective lawyer.<sup>59</sup> When the professor provides feedback to a student on a simulated or real mediation, for example, the professor can consciously identify the student’s strengths and areas of challenge<sup>60</sup> based on the empirical research on lawyer effectiveness and well-being.

For example, when debriefing a mediation, the supervising clinical or experiential professor might say to a student mediator:

I was really impressed with how you kept your cool as a mediator even when the parties’ interactions became heated; you must have been a bit worried, but you didn’t show it! (*Good work demonstrating maturity, strong sense of self, and stress management!*) I particularly liked how you homed right in on that one party’s implicit need for safety and recognized it. (*You showed a good ability to read others and actively listen and recap.*) I know you must have been feeling pressed for time at

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<sup>57</sup> See Charlotte S. Alexander, *Learning to be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465, 467–72, 483 (2011).

<sup>58</sup> See *id.* at 476–78.

<sup>59</sup> See sources cited *supra* note 15.

<sup>60</sup> Note that the term “weakness” has been avoided for reasons stated below. See *infra* text accompanying notes 71–73.

the end of that mediation, but if you'd like to try a more facilitative approach, then next time you could try asking some open-ended questions of the parties to see if they can problem-solve their own solution rather than making direct suggestions to them. (*Let's work on developing patience, questioning, listening, problem-solving, and practical judgment.*) The parties are more likely to follow through, feel heard, and have had a "voice" if they set the terms of their agreement themselves. (*I am now teaching you how to implement the empirical findings of "procedural justice" in your work as a mediator.*) Great job connecting with the lawyers after the mediation; you are good at that! (*You are learning how to network professionally and build and develop professional relationships with peers.*)

The professor can be explicit or implicit about the lawyering competencies being debriefed (*italics, above*), but explicitly stating them is preferable. It grounds the feedback in the lawyer research and gives the student specific labels for the behaviors and skills he or she is developing. It can assist the student in becoming more intentional about his or her professional identity development.

Finally, intentionally using the term "best practices" and assisting students to identify better ways to handle dilemmas and problems that arise in clinical courses can help students maintain a practice of self-reflecting and developing a course for improvement. For example, when mediation students write reflections of their mediations, they can be asked to write about their (1) strengths, (2) areas for improvement (Millennial law students seem to dislike the concept of "weaknesses"<sup>61</sup>), and (3) best practices for the next mediation.<sup>62</sup> Without these prompts, students often default to writing about what the parties said, did, and agreed to, which does not develop their own professional self-awareness.

## VII. SIMPLE STRATEGIES IN ANY COURSE

Even if none of the strategies above seems feasible, even simple strategies can be helpful. For example, one can base a handout on Shultz and Zedeck's empirical research on the twenty-six lawyering effectiveness factors and ask students to self-identify their top strengths and challenge areas from among the twenty-six competencies.<sup>63</sup>

One can assign Rob Atkinson's law review article on the diversity of professional roles among lawyers and ask students to explore which role they personally prefer.<sup>64</sup> One can show Fordham Law School's video, "Red State, Blue State," and explore whether students prefer moral or amoral

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<sup>61</sup> See *infra* text accompanying notes 71–73.

<sup>62</sup> See Daicoff, Syllabus, *supra* note 25.

<sup>63</sup> See Shultz & Zedeck, *supra* note 11, at 630.

<sup>64</sup> See Atkinson, *supra* note 27.



lawyering.<sup>65</sup> One can expose students to emerging concepts of practicing law as a healer or peacemaker to present a diversity of approaches to the law from which students can choose.<sup>66</sup>

One can explore Krieger and Sheldon's empirical findings regarding the differences between intrinsic values and extrinsic values<sup>67</sup> and ask students to identify their own individualized intrinsic values and relate them to their future work in the law, such as helping others, upholding constitutional rights, being an expert, the thrill of court appearances, and representing the underrepresented.<sup>68</sup> Students can be asked to write a "graduation letter" to themselves which reminds them of their intrinsic values and is opened after graduation.<sup>69</sup> Most simply, professors can review the list of lawyering effectiveness competencies set forth above,<sup>70</sup> look for opportunities to mention them, and begin using those labels, names, and concepts in any of their classes when giving feedback to students.

#### VIII. CAUTIONS

A few notes are in order, however. For example, the labels "strengths" and "weaknesses" should be revised slightly when asking law students to reflect on themselves. Millennials may resist the concept of weakness and prefer to identify areas of opportunity, challenge, or growth.<sup>71</sup> Labels can be important psychologically;<sup>72</sup> weakness may sound unappealing or even threatening to law students who typically prefer to be seen as dominant and confident.<sup>73</sup>

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<sup>65</sup> See RED STATE, BLUE STATE: LAWYERS, POLITICS & MORAL COUNSELING (Fordham University School of Law 2009), available at <http://www.law.fordham.edu/louis-stein-center-for-law-and-ethics/10469.htm>.

<sup>66</sup> See SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE 82 (2011); J. KIM WRIGHT, LAWYERS AS PEACEMAKERS 219–20 (2010).

<sup>67</sup> See sources cited *supra* note 4.

<sup>68</sup> See Gantt & Madison, *supra* note 1, at 3, 5, 7.

<sup>69</sup> To be more Millennial-relevant, I now ask students to put it in the "Notes" section of their smartphones for later use rather than writing on paper. See Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199, 262 (2013) (arguing that technology must be employed when training Millennial law students).

<sup>70</sup> See *supra* notes 15–19 and accompanying text.

<sup>71</sup> See JESSICA BRACK, MAXIMIZING MILLENNIALS IN THE WORKPLACE 5–7 (2012), available at <http://www.kenan-flagler.unc.edu/executive-development/custom-programs/~media/DF1C11C056874DDA8097271A1ED48662.ashx>.

<sup>72</sup> See Kevin H. Michels, *Our Hidden Value*, 53 U. LOUISVILLE L. REV. 1, 32 (2014).

<sup>73</sup> Stephen Reich, *California Psychological Inventory: Profile of a Sample of First-Year Law Students*, 39 PSYCHOL. REP. 871, 874 (1976); see also DAICOFF, LAWYER, KNOW THYSELF, *supra* note 6, at 26.

Also, when attempting to provide opportunities for students to develop their professional identities, professors may want to avoid Socratic dialogue, logical argument and questioning, and critical grading or feedback. This can chill personal exploration of preferences, strengths, weaknesses, competencies, and values. Some empirical research indicates that law students want to be seen as competent and socially ascendant, even though internally they feel socially awkward and anxious.<sup>74</sup> Supportive, encouraging words, labels, and exercises are thus more effective in creating a safe environment in which students can explore their values, preferences, strengths, and areas for growth.<sup>75</sup>

#### CONCLUSION

In summary, professional identity formation in law school may occur despite whether professors foster it intentionally. Empirical research exists to inform legal educators about how law students tend to change during law school and about what qualities and skills law students need to develop to be effective lawyers.<sup>76</sup> These two sets of research findings need to be coordinated and combined. This will allow professional development during law school to become a conscious, explicit, and planned phenomenon that is targeted towards the competencies needed to be an excellent lawyer, rather than a happenstance process that could easily go awry. Strategies for providing opportunities for professional identity formation in law school can be simple and feasible. They are likely to be most effective when they are explicit, respectful of students, and informed by existing research on lawyers and law students.

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<sup>74</sup> Reich, *supra* note 73, at 873–74.

<sup>75</sup> See generally Alexander, *supra* note 57 (showing the use of student experiential exercises as tools for professional identity growth); see also BRACK, *supra* note 71, at 7.

<sup>76</sup> See sources cited *supra* notes 4, 6, 8.

## APPENDIX A

SAMPLE MEMORANDUM OF LAW TO BE USED FOR  
THE LEARNING OBJECTIVE OF DEVELOPING  
PROFESSIONAL COMMUNICATIONS AND JUDGMENT  
SKILLS†

**Facts:** In this assignment, I am assuming that I am a lawyer in a divorce case between Rick and Marcia. I represent Rick, who wants to aggressively pursue Marcia in this divorce and, as part of that, wants to call the three minor children as witnesses to testify about Marcia's infidelity during the marriage. I disagree, and, despite the fact that I have counseled with him about this matter in person, he has not changed his mind.

**Law:** The Model Rules ("MR") that apply are MR 1.2, 1.4, and 1.16.<sup>1</sup> Under MR 1.2, the client has the ultimate decision-making power over the objectives of the representation; the lawyer oversees the means but shall consult with client regarding the means to be taken to reach the client's objectives.<sup>2</sup> I must consult with Rick before refusing to call the children as witnesses. Comment 2 to MR 1.2 does not explain how to resolve a disagreement between lawyer and client as to the means to be used.<sup>3</sup> MR 1.4(a)(2) requires me to reasonably consult with Rick regarding the means I will use to accomplish his objectives.<sup>4</sup> I am allowed to deal with technical and tactical issues, grant short or reasonable continuances to the other side if they do not adversely affect the client's case, and plan a trial strategy without Rick's consent.<sup>5</sup> The Restatement 3d says there are two matters outside the client's control: (1) the lawyer can refuse to do things he thinks are unlawful; and (2) the lawyer alone can decide to do things he reasonably believes to be required by law or by an order of a tribunal.<sup>6</sup> Therefore, the law does not clearly permit me to decide not to call a witness against my client's wishes.

In this case we have a "fundamental disagreement" which would allow me to seek to withdraw, but I must seek the court's permission

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† This memorandum is a sample given to students to clearly demonstrate the expectations for this assignment.

<sup>1</sup> MODEL RULES OF PROF'L CONDUCT RR. 1.2, 1.4, 1.16 (2013).

<sup>2</sup> *Id.* R. 1.2(a).

<sup>3</sup> *See id.* R. 1.2 cmt. 2.

<sup>4</sup> *Id.* R. 1.4(a)(2).

<sup>5</sup> *See id.* R. 1.2 cmt. 2.

<sup>6</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 23 (2000).

before I withdraw.<sup>7</sup> MR 1.16(a) requires me to withdraw if (1) my representation will result in a violation of the rules of professional conduct; (2) my representation will result in a violation of law; (3) my physical or mental condition materially impairs my ability to represent the client; or (4) I am discharged by my client.<sup>8</sup> MR 1.16(b) permits me to withdraw if “the client insists upon taking action that [I] consider[ ] repugnant or with which [I] ha[ve] a fundamental disagreement.”<sup>9</sup>

Only MR 1.16(b)(4) applies here. I am not required to withdraw, but am permitted to request the court’s permission to withdraw as his counsel.<sup>10</sup> Since I am his attorney of record in litigation, I likely need the court’s approval to withdraw.<sup>11</sup> Also, I have a duty to mitigate the consequences of my withdrawal for the client and to take reasonable measures to protect Rick’s interests.<sup>12</sup> Upon withdrawing, I must (1) notify the client; (2) allow him time to employ new counsel; (3) surrender papers and property of the client; and (4) refund monies not earned.<sup>13</sup>

**Best Practices:** As this is a permissive withdrawal situation, I have options. Rick’s plan is not the kind of approach I take in divorces because I am not willing to create further harm to minor children, so I am not willing to follow his direction in this case even though his plan is not criminal or fraudulent. Minimizing hostility in family law cases like this may enhance my and my client’s well-being in the long run, and it fits with my intrinsic values of problem-solving; thus, I will seek to withdraw.

**Script:**

Me: Hi, Rick, thank you so much for coming in to see me today. I want to talk about the status of your case and the approach I am taking in representing you, because, as you probably guessed, I have some real concerns about the different ways you and I would like to proceed in your divorce. This “status conference” isn’t going to be time billed to you as a client because I think we just need to sit down and talk about where we are going and whether it makes sense for me to continue as your lawyer.

Rick: *(looks surprised)* Okay . . .

Me: *(giving him no opportunity to argue)* As you know, you and I disagree about the trial strategy regarding whom to call as a witness about your wife’s infidelity. We’ve talked about this at length in person and on the phone, and I wondered if your thoughts on that had changed at all since the last time we talked? *(Assume that we had discussed it at length in our last conference.)*

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<sup>7</sup> See R. 1.16(b)(4), (c).

<sup>8</sup> *Id.* R. 1.16(a).

<sup>9</sup> *Id.* R. 1.16(b)(4).

<sup>10</sup> *Id.* R. 1.16(b), (c).

<sup>11</sup> See *id.* R. 1.16(c).

<sup>12</sup> *Id.* R. 1.16 cmt. 9.

<sup>13</sup> *Id.* R. 1.16(d).

Rick: (*basically says no*) No, I still think that's the way to go.

Me: Well, as you know, that's not a way that I work when handling divorce matters. There are other lawyers who might well be comfortable with that approach, but I'm not. That means that I need to ask the court for permission to withdraw as your attorney and help you find the right attorney for you, one who will really represent you in the way that you're looking for in this case. I'm afraid that my approach would just be frustrating for you and not really get you what you are looking for, so I have determined that this is the best course of action. I will, of course, help you find a new attorney, take time to do this, and do all that I can to make a smooth transition to your new attorney—including giving that attorney all the papers and documents I have in your file. You will also get back any unearned retainer funds in my possession, so you can use them with your new counsel. Does that make sense?

Rick: You're going to quit on me? Are you kidding? You really don't want to do it my way?

Me: I don't see any other way to proceed and provide you with adequate legal representation because we have what is called a "fundamental disagreement" about how to handle the case.

Rick: Well, I guess we do!

Me: (*Probably need to employ some basic empathy to defuse any anger he has and help him understand the dilemma and my choice. For example:*) I can understand how frustrating and surprising this may be, but I don't really see any other options . . . do you agree? (*pause for responses*) Do you have any questions? (*pause for responses*) Would you like me to help you identify some attorneys with whom you might mesh well?

## APPENDIX B

SAMPLE INSTRUCTIONS FOR COURT OBSERVATION  
OR FIELD EXPERIENCE REFLECTION PAPER IN  
PROFESSIONAL RESPONSIBILITY COURSES‡

In person (not by video or phone), spend at least one hour doing one of the following: (1) observing a deposition; (2) observing a court hearing or trial; (3) attending a presentation by a local attorney; (4) providing at least one hour of pro bono direct client service assisting local attorneys providing pro bono services at a local event; or (5) interviewing in person a local attorney or judge about the practice of law and the meaning of “professionalism.”

Afterwards, write a one-page reflective paper thereon in which you address the following questions:

1. Where did you acquire your one hour of field or court observation?
2. What Model Rules did you see “in action” in your experience (if any)?
3. What ethical questions were raised (if any) in your observation? How were those ethical questions handled?
4. What “best practices” (above and beyond the ethical rules) did you observe or would you suggest in the situation you observed?
5. What surprised you about the observation?
6. What inspired you in the observation?
7. What is one concrete event or interaction you observed during the experience that relates to the practice of law, professional responsibility, or professionalism?

Collaboration is permitted, but your final papers must be entirely your own work. You may watch the same proceedings as, or with, another student. You may talk to each other about your impressions and observations. You may read and comment on each other’s draft papers; however, any collaboration beyond what is identified in this paragraph is not permitted.

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‡ These sample instructions can be given to students as a guide for their fieldwork observation and reflection. This set of instructions incorporates questions to foster professional identity development.

# A PROFESSIONAL FORMATION/PROFESSIONALISM CHALLENGE: MANY STUDENTS NEED HELP WITH SELF-DIRECTED LEARNING CONCERNING THEIR PROFESSIONAL DEVELOPMENT TOWARD EXCELLENCE

*Neil Hamilton\**

## INTRODUCTION

Self-directed learning is a critical competency for each law student and new lawyer, but a surprising proportion of law students are at an earlier stage of this competency than where they should be in terms of both their own self-interest and the interests of their law schools and the profession itself. Malcolm Knowles defined self-directed learning as “a process in which individuals take the initiative, with or without the help of others, in diagnosing their learning needs, formulating learning goals, identifying human and material resources for learning, choosing and implementing appropriate learning strategies, and evaluating learning outcomes.”<sup>1</sup> Legal educators, legal employers, and the profession itself want each law student and new lawyer to take ownership over her own self-directed learning so that she continually improves over a career toward excellence at all the competencies needed to serve clients and others well. This is highly beneficial to the law student also.

What if one third to somewhat more than one half of the first year law students are at an earlier stage of self-directed learning regarding their professional development toward the competencies needed to serve clients well than where they need to be and where their law school and

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\* © Neil Hamilton. I am indebted to the teams of student research assistants in the summers of 2013 and 2014 who helped me develop the *Roadmap* curriculum discussed in this article. I am also very grateful for the help of Libby Meyers, the Holloran Center Coordinator, in tabulating the assessment data for the *Roadmap* curriculum reported in this Article.

<sup>1</sup> MALCOLM S. KNOWLES, SELF-DIRECTED LEARNING: A GUIDE FOR LEARNERS AND TEACHERS 18 (1975). See also Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447, 452 (2003) (defining self-regulated learning as “the active, goal-directed, self-control of behavior, motivation, and . . . tasks by an individual student”). Barry Zimmerman further explains that self-regulated learners “believe academic learning is a proactive activity, requiring self-initiated motivational and behavioral processes as well as metacognitive ones. . . . [s]elf-regulated students stand out from classmates by the goals they set for themselves, the accuracy of their behavioral self-monitoring, and the resourcefulness of their strategic thinking.” Barry J. Zimmerman, *Developing Self-Fulfilling Cycles of Academic Regulation*, in SELF-REGULATED LEARNING: FROM TEACHING TO SELF-REFLECTIVE PRACTICE 1, 1 (Dale H. Schunk & Barry J. Zimmerman eds. 1998).

the profession itself need them to be? The data presented in Part II below indicates that about a third to more than half of the first year law students are at these earlier stages of self-directed learning.<sup>2</sup> This is a serious professional formation challenge for these students, their law schools, and the profession. Educators need to foster strong, self-directed learning skills so that each student will continue her professional development toward excellence over a career. This continuing professional development not only benefits clients and the profession but also greatly benefits the student and the student's law school in terms of better employment outcomes. The students, legal educators and employers, and also the profession face a future of the continuing exponential growth of knowledge and rapidly changing markets where the lawyer who takes the initiative with life-long, self-directed learning skills will be best able to secure meaningful employment and serve clients and others well.<sup>3</sup>

This internalized proactive commitment to professional development toward excellence is one of the foundations for a lawyer's professional formation or professionalism. William Sullivan, the co-director of all five Carnegie Foundation for the Advancement of Teaching studies of higher education for the professions, believes that the "chief formative challenge" for higher education in the professions is to help each student entering a profession to change from thinking like a student where he or she learns and applies routine techniques to solve well-structured problems toward the acceptance and internalization of responsibility to others (particularly the person served) and for *the student's own proactive development toward excellence as a practitioner at all of the competencies of the profession*.<sup>4</sup>

Similarly, in the Carnegie Foundation's study of medical education, *Educating Physicians*, the authors conclude that

[t]he physician we envision has, first and foremost, a deep sense of commitment and responsibility to patients, colleagues, institutions, society, and self and an *unfailing aspiration to perform better . . . . Such commitment and responsibility involves habitual searching for improvements in all domains . . . and willingness to invest the effort to strategize and enact such improvements*.<sup>5</sup>

Legal educators and the profession itself have a similar goal for each student.<sup>6</sup> If we borrow some language from the medical profession, we

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<sup>2</sup> See *infra* Part II.

<sup>3</sup> See Neil W. Hamilton et al., *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 THE PROF. LAW., no. 3, 2012, at 1, 9.

<sup>4</sup> See William M. Sullivan, *Foreword to TEACHING MEDICAL PROFESSIONALISM* at xi, xv (Richard L. Cruess et al. eds., 2009); Carnegie Found. Studies in Higher Educ., *Authors*, CARNEGIEHIGHERED.ORG, <http://carnegiehighered.org/authors/> (last visited Apr. 13, 2014).

<sup>5</sup> MOLLY COOKE ET AL., *EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY* 41 (2010) (emphasis added).

<sup>6</sup> Robert MacCrate, *"The Lost Lawyer" Regained: The Abiding Values of the Legal Profession*, 100 DICK. L. REV. 587, 615-16 (1996).



would say that the law graduate we envision has, first and foremost, a deep sense of commitment and responsibility to clients, colleagues, society, justice, the disadvantaged, and self, and an unfailing aspiration to perform better and serve with excellence. Such commitment and responsibility involves habitual searching over a career for improvements in all the competencies needed to serve well and a willingness to invest the effort to strategize and enact such improvements.

Recent studies of both the competencies that legal employers are looking for in hiring new lawyers and the competency models that legal employers use to assess associate performance support the importance of a law student's initiative and internalized commitment to professional development. For example, in the decision to hire a new lawyer for four common types of legal employers, "[i]nitiative/ambition" is one of the competencies considered very important to critically important and "[c]ommitment to professional development toward excellence" is considered important to very important.<sup>7</sup> A recent empirical study of the competency models used for associate evaluation in eighteen larger firms indicates that fifteen of the firms are assessing each associate's initiative/ambition and twelve of the firms are assessing commitment to professional development toward excellence.<sup>8</sup> Berman and Bock's 2012 study of an AM Law 100 firm indicates that a strong "drive for excellence" was a major differentiating competency for higher associate lawyer performance ratings.<sup>9</sup>

The ABA's new accreditation standards for law schools, discussed in Part I below, strongly support a law school's emphasis on helping each student to develop toward both the habit of searching for improvements in all the competencies needed to serve clients and the legal system well and a willingness to strategize and enact such improvements.<sup>10</sup> This habit is essentially developing toward later stages of self-directed learning in the context of the legal profession.<sup>11</sup> Part II analyzes questionnaire data to provide some understanding of the degree to which 1L students have

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<sup>7</sup> Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547, 557–58 (2014) [hereinafter *Changing Markets*].

<sup>8</sup> Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 11 (2013) [hereinafter *Law Firm Competency*].

<sup>9</sup> See Lori Berman et al., *Developing Attorneys for the Future: What Can We Learn from the Fast Trackers?*, 52 SANTA CLARA L. REV. 875, 882–83, 888 (2012); see also *Law Firm Competency*, *supra* note 8, at 23.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867, 995–96 (2009).

taken responsibility for their own proactive development toward self-directed learning and excellence at the competencies needed to serve well.<sup>12</sup> The data will indicate that somewhere between one-third and one-half of the 1L students are at an earlier stage of self-directed learning than where they should be in terms of their own self-interest, the interests of their law schools, and the profession. Part III explores first, a clear learning outcome for students to address this challenge of early-stage students regarding self-directed learning, and second, a curriculum called *Roadmap: The Law Student's Guide to Preparing and Implementing a Successful Plan for Meaningful Employment* (forthcoming from ABA Books, 2015) designed to help each student grow toward the learning outcome.<sup>13</sup> Part IV provides an evaluation of the effectiveness of the *Roadmap* curriculum at helping students achieve the learning outcome outlined in Part III.<sup>14</sup> Lastly, Part V argues for a whole building co-educator curriculum model to foster each student's development toward the learning outcome set forth in Part III.<sup>15</sup>

#### I. ABA ACCREDITATION STANDARDS AND SELF-DIRECTED LEARNING

In 2014, the ABA changed the accreditation standards for law schools to require greater emphasis on “professional and ethical responsibilities to clients and the legal system” in preparing students to practice law.<sup>16</sup> The standards require the articulation of learning outcomes for these “professional and ethical responsibilities” and the assessment of these learning outcomes.<sup>17</sup>

With respect to preparing students to practice law ethically, law schools were subject to former Standard 302(a) that mandated only that a law school “shall require that each student receive substantial instruction in . . . the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”<sup>18</sup> This former standard focused on inputs such as a course on professional responsibility.<sup>19</sup>

The new standards focus on outputs such as learning outcomes for students and assessment of outputs to determine whether the students

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<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See *infra* Part V.

<sup>16</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(c) (2014).

<sup>17</sup> *Id.*

<sup>18</sup> 2013–2014 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(a) (2013).

<sup>19</sup> See *id.* Standard 302(a)(5), Interpretation 302-9; Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 52–53 (2012).

have achieved the learning outcomes.<sup>20</sup> The changes directly relating to preparing law students to practice law ethically and responsibly are noted in *italics* below:

1. Change former Standard 301 on “Objectives” from preparing students for “effective and responsible participation in the legal profession” to “effective, *ethical*, and responsible participation as members of the legal profession.”<sup>21</sup>

2. Change former Standard 302 from “Curriculum” to “Learning Outcomes” that require each law school to “establish learning outcomes that shall, at a minimum, include competency in the following . . . (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.”<sup>22</sup> Note that this new Standard 302 on learning outcomes combined with Standard 301 essentially emphasizes that every law school should articulate learning outcomes to help each student internalize and exercise: (1) the skills needed for both (a) effective and competent, and (b) ethical and responsible participation as a member of the legal profession; and (2) professional and ethical responsibilities to both (a) clients and (b) the legal system.<sup>23</sup>

3. Add a new Standard 314 on “Assessment of Student Learning” providing, “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”<sup>24</sup>

4. Add a new Standard 315 on “Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods” that requires: The dean and the faculty of a law school shall conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.<sup>25</sup>

This Article argues that “ethical, and responsible participation as members of the legal profession” and “professional and ethical

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<sup>20</sup> Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 182–83 (2014).

<sup>21</sup> 2014–2015 ABA STANDARDS Standard 301(a) (emphasis added); 2013–2014 ABA STANDARDS Standard 301(a).

<sup>22</sup> 2014–2015 ABA STANDARDS Standard 302; 2013–2014 ABA STANDARDS Standard 302.

<sup>23</sup> 2014–2015 ABA STANDARDS Standard 301.

<sup>24</sup> *Id.* Standard 314.

<sup>25</sup> *Id.* Standard 315.

responsibilities” to both clients and the legal system require each law student and lawyer to internalize self-directed learning.<sup>26</sup> To use William Sullivan’s words, these accreditation requirements are asking law schools to help each student to internalize deep responsibility both to the client and for the student’s own *proactive* development toward excellence as a practitioner at all of the competencies needed to serve the client and the legal system well.<sup>27</sup> Part II analyzes data on 1L students to provide some understanding of the degree to which 1L students have internalized responsibility for the students’ own proactive development toward excellence at the competencies needed to serve the client and the legal system well.

## II. DATA ON THE SCOPE OF THE PROFESSIONAL FORMATION/PROFESSIONALISM CHALLENGE FOR MANY 1L STUDENTS

A student’s stage of self-directed learning indicates the degree to which the student has taken responsibility for his or her professional development.<sup>28</sup> It is difficult for a student to internalize responsibility and service to clients and others unless the student has taken responsibility for their own professional development toward excellence at the competencies needed to serve well. The data sets below indicate the stage of self-directed learning for 1L students at both the end of fall semester and the beginning of the spring semester.<sup>29</sup>

These data sets indicate each 1L student’s self-assessment of her stage of self-directed learning at the beginning of spring semester at one law school and at the end of fall semester at another law school. There is a self-report bias in this type of research because, “[i]n general, research participants want to respond in a way that makes them look as good as possible.”<sup>30</sup> They want to respond in ways they consider “socially desirable.”<sup>31</sup> A respondent may also fear that true and accurate responses may cause them to be disadvantaged in some way.<sup>32</sup> I assume there is some social desirability bias in the data sets below and that the data therefore understates the proportion of students at earlier stages of development on self-directed learning. With respect to fears that true and

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<sup>26</sup> *Id.* Standard 301(a), 302(c).

<sup>27</sup> *Cf.* Sullivan, *supra* note 4, at xi, xv–xvi (articulating how self-awareness in developing expertise in the medical profession enables medical students to better prepare for becoming a doctor).

<sup>28</sup> See Laurie Barron, *Learning How to Learn: Carnegie’s Third Apprenticeship*, 18 CLINICAL L. REV. 101, 110–11 (2011).

<sup>29</sup> See *infra* Figures 1–4.

<sup>30</sup> Stewart I. Donaldson & Elisa J. Grant-Vallone, *Understanding Self-Report Bias in Organizational Behavior Research*, 17 J. BUS. & PSYCHOL. 245, 247 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> See *id.* at 248.

accurate responses may disadvantage the respondent, it was optional for students to provide an exam number to help with longitudinal studies, and I specified that only the staff person assisting the research would ever see the questionnaires with the exam numbers; professors would see only aggregate data. Finally, to minimize the risk of systemic differences between respondents and non-respondents in the 1L class, I focused on required 1L courses and achieved very high response rates.

At the beginning of spring semester in 2015, I asked all University of St. Thomas School of Law 1L students in Foundations of Justice (a required first-year course) to fill out the assessments form below in Table 1 where the students circled their present stage of self-directed learning.

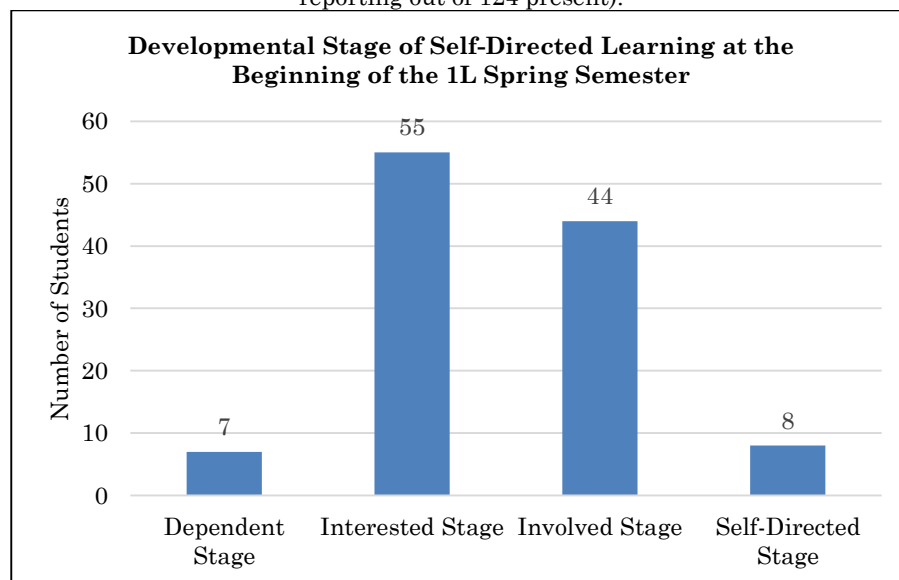
**Table 1: Stages of Self-Directed Learning<sup>33</sup>**

|                         | <b>Student Characteristics</b>  |
|-------------------------|---|
| <b>Dependent Stage</b>  | <ul style="list-style-type: none"> <li>- Assumes passive role with respect to professional self-development</li> <li>- Lacks interest in developing competencies except minimum required by external authority</li> <li>- Does not generally want or seek feedback into strengths and weaknesses</li> <li>- May react negatively to such feedback</li> <li>- Depends on external authority for explicit direction and validation</li> </ul>   |
| <b>Interested Stage</b> | <ul style="list-style-type: none"> <li>- Can see self-interest in professional self-development</li> <li>- May recognize weaknesses, but motivation to improve is principally externalized</li> <li>- Responds reasonably to questions and feedback on strengths and weaknesses</li> <li>- Is willing to engage mentors/coaches in goal-setting and implementation strategies</li> <li>- Shows some initiative and persistence to learn competencies</li> </ul>   |
| <b>Involved Stage</b>   | <ul style="list-style-type: none"> <li>- Is committed to professional self-development</li> <li>- Identifies strengths and weaknesses in development of competencies</li> <li>- Responds positively to and reflects on feedback concerning strengths and weaknesses and how to improve</li> <li>- Seeks insight from mentors and coaches in goal-setting and implementation</li> <li>- Is internalizing motivation to learn new knowledge and skills continuously</li> <li>- Is internalizing standard of excellence at all competencies</li> </ul> |

<sup>33</sup> Adapted from Gerald O. Grow, *Teaching Learners to Be Self-Directed*, 41 ADULT EDUC. Q. 125, 129 (1991).

|                      |  |
|----------------------|--|
|                      | <ul style="list-style-type: none"> <li>- Shows substantial persistence in learning competencies</li> </ul>   |
| <b>Self-Directed</b> | <ul style="list-style-type: none"> <li>- Is intrinsically motivated to professional self-development and learning new knowledge and skills over a career</li> <li>- Actively identifies both strengths and weaknesses in development and sets goals and creates and executes implementation plans</li> <li>- Proactively develops mentor and coach relationships and proactively seeks help and feedback from mentors and coaches</li> <li>- Reflects on feedback and responds to feedback appropriately</li> <li>- Knows when and how to seek help</li> <li>- Actively seeks challenges</li> <li>- Has internalized standard of excellence at all competencies</li> </ul> |

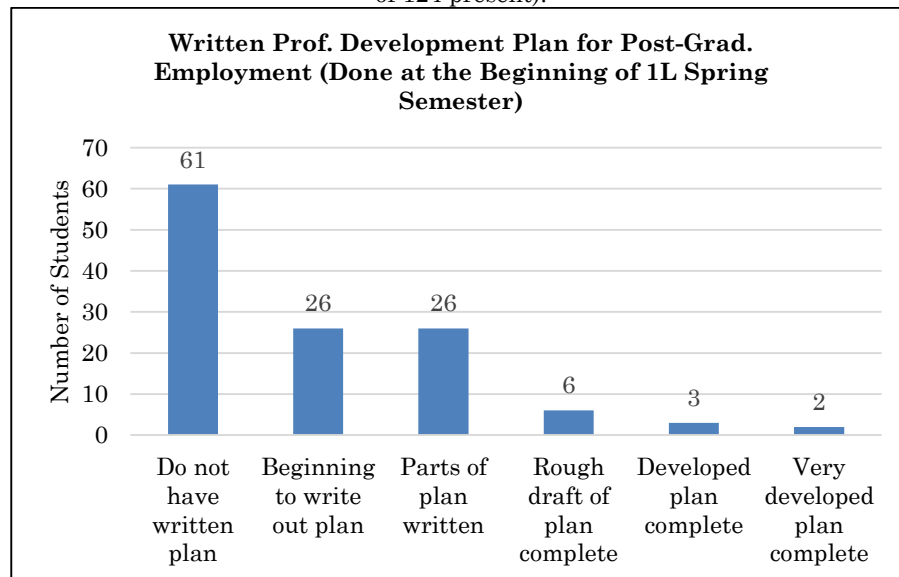
**Figure 1. Beginning of 1L Spring Semester – Entire UST Law 1L Class.** Self-reported ratings of stage of self-directed learning (114 students reporting out of 124 present).



I also asked the 1L students to assess whether they have a written plan of professional development toward employment. The question was: “at this moment, how well developed is your *written* plan to secure post-graduation employment (or your plan for career advancement if you already have post-graduation employment)?” Students were asked to rate their answer from 0 to 5 with 0 being “do not have written plan” to 5 being

a “developed plan complete and have received feedback from veterans on it.” A written professional development plan to use the student’s time in law school most effectively toward meaningful post-graduate employment indicates a later stage of self-directed learning.

**Figure 2. Beginning of 1L Spring Semester – Entire UST Law 1L Class.** Self-reported stage of development of a *written* plan for post-graduate employment in beginning of the spring semester for 1Ls (124 students reporting of 124 present).

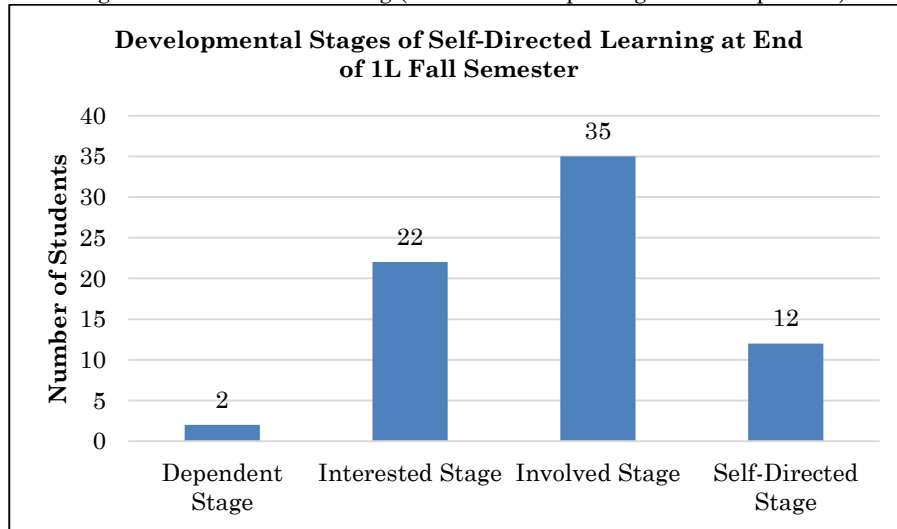


There may be a modest social desirability bias in the student responses in Figure 1. On one hand, pointing toward no social desirability bias, Figure 1 shows eight students self-assessed at a self-directed stage while Figure 2 shows eleven students reported having at least a rough draft of their professional development plan toward employment complete. On the other hand, pointing toward some social desirability bias, fifty-two students in Figure 1 self-assessed at an involved stage or self-directed stage but only twenty-six students in Figure 2 are self-reporting having parts of written plan complete plus eleven have at least a rough draft of a plan complete. So approximately fifteen students who are self-assessing at the involved stage or self-directed stage (fifty-two minus twenty-six minus eleven) either do not have a written professional development plan or are just beginning to write out a plan. The involved stage means a person is “committed to professional development,” which suggests moving beyond the potential bull and self-deception in a non-written plan to a written plan on which others can give feedback.

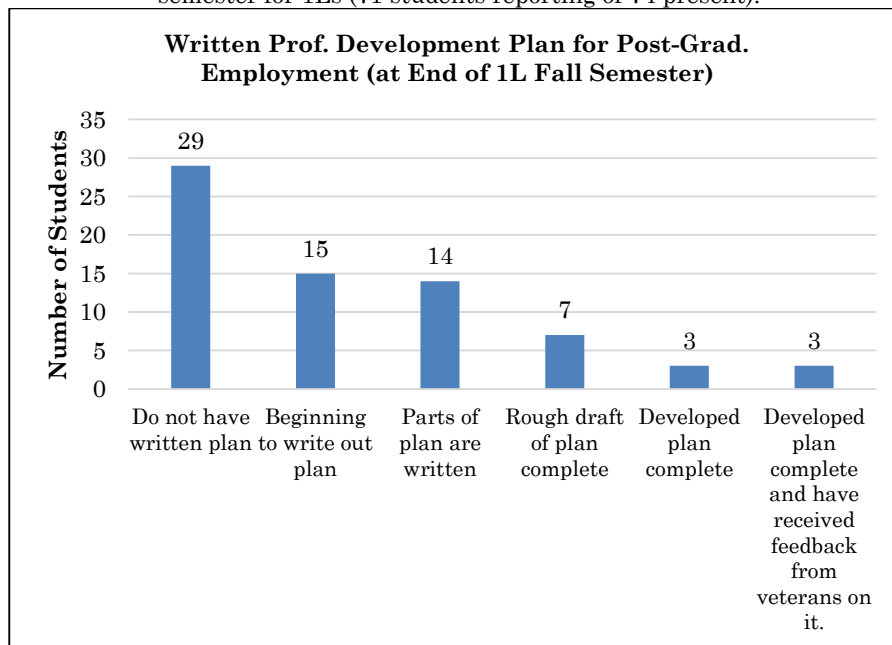
A colleague teaching a large, required section of Civil Procedure at a mid-sized southern law school asked the 1L students to do these same assessments at the end of the fall semester.



**Figure 3. End of 1L Fall Semester – One Required Large-Section Course at a Mid-sized Southern Law School.** Self-reported ratings of stage of self-directed learning (71 students reporting out of 74 present).



**Figure 4. End of 1L Fall Semester – One Required Large-Section Course at a Mid-sized Southern Law School.** Self-reported stage of development of a *written* plan for post-graduate employment at the end of fall semester for 1Ls (71 students reporting of 74 present).



The data in Figures 3 and 4 taken together suggest some social desirability bias in the Figure 3 self-assessment of a student's stage of self-directed learning. While the twelve students who are self-assessing at the self-directed stage match up with the thirteen students who have a rough draft of a written plan complete, there are thirty-five students self-assessing at the involved stage of self-directed learning, but only fifteen of these are reporting they have parts of a written plan for professional development toward employment and the other twenty either have no written plan or are beginning to write out a plan. My experience is that professional development plans that are not written down tend not to be well developed and present a far greater challenge in terms of seeking feedback on the plan from veterans. The discrepancy raises a question of whether all of the thirty-five students are at the involved stage.

The data presented in Figures 1–4 indicate that, depending upon the degree of social desirability bias, about a third (34% at the southern law school) to somewhat more than half (54% at UST Law) of the first year law students are at earlier stages of self-directed learning than where they need to be and where their law schools and the profession want them to be. Note also the data in Part IV from two large UST Law sections of Professional Responsibility at the beginning of the 2L year indicate that 60.3% of the 2Ls were at the two earlier stages of self-directed learning.<sup>34</sup> We want each student to use the remaining time in law school most effectively to develop toward excellence at all of the competencies needed to serve clients and others well. This is a substantial professional formation challenge for these students and for their law schools and the profession. Part III explores a learning outcome to address this student need and a curriculum and pedagogy that helps each student to grow toward the learning outcome.

### III. A LEARNING OUTCOME ON SELF-DIRECTED LEARNING AND THE ROADMAP ENGAGEMENT TO FOSTER EACH STUDENT'S SELF-DIRECTED LEARNING

Based on the new ABA accreditation standards discussed in Part I, the legal education will begin to follow the education assessment framework that the health and undergraduate educations already use.<sup>35</sup>

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<sup>34</sup> See *infra* Part IV.A.

<sup>35</sup> Neil Hamilton, *What Legal Employers and Clients Want: The Competency-Model Approach to Legal Success*, 11 U. ST. THOMAS L.J. 1, 2 (2013) [hereinafter *What Legal Employers and Clients Want*].

This education assessment framework asks faculty to:

1. Identify student educational needs;
2. Articulate student learning outcomes (educational objectives) that respond to student educational needs;

Understanding learning outcomes is helpful when discussing this framework.<sup>36</sup>

The Introduction to this Article made the case that law students should develop toward later stages of self-directed learning,<sup>37</sup> but Figures 1–4 indicate that one third to more than one half of the 1L students need some help to grow toward self-directed learning. This is the student learning need. The learning outcome is that *each law student should demonstrate self-directed learning to proactively create and implement a written plan of professional development to use the student's time in law school most effectively to grow both toward excellence at the competencies needed to serve clients and the legal system well and toward meaningful employment.* This is a professional formation learning outcome that law schools have not historically recognized, especially with respect to the substantial group of students who are at an early stage of development of self-directed learning and commitment to professional development toward excellence at the competencies needed to serve clients well.

The next step in education assessment framework is to plan and implement a curriculum that helps each student achieve the learning

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3. Plan and implement an educational program and curriculum that helps students achieve the learning outcomes;

4. Create formative and summative assessment measures; and

5. Evaluate the effectiveness of the educational program and curriculum.

*Id.* at 2–3 (citation omitted); *see also* Muriel J. Bebeau & Verna E. Monson, *Professional Identity Formation and Transformation Across the Life Span*, in *LEARNING TRAJECTORIES, INNOVATION AND IDENTITY FOR PROFESSIONAL DEVELOPMENT* 1, 18 (Anne Mc Kee & Michael Eraut eds., 2011). “Formative assessments are measurements at different points during a particular course or over the span of a student’s education that provide meaningful feedback to improve student learning.” *What Legal Employers and Clients Want*, *supra*, at 2 n.8. “Summative assessment methods are measurements at the culmination of a particular course or the culmination of any part of a student’s legal education that measures the degree of student learning.” *Id.*

<sup>36</sup>

1. A student learning *need* represents a gap between a student’s current level and some desired level of knowledge, skills, competencies, attitudes, or habits of mind.

2. A student *learning outcome* clearly states the expected knowledge, skills, competencies, attitudes, or habits of mind each student is expected to acquire so that the student learning needs are met.

a. A learning outcome will focus on the student as the performer.

b. It will use an active verb to describe what knowledge, skill, competency, attitude, or habit of mind the student is expected to acquire.

c. It will be measurable with performance indicators to know if the student has achieved the outcome.

d. The learning outcome must be stated so that there can be a sequence of activities or actions that enable the student to achieve the learning outcome.

*What Legal Employers and Clients Want*, *supra* note 35, at 2–3 (citation omitted).

<sup>37</sup> *See supra* text accompanying notes 1–15.

outcome emphasized above.<sup>38</sup> A student team and I designed a curriculum to help students grow toward the learning outcome above in the summer of 2013. After getting student feedback, we then revised the curriculum substantially in the summer of 2014.

The University of St. Thomas School of Law requires all students to take Professional Responsibility in the second year, and Professor Greg Sisk and I teach the two sections of Professional Responsibility in the second year.<sup>39</sup> We required each 2L student to spend 5–7 hours on the *Roadmap* curriculum in both 2013–2014, and in 2014–2015 (including getting feedback on the students' *Roadmap* from a veteran lawyer). Professor Jerry Organ and Dean Robert Vischer have now required the *Roadmap* curriculum for the entire 1L class in their Foundations of Justice course. As a result, all 1L students will do the *Roadmap* in the spring semester of their 1L year, and the professors will get feedback on the students' *Roadmap* before registration for the 2L year.

The *Roadmap* curriculum helps each student work through the fourteen steps below:

A. Assessment of Yourself

1. What are your strengths?
2. What are the characteristics of past work/service experience where you have found the most meaning and positive energy? Are there particular groups of people you have served from whom you have drawn the most positive energy in helping them? What specific strengths and competencies were you using in this work or service?
3. How do you self-assess your trustworthiness in the past to help others on important matters? How do others who know your past work/service assess your trustworthiness?
4. Looking at the competencies that clients and legal employers want, how do you self-assess what your strongest competencies are? How do others who know your past work/service assess your strongest competencies?
5. How do your strengths from question 1 and strongest competencies from question 4 match up with the competencies that legal employers and clients want?
6. Step back and think creatively about the changing legal market and possible entrepreneurial responses to those changes. Could you demonstrate some innovative ideas and differentiating competencies to help potential employers and clients to be more successful in this changing legal market?

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<sup>38</sup> I am using “curriculum” to mean a planned interaction of students with instructional materials and processes including assessments to help students achieve the learning outcome.

<sup>39</sup> See *Current & Upcoming Courses*, UNIV. ST. THOMAS SCH. L., <http://www.stthomas.edu/law/academics/courses/current/#nogo> (last visited Apr. 13, 2015); *Previous Course Offerings*, UNIV. ST. THOMAS SCH. L., <http://www.stthomas.edu/law/academics/courses/current/previous/#nogo> (last visited Apr. 13, 2015).

B. Assessment of Your Most Promising Options for Employment

7. Can you create a tentative list of the most promising options for employment where you see the best match among your strengths, the characteristics of past work that have given you the most positive energy, and the competencies that legal employers want?

8. What is your value proposition to demonstrate to those employers that you can add value beyond the standard technical legal skills to help the employers' clients and the employer itself to be more successful?

C. Your Professional Development Plan

9. How do you plan to use your remaining time in law school to gain good experience at your most promising options for meaningful employment so that you can confirm or eliminate (or add to) your list of most promising employment options? What metrics will you create to assess whether you are implementing your plan?

10. How do you plan to use your remaining time in law school, including the curriculum and all the other experiences of law school, most effectively to develop the competencies that support your value proposition?

11. What evidence are you collecting to demonstrate to potential employers your development at your differentiating competencies? What evidence do you want to develop going forward?

12. How do you plan to develop long-term relationships based on trust with other lawyers, particularly senior lawyers and judges who can give feedback on your employment plan and help you with experiences to implement it? Are you assessing your progress in implementing this plan?

13. What is the biggest fear or roadblock holding you back from any of the steps above?

D. Persuasive Communication

14. How will you most effectively communicate your value to potential employers on your list of most promising employment options?<sup>40</sup>

The *Roadmap* curriculum has a number of formative assessments where the student gets feedback that meet step 4 of the education assessment framework discussed earlier.<sup>41</sup> For example, the curriculum requires each student to do four self-assessments including *StrengthsFinder 2.0* and an evaluation of the student's strongest competencies by two other people who know the student's work, and then the student reflects on that feedback.<sup>42</sup> After completing the *Roadmap*

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<sup>40</sup> NEIL W. HAMILTON, ROADMAP: THE LAW STUDENT'S GUIDE TO PREPARING AND IMPLEMENTING A SUCCESSFUL PLAN FOR MEANINGFUL EMPLOYMENT (forthcoming 2015) [hereinafter ROADMAP] (manuscript at 3–4) (on file with the Regent University Law Review).

<sup>41</sup> See, e.g., *id.* at 56–72 (containing six separate assessments to help a student meet step 4 of the curriculum framework).

<sup>42</sup> *Id.* at 56–67; see also TOM RATH, STRENGTHSFINDER 2.0, at v (2007).

template that covers all fourteen steps above, the student must get feedback from an assigned coach who is either a full time faculty member or a veteran lawyer or judge.<sup>43</sup> Students are also encouraged to seek feedback from other experienced professionals.

Part IV below is step 5 of the education assessment framework discussed earlier where I evaluate the effectiveness of the *Roadmap* curriculum. ABA Standard 315 also requires evaluation of the effectiveness of the curriculum in helping students achieve the learning outcome.<sup>44</sup>

#### IV. EVALUATION OF THE EFFECTIVENESS OF THE *ROADMAP* CURRICULUM TO HELP STUDENTS DEVELOP TOWARD THE LEARNING OUTCOME

The learning outcome for the *Roadmap* curriculum is that each law student should demonstrate self-directed learning to proactively create and implement a written plan of professional development to use the student's time in law school most effectively to grow both toward excellence at the competencies needed to serve clients and the legal system well and toward meaningful employment.<sup>45</sup> A student who grows toward a later stage of self-directed learning indicates the student is growing toward the desired learning outcome.

##### *A. Student Self-Assessment of Growth in the Student's Stage of Self-Directed Learning After the Roadmap Curriculum*

In my 2013 fall semester section consisting of all 2L students, the students were asked at the end of the semester to fill out the assessment form on the next page where the students circled their stage of self-directed learning at the beginning of the semester compared to their stage of self-directed learning at the end of the semester. In my 2014 fall semester section consisting of 2Ls and one 3L, the students were asked at the beginning of the semester and then at the end of the semester to circle their stage of self-directed learning at those times in the semester.

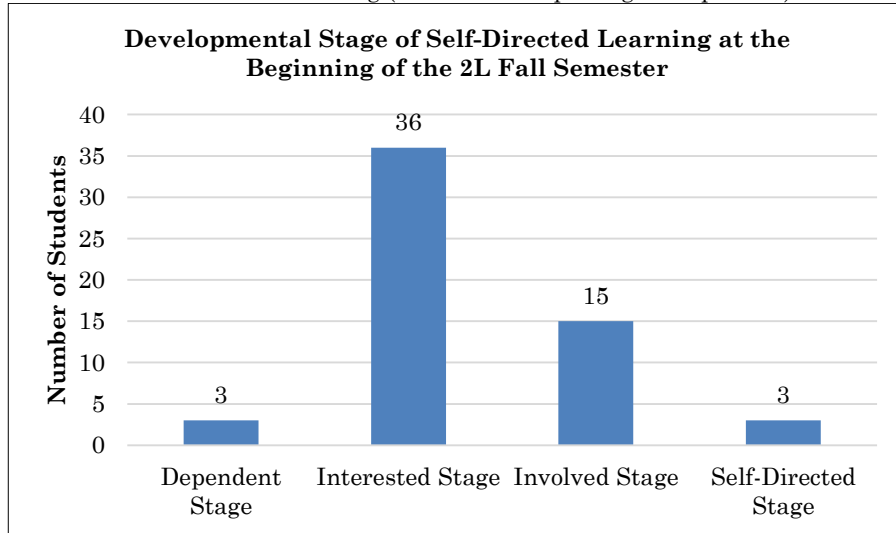
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<sup>43</sup> ROADMAP, *supra* note 40, at 78.

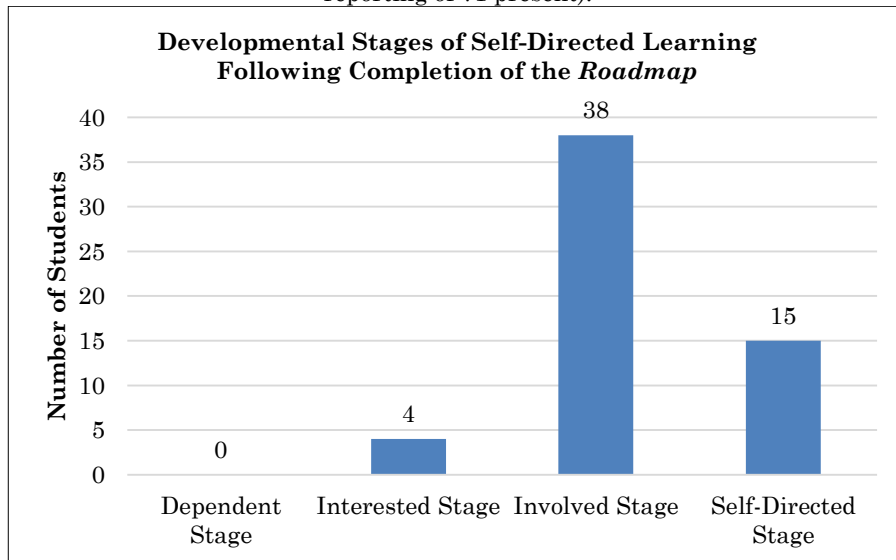
<sup>44</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. (REVISED STANDARDS) Standard 315 (2014).

<sup>45</sup> See ROADMAP, *supra* note 40, at 2.

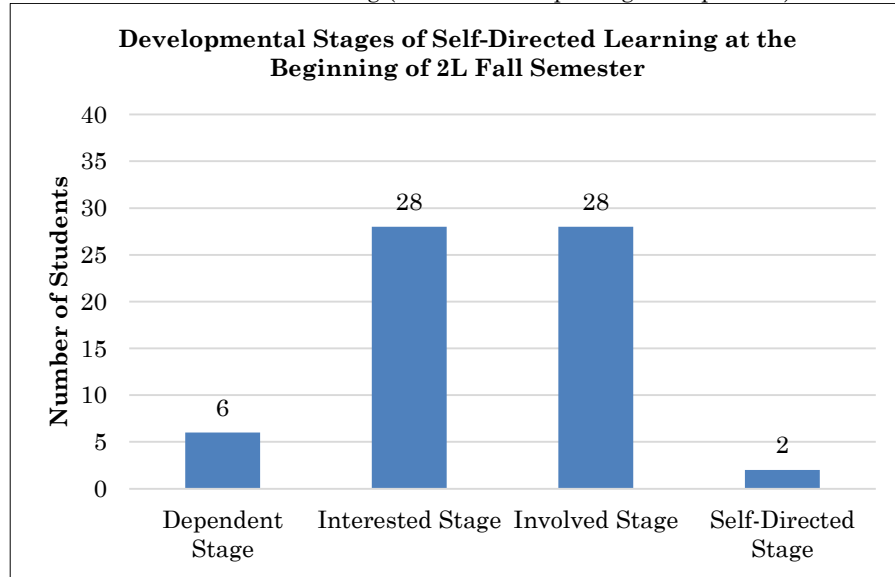
**Figure 5. Fall 2013 Hamilton 2L PR Class.** Self-reported ratings of stage of self-directed learning (57 students reporting of 71 present).



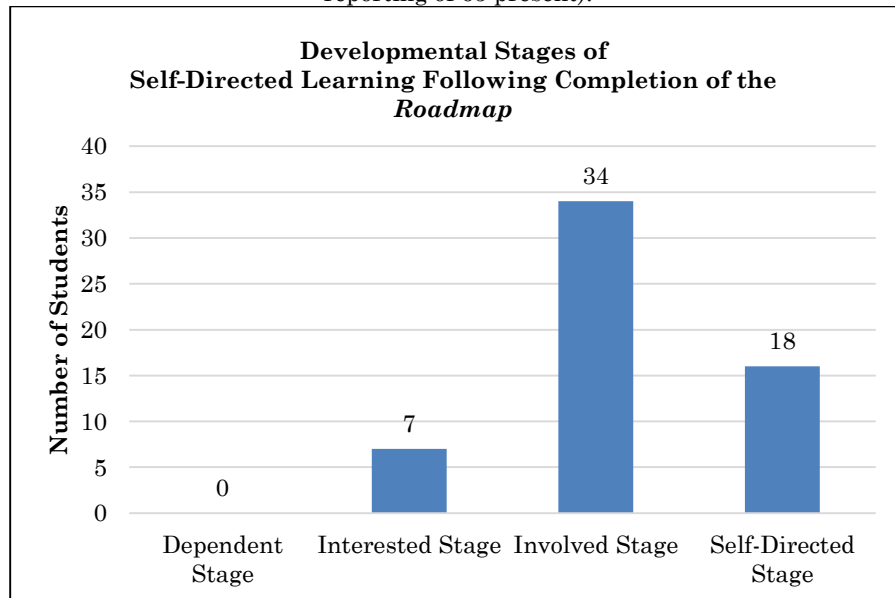
**Figure 6. Fall 2013 Hamilton 2L PR Class.** Self-reported ratings of stage of self-directed learning after completing the *Roadmap* curriculum (57 students reporting of 71 present).



**Figure 7. Fall 2014 Hamilton 2L PR Class.** Self-reported ratings of stage of self-directed learning (64 students reporting of 64 present).



**Figure 8. Fall 2014 Hamilton 2L PR Class.** Self-reported ratings of stage of self-directed learning after completing the *Roadmap* curriculum (59 students reporting of 65 present).





Synthesizing the data in Figures 5 and 7, we saw that 60.3% of the students in the beginning of fall semester 2L year (73 out of 121 are self-assessing at the dependent or interested stage) were at an earlier stage of self-directed learning regarding their professional development than both they need to be and the law school wants them to be. Legal educators and the profession would like the students to be at the involved or ideally self-directed stage of development. After one semester of the *Roadmap* curriculum, of those same 2L students, only 9.5% (11 out of 116 are self-assessing at the dependent or interested stage) were still at the two earlier stages of self-directed learning. The data indicates that the *Roadmap* helped a large number of students move toward a later stage of self-directed learning.

*B. Student Self-Assessment of Growth in Terms of a Written Professional Development Plan to Use the Time in Law School Most Effectively Toward Meaningful Post-Graduation Employment*

I also did an evaluation whether the *Roadmap* curriculum helped students to develop toward the learning outcome that students should proactively create and implement a written plan of professional development to use the students' time in law school most effectively to grow toward meaningful employment.

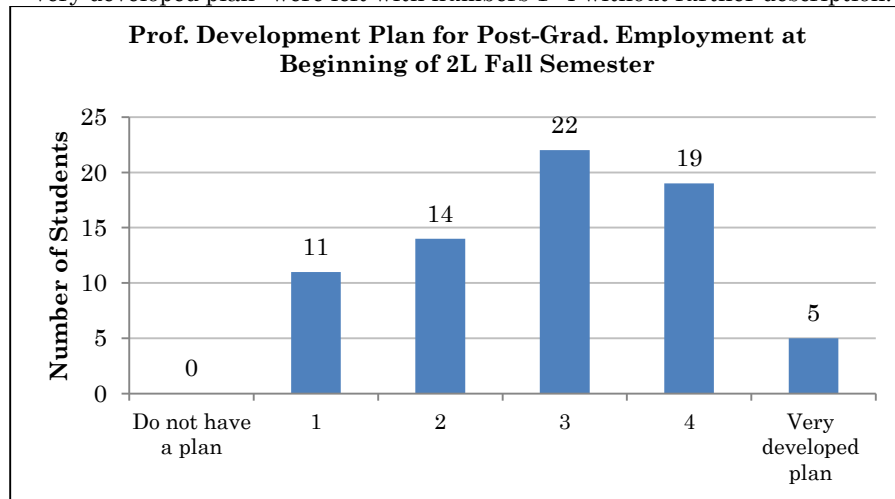
In my fall semester, 2013, Professional Responsibility class, students were asked at the end of the semester to fill out an assessment asking: “[h]ow well developed was your plan for employment (including your plan for career advancement if you already have post-graduation employment) [at the beginning of the semester] before working on the *Roadmap*” and then after working on the *Roadmap*?<sup>46</sup> Students were asked to rate their answer between 0 to 5 with “0” being “do not have a plan” to “5” being “very developed plan.”<sup>47</sup>

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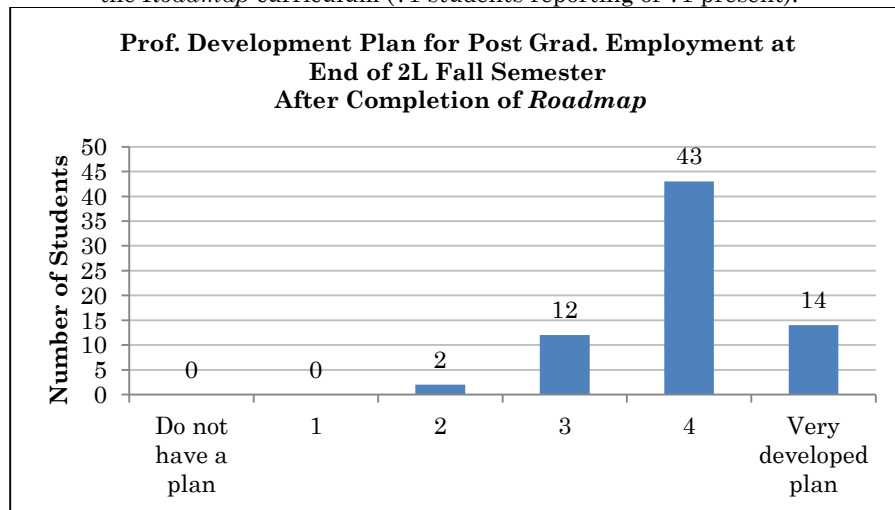
<sup>46</sup> *Changing Markets*, *supra* note 7, at 575.

<sup>47</sup> *Id.* at 575 n.121.

**Figure 9.**<sup>48</sup> **Fall 2013 Hamilton 2L PR Class.** Self-reported ratings of stage of development of a plan for post-graduate employment at the beginning of fall semester for 2Ls (71 students reporting of 71 present).<sup>49</sup> Note that in the 2013 questionnaire, the intermediate stages between “do not have a plan” and “very developed plan” were left with numbers 1–4 without further description.



**Figure 10.**<sup>50</sup> **Fall 2013 Hamilton 2L PR Class.** Self-reported ratings of stage of development of a plan for post-graduate employment after completing the *Roadmap* curriculum (71 students reporting of 71 present).<sup>51</sup>



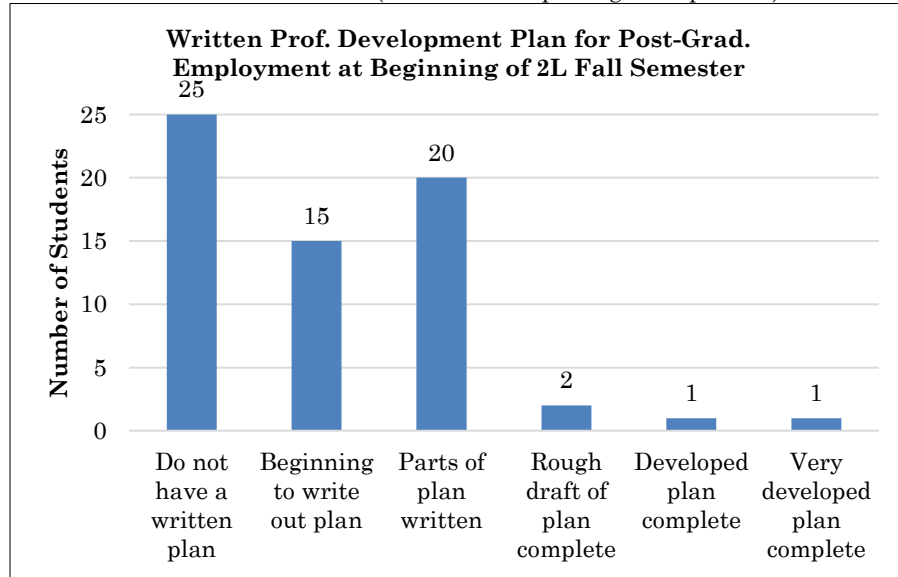
<sup>48</sup> *Id.* at 576.

<sup>49</sup> *Id.*

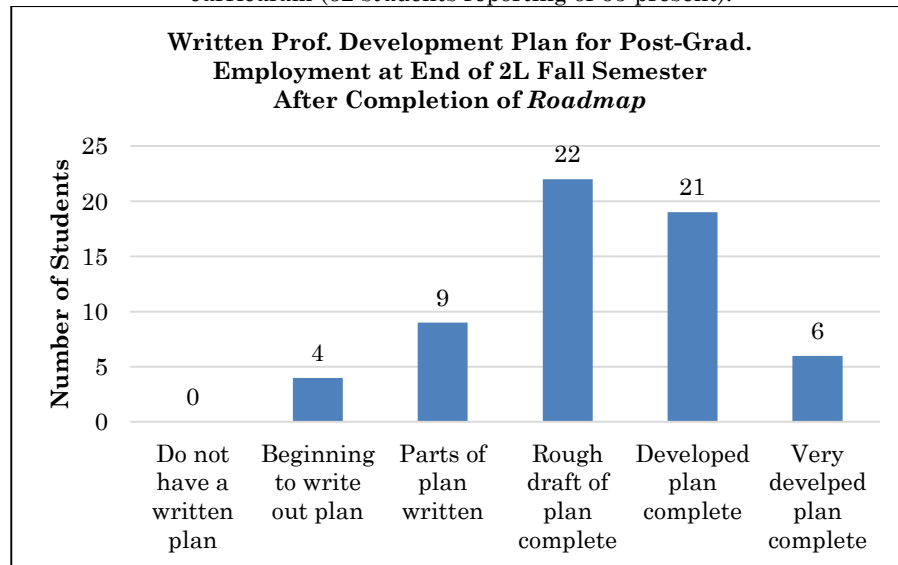
<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

**Figure 11. Fall 2014 Hamilton 2L PR Class.** Self-reported stage of development of a **written** plan for post-graduate employment in beginning of the fall semester for 2Ls (64 students reporting of 64 present)



**Figure 12. Fall 2014 Hamilton 2L PR Class.** Self-reported ratings of development of a **written** employment plan after completing the *Roadmap* curriculum (62 students reporting of 65 present).



The data in Figures 10 and 12 indicate that after completing the *Roadmap*, almost all students are moving toward the learning outcome that the students should proactively create and implement a written plan of professional development to use their time in law school effectively toward meaningful employment. This supports the conclusion that more students are taking responsibility for their professional development and thus are developing toward a later stage of self-directed learning.

Note that the learning outcome in Part III contemplates that each student will proactively create and implement a written plan of professional development. The *Roadmap* curriculum is going to be most effective in helping each student to achieve the learning outcome, particularly the continuing habit of reflecting on experiences and revising the plan and then trying to implement the plan in a continuing cycle if it is part of a much broader whole building co-educator curricular model. Part V explores this curricular model.

#### V. A WHOLE-BUILDING CO-EDUCATOR CURRICULAR MODEL TO FOSTER EACH STUDENT'S ACHIEVEMENT OF THE LEARNING OUTCOME

The *Roadmap* curriculum should be one part of a much broader whole building co-educator curricular model to foster each student's achievement of the learning outcome. Other parts of the curriculum (including the Career and Professional Development staff (CPD); the student counseling staff; the experiential courses like clinic, lawyering skills, the externships, and the simulation courses; the doctrinal courses; and all the mentoring and coaching of students by faculty and staff) also contribute substantially to help each student achieve the learning outcome. I hoped the *Roadmap* curriculum might help students to use other parts of the curriculum more effectively to realize the learning outcome (and vice versa). I tried a simple survey in my Fall Semester 2014 Professional Responsibility class at the end of the semester to test this hypothesis. Sixty-two of the sixty-five 2Ls in the class completed the survey with the results set forth below in Table 2.<sup>52</sup>

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<sup>52</sup> Note that while *Roadmap* in Professional Responsibility and Mentor Externship are required courses in the 2L year, the students are not required to see the Career and Professional Development staff. I included a question whether the student had seen the Career and Professional Development staff. Of the fifty-four students who responded to this question, fifty had at least one meeting with the CPD staff.

**Questions**

To what degree have the following resources helped you?

0 = not at all, 1 = a little, 2 = some, 3 = substantially, 4 = a great deal

**Table 2**  
**Assessment of Degree of Help on *Roadmap* Steps from Different Parts of the Curriculum**

1. Understand your strengths and strongest competencies generally?

| Question |                       | Average |
|----------|-----------------------|---------|
| 1        | i. CPD                | 2.08    |
|          | ii. Mentor Externship | 2.58    |
|          | iii. <i>Roadmap</i>   | 2.65    |

2. Understand the full range of **competencies/skills** necessary to provide excellent service to clients, organizations, the profession, and the community?

| Question |                       | Average |
|----------|-----------------------|---------|
| 2        | i. CPD                | 2.03    |
|          | ii. Mentor Externship | 2.73    |
|          | iii. <i>Roadmap</i>   | 2.94    |

3. Identify both your strengths in terms of **competencies/skills** needed to practice law and the competencies/skills where you need more development?

| Question |                       | Average |
|----------|-----------------------|---------|
| 3        | i. CPD                | 1.94    |
|          | ii. Mentor Externship | 2.56    |
|          | iii. <i>Roadmap</i>   | 3.01    |

4. Identify areas of practice that match your strengths and are of most interest to you and the specific **competencies/skills** needed for these areas?

| Question |                       | Average |
|----------|-----------------------|---------|
| 4        | i. CPD                | 1.78    |
|          | ii. Mentor Externship | 2.73    |
|          | iii. <i>Roadmap</i>   | 2.85    |

5. Develop a plan to effectively gain experiences to confirm or eliminate possible employment areas during your remaining time at UST Law?

- i. CPD  
ii. Mentor Externship  
iii. *Roadmap*

| Question |     | Average |
|----------|-----|---------|
| 5        | i   | 2.04    |
|          | ii  | 2.80    |
|          | iii | 2.70    |

6. Develop a narrative about how you add value to employers in your most promising employment areas?

- i. CPD  
ii. Mentor Externship  
iii. *Roadmap*

| Question |     | Average |
|----------|-----|---------|
| 6        | i   | 2.06    |
|          | ii  | 2.71    |
|          | iii | 3.09    |

7. Identify how to use your remaining time in law school (including the curriculum and all the other experiences of law school) most effectively to develop the competencies/skills that support your narrative/value proposition to employers?

- i. CPD  
ii. Mentor Externship  
iii. *Roadmap*

| Question |     | Average |
|----------|-----|---------|
| 7        | i   | 1.87    |
|          | ii  | 2.65    |
|          | iii | 2.82    |

8. Identify how to create evidence an employer will accept that shows your development at your differentiating competencies?

- i. CPD  
ii. Mentor Externship  
iii. *Roadmap*

| Question |     | Average |
|----------|-----|---------|
| 8        | i   | 2.10    |
|          | ii  | 2.45    |
|          | iii | 2.87    |

9. Develop the competencies associated with effective networking (especially networking to move forward with your professional development plan)?

- i. CPD  
ii. Mentor Externship  
iii. *Roadmap*

| Question |     | Average |
|----------|-----|---------|
| 9        | i   | 1.95    |
|          | ii  | 3.05    |
|          | iii | 2.34    |

10. Understand effective and ineffective professional communication in:

|   |     | Question | Average |
|---|-----|----------|---------|
| i. Resumes<br>1. CPD<br>2. Mentor Externship<br>3. <i>Roadmap</i> | 10i | 1        | 3.25    |
|   |     | 2        | 2.31    |
|   |     | 3        | 1.92    |

|  |      | Question | Average |
|--|------|----------|---------|
| ii. Cover Letters<br>1. CPD<br>2. Mentor Externship<br>3. <i>Roadmap</i> | 10ii | 1        | 2.92    |
|  |      | 2        | 1.77    |
|  |      | 3        | 1.74    |

|   |       | Question | Average |
|---|-------|----------|---------|
| iii. Cover Letters<br>1. CPD<br>2. Mentor Externship<br>3. <i>Roadmap</i> | 10iii | 1        | 2.70    |
|   |       | 2        | 2.35    |
|   |       | 3        | 2.11    |

|  |      | Question | Average |
|--|------|----------|---------|
| iv. Cover Letters<br>1. CPD<br>2. Mentor Externship<br>3. <i>Roadmap</i> | 10iv | 1        | 2.11    |
|  |      | 2        | 2.94    |
|  |      | 3        | 2.40    |

11. Identify specific employers (contacts) in your area of greatest interest?

|  |    | Question | Average |
|--|----|----------|---------|
| i. CPD<br>ii. Mentor Externship<br>iii. <i>Roadmap</i> | 11 | i        | 2.34    |
|  |    | ii       | 2.85    |
|  |    | iii      | 2.48    |

The data from my survey indicate that the students are drawing some help on the learning outcome from all three types of curricular engagements (*Roadmap*, CPD, and Mentor Externship). My teaching experience is that many students need help to connect the dots to see how curriculum in one part of the law school relates to and builds on the curriculum in other parts of the law school. Faculty and staff from different parts of the curriculum could work together to help students understand the connections and the synergy among the various parts of the curriculum to help the students with this learning outcome. The whole building co-educator curricular model will help each student to keep

revisiting her professional development plan and reflect on her experiences to revise, improve, and implement the plan.

#### CONCLUSION

It is highly in the enlightened self-interest of each law student, each law school, and the profession itself for each student to grow toward a later stage of self-directed learning. An internalized *proactive* commitment to professional development toward excellence at all the competencies needed to serve clients and the legal system well is one of the foundations for a lawyer's professional formation or professionalism.

A law school that helps its students to grow toward self-directed learning is also meeting the ABA's accreditation emphasis on developing students' professional and ethical responsibilities. Data from two law schools indicates a surprising proportion of 1L students are at an earlier stage of self-directed learning than where they should be in terms of the student's own self-interest and the interests of their law school and the profession. There seems no reason why this surprising proportion of early-stage 1L students should not be true at other law schools, however we need to test this with other schools assessing their students' stage of self-directed learning and the effectiveness of their curriculum to help students grow toward a later stage of this competency.<sup>53</sup>

Part IV both articulated a clear learning outcome to address this challenge and outlined a curriculum to help each student grow toward this learning outcome.

The *Roadmap* curriculum outlined in Part IV is designed to help students develop toward this learning outcome. The data presented in Part V at Figures 5 and 6 and Figures 7 and 8 indicates that the *Roadmap* curriculum helped many students, particularly those at an early stage of self-directed learning, to develop toward the learning outcome.

What are the major "lessons learned" from two years of development, experimentation, and assessment with the *Roadmap* curriculum that are applicable to similar learning outcomes and curriculum aimed at student professional formation? Of course every experienced academic knows that curriculum change is very challenging and takes a great deal of effort and time. One of the major lessons learned with the *Roadmap* curriculum is that some faculty and staff do not want to help with this type of curricular reform. Some students are resistant to changes in the required curriculum that are not directly linked to passing the bar.

Consider the full-time faculty first. Historically, my experience is that many faculty including myself have thought that it was each student's responsibility both to develop the competency of self-directed learning and to create and implement a professional development plan to

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<sup>53</sup> I am willing to help with such assessments.



use the student's time in law school most effectively to grow toward the competencies necessary to serve clients and the legal system well in meaningful employment. These student learning outcomes were not my responsibility as a teacher. During my service as interim dean in 2012, I changed my mind. I came to understand that our students are entering very challenging markets for meaningful employment, and many were uninformed both about the full range of competencies needed to practice law and about how the student's strengths fit best with this full range of competencies that clients and legal employers want and need. I came to realize that many students do not have a plan of professional development to use their time in law school most effectively to develop the needed competencies to serve clients and the legal system well. I think that historically I was drawn to help students who are at later stages of self-directed learning because they are more like me. I now think that faculty members have a fiduciary duty to help the students from whom we take tuition (from whatever developmental stage the student presents) to grow toward self-directed learning and a professional development plan.

In my experience, many full-time faculty have enormous investments in doctrinal knowledge and legal and policy analysis concerning their doctrinal field. They believe that the student's law school years are about learning doctrinal knowledge, strong legal and policy analysis, and research and writing skills. These faculty members emphasize that they have to stay focused on "coverage" with the limited time in their courses even though this model of coverage of doctrinal knowledge and the above skills overemphasizes these competencies in comparison with the full range of competencies that legal employers and clients indicate they want. This emphasis is also not leading to meaningful employment for many students.

Another challenge is that a whole-building co-educator model to foster each student's growth toward a self-directed learning outcome and a professional development plan involves a level of cooperation among faculty and staff that poses a particular challenge. Law schools are structured in silos with strongly guarded turf in and around each silo. Each of the major silos (including doctrinal classroom faculty, clinical faculty, lawyering skills faculty, externship directors, career services and professional development staff, and counseling staff) wants control over and autonomy regarding its turf. Coordination among these silos is going to take time and effort and involve some loss of autonomy and control.

However, many law schools are facing serious challenges with their metrics regarding employment of graduates.<sup>54</sup> This problem undermines applications and opens the door to the possibility that both full-time

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<sup>54</sup> See Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866, 869 (2012).

faculty and staff may be willing to consider a new model of legal education. For example, there may be some willingness to consider a *Roadmap* curriculum in required courses. If the faculty and staff want to help the early-stage students in terms of self-directed learning, it is best to use the required curriculum since the early stage student may avoid electives with this learning outcome. It is highly in each school's enlightened self-interest to help each student develop toward later stages of self-directed learning.

My suggestion is to focus on a "coalition of the willing" concerning curriculum reform like this proposal to give students more help with self-directed learning.<sup>55</sup> The focus should be especially on faculty members teaching required courses to reach the students who are at an earlier stage of self-directed learning. Some type of faculty development education is going to be important to help faculty with the necessary skills.

Consider also the student reaction to changes in the required curriculum that emphasize self-directed learning and a proactive responsibility for developing a student professional development plan. In my experience, many students are also resistant to innovative change in the curriculum, especially changes in the required curriculum that are not linked to bar preparation. Managing student expectations with new initiatives like this is critical to get as much student "buy-in" as possible. William Henderson emphasizes that students expect to learn about the standard subjects in the standard ways.<sup>56</sup> They are unprepared to learn that the practice of law is about a much broader array of competencies than the focus on the traditional law curriculum.<sup>57</sup>

A curricular engagement that tries to help students grow in terms of stages of self-directed learning is also going to create some cognitive dissonance or cognitive disequilibrium where some students must deal with an experience that challenges the student's assumptions and beliefs and asks for reflection and a synthesis toward a new later-stage approach.<sup>58</sup> This cognitive dissonance may lead a student to feel some level of stress or anxiety, but the faculty must provide enough social support to prevent the student from being overwhelmed while at the same time not just escaping from the quandary or challenge.<sup>59</sup>

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<sup>55</sup> See William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 503–04 (2013).

<sup>56</sup> See *id.* at 505.

<sup>57</sup> *Id.*

<sup>58</sup> For a review of the most effective pedagogies for professional formation in legal education, see Neil W. Hamilton et al., *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 21–22 (2013) and Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 340 (2011).

<sup>59</sup> See *Law Firm Competency*, *supra* note 8, at 36–37.

The *Roadmap* curriculum is designed to appeal to each student's long-term desire both for self-sufficiency and meaningful employment to make a positive difference which helps mitigate student resistance to change. The most important *Roadmap* lesson for each student is that, in the context of a glut in the market for entry-level law graduates, a student can differentiate him or herself by understanding her strengths in the context of all the core competencies clients and legal employers want, and using the three years of law school to develop (and to create evidence demonstrating) some of the core competencies most useful for employment beyond just technical legal skills in the required curriculum. "Law students generally operate on the strong belief that being a good lawyer is about subject matter expertise and analysis. The first question that I ask an applicant for an associate position is: 'What value do you bring beyond just technical legal skills to help our clients be successful?'"<sup>60</sup> Each student should use the three years of law school to prepare to answer this imperative question.

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<sup>60</sup> E-mail from Dennis Monroe, former Chief Exec. Officer, Parasole Restaurant Holdings, to author (May 20, 2013) (on file with author).

# USING PSYCHOLOGICAL TYPE THEORY TO HELP LAW STUDENTS DEVELOP PROFESSIONAL IDENTITY

*Donald C. Peters and Martha M. Peters\**

## INTRODUCTION

Two recent events have challenged American law schools to more comprehensively engage and motivate students to learn and apply knowledge, skills, and values to help them develop professional identity. The comprehensive examination of the preparation of lawyers in law schools published by the Carnegie Foundation for the Advancement of Teaching in 2007 was the first prominent event.<sup>1</sup> Emphasizing daily teaching and learning practices, comparing them to approaches used by other professions, and applying “contemporary understanding of how learning occurs,”<sup>2</sup> this Report articulated a three pillar framework for effective legal education consisting of “legal analysis,” “practical skill,” and “professional identity.”<sup>3</sup>

The *Carnegie Report* concluded that while American law schools impressively create a legal analysis pillar, they do not build the remaining columns effectively.<sup>4</sup> The Report determined that American law schools typically pay relatively little attention to direct instruction in the practical skills required for competent, ethical, and professional practice.<sup>5</sup> It also

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<sup>1</sup> See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 13–14 (2007) [hereinafter CARNEGIE REPORT]. Also published in this same year was another important book drawing on learning theory and experiences of other common law countries to support its recommendations. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 1 (2007). Both works made complementary claims arguing for greater focus in legal education on preparation for professional and ethical practice and experiential education. See CARNEGIE REPORT, *supra*, at 160; STUCKEY ET AL., *supra*, at 62.

<sup>2</sup> CARNEGIE REPORT, *supra* note 1, at 1–2.

<sup>3</sup> CARNEGIE REPORT, *supra* note 1, at 12–14. The report defines professional identity as encompassing “professionalism, social responsibility, [and] ethics” with the main purpose of “draw[ing] to the foreground the purposes of the profession and the formation of the identity of lawyers guided by those purposes.” *Id.* at 14.

<sup>4</sup> *Id.* at 185–88.

<sup>5</sup> See *id.* at 188. A major study published in 1992 showed that law schools devoted nine percent of total instructional time to direct instruction in these practical skills. Task

concluded that American law schools typically failed to complement their successful efforts to develop legal analysis with adequate attention to and support for “developing the ethical and social dimensions of the profession” effectively.<sup>6</sup>

Seven years later, the American Bar Association provided additional encouragement to American law schools to emphasize professional identity development by changing its accreditation standards to require greater emphasis on knowledge relevant to competent exercise of professional and ethical responsibilities.<sup>7</sup> Because of this change, Accreditation Standard 301 now requires schools to prepare students “for effective, ethical, and responsible participation as members of the legal profession.”<sup>8</sup> These amendments also refocused Accreditation Standard 302 by requiring law schools to establish learning outcomes that encompass helping every student internalize and exercise minimum competency in exercising “proper professional and ethical responsibilities to clients and the legal system” and “[o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”<sup>9</sup>

Reinforcing this shift to focusing specifically on what students should learn, the ABA amendments added new accreditation Standard 314, requiring assessment of student learning that uses “both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”<sup>10</sup> This comprehensive accreditation change also added to the existing requirement that successful completion of at least one two-credit professional responsibility course must also encompass substantial instruction in the legal profession’s “history, goals, structure, values, and responsibilities.”<sup>11</sup> This addition requires satisfactory completion of at least one six-credit experiential course that “integrate[s] doctrine, theory,

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Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education & Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 241 (1992) [hereinafter *MacCrate Report*]. They devote most of their time to learning law, adjudicatory procedures and skills, and rule-based advocacy skills. See *id.* at 241, 255–59.

<sup>6</sup> CARNEGIE REPORT, *supra* note 1, at 188.

<sup>7</sup> Task Force on the Future of Legal Educ., *Report and Recommendations* 3 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) (expressing the views of the Task Force, which as of the time of the report’s publication had not yet been adopted by the ABA); see also 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standards 301, 302 (2014); *infra* notes 7–13 and accompanying text.

<sup>8</sup> 2014–2015 ABA STANDARDS Standard 301.

<sup>9</sup> *Id.* Standard 302.

<sup>10</sup> *Id.* Standard 314.

<sup>11</sup> *Id.* Standard 303.

skills, and legal ethics<sup>12</sup> while engaging students in performing one or more core professional practice skills.<sup>13</sup>

A professional identity encompasses multiple dimensions, making it difficult to define precisely. It embraces intellectual, practical, and ethical attitudes and behaviors, as well as personal and professional values.<sup>14</sup> It includes, yet transcends, ethics and professionalism.<sup>15</sup> It also embodies the exercise of wisdom to resolve dilemmas when ethical standards are either ambiguous or conflicting while also leading a fulfilling, satisfying life.<sup>16</sup> A simplistic but useful approach conceptualizes professional identity as stories law students and lawyers tell themselves about who they are and what they do.<sup>17</sup>

The *Carnegie Report* proceeded on the non-controversial assumption that law schools influence the stories that law students tell themselves about the roles they assume as lawyers and how they will behave as they become and act as attorneys.<sup>18</sup> The report also recommended that law schools be more intentional and thoughtful about the stories they help students learn regarding the complex roles lawyers play,<sup>19</sup> necessary commitments to social justice,<sup>20</sup> and foundational behaviors underlying ethical decision-making.<sup>21</sup> Both the *Carnegie Report* and the 2014 ABA

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<sup>12</sup> *Id.* Standard 303(a)(3).

<sup>13</sup> *Id.* Interpretation 302-1. Interpretation 302-1 defines these as the core skills that fulfill this requirement: “interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.” *Id.* In addition, law schools must provide students with “substantial opportunities” for faculty supervised clinical courses and field placements and participation in “pro bono legal services” or “law-related public service activities.” *Id.* Standard 303(b).

<sup>14</sup> See Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 *HAMLIN L. REV.* 555, 556 (2007).

<sup>15</sup> Martin J. Katz, *Teaching Professional Identity in Law School*, 42 *COLO. LAW.* 45, 45 (2013).

<sup>16</sup> See Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, But Does Anyone Really Care: How Law Schools are Failing to Develop Students' Professional Identities and Practical Judgment*, 27 *REGENT U. L. REV.* 339, 352–53 (2015).

<sup>17</sup> See Daniel L. Shapiro, *Identity: More Than Meets the “I,”* in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 225, 225 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

<sup>18</sup> See *CARNEGIE REPORT*, *supra* note 1, at 129 (arguing that “law schools shape the minds and hearts of their graduates in enduring ways” in thinking habits and developing “professional purpose and identity”).

<sup>19</sup> See *id.* at 131–32 (arguing that legal education should introduce students to complex roles and the nuances of those roles linked to the type of lawyering involved).

<sup>20</sup> See *id.*

<sup>21</sup> See *CARNEGIE REPORT*, *supra* note 1, at 30; see also Madison & Gantt, *supra* note 16, at 382 (suggesting that these behaviors encompass “self-awareness,” sensitivity

Accreditation Standards amendments reaffirm that it matters to learn what lawyers who are demonstrating appropriate professional identity do.

Carefully examining the most effective ways to teach law students what lawyers do is important to ensure that students learn and comply with minimum conduct rules and understand the broader issues of character and morality.<sup>22</sup> Lawyers and law students demonstrate their professional identity and reveal their understanding about who they are by the ways they act.<sup>23</sup> They have general obligations under the ABA Model Rules of Professional Conduct to act honestly,<sup>24</sup> competently,<sup>25</sup> and diligently.<sup>26</sup> They also demonstrate morality and character by their actions when confronting situations where conduct rules are silent, ambiguous, or conflicting.

This Article argues that using psychological type theory helps law students learn and perform actions that develop and demonstrate their professional identity. This Article first describes psychological type theory and the Myers-Briggs Type Indicator (MBTI).<sup>27</sup> The MBTI is a simple, easily administered question-and-answer instrument that suggests type preferences<sup>28</sup> users may hold.<sup>29</sup> This Article shares the Authors' experiences drawn from more than seventy combined years working with law students in academic support contexts,<sup>30</sup> experiential learning

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discerning and analyzing ethical issues, "cultural competency," relational skills, and abilities to reach practical judgments resolving competing values regarding ethical dilemmas).

<sup>22</sup> See Carnegie REPORT, *supra* note 1, at 129.

<sup>23</sup> See *id.* at 31.

<sup>24</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT RR. 2.1, 3.3, 3.4 (2013). The preamble to these rules requires that lawyers shall be "competent, prompt, and diligent" in all that they do. *Id.* at pmbl. In addition, most law schools have rules regarding basic honesty and trustworthiness regarding academic issues prohibiting cheating and misrepresenting. See Carnegie REPORT, *supra* note 1, at 129–30.

<sup>25</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

<sup>26</sup> *Id.* R. 1.3.

<sup>27</sup> See *infra* notes 39–44 and accompanying text that describe psychological type theory.

<sup>28</sup> See *infra* notes 55–56 and accompanying text for an explanation of the concept of type preferences.

<sup>29</sup> See ISABEL BRIGGS MYERS ET AL., MBTI MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR 7 (3d ed. 1998) [hereinafter 3D MBTI MANUAL]. The MBTI is one of the instruments most widely used with normal populations to identify personality type preferences and explain their behavioral implications. See Anthony Monahan, *Are You at Loose Ends?: Will Career Testing Really Help You?*, 18 BARRISTER 22, 25 (1991) (estimating that two million persons used the MBTI in 1990); Lillian Cunningham, *The Myers-Briggs Personality Test Is Embraced by All Kinds of Large Organizations—But Not by Many Psychologists*, WASH. POST, Dec. 16, 2012, at G01.

<sup>30</sup> MARTHA M. PETERS & DON PETERS, JURIS TYPES: LEARNING LAW THROUGH SELF-UNDERSTANDING, at xi–xii, 274 (2007) [hereinafter JURIS TYPES]. Co-author Martha Peters developed the Law Student Resources Program, one of the first academic support programs

approaches in clinical courses involving actual clients,<sup>31</sup> and simulation-based professional skills classes.<sup>32</sup> Applying these experiences, this Article examines how using this theory helps law students become more aware of their behavioral tendencies regarding actions essential to demonstrating professional identity.

This Article also analyzes how this self-knowledge facilitates the development of professional skills for competent and ethical lawyering. It focuses on the contexts of teaching and learning effective “interviewing, counseling, negotiation, . . . conflict resolution, . . . collaboration, . . . and self-evaluation.”<sup>33</sup> It illustrates how this knowledge enhances formative assessment and provides safe ways to discuss learning dilemmas and resolution options regarding ethical and moral challenges. By examining the MBTI scale relating to decision-making in the critical context of building and maintaining lawyer-client relationships, this Article also

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in this country at the University of Florida College of Law in 1984, launched the Academic Achievement program at the University of Iowa College of Law in 1999, and as a founding faculty member of Elon University’s School of Law in 2006 worked with the MBTI as a tool for developing leadership skills as well as awareness of individual learning strengths and challenges. *Faculty Description*, GLOBAL ALLIANCE FOR JUSTICE EDUC., <http://www.gaje.org/martha-m-peters/> (last visited Apr. 11, 2015); see JURIS TYPES, *supra*, at xi–xii, 274. She shared many of her specific experiences using psychological type theory in this context in *Juris Types: Learning Law Through Self-Understanding*. JURIS TYPES, *supra*, at xi. She remains active, consulting and presenting workshops at law schools in this country and abroad since taking Emerita status in 2012.

<sup>31</sup> JURIS TYPES, *supra* note 30, at 274. Co-author Donald “Don” C. Peters founded, directed and taught the civil clinic at the University of Florida in 1973 and its small claims mediation clinic in 1996. *History of the Clinics: The Development of the Law Clinics*, LEVIN C. OF L., <http://www.law.ufl.edu/academics/clinics/about-the-clinics/history-of-the-clinics> (last visited Apr. 11, 2015); see Joseph “Josh” B. Stulberg et al., *Creating and Certifying the Professional Mediator—Education and Credentialing*, 28 AM. J. TRIAL ADVOC. 75, 79 (2005). He also described many of his experiences using psychological type theory in these contexts in *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 762–63 (1998) and *You Can’t Always Get What You Want: Organizing Matrimonial Interviews to Get What You Need*, 26 CAL. W. L. REV. 257, 262–64 (1990) [hereinafter *Organizing Matrimonial Interviews*].

<sup>32</sup> Faculty Description, *supra* note 30. Don has frequently taught simulation based courses emphasizing developing professional skills in negotiation, mediation, and mediation advocacy, and both Don and Martha have taught simulation based interviewing and counseling courses. JURIS TYPES, *supra* note 30, at 274. They have described some of their experiences using psychological type theory in these contexts in several articles. See Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Negotiation*, 42 DRAKE L. REV. 1, 11–12 (1993) [hereinafter *Forever Jung*]; Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 877–78 (1996) [hereinafter *Mapping, Modeling*]; Don Peters & Martha M. Peters, *Maybe That’s Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169, 174–75 (1990) [hereinafter *Maybe That’s Why I Do That*].

<sup>33</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(d), Interpretation 302-1 (2014); see *infra* notes 78–86 and accompanying text.



demonstrates how knowledge of natural tendencies helps law students learn both complex role dimensions and specific actions that will enable them to develop and exercise behaviors manifesting appropriate professional identity. Finally, this Article examines how the knowledge and use of psychological type theory helps students acquire and improve the skills that are foundational to ethical dilemma recognition and resolution such as self-awareness, self-reflection, and empathy.

#### I. PSYCHOLOGICAL TYPE THEORY AND THE MYERS-BRIGGS TYPE INDICATOR

Lawyers encounter and deal with personality differences daily. Because people differ, they commonly manifest different actions resulting from variations in perceptions, positions, interests, interpretations, values, beliefs, expectations, experiences, traditions, communication approaches, and decision-making methods. Many of these differences generate problems, and some of these problems escalate to disagreements, disputes, and conflicts. Perhaps more than other professionals, a lawyer's professional identity must include competent abilities to anticipate, recognize, and deal with differences as a foundation for helping their clients sidestep and solve problems, avoid and resolve disputes, and end or manage conflicts.<sup>34</sup>

Theories of psychological type show patterns of fundamental differences in various important contexts and how these differences affect various approaches used to perform common actions.<sup>35</sup> The theoretical foundations of different human types extend back twenty-six hundred years to Hippocrates' theories of social temperaments.<sup>36</sup> More recently, Carl Jung, a Swiss psychologist, provided the contemporary impetus for using a theory of psychological types to understand common behavioral

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<sup>34</sup> The importance of these abilities is reflected by ABA's listing of "negotiation," "conflict resolution," and "collaboration" as examples of skills needed for "competent and ethical" law practice in its Accreditation Standards. 2014–2015 ABA STANDARDS Standard 302(d), Interpretation 302-1. Problem-solving was listed first in a list of "fundamental lawyering skills" in an ABA Task Force Report directed at improving legal education and professional development. *MacCrate Report*, *supra* note 5, at 135, 141–42. The Task Force's analysis of problem solving emphasized the underlying component of dealing well with differences when "identifying and diagnosing . . . problem[s]," "generating alternative solutions and strategies," "developing a plan of action," "implementing . . . plan[s]," and remaining open to new information and ideas throughout. *Id.* at 141–48.

<sup>35</sup> *Forever Jung*, *supra* note 32, at 10.

<sup>36</sup> *Id.* Hippocrates theorized four distinct human behavioral patterns which he labeled temperaments: "Choleric, Phlegmatic, Melancholic, and Sanguine." DAVID KEIRSEY, PORTRAITS OF TEMPERAMENT 6 (2d ed. 1989).

variations.<sup>37</sup> He did this by publishing a typology regarding similarities and differences he observed in common action patterns.<sup>38</sup>

Jung worked with clients from similar ethnic and economic backgrounds in normal and clinical situations, and his work led him to believe that what appeared to be random human behaviors were actually the result of those people's different attitudes and mental functions.<sup>39</sup> Jung then "grouped these common but different behavioral patterns into a theory of psychological types."<sup>40</sup> Jung's objective was "to identify patterns of characteristic behaviors to facilitate self-understanding" through self-awareness of cognitive inclinations, action tendencies, and challenges.<sup>41</sup> He did not intend the typology to be used to stereotype individuals,<sup>42</sup> and he strongly warned against assuming that type preferences determine specific behaviors.<sup>43</sup>

"A psychometric indicator designed to make Jung's theory of psychological types accessible and useful emerged in the 1950s from the

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<sup>37</sup> *Forever Jung*, *supra* note 32, at 10; *see also* GORDON LAWRENCE, PEOPLE TYPES AND TIGER STRIPES: A PRACTICAL GUIDE TO LEARNING STYLES 6 (2d ed. 1982).

<sup>38</sup> *See* C. G. Jung, *Psychological Types*, in THE COLLECTED WORKS OF C. G. JUNG 542, 548 (Herbert Read et al. eds., H.G. Baynes trans., 1971); *see also* LAWRENCE, *supra* note 37, at 6. Jung integrated these behavioral similarities and differences into formal principles to create his theory of psychological types. ANGELO SPOTO, JUNG'S TYPOLOGY IN PERSPECTIVE xvii (Sisa Sternback ed., 1989). Jung's other theoretical formulations include "the collective unconscious, archetypal psychology, . . . synchronicity, and the individuation process." *Id.* at 4. According to one commentator, Jungian theories including his view of psychological types have largely fallen into disfavor by contemporary psychologists. Richard E. Redding, Book Review, 58 J. LEGAL EDUC. 312, 318–19 (2008) (reviewing MARTHA M. PETERS & DON PETERS, JURIS TYPES: LEARNING LAW THROUGH SELF-UNDERSTANDING (2007)).

<sup>39</sup> Jung, *supra* note 38, at 6 (theorizing that his experiences showed typical differences regarding attitudes toward mental functions involved in perceiving and deciding in addition to the distinctions between introversion and extroversion). *See* LAWRENCE, *supra* note 37, at 6 (noting that Jung saw patterns in ways people oriented their energy outwardly or inwardly and prefer to perceive and make judgments).

<sup>40</sup> *Forever Jung*, *supra* note 32, at 10. Jung's theory discussed attitudes and functions. Jung, *supra* note 38, at 330; SPOTO, *supra* note 38, at 20. Attitudes connote a fundamental orientation toward or away from external environments, which he labeled extraversion and introversion. *Id.* at 21. Functions dealt with perception and judgment and Jung labeled them in the following two ways: sensation and intuition affecting perception, and thinking and feeling influencing decision-making. *Id.* at 20.

<sup>41</sup> *Forever Jung*, *supra* note 32, at 10; *see* ISABEL BRIGGS MYERS & PETER B. MYERS, GIFTS DIFFERING: UNDERSTANDING PERSONALITY TYPE 24 (1980); *see also* SPOTO, *supra* note 38, at 15.

<sup>42</sup> Jung, *supra* note 38, at 554–55 ("It is not the purpose of a psychological typology to classify human beings into categories—this in itself would be pretty pointless.")

<sup>43</sup> *See* C. G. Jung, *The Development of Personality*, in THE COLLECTED WORKS OF C. G. JUNG 7 (Herbert Read et al. eds., R.F.C. Hull trans., 1954); *infra* notes 328–33 and accompanying text.

work of Katharine Briggs and Isabel Briggs Myers.<sup>44</sup> After Myers and Briggs amassed data from over ten thousand high school and medical students, the Educational Testing Service published the Myers-Briggs Type Indicator (MBTI).<sup>45</sup> “The MBTI is the simplest, most reliable way to determine a person’s Jungian [psychological] type” preferences.<sup>46</sup> It is used widely in organizational development contexts to promote self-awareness and facilitate leadership instruction, team building, and other effective workplace communication skills.<sup>47</sup>

Although some psychometricians and psychologists question the validity<sup>48</sup> and reliability<sup>49</sup> of the MBTI, this instrument meets all

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<sup>44</sup> *Forever Jung*, *supra* note 32, at 11.

<sup>45</sup> Mary H. McCaulley, *The Myers-Briggs Type Indicator: A Jungian Model for Problem Solving*, in *DEVELOPING CRITICAL THINKING AND PROBLEM-SOLVING ABILITIES* 37, 38 (James E. Stice ed., 1987); *see also* OTTO KROEGER & JANET M. THUESEN, *TYPE TALK AT WORK: HOW THE 16 PERSONALITY TYPES DETERMINE YOUR SUCCESS ON THE JOB* 6 (1992).

<sup>46</sup> *Forever Jung*, *supra* note 32, at 11 n.39.

<sup>47</sup> *See* LEE BARR & NORMA BARR, *THE LEADERSHIP EQUATION: LEADERSHIP, MANAGEMENT, AND THE MYERS-BRIGGS*, at v–vii, x (1989); ROBERT BENFARI & JEAN KNOX, *UNDERSTANDING YOUR MANAGEMENT STYLE: BEYOND THE MYERS-BRIGGS TYPE INDICATORS* xvi (1991); KROEGER & THUESEN, *supra* note 45, at v–vi, xiii.

<sup>48</sup> “Validity in this context means whether the indicator measures those things it claims to measure or the degree to which inferences about the results may be supported by empirical evidence.” *Forever Jung*, *supra* note 32, at 21 n.87. Although resolving this disagreement requires getting quickly into deep statistical analysis and math regarding psychometric approaches and measurement that exceeds the focus and scope of this article, it is fair to note that a disagreement exists regarding the MBTI’s validity. MBTI Manuals extensively document the MBTI’s empirical validity. ISABEL BRIGGS MYERS & MARY H. MCCAULLEY, *MANUAL: A GUIDE TO THE DEVELOPMENT AND USE OF THE MYERS-BRIGGS TYPE INDICATOR* 176–213 (Robert Most ed., 1985) [hereinafter 2D MBTI MANUAL]; 3D MBTI MANUAL, *supra* note 29, at 172–219. A study of how MBTI outcomes compared with self-assessments by Jungian analysts showed 100% agreement on the extraversion and introversion index, 68% on sensing and intuition, and 61% on thinking and feeling. Katherine Bradway, *Jung’s Psychological Types: Classification by Test Versus Classification by Self*, 9 J. ANALYTICAL PSYCHOL. 129, 132 (1964), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-5922.1964.00129.x/abstract>. On the other hand, some dismiss many of these validating studies as “methodologically flawed,” “of relatively low quality,” and “published in low-prestige forums.” Redding, *supra* note 38, at 318. Answering Redding’s argument reviewing *Juris Types* that the authors suffered from confirmation bias in writing *Juris Types*, we note that he did the same thing by cherry picking studies that attack the MBTI’s validity while not examining those that support it beyond generalized dismissals of their methodology and the journals in which they were published. *See id.* at 318–19.

<sup>49</sup> Reliability in this context usually means whether the information an instrument reports is accurate. *See Forever Jung*, *supra* note 32, at 21–22 n.88. Like the disagreement regarding validity, disputing claims apparently exist in the psychometric and contemporary psychological world concerning reliability. Compare 3D MBTI MANUAL, *supra* note 29 at 159–69 (discussing the extensive research supporting the reliability of the MBTI), with Redding, *supra* note 38, at 318–19 (citing Robert R. McCrae & Paul T. Costa, Jr., *Reinterpreting the Myers-Briggs Type Indicator from the Perspective of the Five Factor Model of Personality*, 57

requirements for psychological assessment instruments.<sup>50</sup> The MBTI has also “withstood more than 50 years of scientific scrutiny” and has been deemed useful by “thousands of organizations and millions of people worldwide.”<sup>51</sup> This instrument easily and quickly indicates degrees to which persons express preferences for the aspects of attitudinal and mental functioning that Jung’s typology articulates.<sup>52</sup> The MBTI lets users indicate their psychological type preferences on four indexes that reflect the person’s predispositions regarding his perception, judgment, orientation toward external or internal interactions, and tendencies to seek closure or new information.<sup>53</sup>

A completed MBTI assesses psychometric weightings of choices in each of these four areas based on the user’s answers to simple questions involving everyday situations and indicates which preference from each pairing users select.<sup>54</sup> Psychological type preferences that are indicated by

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J. PERSONALITY 17, 18 (1989) (“Psychometricians are troubled by the conception of psychological types and the limited evidence that the MBTI measures anything other than quasi-normally distributed personality traits.”) (citations omitted)). These validity and reliability disagreements reflect different world view perspectives favoring either trait-based measurements, which are more quantitative and work better in scientific management contexts, or instruments like the MBTI, which are more qualitative and work better in human development contexts by giving more personal insights and more awareness for modifying behavior.

<sup>50</sup> See Rich Thompson, *The Myers-Briggs Assessment Is No Fad—It’s a Research-Based Instrument that Delivers Results*, CPP BLOG CENTRAL (Sept. 19, 2013), <http://www.cppblogcentral.com/cpp-connect/the-myers-briggs-assessment-is-no-fad-its-a-research-based-instrument-that-delivers-results/>; *supra* notes 48–49 and accompanying text.

<sup>51</sup> *Id.* This view of the MBTI’s usefulness was affirmed by an overwhelming majority of the law students, faculty groups, and law firm members with whom the authors have worked in the United States, Malaysia, Poland, Taiwan, and Uganda.

<sup>52</sup> 3D MBTI MANUAL, *supra* note 29, at 5–6.

<sup>53</sup> These are the four psychological type preferences indicated by the Myers Briggs Type Indicator. JURIS TYPES, *supra* note 30, at 1. They address aspects of “perception, judgment,” outward or inward emphasis, and a “lifestyle orientation” toward planning or remaining flexible. *Id.* An external or internal orientation is indicated by E for extraversion and I for introversion. *Id.* at 14. Perception is indicated by S for sensing and N for intuition. *Id.* Judgment is indicated by T for thinking and F for feeling. *Id.* Finally, a life style orientation featuring openness or closure is indicated by P for perceiving or J for judging. *Id.*

<sup>54</sup> See 3D MBTI MANUAL, *supra* note 29, at 16, 116–17. Trait theories are currently ascendant in the personality literature, and some view them as superior to typologies. See Redding, *supra* note 38, at 320 (arguing that modern psychology conceptualizes personality as consisting of complex traits which exist along a continuum). Trait-based personality measures hypothesize the existence of categories and then measure variation along a continuum. See McCrae & Costa, *supra* note 49, at 23. The MBTI “seeks to identify a respondent’s status on either one or the other of two opposite personality categories.” 3D MBTI MANUAL, *supra* note 29, at 5 (emphasis omitted). The MBTI’s focus “is on its usefulness to respondents.” *Id.* Because trait theories lack the underlying theoretical background provided by Jung and incorporated by the MBTI, many organizational

the MBTI refer to the innate predispositions that Jung originally identified rather than conscious selection of attitudes and action tendencies that persons might desire or deem most useful.<sup>55</sup> A preference indicates feeling so “comfortable with a particular way of behaving and experiencing” that this influences behaviors most but not all of the time.<sup>56</sup>

An analogy to handedness is often used to explain psychological type theory’s use of the term preference in this specialized context.<sup>57</sup> Virtually everyone is oriented to primarily use either their right or left hand for tasks such as using pens and pencils, throwing balls and other objects, manipulating cutlery, and many other actions.<sup>58</sup> Like type preferences, this orientation is usually deeply ingrained, has existed for years, and cannot be explained easily. This orientation is revealed in the behaviors it influences, just as type preferences often are.

In addition, handedness, like type preferences, does not necessarily warrant evaluative judgment as right, wrong, better, or worse. Left- or right-handedness is simply different. Similarly, the type preferences in the four indexes are different from, but not superior or inferior to, each other.<sup>59</sup> Moreover, type preferences, like a handedness orientation, influence default actions when individuals are reacting to surprise, experiencing strong stress, or failing to pay attention to their behavioral choices.<sup>60</sup> This aspect is very important to learning lawyering roles, skills, and other foundational professional identity abilities.<sup>61</sup>

## II. PSYCHOLOGICAL TYPE THEORY’S VALUE ADDED IN DEVELOPING PROFESSIONAL IDENTITY

Understanding the influences that psychological type preferences often exert on actions helps law students learn and improve the behaviors needed to develop and demonstrate professional identity and supplies its value-added reason for using this approach.<sup>62</sup> Like a handedness preference, psychological type theory preferences tend to influence certain actions and discourage other ones.<sup>63</sup> Although humans can and frequently

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development professions working with trait theories incorporate specific behavioral descriptions drawn from the MBTI to enhance understanding. *See* McCrae & Costa, *supra* note 49, at 23–24.

<sup>55</sup> *Forever Jung*, *supra* note 32, at 12.

<sup>56</sup> ROWAN BAYNE, PSYCHOLOGICAL TYPES AT WORK: AN MBTI PERSPECTIVE 19 (2004).

<sup>57</sup> *Id.*

<sup>58</sup> *See* SANDRA HIRSH & JEAN KUMMEROW, LIFETYPES 4 (1989).

<sup>59</sup> *See* KROEGER & THEUSEN, *supra* note 45, at 18–19.

<sup>60</sup> Jung, *supra* note 38, at 536.

<sup>61</sup> *See* 3D MBTI MANUAL, *supra* note 29, at 260 (explaining that an understanding of psychological type can be important for students in a classroom setting).

<sup>62</sup> *See id.*

<sup>63</sup> *See* Jung, *supra* note 38, at 536; *supra* notes 57–59 and accompanying text.

do perform contrary to natural preference-influenced actions, they tend to use preference-influenced behaviors more often.<sup>64</sup> These psychological preference influences tend to provide a broad framework for an individual's best developed behavioral repertoire.<sup>65</sup> Performing tasks that would normally be influenced by non-preferred attitudes and functions typically takes more conscious effort to perform.<sup>66</sup> It also usually requires substantial practice to develop proficiency performing these actions as effectively as done when following preference-influenced tendencies.<sup>67</sup>

For example, virtually all nondisabled adults are able to use both their right and left hands, but they typically perform tasks first and more skillfully with the hand they prefer.<sup>68</sup> Consequently, humans typically develop more proficiency performing preference-influenced actions.<sup>69</sup> For example, right-handed persons tend to write and throw primarily with their right hand. Although most right-handed persons are able to write and throw with their left hand, doing this typically requires more conscious effort, feels much less comfortable, and initially produces less proficient actions. Even those who are somewhat proficient at performing actions with their non-preferred hand may revert to using their preferred hand for relevant behaviors when they are surprised or strongly stressed.<sup>70</sup>

Many factors motivate and influence human behavior. No psychological theory, including Jung's ideas regarding a preferences typology, can capture the full range of complexity involved in what motivates and influences human behavior.<sup>71</sup> Consequently, no direct

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<sup>64</sup> See Jung, *supra* note 38, at 536.

<sup>65</sup> See BAYNE, *supra* note 56, at 19–20; WILLIAM C. JEFFRIES, TRUE TO TYPE: ANSWERS TO THE MOST COMMONLY ASKED QUESTIONS ABOUT INTERPRETING THE MYERS-BRIGGS TYPE INDICATOR 25 (1991).

<sup>66</sup> See, e.g., KROEGER & THUESEN, *supra* note 45, at 14 (noting that change and growth come slowly and take major effort); MYERS & MYERS, *supra* note 41, at 194 (noting that learning to perform consistently with less favored, less developed preferences is challenging).

<sup>67</sup> See KROEGER & THUESEN, *supra* note 45, at 14; MYERS & MYERS, *supra* note 41, at 194.

<sup>68</sup> See, e.g., HIRSH & KUMMEROW, *supra* note 58, at 4; 2D MBTI MANUAL, *supra* note 48, at 3.

<sup>69</sup> See HIRSH & KUMMEROW, *supra* note 58, at 4; 2D MBTI MANUAL, *supra* note 48, at 3.

<sup>70</sup> *Forever Jung*, *supra* note 32, at 25–26.

<sup>71</sup> Barbara J. Gilchrist, *The Myers-Briggs Type Indicator as a Tool for Clinical Legal Education*, 10 ST. LOUIS U. PUB. L. REV. 601, 603 (1991) (arguing that “the MBTI is a framework” rather than “a fixed formula” because it does not explain all the complexities of human behavior); see Redding, *supra* note 38, at 321 (“Human behavior is enormously complex and often situationally specific, and so even the best personality tests account for only a modest portion of the variability in behavior.”).

causal relationship between psychological type theory and specific behaviors exists. Psychological type preferences indicated by the MBTI only suggest behavioral tendencies that may result from favored ways of acting and are potentially influenced by the aspects of mental attitudes and functions described by psychological type theory.<sup>72</sup>

Substantial research supports Jung's belief that behaviors are often influenced by psychological type preferences.<sup>73</sup> Research relevant to law practice showed that participants who preferred introversion and intuition, both alone and in combination, were more prone to accept post-event information about a situation they had observed.<sup>74</sup> Our study of legal interviews in a law school clinic showed that extraverted students who preferred sensing perception on the MBTI, as predicted, used specific approaches to information gathering.<sup>75</sup> These students asked more questions than introverted students who preferred intuitive perception on the MBTI and would use, according to the theory, more general, and less specific approaches to inquiry.<sup>76</sup>

The behaviors influenced by psychological type preferences usually do not connect to specific professional actions in the direct ways that particular motor actions are often affected by handedness. The four areas addressed by psychological type theory encompass favoring external or internal interactions; emphasizing specific or general orientations to perceiving and communicating about information; preferring step-into,

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<sup>72</sup> *Forever Jung*, *supra* note 32, at 23–24.

<sup>73</sup> A study of 96 students showed those who preferred sensing perception performed significantly better achieving the lowest production costs than students who preferred intuitive perception. Donald L. Davis et al., *An Experimental Application of Personality Type As an Analogue for Decision-Making Style*, 66 PSYCHOL. REP. 167, 172–73 (1990). Another study found that students who preferred a subjective decision-making approach rated significantly higher than students who favored an objective decision-making approach in applying participative management concepts to a hypothetical management problem. Christa I. Walck, *Training for Participative Management: Implications for Psychological Type*, 21 J. PSYCHOL. TYPE 3, 4–5 (1991) (examining how feeling personality types outperformed thinking personality types in a study); see generally Roger A. Kerin & John W. Slocum, Jr., *Decision-Making Style and Acquisition of Information: Further Exploration of the Myers-Briggs Type Indicator*, 49 PSYCHOL. REP. 132, 132 (1981) (explaining how feeling personality types “prefer analyzing subjective impressions when arriving at a decision” while thinking personality types “view information objectively and impersonally weigh facts when arriving at a decision”).

<sup>74</sup> Roger A. Ward & Elizabeth F. Loftus, *Eyewitness Performance in Different Psychological Types*, 112 J. GEN. PSYCHOL. 191, 196 (1985). The participants accepted both misleading and consistent post-event information. *Id.*

<sup>75</sup> *Maybe That's Why I Do That*, *supra* note 32, at 190. “A sensing preference signals primary reliance on observable facts or happenings through one or more of the five senses.” *Id.* at 175–76.

<sup>76</sup> *Id.* “An intuitive preference, in contrast, focuses on patters, possibilities, and meanings when attending to and gathering information.” *Id.* at 176.

subjective or impersonal, objective decision-making; and desiring structured, planned approaches to external interactions rather than flexible, spontaneous approaches and supply the broad contours of what psychological type preferences influence.<sup>77</sup> Although these impulses potentially influence specific aspects of the complex behavioral sequences required to represent clients competently and resolve ethical dilemmas professionally, these connections usually need to be explored when discussing theories of effective actions and reviewing individual application of those theories.<sup>78</sup> Relying solely on broad descriptions of potential type preference-influenced behaviors that typically accompany distributing MBTI results is seldom sufficient.<sup>79</sup>

Learning potential behavioral influences by adding psychological type theory to skills components of professional identity development fits well with a learning theory premise that humans design behaviors that they use when interviewing, counseling, negotiating, and performing other professional tasks needed to represent clients competently and ethically.<sup>80</sup> Nothing that lawyers do in these contexts depends on premises that occur inherently in the nature of the universe.<sup>81</sup> Instead, lawyers design and select their actions “even if they often are not aware of the reasons underlying these choices.”<sup>82</sup> Many implicit and explicit reasons

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<sup>77</sup> See *id.* at 175–77.

<sup>78</sup> See *Forever Jung*, *supra* note 32, at 27, 105 (describing how potential type influences on student negotiation experiences should occur when the entire class discussed assigned negotiation and in small groups of students who participated in each session, noting that using videotaped clips enhances both).

<sup>79</sup> These descriptions have been criticized as being “so broad as to have little explanatory . . . value” and “sufficiently vague to apply to a large number of people in a wide variety of situations.” Redding, *supra* note 38, at 322. Despite these criticisms, the authors’ experiences have been that law students find their MBTI results very helpful after they receive information introducing them to MBTI concepts, use specific examples and contextualized descriptions, and follow this with frequent discussions about how they might connect to evolving learning and lawyering action theories. See *JURIS TYPES*, *supra* note 30, at 5–6; *Maybe That’s Why I Do That*, *supra* note 32, at 179–180; *Forever Jung*; *supra* note 32, at 102–04; *Mapping, Modeling*, *supra* note 32, at 903–04. Demonstrating these values, students in Don’s negotiation courses described their experiences using the psychological type theory and the MBTI to help them learn, noting: “[the MBTI] seems to help me climb into my own head and find insights I might not have otherwise acknowledged;” “[I] was particularly intrigued with the MBTI’s usefulness as a tool for self-correction;” and “MBTI theory . . . provides a framework for self-analysis and post-negotiation analysis.” *Forever Jung*, *supra* note 32, at 105 n.521.

<sup>80</sup> *Mapping, Modeling*, *supra* note 32, at 878–80; CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 17–18 (6th prtg. 1980).

<sup>81</sup> ARGYRIS & SCHÖN, *supra* note 80, at 17.

<sup>82</sup> *Mapping, Modeling*, *supra* note 32, at 880. Neuroscience, however, is increasingly demonstrating that everything humans feel, think, and do starts with meanings they assign to their perceptions, and portions of these perceptions are first processed by limbic brain



support both common, existing practices in performing these professional tasks and more effective approaches to performing them.<sup>83</sup> Called action theories,<sup>84</sup> these constructs provide ways to act that are likely to produce specific effects.<sup>85</sup> These action theories underlie skills that are best understood as simply actions that produce intended outcomes.<sup>86</sup>

Focusing on the constructed nature of behavior in this way illuminates the element of choice and emphasizes the possibilities for altering and improving future actions.<sup>87</sup> Action theories help students understand complex interactions, explain behaviors that worked in the past, and provide ways to analyze how these choices could be improved to achieve better future outcomes.<sup>88</sup> They give law “students frameworks for preparing, organizing, and evaluating experiences” as they engage “in actual and simulated lawyer situations.”<sup>89</sup>

Action theories provide useful bases upon which to build specific learning objectives and outcomes, such as those the ABA now requires law schools to establish to help students internalize and demonstrate competence in exercising ethical responsibilities, other essential core lawyering skills, and professional identity.<sup>90</sup> Using action theories

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systems that generate emotions. Jeremy Lack & François Bogacz, *The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution?*, 14 CARDOZO J. CONFLICT RESOL. 33, 38 (2012). This challenges the essentially cognitive focus that this article adopts in the many contexts where emotional responses potentially influence behavior initially until the prefrontal cortex may intervene. See Earl K. Miller & Jonathan D. Cohen, *An Integrative Theory of Prefrontal Cortex Function*, 24 ANN. REV. OF NEUROSCIENCE 167, 171 (2001).

<sup>83</sup> See ARGYRIS & SCHÖN, *supra* note 80, at 10–11.

<sup>84</sup> *Id.* at 3–6; DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 255 (1987). Thus, action theories are simply generalizations about behaviors that are likely to produce intended effects and why. SCHÖN, *supra*, at 255. They “include the values and underlying assumptions that inform” objectives and actions likely to accomplish them. *Forever Jung*, *supra* note 32, at 99.

<sup>85</sup> *Mapping, Modeling*, *supra* note 32, at 880.

<sup>86</sup> ARGYRIS & SCHÖN, *supra* note 80, at 6; SCHÖN, *supra* note 84, at 255.

<sup>87</sup> See ARGYRIS & SCHÖN, *supra* note 80, at 17 (discussing how experiential learning focused on behavior helps students adopt new action strategies). For an examination of how neuroscience’s important discovery of the human brain’s abilities to develop new neuroconnections leading to different behaviors, called neuroplasticity, see *infra* notes 150–56 and accompanying text.

<sup>88</sup> *Mapping, Modeling*, *supra* note 32, at 880.

<sup>89</sup> *Id.*

<sup>90</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(3) (2014). Both authors commonly require students in their clinical and simulation-based professional skills course to record all of their interactions with clients and colleagues in role plays. Then students must listen to their recordings and chart the specific action choices they made on a document that forces them to assess what they actually did. These charts

reinforces a three step process for experiential learning.<sup>91</sup> The ABA accreditation standards now strongly encourage this process<sup>92</sup> “through purposeful, self-reflective practice.”<sup>93</sup> Law students using this process “will prepare, act, and then reflectively evaluate.”<sup>94</sup> Ideally, they repeat this sequence frequently in order to learn and develop competence performing the actions needed to accomplish necessary tasks.<sup>95</sup>

Simply understanding action theories cognitively and emotionally does not necessarily create abilities to produce the behaviors the action theories endorse.<sup>96</sup> Skills acquisition and improvement requires individualizing pedagogy to give students opportunities to make, perform, and examine action choices and behaviors.<sup>97</sup> Doing this “engages both cognitive and affective [learning] dimensions and creates a sense of personal discovery” and development.<sup>98</sup> It requires students to engage with and create meaning from their actions and outcomes and realize potential future implications.<sup>99</sup> It also requires fluid response sequences that usually create “important personal insights that are not foreseen by instructors.”<sup>100</sup> Engaging repetitively in this process allows students to interpret experiences according to their own personal learning needs.<sup>101</sup>

Law students who are learning skills relevant to developing personal identity must develop sufficient self-awareness to recognize where they are and where they need to travel to acquire competent professional, ethical, and moral behavioral habits. Students inevitably “start at different places, possess different strengths, and find different challenges” when they journey to skill competence and professional identity.<sup>102</sup> Combining action theories with psychological type theory can help students understand themselves and others, plan where they need to go

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are then reviewed as part of students’ formative assessment, also required by a new ABA accreditation standard. 2014–2015 ABA STANDARDS Standard 314.

<sup>91</sup> ARGYRIS & SCHÖN, *supra* note 80, at 99.

<sup>92</sup> See 2014–2015 ABA STANDARDS Standard 303(a)(3).

<sup>93</sup> *Mapping, Modeling, supra* note 32, at 886.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> ARGYRIS & SCHÖN, *supra* note 80, at 12; Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 295 (1981).

<sup>97</sup> *Mapping, Modeling, supra* note 32, at 883.

<sup>98</sup> *Id.*

<sup>99</sup> See CARL R. ROGERS, FREEDOM TO LEARN 5 (1969).

<sup>100</sup> *Mapping, Modeling, supra* note 32, at 884 n.18.

<sup>101</sup> Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 537–38 (1987).

<sup>102</sup> *Mapping, Modeling, supra* note 32, at 892.

considering their strengths, develop awareness of likely challenges and obstacles, and learn.

Doing this promotes awareness of differences, and these perceptions help students understand potential variations between their own and their colleagues' approaches and behaviors.<sup>103</sup> It often engenders an appreciation of advantages and disadvantages of different action theories and behaviors.<sup>104</sup> It enhances opportunities for effective collaboration<sup>105</sup> and solving problems using strengths of different perspectives.<sup>106</sup> This approach is frequently recommended for resolving challenging ethical and moral dilemmas.<sup>107</sup> Awareness of the strengths and differences signaled by psychological type theory and learning to value them often permits the constructive framing of conflicts as potentially positive occurrences and counters common tendencies to negatively judge others for not acting like oneself.<sup>108</sup> Promoting better understandings of and collaborations with clients, colleagues, counterpart counsel, judges, and other legal system personnel provides important collateral benefits to using psychological type theory.<sup>109</sup>

“Helping students map their way from where they are to where they want to be requires constant attention to both developing and refining action theories that guide purposeful behavioral choice.”<sup>110</sup> Frequent inquiries and conversations about action theories help provide knowledge for planning actions, evaluating their effectiveness, and making spontaneous revisions of earlier plans needed to respond to unexpected

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<sup>103</sup> See *Forever Jung*, *supra* note 32, at 112.

<sup>104</sup> See *id.* at 114–15 (discussing how pairing students in teams in a negotiation class often helps students learn to value differences and identify when and how different actions are effective).

<sup>105</sup> See *infra* notes 214–26 and accompanying text for an analysis of the importance of collaborative, client-centered approaches to client relationships in forming and demonstrating professional identity.

<sup>106</sup> ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 246 (2d ed. 2006) (arguing that effective problem solving involves all four mental functions described by psychological type theory; both sensing and intuitive approaches to perception and judging and feeling approaches to decision-making).

<sup>107</sup> See THOMAS L. SHAFFER & ROBERT F. COCHRANE, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 52 (2d ed. 2009); MICHAEL L. SEIGEL & JAMES L. KELLEY, *LAWYERS CROSSING LINES: TEN STORIES* 217 (2d ed. 2010).

<sup>108</sup> See KROEGER & THUESEN, *supra* note 45, at 156 (explaining how psychological type theory's natural affirming quality helps user recast personality differences and provides a basis for solving problems constructively and effectively).

<sup>109</sup> See Raymond B. Marcin, *Psychological Type Theory in the Legal Profession*, 24 U. TOL. L. REV. 103, 117 (1992) (discussing how “knowledge of type . . . often . . . promote[s] understanding and tolerance” in human relations).

<sup>110</sup> *Mapping, Modeling*, *supra* note 32, at 895.

situations effectively.<sup>111</sup> Adding psychological type theory to these inquiries and conversations stimulates the development of crucial professional identity abilities such as self-awareness<sup>112</sup> and self-evaluation.<sup>113</sup>

Psychological type theory often provides insights about preferences and their accompanying action tendencies.<sup>114</sup> Gaining these insights enhances an essential step in experiential learning approaches by “investigating . . . both what was done and why it was done.”<sup>115</sup> Doing this is often difficult because much of what informs common actions involved in asking questions, listening, perceiving and communicating information, and making decisions is seldom made explicit.<sup>116</sup> Doing this also promotes self-illumination—Jung’s justification for his psychological type theory—by helping persons become aware of their behavioral inclinations and challenges.<sup>117</sup>

For students, learning psychological type theory and their preferences frequently offers them insight into what behaviors, roles, and attitudes come naturally to them when they exercise professional skills in interviewing, counseling, negotiating, mediating, and problem-solving interactions.<sup>118</sup> These natural tendencies often reflect implicit action theories.<sup>119</sup> Such insights into implicit action theories helps students understand many of their action theories, role choices, and resulting behaviors.<sup>120</sup>

Identifying a preference for extraversion, for example, has helped many students in our clinical and professional skills courses become aware of “tendencies to interrupt others and talk when [feeling] uncomfortable.”<sup>121</sup> Learning of a preference for introversion has also

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<sup>111</sup> *Id.*

<sup>112</sup> This is one of the foundational skills needed for ethical dilemma recognition and resolution. *See infra* notes 299–306 and accompany text.

<sup>113</sup> This is one of the professional skills mentioned by the ABA as important to include in law school instruction. 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Interpretation 302-1 (2014).

<sup>114</sup> *Forever Jung, supra* note 32, at 100.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 100–01; *see also* ARGYRIS & SCHÖN, *supra* note 80, at 9–11 (examining how humans do not always manifest their psychological type in their behavior).

<sup>117</sup> *See Forever Jung, supra* note 32, at 101.

<sup>118</sup> *See* ARGYRIS & SCHÖN, *supra* note 80, at 12–13.

<sup>119</sup> Research regarding how professionals develop competence suggests distinguishing between explicit or espoused action theories, consisting of what actors say they intend to do, and implicit or in use theories comprising what underlies how students actually behave. *See* Kreiling, *supra* note 96, at 291; *see also* ARGYRIS & SCHÖN, *supra* note 80, at viii; SCHÖN, *supra* note 84, at 255.

<sup>120</sup> *Forever Jung, supra* note 32, at 103.

<sup>121</sup> *Id.*

helped many students with whom we have worked discern “why reacting quickly to unexpected comments and tactics was hard for them to do.”<sup>122</sup> Students in our courses reported similar experiences in regards to the other dimensions of Jung’s psychological type theory.<sup>123</sup>

Students developing essential professional identity skills need to frequently experience the importance of fitting behaviors to contexts, a process that action theories repeatedly emphasize.<sup>124</sup> Using psychological type theory meets this need because humans commonly use type preference-influenced behaviors produced naturally and seemingly automatically that are effective in some contexts and counterproductive in others. Effective experiential learning demands that professors help students sort which is which. This process connects directly to now ABA mandated use of formative feedback that engages students, reinforces knowledge, and identifies opportunities for corrective practice.<sup>125</sup>

Confidence is important in education, and students can build confidence by determining when their action tendencies produce effective actions.<sup>126</sup> By experiencing when tendencies influence context effective actions, students are provided opportunities to receive positive formative feedback from colleagues, instructors, and themselves.<sup>127</sup> Research demonstrates that specific positive feedback regarding what was done effectively motivates learning more than constructive criticism.<sup>128</sup> Identifying effective decisions and actions also reinforces self-awareness and self-evaluation because it suggests what behaviors should be repeated in identical or similar contexts.

Experiencing contexts in which actions influenced by students’ type preference-related behavioral tendencies produce contextually ineffective behaviors also provides valuable learning experiences. This sometimes

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<sup>122</sup> *Id.* at 103–04.

<sup>123</sup> *See id.* at 104–05 n.519.

<sup>124</sup> *See id.* at 105.

<sup>125</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 314, Interpretation 314-1 (2014).

<sup>126</sup> *Forever Jung*, *supra* note 32, at 106.

<sup>127</sup> The ABA defines formative feedback as measurements during different points of time during courses and educational experiences that provide meaningful feedback to improve student learning. 2014–2015 ABA STANDARDS Interpretation 314-1. Regular and periodic formative feedback supports students’ feelings of competence and growth. It also combats natural feelings of insecurity and occasional overconfidence that arise from lack of feedback.

<sup>128</sup> Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, in CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 191, 209 (1980); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 768 (1989); *see* EARNEST R. HILGARD & GORDON H. BOWER, THEORIES OF LEARNING 608–09 (4th ed. 1975).

occurs because students have not identified an action likely to accomplish their objective before acting.<sup>129</sup> Acting without a guiding theory demonstrates psychological type theory's premise that preferences frequently manifest themselves in habitual behaviors.<sup>130</sup>

Connections between type preference influences and contextually ineffective actions are also frequently identified when students perform actions that do not coincide with their plans to use different behaviors based on selected action theories.<sup>131</sup> "Existing behavioral tendencies strongly influence action choices" and often override initial intentions to behave differently.<sup>132</sup> Habitual behavioral patterns commonly create more difficulties acting consistently with pre-selected action theories than complexities in these frameworks.<sup>133</sup> Many essential action components of the core tasks in competent questioning, listening, and organizing which undergird effective interviewing, counseling, negotiating, and advocacy, are not inherently complex.

Knowing type theory and students' behavioral tendencies linked to their preferences helps students identify when they experience "difficulty acting consistently with their intentions."<sup>134</sup> These situations create learning dilemmas and opportunities that strongly motivate students to seek improvement.<sup>135</sup> This is consistent with neuroscience discoveries that dopamine neurons in human brains "constantly generate patterns [and predictions] based on experience[s]" and distill "if this, then that" occurrences "into models of correlation that allow the brain to anticipate what will happen next."<sup>136</sup> Unexpected or otherwise surprising results

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<sup>129</sup> See *Forever Jung*, *supra* note 32, at 106–07. Students must have a theory of effective action in order to learn to integrate it with behavior. See Lee Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice*, in *ADVANCES IN EXPERIENTIAL SOCIAL PROCESS* 111, 131 (Cary L. Cooper & Clayton Alderfer eds., 1978). This can also occur when students have a theory that proves to be ineffective, demonstrating how experience-based learning allows professionals to test and evaluate theory. *Forever Jung*, *supra* note 32, at 107 n.531.

<sup>130</sup> Recent neuroscience research suggests that much of what humans do occurs without conscious thought by accessing and following scripts about how to act in specific contexts that are stored in memory. DANIEL T. WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL?* 6–7 (2009).

<sup>131</sup> See *Mapping, Modeling*, *supra* note 32, at 923.

<sup>132</sup> *Id.* at 924; see also ARGYRIS & SCHÖN, *supra* note 80, at 99–100; Kreiling, *supra* note 96, at 292–93.

<sup>133</sup> ARGYRIS & SCHÖN, *supra* note 80, at viii; see also ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 147 (Bruce Patton ed., 2d ed. 1991).

<sup>134</sup> *Mapping, Modeling*, *supra* note 32, at 924.

<sup>135</sup> *Id.*; ARGYRIS & SCHÖN, *supra* note 80, at 100 (examining dilemmas as an essential aspect of skills learning).

<sup>136</sup> JONAH LEHRER, *HOW WE DECIDE* 37 (2009).

motivate brains to understand what happened and what needs to be revised to adjust expectations accordingly.<sup>137</sup>

This rapid neural activity that occurs outside conscious awareness motivates most students toward acquiring and demonstrating behavioral competence by seeking consistency between their action goals and behaviors.<sup>138</sup> The recent ABA amendments reinforce the critical importance of achieving skill competency and require law schools to frame learning outcomes in terms of competent exercise of professional responsibilities and other skills needed for ethical lawyering.<sup>139</sup> They also require that achievement of competency be central to institutional evaluation efforts law schools undertake.<sup>140</sup>

Recent research demonstrates that satisfying these aspirations for behavioral competence and effectiveness substantially contributes to a sense of subjective well-being.<sup>141</sup> Self-Determination Theory, a comprehensive explanation of human behavior broadly supported in psychological research over forty years,<sup>142</sup> posits that all humans have “basic psychological needs” such as feeling “competent [and] effective.”<sup>143</sup> Research shows that many of the well-documented negative effects on well-being that American law students experience result from decreases in their abilities to satisfy their fundamental needs for competence along with their desires for autonomy and relatedness to others.<sup>144</sup> This scholarship also shows that experiencing competence, autonomy, and connectedness strongly predicts subjective well-being in lawyers.<sup>145</sup>

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<sup>137</sup> See *id.* at 41.

<sup>138</sup> See *id.*; ARYGRIS & SCHÖN, *supra* note 80, at 99–100; Kreiling, *supra* note 96, at 292 n.29 (explaining that most people value consistency, congruence, and predictability more than inconsistency, incongruity, and unpredictability).

<sup>139</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302 (2014).

<sup>140</sup> *Id.* Standard 315.

<sup>141</sup> Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 263 (2004) [hereinafter *Undermining Effects on Law Students?*].

<sup>142</sup> Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers*, 83 GEO. WASH. L. REV. (forthcoming 2015) [hereinafter *What Makes Lawyers Happy?*]; see *Undermining Effects on Law Students?*, *supra* note 141, at 263–64; Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Role of Basic Psychological Needs in Personality and the Organization of Behavior*, in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 654, 660–62 (Oliver P. John et al. eds., 3d. ed. 2008).

<sup>143</sup> *What Makes Lawyers Happy?*, *supra* note 142.

<sup>144</sup> See *id.*; Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 894 (2007), available at [psp.sagepub.com/content/33/6.toc](http://psp.sagepub.com/content/33/6.toc).

<sup>145</sup> *What Makes Lawyers Happy?*, *supra* note 142.

Learning dilemmas stemming from ineffective behaviors also directly “challenge students to grapple with what motivates their inconsistent actions;” this usually provides a formidable task because much of what motivates human action lies obscured by mimicry of others and habitual behavioral patterns,<sup>146</sup> some of which may have been transferred to implicit procedural memory.<sup>147</sup> Once action scenarios and ways to address them are learned and stored in memory, human brains access these memories to generate actions that then happen immediately and effortlessly.<sup>148</sup> Type preference-influenced behavioral choices may facilitate this type of procedural memory creation and encoding.

Every experience changes a human brain,<sup>149</sup> and a discovery called neuroplasticity demonstrates that new neural pathways can be created by engaging in learning processes.<sup>150</sup> Learning different perspectives and action theories, and practicing them in experiential settings with formative feedback, can update brain connections and activate new behaviors or apply previously learned behaviors in new contexts.<sup>151</sup> This challenging process starts with learning and then focusing on clear images of the different perceptions and actions desired.<sup>152</sup>

These necessary clear images are supplied by combining readings, discussions, and demonstrations of action theories with psychological type theory-based insights on existing cognitive inclinations and behavioral tendencies. Psychological type insights provide value because they often reveal an underlying behavioral pattern that could be used or that is interfering with developing new, more effective action sequences. Focusing simply on trying to undo old habits entrenches them more solidly in brain connections by giving them more attention.<sup>153</sup> Although thinking

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<sup>146</sup> *Mapping, Modeling, supra* note 32, at 924–25.

<sup>147</sup> Memories are encoded in the neural processing that results from experiences. See FRED TRAVIS, *YOUR BRAIN IS A RIVER, NOT A ROCK* 132–33 (Kindle ed. 2012). This processing includes implicit memory encompassing procedural knowledge about how to do things. See RICK HANSON, *HARDWIRING HAPPINESS: THE NEW BRAIN SCIENCE OF CONTENTMENT, CALM, AND CONFIDENCE* 25 (2013).

<sup>148</sup> WILLINGHAM, *supra* note 130, at 6–7.

<sup>149</sup> TRAVIS, *supra* note 147, at 9, 38–46 (“The pattern of connections between your neurons changes continuously. This is called *neural plasticity*, and is one of the most revolutionary findings in the past century.”).

<sup>150</sup> Jill L. Kays et al., *The Dynamic Brain: Neuroplasticity and Mental Health*, 24 *J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCE* 118, 120 (2012) (“Multiple studies have documented neuroplastic changes in healthy human brains as a result of normal processes, such as learning.”).

<sup>151</sup> See TRAVIS, *supra* note 147, at 9.

<sup>152</sup> See Sara Bernard, *Neuroplasticity: Learning Physically Changes the Brain*, *EDUTOPIA* (Dec. 1, 2010), <http://www.edutopia.org/neuroscience-brain-based-learning-neuroplasticity>.

<sup>153</sup> TRAVIS, *supra* note 147, at 45.



through new action theories and steps activates new brain connections, actual experience with them is needed for them to stick.<sup>154</sup> These experiences must be repeated continuously until these new theories and actions become automatic and effortless.<sup>155</sup>

Psychological type theory affords a way to identify and understand habitual behavioral patterns which signal needs to change neural connections. Knowing type theory and preference-influenced behavioral tendencies may help students take an extra step beyond simply identifying inconsistencies between what they intended to do and what they actually did, and developing alternative strategies for resolving these mismatches.<sup>156</sup> Called double loop learning, this extra step examines why the inconsistent behavior occurred.<sup>157</sup> Finding connections to type preference-influenced behavioral tendencies often helps students persevere in learning how to perform important actions that they initially find difficult to produce.<sup>158</sup> It also often helps students develop strategies for modifying their contextually ineffective behavioral tendencies.<sup>159</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; see also NORMAN DOIDGE, *THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE* 47 (2007) (“[P]racticing a new skill, under the right conditions, can change hundreds of millions and possibly billions of [neural] connections between the nerve cells in [a human] brain.”).

<sup>156</sup> This is sometimes called single loop learning and is typically where clinical and other skills instructors stop the discussion and move on to discussing alternative actions that are likely to be more effective and consistent with intention. See Michael Moffitt & Scott R. Peppet, *Action Science and Negotiation*, 87 MARQ. L. REV. 649, 653 (2004).

<sup>157</sup> *Id.* This approach posits that humans have mental maps regarding how to act in situations, and they guide the actions regarding planning, implementing, and reviewing their behaviors more than their stated reasons for behaving. Don Peters, *Critiquing Clinical Performances*, in *A HANDBOOK ON CLINICAL LEGAL EDUCATION* 204, 205 (N.R. Madhava Menon ed., 1998). Scholars have labeled these stated reasons for behaving as implicit or theories in use as opposed to explicit or espoused theories of action. *Id.* Double loop learning challenges students to probe beyond the surface of their actions and seek to “bring ‘into consciousness the often inchoate, pre-conscious’” reasons for the inconsistent behaviors they produced. See *Mapping, Modeling*, *supra* note 32, at 890–91 n.30 (quoting Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1650 (1991)).

<sup>158</sup> *Mapping, Modeling*, *supra* note 32, at 925–26 n.112.

<sup>159</sup> *Id.* at 926–27; see also *Forever Jung*, *supra* note 32, at 107, 109. Enhancing law student awareness of their individual learning preferences and challenges helps them make appropriate adjustments and enhance law school performance. See Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 159 (1995); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 485–86 (1996); Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 476–77 (1988). The MBTI has helped students increase their awareness of their learning processes and develop appropriate adjustments. See, e.g., *JURIS TYPES*, *supra* note 30, at xi; Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 103 (1995).

Doing the hard work to recognize and change action habits is usually essential to developing competence through knowledge of and abilities to exercise the behavioral dimensions of professional identity. Many critical tasks in interviewing, counseling, negotiating, fact-finding, advocating, problem-solving, and discerning and resolving ethical dilemmas require actions that connect to and are potentially influenced by multiple dimensions of type theory. This means that students who are learning to identify and perform each of these tasks inevitably encounter some actions that link to their type preferences and some that require behaviors that are more likely influenced by type dimensions they do not prefer. Effective problem solving, for example, requires skilled actions predictably influenced by all four perceiving and decision-making type theory preferences.<sup>160</sup> The foundational action choices and behaviors involved in asking questions<sup>161</sup> and performing passive and active listening responses<sup>162</sup> also require behaviors potentially influenced by all eight type theory dimensions.

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<sup>160</sup> See McCaulley, *supra* note 45, at 45. This type-based model for solving problems incorporates all four of Jung's theorized four mental functions. It proceeds from gathering facts by using sensing perception to identify what is known in a specific, concrete way to developing potential solutions by using intuitive perceptions to generate possible alternatives and solutions. It then analyzes objectively by using thinking judgment to identify and consider the causal and logical consequences of each option. The model concludes by using feeling judgment to assess and weigh the impact of alternatives on the people involved and other relevant subjective considerations. *Id.* at 44–45.

<sup>161</sup> *Maybe That's Why I Do That*, *supra* note 32, at 196. "Asking questions effectively . . . requires attending to a sensory [perception] orientation to identify the immediate situation with sufficient specificity to decide what the next response should be. If a closed question is appropriate, [sensing perception's] detailed focus . . . helps determine what specific aspect of which concrete topic [the question should] pursu[e]. The contrasting intuitive preference is needed to" ascertain whether an open question would be more appropriate and how to phrase it effectively. "[T]he thinking function allows assessment of the logical consequences of the various possib[le]" phrasing options and facilitates choosing and using logical, cause-and-effect focused language. The feeling preference allows assessing effects question phrasing options are likely to have on clients and evolving relationship dimensions with them. Extraversion stimulates "the external interaction[s] needed to pose the questions and monitor non-verbal responses to them." Intuition permits engaging in pre-act planning and post question reflecting. Judging facilitates using an organized, moderately structured questioning approaches and achieving appropriate closure. Finally, perceiving allows flexibility in structure, organization, approach, and adaptability to unexpected information and other surprising developments when they occur. *Id.*

<sup>162</sup> *Id.* Sensing perception permits attending to immediate situations to assess what responses make the most sense and to paraphrase or summarize accurately whatever content or emotions clients communicate. Intuitive perception facilitates identifying possible meanings communicated and is particularly important when strong emotions are communicated in vague or ambiguous ways requiring identifying possibilities for acknowledging these feelings. Thinking judgment allows assessing likely information gathering consequences of listening responses while feeling judgment orients toward client agendas and eases using active listening to attend to relationship dimensions of evolving

The addition of psychological type theory insights facilitates formative assessments, which are now required by the ABA so that law schools can measure and improve student performance.<sup>163</sup> By requiring formative assessment, the ABA confirmed educational theorists' insistence "that feedback is essential to meaningful learning because it is extremely difficult to assess and change behavior without it."<sup>164</sup> Formative assessment "facilitates learning by encouraging [students performing professional identity relevant actions] to assess [them] against: (1) action theories predicting why the behaviors they sought to use would accomplish [appropriate] intended effects; (2) whether they acted congruently with their [chosen action] theories; (3) whether [these] theories and actions produced [effective] outcomes; and (4) [if effective outcomes did not occur,] what aspects of theories or actions [or both] should be changed" and why.<sup>165</sup>

Humans are not impartial observers of their behavior and often remember it inaccurately.<sup>166</sup> Formative assessment containing specific, behavior-based feedback combats common positive illusion biases that make it difficult for humans to identify and evaluate their actions accurately.<sup>167</sup> Humans, for example, routinely see themselves as more fair, reasonable, cooperative, and competent than average.<sup>168</sup> Specific,

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interactions. Extraversion provides impetus to listen by talking while introversion promotes abilities to resist interrupting clients and occasionally use silence coupled with non-verbal prompts to encourage continued client communication. A judging orientation facilitates planning and organizing while a perceiving orientation allows openness to client agendas, unexpected information, and surprising developments. *Id.* at 196–97.

<sup>163</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 314 (2014).

<sup>164</sup> *Mapping, Modeling, supra* note 32, at 919.

<sup>165</sup> *Id.* at 920.

<sup>166</sup> WILLINGHAM, *supra* note 130, at 151. Lacking confidence, some inaccurately remember their behavior as more ineffective than it was. Far more inaccurately remember their behavior as more effective as part of general tendencies to interpret their experiences more favorably to themselves. *Id.*

<sup>167</sup> *Id.* Substantial evidence demonstrates that humans are likely to make judgments in ways that create positive presentations of self. RUSSELL KOROBKIN & CHRIS GUTHRIE, *Heuristics and Biases at the Bargaining Table*, in *THE NEGOTIATOR'S FIELDBOOK* 351, 354 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). One of the world's top professional tennis instructors found that his extensive research did not find one top player who was "consistent in knowing and explaining exactly what he does." MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 67 (2005).

<sup>168</sup> JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 70, 387 (2012). Research shows that humans systematically express and exhibit more confidence in their abilities than is warranted objectively. RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 100 (2002).

behavior-based formative feedback regarding actions influenced by their tendencies helps students view themselves more objectively.<sup>169</sup>

Knowledge of psychological type theory's contextual dimensions "may help students identify conflicts between what they wanted to accomplish and what they did" when discussing and developing these understandings.<sup>170</sup> This knowledge reinforces important messages that "detailed analysis, careful preparation, and reflective practice" are needed to demonstrate professional identity by competent behaviors.<sup>171</sup> Blending type theory insights into formative assessment discussions also reaffirms "the value of linking preparation, presentation, and evaluation of behavior to espoused theories of competent task performance."<sup>172</sup>

The MBTI's approach of providing only positive descriptions of different psychological type preferences and many of their common behavioral tendencies generates a nonjudgmental framework that often lessens the anxieties and defensiveness law students naturally experience when confronting contextually ineffective actions that they performed.<sup>173</sup> It can also help students demonstrate patience when struggling to perform important actions that seem to come easily to colleagues.<sup>174</sup> Additionally, the MBTI approach can reduce frustrations that can block learning new skills by providing insights into strengths as well as reasons for their challenges.<sup>175</sup> It can also help students view these challenges as requiring countering behavioral tendencies rather than surrendering to "unalterable parts of their personalities."<sup>176</sup>

Discussing and developing these understandings help students acquire habits of reflecting on their theories and behaviors so that they can identify and correct ineffective choices on their own when they

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<sup>169</sup> ROBBENOLT & STERNLIGHT, *supra* note 168, at 82–83.

<sup>170</sup> *Forever Jung*, *supra* note 32, at 109.

<sup>171</sup> *Id.*; see Kreiling, *supra* note 96, at 305.

<sup>172</sup> See *Forever Jung*, *supra* note 32, at 107, 109.

<sup>173</sup> See *Mapping, Modeling*, *supra* note 32, at 922, 925–26. MBTI theory's positive tone differs markedly from major trait theories. For example, individuals scoring low on the five factors trait of conscientiousness, which parallels the JP dimensions of type theory, are described as "weak-willed" and "careless." BAYNE, *supra* note 56, at 24. This makes MBTI theory much more useful than five factor trait theory in educational and organizational contexts. Critics nonetheless attack this all positive aspect of the MBTI as "pseudoscientific variants of the newspaper horoscope" and argue that persons are "particularly likely to believe psychological test results that paint a positive picture." Redding, *supra* note 38, at 312, 323; see Bertram R. Forer, *The Fallacy of Personal Validation: A Classroom Demonstration of Gullibility*, 44 J. ABNORMAL PSYCHOL. 118, 118 (1949).

<sup>174</sup> See *Mapping, Modeling*, *supra* note 32, at 927–28.

<sup>175</sup> See *id.* at 925–27; see also Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 476–77 (1988).

<sup>176</sup> See *Mapping, Modeling*, *supra* note 32, at 928.

practice.<sup>177</sup> These understandings supply “a necessary step in the process of becoming competent in taking action and simultaneously reflecting on that behavior in order to learn from it.”<sup>178</sup> These discussions and understandings also satisfy the ABA’s new requirement that all students be afforded opportunities to develop concepts underlying the professional skills they learn, that is, action theories to experience multiple performance interactions, and to engage in self-evaluation.<sup>179</sup>

### III. TYPE THEORY’S DECISION-MAKING PREFERENCES AND DEMONSTRATING PROFESSIONAL IDENTITY IN LAWYER-CLIENT RELATIONSHIPS

Lawyer and client relationships present many role, objective, and action challenges, and responding effectively to them contributes significantly to developing appropriate professional identity. Learning to competently exercise the behaviors that demonstrate appropriate professional identity comes to life most vividly when experiencing the multiple crucial aspects of building and maintaining relationships with and fulfilling responsibilities for clients.<sup>180</sup> These activities supply the core of lawyering.

Studies show that lawyers spend more time interacting with clients than they devote to any other set of tasks.<sup>181</sup> Lawyer surveys also verify the importance of competent performance of actions required to create and sustain effective client relationships, and the belief that law schools can and should help lawyers learn these skills.<sup>182</sup> Twenty-five ABA Model

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<sup>177</sup> *See id.*

<sup>178</sup> *Forever Jung*, *supra* note 32, at 101.

<sup>179</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(3) (2014).

<sup>180</sup> CARNEGIE REPORT, *supra* note 1, at 129.

<sup>181</sup> These interacting task sets include interviewing, counseling, and preparing clients. A survey of more than 1,000 lawyers practicing in five federal judicial districts in California, New Mexico, Pennsylvania, South Carolina, and Wisconsin showed lawyers typically spent 16% of their time conferring with clients, a greater percentage than they devoted to any other task set. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72, 80–81, 91 tbl.3 (1983).

<sup>182</sup> A survey of 634 California lawyers showed the following percentages listing action theories and implementing actions as essential or important: 82.9% for interviewing and 86.4% for counseling. Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 *GOLDEN GATE U. L. REV.* 321, 324–25 tbl.4 (1973). Over 800 Chicago lawyers gave these rankings of skills as very important or important: 97.6% for oral communication; 71.6% for fact gathering; and 62% for counseling. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 *J. LEGAL EDUC.* 469, 473 tbl.1 (1993). This same survey showed these percentages believing the theories and behaviors associated with these skill sets could be taught effectively in law schools: 77% for oral communication; 65% for fact gathering; and 57% for counseling. *Id.* at 479 tbl.4.

Rules of Professional Conduct affect lawyer-client relationship issues; this is a much larger number of regulations than are directed to any other lawyering context.<sup>183</sup>

One psychological type preference category, judgment, measures how persons prefer to make decisions about their perceptions using one of two methods: thinking or feeling.<sup>184</sup> These preferences encompass and influence methods for evaluating information and making decisions.<sup>185</sup> Both thinking and feeling preferences influence rational ways of analyzing, prioritizing, and evaluating information in order to make decisions, but the methods are different.<sup>186</sup> Because these preferences tend to “exert the most influence on attitudes and behaviors regarding relationship issues,”<sup>187</sup> this Section examines their value in helping students learn roles and competent behaviors demonstrating appropriate professional identity in critical lawyer-client contexts.

“Thinking judgment is objective and impersonal.”<sup>188</sup> A thinking preference often influences actions that analyze and evaluate information, situations, and tasks by considering objective factors first and giving them highest priority.<sup>189</sup> Thinking preference-influenced actions frequently encompass stepping away from situations to make impersonal

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<sup>183</sup> See MODEL RULES OF PROF'L CONDUCT RR. 1.1–1.18, 2.1, 2.3, 3.2, 4.2–4.4, 6.4 (2013).

<sup>184</sup> *Maybe That's Why I Do That*, *supra* note 32, at 176.

<sup>185</sup> JURIS TYPES, *supra* note 30, at 17.

<sup>186</sup> *Id.* The labels used for these concepts, “thinking” and “feeling,” are terms of art and are intended to convey different meanings from connotations given them in other contexts. *Maybe That's Why I Do That*, *supra* note 32, at 176 n.27. Both thinking and feeling in Jungian type theory describe rational, non-emotional approaches to analyzing and evaluating perceptions and making decisions regarding them. *Id.* at 176. A feeling preference does not connote the use of emotions in making decisions, but rather describes a subjective, value-based approach “which is neither exclusively nor necessarily based on emotion.” *Id.* at 176 n.27.

<sup>187</sup> *Forever Jung*, *supra* note 32, at 51. Many behavioral influences flowing from this thinking-feeling dimension of psychological type theory are more subtle than those stemming from other dimensions. *Id.* “This preference does not influence easily observable behaviors such as an emphasis on facts or possibilities” when perceiving or communicating, demonstrating external or internal energy direction, and acting in planned, decision or spontaneous, flexible ways. *Id.* These behavioral influences often “must be discerned . . . from verbal communications . . . that provide clues about how [lawyers and clients] have made decisions about data, situations, and approaches to tasks.” *Id.* at 51–52. They also often surface in oral and written comments on and reactions to and formative assessment feedback regarding interpersonal encounters. *Id.* at 52.

<sup>188</sup> JURIS TYPES, *supra* note 30, at 17; see also 3D MBTI MANUAL, *supra* note 29, at 24 (explaining that thinking decision-making relies on cause and effect principles and tends to apply reason objectively and impersonally).

<sup>189</sup> 3D MBTI MANUAL, *supra* note 29, at 24 (“Thinking judgment relies on impartiality and neutrality with respect to the personal desires and values of both the decision maker and the people who may be affected by the decision.”).

judgments.<sup>190</sup> These actions emphasize critical analysis and criticism.<sup>191</sup> These behaviors also tend to disregard relational concerns, de-emphasize or ignore emotions, and express empathy rarely.<sup>192</sup> A thinking preference usually influences actions that emphasize logical consequences and objective connections.<sup>193</sup>

Feeling judgment, on the other hand, is “subjective and personal.”<sup>194</sup> A feeling preference tends to influence actions that analyze, evaluate, and make decisions about information, tasks, and approaches by considering subjective factors first and giving them highest priority.<sup>195</sup> It influences a process that steps into situations, identifies with the people involved, and uses “subjective, values-based standards” to discern and assess options.<sup>196</sup> Feeling preference-influenced actions frequently express appreciation, communicate positive feedback, and avoid criticism.<sup>197</sup> These actions tend to emphasize relational concerns, acknowledge emotions, and express empathy frequently.<sup>198</sup> A feeling preference often influences a decision-making process that attends to what matters to the people who are involved in situations, emphasizes “human as opposed to the technical aspects of problems,” and seeks to create and preserve “harmonious relationships.”<sup>199</sup>

Although it is estimated that the general U.S. population divides equally with half preferring thinking and half indicating a feeling preference, this psychological type measure is the only one “that shows significant gender differences.”<sup>200</sup> Research suggests that 60 to 65% of men indicate a preference for thinking decision-making while 60 to 65% of

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<sup>190</sup> See COCHRAN ET AL., *supra* note 106, at 240; BAYNE, *supra* note 56, at 23.

<sup>191</sup> 3D MBTI MANUAL, *supra* note 29, at 24 (explaining that thinking decision-making tends to reflect “analytical inclination, objectivity, [a primary] concern with principles of justice and fairness, criticality, an impassive and dispassionate demeanor, and an orientation to time that is linear”).

<sup>192</sup> See *id.*

<sup>193</sup> *Maybe That’s Why I Do That*, *supra* note 32, at 176.

<sup>194</sup> JURIS TYPES, *supra* note 30, at 17.

<sup>195</sup> See 3D MBTI MANUAL, *supra* note 29, at 24 (explaining that feeling decision-making relies on understandings of personal and group values).

<sup>196</sup> JURIS TYPES, *supra* note 30, at 17–18.

<sup>197</sup> See *Maybe That’s Why I Do That*, *supra* note 32, at 176. See generally 3D MBTI MANUAL, *supra* note 29, at 24 (describing characteristics of feeling preferring people).

<sup>198</sup> 3D MBTI MANUAL, *supra* note 29, at 24–25 (explaining that feeling decision-making reflects more attunement to feelings and values of others and desires for “affiliation, warmth, and harmony”).

<sup>199</sup> *Id.*; *Maybe That’s Why I Do That*, *supra* note 32, at 176.

<sup>200</sup> *Forever Jung*, *supra* note 32, at 17.

women show a feeling preference.<sup>201</sup> MBTI samples of lawyers<sup>202</sup> and law students,<sup>203</sup> however, show an overwhelming preference for thinking judgment regardless of gender.<sup>204</sup>

American lawyers and law students frequently manifest this disproportionate thinking judgment type preference by displaying abstract, impersonal, and analytical approaches to persons and problems in law practice.<sup>205</sup> An estimated ninety percent of American law students and lawyers are “left brain dominant,” indicating impersonal, analytical decision-making inclinations.<sup>206</sup> Researchers often use lawyers when measuring an occupational group that is analytical and objective in its typical behaviors regarding perceiving, deciding, and acting.<sup>207</sup> As noted in the *MacCrate Report*, these tendencies are extensively reinforced by contemporary American legal education.<sup>208</sup>

The *Carnegie Report* specifically encourages law schools to introduce students to nuances of the complex roles lawyers play with their clients

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<sup>201</sup> Compare 2D MBTI MANUAL, *supra* note 48, at 45 (estimating that 60% of men in the United States show a preference for thinking and 65% of women in the United States show a preference for feeling), with JEFFRIES, *supra* note 65, at 48–49 (noting that the Center for Applications of Psychological Type has consistently found that 60–66% of men prefer the thinking type, and 60–66% of women prefer the feeling type).

<sup>202</sup> A 1992 survey of 3014 practicing attorneys showed 78% preferring thinking, and this total included 81% of the males and 66% of the females measured. Larry Richard, *The Lawyer Types: How Your Personality Affects Your Practice*, A.B.A. J., July 1993, at 74–76.

<sup>203</sup> Frank L. Natter, *The Human Factor: Psychological Type in Legal Education*, 3 RES. PSYCHOL. TYPE 55, 55–56 (1981) (reporting data gathered by P.V.R. Miller in 1965 and 1967).

<sup>204</sup> Seventy-eight percent of University of Florida law students surveyed in the 1980s indicated a thinking preference, and this included 82% of the men and 70% of the women. *Forever Jung*, *supra* note 32, at 17. This was very similar to the 73% of 2248 law students surveyed in the 1960s expressed a thinking preference. Natter, *supra* note 203, at 56.

<sup>205</sup> Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 156 (2001).

<sup>206</sup> *Id.* One lawyer described legal education “as a process in which the left brain circles around the right brain and eats it.” David A. Hoffman, *Paradoxes of Mediation*, DISP. RESOL. MAG., Fall 2002, at 23, 23. This perspective draws on generalizations regarding human brains which feature an “analytical, verbal left hemisphere” and an “intuitive, creative right hemisphere.” WINIFRED GALLAGHER, RAPT: ATTENTION AND THE FOCUSED LIFE 71 (2009). The left hemisphere “has many small, well-defined [neural] connections that process the details of experience” and support “math, speech, analysis, and logic.” TRAVIS, *supra* note 147, at 54. The right hemisphere has more global circuits composed of long-range connections that integrate larger contexts of experiences and “support[s] insight, aesthetics . . . and imagination.” *Id.* Recent neuroscience research suggests that performing challenging tasks, like those appropriate professional identity demands, involve both brain hemispheres and effective neural harmony between them; this allows analysis and synthesis to support and enrich both hemispheres. *See id.* at 55–56.

<sup>207</sup> Guthrie, *supra* note 205, at 156.

<sup>208</sup> *See MacCrate Report*, *supra* note 5, at 239–41.



as students develop a professional identity and the relevant competence in interviewing, counseling, and exercising other client-focused behaviors.<sup>209</sup> Thinking-feeling preferences potentially influence both broad role choices and specific action decisions in lawyer-client interactions.

For example, strong, unrestrained thinking influences may lead to adopting leading and controlling as the most appropriate roles for lawyers to play in their client interactions.<sup>210</sup> These influences may incline law students and lawyers to view recommending best options and telling clients what to decide as their primary role when helping clients make decisions.<sup>211</sup> These influences may also impact tendencies to view substantive legal knowledge, relevant facts, and likely legal outcomes as the most important factors that should drive client decisions.<sup>212</sup>

Extreme forms of these behaviors resulting from these roles are unprofessional and violate the collaborative, client-centered approach that the ABA Model Rules of Professional Conduct mandate.<sup>213</sup> Model Rule 1.4 requires that lawyers help clients make decisions by providing sufficient information to allow them to produce informed choices.<sup>214</sup> Model Rule 1.0(e) explains that the information required for making informed decisions encompasses providing adequate information explaining proposed conduct options along with their material risks and reasonably available alternatives and their risks.<sup>215</sup>

These role conceptions also facilitate unprofessionally extending the authority Model Rule 1.2 gives to lawyers to decide means of representation issues while respecting client autonomy to decide the ends and objectives of legal representation.<sup>216</sup> A comment to Model Rule 1.2 requires lawyers to consult with clients regarding means of representation

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<sup>209</sup> See CARNEGIE REPORT, *supra* note 1, at 128.

<sup>210</sup> See COCHRAN ET AL., *supra* note 106, at 2 (explaining that lawyers embracing an authoritarian approach to counseling assume that they are able to be disinterested and make objective decisions).

<sup>211</sup> See THOMAS L. SHAFFER ET AL., LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 54, 56 (4th ed. 2005). These roles flow from carrying legal knowledge and expertise to their logical extremes and concluding that the reasons clients hire them is to do what they are told. These roles encompass deciding what clients should do and insisting on rigid client compliance with these commands. *Id.* at 57. They also frequently include sharing “unsolicited advice,” making “grandiose claims and arguments,” and frequently referring to legal aspects that are beyond their clients’ understanding. *Id.*

<sup>212</sup> See COCHRAN ET AL., *supra* note 106, at 2–3 (discussing how authoritarian lawyers assume solutions are primarily technical and lawyers are experts in the technical information needed to arrive at correct decisions).

<sup>213</sup> See *id.* at 4.

<sup>214</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4 (2013).

<sup>215</sup> *Id.* R. 1.0(e).

<sup>216</sup> *Id.* R. 1.2.

decisions regarding expense issues and impacts on others not actually involved.<sup>217</sup>

This ends-means distinction in Model Rule 1.2 has been criticized as not realistically reflecting the majority of decisions that lawyers help clients make in multi-issue deal-making and dispute-resolving situations.<sup>218</sup> These multi-issue contexts are seldom sufficiently linear to draw clear ends-means distinctions. Instead, most decisions lawyers must help clients make inevitably require weighing consequences and choosing between differing sets of advantages and disadvantages presented by multiple pertinent options.<sup>219</sup>

This reality has led many scholars to recommend a collaborative, client-centered role, which gives clients autonomy to make all decisions that have a substantial legal and non-legal impact on them and their situations.<sup>220</sup> This approach best respects the neuroscience research showing that human brains are wired to need autonomy, and that persons are motivated to possess and exercise the ability to make decisions affecting them.<sup>221</sup> It also reflects the reality that clients are better situated to identify and assess non-legal consequences, which usually contribute more to their personal satisfaction regarding outcomes than legal consequences do.<sup>222</sup> Substantial uncertainties invariably exist, and clients, not lawyers, should decide acceptable risk levels regarding them.<sup>223</sup> In addition, different and potentially conflicting interests between lawyers and their clients regarding economic and reputation issues exist in most,

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<sup>217</sup> *Id.* cmt. 2.

<sup>218</sup> See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 322 (3d ed. 2012) (noting that using an ends-means distinction is unworkable).

<sup>219</sup> See *id.* at 328; COCHRAN ET AL., *supra* note 106, at 110.

<sup>220</sup> See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 255–56 (1990); BINDER ET AL., *supra* note 218, at 323–24; COCHRAN ET AL., *supra* note 105, at 6. This approach “focuses on the likely impacts on individual clients, rather than on fuzzy distinctions between ‘ends’ and ‘means.’” BINDER ET AL., *supra* note 218, at 325.

<sup>221</sup> See Lack & Bogacz, *supra* note 82, at 46. “There is a broad consensus within Western ethical systems . . . [that] individuals should control decisions that affect them.” COCHRAN ET AL., *supra* note 106, at 3. “[T]he intrinsic desirability of exercising the capacity for self-determination” links autonomy to activity, and the “higher forms of consciousness . . . are distinctive of human potential.” *Id.* (quoting GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 112 (1988)).

<sup>222</sup> BINDER ET AL., *supra* note 218, at 5 (explaining that crucial “non-legal ramifications are typically embedded in solutions to legal problems”). Clients possessing similar legal problems often have very different non-legal interests because of variations in “circumstances, values and personalities.” *Id.* at 6.

<sup>223</sup> *Id.* at 7 (noting that most decisions needed to resolve legal problems exist under “conditions of uncertainty”). Clients, as owners of legal problems, should determine how great a risk they are willing to accept regarding possibilities that potential consequences will occur as predicted instead of unforeseen outcomes. *Id.*

if not all, difficult decisions.<sup>224</sup> These potentially conflicting interests provide another justification for lawyers to defer regarding all choices carrying substantial legal or non-legal impacts.<sup>225</sup>

Typical feeling preference action inclinations may help law students learn and exercise behaviors that better demonstrate this collaborative client-centered role perspective regarding lawyer-client decision making. These behavioral tendencies may influence adopting and performing actions that consistently empower and appropriately follow client leadership regarding all decisions having substantial non-legal and legal impacts. They may help law students adopt a primary role that emphasizes informing clients and facilitating decisions that best maximize client satisfaction. These inclinations also may help law students understand that subjective, non-legal factors are usually equally or more important than predicted legal outcomes in achieving maximum client satisfaction.

Beyond fundamental role adoptions and actions demonstrating them, developing professional identity in client relationships requires competent performance of many specific behaviors pursuing two goals simultaneously. Legal interviewing scholars suggest that these objectives are: “(1) building and maintaining an effective working relationship with clients; and (2) acquiring complete and accurate information about their situations and desires.”<sup>226</sup> Psychological type’s thinking and feeling preferences influence behavioral tendencies, potentially encouraging both effective and ineffective actions that pursue these objectives.

A preference for thinking, for example, may influence generally ineffective actions that result in dominating topic selection and

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<sup>224</sup> See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 662 (1990).

<sup>225</sup> BINDER ET AL., *supra* note 218, at 321 (explaining that lawyers and clients often have conflicting interests, creating strong temptations for lawyers to influence decisions that advance their personal interests); see ROBERT H. MNOOKIN, SCOTT R. PEPPET, & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 10, 74–76 (2000) (arguing that potential conflicting interests exist by virtue of inevitable differences in information and incentives when clients delegate tasks to lawyers). Research suggests that all too often lawyers put their own self interests ahead of their client’s concerns. See, e.g., Lerman, *supra* note 224, at 662; Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 831 (1992).

<sup>226</sup> *Maybe That’s Why I Do That*, *supra* note 32, at 171; see also BASTRESS & HARBAUGH, *supra* note 220, at 62; *Organizing Matrimonial Interviews*, *supra* note 31, at 259. The primary value advocated in clinical interviewing and counseling literature is that lawyers conducting interviews should act in ways that build effective relationships with their clients. *Organizing Matrimonial Interviews*, *supra* note 31, at 260. Relationship goals include building “an interactive dynamic that facilitates the development of mutual trust, confidence, and respect between client and lawyer.” *Id.* at 260–61; see also MARK K. SCHOENFIELD & BARBARA PEARLMAN SCHOENFIELD, *INTERVIEWING AND COUNSELING* 1 (1981); SHAFFER ET AL., *supra* note 211, at 77.

conversation agendas.<sup>227</sup> It can influence choosing to phrase questions and comments as initiatives to persuade and control rather than as efforts to inform and motivate.<sup>228</sup> A psychological type preference for thinking may also influence ineffective actions that emphasize expertise, authority, and insider status<sup>229</sup> and diminish or ignore non-legal factors and interests.<sup>230</sup>

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<sup>227</sup> Lawyers often begin controlling their representation of clients by dominating their interviews with them. COCHRAN ET AL., *supra* note 106, at 14. This control encompasses the topics discussed and the sequence in which they are explored. *Id.* Research suggests that this frequently occurs in practice. *See, e.g., id.* at 16 (“Lawyers, particularly those unaware of their own cognitive tendencies, [often channel] conversation into areas of the law that are more familiar to and more comfortable for the lawyer.”); Carl J. Hosticka, *We Don’t Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 600–01, 604 (1979) (explaining that legal services lawyers often exercised control by selecting topics, changing topics, and initiating who should speak); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 207 (1986) (discussing how lawyers often demonstrated a predisposition for one form of bankruptcy and did not even explore other forms).

<sup>228</sup> Questions may be used to dominate and control. *See* BASTRESS & HARBAUGH, *supra* note 220, at 288 (noting that lawyers often view their role as gathering facts toward their selection of the most advantageous option, which typically reflects what best enhances the lawyer’s profit and status). Questions that are phrased narrowly to seek only a specific detail in a particular context or suggestively by containing the answer they seek are most commonly used to control and persuade. Research suggests a tendency of lawyers to control interviews by primarily using closed inquiry. *See, e.g.,* Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 112–13 (1977); Hosticka, *supra* note 227, at 606; Neustadter, *supra* note 227, at 229. Extensive use of closed questions diminishes client engagement in “identifying problems and actively participating in their resolution.” BINDER ET AL., *supra* note 218, at 71. Hosticka’s study of legal services interviews showed that over 90% of the lawyers’ statements were instances of topic control and 21.8% were leading questions that suggested desired answers. Hosticka, *supra* note 227, at 605.

<sup>229</sup> COCHRAN ET AL., *supra* note 106, at 17 (suggesting that lawyers often steer interviewing conversations toward their status as legal system insiders and sell this insider status rather than their legal knowledge); *see* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663, 1664 (1989).

<sup>230</sup> American legal education strongly influences law students and practicing lawyers to perceive and act through “law-based, rights-oriented lenses.” Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers’ Resistance to Mediating Commercial Disputes*, 9 RICH. J. GLOBAL L. & BUS. 381, 406 (2010) [hereinafter *Two to Tango*]; *see* Guthrie, *supra* note 205, at 160. These lenses translate complex, multi-factor situations into manageable frames for adjudicatory resolution. *See* Guthrie, *supra* note 205, at 158, 174–75. They encourage interviews focused on legally-authorized causes of action; facts which substantiate or refute them; and key damage, evidence, and proof matters. *See id.* at 174–75. They also tend to discourage interviewing regarding interests, non-monetary considerations, and relational issues, such as reorienting parties to each other and promoting respect, affinity, and autonomy. *See id.*; Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 16 (2002).

A feeling preference, on the other hand, can influence generally effective actions that encourage clients to select conversation agendas and topics.<sup>231</sup> It may influence actions and the phrasing of comments and questions in efforts to empower and inform.<sup>232</sup> It can also influence actions that emphasize clients' situational expertise and non-legal concerns and interests.<sup>233</sup>

Demonstrating that type inferences may often influence effective as well as ineffective behavioral inclinations, a thinking preference may influence necessary actions that fully explore topics that clients are likely to experience as difficult or uncomfortable.<sup>234</sup> Thinking judgment likely helps law students and lawyers inform clients fully regarding potential disadvantages of decision options and give other forms of bad news.<sup>235</sup> The natural impersonal stance a thinking judgment preference encourages helps maintain appropriately objective perspectives and avoid over-identifying with clients or their situations in counterproductive ways. Finally, tendencies to criticize rather than appreciate are likely to help law students and lawyers share constructive feedback regarding client actions that are ineffective or contextually inappropriate.

Similarly, a feeling preference may influence ineffective behavioral inclinations that lead law students and lawyers to over-identify with clients or their situations and lose necessary objective perspectives.<sup>236</sup> The influences of feeling judgment may challenge law students and lawyers to explore difficult, potentially uncomfortable topics fully and to provide complete information regarding potential disadvantages.<sup>237</sup> A feeling preference may also influence reluctance and discomfort creating less than effective actions giving bad news, confronting clients appropriately, and providing warranted constructive feedback.<sup>238</sup>

Thinking or feeling psychological type preferences potentially influence core actions dealing with and responding to communicated

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<sup>231</sup> See *Forever Jung*, *supra* note 32, at 64–65 (“Significant correlations exist between a feeling preference and the use of cooperative behaviors”).

<sup>232</sup> See *id.* at 65.

<sup>233</sup> See COCHRAN ET AL., *supra* note 106, at 240 (noting that students and lawyers preferring feeling tend to look for solutions that fully meet all the needs of their clients).

<sup>234</sup> See *id.* (discussing how law students and lawyers preferring thinking have natural tendencies to question case strengths and push their clients to shore up potential weaknesses).

<sup>235</sup> See *id.*

<sup>236</sup> *Id.* (explaining that law students and lawyers preferring feeling run risks of over-identifying with their clients).

<sup>237</sup> See *id.* (noting that law students and lawyers preferring feeling “can have difficulty standing back and objectively critiquing the case or challenging the client on difficult issues or inconsistent facts”).

<sup>238</sup> See *id.*

feelings, and emotions comprise an essential aspect of all relationships, including those between attorneys and clients. All human decisions are influenced by emotions.<sup>239</sup> Neuroscience demonstrates that all human cognitive, emotional, and behavioral activities start with perception.<sup>240</sup> Consequently, everything felt, thought, and done starts with meanings humans attribute to their perceptions.<sup>241</sup> Substantial portions of these perceptions are first processed by limbic brain systems, which generate emotions.<sup>242</sup> These initial emotion-based assessments operate quickly and independently of prefrontal cortex systems.<sup>243</sup> They also provide interpretations that influence immediate behaviors or subsequent cognitive assessments and resulting actions in complex ways.<sup>244</sup>

Contemporary neuroscience's insight that suppressing emotions during lawyer-client interactions is neither possible nor productive encourages action theories and behaviors that are likely to engender positive rather than negative emotional reactions. Humans possess core concerns that are present in all interactive contexts and that usually "stimulate positive emotions," if met, and negative feelings, if ignored.<sup>245</sup> These concerns reflect basic human needs and reflect how humans want to be treated.<sup>246</sup> How humans assess others' responses to these core concerns usually manifests as emotions, and these feelings often influence subsequent behaviors.<sup>247</sup>

Action theories underlying many of the specific effective and ineffective behaviors described earlier<sup>248</sup> are designed to demonstrate sensitivity to these core concerns. They enhance likelihoods that resulting emotions will be positive and influence productive, non-defensive behaviors.<sup>249</sup> Three of these important concerns are appreciation, affiliation, and autonomy.<sup>250</sup>

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<sup>239</sup> LEHRER, *supra* note 136, at xv (stating that whenever a human makes decisions, "the brain is awash in feeling" and even when she tries to be rational and logical, "these emotional impulses . . . influence judgment").

<sup>240</sup> Lack & Bogacz, *supra* note 82, at 38.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 39–40.

<sup>244</sup> See Miller & Cohen, *supra* note 82, at 171; Donald C. Peters, *Neuroscience Justifications for Collaborative Mediation Advocacy*, 2014 ASIAN J. MEDIATION 82, 84 [hereinafter *Neuroscience Justifications*].

<sup>245</sup> ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 15–18 (2005).

<sup>246</sup> *Id.* at 15–16.

<sup>247</sup> See *id.* at 18.

<sup>248</sup> See *supra* notes 183–85, 192, 198–208 and accompanying text.

<sup>249</sup> See FISHER & SHAPIRO, *supra* note 245, at 18, 20.

<sup>250</sup> *Id.* at 15–21.

A concern for feeling appreciated encompasses experiencing that one's emotions are acknowledged and one's interests, perspectives, and comments are perceived to have merit.<sup>251</sup> "Being heard and understood [usually] makes speakers feel better both about the person with whom they are communicating and the process of talking with him or her."<sup>252</sup> These experiences also typically motivate further information sharing.<sup>253</sup>

A concern for affiliation incorporates a sense of connectedness with others and makes working together easier.<sup>254</sup> Recent neuroscience discoveries demonstrate that humans are neurally wired to connect, making connecting one of the human brain's capacities.<sup>255</sup> Neuroscience research also shows that humans manifest increased abilities to trust and empathize with others with whom they affiliate genuinely.<sup>256</sup> The core concern of autonomy was described earlier.<sup>257</sup>

Needs to respond positively to core concerns of appreciation, affiliation, and autonomy are encountered in all lawyer-client interactions, and listening usually supplies the most effective actions to accomplish these objectives.<sup>258</sup> Two approaches to listening are passive and active.<sup>259</sup> Passive listening requires remaining silent and encouraging others to talk without interruption.<sup>260</sup> Active listening requires making verbal responses that paraphrase or summarize the content of what speakers say or that acknowledge communicated emotions without judgment, analysis, or reassurance.<sup>261</sup>

Using active listening responses by making statements that acknowledge emotions communicated demonstrates understanding and merit by recognizing and valuing the sharing of these intimate human

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<sup>251</sup> *Id.* at 15, 17.

<sup>252</sup> BINDER ET AL., *supra* note 218, at 27–28; see CARL R. ROGERS, COUNSELING AND PSYCHOTHERAPY 131–33 (1942); John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 507 n.13, 515 (1983); *Organizing Matrimonial Interviews*, *supra* note 31, at 279.

<sup>253</sup> *Organizing Matrimonial Interviews*, *supra* note 31, at 279.

<sup>254</sup> *Id.*

<sup>255</sup> DANIEL GOLEMAN, SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS 4–5 (2006) [hereinafter SOCIAL INTELLIGENCE].

<sup>256</sup> Lack & Bogacz, *supra* note 82, at 44.

<sup>257</sup> See *supra* notes 143–44, 214–26 and accompanying text.

<sup>258</sup> See FISHER & SHAPIRO, *supra* note 245, at 28–29, 33–35, 57–58, 84–89.

<sup>259</sup> *Organizing Matrimonial Interviews*, *supra* note 31, at 277.

<sup>260</sup> *Id.* Effective passive listening actions also encompass "maintaining attentive [and culturally appropriate] eye contact" and providing quasi-verbal and "non-verbal encouragement to communicate." *Id.*

<sup>261</sup> BINDER ET AL., *supra* note 218, at 46–47, 50, 55, 57. Described as "the 'most effective talk tool that exists for demonstrating understanding and reducing misunderstanding,'" active listening is the "process of picking up [speakers'] messages and sending them back in reflective statements." *Id.* at 46–47.

experiences.<sup>262</sup> When made in response to strong emotional communications, these statements may calm amygdala-stimulated fight or flight response tendencies and actions, activate pre-frontal cortex neural paths, engage cortical inhibitory systems, and ameliorate further negative emotion-influenced actions.<sup>263</sup> Making active listening statements that neutrally paraphrase or summarize the non-emotional content of what clients communicate expresses merit by valuing others sufficiently to demonstrate hearing and understanding what they said.<sup>264</sup> They also decrease misperceptions and misunderstandings by giving clients opportunities to correct them.<sup>265</sup>

These active listening responses supply the most effective ways lawyers can experience and express empathy.<sup>266</sup> Empathy involves understanding the experiences, views, behaviors and feelings of others and expressing these understandings neutrally without judgment or analysis.<sup>267</sup> Perhaps because emotions reflect core limbic brain responses stimulating intimate, often intense universal human experiences of fear, anger, sadness, surprise, happiness, and disgust,<sup>268</sup> genuine statements acknowledging these emotions express empathy powerfully. Making

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<sup>262</sup> See BINDER ET AL., *supra* note 218, at 28.

<sup>263</sup> See RICHARD J. DAVIDSON, *THE EMOTIONAL LIFE OF YOUR BRAIN* 71 (2012). Acknowledging strong emotions stimulates prefrontal cortex consideration of the existence and accuracy of feelings identified. This may afford opportunities for prefrontal activity talking back to and analyzing negativity bias-influenced action tendencies and amygdala hijacking impulses. It may create prefrontal influences resulting in different ways to react, and may also lessen the need to express negative emotions further because they have been heard and understood. It may produce a form of resilience that is reflected in more productive future actions. See *id.* at 243–44.

<sup>264</sup> BINDER ET AL., *supra* note 218, at 27–28.

<sup>265</sup> *Id.* at 46, 51.

<sup>266</sup> *Id.* at 47–48; see Barkai & Fine, *supra* note 252, at 506–07; *Organizing Matrimonial Interviews*, *supra* note 31, at 280. Closely focusing on and attending to non-verbal and verbal communications sufficient to permit responses that paraphrase and summarize the non-emotional dimensions and acknowledge the feeling components provides the optimal way for lawyers to set aside their agendas, assumptions, and expectations in order to understand another's experiences, views, behaviors, and feelings. See BINDER ET AL., *supra* note 218, at 47–48.

<sup>267</sup> Steven Hartwell, *Moral Development, Ethical Conduct, and Clinical Education*, 35 N.Y.L. SCH. L. REV. 131, 150 n.116 (1990) (defining empathy as “accurately identifying and sensitively responding to the feelings and the ideas of another person”) [hereinafter *Moral Development, Ethical Conduct*]; Lauren Wispé, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word is Needed*, 50 J. PERSONALITY & SOC. PSYCHOL. 314, 314 (1986) (defining empathy as “the attempt of one self-aware self to understand the subjective experiences of another self”).

<sup>268</sup> Research shows that these are basic emotions found in all humans even though individuals differ in how they experienced and are strongly influenced by cultural rules regarding displaying them. PAUL EKMAN, *EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE* 15, 213–16 (2003).



statements acknowledging the emotional content of a speaker's communication accurately and non-judgmentally demonstrates that law students and lawyers can enter their clients' world and see it from their perspectives.<sup>269</sup> It proves that these law students and lawyers are, in a powerful sense, feeling with, not for, their clients. This is the crucial distinction between empathy and sympathy.<sup>270</sup>

Even though research shows that professional "success in law [practice] correlates significantly more with relationship skills than it does with knowledge of substantive law,"<sup>271</sup> American law schools are not doing much to teach their students how to properly recognize and deal with emotions.<sup>272</sup> Reflecting the overwhelming predominance of thinking over feeling preferences, studies show that American law students and lawyers have relatively underdeveloped interpersonal and emotional capacities.<sup>273</sup> Not surprisingly, research also shows that many lawyers seldom express empathy in their client interactions.<sup>274</sup>

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<sup>269</sup> Humans usually "want and need to have their feelings heard and understood[,] rather than analyzed, judged or minimized." *Organizing Matrimonial Interviews*, *supra* note 31, at 281. The message clients usually receive when their lawyers do not listen actively to acknowledge their feelings is that their emotions "are not important." *Id.* at 281–82. This unfortunate message directly contradicts the crucial importance of emotions to humans, which are critical to humans' decision making processes. *See* LEHRER, *supra* note 136, at 15–17.

<sup>270</sup> While the concept of empathy traces back to Plato, the current word derives from a translation of "*Einführung*, a German word meaning 'feeling into' in an aesthetic sense." *Organizing Matrimonial Interviews*, *supra* note 31, at 280 n.74.

<sup>271</sup> Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 56. Empirical data suggests that clients are most satisfied with lawyers who possess the best personal skills. Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311, 311 (1981).

<sup>272</sup> *Two to Tango*, *supra* note 230, at 411.

<sup>273</sup> Guthrie, *supra* note 205, at 156. American lawyers and law students are "less interested in people, in emotions, and interpersonal concerns." Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1405 (1997). For example, limited empirical research suggests relatively infrequent use of active listening responses during initial interviews. In an analysis of 23 actual interviews in a clinic representing low-income clients seeking to end their marriages, "the average use of active listening responses . . . , compared to all inquiry and other listening responses, was seventeen percent." *Maybe That's Why I Do That*, *supra* note 32, at 191–92 (citation omitted).

<sup>274</sup> BINDER ET AL., *supra* note 218, at 48 (noting lawyers generally "pay too little attention to clients' feelings"). Lawyers and law students "are prone to seeing themselves as rational fact-gatherers and decision-makers" and "tend to perceive feelings as either irrelevant or as unwelcome impediments to what should ideally be . . . completely rational" processes and interactions. *Id.*; *see also* ROWAN BAYNE, IDEAS AND EVIDENCE: CRITICAL REFLECTIONS ON MBTI THEORY AND PRACTICE 55 (2005) [hereinafter IDEAS AND EVIDENCE] (noting persons preferring thinking decision-making tend to believe that emotions interfere with good decisions, cloud effective judgments, and should be kept in their place).

Although more empirical knowledge about how lawyers actually behave in client interactions is needed, indications exist that these underdeveloped interpersonal and emotional capacities influence behaviors that fail to demonstrate appropriate professional identity.<sup>275</sup> Research suggests that lawyers routinely have difficulty giving up control, listening, not interrupting, and empathizing.<sup>276</sup> Many lawyers often tell clients what to do.<sup>277</sup> Many also commonly over-emphasize expertise, insider status, and legal rights-based inquiry and de-emphasize or ignore exploring non-legal interests.<sup>278</sup> Less than competent communication skills often appear as the basis of client complaints about attorneys.<sup>279</sup> These complaints encompass failing to solicit or listen to client concerns before proceeding and handling legal matters without fully informing clients of risks.<sup>280</sup>

Insights derived from type theory's thinking-feeling dimension may help law students develop more competent action habits regarding general relational and specific empathy challenges. Skilled active listening and empathizing require actions generally more influenced by feeling than thinking behavioral tendencies. These skills require giving up control, stepping into rather than away from situations, valuing speakers' emotional and content agendas, and avoiding forming and expressing logical, impersonal analysis and judgment.

A common behavioral tendency influenced by a feeling preference is greater initial sensitivity to the subjective relational aspects than to the objective task dimensions of interpersonal interactions.<sup>281</sup> The

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<sup>275</sup> Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y. & L. 1173, 1182 (1999).

<sup>276</sup> See *supra* notes 228–29, 274 and accompanying text.

<sup>277</sup> Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987). For example, a study of 699 public defenders from 5 different jurisdictions showed a majority advocated a lawyer-centered rather than client-centered approach to decision making, and most agreed that only 4 of 12 strategic decisions they repeatedly confronted required client consent. Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 31–34, 38 (1998); see also Bastress & Harbaugh, *supra* note 220, at 288 (stating lawyers often organize interviews and counseling conferences to influence clients to select options that best enhance their profit and status).

<sup>278</sup> See *supra* notes 230–31 and accompanying text.

<sup>279</sup> Stephen E. Schemenauer, Comment, *What We've Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 632 (2007).

<sup>280</sup> *Id.*; Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 670–71 (1990).

<sup>281</sup> See, e.g., BARR & BARR, *supra* note 47, at 104 (suggesting persons preferring feeling judgment tend to focus “first with the agreeable-disagreeableness of an interaction” and then focus on specific tasks); HIRSH & KUMMEROW, *supra* note 58, at 46–47 (noting that persons preferring feeling judgment typically consider “underlying values and human needs when making work-related decisions”); KROEGER & THUESEN, *supra* note 45, at 74 (observing that

comparatively small number of law students and lawyers who prefer feeling decision-making are likely to experience more behavioral tendencies to use active listening responses because doing this requires valuing others.<sup>282</sup> Because of their probable heightened sensitivity to others' affective agendas, they are also likely to be drawn to and more comfortable making active listening responses that acknowledge strong emotional expressions.<sup>283</sup> Research in a law school family law clinic setting found that law students who prefer thinking judgment missed twice as many opportunities to acknowledge emotions during interviews with clients seeking to end their marriage than did students preferring feeling judgment.<sup>284</sup>

Research suggests that following the recommendations from the Carnegie Foundation and the ABA Accreditation Standards for more instruction and practice to develop competent skills in lawyer-client contexts will produce more knowledge and effective actions in these contexts.<sup>285</sup> With appropriate instruction and practice opportunities, law students have improved their active listening, emotion recognition, and acknowledgment skills in clinical courses.<sup>286</sup> They also have improved their questioning skills.<sup>287</sup>

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persons preferring feeling judgment want work goals that reflect concern for everyone involved).

<sup>282</sup> *Forever Jung*, *supra* note 32, at 65; *see* IDEAS AND EVIDENCE, *supra* note 274, at 55 (stating that persons preferring feeling judgment often perceive that logic misses main points and that emotions are central to effective decisions because they signal what matters most).

<sup>283</sup> *Forever Jung*, *supra* note 32, at 66.

<sup>284</sup> *Maybe That's Why I Do That*, *supra* note 32, at 170, 174–75, 195 & n.91 (reflecting on analysis of data taken from transcriptions of twenty-three actual interviews with clients seeking representation in the Virgil Hawkins Civil Clinic at the University of Florida College of Law). Demonstrating the unreliability of using type theory to predict behavior, the twelve students preferring thinking in the study averaged three feeling acknowledgement responses per interview, one more than the eleven students preferring feeling. *Id.* at 194 n.89.

<sup>285</sup> *See infra* notes 286–87 and accompanying text.

<sup>286</sup> Barkai & Fine, *supra* note 252, at 508, 526–27 & nn.63–64 (observing that students increased empathy scale measurements from a pretest mean of 2.46 to a 4.91 on the Truax Accurate Empathy Scale after four hours of instruction); *Maybe That's Why I Do That*, *supra* note 32, at 192 (noting that students increased their use of active listening from an average of 7% of total responses on a pretest simulated interview to 17% during their actual interviews); *see also* BENJAMIN POPE, THE MENTAL HEALTH INTERVIEW: RESEARCH AND APPLICATION 358 (1979) (concluding that empathy is teachable).

<sup>287</sup> Students have increased their use of open inquiry, using questions phrased to invite broad, minimally restricted responses to instructional units emphasizing the value of these actions in interviewing contexts. *Organizing Matrimonial Interviews*, *supra* note 31, at 264, 284 & nn.23 & 84 (finding that students used an average of 7% open inquiry in actual client interviews after 20 hours of instruction, as compared to 2% before); Paula L. Stillman et al., *Use of Client Instructors to Teach Interviewing Skills to Law Students*, 32 J. LEGAL

Substantial neuroscience evidence suggests that human brains possess neural circuitry that potentially operates in social interactions and facilitates experiencing and expressing empathy.<sup>288</sup> Mirror neurons “sense both the move another person is about to make and their feelings, and instantaneously prepare us to imitate that movement” and empathize with these emotions.<sup>289</sup> Mirror neurons also “prime circuitry that connects the [brain’s] insula and premotor cortex with the limbic system” and facilitates reading and responding to emotional messages in another person’s tone of voice.<sup>290</sup> Different neurons in the fusiform area of a brain’s temporal lobe help humans recognize and interpret emotions from facial expressions.<sup>291</sup> Simply learning of this existing brain circuitry may help students start to counter non-empathic action inclinations potentially influenced by their thinking judgment preference with more empathic behaviors.

The large percentage of law students who prefer thinking judgment are likely to benefit from instruction and practice that identifies and challenges their potentially type-influenced behavioral tendencies to avoid or deemphasize recognizing and acknowledging emotions when interviewing clients and helping them make decisions. Providing opportunities to see more relationship and emotion-sensitive behaviors demonstrated by colleagues who prefer feeling and instructors who have acquired these action habits often helps students who prefer thinking see their value.<sup>292</sup> It helps them perceive acquiring these action habits as necessary, though admittedly often difficult, challenges to embrace and overcome.<sup>293</sup>

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EDUC. 395, 400–01 (1982) (finding that law students increased their use of open questions after receiving simulation-based instruction).

<sup>288</sup> See MARCO IACOBONI, MIRRORING PEOPLE 118–19 (2008); CHRISTIAN KEYSERS, THE EMPATHIC BRAIN: HOW THE DISCOVERY OF MIRROR NEURONS CHANGES OUR UNDERSTANDING OF HUMAN NATURE 221–22 (2011). Many prominent neuroscientists, however, express uncertainty regarding whether mirror neurons exist. See Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 OHIO ST. J. ON DISP. RESOL. 477, 482 (2010).

<sup>289</sup> SOCIAL INTELLIGENCE, *supra* note 255, at 9, 324.

<sup>290</sup> *Id.* at 324–25.

<sup>291</sup> *Id.* at 325.

<sup>292</sup> For example, one of co-Author Don Peters’s students who preferred thinking wrote at the end of a negotiation course: “At first, these tools [active listening and process comments] seemed like little more than time wasters employed to stroke a counterpart’s ego, which shouldn’t need stroking. In the end, though, I began to understand a few things: People’s egos need occasional stroking regardless of whether they should.” *Forever Jung*, *supra* note 32, at 66 n.316 (alteration in original).

<sup>293</sup> See *Forever Jung*, *supra* note 32, at 111. Another thinking-preferring student with whom Don Peters worked in a negotiation course wrote: “I found [active listening] difficult to implement as a deliberate planned response [because it required] fighting against my

Experiencing and receiving formative assessment-feedback regarding these core relationship-relevant actions from colleagues, instructors, and themselves in journaling, action-based rubrics, and other self-reflection contexts increase likelihoods that these students will change their professional identity stories. These educational processes increase chances that students will tell themselves professional identity stories that include collaboration, connection, and empathy. These experiences and formative assessments also will make it harder for students to continue telling themselves professional identity stories that emphasize the emotional detachment assumed to be essential to acting exclusively as professional technicians who handle files impersonally.

#### CONCLUSION

Change, like the modifications advocated by the *Carnegie Report* and mandated by the 2014 amendments to the ABA Accreditation Standards, is never easy.<sup>294</sup> Replacing existing perceptions, patterns, practices, and structures requires time, determination, perseverance, and continuous experimentation, reflection, and assessment.

Making progress implementing the recommendations of both the *Carnegie Report* and the 2014 amendments to increase emphasis on and support for developing professional identity will require adding more experiential learning opportunities to existing curriculums. Research demonstrates that using effective experiential teaching approaches frequently employed to develop skill competence essential to ethical practice may “influence the moral development of [law] students.”<sup>295</sup> These experiential learning processes work best when they emphasize extensive engagement and role taking, cooperative, student-centered instruction, supportive small groups, and encouragement of free expressions of emotions.<sup>296</sup>

This Article advocates that adding psychological type theory knowledge and insights to these learning efforts facilitates critical objectives regarding developing and enhancing self-awareness generally and empathy specifically. Self-awareness or self-knowledge supplies a foundational basis upon which law students can build professional skill

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established responses to stimuli that are ingrained and emerge . . . when I react instinctively in the moment.” *Id.* at 111 n.545 (alterations in original).

<sup>294</sup> See *supra* note 5 and accompanying text.

<sup>295</sup> *Moral Development, Ethical Conduct*, *supra* note 267, at 167.

<sup>296</sup> Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 505, 531–32 & n.90 (1995) [hereinafter *Promoting Moral Development*]. Carl Rogers argued persuasively that the only important learning is that which significantly influences behavior and results from efforts that are self-discovered and self-appropriated. CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST’S VIEW OF PSYCHOTHERAPY 276 (1961).

competence and identity.<sup>297</sup> Preceding sections explained how self-knowledge of cognitive patterns and tendencies during learning activities enhances developing “behavioral interventions leading to new [action] habits that improve [law] study approaches and understandings.”<sup>298</sup> Law students also gain valuable insights about their values and identity by learning their behavioral inclinations. They become aware of their strengths, challenges, and needs for contextually modifying their actions to achieve identified objectives.<sup>299</sup> This form of self-awareness also aids students in developing skill competence essential to professional identity by helping them connect their behaviors to explicit action theories. This helps them discern action theories that they might otherwise dismiss or avoid because the recommendations require behaviors influenced by psychological type dimensions they seldom use. It also enhances developing contextual adaptations necessary to perform effectively and useful responses to unique situations where theoretical knowledge is neither sufficient nor easily accessible.<sup>300</sup>

Psychological type theory’s underlying premise that individuals commonly display significantly different approaches to conceptualizing and performing central interactive behaviors helps students understand their behavioral inclinations.<sup>301</sup> These understandings give students insights into their implicit theories of action, which drive their customary, often virtually automatic behaviors.<sup>302</sup> Developing and using behaviors based on these insights facilitates competence in performing actions while simultaneously reflecting on these behaviors to learn from them.<sup>303</sup> This critical step in learning to learn from experience begins with self-awareness and leads directly to self-evaluation.<sup>304</sup> It also enhances

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<sup>297</sup> See STEVEN PINKER, *HOW THE MIND WORKS* 134 (1997) (noting that self-knowledge, while important, “is no more mysterious than any other topic in perception and memory”).

<sup>298</sup> See JURIS TYPES, *supra* note 30, at 5.

<sup>299</sup> See ROBBENNOLT & STERNLIGHT, *supra* note 168, at 387.

<sup>300</sup> See *Forever Jung*, *supra* note 32, at 106–07.

<sup>301</sup> See *id.* at 101.

<sup>302</sup> *Id.*

<sup>303</sup> See ARGYRIS & SCHÖN, *supra* note 80, at 18–19.

<sup>304</sup> Changing legal education in response to the Carnegie and ABA accreditation amendment recommendations should improve student abilities to learn from experience. Important social science research from scholars investigating how professions learn competence shows that the most common general sets of behaviors displayed by lawyers, business executives, industrial managers, and public administrators reflect actions and implicit action theories that inhibit abilities to learn from experience. See *id.* at 68–69, 73, 81, 83–84; SCHÖN, *supra* note 84, at 256–59. These behaviors and implicit action theories orient interpersonal actions toward achieving unilaterally defined objectives, defining situations as exclusively win-lose, consistently seeking to win and avoid losing, and minimizing the open expression of feelings. SCHÖN, *supra* note 84, at 256. These implicit

learning to appreciate clients and colleagues who customarily behave differently.<sup>305</sup>

Taking this step significantly contributes to developing and demonstrating intrinsic values of self-understanding, appreciation of others, and self-improvement that contribute to a lawyer's well-being.<sup>306</sup> These intrinsic values logically lead to actions that promote introspection, honesty, and cooperation with and respect for others.<sup>307</sup> They also encourage behaviors consistent with ethical professional identity that promote integrity, candor, and, because they have developed more appreciation for different perspectives, attitudes, and behaviors others naturally possess, respectful interactions with clients, counterpart counsel and clients, and others.<sup>308</sup>

Self-awareness, demonstrated by recognizing feelings as they happen, supplies "the keystone of emotional intelligence,"<sup>309</sup> which enhances empathic abilities and behaviors.<sup>310</sup> Psychological type insights often help students learn to value and exercise empathy, which, in addition to building effective lawyer-client relationships,<sup>311</sup> also underlies ethical sensitivity and supplies a core component of professional identity.<sup>312</sup> The roots of morality lie in empathy because the capacity to put oneself in another's place motivates helping actions and decisions to follow moral principles.<sup>313</sup>

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action theories and resulting behaviors typically create "defensive and mistrustful relationships, ineffectiveness of relationship and human systems, and long-term deterioration of problem-solving processes." Bolman, *supra* note 129, at 115; see Kreiling, *supra* note 96, at 295–96. Many aspects of these findings suggest a predominance of thinking judgment influencing implicit action theories and behaviors, and a relative absence of more relationship-oriented action theories and actions helped by influences from feeling judgment.

<sup>305</sup> See *supra* notes 109–10 and accompanying text.

<sup>306</sup> See *Undermining Effects on Law Students?*, *supra* note 141, at 264; see also *supra* notes 144–45 and accompanying text.

<sup>307</sup> *What Makes Lawyers Happy?*, *supra* note 142.

<sup>308</sup> *Id.*

<sup>309</sup> DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 43 (1995) [hereinafter EMOTIONAL INTELLIGENCE].

<sup>310</sup> Emotional intelligence has been defined as abilities to (1) "perceive accurately, appraise, and express emotion;" (2) "access . . . feelings when they facilitate thought;" (3) "understand emotion and emotional knowledge;" and (4) "regulate emotions to promote emotional and intellectual growth." EMOTIONAL INTELLIGENCE: KEY READINGS ON THE MAYER AND SALOVEY MODEL 35 (Peter Salovey et al. eds., 2004).

<sup>311</sup> See *supra* notes 263–71 and accompanying text.

<sup>312</sup> See EMOTIONAL INTELLIGENCE, *supra* note 309, at 104–05 (arguing that to feel for another is to care for another).

<sup>313</sup> *Id.* at 105; Martin L. Hoffman, *Empathy, Social Cognition, and Moral Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 275, 276 (William M. Kurtines & Jacob L. Gewirtz eds., 1991).

Empathy influences lawyers to appreciate that their representational actions affect not only themselves and their clients but others as well. This stimulates assessing actions by considering consequences to everyone while also integrating their personal needs to act consistently with internal principles.<sup>314</sup> This empathy-influenced approach tends to resolve ethical dilemmas in ways that avoid unnecessary harms to others. It also reflects a post-conventional stage five of moral reasoning articulated by Lawrence Kohlberg<sup>315</sup> because it demonstrates capacities “to differentiate and integrate conflicting ethical [and moral] responsibilities.”<sup>316</sup>

As explained earlier, influences from a feeling judgment preference naturally produce behavioral inclinations toward empathic understandings and actions.<sup>317</sup> On the other hand, influences from a thinking judgment preference produce behavioral tendencies that resist forming subjective, situational understandings and encourage performing actions that are objective, impersonal, and non-empathic.<sup>318</sup> Students and lawyers performing actions influenced by their thinking preference may be more likely to resolve ethical dilemmas by using Kohlberg’s stage four of conventional reasoning. Stage four reflects tendencies to comply with literal text of formal ethical rules because they are impartial, impersonal guidelines.<sup>319</sup> “Most lawyers probably reason . . . [morally] at Stage Four.”<sup>320</sup>

Using psychological type theory effectively to develop and improve behavioral competence demonstrating professional identity requires ethical application of this knowledge. Ethical use of psychological type theory requires providing frequent reminders that everyone is an individual, that their type preferences are important elements in their individuality, and that these preferences often influence but certainly do not mandate, restrict, or limit future behaviors.<sup>321</sup> Psychological type theory preferences should be used only to provide potential explanations of, not rationalizations for, past behavior. Understanding psychological type theory and MBTI results offers valuable possibilities of drawing into conscious awareness reasons why students acted the ways they did and permits modifying future behaviors appropriately. Affording brief

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<sup>314</sup> See Darcia Narvaez, *Integrative Educational Education*, in HANDBOOK OF MORAL DEVELOPMENT 703, 718–19 (Melanie Killen & Judith Smetana eds., 2006).

<sup>315</sup> See LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 411–12 (1981).

<sup>316</sup> See *Promoting Moral Development*, *supra* note 296, at 539.

<sup>317</sup> See *supra* notes 282–86 and accompanying text.

<sup>318</sup> See *supra* notes 273–75 and accompanying text.

<sup>319</sup> See *Promoting Moral Development*, *supra* note 296, at 510.

<sup>320</sup> *Id.*

<sup>321</sup> BAYNE, *supra* note 56, at 5.



glimpses of some personality elements and how people often differ regarding them, psychological type theory also can help law students and lawyers better understand other's past behaviors and facilitate more effective future communication with persons who seem to perceive and act differently.

Working ethically with psychological type theory to develop professional identity and related skill competence requires honoring Jung's insistence not to use any aspect of this knowledge in restrictive or heavy-handed ways.<sup>322</sup> Using psychological type theory to predict specific future behavior applies this useful knowledge rigidly and unethically. It stereotypes individuals, insulting them by denying them their individual autonomy to behave as they desire.<sup>323</sup> It turns psychological type theory into an inflexible form of behaviorism totally inconsistent with Jung's objective to promote awareness and self-growth. Jung embraced a wide variety of behavioral inclinations within his typology and emphasized that every individual was an exception to, as well as a reflection of, their type preferences.<sup>324</sup>

Because human brains are designed to avoid the slow, hard, uncertain tasks thinking carefully requires,<sup>325</sup> they prefer and frequently use mental shortcuts based on their memory.<sup>326</sup> This often makes it relatively easy for persons encountering and understanding psychological type theory superficially to overgeneralize and stereotype others by assuming how they will behave in the future and making decisions based on these assumptions.<sup>327</sup> Jung warned future users of these risks by

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<sup>322</sup> See SPOTO, *supra* note 38, at 4, 13, 125.

<sup>323</sup> See FISHER ET AL., *supra* note 133, at 167. Beyond unethical stereotyping, future predictions based on type preferences are not likely to be reliable for several reasons. Type is only one of many factors that influence human behavior. Gilchrist, *supra* note 71, at 603 (noting that the MBTI does not explain all the complexities of human behavior); KROEGER & THUESEN, *supra* note 45, at 48–49 (explaining that gender, ethnicity, socioeconomic factors, and many other factors contribute besides type preferences). Assuming type preferences are known or predicted accurately, people differ broadly in the degree to which they have developed effective behaviors influenced by their non-preferences. Moreover, most important lawyering tasks are complex and require effective exercise of actions potentially influenced by most, if not all, type preferences. See *supra* notes 161–63 and accompanying text.

<sup>324</sup> Jung, *supra* note 38, at 516. Explaining the psychological type theory that underlies the MBTI, Jung wrote:

[E]very individual is an exception to the rule. Hence one can never give a description of a type, no matter how complete, that would apply to more than one individual, despite the fact that in some ways it aptly characterizes thousands of others. Conformity is one side of a man, uniqueness is the other. *Id.*

<sup>325</sup> WILLINGHAM, *supra* note 130, at 4.

<sup>326</sup> *Id.* at 5, 7.

<sup>327</sup> See Marcini, *supra* note 109, at 104 (arguing that superficial understandings and inept uses of type theory generate stereotyping “that can cause and exacerbate social and individual wounds”).

acknowledging that “[t]heories in psychology are the very devil.”<sup>328</sup> Jung gave this warning to ensure that psychological type theory should be used to promote awareness and self-growth, not to limit or stereotype others.<sup>329</sup>

Although these risks of psychological type theory’s misuse lead critics of its use in legal education to unjustifiably assume that using the MBTI will “unavoidably . . . pigeonhole and stereotype students” and faculty,<sup>330</sup> these dangers need to be balanced against the demonstrable value of self-awareness and self-evaluation that effective, ethical use of this knowledge generates.<sup>331</sup> Proper, ethical use coupled with frequent reminders also reinforces the role purposeful thought and design can play in producing effective behavior. This belief that law students and lawyers can design and exercise effective behaviors and change less effective actions underlies existing, well-accepted, and successful approaches to developing skills competence and professional identity already in wide use in contemporary clinical legal education.

According to cognitive learning theory, skills learning, defined as a change in human behavioral ability which persists over time,<sup>332</sup> begins with constructs containing knowledge and suggestions regarding what actions will be effective and why. Then learning continues with activities that encourage students to confront, apply, modify, interpret and assess these constructs in the contexts of their role played and actual experiences performing these actions.<sup>333</sup> Making these journeys effectively requires learning about self and others. Psychological type theory makes useful contributions to these critical steps and enhances successful journeys to competence and professional identity.

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<sup>328</sup> SPOTO, *supra* note 38, at 1 (quoting Carl G. Jung, *Psychological Types*, in THE COLLECTED WORKS OF CARL J. JUNG 7 (Herbert Read et al. eds., H.G. Baynes trans., 1971)).

<sup>329</sup> Jung saw psychological type theory as a way of engaging persons with conscious, active participation with attitudinal, perceptual, and behavioral aspects of their personalities. *See id.* at 25.

<sup>330</sup> Redding, *supra* note 38, at 324.

<sup>331</sup> *See* BAYNE, *supra* note 56, at 3.

<sup>332</sup> ROBERT M. GAGNÉ, THE CONDITIONS OF LEARNING AND THEORY OF INSTRUCTION 2 (1985).

<sup>333</sup> *See* MICHAEL HUNTER SCHWARTZ ET. AL., TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 5 (2009).

# “TEACHING” FORMATION OF PROFESSIONAL IDENTITY

*David I. C. Thomson\**

## INTRODUCTION

In its landmark 2007 report on legal education, the Carnegie Foundation for the Advancement of Teaching focused its strongest criticism on the conclusion that law schools were not paying sufficient attention to the formation of professional identity in their students.<sup>1</sup> This was a relatively new concept to legal educators, although one they may have addressed occasionally in some courses and clinical offerings.<sup>2</sup> But the *Carnegie Report* put a spotlight on the obligation as follows: “Because it always involves social relationships with consequences, [law] practice ultimately depends on serious engagement with the meaning of the activities—in other words, with their moral bearing. For professionals, the decisive dimension is responsibility for clients and for the values the public has entrusted to the profession.”<sup>3</sup>

It is instructive to remember that the *Carnegie Report* was part of a series of reports on education for the professions and included reports on the training of doctors, nurses, clergy, and engineers.<sup>4</sup> In each report, Carnegie Foundation authors emphasized the professional formation of the student.<sup>5</sup> However, perhaps because the legal profession already had a code of professional conduct<sup>6</sup> and the ABA already required every law school to teach professional ethical rules,<sup>7</sup> many legal educators did not understand what exactly was missing. As a result of the report encouraging the emphasis of professional identity formation in a

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<sup>1</sup> See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14 (2007) [hereinafter CARNEGIE REPORT].

<sup>2</sup> See *id.* at 12–14.

<sup>3</sup> *Id.* at 11–12.

<sup>4</sup> *Id.* at 15.

<sup>5</sup> See Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404, 405, 410 (2008).

<sup>6</sup> See MODEL RULES OF PROF'L CONDUCT pmb. para. 7 (2013).

<sup>7</sup> See 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014).

curriculum that already had a required course dedicated to ethics, there was confusion. It did not help that the report unintentionally blurred the distinction between the required course in ethics (and its emphasis on the ethical rules) that has long been a part of legal education and the new concept introduced in the report: the *formation of professional identity*.<sup>8</sup> It took legal educators some time to realize that, buried in the report, was a concept that was almost completely new to them. Many had little idea what it was, reduced as it was in their minds to the concept of *professionalism*; and, having scant understanding that it was something different, had done very little to address it in legal education.

This Article is my attempt to provide a guide to what professional identity formation is—as distinct from more familiar concepts of professionalism and ethics—and what legal educators are doing, and could do in the future, to foster this sort of professional formation in their courses and curricula. In Part I, I offer some background and history of the topic, which supports a new definition provided in the Article for lawyer professional identity formation. I describe in Part II what some schools are doing to “teach” formation of professional identity and argue that those efforts have some significant limitations. I argue in Part III that teaching law through simulations can provide learning opportunities that foster professional identity formation and that these learning opportunities can be added to any course. Finally, in Part IV, I describe a particular course in civil discovery law that illustrates the concepts and arguments made in the Article.

## I. DEFINING PROFESSIONAL IDENTITY FORMATION

### A. *What a Profession Is*

The concept of a “profession” started with medicine and dates back to the fifth century B.C.<sup>9</sup> The medical profession was the first to combine promises of scientific expertise with individual moral commitments.<sup>10</sup> Interestingly (and appropriately, given how little about the human body was known), among those moral commitments were humility and a promise to learn from one’s and others’ mistakes.<sup>11</sup> Even to the present day, the core of medical professional identity is found in what is known as the Hippocratic Oath, and most students recite the oath upon graduation

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<sup>8</sup> See CARNEGIE REPORT, *supra* note 1, at 129.

<sup>9</sup> See STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE 3, 178 (2004). The Hippocratic Oath is an early embodiment of the concept of a profession. *Id.* at 3.

<sup>10</sup> See *id.* at 178.

<sup>11</sup> See *id.* at xiii–xiv (binding the physician to use his ability and judgment to keep patients from harm or injustice and guard life in a pure and holy way).

from medical school.<sup>12</sup> A common misunderstanding about this oath is that it contains the words "first do no harm,"<sup>13</sup> but those words were added to medical professional formation by a nineteenth century surgeon, Thomas Inman.<sup>14</sup> The oath that dates back to Hippocrates does include the words "I will use regimens for the benefit of the ill in accordance with my ability and my judgment, but from [what is] to their harm or injustice I will keep [them],"<sup>15</sup> but also includes two key formulations that will sound familiar to any legal educator today: that what is learned by the professional will be shared with the professional's pupils, and that what is learned by the professional which is not proper to repeat will be kept confidential.<sup>16</sup>

These concepts in the oath became part of a legacy, a basis of identity for medical professionals, and that legacy remains much so to this day.<sup>17</sup> The Hippocratic Oath created shared standards for moral behavior in the medical profession, even though it was not until 1847 that there was a published national code of ethics for doctors.<sup>18</sup>

The root word of professional is *profess*, or to declare something in public.<sup>19</sup> The dictionary definition of that word is: "to declare or admit openly or freely: affirm."<sup>20</sup> A group of people who declare principles to which they will adhere constitutes a profession, and each professional thereby limits his options and behaves in conformance with the declared set of values. Lawyers, of course, declare openly that they will adhere to the Rules of Professional Conduct, the ethical standards of the legal profession.<sup>21</sup> Roscoe Pound defined a profession as a group "pursuing a

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<sup>12</sup> Raphael Hulkower, *The History of the Hippocratic Oath: Outdated, Inauthentic, and Yet Still Relevant*, 25/26 *EINSTEIN J. BIOLOGY & MED.* 41, 41 (2010).

<sup>13</sup> Daniel K. Sokol, "First Do No Harm" Revisited, *BMJ* (Oct. 25, 2013), <http://www.bmj.com/content/347/bmj.f6426>; JACALYN DUFFIN, *HISTORY OF MEDICINE: A SCANDALOUSLY SHORT INTRODUCTION* 103 (2d ed. 2010) (noting that this is the translation of the commonly used Latin phrase "*primum non nocere*").

<sup>14</sup> See Sokol, *supra* note 13.

<sup>15</sup> MILES, *supra* note 9, at xiii (alteration in original).

<sup>16</sup> See *id.* at xiii–xiv.

<sup>17</sup> See Hippocratic Oath, Modern Version, GUIDES JOHNS HOPKINS U., <http://guides.library.jhu.edu/c.php?g=202502&p=1335759> (last visited Apr. 10, 2015).

<sup>18</sup> *History of AMA Ethics*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/about-ama/our-history/history-ama-ethics.page> (last visited Apr. 10, 2015); see also COUNCIL ON ETHICAL & JUD. AFF., AM. MED. ASS'N, *CODE OF MEDICAL ETHICS* (2015), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page>.

<sup>19</sup> *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 928 (10th ed. 2001).

<sup>20</sup> *Id.*

<sup>21</sup> See MODEL RULES OF PROF'L CONDUCT pmb1. (2013). The ABA requires law schools to teach students these standards, and many lawyers swear an oath when admitted to the bar. See 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014);

learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood.”<sup>22</sup> So lawyering is done as a “common calling”—we do it in common, and we are “called” to work in “the spirit of public service.” The question then becomes: What are the standards for moral behavior in service to the public for lawyers? Is it simply the ethical standards we have, or is it something more? And if it is something more, what does that mean for us as legal educators? Formal legal education has been criticized for being disconnected from the profession nearly since its inception, and a brief study of the more recent criticism might help to answer those questions.

### B. The MacCrate Report

Legal education has been criticized for over 100 years,<sup>23</sup> but in the last twenty years or so, a series of reports has contained criticism and suggestions for improvement. The first report of the modern era was issued in 1992 by a panel of practicing lawyers and legal educators brought together in 1989 by the Council of the Section of Legal Education and Admissions to the Bar at the American Bar Association.<sup>24</sup> The colloquial name for this report comes from the chair of that panel, Robert MacCrate, a prominent attorney in New York.<sup>25</sup> The *MacCrate Report* offered a list of ten “Skills” and four “Values” that it concluded were fundamental to proper training for the practice of law.<sup>26</sup> This list became a guideline for curricular reform at many law schools in the 1990s, and in particular, was the genesis of significant growth in the clinical legal education movement.<sup>27</sup> However, much of that growth was focused on the ten lawyering skills that MacCrate listed, which included problem solving; legal research, analysis, and reasoning; written and oral communication; client counseling; negotiation; and recognizing and resolving ethical

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MODEL RULES OF PROF'L CONDUCT pmbl. (2013); Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 44–57 (2009).

<sup>22</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

<sup>23</sup> See JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* v (1914); ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* xiv–xv (1921).

<sup>24</sup> Task Force on Law Sch. & the Profession: Narrowing the Gap, *Legal Education & Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B., at xi–xiv (1992) [hereinafter *MacCrate Report*].

<sup>25</sup> See *A Survey of Law School Curricula: 2002–2010*, 2012 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 13 n.1 (2012) [hereinafter *2002–2010 A.B.A. Curricular Survey*].

<sup>26</sup> See *MacCrate Report*, *supra* note 24, at 138–41.

<sup>27</sup> See Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 514–15 (1994); see also Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 J. LEGAL WRITING INST. 261, 264 (2011).

dilemmas.<sup>28</sup> The *MacCrate Report* had significant impact on the development and expansion of clinical legal education, as well as the expansion of skills classes.<sup>29</sup> Less noticed, and less implemented, was the "Values" portion of the recommendations.

The *MacCrate Report* endorsed four "Fundamental Values of the Profession": 1) Provision of Competent Representation; 2) Striving to Promote Justice, Fairness, and Morality; 3) Striving to Improve the Profession; and 4) Professional Self-Development.<sup>30</sup>

Much of law school is focused on the first value: competent representation.<sup>31</sup> But there is much else of importance in this list. There is a reference to the morality of the profession, and the list includes such goals as promoting justice and fairness, a commitment to improvement of the profession, as well as one's own professional self-development.<sup>32</sup> Because the primary focus of law school is on learning the law to represent the interests of a client,<sup>33</sup> what remains in this list of professional values are only occasionally or indirectly addressed.

### C. *The Carnegie Report*

Starting in the late 1990s, the Carnegie Foundation for the Advancement of Teaching initiated a wide-ranging study of professional education in several fields.<sup>34</sup> The project, called Preparation for the Professions, included studies of medical, clergy, engineering, and legal education, and each project issued an extensive report.<sup>35</sup> The report on legal education, entitled *Educating Lawyers: Preparation for the Profession of Law*, was published in 2007.<sup>36</sup> After nearly 100 years of critical reports on the form and structure of legal education, just eight years after its publication, the *Carnegie Report's* influence has already been significant. Numerous conferences dedicated to the study and

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<sup>28</sup> *MacCrate Report*, *supra* note 24, at 138–40.

<sup>29</sup> *See* Garth, *supra* note 27.

<sup>30</sup> *MacCrate Report*, *supra* note 24, at 140–41.

<sup>31</sup> *See id.* at 210–12 (noting that the goal of competent representation is recognized in the ABA's Model Rules of Professional Conduct and the ABA's Code of Professional Conduct).

<sup>32</sup> *MacCrate Report*, *supra* note 24, at 140–41.

<sup>33</sup> *See* 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302 (2014).

<sup>34</sup> *See* Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763, 765 (2012).

<sup>35</sup> CARNEGIE REPORT, *supra* note 1, at 15. For a brief description of these reports, see Hamilton, *supra* note 34, at 769–71.

<sup>36</sup> *See generally* CARNEGIE REPORT, *supra* note 1.

discussion of the report have been held,<sup>37</sup> significant adjustments have been made throughout legal education that were obviously influenced by the report,<sup>38</sup> and at least three initiatives have been dedicated to promoting one or more of the principles described in the report.<sup>39</sup>

The three principal contributions of the *Carnegie Report* were: first, that it identified the “three apprenticeships” of effective legal training;<sup>40</sup> second, that it argued persuasively in favor of the integration of all three apprenticeships throughout legal education;<sup>41</sup> and third, that it brought attention to the importance of professional identity formation.<sup>42</sup> The three apprenticeships it identified in the report were: (1) the cognitive, (2) the practical, and (3) the ethical-social.<sup>43</sup> The cognitive apprenticeship focuses on what has long been referred to as “thinking like a lawyer.”<sup>44</sup> The practical apprenticeship focuses on practical lawyering skills and harkens back to the list of skills in the *MacCrate Report*.<sup>45</sup> The ethical-social apprenticeship focuses on the formation of the student as a professional attorney.<sup>46</sup>

The *Carnegie Report* found that law schools were generally effective, particularly in the first year, inculcating in students the principles of the first apprenticeship through the case method of study, which it called the “signature pedagog[y]” in law school.<sup>47</sup> Concerning the practical apprenticeship, the report expressed concern that there was not enough teaching of legal doctrine in the context of practice, noting that “[w]ith little or no direct exposure to the experience of practice, students have slight basis on which to distinguish between the demands of actual

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<sup>37</sup> Comm. on the Prof'l Educ. Continuum, *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, 2013 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 18–19 (2013).

<sup>38</sup> See *id.* at 5.

<sup>39</sup> See *generally* EDUCATING TOMORROW'S LAW., <http://educatingtomorrowlawyers.du.edu> (last visited Apr. 10, 2015) (labeling itself an initiative of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver); HOLLORAN CENTER FOR ETHICAL LEADERSHIP PROFS., <https://www.stthomas.edu/hollorancenter/> (last visited Apr. 10, 2015) (labeling itself an initiative of St. Thomas Law School); PARRIS INST. FOR PROF. FORMATION, <http://law.pepperdine.edu/parris-institute/> (last visited Apr. 10, 2015) (labeling itself an initiative of Pepperdine School of Law).

<sup>40</sup> CARNEGIE REPORT, *supra* note 1, at 27.

<sup>41</sup> See *id.* at 28–29.

<sup>42</sup> See *id.* at 14.

<sup>43</sup> See *id.* at 28.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see *MacCrate Report*, *supra* note 24, at 135.

<sup>46</sup> CARNEGIE REPORT, *supra* note 1, at 28.

<sup>47</sup> See *id.* at 2, 23–28.



practice and the peculiar requirements of law school."<sup>48</sup> In this way, the *Carnegie Report* refocused attention on skills needed for practice, as the *MacCrate Report* did before it.<sup>49</sup>

However, the *Carnegie Report* reserved its greatest criticism of legal education for the lack of intentional development of its students in the third apprenticeship, the ethical-social, which it also referred to as the students' formation of professional identity as a lawyer.<sup>50</sup> In recent years, conferences and commentators have begun to focus on this apprenticeship—what it means and what sorts of adjustments to legal education might be needed to address it.<sup>51</sup> Bryant Garth, former Director of the American Bar Foundation and dean at two law schools, has suggested that this recommendation, and the changes it will bring if taken seriously, may have an even more profound impact on legal education than the *MacCrate Report* has.<sup>52</sup>

Among the *Carnegie Report's* most important recommendations were that the three apprenticeships should be integrated throughout the law school course of study, and that paying greater attention to the third

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<sup>48</sup> *Id.* at 95.

<sup>49</sup> Compare *id.* (noting that the key to becoming an effective legal problem-solver is practicing legal problem-solving in real or hypothetical situations), with *MacCrate Report*, *supra* note 24, at 138–40 (identifying ten fundamental lawyering skills).

<sup>50</sup> See CARNEGIE REPORT, *supra* note 1. The *Carnegie Report* likely used the word "identity" quite intentionally. The psychologist Erik Erikson developed the concept of identity in the middle of the twentieth century. HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET 11 (2001). Identity has been defined as a combination of "a person's deeply felt convictions about who she is, and what matters most to her existence as a worker, a citizen, and a human being." *Id.* Contemporaries summarized Erikson's theory of identity formation as follows: "Each person's identity is shaped by an amalgam of forces, including family history, religious and ideological beliefs, community membership, and idiosyncratic individual experiences." *Id.*

<sup>51</sup> For example, the first annual conference of the Educating Tomorrow's Lawyers initiative of IAALS, which took place September 27–29, 2012, was thematically focused on the third apprenticeship. See *Event: The Development of Professional Identity*, EDUCATING TOMORROW'S LAW., <http://educatingtomorrowlawyers.du.edu/events/the-development-of-professional-identity-in-legal-education-rethinking-lear/program/> (last visited Apr. 10, 2015). This Article comes out of a presentation made by the author with Bill Sullivan on September 28, 2012, at that conference. Also, at the Southeast Association of Law Schools (SEALS) 2014 Conference, a three-hour discussion group of ten law faculty addressed itself to a detailed discussion of the third apprenticeship and prepared short papers on the subject in advance. See *Seals 2014 Conference Program*, SEALS, <http://sealslawschools.org/submissions/program/pastprograms.asp?confyear=2014> (last visited Apr. 10, 2015). In addition, I participated in this symposium entirely devoted to professional identity hosted by Regent University School of Law on October 5, 2014. See *Regent University Law Review Symposium Presenters*, REGENT U. SCH. L., [http://www.regent.edu/acad/schlaw/student\\_life/studentorgs/lawreview/symposiumparticipants.cfm](http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposiumparticipants.cfm) (last visited Apr. 10, 2015).

<sup>52</sup> See Garth, *supra* note 27, at 267.

apprenticeship could help facilitate that integration.<sup>53</sup> Even the report itself mentions the potential power of law schools paying significant attention to the third apprenticeship: “The third element of the framework—professional identity—joins the first two elements and is, we believe, *the catalyst* for an integrated legal education.”<sup>54</sup> The report criticized the typical law school curriculum as being too separated between doctrine and skills and recommended that law schools make an effort to integrate all three apprenticeships into their curricula.<sup>55</sup>

A more adequate and properly formative legal education requires a better balance among the cognitive, practical, and ethical-social apprenticeships. To achieve this balance, legal educators will have to do more than shuffle the existing pieces. The problem demands their careful rethinking of both the existing curriculum and the pedagogies that law schools employ to produce a more coherent and integrated initiation into a life in the law.<sup>56</sup>

Unfortunately, as the *Carnegie Report* also notes, “in most law schools, the apprenticeship of professionalism and purpose is subordinated to the cognitive, academic apprenticeship.”<sup>57</sup>

As we develop our thinking about professional identity formation, however, we should be explicit about what it means. Since the *Carnegie Report* was published, the terms “professionalism” and “professional identity” have been confused with each other, and yet, they are mostly different concepts.<sup>58</sup> While there is some overlap between them, each contains components that are distinct from the other. The *Carnegie Report* uses this language to describe professional identity formation: “Th[e] apprenticeship of professional identity . . . include[s] conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession.”<sup>59</sup>

So we know that the original idea included concepts of “personal meaning” and “responsibility.” Further, the report argued that learning how to balance the competing interests in legal representation was critical to our students’ formation:

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<sup>53</sup> CARNEGIE REPORT, *supra* note 1, at 28.

<sup>54</sup> *Id.* at 14 (emphasis added).

<sup>55</sup> *See id.* at 27–29.

<sup>56</sup> *Id.* at 147.

<sup>57</sup> *Id.* at 132–33.

<sup>58</sup> Compare Martin J. Katz, *Teaching Professional Identity in Law School*, COLO. LAW., Oct. 2013, at 45, 45 (explaining that professional identity includes “more than simply ethics or professionalism—or even both together”), with Donald Burnett, *A Pathway of Professionalism—The First Day of Law School at the University of Idaho*, ADVOCATE, Feb. 2009, at 17, 18 (using the words “professional identity” and “professionalism” synonymously).

<sup>59</sup> CARNEGIE REPORT, *supra* note 1, at 132.

[L]egal education needs to attend very seriously to its apprenticeship of professional identity. . . . [S]tudents' great need is to begin to develop the knowledge and abilities that can enable them to understand and manage these tensions in ways that will sustain their professional commitment and personal integrity over the course of their careers.<sup>60</sup>

As a way of underscoring this important subject, the report argued that it was one with far-reaching consequences:

Insofar as law schools choose not to place ethical-social values within the inner circle of their highest esteem and most central preoccupation, and insofar as they fail to make systematic efforts to educate toward a central moral tradition of lawyering, legal education may inadvertently contribute to the demoralization of the legal profession and its loss of a moral compass . . . .<sup>61</sup>

In a book about undergraduate business education that he co-authored, William Sullivan, lead author of the *Carnegie Report*, said this about ethical formation in that context:

[U]nless this rigorous thinking is directed toward some committed purpose, it can lead to relativism or cynicism—or at least to a narrowly instrumental orientation.

A strong education in Analytical Thinking and Multiple Framing without attention to meaning can teach students to formulate and critique arguments, but this very facility can make it hard for them to find any firm place to stand. For this reason, Analytical Thinking and Multiple Framing need to be grounded in and guided by the third mode of thought in liberal learning—the Reflective Exploration of Meaning, which engages students with questions such as “What do I really believe in, what kind of person do I want to be, what kind of world do I want to live in, and what kind of contribution can I make to that world?” Lack of attention to this third mode is a dangerous limitation, especially when students are preparing for work that has important implications for the welfare of society.<sup>62</sup>

#### *D. Lawyer Professional Identity Defined*

Having examined the *Carnegie Report* closely, we know that the concepts behind the third apprenticeship include: personal meaning in the work, responsibility to the profession and society, and personal integrity.<sup>63</sup> Unfortunately, while introducing a potentially quite valuable concept into legal education, the *Carnegie Report* also adds some confusion to the

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<sup>60</sup> *Id.* at 128.

<sup>61</sup> *Id.* at 140.

<sup>62</sup> ANNE COLBY ET AL., *RETHINKING UNDERGRADUATE BUSINESS EDUCATION* 79 (2011).

<sup>63</sup> *CARNEGIE REPORT*, *supra* note 1, at 132.

difference between this new concept and the traditional concept of professional ethics as studied in law school.<sup>64</sup>

Part of this confusion comes simply through the various terms the report uses for the third apprenticeship. Chapter four of the report is focused on this subject, and there are references to the “[a]pprenticeship of [i]dentity and [p]urpose,” the “apprenticeship of professional identity,” the “apprenticeship of professionalism and purpose,” and the “ethical-social apprenticeship.”<sup>65</sup> Further, there is confusion between the terms “professionalism” and “professional identity.”<sup>66</sup> Is professional identity formation simply the same as professionalism? Or does it merely refer to the identity of being a professional attorney?

Professor W. Bradley Wendel believes there is no difference between the two concepts. In his critique of the *Carnegie Report*, he states that the professional identity of lawyers is described “simply [as] performing the complex task of representing clients effectively within the bounds of the law.”<sup>67</sup> He believes that law professors should just “continue teaching their students to be good lawyers.”<sup>68</sup>

In his critique, he uses the example of John Yoo, an attorney for the Office of Legal Counsel in the U.S. Department of Justice during the early days after the September 11th terrorist attacks on the United States.<sup>69</sup> Mr. Yoo (now Professor Yoo at Berkeley Law School) was the primary author of what has since become known as the “Torture Memos,” which provided legal justification to the administration of President George W. Bush to torture prisoners of war.<sup>70</sup> Critiques of the memos have focused on the immorality of torture, and have suggested that a lawyer acting morally would not have written them.<sup>71</sup> Professor Wendel believes that the law contains internal logic and that a significant part of what it means to be a lawyer is to be loyal to the law.<sup>72</sup> Quite apart from the immorality of torture, the conclusion of the memos was “flawed *as legal advice*”

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<sup>64</sup> See sources cited *supra* note 58.

<sup>65</sup> CARNEGIE REPORT, *supra* note 1, at 132.

<sup>66</sup> See sources cited *supra* note 58.

<sup>67</sup> W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L.J. 497, 498 (2011).

<sup>68</sup> *Id.* at 501.

<sup>69</sup> See *id.* at 503 n.27.

<sup>70</sup> Robert Bejesky, *An Albatross for the Government Legal Advisor Under MRPC Rule 8.4*, 57 HOW. L.J. 181, 182–85 (2013).

<sup>71</sup> See, e.g., Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 355–56 (2007) (claiming that the Torture Memo authors were accomplices to torture).

<sup>72</sup> See Wendel, *supra* note 67, at 498, 501.

because the law does not allow torture.<sup>73</sup> Yoo was therefore a poor lawyer and displayed disloyalty to the law in claiming otherwise.<sup>74</sup> In other words, all the professional identity in the world would not have helped; what was needed was a better adherence to the craft of lawyering.

The views of Professor Wendel about professional identity of lawyers are in opposition to those of Professor David Luban, and these two professors have had a back-and-forth scholarly discussion about the relationship between morality and the duties of a lawyer for over a decade.<sup>75</sup> Luban notes that Wendel takes the view that a lawyer should "recognize professional duties as obligations of political morality, not individual morality."<sup>76</sup> Luban's view is that, however difficult it might be at times, a lawyer must still consider matters of justice and individual morality.<sup>77</sup>

Professor Eli Wald believes that the ABA Model Rules of Professional Conduct have what he calls a "hired gun bias" and that they should be refocused to emphasize the role of lawyers as officers of the legal system and public citizens, going so far as to suggest that the preamble to the Model Rules should be rewritten as follows: "A lawyer is a public citizen, an officer of the legal system and a representative of clients."<sup>78</sup> Further, Professor Wald argues that the Model Rules ought to be rewritten to reflect the commitment of the Model Rules to form lawyers whose professional identity is more complex than mere servants of client interests.<sup>79</sup>

Professors Ben Madison and Natt Gantt offer the following definition of the professional identity of a lawyer:

[P]rofessionalism[s] . . . focus historically has been on the outward conduct the legal profession desires its members to exhibit. . . . Professional identity [, however, ] encompasses the manner in which a lawyer internalizes values such that, for instance, she views herself as a civil person who treats others with civility and respect even in hotly disputed matters.<sup>80</sup>

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<sup>73</sup> *Id.* at 502.

<sup>74</sup> *See id.* at 503 n.27.

<sup>75</sup> *See, e.g.*, David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101 (2010); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

<sup>76</sup> Luban, *supra* note 75, at 1102 (citing Woolley & Wendel, *supra* note 75, at 1098).

<sup>77</sup> *See id.* at 1116–17.

<sup>78</sup> Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 266 (2014).

<sup>79</sup> *See id.*

<sup>80</sup> Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, but Does Anyone Really Care? How Law Schools Are Failing to Develop Students' Professional Identities and Practical Judgment*, 27 REGENT U. L. REV. 337, 344–45 (2015).

Professor Daisy Hurst Floyd has proposed another definition: “Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being.”<sup>81</sup>

Returning to the *Carnegie Report*, it offers a prescription that may be helpful in the context of this brief review of competing views of lawyer professional identity:

Law school graduates who enter legal practice also need the capacity to recognize the ethical questions their cases raise, even when those questions are obscured by other issues and therefore not particularly salient. They need wise judgment when values conflict, as well as the integrity to keep self-interest from clouding their judgment.<sup>82</sup>

Some key terms in this prescription are worth highlighting: “ethical questions their cases raise,” “wise judgment when values conflict,” and “integrity to keep self-interest from clouding their judgment.”<sup>83</sup>

It is possible for all these competing views and definitions to be reconciled. Doing so, however, will require that we separate the terms “professionalism” and “professional identity.” It is important that we do this because, while the ethical rules include value judgments,<sup>84</sup> they are rules, and as such, are amenable to bad lawyering.<sup>85</sup> The values of the profession, however, are not fully contained in the ethical rules, and where they are addressed, they often reflect historical values that may be antiquated or include some undesirable values the profession ought to rethink.<sup>86</sup> Those values may be difficult to achieve, but that does not mean it is impossible or unrealistic.<sup>87</sup> The *Carnegie Report* suggests that even though we have ethical rules that govern our behaviors, something is still missing, or at least sufficient focus on that something has been lost.<sup>88</sup>

While there is some overlap existing between the two concepts, these concepts are separable, and there is value in articulating two separate

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<sup>81</sup> Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 201–02 (2012).

<sup>82</sup> CARNEGIE REPORT, *supra* note 1, at 146.

<sup>83</sup> *Id.*

<sup>84</sup> See Andrew B. Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 2 (2013).

<sup>85</sup> See Wendel, *supra* note 67, at 518 (describing the Holmesian bad man approach to legal ethics).

<sup>86</sup> See Wald, *supra* note 78, at 256 (explaining that the underlying assumptions of the Model Rules of Professional Conduct are inconsistent with the profession as a whole).

<sup>87</sup> See Luban, *supra* note 75, at 1102 (arguing that mere difficulty is an insufficient reason to reject the conception of “moral agency”).

<sup>88</sup> See CARNEGIE REPORT, *supra* note 1, at 127.

definitions and goals in this work and in our teaching. Therefore, this Article offers the following formulation of professionalism: "Professionalism relates to the ethical rules (the line below which we cannot stray) as well as behaviors, such as thoroughness, respect and consideration for one's clients and towards opposing counsel and judges, and responding to client needs in a timely fashion."

Remember that the *Carnegie Report* suggests that law schools are not giving sufficient attention to the formation of professional identity in law school.<sup>89</sup> But it *could not* have been referring to the concepts included in this definition of professionalism; we teach these concepts pretty well in law school, not only in the ethics course, but also across the curriculum. Arguably, we could be more intentional about how and when we do this, but throughout the curriculum, beyond the required ethics course, we expect certain behaviors from our students. Often we define them in our course policy documents, and certainly they are defined in our student handbooks and honor codes.<sup>90</sup> We expect certain behaviors, and for the most part we get them. We could doubtless do a better job of engendering consideration for diverse clients and diverse client perspectives, but this is becoming a more intentional part of clinical pedagogy, as well as all forms of experiential learning.<sup>91</sup>

If that is an acceptable definition of professionalism—at least for the purpose of defining the goals for legal education—what is the Carnegie Report referring to when it argues in favor of law schools being more intentional about the work they do with their students in helping them to form a professional identity? This Article offers the following definition of professional identity for lawyers: "Professional identity relates to one's own decisions about professional behaviors 'above the line,' as well as a sense of duty as an officer of the legal system and responsibility as part of a system in our society that is engaged in preserving, maintaining, and upholding the rule of law."

The reason for the "above the line" distinction in this definition is this: no one goes to law school to learn how to violate the ethical rules.<sup>92</sup>

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<sup>89</sup> See *id.*

<sup>90</sup> See generally, e.g., Academic Honor Code, BERKELEY L., <http://www.law.berkeley.edu/819.htm> (last visited Apr. 10, 2015); Honor Code, STANFORD U., <https://studentaffairs.stanford.edu/communitystandards/policy/honor-code> (last visited Apr. 10, 2015).

<sup>91</sup> See Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 131–32 (2015).

<sup>92</sup> No rational student would spend the tuition and attendant costs to attend law school just to run the risk of being disbarred and losing all of that investment.

Students want to know what is expected of them as professionals.<sup>93</sup> And not all situations—indeed precious few of them in day-to-day practice—require that the attorney takes a position that is *right on the ethical line*.<sup>94</sup> So professional identity must involve personal decisions of where the attorney will apply his judgment to decide how to resolve particular ethical matters that reside “above the line.”<sup>95</sup> Such decisions obviously involve both matters of morality and matters of identity.

And so then the concept of *teaching* professional identity means we want our students to experience making these sorts of decisions while they are still in law school so they have some idea of how they would resolve them when they arise in practice. When we say we “teach” professional identity, it means we ask our students to finish this sentence: “I am a *lawyer*, and that means for *me* that *I* will resolve this *above the line* ethical dilemma as follows . . . .” The *Carnegie Report* is probably correct when it says most law schools do not *teach* that—or when they do, not intentionally or very well—across the curriculum.<sup>96</sup>

## II. “TEACHING” PROFESSIONAL IDENTITY

### A. *Is This Something We Can Teach?*

With the emerging consensus that these are things we should teach our students comes the companion view that this is something we *can* teach. Indeed, “[t]he predominant view among legal educators is no longer that students can learn professional values by osmosis or on the job training. We have to teach it in law school.”<sup>97</sup> A recent panel at the annual conference of the Association of American Law Schools (AALS) was entitled “Incorporating Teaching Professional Identity into the Legal

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<sup>93</sup> See Helia Garrido Hull, *Legal Ethics for the Millennials: Avoiding the Compromise of Integrity*, 80 UMKC L. REV. 271, 272–73 (2011) (noting stories of lawyers facing discipline or disbarment for lack of professionalism); Sabrina C. Narain, *A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School’s Duty to Better Prepare Lawyers for Real Life Practice*, 41 W. ST. U. L. REV. 411, 415–16 (2014) (noting that most professional responsibility courses focus on the “basic framework to avoid malpractice liability and disciplinary actions by the state bar”).

<sup>94</sup> See Luban, *supra* note 75, at 1116 (“By and large, lawyers do not go frantically through life encountering one moral dilemma after another like challenges in a video game.”).

<sup>95</sup> Because this part of the definition incorporates the ethical rules, it is the place of overlap between the two concepts of “Professionalism” and “Professional Identity.”

<sup>96</sup> CARNEGIE REPORT, *supra* note 1, at 14, 146–47.

<sup>97</sup> Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 99 (2012).



Education Curriculum."<sup>98</sup> Law professors are a confident and hard-working bunch, and there is a broad assumption that this is something we can teach.

The problem for us as teachers is that formation of a student's identity is not directly "teachable," at least not in the didactic sense. As we have seen, professional formation in law happens in the context of work that is important for the welfare of society, and it involves judgment and concepts of one's personal identity as a human being and as a citizen and member of that society.<sup>99</sup> Because the subject is so personal to each student, the answers to such questions as "What do I really believe in?" and "What kind of a person do I want to be?" and, gradually, "What kind of a lawyer do I want to be?" are not something we can "teach," at least not through the methods common to law school classrooms.<sup>100</sup> We cannot effectively teach someone to answer such questions in the abstract. When we try to do that, we usually receive tentative answers disconnected from the legal context that animates them. The context and the value judgments students make are the bases from which they will form their professional identity as lawyers.<sup>101</sup>

We must also remember that all students come to law school with different backgrounds and educational experiences, all of which have formed them as human beings. Instead of thinking that ethical formation is something we can do for our students didactically—*teaching* in the standing-behind-the-podium sense—law faculty need to do something else. We need a pedagogical method by which we might address the third apprenticeship throughout the curriculum.<sup>102</sup> It is likely this will be something different than the familiar one-to-many classroom framework in which we are most comfortable.

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<sup>98</sup> Final Program at Association of American Law Schools 2015 Annual Meeting: Legal Education at the Crossroads 10 (Jan. 2–5, 2015), available at [https://www.aals.org/wp-content/uploads/2014/12/Program\\_Final.pdf](https://www.aals.org/wp-content/uploads/2014/12/Program_Final.pdf).

<sup>99</sup> Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, MICH. B.J., Jan. 2008, at 20, 23 (noting that part of professionalism training must include the concept of a lawyer as a citizen of the United States).

<sup>100</sup> See Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 676 (2000) ("[A] student needs to engage not just her intellect, as she might in puzzling out the intricacies of federal jurisdiction, but she must also engage her heart, to determine how she will feel in a professional situation she may face.").

<sup>101</sup> It should be noted, of course, that clinical and externship faculty have often worked on these matters more intentionally than other parts of the typical law school faculty. However, the goal of this Article is also to be helpful in clinic and externship programs, since the framework provided here could also be helpful in those contexts.

<sup>102</sup> Denise Platfoot Lacey, *Embedding Professionalism into Legal Education*, 18 J.L. BUS. & ETHICS 41, 46 (2012).

*B. Attempts to “Teach” Formation of Professional Identity*

One methodology we have seen in recent years is a proliferation of additional programs that address attorney behavior and professionalism.<sup>103</sup> Many schools have added programs—outside of the ethics course—in which practitioners and judges have mostly talked at students about how important professional behavior is.<sup>104</sup> Until the fall of 2014, my own school was no exception; we developed a program that took most of the day on a Saturday in the fall semester.<sup>105</sup> It mostly involved local practitioners for whom this is an important topic or judges who are sick of resolving disputes between overly-litigious attorneys, lecturing about how awful badly-behaved attorneys are and how these students should not be like that when they graduate.<sup>106</sup> There is scant evidence that such programs have value. Indeed, when they are asked, students often say they perceived them as having little impact.<sup>107</sup> This may be because such programs do not engage the student in the personal contextual thinking process necessary for ethical formation.<sup>108</sup>

Better than these one-day programs is the emergence of professionalism and ethical formation courses in a handful of innovative schools across the country. These fall into two main categories—first-year required courses and upper-level electives.

Some schools now require in the first year of law school a specialized course designed to introduce new students to what lawyers do and the obligations they have. An example of this is the course at the University of St. Thomas School of Law that explores the legal system and the values of lawyers, including the moral and ethical dimensions—which requires

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<sup>103</sup> For a recent study of professionalism education in American law schools, see generally Kehner & Robinson, *supra* note 97.

<sup>104</sup> See Lacey, *supra* note 102, at 45–46 (noting examples of schools adding professionalism events into law school programs).

<sup>105</sup> See Event Agenda at For This We Stand, Joint 1L Professionalism Orientation Event (Sept. 15, 2012) (on file with the Regent University Law Review) (outlining the schedule for a one-day professionalism program at the University of Denver Sturm College of Law).

<sup>106</sup> See *id.*

<sup>107</sup> *E.g.*, E-mail from Student 1 to author (Feb. 23, 2015, 04:06 PM) (on file with the Regent University Law Review) (used with permission) (likening a professionalism event to a glorified legal rumor mill); E-mail from Student 2 to author (Feb. 23, 2015, 11:48 AM) (on file with the Regent University Law Review) (used with permission) (considering a professionalism event a waste of time).

<sup>108</sup> See Dwane L. Tinsley, President’s Page, *Ethical Is the Best Policy*, W. VA. LAW., Jan.–Mar. 2009, at 4, 5 (“Legal ethics require lawyers to make contextual, discretionary, ethical judgments.”).

students to begin reflecting on these issues.<sup>109</sup> Another example is the required first-year course taught at the University of North Dakota School of Law called Professional Foundations, or "ProfFound" for short. This course

explicitly asks students to engage in studied self-reflection about twelve core professional qualities of a "good lawyer," including attributes such as adaptability, diligence, courage, honesty, humility, integrity, loyalty, and patience. The course explores these qualities through life-like lawyering scenarios that implicate their meaning and application, and ask students to confront the questions "What would *I* do or how would *I* feel as a lawyer dealing with those issues in these particular situations?"<sup>110</sup>

These are both good examples of first-year required courses that attempt to foster the Carnegie third apprenticeship. But many schools will not want to dedicate the time and effort to offering a course like this in the first year. Instead, some schools have chosen to allow interested faculty to offer an upper-level elective with similar educational goals.

An example of an innovative upper-level course that immerses students in opportunities for professional formation is the course entitled Advanced Legal Ethics: Finding Joy and Satisfaction in the Legal Life, which was developed over a decade ago and taught by Professor Daisy Hurst Floyd at Mercer School of Law.<sup>111</sup> In this course, Professor Floyd asks her upper-level students to reflect in writing on what they think will make them better lawyers (beyond the assumption of competence) and how those qualities relate to their notions of the profession of law.<sup>112</sup> Second, Professor Floyd's students write a reflection on times in their lives when they have felt most alive and whether they expect they will ever be able to feel like that when they are practicing law.<sup>113</sup> These assignments are atypical compared to what most students are asked to do in most law school classes.<sup>114</sup>

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<sup>109</sup> Neil W. Hamilton et al., *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 31 (2012) (describing the first-year course entitled Foundations of Justice at the University of St. Thomas School of Law).

<sup>110</sup> *Professors Alleva & McGinniss Present on Professional Foundations at the AALS 2015 Annual Meeting*, U. N.D. SCH. L., <http://law.und.edu/faculty/news/2015/alleva-mcginniss-aals.cfm> (last visited Apr. 11, 2015).

<sup>111</sup> Daisy Hurst Floyd, Dean and Univ. Professor of Law & Ethical Formation, Walter F. George Sch. of Law, Curriculum Vitae 4, available at [http://law.mercer.edu/mulaw/faculty/directory/hurst-floyd/upload/Floyd\\_Daisy\\_CV.pdf](http://law.mercer.edu/mulaw/faculty/directory/hurst-floyd/upload/Floyd_Daisy_CV.pdf) (showing that Dean Floyd taught Advanced Legal Ethics with Steven J. Keeva in the fall of 2001).

<sup>112</sup> WILLIAM M. SULLIVAN & MATTHEW S. ROSIN, A NEW AGENDA FOR HIGHER EDUCATION 56 (2008).

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 57.

Professor Cliff Zimmerman teaches another example of an upper-level course addressing these issues at Northwestern University School of Law.<sup>115</sup> In that course, Professor Zimmerman asks his students to write their own personal narrative, believing that the process of connecting with their stories will help them to reconnect with their personal identity.<sup>116</sup> After that foundational step, he asks his students to read and talk about personal moral codes, the ethics of storytelling, the ethics of counseling and interviewing, and multiple ethics-based challenging situations to learn more about how they will react when the situations are real.<sup>117</sup> All of the course assignments are reflective in nature, and they culminate in a final paper containing a student's interview of an attorney about her professional development and identity as well as the student's reflection on his own law school experience and the development of his professional identity.<sup>118</sup>

Both Professors Floyd and Zimmerman have noted that, early on in their courses, it is sometimes difficult to get law students to "open up" to these different sorts of learning experiences.<sup>119</sup> So much of law school is about very different sorts of subjects and in very different learning environments.<sup>120</sup> As a result, students are sometimes taken aback that professors care about these matters and want to help them develop in these areas. Generally, students warm up to the approach and value it over the course of the semester, but this may be because they have self-selected into the course. It may also be because the professors have highly developed skills for teaching in this way.

Other pedagogical methods are being used and tested in other courses. In an Interviewing and Counseling course, Professor Lisa Bliss puts cards in a jar from which students pick one card.<sup>121</sup> On the cards are

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<sup>115</sup> Cliff Zimmerman, Legal Professionalism and Narrative Syllabus (Spring 2013), available at <http://www.lawschool2.org/files/syllabus-4-1-13.docx>.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* (indicating that students' assignments require exploring a formative moment in life, building lists of traits identifiable in good professionals, and discussing material with guest speakers).

<sup>119</sup> See SULLIVAN & ROSIN, *supra* note 112, at 59; David Thomson, *Presentation at the Applied Storytelling Conference*, L. SCH. 2.0 (Aug. 1, 2013, 12:40 PM), <http://www.lawschool2.org/lis2/2013/08/presentation-at-the-applied-storytelling-conference.html> (outlining a presentation in which Professor Zimmerman described his students' coursework in his Legal Professionalism and Narrative class).

<sup>120</sup> Jess M. Krannich et. al., *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 386 (2009) (noting that within the first year of law school students are "initiated into a distinctive method of thinking that will forever alter the way they analyze disputes").

<sup>121</sup> Lisa Bliss, Dir. of Experiential Educ., Co-Dir. of Health Law P'ship Legal Servs. Clinic, Ga. State Univ. Coll. of Law, Helping Students Cultivate Awareness and Sensitivity

descriptions of particular clients, their emotions, and their attitudes; students get to role-play both a client and the lawyer working with that client.<sup>122</sup> This supports that aspect of professional formation that values the building of empathy for different client backgrounds and needs.

Some of this sort of professional formation has been happening in the first year of law school, although perhaps not intentionally.<sup>123</sup> The first-year lawyering class entered the curriculum approximately thirty years ago.<sup>124</sup> Since then, the pedagogy of the course has grown and matured, and a great deal of significant scholarship has been published about how to teach it well, develop its learning outcomes, and conduct effective assessment.<sup>125</sup>

While the course is still titled "Legal Research and Writing" in some schools, most faculty members who teach in this area consider this to no longer be a representative term for what is now addressed by this course (although it does include both of those subjects).<sup>126</sup> Some schools have changed the name of the course; at the University of Denver, it is known as "Lawyering Process."<sup>127</sup> This title, given to the course in a pioneering step by the law faculty in 1990, is intentionally descriptive of what the

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to Client Emotions and Attitudes and the Role that Client Emotions and Attitudes Play in Client Decision-Making, Discussion at Southeastern Association of Law Schools 2014 Annual Conference 12, 14 (Aug. 7, 2014) (on file with the Regent University Law Review) (including a description of Professor Bliss's course).

<sup>122</sup> *Id.* at 14.

<sup>123</sup> See Kehner & Robinson, *supra* note 97, at 85–87.

<sup>124</sup> See, e.g., Paul Brest, *A First-Year Course in the "Lawyering Process,"* 32 J. LEGAL EDUC. 344, 344 (1982).

<sup>125</sup> See, e.g., Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 653–54 (2007); Kristen K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING 1, 2 (2003); Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 LEGAL WRITING 325, 326 (2011); Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 149–50 (2010); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 93–94 (2005); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 107 (2003); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 250–52 (1996).

<sup>126</sup> See, e.g., *Legal Research and Writing*, STANFORD L. SCH., <https://www.law.stanford.edu/courses/legal-research-and-writing> (last visited Apr. 10, 2015); *Legal Research and Writing Program Overview*, GEORGE WASHINGTON U., <http://www.law.gwu.edu/Academics/EL/LRW/Pages/Overview.aspx> (last visited Apr. 10, 2015); *Oregon's LRW Curriculum*, U. OR., <http://law.uoregon.edu/lrw/overview/#overview> (last visited Apr. 10, 2015).

<sup>127</sup> *Academics: Experiential Learning*, U. DENVER STURM C. L., <http://www.law.du.edu/index.php/academics/experiential-learning> (last visited Apr. 10, 2015).

course addresses and how it does so.<sup>128</sup> It is taught almost entirely with simulated client problems, and is designed to introduce first-year students broadly to the *process* that *lawyers* go through to do their jobs.<sup>129</sup> This process includes client interviewing, statute and case reading, legal analysis, legal research, and several forms of legal expression, including legal writing, contract drafting, and oral advocacy.<sup>130</sup> Despite being focused on developing these fundamental professional skills, many lawyering faculty may have been caught up short by the *Carnegie Report's* focus on the third apprenticeship. While lawyering faculty members regularly address issues of professionalism in their classes, they have not traditionally offered *intentional* opportunities for their students to form their professional identities. This is changing, and increasingly an additional item on the already long list of learning outcomes for the lawyering class is to offer intentional opportunities for professional formation.<sup>131</sup>

### C. What Remains Unaddressed

Despite these encouraging courses and teaching methods, not many schools are engaged in this sort of intentional professional identity formation, and those that do are still not addressing all of our students. A recent ABA Curricular Survey indicates that where such opportunities have been made available, they are mostly in upper-level electives.<sup>132</sup> In another study of the professionalism-related course offerings in American law schools, the authors found that professionalism instruction exists (however that might be defined by the survey respondent) in only sixteen percent of doctrinal courses.<sup>133</sup>

But perhaps more importantly, there are significant limitations to the current attempts to teach formation of professional identity however well-designed and intentioned they are. Because the nature of professional formation is interwoven with personal formation, these specialized courses by nature must be small. The first-year courses are difficult to implement across the first-year class, and where they have been implemented (University of St. Thomas, Mercer), they required a

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<sup>128</sup> PHILIP E. GAUTHIER, *LAWYERS FROM DENVER* 199–200 (1995).

<sup>129</sup> *See id.*

<sup>130</sup> *See, e.g.*, David Thomson, Contract Drafting Exercise in Lawyering Process (Spring 2015) (on file with the Regent University Law Review); David Thomson, Oral Argument Assignments in Lawyering Process (Spring 2014) (on file with the Regent University Law Review).

<sup>131</sup> *See* Kehner & Robinson, *supra* note 97, at 71 & n.62, 72 (giving examples of learning outcome goals that embrace professional identity).

<sup>132</sup> *See* 2002–2010 A.B.A. Curricular Survey, *supra* note 25, at 16.

<sup>133</sup> Kehner & Robinson, *supra* note 97, at 85–86.

broad institutional commitment to the work; indeed, it became integrated into the school's culture—no easy task to achieve.<sup>134</sup> First-year students are also being pushed and pulled in many different directions in their other courses, and that makes it a difficult time to devote so much time to these concepts. Further, because the nature of professional formation requires the ethical rules as a reference point, it is at least not ideal for students to grapple with these issues without having taken the required course in ethics.

More concerning, however, is that even though these courses use problems set in the context of practice, they are non-contextual for all students. So much of professional formation is localized in the area of practice of the graduate. Criminal defense attorneys have a different professional identity than corporate law attorneys in a large law firm.<sup>135</sup> If a student who wants to be a prosecutor takes one of these courses and all the contextual problems are not in criminal law, then he is still without the tools he needs for ethical formation *in his area of practice*. So while the first-year work endeavors to be contextual, it cannot cover all areas of practice and is not likely to be highly transferrable, or at least not as transferrable as we would like. What is needed is the taking up of such matters in the courses where students are taking their concentration and ensuring that they are taken up in the context of ethical issues that arise in that area of law practice. However, none of these limitations is meant as an argument against such first-year courses. They are just not enough.

Another worry is that such courses could allow the remainder of the faculty—those who are not engaged in these forms of education—to think that it is being taken care of elsewhere. But of course, the *Carnegie Report's* most fundamental recommendation was that the third apprenticeship be integrated throughout the curriculum.<sup>136</sup>

Indeed, perhaps the greatest concern about these efforts is that they are piecemeal—they do not ultimately achieve the goal of integration of the three apprenticeships across the curriculum. Professional formation not only needs to be contextual, but it also needs to be regular and repeated. As William Sullivan has written, "[m]ost importantly, when ethical professional practices and standards are enacted over and over in

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<sup>134</sup> See, e.g., Hamilton et al., *supra* note 109, at 29 ("[F]aculty members . . . create[d] a curriculum and a culture in which each student can develop the knowledge and skills essential to becoming an excellent lawyer while also forming an ethical professional identity integrated with the student's faith and moral compass.")

<sup>135</sup> See Robert Rubinson, *Professional Identity as Advocacy*, 31 MISS. C. L. REV. 7, 9 (2012). Typically, large law firms have a professional identity with "no moral or political spin," just opposition to another large organization. *Id.* By contrast, "criminal defense attorneys and prosecutors assume mythical roles of good against evil, both seeking to bear the mantle of truth and justice." *Id.* at 26–27.

<sup>136</sup> See *supra* text accompanying note 54.

the course of training, students develop habits of heart and mind that shape their approach to their work for years to come.”<sup>137</sup>

The nature of identity itself requires regular and repeated formation opportunities. Carrie Yang Costello is a sociologist who had prior training and practice experience as a lawyer, and she has written a book about professional identity formation in training for two professions (one of which is law). In her book, Professor Costello notes that “our identities are like icebergs. The large bulk of them lies invisible to us below the surface of consciousness, while only a small part of them are [sic] perceptible to our conscious minds.”<sup>138</sup> The non-conscious bulk of identity is referred to by sociologists as “habitus.”<sup>139</sup> This includes taste, body language, and emotional identity.<sup>140</sup> When one’s habitus is in dissonance with the professional identity of one’s chosen profession, this leads in most cases to difficulty having success in the profession or added physical stress—and often both.<sup>141</sup> Only through repeated efforts to reconcile the two—or through finding a sub-specialty in the law that fits one’s personal identity better than most others and working to reconcile that—is one likely to reduce the dissonance between one’s identity and one’s profession. For these reasons, it is important to “consistently emphasize the development of professional identity and purpose throughout.”<sup>142</sup>

It is worth noting that law schools with a religious affiliation may have a head start in efforts to promote the formation of professional identity.<sup>143</sup> The University of St. Thomas School of Law is the home of the Holloran Center for Ethical Leadership in the Professions.<sup>144</sup> The school and Center, within a Catholic university, have been leaders in developing courses and teaching methodologies for professional formation.<sup>145</sup> And Regent University School of Law, host of this symposium on professional

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<sup>137</sup> Colby & Sullivan, *supra* note 5, at 421; *see also* CARNEGIE REPORT, *supra* note 1, at 191–92 (noting that the three apprenticeships—the cognitive, the practical, and the ethical-social—should be consistently integrated in law school curricula).

<sup>138</sup> CARRIE YANG COSTELLO, PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS 20 (2005). For a brief discussion of the psychological concept of personal identity, *see supra* note 50.

<sup>139</sup> COSTELLO, *supra* note 138.

<sup>140</sup> *Id.* at 20–22.

<sup>141</sup> *See id.* at 23.

<sup>142</sup> Colby & Sullivan, *supra* note 5, at 423.

<sup>143</sup> Jeffrey A. Brauch, *Faith-Based Law Schools and an Apprenticeship in Professional Identity*, 42 U. TOL. L. REV. 593, 598 (2011) (“Faith-based law schools are well-positioned to provide the professional identity training that Carnegie finds generally lacking in legal education today.”).

<sup>144</sup> *See* HOLLORAN CENTER FOR ETHICAL LEADERSHIP PROFS., <http://www.stthomas.edu/hollorancenter/> (last visited Apr. 10, 2015).

<sup>145</sup> *Id.*; *The Vision of a Catholic College in the Midwest*, U. ST. THOMAS, <http://www.stthomas.edu/aboutust/mission/> (last visited Apr. 10, 2015).



identity, is part of a faith-based university that provides an education "rooted in a Christian perspective."<sup>146</sup> At these schools, discussions around faith and morality are connected to their missions and are a part of their cultures.<sup>147</sup> To a large extent, their students self-select to these institutions because they already have a personal identity that is formed, at least in part, by the belief system that is consonant with the school's mission.<sup>148</sup> At law schools without such a foundation or culture, professional formation discussions are more likely to be met with skepticism.<sup>149</sup> In the Carnegie Foundation's study of clergy education, it was noted that "[m]any theological schools are more self-conscious about their reliance on the formative influences of the school's cultural practices . . . . [F]ormative communities of practice [are] a central mechanism of the third apprenticeship in theological education."<sup>150</sup> "Unfortunately," William Sullivan has noted, "the kind of intentionality with regard to campus culture as a formative mechanism that we see in clergy education is rare in most other professional schools."<sup>151</sup>

### III. TEACHING METHODOLOGIES FOR THE THIRD APPRENTICESHIP

#### A. *The Value of Simulations for the Third Apprenticeship*

What is becoming clear is that we need to not simply lecture about professional formation, but instead create realistic "situations" in which our students can be confronted with ethical questions, reflect on the decisions they make, and be guided by us as they form their own

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<sup>146</sup> *Regent Univeristy Law Review Symposium Schedule*, REGENT U. SCH. L., [http://www.regent.edu/acad/schlaw/student\\_life/studentorgs/lawreview/symposiumschedule.cfm](http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposiumschedule.cfm) (listing the events for a legal symposium titled "Raising the Bar: How Developing a Professional Identity Can Help You Break the Negative Lawyer Stereotype") (last visited Apr. 10, 2015); *Why Regent*, REGENT U., <http://success.regent.edu/index.php> (last visited Apr. 10, 2015).

<sup>147</sup> Brauch, *supra* note 143, at 602 (noting that, at Regent University School of Law, professional identity is a focus both inside and outside the classroom).

<sup>148</sup> *E.g.*, *Testimonials*, CENTER FOR ETHICAL FORMATION AND LEGAL EDUC. REFORM, <http://www.regent.edu/acad/schlaw/programs/cef/testimonials.cfm> (last visited Apr. 10, 2015) ("I knew that Regent was going to not only equip me academically and professionally, but it is also supportive of my values, viewing law as a means [of] glorifying God with our talents and knowledge."); *see also The Regent Law Difference*, REGENT U. SCH. L., <http://www.regent.edu/acad/schlaw/whyregentlaw/whyregentlaw.cfm> (last visited Apr. 10, 2015) (recruiting students interested in legal education based on "eternal principles of truth and justice [that] inform the way we should teach, study, and practice law").

<sup>149</sup> *See* LAW SCH. SURVEY OF STUDENT ENGAGEMENT, LSSSE LAW SCHOOL REPORT 2014: REGENT UNIVERSITY SCHOOL OF LAW 120 (2014) (identifying that 84.5% of Regent 3L's claim their law school experience "quite a bit" or "very much" helped them to develop a personal code of values and ethics, compared to only 54.3% of 3L's nationwide).

<sup>150</sup> Colby & Sullivan, *supra* note 5, at 417.

<sup>151</sup> *Id.*

professional identities. Seminars dedicated to creating space for professional reflection and formation serve an important role, but formation clearly needs to be repeated and regular throughout the curriculum.<sup>152</sup> What is needed is a methodology where this can take place in any subject-matter focused “doctrinal” course.

Fortunately, we already have that methodology—we just need to use it more. Teaching legal doctrine through simulations is a powerful and effective way of enabling professional formation because it is done in the context of the area of practice.<sup>153</sup> The *Carnegie Report* noted:

While simulated practice can be an important site for developing skills and understandings essential for practice, it can also provide the setting for teaching the ethical demands of practice. Lawyering courses that use simulation of client interviewing and counseling, for example, permit the introduction of ethical as well as technical problems in a setting that mimics for the student the unpredictable challenges of actual practice.<sup>154</sup>

Indeed, teaching through simulations is becoming more common in other forms of professional education, particularly medical education: “It is instructive to note that . . . medical education has been moving heavily into the use of simulation.”<sup>155</sup> Of course, medical education is different from legal education in many important ways, but the trend in medical education is “suggestive that increased use of the pedagogy of simulation is likely to prove a boon to teaching both practical skills and ethical-social development. Ethical engagement has practical dimensions that are more fully evident and can be examined and taught in conditions that simulate practice rather than in conventional classrooms.”<sup>156</sup>

As has been noted, the *Carnegie Report* recommends that more courses be designed to provide the learning of doctrine *in the context of practice* and to present the legal principles in such a way that students are exposed to situations that allow them to begin to form their identities as legal professionals.<sup>157</sup> Simulated practice experiences delivered through doctrinal simulations are ideal for this.

The question then becomes what those “situations” might look like. This Article offers a framework for contextual formation that should be applicable across the curriculum, from doctrinal classes to clinics. It involves a combination of guided steps that ideally take place in a particular order, called a Guidance Sequence for Formation of Professional Identity (GSFPI).

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<sup>152</sup> See sources cited *supra* note 137.

<sup>153</sup> CARNEGIE REPORT, *supra* note 1, at 158–59.

<sup>154</sup> *Id.* at 158.

<sup>155</sup> *Id.* at 159.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 195–97.

The sequence has four essential components: (1) a client representation, an exercise, or a writing assignment that presents an ethical dilemma as it appears in practice; (2) an identification by the student of the ethical quandary raised in completing the work; (3) a written expression by the student of the ethical issue as well as his reflection on his own decisions about how he resolved the dilemma; and (4) some form of written or oral feedback from the professor about the decisions and choices the student made and the quality and depth of the identification and reflection offered.<sup>158</sup>

This could be accomplished fairly easily in any clinic, externship, or simulation-based course, but there is no reason it could not also be accomplished in a traditional doctrinal course as well. It could be a separate assignment in the course, with a portion of the grade assigned to it. The feedback from the professor is more time-consuming in a large class, but not impossible with a well-designed rubric. Offering such situations for students to engage with regularly throughout the course is ideal, and a whole-course simulation is the best form of this teaching. Still, if such methodologies were employed even once in every (or even most) doctrinal courses, it would go a long way to achieve the goals of the *Carnegie Report's* intended integration.

In the Discovery Law class that I teach (a simulation-based class that is discussed in greater detail below), every discovery document the students prepare—and serve on their assigned opposing counsel—offers opportunities for *identification* of ethical issues, and the memos that accompany each assignment specifically ask the students to explain the choices they made and *reflect* on how and why they made those decisions.<sup>159</sup> In the final step of the sequence, I provide margin *feedback* on their memos, and one of the criteria in the grading rubric on each assignment addresses the accuracy and quality of the identification of the ethical issue as well as the depth and clarity of the reflection.<sup>160</sup>

Legal research and writing (LRW) professors should be working on how to introduce such GSFPI opportunities in the first-year course for three reasons. First, the *Carnegie Report* suggests that the formation of professional identity should be infused throughout the curriculum,<sup>161</sup> and

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<sup>158</sup> This discussion of a GSFPI has been adapted from my blog; for more, see David Thomson, "*Teaching*" *Formation of Professional Identity*, L. SCH. 2.0 (July 24, 2012, 1:46 PM), <http://www.lawschool2.org/lis2/2012/07/formation-of-professional-identity.html>.

<sup>159</sup> See David Thomson, Discovery Practicum Syllabus 1 (Spring 2015) (on file with the Regent University Law Review).

<sup>160</sup> See David Thomson, Discovery Practice Grading Rubric: Deposition (on file with the Regent University Law Review); David Thomson, Discovery Practice Grading Rubric: Requesting Document (on file with the Regent University Law Review); David Thomson, Discovery Practice Grading Rubric: Responsive Document [hereinafter Thomson, Responsive Document Rubric] (on file with the Regent University Law Review).

<sup>161</sup> See CARNEGIE REPORT, *supra* note 1, at 191–92.

obviously that would include LRW. Second, because LRW professors already do some of this (just not necessarily intentionally) and their class is the first one that law students take which simulates legal practice, it is important for the LRW class to introduce concepts of formation of professional identity. Third, it would give LRW professors opportunities for more connections with other parts of the curriculum working on formation of professional identity, most particularly the clinic and the externship program.

Fortunately, it should not be difficult to do. Perhaps one way might be to have an ethical dilemma arise about whether to include a borderline negative case in a brief. That is a writing assignment that already exists in the LRW course, and sometimes this does happen.<sup>162</sup> But LRW professors do not necessarily ask the students to identify and reflect on the choice they made about that case, and as a result, they might miss an opportunity for response and guidance to the students, which would complete each of the steps in a GSFPI. With a modicum of intention and planning, this sort of exercise could be accomplished in many courses currently in the law school curriculum.

At the University of Denver, we developed a model for upper class simulations that are designed to achieve the *Carnegie Report's* call for integration of the three apprenticeships.<sup>163</sup> This model, known as Carnegie Integrated Courses, is designed to integrate doctrine, skills, and professional identity formation in any law school course.<sup>164</sup> Typically taught in a simulation format, it can be applied to any legal doctrinal subject.<sup>165</sup> These courses can often provide necessary skills in a safe environment, and they can serve to prepare students to take a clinical course next, perhaps followed by an externship experience.

It is likely that these sorts of whole-course simulations—courses that intentionally integrate the three apprenticeships and use a systematic approach such as the GSFPI—may be the best pedagogy for the development of the third apprenticeship in our students. This is so because students learn the doctrine in the context that they apply it, so

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<sup>162</sup> See ASS'N OF LEGAL WRITING DIRS., LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY iv (2010), available at <http://www.alwd.org/wp-content/uploads/2013/02/2010-survey-results.pdf>.

<sup>163</sup> *Compare Course Simulations: Carnegie Integrated Courses*, U. DENVER STURM C. L., <http://www.law.du.edu/index.php/experiential-advantage/course-simulations> (last visited Apr. 10, 2015) [hereinafter *Carnegie Integrated Courses*] (describing the Carnegie Integrated Courses, which are mostly simulation-based and practice-oriented), with CARNEGIE REPORT, *supra* note 1, at 12 (suggesting law schools adopt curricula that integrate the three apprenticeships throughout). The *Carnegie Report* also suggested that models for integration of the apprenticeships already existed in the legal writing programs of many law schools. CARNEGIE REPORT, *supra* note 1, at 104.

<sup>164</sup> *Carnegie Integrated Courses*, *supra* note 163.

<sup>165</sup> *Id.*

they are confronted with ethical issues as they arise in practice, and they must resolve them to complete the assignment and reflect on their formation. While clinical and externship opportunities do this as well, it is impossible in those live-client representations to expose students to as many of the ethical issues that arise as can be done in the safer environment of a simulation.

Further, a simulation that places students in role relationships to each other—such as opposing counsel—creates a built-in normative benefit. Generally speaking, students are not willing to submit documents to each other that would be so sloppy or late as to inhibit the learning experience for their classmates. This might create a normative behavioral benefit: if their first experience (and then repeated experience) is in the mode and expectation of professional behavior, perhaps that will inculcate such behaviors and values as they enter practice.

*B. The Value of Experiential Learning for the Third Apprenticeship*

There has been much discussion in legal education recently about the benefits of experiential learning as a pedagogical design. Schools across the country have been expanding their experiential offerings, and the ABA has recently required that law schools increase these offerings.<sup>166</sup> But there remains some confusion about what experiential learning actually entails and why it can be so beneficial for student learning and formation.<sup>167</sup>

My recent article offered a history and background for experiential learning and provided a new definition of experiential learning which intentionally includes opportunities for professional formation.<sup>168</sup>

The term "Experiential Learning" refers to methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law.<sup>169</sup>

There are several essential attributes of this definition that deserve highlighting. Experiential learning must focus on the students'

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<sup>166</sup> See David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 5 (2014).

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* at 19–20.

<sup>169</sup> *Id.* at 20.

experience, place students *in the role of attorneys*, intentionally emphasize the *formation of professional identity*, and effectively communicate to students that the concepts learned in law school are merely the foundation to their ever-expanding knowledge of the legal practice.<sup>170</sup>

This definition can be made to apply to many different contexts, but one must ask several questions to pinpoint its application to a particular course.<sup>171</sup> One of these questions is focused on the third apprenticeship: “Do you include opportunities for student self-reflection (in writing) about the experience of being ‘in role’ so as to help them form their professional identities as lawyers?”<sup>172</sup> By asking this question, a professor can determine whether he has adequately planned for the formation of professional identity in his students through opportunities of student reflection. Although self-reflection is not *required* by the definition, a course that plans these opportunities meets at least one of the goals of experiential education. Obviously, courses without opportunities for students to reflect, but with other structures in place for students to form their professional identities, can still be classified as “experiential.”<sup>173</sup> This could also be true of virtually any course in the law school curriculum. Any course could incorporate one or more GSFPI designed modules that fit the substantive area of law being taught. It is also possible to do this throughout a course, and what follows is an example of that sort of course design.

#### IV. AN EXAMPLE COURSE IN DISCOVERY LAW

For over twenty years (on and off), I have taught a Civil Discovery Litigation course that is a whole-course simulation and which uses the GSFPI method for the intentional formation of professional identity. A typical pre-trial course might be thought of as just a skills course, leaving to some other course the teaching of the applicable doctrine. Most schools do not have a course focused just on civil discovery law, in part because it is believed that the subject is sufficiently covered in the first-year Civil

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<sup>170</sup> See *id.* John Dewey emphasized teaching students how to learn, saying, Collateral learning in the way of formation of enduring attitudes . . . may be and often is much more important than the spelling lesson or lesson in geography or history that is learned. For these attitudes are fundamentally what count in the future. The most important attitude that can be formed is that of desire to go on learning.

JOHN DEWEY, *EXPERIENCE AND EDUCATION* 48 (1938).

<sup>171</sup> See Thomson, *supra* note 166, at 21–22.

<sup>172</sup> *Id.* at 22.

<sup>173</sup> Trial Practice is an example. See *id.* at 23. Practice-heavy courses like this would require only a bit of planning to transform them into explicitly formative courses. *Id.*

Procedure course.<sup>174</sup> Unfortunately, while all students take that course in the first year, they rarely learn much of the detail of the discovery phase in a civil litigation during that course. A typical Civil Procedure casebook contains 1200 pages and allocates but eighty pages to the discovery rules.<sup>175</sup> While some courses might direct some effort at those rules, the overwhelming focus of the first-year course is on such mainstream topics as jurisdiction, venue, pleading, and the *Erie* doctrine.<sup>176</sup> This is done for two primary reasons. First, those are subjects that can be tested on a final exam more substantively than the discovery rules can be tested, and second, because those are topics tested on the bar exam.<sup>177</sup> This is all understandable (and perhaps even appropriate), but it creates a problem: a law school graduate going into a litigation practice will have a good grounding in those subjects that can be tested on a summative exam but will rarely have any idea how to actually draft a set of interrogatories or understand why one would want to.

The Discovery Practice course is focused on the doctrine of the twelve Federal Rules of Civil Procedure that govern discovery.<sup>178</sup> While one could teach such a course in a "traditional" format, with lectures and a final exam, such a structure would not address the *Carnegie Report's* concerns about proper use of the upper-level years in law school and the integration of doctrine, skills, and professional identity formation.<sup>179</sup> Therefore, the structure of this course is set fully around a simulated litigation that takes place during the course, led by the students in teams of two.<sup>180</sup> Each team of two students is simulating the same litigation, so there are eight to ten versions of the case going on in each administration of the course.<sup>181</sup> In such a course design, students learn about Rule 33,<sup>182</sup> for example, by studying the Interrogatories to Parties rule itself, discussing key cases that interpret it, and learning various strategies for how and when to use interrogatories in litigation. Then the students *prepare* a set of

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<sup>174</sup> See Arin Greenwood, *School of E-Discovery: Online Course Aims to Help Lawyers Bone Up*, A.B.A. J., Apr. 2011, at 30, 30 (noting that lawyers and law students have limited access to courses on e-discovery).

<sup>175</sup> See, e.g., RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH*, at ix–xi (5th ed. 2009).

<sup>176</sup> See, e.g., *id.* at ix–x.

<sup>177</sup> See NAT'L CONFERENCE OF BAR EXAM'RS, *MBE SUBJECT MATTER OUTLINE 1* (2014), available at [http://www.ncbex.org/assets/media\\_files/MBE/MBE-Subject-Matter-Outline.pdf](http://www.ncbex.org/assets/media_files/MBE/MBE-Subject-Matter-Outline.pdf) (including jurisdiction, venue, pleading, and law applied by federal courts as Civil Procedure topics tested on the MBE).

<sup>178</sup> Thomson, *supra* note 159.

<sup>179</sup> See *CARNEGIE REPORT*, *supra* note 1, at 12.

<sup>180</sup> See Thomson, *supra* note 159.

<sup>181</sup> See *id.* at 7.

<sup>182</sup> FED. R. CIV. P. 33.

interrogatories, and at the next class they *serve* their assigned opposing counsel the set that they have drafted.<sup>183</sup> This continues throughout the course, and the students draft a dozen discovery documents, one per week.<sup>184</sup> In this simulation course design there is still class time, of course, and there is doctrine to cover, but there are many more active learning methods of teaching that can be implemented.

The problem set the students work on during the course is a product liability prescription drug case.<sup>185</sup> It is an “ill-structured problem”<sup>186</sup> in the sense that the case has a range of reasonable outcomes, although it is not entirely unpredictable how it is likely to turn out. At the beginning of the course, students are given a précis about the problem, a complaint and answer, and a portion of the case file.<sup>187</sup> They spend the rest of the course learning about the rules, cases, and strategy in class, and then they *use* the discovery tools they have learned to find out the rest of the information that is available—just as in a real litigation.<sup>188</sup> In this way, the students are producers of knowledge about the case, but there are also ways in which they produce the knowledge about the discovery rules they learn during the course. One of those ways is working in collaborative groups to research one of the lesser important rules of discovery law (such as Rule 28—Persons Before Whom Depositions May Be Taken<sup>189</sup>) and present to the class what they have learned.<sup>190</sup> There are five of these groups, and they each prepare a wiki-based research site and present in class from the site they have prepared. This way, other students have access to the sites on these rules to reference throughout the rest of the course.

In the Discovery course, as with many other law school courses, students come into the class with well-formed notions of how the litigation system works or does not work, drawn mostly from popular media such as TV shows and movies. Typically, attorneys are depicted in the popular media as unethical sharks who use the litigation system for combat, often

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<sup>183</sup> See Thomson, *supra* note 159, at 3.

<sup>184</sup> See *id.* at 3–5.

<sup>185</sup> David I. C. Thomson, *About S&V: Discovery Practice*, DISCOVERY SKILLS, <http://www.discoveryskills.com/aboutdp.htm> (last visited Apr. 10, 2015) [hereinafter Thomson, *About Discovery Practice*]; see also Thomson, *supra* note 159, at 2.

<sup>186</sup> See David H. Jonassen, *Instructional Design Models for Well-Structured and Ill-Structured Problem-Solving Learning Outcomes*, 45 EDUC. TECH. RES. & DEV. 65, 68 (1997); see also DAVID H. JONASSEN, *LEARNING TO SOLVE PROBLEMS: AN INSTRUCTIONAL DESIGN GUIDE 4* (2004).

<sup>187</sup> These documents are provided in the assigned textbook. See Thomson, *About Discovery Practice*, *supra* note 185.

<sup>188</sup> See Thomson, *supra* note 159, at 1–5.

<sup>189</sup> FED. R. CIV. P. 28.

<sup>190</sup> See Thomson, *supra* note 159, at 4.



using it to unfairly overwhelm their opponents.<sup>191</sup> The design of the Discovery course is to put students into nearly "real" situations wherein they must represent a client, work with an opposing counsel, conduct a deposition, and ultimately reach a settlement. Through these stages of the course, the students can see for themselves that—at least most of the time—it is not about "winning" the case for a client, but it is more about managing a process according to the governing rules and reaching an acceptable result for the client.<sup>192</sup>

Because over ninety-eight percent of cases settle (at least in federal court), the course ends with a settlement negotiation, which the students conduct themselves with the professor only acting as a facilitator where needed.<sup>193</sup> In some cases, the professor acts as a student attorney's client (depending on which side the student is representing). Almost every time, students successfully settle the case within a fairly broad, but still reasonable, range of settlement terms.

In a traditional course, the professor can lecture, explain, or tell war stories about the subject matter of the course. But when students learn on a metacognitive level through exercises such as a mock deposition or a settlement conference, they learn the subject of the course much more deeply, and often in a personal way.<sup>194</sup> Further, the simulation puts them in situations where they have to begin to form their own professional identity and consider difficult questions such as "How will I behave in this situation as an attorney?" and "What kind of attorney do I want to be: an obstreperous one or a cooperative one?" or more simply: "What is my style of lawyering going to be?"

Further, with each discovery document the students prepare through the course of the semester, they also prepare a "strategy and reflection" memo to the professor detailing their planned and attempted strategies in the particular document they drafted.<sup>195</sup> In that memo, they also address the ethical issues they faced and how they resolved them.<sup>196</sup> This feature of the course also provides an opportunity for metacognitive learning and further development of the students' professional identity.

As we learn more about assessment in law school, we have come to know that the more explicit we can be with our students about our

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<sup>191</sup> See Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 2–3 (1999).

<sup>192</sup> Any of these individual discovery modules could also be conducted in the first-year Civil Procedure course.

<sup>193</sup> See Thomson, *supra* note 159, at 1, 5.

<sup>194</sup> See CARNEGIE REPORT, *supra* note 1; see, e.g., Thomson, *supra* note 159.

<sup>195</sup> Thomson, *supra* note 159, at 7.

<sup>196</sup> *Id.*

learning outcomes for the course, the better their learning will be.<sup>197</sup> Therefore, because the formation of professional identity is a learning outcome I have for the course, I am explicit about that on the first page of the syllabus:

[T]he learning objectives for this course are that, by the end of the course, you will be able to:

- Recognize and apply the twelve Federal Rules of Civil Procedure that pertain to discovery
- Recognize how and when to use the most common litigation documents
- Prepare such documents in a simulated litigation
- ....
- Identify and evaluate ethical dilemmas that arise in the discovery context
- ....
- Take and defend a deposition
- Compare options and negotiate a settlement with opposing counsel
- ....
- Use these opportunities to reflect intentionally on the formation of your professional identity.<sup>198</sup>

Because a good discovery document does not necessarily reveal its strategy and goals to opposing counsel, I have students write a memo to me each week about each document they prepare.<sup>199</sup> Those memos fit a model that I describe for the students as follows:

The memos should address at least these three topics: 1) *methods and approaches*, 2) *strategy*, and 3) *formation of professional identity*. For the first topic, *methods and approaches*, please provide information about how you developed and prepared the document, such as your starting point and adjustments you made. For the second topic, please describe your *strategy* in preparing the document—what are you trying to learn from the opposing party, and why did you take the approach you did? For the third topic, *formation of professional identity*, please a) identify any ethical issues you encountered in preparing the document, b) describe how you resolved those ethical issues, c) reflect on how the

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<sup>197</sup> Ciara O'Farrell, *Enhancing Student Learning Through Assessment: A Toolkit Approach*, DUBLIN INST. OF TECH. 8, available at [http://www.tcd.ie/teaching-learning/academic-development/assets/pdf/250309\\_assessment\\_toolkit.pdf](http://www.tcd.ie/teaching-learning/academic-development/assets/pdf/250309_assessment_toolkit.pdf) (last visited Apr. 10, 2015).

<sup>198</sup> Thomson, *supra* note 159 (including a slightly abbreviated set of the learning outcomes for the course).

<sup>199</sup> *Id.* at 8.

decision you made contributes to or is consistent with your own formation of professional identity as a lawyer.<sup>200</sup>

Finally, the fourth step is to provide some feedback. As assessment professionals say, "[w]e should measure what we value,"<sup>201</sup> so if we value this learning outcome, we must measure how the students are doing in their formation. Thus, twenty percent of the grade for each week's assignment includes the following one-to-five scale:

ETHICS / REFLECTION (20%)

- 1 Identification of ethical issues is poor or lacking (such as objecting to answer a legitimately focused question). Document and memo seems mechanical and lacks reflection.
- 2 A few ethical identification errors made. Document and memo show some thoughtful reflection.
- 3 Only one or two ethical identification concerns in the document and memo. Some thoughtful reflection and clarity of purpose is shown in the document.
- 4 No ethical identification concerns, and the document and accompanying memo show significant thoughtful reflection in preparing the document.
- 5 This is a student who is becoming confident with discovery, identifies all ethical grey areas, and uses the simulation to reflect with depth and clarity on decisions made while balancing the various competing concerns.<sup>202</sup>

It would be easy to think that students would not take this part of the assignments seriously. But quite the reverse is true. Here are a few examples of what students have said about their work on the discovery documents using this methodology:

"The central ethical dilemma of discovery came into sharp focus during this exercise. I felt torn on several questions . . . For each, I tried to imagine standing in front of a judge and explaining the choice I had made."<sup>203</sup>

"[W]hile I certainly could have phrased my interrogatories in a more aggressive manner . . . I chose not to. I felt it was more necessary to establish a generally amicable relationship with opposing counsel so that

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<sup>200</sup> These directions exemplify cultivating both technical skills and professional identity formation. David Thomson, Discovery Practicum Memo Instructions (on file with author).

<sup>201</sup> Robert Coe & Carol Taylor Fitz-Gibbon, *School Effectiveness Research: Criticisms and Recommendations*, 24 OXFORD REV. EDUC. 421, 433 (1998).

<sup>202</sup> Thomson, Responsive Document Rubric, *supra* note 160.

<sup>203</sup> Student 3, Memorandum of Strategy for Answers to Interrogatories (on file with the Regent University Law Review) (used with permission).

future discussions relate specifically to the main points of contention . . . .”<sup>204</sup>

“I do not want lawyers, clients, or judges to perceive me as an attorney who walks too close to the unethical line, occasionally crossing it. However, I also want to protect my clients’ interests.”<sup>205</sup>

These student reflections are quite typical, and they indicate that the regular *guided sequences* provided in this simulation course give students the opportunity to explore the *personal meaning* of the legal work they are planning to do and to begin to feel the weight of *responsibility* that comes with being a lawyer.

### CONCLUSION

The *Carnegie Report* argues that the professionalism problem starts in law school and that it is not about mundane things like timeliness and respect for judges, but rather is founded in the professional identity of lawyers.<sup>206</sup> Further, it suggests that professional identity is governed only at its base by the Model Rules but is mostly about notions of duty and responsibility to society and the rule of law upon which that society is based.<sup>207</sup> The *Carnegie Report* called on law schools to give this third apprenticeship greater attention, focus, and intentionality, and to do so in a curriculum that integrates professional identity with the essential doctrinal knowledge and skills required to function as an attorney.<sup>208</sup>

Some schools are working hard to address this call for reform in legal education.<sup>209</sup> Innovative courses have been developed and taught to students in both the first year and upper-class years.<sup>210</sup> Legal educators who have always addressed themselves to such matters (such as clinicians and legal writing professors) have become more intentional about what they are doing.

However, this Article argues that there is much more to be done, and the call for integration has not yet been met. The barriers to achieving integration seem high, but they are not. Experiential learning opportunities are already expanding, and these learning environments are ideally suited to facilitate the professional formation of students. Even outside of experiential learning courses, modules that implement a guided

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<sup>204</sup> Student 4, Memorandum on Defendant’s Interrogatories (on file with the Regent University Law Review) (used with permission).

<sup>205</sup> Student 5, Plaintiff’s Response to Interrogatories (on file with the Regent University Law Review) (used with permission).

<sup>206</sup> See CARNEGIE REPORT, *supra* note 1.

<sup>207</sup> *Id.* at 129.

<sup>208</sup> *Id.* at 196.

<sup>209</sup> See sources cited *supra* note 39; see also text accompanying notes 143–51.

<sup>210</sup> See *supra* Part II.B.

sequence for professional identity formation can be fit into any course. This Article provides a methodology for doing so.

When legal education achieves apprenticeship integration throughout the curriculum, it will have moved itself substantially forward in the direction of addressing its limitations. When this is achieved, the impact on the legal profession will likely be profound in ways that have long been desired.

THE EMPEROR HAS NO CLOTHES, BUT DOES ANYONE  
REALLY CARE? HOW LAW SCHOOLS ARE FAILING TO  
DEVELOP STUDENTS' PROFESSIONAL IDENTITY AND  
PRACTICAL JUDGMENT

*Benjamin V. Madison, III\** and *Larry O. Natt Gantt, II\*\**

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#### INTRODUCTION

Criticism of law schools has come often of late. Although some of this criticism may be unjustified, this Article contends that the deficiency exposed in two recent and influential studies of law teaching is accurate. Most law schools fail to cultivate students' professional ethical identity and practical judgment. The two studies, one by the Carnegie Institute for the Advancement of Teaching and Learning in *Educating Lawyers (Carnegie Report)*,<sup>1</sup> and the other by the Clinical Legal Education Association in *Best Practices for Legal Education (Best Practices Report)*<sup>2</sup> (collectively, the 2007 Reports), represent arguably the most comprehensive evaluations of law school education in more than a century. The reports categorize law teaching in three broad categories: (1) analytical skills or legal analysis; (2) practical and experiential lawyering skills; and (3) development of a "professional identity"—a rich but often misunderstood term that encompasses a person's self-concept, values, and philosophy of lawyering.<sup>3</sup>

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<sup>1</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

<sup>2</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES].

<sup>3</sup> The *Carnegie Report* uses the term "professional identity." Although the *Best Practices Report* uses the term "professionalism," it describes this concept similarly to how "professional identity" is described in the *Carnegie Report*. See BEST PRACTICES, *supra* note 2, at 207 (regarding analytical skills); *id.* at 165 (regarding lawyering skills); *id.* at 27–29 (regarding cultivation of professional identity); CARNEGIE REPORT, *supra* note 1, at 27–29 (providing an overview of these "three apprenticeships"); *id.* at 5–6 (regarding analytical skills); *id.* at 87–89 (regarding lawyering skills); *id.* at 126 (regarding cultivation of professional identity).



In assessing law schools in each category, the two reports rely not only on empirical studies and assessments by respected educators, but also on their own comprehensive investigation of law school teaching.<sup>4</sup> The studies found that students received excellent instruction in developing analytical skills.<sup>5</sup> The reports then observe how law schools are addressing the need to develop students' practical lawyering skills but that schools still have much work to do in this area.<sup>6</sup> Finally, the reports identify that the most glaring deficiency in law teaching is the failure to cultivate professional ethical identity and practical judgment.<sup>7</sup> Even more disturbing, the reports suggested that law schools, perhaps unintentionally, prepared students in a manner that led them to engage in unprofessional conduct, to be prone to personal dissatisfaction, and to exercise poor judgment in practice.<sup>8</sup>

This Article explores the meaning of professional identity and of practical judgment. By understanding these concepts more precisely, the reader should appreciate the connection that the 2007 Reports draw between the deficiency in professional formation and the ills that have plagued the legal profession—lawyer dissatisfaction, unethical and unprofessional conduct, and poor representation of clients.<sup>9</sup> Law schools have responded to the *Carnegie* and *Best Practices Reports'* recommendation to enhance lawyering skills training and experiential learning.<sup>10</sup> Conversely, most law schools have either ignored or responded insufficiently to the reports' appeal to concentrate on professional formation as fully as on legal analysis and skills.<sup>11</sup>

This Article considers the potential reasons for the delay in embracing the challenge to help law students cultivate a professional identity so that they can exercise practical judgment in practice. Ultimately, the Article concludes that law schools would more likely embrace this challenge if (a) the meaning of professional identity formation were clear, (b) legal educators more fully appreciated the connection between such formation and the exercise of practical judgment in law practice, and (c) law schools realized that the educational methods

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<sup>4</sup> BEST PRACTICES, *supra* note 2, at 1; CARNEGIE REPORT, *supra* note 1, at 15–17.

<sup>5</sup> See BEST PRACTICES, *supra* note 2, at 211; CARNEGIE REPORT, *supra* note 1, at 2.

<sup>6</sup> See BEST PRACTICES, *supra* note 2, at 171–72; CARNEGIE REPORT, *supra* note 1, at 89.

<sup>7</sup> See BEST PRACTICES, *supra* note 2, at 81; CARNEGIE REPORT, *supra* note 1, at 31, 188.

<sup>8</sup> See BEST PRACTICES, *supra* note 2, at 35–36; CARNEGIE REPORT, *supra* note 1, at 140–42.

<sup>9</sup> See CARNEGIE REPORT, *supra* note 1, at 127–28 (citing studies analyzing the “growing sense of demoralization in legal practice”).

<sup>10</sup> See *infra* notes 92–101 and accompanying text.

<sup>11</sup> See *infra* notes 102–09 and accompanying text.

that would nurture growth in ethical identity and judgment are not as difficult to design and implement as many believe.

This Article unfolds in four parts. Part I clarifies the meaning of professional identity formation and explores the connection between such formation and the development of practical judgment or wisdom. Part II addresses why ethical professional identity formation and cultivation of practical judgment ought to be priorities. This Part specifically discusses research from the *Carnegie Report*, the *Best Practices Report*, and other sources that affirm the connection between forming ethical professional identity and the degree of fulfillment a lawyer finds in practice.

Part III gathers the evidence of disparity in law school curricula. This section discusses evidence demonstrating that, among ABA-approved law schools, (1) doctrinal courses heavily outweigh either skills and experiential courses or ethics and professional formation courses and (2) skills and experiential courses outweigh ethics and professional formation courses. Part III further explores the reasons that may explain law schools' delay in addressing the call to develop students' ethical professional identity and judgment.

Part IV presumes that law schools will, at some point, begin to develop educational methods that address the goals of forming professional identity and practical judgment. The section clarifies a threshold issue that much of the literature on professional identity formation fails to address—the need to approach students' formation as an incremental process. Thus, the concluding section of this Article offers recommendations which schools can use to structure an integrated program designed to help students learn skills such as self-awareness before they advance to exercises that develop reflection and decision-making skills. This section also makes concrete recommendations on structuring curricula and suggests teaching methods designed to nurture students' ethical professional identity and practical judgment.

#### I. DEVELOPING PROFESSIONAL ETHICAL IDENTITY AS A PREREQUISITE TO EXERCISING PRACTICAL JUDGMENT IN LAW PRACTICE

Neither law schools nor others can appreciate the depth of the implications of the deficiency exposed in the *Carnegie Report* and the *Best Practices Report* without a clear understanding of “professional identity” and “practical judgment.” The concept of “professional identity” is a concept new to legal education. It seeks many of the same goals as the professionalism movement in law but is not synonymous with professionalism. As explained below, the concept focuses not so much on external conduct, but rather on internal beliefs and standards. The concept of practical judgment is a modern term for Aristotle's notion of

“phronesis.”<sup>12</sup> The objective embraced here is the kind of counseling and decision-making that engages all of a person’s faculties, including one’s intellect, emotional intelligence, and experience.

This Part begins with a brief introduction to the centrality of these concepts to students’ formation. A more extended discussion in Part II.A. then demonstrates the impact on lawyers who lack the skills that accompany intentional formation and development of judgment. Conversely, Part II.B. discusses lawyers who have the integrity and sound judgment characteristic of such formation. These lawyers avoid the ills that afflict the legal profession. They appear to have formed a professional identity and developed wise judgment despite the lack of attention in law school and can credit good mentors. Part II.B. also addresses the development in practice of professional identity and judgment, as well as changes in the legal environment that have made such mentoring less likely.

#### *A. The New Concept: Professional Identity Versus Professionalism*

The concept referred to as “professional identity” needs to be clarified before one can appreciate its significance to a lawyer’s development and its connection to the ancient concept of phronesis, or practical wisdom. Scholars have already had difficulty agreeing on a definition of “professionalism.”<sup>13</sup> It should be no surprise, then, that “professional identity” has required clarification. The phrase is not clearly defined even within the seminal reports introducing the concept.<sup>14</sup>

One thing, however, is clear: professionalism and professional identity formation are not the same thing. Although lawyer professionalism has been defined in various ways, its focus historically has been on the outward conduct the legal profession desires its members to exhibit.<sup>15</sup> Lawyer professionalism has often referred to adherence to

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<sup>12</sup> See ARISTOTLE, THE NICOMACHEAN ETHICS bk. VI, at 106 (David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

<sup>13</sup> Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 480 (2008).

<sup>14</sup> See Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 200 (2012).

<sup>15</sup> The professionalism movement in the American legal system has its own history. The movement can be traced to the ABA’s Commission on Professionalism, prompted by the urging of then Chief Justice Warren E. Burger. See, e.g., Donald J. Weidner, *The Common Quest for Professionalism*, 78 FLA. B.J., March 2004, at 18, 18. At its August 1988 meeting, the ABA House of Delegates further encouraged this movement by adopting as a policy that state and local bar associations “encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers’ creed of professionalism.” THOMAS D. MORGAN & RONALD D. ROTUNDA, 2015 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 661 (2015). The Commission has helped state bar associations throughout the country adopt statements on professionalism and civility. A recent 2011 count indicates

standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others.<sup>16</sup>

Civility and respect for others are undeniably important to a lawyer's professional identity,<sup>17</sup> but professional identity engages lawyers at a deeper level because it challenges lawyers to internalize principles and values such that their professional conduct flows naturally from their individual moral compass. Professional identity therefore encompasses the manner in which a lawyer internalizes values such that, for instance, she views herself as a civil person who treats others with civility and respect even in hotly disputed matters. The only difference between a lawyer told to be professional who acts in this way and one who acts this way because of her professional identity is that the lawyer *herself* believes that this is the way she should act. Incorporating "identity" into the description of this concept thus is central to the innovation it brings.<sup>18</sup> It reflects the difference between someone who acts because an external influence (such as a bar association or judge) says that is how she "should" act and someone who has internalized those standards and herself believes that is how she should act.

After discussing the struggle to articulate the deep meaning of "professional identity," one scholar offers the following definition: "Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being."<sup>19</sup> Others have recognized that engaging students in this process of professional identity development "put[s] students up against the fundamentals of who they are, what they want the world to be, and their role in, and responsibility for, creating both."<sup>20</sup>

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that thirty-two states have adopted official statements on professionalism. See Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 107 & n.53 (2011) (listing jurisdictions that have adopted statements on professionalism).

<sup>16</sup> See CARNEGIE REPORT, *supra* note 1, at 126–27.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 132.

<sup>19</sup> Floyd, *supra* note 14, at 201–02; see also Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 430 (2005) [hereinafter Krieger, *Inseparability*].

<sup>20</sup> Patti Alleva & Laura Rovner, *Seeking Integrity: Learning Integratively from Classroom Controversy*, 42 SW. L. REV. 355, 370 (2013).

*B. An Ancient (but Timeless) Concept: Phronesis—Practical Wisdom or Good Judgment*

Intimately tied with professional identity formation is the goal that lawyers act professionally as part of who they are, and, as a result of their integrity, develop the practical wisdom and good judgment required to practice law. As previously mentioned, Aristotle's *Nicomachean Ethics* is the source of the classical concept called "phronesis."<sup>21</sup> Aristotle viewed practical wisdom as the cardinal virtue implicit in the other virtues, including courage, self-control, fairness, gentleness, loyalty, friendliness, and honesty.<sup>22</sup> Significantly, Aristotle's emphasis was on one who knew how to employ these virtues "practically" in human affairs in order to be wise.<sup>23</sup> Good judgment required a combination of intellectual and moral considerations.<sup>24</sup> As one scholar correctly assessed Aristotle's conception of practical wisdom:

The objective is not to seek truth abstractly and let the chips fall where they may, but to give due consideration to moral concerns and the immediate, human consequences of our actions. The point is that how we exercise judgment in legal practice depends on both our mental development and our moral development.<sup>25</sup>

A recent book by psychologist Barry Schwartz and political scientist Kenneth Sharpe titled *Practical Wisdom: The Right Way to Do the Right Thing*<sup>26</sup> offers helpful insights on teaching good judgment. One aspect of applying practical wisdom that Schwartz and Sharpe highlight is the need to develop skill in balancing empathy with detachment as one reaches a decision.<sup>27</sup> As another scholar explains the same concept,

Being empathetic requires heightened sensitivity to the interpersonal dynamics of human relationships . . . . If I am to put myself in someone else's shoes, I need to imagine how things look from the other's standpoint. . . .

. . . Having spotted the potentially relevant issues, one has to step back and decide what really needs to be acknowledged and what does not.<sup>28</sup>

Although Schwartz and Sharpe do not directly apply their interpretation of Aristotelian principles to legal education, Professor Daisy Hurst Floyd,

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<sup>21</sup> ARISTOTLE, *supra* note 12.

<sup>22</sup> *See id.* at 106–07, 116.

<sup>23</sup> *See id.* at 107.

<sup>24</sup> *Id.* at 114–15.

<sup>25</sup> Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258 (1998) [hereinafter Aaronson, *Practical Judgment*].

<sup>26</sup> BARRY SCHWARTZ & KENNETH SHARPE, *PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING* (2010).

<sup>27</sup> *See id.* at 39–41.

<sup>28</sup> Aaronson, *Practical Judgment*, *supra* note 25, at 269.

a pioneer in advocating formative education in law schools, has gleaned from Schwartz and Sharpe's work the following principles that help in forming both the professional identity and practical wisdom of law students:

1. Know the proper aim or purpose of both being a lawyer and of this particular representation;
2. Know how to improvise, which requires "balancing conflicting aims and interpreting rules and principles in light of the particularities" of the situation;
3. Know how to read context and to see the particularities in a situation;
4. Know how to take the perspective of another, including developing empathy for others;
5. Know how to make emotion "an ally of reason;" and
6. Know how to make use of their accumulated experiences as a person and lawyer.<sup>29</sup>

Significantly, Aristotle referred to practical wisdom as a "faculty."<sup>30</sup> A faculty in Aristotle's view could be learned, nurtured, and taught.<sup>31</sup> Without appreciating Aristotle's emphasis on the need to apply a faculty to the infinite variety of human circumstances, and without putting the philosopher's lessons into a modern context, some perceive Aristotle's emphasis on virtues as setting an unrealistic standard.<sup>32</sup> However, the emphasis Aristotle places on the combination of intellect and moral or ethical sensitivity—and on how the key to good judgment is being able to apply both in the context of human life—shows that practical wisdom is within the reach of those who seek it. One's judgment will improve with experience, and it can also be developed through instruction. A legal educator who aims to teach practical judgment in clinical courses says it this way:

[P]ractical judgment is the process by which we take into account relevant information and values, and then determine what ought to take priority in a particular context. To help students improve their judgment, we need to alert them to a variety of . . . considerations, some information-based and some value-based, that affect legal problem solving.<sup>33</sup>

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<sup>29</sup> Floyd, *supra* note 14, at 205–06 (footnotes omitted) (citing SCHWARTZ & SHARPE, *supra* note 26, at 25–26).

<sup>30</sup> See ARISTOTLE, *supra* note 12, at 112–13.

<sup>31</sup> See *id.* bk. X, at 199–200.

<sup>32</sup> See Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 261 (2002) (stating that the "perfect 'Aristotelian agent'" exercising practical wisdom would have to inhabit a fictional world, whereas lawyers inhabit the real world and presumably cannot be "perfect 'Aristotelian agents,'" though they can do their best in circumstances to reach decisions).

<sup>33</sup> Aaronson, *Practical Judgment*, *supra* note 25, at 262.

In other words, students can learn the process of exercising judgment. They ought to improve as they gain experience, but the notion that this faculty is reserved for a few is at best, mistaken, and at worst, elitist.

The next sections, as noted above, will underscore how formational education and developing practical judgment impact a lawyer's quality of life, the degree to which lawyers value civility and other professional conduct, and finally, their effectiveness in representing clients. Lawyers who leave law school and enter practice without the development of professional identity skills such as self-awareness, ethical decision-making, or practical judgment tempt the prospect of not only dissatisfaction, but also dysfunction.<sup>34</sup> By contrast, lawyers who have formed these skills, identity, and judgment are more fulfilled and are more inclined to treat others professionally and represent their clients well.<sup>35</sup>

## II. THE CONNECTION BETWEEN FORMATION OF PROFESSIONAL IDENTITY AND JUDGMENT, A LAWYER'S QUALITY OF LIFE, AND THE QUALITY OF LEGAL SERVICES THE LAWYER PROVIDES

Significant data now supports the need for lawyers to develop a professional identity and be equipped to make good judgments. We have too much evidence showing the link between the degree to which law students develop skills associated with professional identity—including the ability to make judgments consistent with their internal values—and the extent to which they are either fulfilled in practice and live healthy lives or are unfulfilled and develop unhealthy, dysfunctional means of coping with their dissatisfaction.<sup>36</sup> If nothing else, the data supporting this connection should motivate legal educators and law students to take seriously the need to address professional formation. Law students and lawyers can find a reasonable degree of fulfillment if law schools prepare students both to know themselves and to develop strategies by which they will make professional judgments.

Law students who do not develop a sense of their internal values and honor those as part of their judgments in practice are far more likely to lose their sense of self.<sup>37</sup> Professor Reed Elizabeth Loder has described this process well:

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<sup>34</sup> See *infra* Part II.A.

<sup>35</sup> See *infra* Part II.B.

<sup>36</sup> See BEST PRACTICES, *supra* note 2, at 22–24, 35–36 (connecting the current method of legal education with the development of a destructive view of the lawyer's role in the legal system); CARNEGIE REPORT, *supra* note 1, at 31–32 (describing how the “hidden curriculum” sends messages undermining ethical values and “misshapes” professional education); *id.* at 140–42 (underscoring the importance of “clarify[ing] the relationship between moral and legal concerns” in order to avoid creating “people who are smart without a purpose.”).

<sup>37</sup> *But cf.* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 910 (1999) (stating that being an ethical lawyer requires living an ethical and balanced life).

The lawyer who suppresses moral scrutiny can fall prey to a kind of self-loathing that those with integrity can resist. By ignoring early dissonance, a lawyer suppresses her moral identity instead of silencing it. She may overcome alienation by subtly reshaping who she is as a person. Incrementally, these changes are almost imperceptible. This is human character in moral drift. Although personal change can signify moral progress, not all fluidity is compatible with integrity. Moral development emerges from braving the discomforts of self-scrutiny. It arises from caring about personal betterment and moral knowledge. Self-protective maneuvers produce dissonance and alienation instead. Eventually, the lawyer adapts to avoid discomfort and remove moral impediments. Instead of humble, she becomes servile. What was at first professional inauthenticity slips into a newly authentic, lesser self. Self-loathing emerges because squelching the moral self leaves lingering guilt and regret.<sup>38</sup>

The phrase “self-loathing” powerfully describes a lawyer who loses herself by ignoring the all-too-common internal conflict she feels in making decisions against her ethical compass. Another way to describe the conflict or dissonance to which Loder refers is when the lawyer feels in her gut that something is wrong but suppresses that feeling. If those who have studied the link between lack of professional formation and dysfunction are correct, the greatest contribution of the *Carnegie Report* and the *Best Practices Report* could well be that they affirm the conclusion that many of the legal profession’s ills derive, at least in part, from the failure of legal education to help students cultivate a philosophy of what it means to be a lawyer who stays true to herself.<sup>39</sup> In other words, professional formation will guard against the dangerous path of ignoring internal dissonance and will help maintain integrity. Such formation encourages individuals to pay attention to internal guidance and address issues that cause anxiety rather than ignore them.

Again, although some authors had already suggested as much,<sup>40</sup> the *Carnegie Report* and *Best Practices Report* affirmed that law schools’ method of emphasizing legal analysis and dismissing other considerations

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<sup>38</sup> Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 877 (2002).

<sup>39</sup> See BEST PRACTICES, *supra* note 2, at 29–30 & n.76 (citing articles and studies reflecting lawyer dissatisfaction, substance abuse, depression, mental illness, and even emotional problems beginning in law school); CARNEGIE REPORT, *supra* note 1, at 134–35.

<sup>40</sup> Larry Krieger and Ken Sheldon’s longitudinal studies comparing law students to students in other forms of higher education were among the first to demonstrate the effects law schools’ methods were causing. See, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School*, and *Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002) [hereinafter Krieger, *Institutional Denial*]; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 262–63 (2004).



such as fairness, morality, and social consequences sent a depressing message to law students; in essence, students' maladjustment began in law school.<sup>41</sup> In other words, rather than helping students develop as healthy professionals, law schools have encouraged the opposite.

The first subsection below discusses the nature of the dysfunction and how its seeds are sown in law school. The second subsection suggests how an emphasis on professional identity formation and judgment can change this phenomenon.

*A. Dysfunction in the Legal Profession—A More Accurate Explanation of the Causes*

The evidence of dysfunction among legal professionals should trouble anyone who cares about the profession and the public it serves. The existence of depression, substance abuse, and emotional maladjustment occurring at much higher rates among lawyers than the average population is well known.<sup>42</sup> Additional studies since 2007 have done nothing to suggest that the rates of lawyer substance abuse, depression, or other dysfunctions are declining.<sup>43</sup>

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<sup>41</sup> BEST PRACTICES, *supra* note 2, at 34, 36; CARNEGIE REPORT, *supra* note 1, at 31.

<sup>42</sup> See, e.g., Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 532 (2008).

<sup>43</sup> For instance, a 2014 survey of attorneys in Virginia found that nearly one-third of the respondents reported that either mental health or substance abuse problems had affected their personal or professional lives. Linda McElroy, *Lawyers Helping Lawyers Remains Important Resource*, 63 VIRGINIA LAWYER, Dec. 2014, at 22, 22, <http://virginialawyer.vsb.org/i/434138>. Another study explained the following: a) according to a 2008 study by the Brain and Mind Research Institute at the University of Sydney, one in five Australian lawyers suffers from clinical depression, and depression in the Australian legal profession is four times higher than the general population; and (b) according to a 2007 study by Beaton Consulting and BeyondBlue, Australian lawyers are significantly more likely to suffer from depression than the general population, and Australian "lawyers are more likely than any other profession to use alcohol or other drugs to manage depression or anxiety." Michelle Sharpe, *The Problem of Mental Ill-Health in the Profession and a Suggested Solution*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 269, 270–71 (Francesca Bartlett et al. eds., 2011). In addition, a Johns Hopkins University study conducted in 1990 found that three to five percent of the general population suffers from major depressive disorders, while more than ten percent of lawyers suffer major depression. NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER* 6 (2010). A still widely accepted 1991 survey of lawyers in the state of Washington estimated that one in five lawyers suffers substance abuse problems—almost twice the national average. *Id.* Finally, "[a]ccording to the American Bar Association Commission of Lawyer Assistance Programs, fifteen to eighteen percent of attorneys suffer from alcoholism, compared with only ten percent of the general population." Rachel Tarko Hudson, *Pick Your Poison: Abuse of Legal Versus Illegal Substances as Mitigation in Attorney Disciplinary Cases*, 22 GEO. J. LEGAL ETHICS 911, 911 (2009).

Before the 2007 Reports, many people readily accepted alternative reasons for the cause of the dysfunction and lawyer unhappiness—reasons that did not acknowledge law schools' role.<sup>44</sup> Data before the 2007 Reports and data included in them, however, affirm that law schools play a role in creating lawyer dysfunction.<sup>45</sup> Certainly, the legal profession has a role in encouraging the continued formation of lawyers' professional identity and judgment after they leave law school. Nonetheless, if law schools do not provide a solid foundation, the ability of inexperienced lawyers to develop their identity and judgment on their own is more difficult in the modern legal workplace than it ever has been.<sup>46</sup>

Authors have identified the emotional maladjustment that can occur when a lawyer adopts role differentiation in which she has one set of values on the job and another in other aspects of her life.<sup>47</sup> The seeds of such maladjustment begin in law school, which often emphasizes analysis and logic and deemphasizes, if not openly denigrates, ethical and moral considerations.<sup>48</sup> Law students are not predisposed to be discontented.<sup>49</sup> Indeed, extensive studies contrasting new law students to undergraduate students showed just the opposite.<sup>50</sup> In their study comparing undergraduate students with law students, Professors Lawrence Krieger and Ken Sheldon concentrated on the happiness and overall emotional health of law students upon entering law school, late in the first year, and the next fall semester, as contrasted with that of undergraduate students.<sup>51</sup> The authors found that, early in their legal studies, law students were generally happier, better emotionally adjusted, and more

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<sup>44</sup> Mental illness and substance abuse problems can easily be blamed for lawyer dissatisfaction. *See, e.g.*, Rothstein, *supra* note 42, at 533.

<sup>45</sup> BEST PRACTICES, *supra* note 2, at 34, 36; CARNEGIE REPORT, *supra* note 1, at 31.

<sup>46</sup> *See infra* notes 77–78 and accompanying text (demonstrating that mentoring and the ability of inexperienced lawyers to develop under the tutelage of a more experienced lawyer have been declining for many years). Mentoring, though valuable, was already a “hit or miss” proposition, as it depended on the mentor’s own professional formation and ability to teach such matters to an inexperienced lawyer.

<sup>47</sup> *See, e.g.*, Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 247 (2004).

<sup>48</sup> *See, e.g.*, BEST PRACTICES, *supra* note 2, at 139 (“Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant—in fact ‘irrelevant’ and inappropriate in the context of legal discourse—and their traditional ways of thinking and feeling are wholly unequal to the task before them”); CARNEGIE REPORT, *supra* note 1, at 31 (“[L]aw school typically blares a set of salient, if unintentional, messages that undercut the likely success of efforts to make students more attentive to ethical matters.”).

<sup>49</sup> Krieger, *Institutional Denial*, *supra* note 40, at 122.

<sup>50</sup> *Id.* at 123 & n.44.

<sup>51</sup> *Id.* at 122.

oriented toward promoting ideals than the undergraduates to which they were being compared.<sup>52</sup> As they progressed in school, however, the law students became not only more depressed, but also more disinterested and less concerned with values about which they previously cared.<sup>53</sup>

Krieger and Sheldon concluded that law schools' pressure to succeed according to external standards of success, such as placement in the top ten percent of the class or getting a prestigious job, led to the deterioration in ideals, values, and satisfaction.<sup>54</sup> Moreover, Krieger and Sheldon urged law schools to shift school culture to help students find satisfaction in doing their legal work well, not in impressing others.<sup>55</sup> An attitude toward legal work that ignores the reason for which lawyers are doing the work leads students away from seeing the purpose of their work, a key ingredient to fulfillment.<sup>56</sup>

Observers have long suspected that the well-known dysfunction and unhappiness among lawyers is largely a direct result of this disconnection between lawyers' internal values and their actions.<sup>57</sup> Other explanations exist for the dysfunction and unhappiness in the legal profession, such as the stress of billable hours and of law practice generally,<sup>58</sup> but the ability to account for lawyer unhappiness and dysfunction solely on these grounds seems less persuasive than ever. Both legal educators and lawyers must face the prospect that the dysfunction in the legal profession begins in law school.<sup>59</sup>

*B. The Benefits of Developing Methods to Cultivate Students' Professional Identity and Practical Wisdom*

Those who participate in forming a professional ethical identity and in learning to exercise practical wisdom are more likely to be fulfilled in their professional lives. As Professor Floyd writes:

There is another advantage to practical wisdom. It addresses not just how we prepare our students for ethical action, but also how we prepare them for fulfilled lives. Aristotle believed that practical wisdom is essential to human flourishing, which to him was the purpose of life. Modern happiness studies show that Aristotle's hypothesis is confirmed by science. . . . [P]eople are happiest when their work has meaning and provides the discretion to use their judgment. That discretion allows the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 122–23.

<sup>54</sup> *Id.* at 123–24.

<sup>55</sup> *See id.* at 124.

<sup>56</sup> *Id.* at 125–26.

<sup>57</sup> Krieger, *Inseparability*, *supra* note 19, at 438; *see also* Gantt, *supra* note 47, at 255.

<sup>58</sup> *See* Schiltz, *supra* note 37, at 888–89.

<sup>59</sup> *See* Krieger, *Institutional Denial*, *supra* note 40, at 122–23.

development of the wisdom needed to do the work well. In turn, people are motivated to develop judgment so that they can do their work well and serve others, which makes them happy. "It turns out that the characteristics of work that most demand the exercise of practical wisdom are the same characteristics that make work engaging, meaningful, and potentially satisfying."<sup>60</sup>

Some have also suggested that one of the most crucial facets of leading a healthy professional life is maintaining consistency between personal beliefs and behavior.<sup>61</sup> Someone is bound to feel better about herself if she possesses self-awareness, knows her limits, and engages in the process of balancing competing values that arise in resolving difficult ethical decisions. Although it may be tempting to avoid deliberating over a question and just do whatever seems to benefit one's client so long as one does not violate the ethical rules, this approach avoids the world of gray known by those who are committed to the deliberation and introspection required to exercise practical judgment. Most ethical and professional dilemmas involve conflicting values,<sup>62</sup> and reaching a good judgment requires self-knowledge and fortitude to avoid having personal motives interfere in the decision-making. When questions and answers fall into a gray area, consideration of the many possible courses of actions, such as who will be affected and how, must be weighed within the specifics of the context of the situation.

Lawyers' quality of life is impacted by their choice to consider the competing values and consequences of each course of action and then confidently make principled decisions based on that consideration.<sup>63</sup> Those who engage in practical judgment have self-respect and the respect of their colleagues throughout their practice of law.<sup>64</sup> Cultivating practical judgment thus creates a ripple effect by increasing the quality and integrity of the legal profession. Conversely, those who take the easy path, ignore personal values (especially when their "gut" tells them otherwise), and only try to avoid sanctions when advocating their client's best interest, are prone to dissonance that, with enough repetition, festers into self-loathing.

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<sup>60</sup> Floyd, *supra* note 14, at 217 (footnote omitted) (quoting SCHWARTZ & SHARPE, *supra* note 26, at 284).

<sup>61</sup> *E.g.*, Gantt, *supra* note 47, at 247, 255.

<sup>62</sup> *See id.* Finding a work-life balance is a classic professional dilemma. It can become an ethical one if the lawyer works so much that her competence is affected.

<sup>63</sup> *See* Kennon M. Sheldon et al., *What Is Satisfying About Satisfying Events? Testing 10 Candidate Psychological Needs*, 80 J. PERSONALITY & SOC. PSYCHOL. 325, 337 (2001) (illustrating the importance of satisfying intrinsic motivations and needs versus extrinsic ones).

<sup>64</sup> *See* LEVIT & LINDER, *supra* note 43, at 220.

Psychologists suggest that fulfillment derives from satisfying personal intrinsic values rather than extrinsic values merely proffered by others.<sup>65</sup> Ironically, intrinsic values, such as fostering meaningful relationships and finding purpose in what one does, tend to resemble the kinds of messages that law students and lawyers have heard from those sounding the call for professionalism.<sup>66</sup> However, the reason someone is more likely to be motivated to act based on principles is that she has decided that the values underlying the principles are ones she deems important, and not because she is trying to meet someone else's definition of what is important.<sup>67</sup> Relying on the theories of Abraham Maslow and later work of other psychologists, Professor Krieger convincingly argues that intrinsic motivation will typically result in the kind of lawyering most would respect:

[Research confirming Maslow's work] demonstrates that well-being results from experiences of *self-esteem*, *relatedness to others*, *autonomy*, *authenticity*, and *competence*. Fulfillment of any of these needs provides a sense of well-being and thriving, while lack of such experiences produces distress, depressed mood or loss of vitality. Self-esteem and relatedness show the very strongest correlation to happiness. As we look to our ideals for attorneys, we see again that the preferred professional behaviors will tend to fulfill these basic human needs and hence support a satisfying life experience. The truly professional lawyer will be competent in legal skills, but beyond that she will feel closely connected to others in her community because she respects and is respected by them. She will experience the authenticity and integrity that comes from loyalty to her deepest values, and she will feel good about herself for all of the above reasons.<sup>68</sup>

An increasing number of educators recognize that an approach that helps students find internal satisfaction from lawyering will likely increase the quality of lawyers' lives and, by doing so, improve their effectiveness as counselors and advocates.<sup>69</sup> Some may believe lawyers who are fulfilled, have a strong sense of professional identity, know their values, recognize their limits, and exercise practical wisdom do not exist. Professor Neil Hamilton and Dr. Verna Monson, however, tested this view in a project in which they interviewed lawyers whose peers deemed them

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<sup>65</sup> See Sheldon, *supra* note 63.

<sup>66</sup> See Krieger, *supra* note 19, at 427.

<sup>67</sup> See *id.* at 429.

<sup>68</sup> *Id.* at 430 (footnote omitted).

<sup>69</sup> See Schiltz, *supra* note 37, at 924 (arguing that happy lawyers are ethical lawyers); Neil W. Hamilton et al., *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 16 (2012) [hereinafter Hamilton et al., *Empirical Evidence*].

“exemplary.”<sup>70</sup> The results of the interviews showed lawyers who had found fulfillment by developing an internalized set of professional values that enabled them to exercise practical wisdom in counseling and advocating for clients.<sup>71</sup> Hamilton and Monson’s observations on the common themes of the lawyers they interviewed are telling:

Interviews with peer-honored lawyers exploring the meaning of professionalism revealed four primary, overarching themes, including the ideas that:

1. Professionalism is linked to a lawyer’s moral core or moral compass, and includes a deep commitment to clients, colleagues, the firm, and broader society. The foundation of this moral core is trustworthiness, which serves to “hold together” the day-to-day functions of practicing law, and serves as an important marker in both establishing and maintaining a lawyer’s credibility and reputation. A major part of this foundation of trustworthiness is honesty, with self and others. Honesty serves also as an internal mechanism that is part of an ongoing practice of self-reflection and growth.
2. Counseling the client with independent judgment and candid advice is central to the lawyer’s role.
3. Self-reflection becomes habitual, and ongoing, and is related to ongoing growth in a lawyer’s professionalism.
4. A lawyer’s understanding of professionalism evolves over a career.<sup>72</sup>

Not surprisingly, Hamilton and Monson found that these lawyers displayed the ability to evaluate practice dilemmas by considering potential responses through their own lenses of professionalism.<sup>73</sup>

For those who may believe that exemplary lawyers are the rare few who find satisfaction in law practice, Nancy Levit and Douglas Linder’s interviews of lawyers in all walks of law practice suggest that satisfaction is available to anyone who aligns the manner in which she practices with her values.<sup>74</sup> The common theme of the interviews of these lawyers is that the person needs to decide what kind of lawyer she wants to be, that her purpose will come from helping others rather than from money or glory, and that aligning work and values is a must.<sup>75</sup>

One significant difference between the exemplary lawyers discussed by Hamilton, Monson, Levit, and Linder and new lawyers today is that

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<sup>70</sup> Neil W. Hamilton & Verna E. Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921, 931–32 (2012) [hereinafter Hamilton & Monson, *Ethical Professional (Trans)Formation*].

<sup>71</sup> *See id.* at 948–49.

<sup>72</sup> *Id.* at 957.

<sup>73</sup> *See id.* at 958.

<sup>74</sup> *See* LEVIT & LINDER, *supra* note 43, at 220.

<sup>75</sup> *Id.* at 220–21.

the exemplary lawyers learned to practice in an environment in which firms and lawyers were more inclined to mentor less experienced lawyers.<sup>76</sup> Such mentoring, however, is on the decline because clients are far less willing to pay for work for which a more senior lawyer and a less experienced lawyer both bill.<sup>77</sup> Although mentors can be found, this task is more difficult now than in the past.<sup>78</sup> Thus, the need for law schools to begin the process of forming lawyers' professional ethical identity and equipping them with a framework in which to resolve ethical and professional issues is more pressing than ever.

III. DISPARITY IN THE LAW SCHOOL CURRICULUM—EXPLORING REASONS WHY LAW SCHOOLS ARE FAILING TO MAKE CULTIVATION OF PROFESSIONAL IDENTITY AND JUDGMENT A PRIORITY WHILE RESPONDING TO THE RECOMMENDATION FOR ENHANCED SKILLS TRAINING

*A. Imbalance in Law School Curricula*

Law school curricula remain heavily weighted toward doctrinal courses.<sup>79</sup> As will be discussed below, lawyering skills courses have significantly increased in prominence since the 2007 Reports.<sup>80</sup> In contrast, most law schools have been slow to respond to the critiques that legal education is severely wanting in developing students' professional ethical identity and practical judgment.<sup>81</sup> This slow response is evidenced by observations of legal scholars teaching in the field of professional formation, by an ABA survey of law school curricula, and by a survey of associate deans for academic affairs at ABA-approved law schools conducted by the authors.

Having observed and written on educational methods designed to address formation of students' skills beyond analysis and technical lawyering, Professor Susan Daicoff is an authority in the field of

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<sup>76</sup> Cf. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–82 (2000) (describing the decline of mentoring in law firms and its adverse effect on junior attorneys, their firms, and clients).

<sup>77</sup> See *id.* at 281 & n.257, 282 (describing how billable hour constraints often decrease a firm's commitment to mentoring, training, and supervision).

<sup>78</sup> Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 739–46 (1998).

<sup>79</sup> Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 173 (2013) (“[T]he evidence from the [2002–2010] ABA curriculum survey indicates that . . . the majority of curricular hours offered still continue to be in doctrinal-focused courses.”).

<sup>80</sup> See *infra* Part III.B.

<sup>81</sup> See *infra* Part III.C.

professional formation in the legal education context.<sup>82</sup> In a recent article, Professor Daicoff largely confirms the view that law schools have paid far more attention to the 2007 Reports' recommendation to adopt skills and experiential courses than to promote development of ethical professional identity among students.<sup>83</sup> She notes that the most comprehensive survey of lawyer skills and competencies to date—a study conducted by Marjorie Shultz and Sheldon Zedeck<sup>84</sup>—includes the following twenty-six skills associated with effective lawyers, grouped under eight umbrella categories:

- 1: intellectual & cognitive
  - analysis and reasoning
  - creativity/innovation
  - problem solving
  - practical judgment
- 2: research & information gathering
  - researching the law
  - fact finding
  - questioning and interviewing
- 3: communications
  - influencing and advocating
  - writing
  - speaking
  - listening
- 4: planning and organizing
  - strategic planning
  - organizing and managing one's own work
  - organizing and managing others (staff/colleagues)
- 5: conflict resolution
  - negotiation skills
  - able to see the world through the eyes of others
- 6: client & business relations—entrepreneurship
  - networking and business development
  - providing advice & counsel & building relationships with clients
- 7: working with others
  - developing relationships within the legal profession
  - evaluation, development, and mentoring

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<sup>82</sup> See generally Susan Daicoff, *Lawyer, Form Thyself: Professional Identity Formation Strategies in Legal Education Through "Soft Skills" Training, Ethics, and Experiential Courses*, 27 REGENT U. L. REV. 205 (2015).

<sup>83</sup> See Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 810–11 (2012).

<sup>84</sup> MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 15 (September 2008), <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.



## 8: character

- passion and engagement
- diligence
- integrity/honesty
- stress management
- community involvement and service
- self-development.<sup>85</sup>

Professor Daicoff then observes:

Of these twenty-six competencies, perhaps seven (about twenty-seven percent) are skills traditionally taught in law school. Three to six more skills are often taught in elective clinical courses in law school. The remaining thirteen to sixteen (fifty to fifty-seven percent) are skills that may not be typically explicitly covered by most legal educators. This highlights the imbalance between legal education's current focus and what competencies are determined by those in the occupation as necessary to be professionally prepared to practice law.<sup>86</sup>

She notes progress in lawyering skills and experiential courses but highlights the disparity in law school curricula between doctrinal and lawyering skills courses and courses aimed at cultivating professional development, emotional intelligence, awareness of values, and judgment.<sup>87</sup> Professor Daicoff then reasons that lawyers will also “find themselves in professional situations that call for judgment, maturity, self-awareness, self-control, interpersonal awareness, the ability to influence people, relationship-building, teamwork, collaboration, problem solving, and strategic planning.”<sup>88</sup> She observes that “law schools have begun expanding their curricula to include . . . less traditional skills training (e.g., they may include professionalism, values, interviewing, counseling, and negotiating . . .).”<sup>89</sup> However, Professor Daicoff clearly advocates for an expanded role of teaching that matches the factors associated with effective lawyers as outlined in studies such as that performed by Shultz and Zedeck, as well as several others that reached similar conclusions.<sup>90</sup> Professor Daicoff is not alone in observing the imbalance in law school curricula. Other scholars have noted the lack of law school courses aimed at cultivating emotional intelligence and

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<sup>85</sup> Daicoff, *supra* note 83, at 822–23 (quoting SHULTZ & ZEDECK, *supra* note 84, at 26–27).

<sup>86</sup> *Id.* at 823–24 (footnotes omitted).

<sup>87</sup> Compare *id.* at 833 (recognizing the rise in experiential and skills courses), with *id.* at 834–35 (discussing competencies dealing with students' self-awareness, values, and other aspects of professional ethical identity).

<sup>88</sup> *Id.* at 834.

<sup>89</sup> *Id.* at 835.

<sup>90</sup> *Id.* at 864–68.

relational and other skills not associated with analysis or technical legal skills.<sup>91</sup>

### *B. Recent ABA Curricular Survey*

In its 2002–2010 *Survey of Law School Curricula* (“ABA Curricular Survey”), the ABA’s Section of Legal Education and Admissions to the Bar reported the findings of a comprehensive survey of law school curricular offerings.<sup>92</sup> The survey confirms the imbalance in law school curricula. Curricular hours in doctrinal courses continue to greatly outnumber both lawyering skills and ethics courses.<sup>93</sup> The survey shows that law schools have begun to offer more curricular hours in technical lawyering skills.<sup>94</sup> It also found that, in required courses “[l]aw schools have increased all aspects of skills instruction, including clinical, simulation, and externships, to meet [then-]recently adopted ABA Standard 302(a)(4), which requires that students receive ‘other professional skills’ instruction.”<sup>95</sup> In its findings on elective curricula, the survey reported that schools “offered a wide range of professional skills opportunities, with half the respondents reporting ten or more types of professional [lawyering] skills courses.”<sup>96</sup> By contrast, although the survey mentions more elective courses in “professionalism and professional identity,”<sup>97</sup> only twenty-seven schools are listed as having a “significant increase” in their “[l]egal [e]thics/[p]rofessionalism” curriculum.<sup>98</sup> Thus, while doctrinal

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<sup>91</sup> See, e.g., Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 68–70 (2012); Heidi K. Brown, *The Emotionally Intelligent Law Professor: A Lesson from the Breakfast Club*, 36 U. ARK. LITTLE ROCK L. REV. 273, 286–89 (2014); Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should Be Learning and Doing*, 45 MCGEORGE L. REV. 133, 154–55 (2013).

<sup>92</sup> *A Survey of Law School Curricula: 2002–2010*, 2012 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 13 (2012) [hereinafter *2002–2010 A.B.A. Curricular Survey*].

<sup>93</sup> See *id.* at 52 (noting that 11% of schools surveyed required first-year students to take a course in “Professionalism/Professional Responsibility” and 10% of schools surveyed offered professional skills instruction to first-year students).

<sup>94</sup> For instance, the survey included the following in its list of curricular offerings that showed a “significant increase”: alternative dispute resolution, drafting (contract, legislative, other), trial and appellate advocacy, and advanced legal research. *Id.* at 74.

<sup>95</sup> *Id.* at 15 & n.11 (referencing “ABA Standard 302(a)(4), adopted in 2004 [sic]”). ABA Standard 302(a)(4), first adopted in 2006, requires that students “receive substantial instruction in: . . . (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.” 2006–2007 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(a)(4) (2006).

<sup>96</sup> *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 16.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 74. “Professional Responsibility/Ethics” is listed as a separate category, with eighteen schools reporting a “significant increase” in their curricular offerings in that category. *Id.*

courses remain the dominant curricular offerings in law schools,<sup>99</sup> lawyering skills courses have made progress in required curricular offerings,<sup>100</sup> as well they should.<sup>101</sup>

The survey suggests some awareness of the much needed attention to professionalism. The report's executive summary states that "[m]any law schools also added courses and course components on professionalism and professional identity."<sup>102</sup> However, study of the full survey reveals that the "professionalism and professional identity" curricula to which the executive summary refers is difficult to gauge because law schools' narratives seemed to assert that the topics could be taught in many ways—even in non-class settings. "Some respondents added courses or components on professionalism to existing courses in the first-year curriculum. Some respondents created professional development centers and/or lawyering electives that emphasized the various roles and obligations of attorneys."<sup>103</sup> Unfortunately, as noted above, only twenty-seven schools listed legal ethics and professionalism among curricula with significant increases.<sup>104</sup> Other than a relatively small percentage of schools stating that they include a professionalism component in first-year courses,<sup>105</sup> the implication from the survey is that "professionalism" is being addressed by electives rather than required courses. Indeed, it is the section on upper-division curricula, many of which are electives, in which the survey states that a number of schools reported offering more courses on professionalism.<sup>106</sup>

Moreover, the report uses the term "professional identity" in at least one instance in conjunction with professionalism,<sup>107</sup> but nothing clearly indicates that any courses involving a formative element are actually

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<sup>99</sup> Fines, *supra* note 79, at 172.

<sup>100</sup> *Id.* at 173–74 & n.102 (stating that "skills-focused courses in the first year such as legal research and writing have expanded in credit hours over time" and "[o]ver half [of] the law schools [participating in the ABA's 2002–2010 *Survey of Law School Curricula*] offer ten or more courses to satisfy the professional skills requirement").

<sup>101</sup> See Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 320–23 (2008) (arguing that using experiential and skills-based teaching methods in conjunction with Socratic dialogue produces better learning outcomes).

<sup>102</sup> *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 16.

<sup>103</sup> *Id.* at 102.

<sup>104</sup> *Id.* at 74.

<sup>105</sup> *Id.* at 52 (reporting that "11% required a course in Professionalism/Professional Responsibility"). The survey does not indicate the breakdown of the schools that deal solely with the ABA Model Rules of Professional Conduct in the first year, nor does it note whether these courses are in any way formational rather than just focusing on doctrinal instruction in the ethics rules and standards.

<sup>106</sup> *Id.* at 73–74.

<sup>107</sup> *Id.* at 102.

being offered. The survey includes a reference in the context of the reported professionalism courses that describes them as covering “various roles and obligations of attorneys.”<sup>108</sup> This description, however, does not imply that such courses contain a formative element. The description could mean only that schools are offering various types of Professional Responsibility courses because such courses include instruction on the ABA Model Rules of Professional Conduct (“Model Rules”), which are the source most schools use for understanding the roles and obligations of attorneys.<sup>109</sup>

Without more facts, the reader can infer that law schools have gotten the message that they need to emphasize lawyering skills and address professionalism. Beyond stating that schools are aware of the significance of professionalism, ethics, or something similar, the survey provides no verification that most schools are taking the recommendations of the 2007 Reports seriously. Indeed, all indications are that the skills recommendations are being earnestly implemented but that schools are not making professional formation a priority.

### *C. Authors’ Survey of Law School Associate Deans for Academic Affairs*

The 2002–2010 *ABA Curricular Survey* is inconclusive on the nature of courses with a professionalism component. In response, the authors gleaned data by sending a survey to associate deans for academic affairs at all ABA-approved law schools.<sup>110</sup>

In December 2014 and January 2015, Professor Gantt sent e-mails to the associate deans for academic affairs at all ABA-approved law schools asking them to complete a survey composed by the authors. The e-mail invitation stated that the survey’s purpose was to assess the extent to which law schools are employing courses and extra-curricular activities to cultivate the formation of professional identity in students. The e-mail

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<sup>108</sup> *Id.*

<sup>109</sup> See Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 372 (2013) (noting that the Model Rules influence enforceable court rules).

<sup>110</sup> REGENT UNIV. SCH. OF LAW, SUMMARY OF RESULTS: SURVEY OF ASSOCIATE DEANS ON PROFESSIONAL IDENTITY CURRICULUM AND PROGRAMMING (Benjamin V. Madison, III & Larry O. Natt Gantt, II eds., 2015) [hereinafter SURVEY OF ASSOCIATE DEANS] (on file with authors). In addition to this survey, Professor Madison gathered curricular data on all ABA-approved law schools by reviewing the schools’ websites. The data supports the findings from the survey. Specifically, the data shows that law schools overall are offering many more credit hours in experiential and skills courses than in ethics, professionalism, and professional formation courses. BENJAMIN V. MADISON, III, REVIEW OF CURRICULAR INFORMATION ON LAW SCHOOL WEBSITES (2015) [hereinafter REVIEW OF CURRICULAR INFORMATION] (on file with authors). This Article does not discuss this website data in detail because the authors consider the dean survey data to be more empirically sound.

provided a definition of “professional identity” to guide the respondents as they worked through the questions. The e-mail read in pertinent part:

As discussed in *Educating Lawyers: Preparation for the Profession of Law* (the “Carnegie Report”), “professional identity” goes beyond “professionalism,” as the latter term is often interpreted. Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules. Professional identity engages students at a deeper level by challenging them to internalize principles and values such that their professional conduct is a natural outgrowth of their internal moral compass. Please use this definition of professional identity as a common reference point as you complete the survey.<sup>111</sup>

By providing this definition at the outset, the authors sought to avoid the problem in the ABA survey in which schools’ responses to questions on “professionalism” could have little to do with “professional identity formation” as the concept is described in the *Carnegie Report*.

Sixty schools responded by completing at least a portion of the authors’ survey.<sup>112</sup> The survey consisted of nine questions, seven of which gave the respondents choices from which to select and two of which allowed the respondents to provide narrative answers.<sup>113</sup>

The first question focused on the extent to which schools are addressing professional identity formation in their course offerings.<sup>114</sup> Two questions asked respondents to indicate how many courses in their law school’s required and elective J.D. curricula have “components that include as a learning outcome or goal the development of students’ professional identity.”<sup>115</sup> Sixty (60) schools responded to the question regarding required courses as follows:

- “0”—6 responses
- “1-3”—28
- “4-6”—9
- “7-9”—5
- “10 or more”—12<sup>116</sup>

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<sup>111</sup> E-mail from Professor Larry O. Natt Gantt, II to Assoc. Deans for Academic Affairs at ABA Accredited Law Sch. (Dec. 9, 2014, 3:47 PM) [hereinafter E-mail to Associate Deans] (on file with authors).

<sup>112</sup> Of the sixty schools that completed the survey, sixteen responded only to the first question. SURVEY OF ASSOCIATE DEANS, *supra* note 110, at 1. To incentivize the associate deans to complete the survey, the e-mail indicated that all respondents would receive a summary of the results and all respondents who completed the survey would be entered in a random drawing to win one of five fifty-dollar gift cards to Amazon.com. E-mail to Associate Deans, *supra* note 111.

<sup>113</sup> SURVEY OF ASSOCIATE DEANS, *supra* note 110, at 1–3.

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.* at 1–2.

<sup>116</sup> *Id.* at 1.

Forty-four (44) schools responded to the question regarding elective courses as follows:

- “0”—6 responses
- “1-3”—12
- “4-6”—7
- “7-9”—2
- “10 or more”—17<sup>117</sup>

Two follow-up questions to these questions then asked the respondents to list the names and credit hours of the courses included in the calculations above.<sup>118</sup>

Another question focused on the schools’ instruction in Professional Responsibility, asking, “To what extent does your law school’s course in Professional Responsibility include as a learning outcome or goal the development of students’ professional identity as opposed solely to learning the content of the ABA Model Rules of Professional Conduct or related state ethics rules[?]”<sup>119</sup> Of forty-four (44) responses, the answers were as follows:

- “not addressed”—1 response
- “addressed but not emphasized”—5
- “emphasized but not as much as learning the content of the rules”—26
- “emphasized as much as learning the content of the rules”—11
- “emphasized more than learning the content of the rules”—1<sup>120</sup>

Concluding the specific questions on courses, another question asked schools to report how they assess students’ professional identity development in courses that include such development as a learning outcome or goal.<sup>121</sup> The question gave respondents choices outlining different levels of assessment. Out of twenty-eight (28) responses, the answers were as follows:

- “not assessed in any course”—5 responses
- “assessed in some courses but not all courses, but in no course is it factored into the students’ final course grade”—2
- “assessed in some but not all courses, and in some is factored into the students’ final course grade”—15
- “assessed in all courses and in some is factored into the students’ final course grade”—5

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<sup>117</sup> *Id.* at 2.

<sup>118</sup> *Id.* at 1–2. This summary of the survey results does not describe these lists of class names, but they are on file with the authors.

<sup>119</sup> *Id.* at 2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

- “assessed in all courses and in all is factored into students’ final course grade”—1<sup>122</sup>

The survey then turned to questions related to extra-curricular programming at the law schools. The first of such questions asked, “Which of the following extra-curricular activities at the law school significantly address the development of professional identity . . . [?]”<sup>123</sup> The question then listed several activities from which respondents could select and provided an option for “other activities.”<sup>124</sup> Thirty-three (33) schools responded to this question, and the numbers below indicate the number of schools that indicated that the corresponding activity significantly addresses professional identity:

- “orientation for incoming students”—33 responses (all respondents)
- “presentations sponsored by the law school and given by members of the judiciary and/or the practicing bar”—29
- “activities sponsored by student organizations and led by students”—26
- “teams that participate in competitions, such as moot court, trial advocacy, negotiation, and client counseling”—27
- “events in which the law school’s career services office makes presentations”—27
- “presentations by faculty outside of the context of a particular course”—17
- “internships in which students work under the supervision of a judge or lawyer”—30
- “activities sponsored by local bar associations, American Inns of Court, or similar groups comprised primarily of judges and lawyers”—23
- “other activities”—4<sup>125</sup>

The second of these questions focused on mentoring as a tool to develop students’ professional identity. The question specifically asked, “To what extent is mentoring provided to students in matters related to development of professional identity . . . [?]”<sup>126</sup> Thirty-three (33) schools responded to this question, and the numbers below indicate the number of schools that indicated how such mentoring was occurring at their institutions:

- “is provided by faculty informally”—29 responses

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.* at 2–3.

<sup>126</sup> *Id.* at 3.

- “is provided by faculty formally in required meetings between a student and faculty advisor to discuss not only course selection but also matters related to professional identity”—6
- “is provided by judges and lawyers informally”—20
- “is provided by judges and lawyers formally in a mentor program organized through the law school but in which students are not required to participate”—16
- “is provided by judges and lawyers formally in a mentor program organized through the law school and in which students are required to participate”—1<sup>127</sup>

The final survey question asked the respondents to assess overall how their schools prioritized students’ professional identity formation (the *Carnegie Report’s* Third Apprenticeship) in relation to the *Carnegie Report’s* other two apprenticeships. The question specifically asked, “Out of 100%, please approximate the percentage that your law school devotes its efforts and resources to developing students’ analytical abilities (The Carnegie Report’s First Apprenticeship), developing students’ lawyering skills (Carnegie’s Second Apprenticeship)[,] and developing students’ professional identity (Carnegie’s Third Apprenticeship) . . . .”<sup>128</sup> Twenty-eight (28) schools responded to this question with specific percentages totaling 100%, and the following results indicate the average percentage for each Apprenticeship:

- First Apprenticeship—55.6%
- Second Apprenticeship—29.6%
- Third Apprenticeship—14.8%<sup>129</sup>

These results support and augment the findings of the *ABA Curricular Survey* by indicating that law schools’ efforts in promoting professional identity formation have concentrated on extra-curricular settings while significantly ignoring their required curricula. For instance, every school that responded to the question on extra-curricular programming indicated that its orientation program addresses issues related to professional identity formation.<sup>130</sup> In sharp contrast, over half, or 57%, of the schools responded that only as many as three of their required courses include as a learning outcome or goal the development of

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* While thirty-three schools responded to this question, three schools declined to provide specific percentages. Two schools provided specific percentages, but their responses were not included because they did not total 100. One school answered “100” for all three. The other school supported the overall findings in that it heavily weighted the first two apprenticeships over the third; it answered “40,” “40,” and “10.”

<sup>130</sup> *Id.* at 2.



students' professional identity.<sup>131</sup> Similarly, even among schools' more numerous courses in their elective curricula, 41% responded that only as many as three of their elective courses include as a learning outcome or goal the development of students' professional identity.<sup>132</sup> Assessment of students' professional identity formation in these courses is also lacking, as illustrated by the fact that only 21% of schools indicated that professional identity formation is assessed in all courses in which it is a learning outcome or goal.<sup>133</sup>

Furthermore, although students can experience broad exposure to extra-curricular programming and both informal faculty and other mentoring events, this programming and mentoring may not reach many students because it may not be required beyond orientation. For instance, only 18% of schools responding to the question regarding mentoring indicated that such mentoring by faculty occurs in required meetings with students.<sup>134</sup> Similarly, only 3% of the schools responding to the question indicated that such mentoring by lawyers or judges occurs in a mentoring program in which students are required to participate.<sup>135</sup>

Most telling is the participants' responses to the final question about the *Carnegie Report's* apprenticeships. Schools estimated that only 14.8% of their efforts and resources are devoted to developing students' professional identity.<sup>136</sup> The 2007 Reports did not advocate that law schools' focus on professional identity formation should be less emphasized than students' cognitive and skills development.<sup>137</sup> The *Carnegie Report's* three-apprenticeship model, in fact, indicates the three are equally important; given that report's discussion of how law schools have historically harmed students' ethical development, one could imply that the third apprenticeship should perhaps be given greater weight than the others. Moreover, the Shultz and Zedeck list of lawyer competencies indicates that many lawyer competencies—certainly more than 14.8%—involve traits that do not pertain solely to lawyers' cognitive or practical

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<sup>131</sup> *Id.* at 1.

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 3.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 65–66 (2012) (“The [Carnegie] Report suggests that without emphasis and development of all three apprenticeships throughout the entire law school curriculum, legal education fails to prepare students adequately for the practice of law.”).

skills development.<sup>138</sup> The responses to this survey question therefore affirm that schools are not properly allocating their efforts and resources in ways that cultivate these effectiveness factors.

Perhaps we ought not be surprised that law schools are offering more skills/experiential courses since the ABA adopted a standard in 2006 requiring them to do so.<sup>139</sup> A question thus looms about whether new ABA Standard 302, adopted in 2014, will encourage law schools to implement more instruction in professional formation. Specifically, Standard 302 now requires law schools to establish learning outcomes that include competency in the “[e]xercise of proper professional and ethical responsibilities to clients and the legal system; and . . . [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”<sup>140</sup>

In sum, the assessment of knowledgeable scholars, the 2002–2010 *ABA Curricular Survey*, a review of law schools’ curricula and programming on their websites, and a survey of associate deans at ABA-approved law schools all point to the same conclusion: law schools have not responded appropriately to the 2007 Reports’ critique of their failure to develop students’ character as professionals.

Although scholars have highlighted law schools’ recent progress in teaching students about professionalism,<sup>141</sup> strong evidence supports the conclusion that such progress is sparse and that many schools have not significantly altered their curriculum to accomplish the goals of cultivating students’ professional identity or enhancing their ability to make good practical judgments.<sup>142</sup> The irony here is that probably the most important education law schools can provide students—how to incorporate their moral compass and values into lawyering to become practically wise lawyers—receives the least emphasis.

#### *D. Reasons Why Law Schools May Be Delaying Emphasis on Developing Professional Identity and Practical Judgment Skills*

Several reasons may explain law schools’ less-than-enthusiastic response in developing curricular initiatives that foster professional

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<sup>138</sup> See SHULTZ & ZEDECK, *supra* note 84, at 26–27. For instance, of their twenty-six competencies, all six “Character” competencies, both “Working with Others” competencies, and the competencies of “Able to See the World Through the Eyes of Others” and “Providing Advice & Counsel & Building Relationships with Clients”—or 38% of the competencies—relate directly to students’ professional identity formation. *See id.*

<sup>139</sup> *See supra* note 95 and accompanying text.

<sup>140</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(c), (d) (2014).

<sup>141</sup> Kehner & Robinson, *supra* note 137, at 99 (“[M]any law schools have answered the call in the *Carnegie Report* and *Best Practices* to teach students about professionalism.”).

<sup>142</sup> *See supra* notes 130–38 and accompanying text.

formation. First, the myth exists that students have fully formed their values and moral codes by the time they reach law school.<sup>143</sup> Second, some in the legal academy resist efforts to cultivate professional identity and practical judgment on the theory that it would involve inculcating values.<sup>144</sup> Third, law schools may be clinging to the unrealistic notion that a single course, Professional Responsibility, can teach students not only the content of the Model Rules of Professional Conduct, but also how to practice professionally and reach sound judgments.<sup>145</sup> Finally, a view not often stated—but which may best explain the delay most law schools have shown—is the belief that it is difficult to adopt educational initiatives that cultivate development of professional identity and practical judgment.<sup>146</sup>

This Part of the Article will address the first three reasons articulated above. However, the reason that most needs to be addressed—the notion that it is too difficult to develop teaching methods to cultivate professional identity and judgment—will take up the entirety of Part IV, the concluding section of this Article. That discussion will demonstrate methods that already exist or that can be borrowed from methods in other professional schools so that law schools need not delay further in addressing what may be the most important part of students' law school education.

#### 1. The Myth that Law School Students Are Not Able to Benefit from Formative Exercises in Professional Values and Judgment

The myth that law students' ethical compasses and values are fully formed by the time they enter law school has been proven false.<sup>147</sup> The

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<sup>143</sup> See CARNEGIE REPORT, *supra* note 1, at 133 (noting that faculty “often argue that by the time students enter law school it is too late to affect their ethical commitment and professional responsibility”).

<sup>144</sup> See *id.* at 135 (“Many faculty who doubt the value of education for professional responsibility in law schools equate efforts to support students' ethical development with inculcation, which they see as illegitimate and ineffective.”).

<sup>145</sup> Cf. Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 46 (2009) (“Almost all schools require courses in professional responsibility, and three quarters of those responding to the [2004] Law School Survey on Student Engagement reported that their school placed ‘very much’ or ‘quite a bit’ of emphasis on the ethical practice of the law. Yet only a minority of students felt that these efforts had significantly helped them develop ‘a personal code of values and ethics.’”) (quoting LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2004 ANNUAL SURVEY RESULTS: STUDENT ENGAGEMENT IN LAW SCHOOLS 12 tbl.4 (2004), available at [http://lssse.iub.edu/2004\\_annual\\_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf](http://lssse.iub.edu/2004_annual_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf)).

<sup>146</sup> See *id.* (noting that the lack of professional responsibility coverage outside of required courses is the result of teachers who “believe that their efforts are undermined by a mandatory format and the perceived need to prepare students for a rule-oriented multistate bar ethics exam”).

<sup>147</sup> CARNEGIE REPORT, *supra* note 1, at 133–35; see also Cheryl Armon & Theo L. Dawson, *Developmental Trajectories in Moral Reasoning Across the Life Span*, 26 J. MORAL

myth parallels a myth about intelligence in general. The past few decades have produced a better understanding of the multiple intelligences of human beings and their capacity to develop these well into adulthood.<sup>148</sup> Many refer to these developing forms of intelligence as emotional intelligence, sometimes called “EQ,” which is not fixed at a point in human development in the same manner as one’s intelligence quotient (IQ). Emotional intelligence is something necessary to the development of one’s professional identity, and by exploring the concepts of emotional intelligence and development of professional identity and judgment, we can see that they are alike in many ways.<sup>149</sup>

(a) *Emotional Intelligence as a Framework for Understanding the Ability to Develop Skills and Values as One Matures*

Before Daniel Goleman’s *Emotional Intelligence* became a best-seller in the 1990s, many believed that personality traits were fixed in the same way as IQ.<sup>150</sup> Goleman dealt with intelligences other than cognitive intelligence—forms of intelligence that he called “emotional intelligence.”<sup>151</sup> He categorized these forms as (1) knowing one’s emotions, (2) managing one’s emotions, (3) motivating oneself, (4) recognizing emotion in others, and (5) handling relationships.<sup>152</sup> As Goleman observed: “[E]ven though a high IQ is no guarantee of prosperity, prestige, or happiness in life, our schools and our culture fixate on academic abilities, ignoring *emotional* intelligence, a set of traits—some might call it character—that also matters immensely for our personal destiny.”<sup>153</sup>

Goleman discussed the essential need to include intuition in decision-making alongside cognitive analysis. Life’s personal “decisions

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EDUC. 433, 433–34 (1997). See generally Muriel J. Bebeau, *Evidence-Based Character Development*, in 10 ADVANCES IN BIOETHICS: LOST VIRTUE: PROFESSIONAL CHARACTER DEVELOPMENT IN MEDICAL EDUCATION 47 (Nuala Kenny & Wayne Shelton eds., 2006).

<sup>148</sup> See *infra* notes 150–68 and accompanying text.

<sup>149</sup> This section is on emotional intelligence as an area in which law schools need to become more familiar so that they can develop educational methods that foster emotional intelligence as a part of students’ professional judgment. The following section concerns the contributions of moral psychologists and others in the field of moral, ethical, and human development as another area legal educators need to rely on in shaping their efforts in this area. Both sections are inspired by the discussion of these subjects in Larry O. Natt Gantt, II & Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville et al. eds., forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2562507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562507).

<sup>150</sup> See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 34 (1995).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 43.

<sup>153</sup> *Id.* at 36.

cannot be made well through sheer rationality; they require gut feeling, and the emotional wisdom garnered through past experiences.<sup>154</sup> Thus, unlike IQ, one's emotional intelligence is not fixed at a certain age.<sup>155</sup> Even into adulthood, a person can improve her ability to understand her own emotions and be aware of the emotions and motivations of others.

*(b) Whether Values, Ethical Development, and Decision-Making Skills Are Fixed Before Young Adulthood*

Some hold to the belief that a person's values and moral compass have been formed by the time she reaches law school.<sup>156</sup> Empirical studies, however, have confirmed that the moral and ethical development of the average adult continues well into mid-life, and probably even later.<sup>157</sup> Inspired by the work of Jean Piaget, Lawrence Kohlberg is the architect of the modern theory of the development of moral reasoning.<sup>158</sup> Kohlberg developed the classic formulation of six stages of moral development.<sup>159</sup> In his theory, Kohlberg opined that individuals develop in their moral reasoning as they move through these six stages, which are grouped into three levels.<sup>160</sup> Volumes have been written on Kohlberg's stage theory.<sup>161</sup> Although critics have challenged Kohlberg's approach,<sup>162</sup> his work still serves as the foundation of much thought on moral reasoning and has

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<sup>154</sup> *Id.* at 53.

<sup>155</sup> *See id.* at 37.

<sup>156</sup> *See* Floyd, *supra* note 14, at 221 (stating that practical wisdom, as old as Aristotle's teaching, "responds to skeptics who argue that we have no responsibility for students' ethical formation because their characters are already formed by the time they begin law school").

<sup>157</sup> *See* Hamilton & Monson, *Ethical Professional (Trans)Formation*, *supra* note 70, at 927 & n.14 (collecting authorities on developmental research in higher education programs).

<sup>158</sup> 2 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT*, at xxvii-xxx (1984).

<sup>159</sup> *Id.* at 170.

<sup>160</sup> *Id.* at 170, 173-76.

<sup>161</sup> *See generally, e.g.*, RONALD DUSKA & MARIELLEN WHELAN, *MORAL DEVELOPMENT: A GUIDE TO PIAGET AND KOHLBERG* (1975); LAWRENCE KOHLBERG: *CONSENSUS AND CONTROVERSY* (Sohan Modgil & Celia Modgil eds., 1986); LAWRENCE KOHLBERG, *THE MEANING AND MEASUREMENT OF MORAL DEVELOPMENT* (Heinz Werner Lecture Ser. Vol. 13, 1981); LAWRENCE KOHLBERG ET AL., *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* (J.A. Meacham ed., 1983); *MORAL DEVELOPMENT FOUNDATIONS: JUDEO-CHRISTIAN ALTERNATIVES TO PIAGET/KOHLBERG* (Donald M. Joy ed., 1983); *MORAL DEVELOPMENT, MORAL EDUCATION, AND KOHLBERG* (Brenda Munsey ed., 1980).

<sup>162</sup> *See* Israela Ettenberg Aron, *Moral Philosophy and Moral Education: A Critique of Kohlberg's Theory*, 85 SCH. REV. 197, 197 (1977). *See generally* John G. Gibbs, *Kohlberg's Stages of Moral Judgment: A Constructive Critique*, 47 HARVARD EDUC. REV. 43 (1977).

spawned “neo-Kohlbergian” approaches by such theorists such as James Rest.<sup>163</sup>

If one uses the Kohlberg paradigm, a law student, like any other human being, will fall somewhere along the six stages of decision-making. The “pre-conventional” stages include: focusing on making decisions to avoid punishment (stage 1) or to obtain rewards (stage 2).<sup>164</sup> The “conventional” stages include: making decisions to be a good person in one’s own eyes and the eyes of others (stage 3) or to comply with one’s sense of duty to society (stage 4).<sup>165</sup> The “post-conventional” or “principled” stages include: decision-making motivated by the “social contract” for the “welfare of all” (stage 5) or to comply with one’s commitment to universal ethical principles (stage 6).<sup>166</sup> James Rest and his colleagues at the Center for the Study of Ethical Development modified Kohlberg’s stage theory into “schema theory,” but this theory resembles Kohlberg’s approach by identifying three schemas that influence how individuals view and resolve moral problems.<sup>167</sup>

These constructs in developmental stages of decision-making show a number of things legal educators should notice. First, educators are badly mistaken if they believe every law student enters law school at the same level of ethical development. Law students will vary in their ability to grapple with questions of ethics and professional conduct. Law schools thus have the ability to influence students’ emotional intelligence and prudence. Second, challenging students to address issues pertinent to ethical decision-making spurs their further development.<sup>168</sup>

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<sup>163</sup> See generally, e.g., JAMES REST ET AL., *POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH* (1999).

<sup>164</sup> KOHLBERG, *supra* note 158, at 174.

<sup>165</sup> *Id.* at 174–75.

<sup>166</sup> *Id.* at 176.

<sup>167</sup> Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 334–35 (2011) [hereinafter Hamilton & Monson, *Legal Education’s Ethical Challenge*].

The Rest schemas maintain that a person’s reasoning processes is driven by one of the following:

(1) *personal interests*, or simplistic reasoning dominated by egocentric self-interest arguments, fear of punishment and authority, and early immature notions of social reciprocity (e.g., “You scratch my back, I’ll scratch yours”); (2) *maintaining norms*, or reasoning focused on existing norms, rules, codes, and laws; and (3) *post-conventional*, or reasoning involving concepts of justice, fairness, duty, and the evolutionary nature of morality in society.

*Id.* at 335.

<sup>168</sup> See F. CLARK POWER ET AL., *LAWRENCE KOHLBERG’S APPROACH TO MORAL EDUCATION* 133–34 (1989) (discussing research related to cultivating moral development in the educational context).

## 2. Exploring the Belief that Law Schools Should Not Inculcate Values and, at Most, Teach Only the Rules of Professional Conduct

The belief that cultivating professional identity and practical judgment requires inculcating values may be another reason legal educators are balking in response to the challenges to engage students in such formation.<sup>169</sup> Ironically, law schools and professors *are* addressing values when they make the effort to avoid them. Both the *Carnegie Report* and the *Best Practices Report* recognize that by avoiding discussion of ethical, social, and personal values, law schools are already showing their hand.<sup>170</sup> As the 2007 Reports conclude, the message law schools send by not addressing values, justice, and similar issues tells students that those issues are not important—and that what matters is competition, legal acumen, and how well one answers a professor's questions.<sup>171</sup>

Prior to the 2007 Reports, others had reached similar conclusions regarding the importance of teaching values in law school. For instance, after surveying the development of law schools from the advent of the Langdellian case-based Socratic Method through practice in modern law schools, Robert Stevens in his book *Law School: Legal Education in America from the 1850s to the 1980s* considered it fair to question “whether [law schools’] tendency was to produce analytic giants but moral pygmies.”<sup>172</sup> In his colorful metaphor, Stevens intended to convey that, in an effort to focus on cognitive skills and to ignore ethical, social, and moral questions, law schools were neglecting an important role.<sup>173</sup> Additionally, in his seminal 1978 article titled *The Ordinary Religion of the Law School Classroom*, Dean Roger Cramton observed:

The law teacher typically avoids explicit discussion of values in order to avoid “preaching” or “indoctrination.” His value position or commitment is not thought to be relevant to class discussion; students are left to decipher his views from the verbal and non-verbal cues that he provides. The teacher, moreover, has strong interests in the substantive niceties of his subject and is concerned about “coverage.” There is so much law

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<sup>169</sup> CARNEGIE REPORT, *supra* note 1, at 135 (reflecting comments from law professors to the authors expressing the view that dealing with professional development and values would be illegitimate indoctrination of values).

<sup>170</sup> See *supra* notes 1–8 and accompanying text.

<sup>171</sup> See BEST PRACTICES, *supra* note 2, at 30; CARNEGIE REPORT, *supra* note 1, at 140 (claiming that, by ignoring ethical and social issues, faculty members “are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students’ habits of mind, with important long-term effects on how they approach their work”); Daisy Hurst Floyd, *Reclaiming Purpose—Our Students’ and Our Own*, L. TCHR., Spring 2003, at 1, 1.

<sup>172</sup> ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 53, 121 (1983).

<sup>173</sup> See *id.* at 121–22.

to study! Exploration of value positions on particular questions has a lower priority. This would not be troublesome if the priorities of other instructors differed, but it is likely that systematic neglect of values results from similar choices being made by most instructors.<sup>174</sup>

In responding to Dean Cramton, Professor Katharine Bartlett directly addressed the paradox that attempting to avoid values actually teaches students a value system. The dilemma is one she perceives as inherent in addressing this field because professors cannot really be value-neutral, and “we merely mask our lack of neutrality by failing to address it.”<sup>175</sup> She adds that the professors should therefore discuss values in their classes “because it is right to do so.”<sup>176</sup> At the same time, Professor Bartlett observes that law professors cannot truly “teach” their students to adopt certain values because students are individual moral actors who come to law school with certain influences and views and who will not automatically abandon those.<sup>177</sup> The tension between these competing perspectives, however, ought not to deter law schools from the crucial task of addressing value formation.<sup>178</sup> Indeed, law professors should accept discussion and development of values as a challenge. The challenge will involve respecting the difference between the professor’s values, the institutional values of the legal profession, and the student’s values—at whatever stage in the ethical development process the student then finds herself.<sup>179</sup>

In sum, the *Carnegie Report* and the *Best Practices Report* echoed observations that keen observers had been making for years. Law schools have never really been value-neutral. Law inherently deals with matters other than pure logic. Even in the sterile universe of an appellate opinion, students will realize the social, economic, and moral issues surrounding decisions. The exercise of practical judgment requires reasoning, but it also entails considering factors beyond the analytical realm. Without education that prepares students to exercise practical judgment using all of the elements that form sound decisions, students are receiving less than they deserve.

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<sup>174</sup> Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 256 (1978).

<sup>175</sup> Katharine T. Bartlett, *Teaching Values: A Dilemma*, 37 J. LEGAL EDUC. 519, 519 (1987).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 519–20.

<sup>178</sup> *Id.* at 521.

<sup>179</sup> *Id.*



### 3. How a Single Course in the Rules of Professional Conduct Cannot Satisfy the Law School's Obligation to Form Students and Help Them Develop Judgment

To remain accredited by the ABA, law schools must require students to complete one course of at least two credits in professional responsibility,<sup>180</sup> in which the schools typically teach the Model Rules.<sup>181</sup> Law schools' emphasis on teaching the Model Rules goes hand-in-hand with the mandate from most states that students obtain a certain score on the Multistate Professional Responsibility Exam (MPRE) in order to be licensed.<sup>182</sup> That exam tests a student's knowledge of the Model Rules<sup>183</sup> and, as a hurdle to receiving a state bar license, motivates schools to teach students the Model Rules so that each student knows what conduct is subject to discipline. These Rules do not encourage lawyers to practice beyond the minimal standards of competency.<sup>184</sup> Students are not encouraged to explore how the values of the profession may lead lawyers through their practical judgment to resolve competing values.<sup>185</sup> The focus is on avoiding sanctions.<sup>186</sup> Moreover, "[w]hen legal ethics courses focus

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<sup>180</sup> 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014).

<sup>181</sup> The ABA adopted the Model Rules of Professional Conduct in 1983. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44 (1995). The Model Rules replaced the Model Code of Professional Responsibility that divided Disciplinary Rules, for which a lawyer could be sanctioned, and Ethical Considerations, to which lawyers were asked to aspire. *See id.* One commentator made the following observation on this shift: "The effect of the move from general aspirations to detailed standards . . . became a move from a reach for professionalism to a search for loopholes that would justify lower and lower standards of behavior." Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 419 (2001); *see also* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 412 (2005) (reaching a similar conclusion and arguing for a move away from the Model Rules toward overarching moral guidelines).

Without an incentive to strive for values exceeding minimum standards, the Model Rules offer a lawyer the license to do everything not proscribed by the Model Rules. *See, e.g.*, Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 550 (2002).

<sup>182</sup> For the list of states that require applicants to take the MPRE, see *Jurisdictions Requiring the MPRE*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Apr. 11, 2015).

<sup>183</sup> Jeremy M. Miller, *Legal Ethics and Classroom Teaching: The Apology*, 14 WIDENER L.J. 365, 421 (2005).

<sup>184</sup> *See id.* at 421–22.

<sup>185</sup> *See* Joshua E. Perry, *Thinking Like a Professional*, 58 J. LEGAL EDUC. 159, 159–60 (2008).

<sup>186</sup> *See* CARNEGIE REPORT, *supra* note 1, at 149. In a 1996 ABA Symposium on Teaching and Learning Professionalism, then-Professor (later Dean) Roger Cramton recalled the practice of law in the not-too-distant past when a lawyer was expected to balance her

exclusively on teaching students what a lawyer can and cannot get away with, they can inadvertently convey a sense that knowing this is all there is to ethics.”<sup>187</sup>

The authors’ survey results indicate that many schools are now doing more than singularly focusing on the Model Rules in their Professional Responsibility courses. As noted above, only 16% of the schools responding to the question on professional responsibility instruction indicated that the development of students’ professional identity was not emphasized in their course. At the same time, over half of the respondents (57%) reported that professional identity was “emphasized but not as much as learning the content of the rules.”<sup>188</sup>

The results affirm that it may be unrealistic to expect professors who teach Professional Responsibility in two- or three-credit hour courses to teach the Model Rules while equally emphasizing the cultivation of students’ ethical professional identity. After all, a course in the Model Rules is not in reality a course in “legal ethics” in a comprehensive sense. The Model Rules neither refer to ethics in name nor seek to provide a method of developing practical judgment.<sup>189</sup> The drafters of the Model Rules recognized that the Rules’ focus is on regulating conduct.<sup>190</sup> Geoffrey Hazard, chief drafter of the Model Rules, noted that they were never intended to be a code of “ethics,” but are more properly understood as a code of “legal obligations.”<sup>191</sup> Similarly, the National Conference of Bar Examiners plainly states that the MPRE “is not a test to determine an individual’s personal ethical values.”<sup>192</sup> The limited role of the Model Rules is not a criticism; it is a statement of fact. However, law schools need to ensure students know this limitation.

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duties to the client with her duties to the judicial system. Professor Cramton observed that a shift has occurred and lawyers now believe “the modern heresy, endlessly repeated in multiple settings, that ‘the client comes first,’ meaning ‘first and only.’” Roger C. Cramton, Robert S. Stevens Emeritus Prof. Law, Cornell Univ., On Giving Meaning to “Professionalism,” Keynote Address at American Bar Association Symposium on Teaching and Learning Professionalism (Oct. 2–4, 1996), in *Teaching and Learning Professionalism*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 7–8 (1997).

<sup>187</sup> CARNEGIE REPORT, *supra* note 1, at 149; *see also* Schiltz, *supra* note 37, at 909 (“[C]omplying with the formal rules will not make you an ethical lawyer, any more than complying with the criminal law will make you an ethical person. . . . Complying with the rules is usually a necessary, but never a sufficient, part of being an ethical lawyer.”).

<sup>188</sup> *See supra* Part III.C.

<sup>189</sup> Luban & Millemann, *supra* note 181, at 45.

<sup>190</sup> *Id.*

<sup>191</sup> *See* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 109 (3d ed. 1994); Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 571, 574 (1981).

<sup>192</sup> *Jurisdictions Requiring the MPRE*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Apr. 11, 2015).

Given the number of Rules and the complexity of many of them, a two- or three-credit hour course can do little more than ensure the students learn the Rules and the other relevant professional standards. One school candidly stated an observation about professional responsibility that no doubt is not exclusive to that school: “Most students took the course only because it was required for graduation. They put it off until the last semester; they did not care about their grade, for they were assured of graduation and most of them had jobs lined up; and they did as little work as possible.”<sup>193</sup>

Despite this constraint, law schools can ensure that students are informed in their Professional Responsibility course that the Rules should not be the *only* considerations in resolving ethical and professional questions. It would not take a great deal of effort to put the Model Rules in context, and the survey results support that many schools are indeed encouraging students to look beyond the Rules for decision-making guidance. Professional Responsibility professors, for instance, can explain that students will have to develop their own ethical guidelines to accompany the Rules and help them resolve dilemmas in those many areas where the Rules leave matters to an attorney’s discretion.

As one way of promoting such decision-making, all students in Regent University School of Law’s required Professional Responsibility course must write their personal philosophy of lawyering, an assignment adapted from the discussion of developing a philosophy of lawyering in the Professional Responsibility casebook authored by Nathan Crystal.<sup>194</sup> In the paper, which is graded and counts as a percentage of each student’s final course grade, students are instructed to set forth a decision-making “framework that will guide them as they: (1) integrate their personal and professional lives; and (2) approach ethical issues in their practice as lawyers.”<sup>195</sup>

If a school does not add such a component to the Professional Responsibility course to address the relationship between the Model Rules and principles beyond them, it can offer a separate required course to ensure every student receives a more comprehensive view of ethical

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<sup>193</sup> Edmund B. Spaeth, Jr. et al., *Teaching Legal Ethics: Exploring the Continuum*, 58 *LAW & CONTEMP. PROBS.* 153, 154 (1995).

<sup>194</sup> See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 52–55 (5th ed. 2012).

<sup>195</sup> Larry O. Natt Gantt, II, Professional Responsibility Syllabus 5–6 (Spring 2015) (on file with the Regent University Law Review). The syllabus also provides that students must set forth particular ethical principles that will guide them as they integrate their personal and professional lives and as they approach ethical issues as lawyers. Students should discuss how they will prioritize these principles when they face ethical dilemmas that involve conflicts between two competing virtues or goals.

*Id.* at 6.

principles. Students must be taught the role of the Model Rules in conjunction with other inherent values and principles to learn how to reach sound judgments. The bottom line is that a single course in Professional Responsibility can enhance students' professional identity, but it cannot produce the level of professional formation law schools must seek to attain in their students.

#### IV. HOW CURRICULUM AND TEACHING METHODS AIMED AT DEVELOPING ETHICAL PROFESSIONAL IDENTITY CAN ULTIMATELY LEAD TO THE FOUNDATION FOR PRACTICAL JUDGMENT

Any law school that decides to value the cultivation of ethical professional identity and practical judgment should consider the need to approach such objectives incrementally. We should not be surprised that law students, who are mostly young adults, do not enter law school with fully developed moral compasses. A recent longitudinal study that tested the moral development and ethical progress of incoming law students and then employed the same testing tools immediately before the students left school provides hope that law schools can positively affect their students' ethical professional identity development.<sup>196</sup> Because these students experienced an intentional, well-designed curriculum that fostered their ethical development from the first to the third year, a closer look at the study and the school's curricular approach is in order.

##### *A. Recent Study Which Supports the Need to Structure the Educational Program to Develop Law Students' Professional Identity and Judgment*

The longitudinal study focused on law students at the University of St. Thomas School of Law. In the fall of 2009, the study first collected the results of 168 entering law students' responses to two measures; (1) the Defining Issues Test (DIT), an accepted test for measuring moral development, and (2) the students' essay on professional formation.<sup>197</sup> Then, the study gathered results from the same students in the spring of 2012, employing the same test instruments—the DIT and the same professional formation essay.<sup>198</sup> The students showed a marked improvement in their moral and ethical judgment.<sup>199</sup>

The University of St. Thomas Law School has a well-conceived curricular focus that seeks to nurture students' professional formation in each year of law school.<sup>200</sup> While acknowledging the potential limits of the

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<sup>196</sup> Hamilton et al., *Empirical Evidence*, *supra* note 69, at 48.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 55, 58.

<sup>200</sup> *Id.* at 31–34.

study, the results of this school's longitudinal study suggest that the school's curricular emphasis on professional formation and judgment improved students' results on the assessments of their moral development.<sup>201</sup> Those who administered the study observed that many of the "law students gr[e]w in moral reasoning and ethical professional identity during the three years of law school."<sup>202</sup>

The emphasis the school places on nurturing students' professional formation is considerable. A first-year course that explores legal systems, the values of lawyers, broad moral and ethical issues—and which requires students to begin reflecting on these issues—provides a solid foundation.<sup>203</sup> Additional required education, including a mentor externship and seminar that extends to the second and third years, offers the opportunity to help students further their professional formation.<sup>204</sup> Though it appears to focus on developing practical skills, a required lawyering skills course includes an intentional effort to reinforce the professional formation begun in other courses.<sup>205</sup> Moreover, the required Professional Responsibility course includes more than simply teaching the Model Rules.<sup>206</sup> Instead, it helps students appreciate that the Model Rules are a necessary part of the information they need to make professional decisions, but that they must rely on ethical principles that transcend the Rules. In some professors' versions of the course, students prepare reflective papers to demonstrate their understanding of how the Model Rules and their value systems assist them in professional decision-making.<sup>207</sup> Moreover, professors of doctrinal courses include exercises in their courses that require students to reflect on "lawyering, morality, and justice."<sup>208</sup> Finally, students are encouraged to take a number of elective courses and participate in activities that further nurture their ethical professional identity and judgment.<sup>209</sup>

The results of this law school's study suggest that an integrated approach to teaching professional ethical formation and judgment can accomplish formative goals. The implications of this school's approach and its study results suggest that law schools should—if they are serious about professional ethical formation and development of practical judgment—

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<sup>201</sup> *Id.* at 62–63.

<sup>202</sup> *Id.* at 63.

<sup>203</sup> *Id.* at 31–32.

<sup>204</sup> *Id.* at 32–34.

<sup>205</sup> *See id.* at 34.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 35.

<sup>209</sup> *See id.* at 35–39 (discussing, among other things, the school's clinical and experiential learning offerings, course in ethical leadership, and public service requirement).

structure their curricula to reflect that commitment. As noted, foundational courses in the first year need to introduce students to legal systems, professional values, and the ethical dilemmas students are likely to encounter in practice. Courses that carry through into the second and third years should concentrate on helping students formulate a method for reflectively deliberating on such dilemmas, a process which helps students grow in their ability to use their moral compass. Even with such an emphasis, a student may not develop practical wisdom in law school such that she can model Aristotle's phronesis<sup>210</sup> of (1) balancing competing values with empathy and detachment, (2) considering the variable courses of action and the consequences to others from each option, and (3) resolving the question in a way that is the best alternative in the circumstances.<sup>211</sup> However, a student who has received training like that described in the University of St. Thomas study and proposed by this Article will be far more likely to develop phronesis than one whose ethical professional identity is neglected.

Despite the encouragement offered by this study of law students' development, questions remain. Over the long term, will students who experience cultivation of their ethical professional identity continue to develop in law practice? Will they realize that attending to their moral compass affects their well-being and fulfillment, as well as all those whom they serve in practice? Or will law students regress in the heat of practice and resort to the shortcut of doing whatever seems to advantage the client and avoids sanctions? A longitudinal study that tested students while in law school and again at a later point in time, such as ten years into practice, would help clarify the answers to these questions. For now, however, this study provides empirical evidence that a well-designed curriculum aimed at developing law students' ethical professional identity and judgment can have a favorable impact.

*B. Recommendations of Curricular Changes and Specific Teaching Methods Which Provide Additional Evidence that Law Schools Can Affect Students' Ethical Professional Identity*

More law schools need to adopt curricular and extracurricular programming to enhance their students' professional identity formation. In particular, introducing professional formation in the first year is likely crucial to the success of any three-year effort, given that students' development in this area is incremental and begins with foundational

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<sup>210</sup> For a discussion of the meaning of phronesis—most simply translated “practical wisdom”—see *supra* Part I.B.

<sup>211</sup> See *supra* Part I.B.

skills.<sup>212</sup> Most law schools do not seem to be taking this approach. The recent *ABA Curricular Survey* suggests that, to the extent law schools are offering professional development or professional identity opportunities, these options are typically in the upper-division courses.<sup>213</sup> The authors' review of law school course offerings, moreover, indicates that these upper-division courses must be electives because so few required ethics credits were found.<sup>214</sup> Currently, the approach seems to fall into three categories. First, a relatively small minority of schools are making professional identity part of the curriculum and intentionally seeking to structure their efforts to best promote formation.<sup>215</sup> Second, some schools appear to be offering a series of electives without an integrated structure that students sequentially take for skill and professional identity development.<sup>216</sup> Third, the majority of law schools are paying less attention to professional identity formation—or even to developing ethics courses—than to skills and experiential courses.<sup>217</sup>

If a school took the findings of the 2007 Reports to heart, its curriculum would look much different. It would have at least a component of some first-year course in which the foundational skills necessary for developing an ethical professional identity were part of the curriculum. These foundational skills are discussed fully below.<sup>218</sup> Furthermore, students should be aware from the start of law school that, although Professional Responsibility and the Model Rules are a necessary part of their education and formation, these are not sufficient to prepare them to make sound judgments. Ideally, Professional Responsibility would address the Model Rules and include elements of instruction on how one's moral compass, informed by principles important to both the person and to the profession, needs to guide the decision-making process. Finally,

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<sup>212</sup> See *supra* Parts III.D.1.b., IV.A.; see *infra* Part IV.C.1.

<sup>213</sup> See *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 16 (indicating the addition of courses on professionalism and professional identity in a review of law schools' upper division curricula).

<sup>214</sup> See REVIEW OF CURRICULAR INFORMATION, *supra* note 110 (showing only twenty-four schools with required ethics-related offerings beyond Professional Responsibility). For an in-depth discussion of the authors' survey results, see *supra* Part III.C.

<sup>215</sup> As discussed in the preceding section, the University of St. Thomas is a good example of this approach. See *supra* notes 196–209 and accompanying text.

<sup>216</sup> See REVIEW OF CURRICULAR INFORMATION, *supra* note 110 (concluding that if the courses are not required ethics courses, they must be electives). Moreover, the more typical curriculum included a wide range of courses that touched on matters involving ethics, but not on the method of ethical formation and judgment. *Id.* at n.1.

<sup>217</sup> See *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 74 (indicating that, whereas skills and experiential courses were increased at between thirty and sixty schools, only twenty-seven schools reported an increase in legal ethics and professionalism curricular offerings).

<sup>218</sup> See *infra* Part IV.C.1.

upper-division courses other than Professional Responsibility would build on the foundational skills students learn in their first year and would challenge them to grow by exercising their judgment in course exercises.

Law schools have sufficient teaching method models to develop students' foundational skills and form higher order skills. A variety of teaching methods—some developed in legal education and some borrowed from other professional schools—can help students improve in understanding themselves and resolving value conflicts.<sup>219</sup> The key is to weave these teaching methods intentionally into a well-designed curriculum. Certain skills need to be developed before students can proceed. By recognizing what we know about human emotional and moral development,<sup>220</sup> legal educators should ultimately gravitate to a curriculum that first addresses foundations skills, such as self-awareness and empathy for others, and later addresses complex problem-solving exercises designed to exercise practical judgment. Because certain skills are foundational, students can develop higher order faculties such as empathy and relational aptitude only after they are equipped to develop such faculties. The ultimate goal should be for students to have the framework from which to exercise practical judgment in resolving challenging ethical and professional dilemmas. If schools do not accept that the development of a professional ethical identity is an incremental process, they risk undermining the effectiveness of any effort to cultivate students' professional identity and judgment. The lack of required ethics credits and the scattered electives offered to students suggest that many schools have failed to design curricula that will best serve their students in this area.<sup>221</sup>

Law schools certainly can take different approaches to reach the goal outlined above, but a guiding principle needs to be the incremental nature of the development of ethical professional identity and judgment.<sup>222</sup> If they remember that principle and sequence the curriculum accordingly, educators can reasonably debate the teaching methods most effective at their schools.<sup>223</sup>

The following suggested methods are drawn from the pioneers in law teaching who have ventured into the realm of developing self-awareness, emotional intelligence, and/or how to exercise practical judgment.<sup>224</sup> Other

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<sup>219</sup> See *infra* Part IV.C.

<sup>220</sup> See *supra* Parts II.B, III.D.1.

<sup>221</sup> See *supra* notes 213–17 and accompanying text.

<sup>222</sup> See Kehner & Robinson, *supra* note 137, at 99.

<sup>223</sup> *Id.* (“[T]here is no ‘one size fits all’ approach to teaching students the habits and traits that embody one’s sense of professional identity.”).

<sup>224</sup> See *infra* Part IV.C.1.



exercises are drawn from education in other professions, such as medical schools.<sup>225</sup>

*C. Incremental Skills and Faculties Necessary to Professional Identity and Practical Judgment*

Students do not come to law school as fully-formed, self-aware persons who are able to deliberate thoughtfully over ethical and professional questions.<sup>226</sup> By helping them develop skills that are foundational to ethical professional identity and then building on those skills, law schools give students the opportunity to grow.

1. Foundational Skills

The following skills are foundational to the development of a well-developed ethical compass: (1) self-awareness, (2) ethical sensitivity, (3) relational skills and cultural competency, (4) the ability to recognize one's own lack of objectivity and the related need to have others (e.g., mentors) serve as a check on one's lack of objectivity and on one's tendency to rationalize, and (5) self-reflection on values in light of ethical issues and a method for reaching a practical judgment between competing values.<sup>227</sup>

These skills cannot all be gained at once.<sup>228</sup> Some students will be stronger in certain skills than in others.<sup>229</sup> Each student needs to have the opportunity to identify the skills in which she needs development. Students can then move to experiences that challenge them to apply these skills and see clearly how they will relate to their effectiveness as lawyers. Because working with and understanding other people (clients, opposing counsel, witnesses, judges, and court personnel) is crucial to effective lawyering, as it is to so many professions, developing relational skills should be a priority.<sup>230</sup> An integrated program of instruction would sequence the educational methods so as to help students grow in their understanding of themselves and in their ability to resolve value and ethical conflicts.<sup>231</sup> Such a program would develop foundational skills in

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<sup>225</sup> See *infra* Part IV.C.2.

<sup>226</sup> See *supra* Part III.D.1.

<sup>227</sup> See *infra* Parts IV.C., IV.D.2.; Julie A. Oseid, *When Big Brother Is Watching [Out for] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues from My Mentor*, 59 S.C. L. REV. 393, 420–21 (2008). For one of the best sources on the subject of relational skills, see RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden eds., 2010) [hereinafter RELATIONSHIP-CENTERED LAWYERING].

<sup>228</sup> See *supra* Part III.D.1.

<sup>229</sup> See *supra* Part III.D.1.b.

<sup>230</sup> See generally RELATIONSHIP-CENTERED LAWYERING, *supra* note 227.

<sup>231</sup> As Professor Timothy Floyd contends,

the early part of law school and build on those skills as students progress. The following are suggestions for such a program.

(a) *Developing Self-Awareness as a Beginning*

A reasonable point of departure is to help students develop greater self-awareness. A self-aware person recognizes her strengths, weaknesses, emotions, thoughts, and beliefs.<sup>232</sup> A self-aware person displays the qualities of emotional intelligence discussed above.<sup>233</sup> Indeed, recent studies—most notably the one performed by Marjorie Shultz and Sheldon Zedeck—have suggested that such qualities have as much to do with lawyer effectiveness than cognitive skills.<sup>234</sup>

(b) *Teaching Methods to Enhance Self-Awareness*<sup>235</sup>

(1) Journaling and Class Discussion

Journaling probably was among the first efforts in law school to help students develop a degree of self-awareness. As one leading educator has observed: “The long list of impressive benefits of journal writing for students included promoting self-awareness and reflection, enhancing learning from experience, releasing stress, and developing lifelong

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the focus on professional identity and integrity must be intentional, it must be pervasive, and it must start in the first year. The Carnegie Report insists that it will not be helpful to simply add on another elective course or two as an adjunct to the core curriculum. The strategy must be integrative rather than additive.

Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity*, 28 MISS. C. L. REV. 339, 348 (2009).

<sup>232</sup> See Victor Lipman, *All Successful Leaders Need This Quality: Self-Awareness*, FORBES (Nov. 18, 2013, 4:54 PM), <http://www.forbes.com/sites/victorlipman/2013/11/18/all-successful-leaders-need-this-quality-self-awareness> (summarizing the qualities of self-awareness and their importance to the success of leaders).

<sup>233</sup> GOLEMAN, *supra* note 150, at 43; *see supra* Part III.D.1.a.

<sup>234</sup> *See supra* notes 82–91 and accompanying text. Of the twenty-six factors identified by Shultz and Zedeck as indicative of lawyer effectiveness, at least half of the skills associated with effective lawyers are ones that (1) many would associate with emotional intelligence and (2) would be the kind enhanced by training in self-awareness. These range from the ability to listen and work with others, to empathy, or the ability to “see the world through the other’s eyes,” to regulating one’s level of stress and spending time on self-development. *See supra* notes 82–91 and accompanying text. As one commentator observed about the implications of the Shultz-Zedeck study, “the results . . . suggest that academic factors are profoundly under-inclusive of future lawyering potential.” William D. Henderson, *Successful Lawyer Skills and Behaviors*, in AM. BAR ASS’N, ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER 59, 69 (Paul A. Haskins ed., 2013).

<sup>235</sup> This section is inspired by a discussion of the topic in Gantt & Madison, *supra* note 149.

self-directed learning habits.”<sup>236</sup> Other professional schools have long used journaling to help students develop self-awareness through reflection.<sup>237</sup>

In law schools, clinical programs and externships appear to have been among the first to use journals and reflective writing to help students develop self-awareness and to provide them feedback on their journals.<sup>238</sup> Journaling offers law students the rare opportunity to express feelings:

There is seldom a place in a law school curriculum for a student to regard awareness of and expression of her feelings as an integral part of the educational experience. This is especially true of the doubts and anxieties that students often encounter when faced with the reality of their own role in the legal system.<sup>239</sup>

More recently, doctrinal courses have begun to include journaling as part of the course. For instance, the *Context & Practice* series of casebooks, edited by Michael Hunter Schwartz includes professional formation questions in each casebook.<sup>240</sup> These questions are designed primarily to focus on the gray areas of the Model Rules, thereby requiring the students to exercise their own discretion in solving the lawyer’s dilemma.<sup>241</sup> Moreover, many of the questions ask students to reflect in journals on emotions they may experience in a scenario outlined for them.

For instance, students in Regent University School of Law’s course in State Civil Pretrial Practice and Procedure journal on assuming the role of a lawyer meeting with a client. In the meeting, the lawyer must deliver unfavorable news about claims that are not sustainable along with

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<sup>236</sup> Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 GONZ. L. REV. 129, 130 (2003).

<sup>237</sup> See, e.g., Karen Hinett, *Improving Learning Through Reflection—Part One*, HIGHER EDUC. ACAD., available at [http://www-new1.heacademy.ac.uk/assets/documents/resources/database/id485\\_improving\\_learning\\_part\\_one.pdf](http://www-new1.heacademy.ac.uk/assets/documents/resources/database/id485_improving_learning_part_one.pdf) (describing the usefulness of reflection to doctors, dentists, social workers, and architects).

<sup>238</sup> See J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 55 (1996); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 249–51 (2009).

<sup>239</sup> Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLINICAL L. 7, 34 (1997).

<sup>240</sup> See Michael H. Schwartz, *Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, 3 ELON L. REV. 27, 34, 51–53 (2011); Flier for *Context and Practice Series*, CAROLINA ACAD. PRESS, [http://www.cap-press.com/pdf/C&P%20december%202013\\_schwartz%20series.pdf](http://www.cap-press.com/pdf/C&P%20december%202013_schwartz%20series.pdf) (last visited Apr. 11, 2015). Other series, to a greater or lesser extent, include some forms of educational methods aimed at improving students’ professional formation and judgment. See, e.g., BRIDGE TO PRACTICE (West Academic Publishing); DEVELOPING PROFESSIONAL SKILLS (West Academic Publishing); EXPERIENCING LAW (West Academic Publishing); SKILLS & VALUES (LexisNexis); LEARNING SERIES (West Academic Publishing).

<sup>241</sup> See, e.g., BARBARA GLESNER FINES, PROFESSIONAL RESPONSIBILITY: A CONTEXT AND PRACTICE CASEBOOK, at xx (2013).

positive news that other claims can be brought.<sup>242</sup> The students are encouraged to journal on how they feel about delivering bad news. Many, if not most students, report a feeling of some anxiety. Recognizing that inexperienced lawyers often have difficulty expressing unfavorable news to clients, journaling is employed as a means to introduce students to the value of self-awareness.

After students have journaled their reactions, they discuss their experience as a class.<sup>243</sup> Inevitably, as some students acknowledge feeling uncomfortable about bearing unfavorable news, a dialogue proceeds on how feeling that way as a new lawyer is fairly typical. Some students acknowledge that until they realized the anxiety that was leading them to do so, they planned solely to discuss the positive news and avoid discussing the bad news. Such a phenomenon of avoiding negative feelings—and of being unconscious of that fact—is not unusual.<sup>244</sup> If students have not recognized these feelings before, the discussion helps them build self-awareness. They begin seeing that their emotions are a useful guide to which they should pay attention in representing a client. When addressing a lawyer’s role and obligations to the client, the professor can guide a discussion that explores why the best approach is to be thorough and honest with the client.

## (2) Assigned Readings and Class Discussion to Improve Emotional Intelligence

Professors can help students develop self-awareness in other ways. For instance, Professor Robin Slocum describes how she uses readings that relate to ethical issues likely to evoke emotional responses from students.<sup>245</sup> For example, Professor Slocum selects readings describing “a grim portrayal of an actual lawyer’s experiences in a law firm in which colleagues pressured him to conform to a variety of billing practices that he believed were unethical and immoral.”<sup>246</sup> She then suggests a way to spur discussion in class: “As a prompt, [the professor] ask[s] whether any students felt sad, angry, afraid, or disheartened about the profession they

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<sup>242</sup> BENJAMIN V. MADISON, III, CIVIL PROCEDURE FOR ALL STATES: A CONTEXT AND PRACTICE CASEBOOK 21–22 (2010) [hereinafter MADISON, CIVIL PROCEDURE].

<sup>243</sup> Students are not required in class to disclose what they wrote in their journals. Most students are willing to engage in the discussion and to say what they wrote. After the discussion they will provide comments such as whether they have revised their view.

<sup>244</sup> See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 48, 59 (2012).

<sup>245</sup> Robin Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, 45 CREIGHTON L. REV. 827, 847–48 (2012).

<sup>246</sup> *Id.* at 847 (describing readings taken from LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 519–26 (2d ed. 2008)).

were preparing to enter.”<sup>247</sup> Professor Slocum helps students realize that their emotional reactions can signal the internal tension they feel (and should feel) with unethical practices. “Because students become viscerally aware of the emotional impact that various unethical practices would have on them, this discussion also makes their personal values become more alive within them.”<sup>248</sup> The self-awareness that students gain through such a method is only the beginning of a process. As explained below, students will learn other skills that enhance their ability to exercise practical judgment.

### (3) Mindfulness and Contemplative Practices

For those who wish to be more self-aware, contemplative practices have for ages served to help them live better lives. Recognizing the value of these practices in developing self-awareness, Professor Rhonda Magee includes in her definition of “contemplative practice” a variety of practices but highlights primarily “mindfulness meditation” techniques.<sup>249</sup> She contends that this practice leads to “increased awareness, increased capacity to regulate emotions . . . and a felt sense of interconnection with others.”<sup>250</sup>

Beyond simply introducing students to meditation, Professor Magee incorporated the practice into a class in which students played the role of a lawyer facing a variety of stressful circumstances.<sup>251</sup> She found that the students who meditated became more aware of their emotions, improved their ability to regulate these emotions, and showed the capacity to develop a sense of connection to others.<sup>252</sup> In other words, they were more conscious in the process of performing a legal task and were better able to maintain composure.<sup>253</sup>

#### 2. A Step Further—Developing Empathy and Moral Sensitivity<sup>254</sup>

Students who are self-aware are not necessarily empathic. They are at least more aware of their own emotions and perhaps even their motivations, ideals, and other insights that come with self-awareness.

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<sup>247</sup> *Id.* at 848.

<sup>248</sup> *Id.*

<sup>249</sup> Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 539–40 (2011). For a collection of articles on the value of teaching mindfulness to law students, see Symposium, *Mindfulness*, 61 J. LEGAL EDUC. 634 (2012).

<sup>250</sup> Magee, *supra* note 249, at 589.

<sup>251</sup> *Id.* at 588.

<sup>252</sup> *See id.* at 589.

<sup>253</sup> *See id.* at 589–90.

<sup>254</sup> This section is inspired by a discussion of the topic in Gantt & Madison, *supra* note 149.

With heightened emotional intelligence, the next challenge in cultivating students' professional identity and their ability to exercise practical judgment is to help them develop empathy.

The reason empathy is so important to a lawyer's professional identity and judgment is that empathizing with others affected by her decisions improves the lawyer's ability to evaluate and choose between potential courses of action.<sup>255</sup> An ethically sensitive person recognizes the competing values in any ethical dilemma, and considers the impact *on others* of the potential choices as she chooses the best one under the circumstances.

*(a) Teaching Methods and Exercises Used in Other Professional Schools to Develop Empathy and Moral Sensitivity*

Even though law schools typically have not developed methods to encourage the skills of empathy and moral sensitivity, other professional schools have. For instance, "[i]n the last decade in graduate medical and dental education, research on how to assess empathy and the effects of the curriculum and specific pedagogies on students' abilities to empathize with patients, has flourished, providing some insights for legal education."<sup>256</sup> Likewise, medical schools highlight the value of empathy in a variety of ways. For instance, medical students are taught to empathize with patients during simulations with community members trained to role play difficult patient situations.<sup>257</sup> Medical schools also use other educational models in which students role play, such as by taking on the role of a patient hospitalized with a specific condition, facing some of the frustrations patients experience in hospitals.<sup>258</sup> Dental schools have also made progress in encouraging and assessing ethical sensitivity. One example is in the use of a Dental Ethical Sensitivity Test, in which students role play as dentists listening to a patient's problem, after which the student continues in role to respond to the situation.<sup>259</sup> A student then meets with her dentist-mentor, and they discuss the degree of ethical sensitivity the student displayed, how to improve the student's sensitivity, and how to convey that sensitivity to the patient.<sup>260</sup>

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<sup>255</sup> Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 18, 22 (2008).

<sup>256</sup> Hamilton & Monson, *Legal Education's Ethical Challenge*, *supra* note 167, at 358.

<sup>257</sup> See Helen R. Winefield & Anna Chur-Hansen, *Evaluating the Outcome of Communication Skill Teaching for Entry-Level Medical Students: Does Knowledge of Empathy Increase?*, 34 MED. EDUC. 90, 91, 93 (2000).

<sup>258</sup> See, e.g., Michael Wilkes et al., *Towards More Empathic Medical Students: A Medical Student Hospitalization Experience*, 36 MED. EDUC. 528, 529–30 (2002).

<sup>259</sup> See Hamilton & Monson, *Legal Education's Ethical Challenge*, *supra* note 167, at 361.

<sup>260</sup> See *id.* at 361–62.

(b) *Law Students “Role Playing” a Lawyer Representing a Seriously Injured Client*

Law schools could adapt the methods used in medical and dental schools. A law student, for example, could role play a lawyer meeting with a client who was paralyzed in an accident. Before meeting the client, the student could be asked to prepare by considering, if she were that client, how she would likely feel in the client's situation, how she would feel about no longer being able to do the job she had done all her life, and how she would likely feel about having to adapt to life after the accident. After considering these questions, the student could be asked what she should do in the first client meeting that she might not otherwise have thought to do.

An alternative approach that would match the method used in medical schools would be to have the student role play the paralyzed client but then have another student, or the professor, play the role of the lawyer. The lawyer could then purposefully fail to show concern for the client and demonstrate how a client might feel when consulting with a lawyer who has no idea what it is like to be paralyzed and seems to think that litigation can solve all the client's problems. As with a medical student who is forced to role play a patient and be subjected to the frustrations of hospitalization, taking on the role of the injured client may more effectively show to students why they need to develop empathy.

(c) *Law Students “Role Playing” a Lawyer Dealing with a Rambo Opposing Counsel*

Having become the client's advocate, lawyers without foundational skills to help them remain balanced and true to their values can become singularly focused on the client's interests.<sup>261</sup> Such a lawyer often is blind to the views and feelings of witnesses in the case, of opposing counsel, or even of the judge.<sup>262</sup> Lawyers should represent their clients diligently and with the clients' best interests in mind. However, lawyers who lack the broader perspective that comes with emotional intelligence, empathy, and moral sensitivity often yield to the temptation to act in ways that go

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<sup>261</sup> Cf. CRYSTAL, *supra* note 194, at 22 (asserting that the traditional approach to decision-making is the client-centered philosophy which requires lawyers to take any action that will advance the client's interests as long as it does not violate the law).

<sup>262</sup> See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 86–87 (2000) (describing the two principles underlying this type of lawyering as 1) zealous partisanship on behalf of clients that will do everything possible to obtain client's goals short of violating a rule and 2) the belief that such lawyers are neither morally nor legally accountable when functioning as this type of advocate).

beyond the bounds of proper advocacy.<sup>263</sup> The truth is, moreover, that taking such an approach usually does not serve, but often hurts, the client's best interests.<sup>264</sup> A lawyer, for instance, may try to impress his client by acting aggressively in depositions, by insulting deponents, and arguing with opposing counsel.<sup>265</sup> These are classic examples of behaviors that occur regularly, but which serve no good purpose.

A law student (or lawyer) who has reflected on the professional identity and values she wants to display would be unlikely to engage in such behaviors. The hardball approach often is a role that lawyers adopt because they somehow have the notion that effective lawyers have to play tough at all times.<sup>266</sup> In reality, the lawyers who have a sense of their principles will not adopt the role of a "Rambo" lawyer and are able to educate clients that hardball lawyering can do more damage than good. It often is damaging because the disrespectful, overly aggressive treatment of others backfires and motivates one's opponent and her lawyer to fight the case more vigorously.

Role playing can be effective in developing one's ethical sensitivity in a way that discourages hardball lawyering. Students can take on the role, for instance, of counsel in a deposition facing an opposing counsel who constantly objects in ways to convey information to the client. Known as "speaking objections," such objections are prohibited by the Federal Rules of Civil Procedure.<sup>267</sup> However, the practice is still prevalent because depositions typically occur outside the court and, thus, the lack of a judge often emboldens a lawyer to feel more freedom to act as she pleases.<sup>268</sup> A deposition simulation in which opposing counsel makes inappropriate speaking objections should teach students at least two things. First, the student "lawyer" will appreciate how inappropriate it is for a lawyer to take her client's interests to such an extreme that she will interfere with another lawyer's questioning and suggest answers. The professor could ask the class observing such behavior, "Do you want to be that kind of lawyer?" Most should see they do not. Those who say they have no problem with it can be engaged in a dialogue that explores how they will deal with

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<sup>263</sup> Cf. *supra* CRYSTAL, note 194, at 23 (describing how critics of a client-centered approach contend that such an approach leads to attorneys' pursuing morally objectionable goals and unfair strategies on behalf of their clients).

<sup>264</sup> See Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 79, 79–81.

<sup>265</sup> See *id.* at 79. The phrase "Rambo lawyering" likens overly aggressive lawyers who use hardball tactics to Sylvester Stallone's character in the Rambo movies, most of which were released in the 1980s.

<sup>266</sup> *Id.*

<sup>267</sup> See FED. R. CIV. P. 30(c)(2); *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at \*4 (D. Kan. Jan. 5, 2012).

<sup>268</sup> Bruce Ching, *Narrative Implications of Evidentiary Rules*, 29 QUINNIPIAC L. REV. 971, 983 (2011).



such behavior when they are taking a deposition. They can be asked whether they have considered that antagonizing an opponent will make the case more difficult. Or the professor can simply ask, “Isn’t it deceptive to make objections that send messages to a witness? If a lawyer cannot answer for a witness, why do you believe they can do indirectly what they cannot do directly?” Second, the student “lawyer” will learn that the way to deal with such practices is to ask the court reporter to mark the pertinent parts of the record and, if opposing counsel continues to interfere, call the court and find a judge who will order objecting counsel to cease.

*(d) Allowing Students to Develop Moral Sensitivity in Externships Guided by the Supervising Lawyer and Faculty Advisor*

Finally, law schools clearly need to offer opportunities for students to interact with clients in clinical settings and externships, under the supervision of a lawyer and a faculty advisor. In such one-on-one relationships, the mentor can—as the mentor-dentist does with the dentistry student—explain how opportunities for empathy arise in every case.<sup>269</sup> The clinical program and externship program highlight for the supervising lawyer, the faculty advisor, and the student the importance of the student’s seeking and receiving guidance on evaluating the choices that inevitably arise in handling cases. Encouraging students to see the impact of their ethical choices on clients and all others affected by their decisions, and to make consideration of these a habitual part of their way of dealing with clients and others, will likely increase the degree to which students pay attention to the feelings and limitations of others and the need to attend to these as part of their lawyering practice.

*D. Equipping Students to Develop Practical Judgment*

The previous sections have suggested that the cultivation of foundational skills is necessary in forming professional identity and developing good practical judgment. The root of that process is for students to become more aware of themselves and to develop skills that require capacities other than purely cognitive ones, such as their intuition and knowledge of human nature.<sup>270</sup> Persons with emotional intelligence as outlined in this Article, who can use both their intellect and other forms of intelligence, are prepared to engage the higher order skill of exercising practical judgment.<sup>271</sup> Because the ability to develop practical judgment continues throughout the practice of law, law schools can at best provide

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<sup>269</sup> See *supra* note 260 and accompanying text.

<sup>270</sup> See *supra* Part IV.C.1.

<sup>271</sup> See *supra* Part III.D.1.

students with a framework in which to begin making decisions.<sup>272</sup> Yet, if law schools do not attempt to equip students with the tools necessary to identify factors, such as competing values, that will affect their professional decisions, they are failing to offer arguably the most important part of a professional education.

### 1. Elements of Decision-Making that Aims for Practical Wisdom

No one can expect to provide a formula by which students or lawyers will easily reach good judgments. Typically, the deliberative process requires holding more than one possible course of action in mind. After deliberation, a person exercising practical wisdom or judgment decides upon what she deems the best resolution in the circumstances. This best resolution does not mean the resolution is one in which no one is affected adversely; more often than not, judgments are made that represent the best decision under the circumstances but do not resolve every issue neatly. Because most ethical or professional judgments involve “gray areas,” students can, as they progress in phronesis or practical wisdom, realize that exercising thoughtful judgment in these circumstances is better than avoiding reflective deliberation on the path of least resistance.<sup>273</sup>

In this process, students will see that one of the facets of Aristotle’s concept of phronesis is the tension between seemingly opposite points. As Anthony Kronman observed, the process is, in a way, “bifocal,” with tension between one’s sympathy for a person or position and the simultaneous need for detachment.<sup>274</sup> Commenting on Kronman’s insight, Mark Aaronson recognized how the tension implicit in exercising practical wisdom serves as valuable guidance for educators: “[Kronman’s] explanation provides, in effect, an analytic roadmap on how to improve one’s judgment, particularly when seeking to choose among competing considerations in factually specific contexts.”<sup>275</sup> In making a judgment call, someone needs to both empathize with those potentially affected and maintain enough detachment to be objective.<sup>276</sup> Although it does not provide a complete roadmap, this method of reaching practical judgments from both empathy and detachment leads to better decisions, and instructing students on such methods will improve their decision-making

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<sup>272</sup> See *supra* Part III.D.1. Legal educators have recognized that law schools should borrow other professional schools’ methods of helping their students develop the ethical judgment necessary in those disciplines. See *supra* Part IV.C.2.a.

<sup>273</sup> See *supra* notes 21–33 and accompanying text.

<sup>274</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER* 72 (1993).

<sup>275</sup> Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 144 (1995).

<sup>276</sup> *Id.*

generally.<sup>277</sup> In emphasizing the importance of understanding the *process* of good decision-making, Aaronson writes:

Lawyers and law students often are too quick to jump to ultimate value judgments. The effects frequently are the per se dismissal of opposing value premises and an automatic self-justification of one's own without any real reflection. In separating the process from the substance of moral decision making, my intention has been to draw attention to a moral foundation for lawyering that acknowledges the contextual nature of the choices that attorneys make but does not sanction a false relativism.<sup>278</sup>

Likewise, empirical studies demonstrate that law students learn professional decision-making most effectively when presented with “cognitive disequilibrium or optimal conflict on issues relating to the person's moral core within a context of psychological safety.”<sup>279</sup> In other words, students learn when confronted with questions that are not easily resolved and that they can work through without fear of criticism or judgment. Once students have developed the foundational skills suggested in this Article, legal educators should ensure they are confronted with challenges that will require the student to grow. However, they should learn to work through their disequilibrium in a safe environment in which they are not expected to have the practical wisdom of a seasoned, respected lawyer. Perhaps they will be inarticulate in their first attempts to deal with difficult questions. With practice and experience, they should improve their ability to exercise judgment. It may be years before someone truly displays practical wisdom consistently, but she will at least be on the path to doing so. In his influential book, *The Reflective Practitioner*, Donald Schön describes a professional who has mastered the ability to evaluate multiple solutions: “When the practitioner reflects-in-action . . . , paying attention to phenomena and surfacing his intuitive understanding of them, his experimenting is at once exploratory, move testing, and hypothesis testing. The three functions are fulfilled by the very same actions. And from this fact follows the distinctive character of experimenting in practice.”<sup>280</sup>

Other guides to practical judgment in the face of difficult questions should be mentioned. Although not often the basis for a definitive answer to a question in practice, knowledge of the Model Rules and other relevant ethical standards remains essential to developing professional judgment.

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<sup>277</sup> See *id.* at 144–45.

<sup>278</sup> *Id.* at 152–53.

<sup>279</sup> Neil W. Hamilton et al., *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW., no. 3, 2012, at 1, 11.

<sup>280</sup> DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 147 (1983).

If the matter is client confidentiality, for instance, the Model Rules will often leave little room for alternative courses of action.<sup>281</sup> However, most of the Model Rules allow for the exercise of discretion, especially when different Rules are in tension. For instance, the Rule on Diligence (Model Rule 1.3) and the Rule on Fairness to Opposing Counsel (Model Rule 3.4) are often in tension with scenarios that implicate hardball lawyering.<sup>282</sup> As the Model Rules' Preamble itself states, one needs to be ethically and morally sensitive so as to exercise wise judgment in situations in which the Rules give lawyers discretion in ethical decision-making.<sup>283</sup>

In addition, good decision-makers pay attention to their emotions and process them without allowing them to dominate their decisions. This practice is known as making emotions “an ally of reason.”<sup>284</sup> Moreover, a person's life experiences are also part of the factors employed in evaluating all of the considerations that bear on making the decision.<sup>285</sup> Perhaps the essence of practical wisdom is relying on everything a person knows and has experienced to decide a course of action in specific circumstances: “[P]ractical judgment is the process by which we take into account relevant information and values, and then determine what ought to take priority in a particular context.”<sup>286</sup>

Students who follow the guidance suggested above will become increasingly skilled at exercising practical judgment. The 2007 Reports went to great lengths to emphasize, and this Article seeks to highlight, that such decision-making might be the difference between lawyers who develop internal tension and dissonance by acting inconsistently with their values, and those who enjoy a fruitful and happy career practicing law by following their moral compass.<sup>287</sup> The connection between a lawyer's decisions and the degree to which she finds that she can respect herself for at least seeking to reach sound decisions cannot be undervalued. If the lawyer has a framework in which she can begin to develop awareness and a method of resolving issues, she can deal with the tension that arises when she faces a decision.

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<sup>281</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6 & cmt. 2 (2013).

<sup>282</sup> See *id.* RR. 1.3, 3.4.

<sup>283</sup> *Id.* pmbl. para. 9 (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”).

<sup>284</sup> SCHWARTZ & SHARPE, *supra* note 26, at 26.

<sup>285</sup> See *id.*

<sup>286</sup> Aaronson, *Practical Judgment*, *supra* note 25, at 262.

<sup>287</sup> For a discussion of this connection, see *supra* notes 39–69 and accompanying text.

## 2. Teaching Methods Available in Law Schools to Help Cultivate the Fundamentals of Practical Judgment

It is unrealistic to expect law students to fully develop practical wisdom in the three years of law school. Expecting them to develop the foundational skills necessary to make practically wise decisions, however, and equipping students with a framework to approach judgment calls, is possible.<sup>288</sup> With this foundation, students can then build a framework that allows them to reach sound judgments that they develop throughout law school.

The remaining question for many schools will then be how to encourage students to move beyond these foundational skills to develop the art of making professional judgments. Clinics and externships were among the first efforts in law schools to nurture students' reflection on what it means to be a professional and to exercise practical judgment in practice.<sup>289</sup> However, clinical or externship experiences are typically electives.<sup>290</sup> Thus, many students graduate without the benefit of this formational experience.<sup>291</sup> This section therefore addresses how clinical and externship experiences have been employed—and can still be employed—as a means of developing practical judgment. To ensure that students who do not take clinics or participate in externships receive training in forming professional judgments, this section also offers suggestions for teaching methods that can be employed in other courses.

### (a) *Clinical Programs and Externships that Integrate Education on Developing Judgment*

Clinical experiences and externships appear to have been the initial means by which modern legal educators attempted to develop students' self-reflection and, in turn, their professional judgment and practical wisdom.<sup>292</sup> One clinical program director observed: "If there is a universal

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<sup>288</sup> See *supra* Part IV.C.

<sup>289</sup> See, e.g., Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 *HAMLIN J. PUB. L. & POL'Y* 1, 4–5, 16, 33 (2002) (citing the development of legal clinics as early as the late 1800s and their importance in teaching law students fundamental practical skills).

<sup>290</sup> See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 32 (2000) ("[A]lthough clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.").

<sup>291</sup> Jessica Dopierala, Note, *Bridging the Gap Between Theory and Practice: Why Are Students Falling off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 *U. DET. MERCY L. REV.* 429, 444 (2008).

<sup>292</sup> See McCaffrey, *supra* note 289, at 4–5, 33, 62.

tenet in clinical legal education, it is the importance of being self-consciously and critically reflective about one's practice experiences."<sup>293</sup> His observations exemplify that the learning experiences they are encouraging are ones that foster practical judgment:

Perhaps the hardest thing for many law students to accept is that there is no formula on how to proceed. There is always a significant degree of uncertainty about what one knows and what may happen. Yet one still has to come up with good reasons for proceeding along one course and not another. As teachers, we cannot ignore the discomfort students may feel in making decisions in such open-ended circumstances. Without necessarily noting that psychologically such discomfort in part may be developmental, we have to acknowledge and affirm that notwithstanding such uncertainty, options have to be proposed and choices made . . . .<sup>294</sup>

*(b) Employing Simulated Cases to Expand Opportunities for Students to Exercise Practical Judgment*

Not every law student will take part in a clinic. The students who do not participate in clinics could be required to take courses using simulated cases in which they are asked to consider questions of professional identity and decision-making. In this regard, schools that have adopted programs that rely heavily on case simulations are good models.<sup>295</sup> Law schools could require students to take either a clinical course geared toward fostering practical judgment or a course that relies heavily on simulated cases. These simulations provide the context within which students can discuss, journal, role play, or engage in any variety of methods that help them develop (a) the internalized sense of professional values that distinguishes professional identity training and (b) a framework for determining how they will resolve challenges in practice. The course should address questions of work-life balance, ethical dilemmas, such as how to deal with a supervising lawyer who might be verbally abusive or indifferent to the associate's well-being and development, and other real-life questions that new lawyers face.

Arizona Summit Law School developed a course that allows students to study seven aspects of law practice which the student will likely

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<sup>293</sup> See Aaronson, *Practical Judgment*, *supra* note 25, at 304–05.

<sup>294</sup> *Id.* at 305–06.

<sup>295</sup> See, e.g., Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: Perspectives on Curriculum Reform, Mercer Law School's Woodruff Curriculum, and . . . "Perspectives,"* 63 MERCER L. REV. 975, 1007–08 (2011) (describing how Mercer Law School, in an effort to teach practical and professional judgment skills, "chose to make extensive use of simulations instead of live-client clinics in order to ensure that all students, not just a relatively select few, received the desired skills training").

encounter as a lawyer.<sup>296</sup> As described by those who developed it, the program offers students a set of skills derived from surveys of lawyer effectiveness.<sup>297</sup> Two of the learning objectives ensure that students have “experienced how lawyers solve legal problems, interviewed and counseled clients,” and “demonstrated a commitment to high ethical standards and professionalism in dealing with clients, opposing counsel, courts, and the community.”<sup>298</sup>

Students studying each of the seven areas of practice analyze simulated cases developed by lawyers and faculty.<sup>299</sup> The simulated modules consist of these different areas: “(1) law office organization and management; (2) family law; (3) small business entities law; (4) debtor/creditor law; (5) wills and estates law; (6) criminal law; and (7) personal injury law.”<sup>300</sup> As part of the students’ experience, the teaching lawyers and faculty focus on ethical issues and value traits in the context of one of the seven practice modules.<sup>301</sup> Each faculty/lawyer teaching team seeks to demonstrate how the traits they identified are significant in the area of practice.<sup>302</sup> The course seeks to teach students—in the context of the subject area of the module—the goals of “(1) acting honestly and with integrity; (2) showing reliability and willingness to accept responsibility; (3) striving to provide competent, high quality legal work for each client; (4) treating clients, lawyers, judges, and staff with respect; (5) demonstrating creativity and innovation; and [(6) showing tolerance, patience, and empathy.”<sup>303</sup>

Such simulated case courses can form part of an intentionally designed curriculum that allows students, before leaving law school, to engage in the kind of professional and ethical judgments lawyers face. Through such simulations, students learn what those in the clinical setting learn: few questions requiring true judgment are black and white; most questions are in the gray area. Seeing alternative courses of action within this uncertainty, the students will be doing exactly what anyone

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<sup>296</sup> See Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 527–28 (2009) (describing the General Practice Skills course as incorporating seven “modules,” including law office management, family law, wills, and criminal law). The article refers to the course at Phoenix School of Law, but the school changed its name to Arizona Summit Law School in 2013. Press Release, Ariz. Summit Law Sch., Phoenix School of Law Announces New Name (Nov. 4, 2013), [https://www.azsummitlaw.edu/sites/default/files/final\\_asls\\_new\\_name\\_announcement\\_v4.pdf](https://www.azsummitlaw.edu/sites/default/files/final_asls_new_name_announcement_v4.pdf).

<sup>297</sup> Gerst & Hess, *supra* note 296 at 523–26.

<sup>298</sup> *Id.* at 527–28.

<sup>299</sup> *Id.* at 530–31.

<sup>300</sup> *Id.* at 528.

<sup>301</sup> *Id.* at 536.

<sup>302</sup> *Id.* at 536–37.

<sup>303</sup> *Id.* at 529–30.

capable of practical judgment does—having empathy for the different persons and entities affected by different courses of action, while remaining detached enough to judge which course of action is the best in the circumstances. Again, no one can expect law students to develop practical wisdom overnight. However, if they are introduced to the process of reaching professional judgments, they are more likely to continue resolving professional and ethical dilemmas in a principled manner.

(c) *Incorporating Teaching of Practical Judgment in Doctrinal Courses*

Another approach that is receiving increased attention is including professional and ethical dilemmas within traditional doctrinal courses.<sup>304</sup> This method is specifically geared towards students who learn better “by being exposed to moral philosophy in the classroom, discussing situations in which moral judgment is needed and reflecting on choices others made.”<sup>305</sup> As the editor of a series of casebooks designed to include professional formation as part of the fabric of the course, Dean Michael Hunter Schwartz explains why the emphasis on professional formation was so important:

[The] series was designed specifically to respond to and to begin to address the concerns raised by *Educating Lawyers*, *Best Practices for Legal Education*, and [Lawrence] Krieger’s findings. Thus, in addition to the questions aimed at developing students’ self-regulated learning skills described above, [the casebooks in this series] include[] questions that prompt students to consider professional ethics and their identity as professionals and to reflect on the intersection of legal ethics and values and their personal values and needs.<sup>306</sup>

For the last six years, Regent University School of Law has offered an advanced civil pretrial practice and procedure course in which students assume the role of an associate in a case and proceed through the stages of the civil litigation process.<sup>307</sup> The course casebook authored by Professor

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<sup>304</sup> See Paula Schaefer, *Integrating Professionalism into Doctrinally-Focused Courses*, in BUILDING ON BEST PRACTICES, *supra* note 149.

<sup>305</sup> Clare Keefe Coleman, *Teaching the Torture Memos: “Making Decisions Under Conditions of Uncertainty,”* 62 J. LEGAL EDUC. 81, 92 (2012).

<sup>306</sup> Schwartz, *supra* note 240, at 52. Dean Schwartz refers to Professor Madison’s casebook, *Civil Procedure for All States*, as adopting educational methods that address the concerns raised in the *Carnegie Report* and *Best Practices Report*. *Id.* at 33.

<sup>307</sup> See MADISON, CIVIL PROCEDURE, *supra* note 242, at 9. (Although the casebook was published in 2010, Professor Madison used a manuscript of the casebook to teach the class in the first few semesters in which he taught the course.) The casebook presents a Master Case, in which a plaintiff is suing a city, the state, and a manufacturer—all related to an accident in which the city (allegedly grossly negligent) and the state created a dangerous condition that led to an accident in which the vehicle the plaintiff was driving failed to protect her when the roof collapsed. *Id.* at 9–10. The course requires students, for part of



Madison responds to the recommendations of the *Carnegie Report* and *Best Practices Report*.<sup>308</sup> The course therefore presents students with a variety of professional identity questions and a concluding reflective essay assignment.

Through the professional identity questions, the course encourages students to form their professional identity by discussing skills, values, and ways of approaching professional and ethical questions that they are likely to encounter practicing law. These generally start with ones designed to raise self-awareness and emotional intelligence. They proceed to the more challenging ones that ask students to consider alternative courses of action. Students receive clear guidance on the manner in which they should approach the journaling process. The course syllabus asks students, in journaling, to identify: (1) the value conflicts within the situation presented in each question, (2) any Model Rule(s) that are applicable, (3) at least one source other than the Model Rules that has a bearing on the question (e.g., the work of a philosopher such as Aristotle), (4) what the student's discussion with a mentor of their choosing (other than a law student in the class) reveals, and (5) the student's suggested course of action in light of the question.<sup>309</sup> Psychological research suggests that, in answering such questions, the person responding will have a tendency to predict that she will act ethically (idealizing oneself) and downplay pragmatic factors that, in reality, can lead one to act differently.<sup>310</sup> The class discusses this psychological evidence so that students are aware of the phenomenon. The disclosure may not preclude students from such idealization, but it makes them conscious of that possibility.

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their grade, to write intra-office memoranda addressing matters such as the statutes of limitations on each claim, *see id.* at 46, whether the out-of-state manufacturer is subject to the long-arm statute and personal jurisdiction in the court where suit is filed, *see id.* at 71, and determining the value of plaintiff's case according to the valuation methods set forth in the casebook, in preparation for a settlement conference, *see id.* at 250. Other graded assignments include drafting pleadings such as a complaint, *see id.* at 99, a motion to dismiss for failure to state a claim on which relief can be granted, *see id.* at 150, a discovery plan that identifies the evidence plaintiff will need to prove at trial and determines the ideal means to develop evidence that is in the hands of defendants, *see id.* at 213–14, and a summary judgment motion, *see id.* at 229. These assignments foster the kind of lawyering skills that the 2007 Reports encourage. The professional identity questions, while strengthened from placement at the point in the stage of a case where they often arise in practice, are not dependent on the lawyering skills assignments.

<sup>308</sup> *Id.* at xxi–xxii.

<sup>309</sup> *See* Benjamin V. Madison, III, State Civil Pretrial Practice and Procedure Syllabus 9–10 (Spring 2015) [hereinafter Madison, State Pretrial Syllabus] (on file with the Regent University Law Review).

<sup>310</sup> ROBBENNOLT & STERNLIGHT, *supra* note 244, at 389.

The professional identity questions are thus presented as they would arise in the course of an actual lawsuit. An explicit course objective highlighted in the syllabus is “to give [students] the skills, knowledge and values [they] need to be able to learn and grow as a professional.”<sup>311</sup> To achieve this objective, the course makes professional development an explicit and graded part of the course; students satisfy this objective by keeping a journal and submitting their entries to the professor at regular intervals.<sup>312</sup> Each question raises some issue or problem that arises in practice.<sup>313</sup> The questions are designed to help students progressively acquire more self-knowledge about the connection between their emotions, which provide valuable clues to consider in reaching professionally sound judgments,<sup>314</sup> and resolving ethical dilemmas that arise in litigation.<sup>315</sup>

The casebook’s professional identity questions aimed at developing emotional intelligence include the example mentioned above, in which the student “lawyer” recognizes feeling uncomfortable about delivering bad news to a client but must do it anyway.<sup>316</sup> A later question presents students with the array of deadlines that a litigator typically faces—often conflicting ones—and asks them to acknowledge what feelings the pressure of meeting deadlines and juggling cases evokes.<sup>317</sup> Likewise, another question describes a choice between filing suit in two courts—one in which the case will proceed for the client (a plaintiff) more swiftly and in which the court strictly enforces the rules, including discovery rules, and another in which the case will likely take longer but involves less risk of having deadlines and strict enforcement of rules.<sup>318</sup> Students know at this point that a court that keeps deadlines and enforces rules is likely one that will serve the client’s interests by resolving the case more quickly and limiting costs. The question of where to sue thus raises the issue of whether a student will allow her own self-interest influence her decision. As an inexperienced lawyer who may be fearful of litigating in a court with tight deadlines and strict rules, these dynamics may lead the lawyer to

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<sup>311</sup> Madison, State Pretrial Syllabus, *supra* note 309, at 9.

<sup>312</sup> Professor Madison does not grade students on whether they express values with which he agrees, but on the thoughtful completion of the assignments. Students are assigned professional identity questions and, at appointed due dates, turn in journal entries. *See id.* at 9–10.

<sup>313</sup> *See* MADISON, CIVIL PROCEDURE, *supra* note 242, at 8.

<sup>314</sup> *See id.* at 21.

<sup>315</sup> *See id.* at 34, 40, 51.

<sup>316</sup> *See supra* note 242 and accompanying text.

<sup>317</sup> *See* MADISON, CIVIL PROCEDURE, *supra* note 242, at 34.

<sup>318</sup> *See id.* at 51.

file in the court in which she is more likely to feel comfortable.<sup>319</sup> Students have to recognize that, unless they remain conscious of their motivations, they can make such decisions without properly weighing the client's best interests as opposed to their own preferences.

The professional identity questions also address other dilemmas inexperienced lawyers face. For instance, a number of the questions involve an associate's being instructed by a supervising partner to take a dubious course of action. In one, the senior partner tells the associate to find some basis to file a counterclaim, regardless of whether the law really supports it, because the partner has found that this tactic often scares off plaintiffs.<sup>320</sup> Another has a senior partner instructing the associate to file a baseless Rule 11 motion against the opponent because, in the partner's experience, sometimes such motions discourage litigants who are not serious.<sup>321</sup>

The most difficult professional identity questions seek to explore the gray areas of ethical and professional dilemmas. Some of the questions address outright aggressive lawyering methods this Article previously referred to as "Rambo" style litigation.<sup>322</sup> The reality that lawyers can get away with many forms of hardball lawyering with little risk of sanctions<sup>323</sup> makes the question as to whether one could act in an overly aggressive fashion more debatable than it ought to be.

For example, routinely, one of the students' favorite questions is a question on service of process. The professional identity question poses a scenario in which the client is angry at a corporation, and on the day suit is filed, the client tells the lawyer she wants to have the president of the defendant corporation served at a press conference on the following day to embarrass him.<sup>324</sup> The Model Rule on Respect for Rights of Third Persons (Model Rule 4.4) states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."<sup>325</sup> Although the Rule prohibits certain conduct intended to embarrass one's opponent, the reality is that such conduct is not often the

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<sup>319</sup> For example, this phenomenon can occur for those who fear federal court as being somehow more challenging than state court.

<sup>320</sup> MADISON, CIVIL PROCEDURE, *supra* note 242, at 91.

<sup>321</sup> *Id.* at 79. This question presumes that the applicable version of Rule 11 does not contain the safe harbor provision added in the 1993 amendments to Federal Rule of Civil Procedure 11. *Id.* at 78.

<sup>322</sup> See *supra* note 265 and accompanying text.

<sup>323</sup> See, e.g., Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 83 (1991) (maintaining that lawyer misconduct "has grown in incidence and severity largely because of judges' tolerance").

<sup>324</sup> See MADISON, CIVIL PROCEDURE, *supra* note 242, at 115.

<sup>325</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4 (2013).

subject of disciplinary proceedings.<sup>326</sup> Another formation question in this category involves the practice of overloading an opponent with as many documents as possible in an effort to keep the opponent from finding pertinent material (colloquially known as a “document dump”)—a method that, though the responding attorney’s motives likely violate the Model Rules, rarely results in sanctions.<sup>327</sup>

The students’ last assignment is a reflective essay in which they address several matters. First, they discuss whether they have developed awareness of any strengths and weaknesses that could affect their decision-making in practice. Second, they outline the process they intend to use in considering and resolving ethical dilemmas in practice. Third, they provide specific practices they plan to adopt to help them reach sound decisions, such as discussing questions with a mentor. Finally, they describe the kind of lawyer they want to be, meaning what qualities they want to exhibit in practice.<sup>328</sup>

A review of students’ professional identity journals and reflective essays in this course allows for some general observations. Although the number of students who have submitted journals at this point would qualify as a legitimate sample size,<sup>329</sup> the following observations are not offered as formal study results. The authors did not develop the criteria, controls, and methods that would be necessary to reach empirical conclusions. Instead, the goal was to observe students over a period of time so as to develop some preliminary observations and, if appropriate, follow up with empirical research.

The results of the journaling indicate students’ growth in professional formation and, in some cases, in their display of practical judgment.<sup>330</sup> Over the course of each semester, most students demonstrate progress in professional formation as they complete journal entries and, ultimately, their reflective essays. For instance, the most frequent result of the students’ professional formation work is their increased self-awareness. Representative comments from the reflection essays summarizing the students’ observations from the journaling include:

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<sup>326</sup> For a recent example in which a famous defendant was served in a public setting, see the video of singer Ciara being served at a concert. TMZ, *Ciara—Served with Lawsuit While on Stage!*, YOUTUBE (June 9, 2013), [http://www.youtube.com/watch?v=jV-yG0\\_fbBk](http://www.youtube.com/watch?v=jV-yG0_fbBk).

<sup>327</sup> See MADISON, CIVIL PROCEDURE, *supra* note 242, at 180; Kanner, *supra* note 323.

<sup>328</sup> Madison, State Pretrial Syllabus, *supra* note 309, at 10–11.

<sup>329</sup> Professor Madison first taught the course in the spring semester of 2009 and since then has received journals and reflective essays from over 500 students.

<sup>330</sup> In their journal entries and essays, many students note how completing their personal philosophy of lawyering paper in Professional Responsibility served as a foundational exercise from which they drew in answering the professional identity questions in this course. See *supra* Part III.D.3 (discussing the philosophy of lawyering assignment).

[A] certain weakness I have is a lack of confidence. If I am nervous, I become unsure about the situation. I have realized that this weakness can lead to accommodation if I am not careful. . . . [M]y insecurity and lack of confidence . . . could result in failing to advocate for my client.<sup>331</sup>

I have also begun to realize weaknesses that can hinder my practice of law, which include hyperactivity, idolizing people, inexperience, and naivety. . . .

. . . [T]o overvalue what others think of me . . . could be a significant conflict when I need to be forthright with clients or supervisors about my personal convictions in difficult situations.<sup>332</sup>

The first [weakness I discovered] is prejudice. As a guy who grew up in a single parent family characterized by periods of homelessness and poverty, it can be too easy to believe that the plaintiff in a case is always a victim. I can imagine someone coming into my office, telling me a story of how a corporation wronged them, and [in my overzealous response, not] asking tough questions that party opponents' lawyers would ask. My prejudice could make me less effective for my clients.<sup>333</sup>

Most students demonstrate increased awareness of their emotions, motives, and values. In several ways, their journals on formation questions and their reflective essays demonstrate growth in emotional intelligence. First, the journal entries and essays reveal students' recognition of how their own feelings and motivations affect their decisions in life. Second, the entries and essays show a consistent pattern of students recognizing how they need to work with their emotions to separate irrational fears (matters, perhaps triggered by their life experiences, that can interfere with their objectivity) from passionate convictions (that will help them represent their client). Third, the students' work reflects increasing consciousness that having a process in place for evaluating questions, and resources such as mentors, will likely improve the degree to which they act consistently with the professional identity they seek.

The professional identity questions designed to require students to engage in deliberations so as to reach practical judgments have produced journaling and reflective essays that display more modest progress. One consistent measure of progress is that students seem to be more keenly aware after the journaling process of the subtle nature of professional and ethical judgments. One student's reflective essay is typical of this progress:

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<sup>331</sup> Student 1, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

<sup>332</sup> Student 2, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

<sup>333</sup> Student 3, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

After the completion of Professional Responsibility [in] my 2L year, I became aware that there was a potential for conflicts in the practice of law. Things like conflicts of interest and payment disputes seemed like . . . things that would definitely come up eventually, but not things that I would face regularly. The questions and situations presented this semester in our Professional Identity Questions have shown me that . . . these situations . . . come up very regularly.

. . . I have [also] come to realize ethical situations do not always present themselves with answers that are either black or white. . . . Examining the situations presented made it clear that sometimes the answer may lie in the gray. I have come to the realization that in determining my course of action when presented with a difficult situation, I may need to not only examine the Rules of Professional Conduct, but also my own ethical values . . . and to consult with trusted friends, family members, and colleagues . . .<sup>334</sup>

Despite their progress in developing professional skills, self-knowledge, and the awareness they need to go beyond the Model Rules in many circumstances to resolve questions, the students usually do not demonstrate “the sophisticated deliberation” of someone who possesses practical wisdom.

An example of journaling that reflects more sophisticated deliberation is the following entry:

The question asked whether I would instruct my client on how to give testimony that will result in a mistrial if the case is not going well for us. . . . I’ll run it through my moral calculus:

. . . .  
. . . Is it prohibited by the Professional Rules of Conduct? Probably: “It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.” Virginia Rules of Professional Conduct Rule 8.4 C. Also, more directly on point: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Virginia Rules of Professional Conduct Rule 3.1.<sup>335</sup>

The student went on to evaluate this question through a philosophical lens, having introduced philosopher Immanuel Kant’s so-called “Categorical Imperative” in several prior journal entries. As explained by the student, the Categorical Imperative is an ethical framework that requires a decision-maker to universalize the question before reaching a conclusion. By framing the question in universal terms—e.g., what would

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<sup>334</sup> Student 4, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

<sup>335</sup> Student 5, Journal on Professional Identity Question (on file with the Regent University Law Review) (used with permission).

happen if everyone faced with such a decision acted (or failed to act) in the same way—one could see the implications of the student's decision from a broader perspective. Thus, in the journal entries, the student translated each professional identity question by asking whether, if every attorney answered the question by acting (or not acting) in a certain way, the implications would help answer the question. In line with this approach used throughout the semester, the student asked in response to this particular formation question:

. . . Would it violate Kant's categorical imperative? If every attorney did this every time, what result? If every attorney did this every time they thought they were losing a case, no case would ever come to completion. Our legal system would become a joke, and no one would ever get relief. It would create an absurdity, so therefore I should not engage in this kind of conduct.

So because this violates all . . . of my variables within the moral calculus, it's safe to say that I would consider this sort of behavior to be unethical. So if I was ever faced with this sort of temptation in my practice, I would endeavor to avoid it based on the reasons I gave above. The better practice would be to move for non-suit if possible, or if that's not available, then finish the trial as best as you are able . . .<sup>336</sup>

The above journal entry is one of the more thoughtful entries submitted by a student. Expecting all students in the course of a semester to develop such sophistication is unrealistic. Most students typically identify competing values because the course syllabus instructs them to do so. Most journal entries identify some ethical conflicts and cite to potential sources that suggest possible resolutions.

Some students do express the path of least resistance and suggest that, as long as they are arguably acting in the client's best interests and their decision does not violate the Model Rules, they will do whatever is necessary. Those students receive comments on their entries and an opportunity to meet with the professor to discuss the questions. Together the student and professor explore the various options and their consequences. The professor will, when applicable, share personal experiences on the issue. The student will be provided time to ask questions and discuss how she came to her decision and whether now she would consider other options.

As noted, each student's final assignment is to prepare a reflective essay on the philosophy she has developed for how she wants to practice law. As shown in the sampling of quotes above, the essay requires students to reflect on what they have learned about themselves (particularly areas of challenge or "weakness") and how these can affect the way in which they practice law. A student likewise synthesizes her view of a professional—the identity she has developed in responding to a

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<sup>336</sup> *Id.*

number of gray-area professional scenarios, by reviewing comments from her professor on her entries, and by discussing with the professor, other students, and practicing lawyers, the values and convictions to which she has committed. Moreover, students project a plan for continuing the cultivation of their professional development.<sup>337</sup>

Although it cannot be empirically proven at this time that this professional formation component of Regent's course helps students, evidence exists that it does. First, the entries and essays show that most students during the course of the semester improve their self-awareness, their understanding of their strengths and weaknesses, and their recognition of how their weaknesses could present problems in practice. The process of journaling on the questions makes them more conscious of matters of which many were unaware. Second, the entries and essays show that students learn that the Preamble to the Model Rules and the Rules themselves encourage students to develop ethical values that exceed the requirements of the Rules. They learn that often the process of resolving a "gray question" will involve both a Model Rule and their moral compass. Third, the entries and essays show that students are learning a framework for reflective deliberation that—if a student continues to practice resolving questions according to the process she internalizes—should result in a lawyer who makes good decisions and, ultimately, will likely be one who cultivates practical wisdom. That the journaling shows some growth in deliberative reasoning gives reason to hope that, if a curriculum designed to develop these skills over the entire law school career were in place, students would truly develop this framework for making judgments and would increase their emotional intelligence.

Furthermore, although the data is not tied to specific curricular causes, data from the Law School Survey of Student Engagement (LSSSE) suggests that Regent's curricular efforts, such as its Professional Responsibility course and State Civil Pretrial Practice and Procedure course, positively affect students' professional identity development. Most notably, in the 2014 LSSSE survey, 84.5% of the third-year Regent students responding to the survey reported that because of their law school experience they "quite a bit" or "very much" "developed a personal code of ethics," as compared with the national average of 54.3%.<sup>338</sup> Given

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<sup>337</sup> See Madison, State Pretrial Syllabus, *supra* note 309, at 9; Benjamin V. Madison, III, Civil Pretrial Practice & Procedure Class Assignments and Due Dates 5 (Spring 2015) (on file with the Regent University Law Review).

<sup>338</sup> LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT 2014 LAW SCHOOL REPORT (REGENT UNIVERSITY SCHOOL OF LAW) 120 (on file with authors) (indicating that fifty-eight third-year students responded to this question). In the same survey, 94.9% of the fifty-nine third-year respondents reported that their law school environment "quite a bit" or "very much" "encourages the ethical practice of law," as compared with the national average of 79.3%. *Id.* at 116. The adjusted sample size of Regent third-year students for this 2014 survey was 120. *Id.* at 1.



the more than thirty-point difference between Regent students' reported development and the reported development at other schools, it is hard to deny that intentional curricular efforts at developing students' professional identity can have an impact.

#### CONCLUSION

This Article emphasizes how professional identity formation and learning to exercise practical judgment together serve as the thread that unites lawyer effectiveness and satisfaction in practicing law. And yet, even after the *Carnegie* and *Best Practices Reports* disrobed law schools by showing that they not only fail to teach students these faculties, but actually often do more harm than good in students' ethical maturation, many law schools have not changed. The conclusions of scholars, an ABA curricular survey, a survey of law school associate deans for academic affairs, and a review of course offerings at U.S. law schools reveal that the response to the 2007 Reports has been to increase courses in technical legal skills without making significant progress in teaching ethical professional identity and practical judgment.

Unless schools inspire students to be ethical professionals with sound judgment, the technical skills students gain in law school are as likely to be used as weapons in the name of zealous advocacy as they are tools for resolving disputes in a civil fashion. The ABA's recent survey, the survey of associate deans, and the review of law school course offerings suggest that ethical professional development is not the priority the 2007 Reports contended it should be. In response to the critique of the 2007 Reports, law schools must require courses that intentionally provide formative experiences for the purpose of developing principled judgment. Most law schools offer only electives in professional formation and do not have an integrated curriculum that emphasizes that the Model Rules are a necessary but insufficient criteria in students' decision-making development. As suggested in the last Part of this Article, required courses that include professional formation components ought to be part of an intentional effort to provide foundational experiences in which students develop self-awareness and other skills associated with emotional intelligence, followed by courses that develop higher order deliberative skills.<sup>339</sup>

We must ask ourselves the question posed in the title of this Article: "Does anyone really care?" When law schools seem to have responded vigorously to a major criticism (the lack of skills and experiential learning), but most have largely ignored in required curricula the other critique (the failure to nurture professional identity and judgment), the

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<sup>339</sup> See *supra* Part IV.

temptation is to answer that law schools do not care. Alternatively, an objective observer could say that law schools simply remain in denial.<sup>340</sup> Our hope is that law schools do care, but for the reasons given in this Article are delaying their response to the most glaring deficiency in legal education.<sup>341</sup> If the main reason for delay is the one least articulated—an apparent belief that educating students to develop ethical professional identity and exercise practical judgment is too challenging a task for law schools—then sufficient groundwork has already been done to allow law schools to see that they can take on this challenge.

As in other professional school settings, the process of developing professional identity should be incremental. In the first year, students should receive an introduction to the profession and complete exercises that begin developing self-awareness and emotional intelligence. In the last two years, further teaching should develop the faculty Aristotle called *phronesis*. Teachers and mentors should equip students with a framework for decision-making. Without this framework, too many lawyers will likely fall into the pattern of doing the client's bidding so long as the Model Rules do not forbid it.

At this juncture, the ones who most obviously care about law schools' most glaring deficiency are the educators who see the problem and have acted to change legal education. Law students—who pay a great deal to receive a legal education lacking the most important features students can and should be taught—also ought to care. Judges who should by now be tired of incompetent and overly aggressive lawyers ought to care. The American Bar Association ought to care. But, ultimately, a majority of the faculty in law schools needs to care enough to bring about more quickly the changes that are far overdue. As scholars have observed, “[f]aculty buy-in is essential to any successful professionalism initiative.”<sup>342</sup>

Law schools and educators who are consciously implementing required formative ethical development beyond the Model Rules actively seek to robe the legal profession in the majesty of virtuous ideals, use of a moral compass, principled decision-making, and practical judgment. These and other inherent virtues are foundations to a satisfying and sustainable legal practice. The restoration of the nobility of legal practice must be embraced by the entirety of the legal profession: lawyers, judges, professors, students, bar associations, and Inns of Court. Failure to

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<sup>340</sup> Well before the 2007 Reports, Professors Larry Krieger and Kennon Sheldon published the result of their longitudinal study comparing law students with students in other schools and concluding that law schools were in “institutional denial” about the damage they were doing to students’ identity and ability to make sound professional decisions. See Krieger, *supra* note 40, at 112–16. The authors agree that the characterization of law schools’ approach to this important issue could be characterized as one of denial.

<sup>341</sup> See *supra* notes 143–46 and accompanying text.

<sup>342</sup> Kehner & Robinson, *supra* note 137, at 104.

address the exposure of the legal profession's ineptitude at cultivating healthy professional identity formation demonstrates the degree to which empathy and practical wisdom have devolved in legal practice. Until more than a few care to implement the necessary changes in legal education, the naked dissatisfaction of lawyers and clients will continue to pervade the legal profession.

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#### INTRODUCTION

Criticism of law schools has come often of late. Although some of this criticism may be unjustified, this Article contends that the deficiency exposed in two recent and influential studies of law teaching is accurate. Most law schools fail to cultivate students' professional ethical identity and practical judgment. The two studies, one by the Carnegie Institute for the Advancement of Teaching and Learning in *Educating Lawyers (Carnegie Report)*,<sup>1</sup> and the other by the Clinical Legal Education Association in *Best Practices for Legal Education (Best Practices Report)*<sup>2</sup> (collectively, the 2007 Reports), represent arguably the most comprehensive evaluations of law school education in more than a century. The reports categorize law teaching in three broad categories: (1) analytical skills or legal analysis; (2) practical and experiential lawyering skills; and (3) development of a "professional identity"—a rich but often misunderstood term that encompasses a person's self-concept, values, and philosophy of lawyering.<sup>3</sup>

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<sup>1</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

<sup>2</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES].

<sup>3</sup> The *Carnegie Report* uses the term "professional identity." Although the *Best Practices Report* uses the term "professionalism," it describes this concept similarly to how "professional identity" is described in the *Carnegie Report*. See BEST PRACTICES, *supra* note 2, at 207 (regarding analytical skills); *id.* at 165 (regarding lawyering skills); *id.* at 27–29 (regarding cultivation of professional identity); CARNEGIE REPORT, *supra* note 1, at 27–29 (providing an overview of these "three apprenticeships"); *id.* at 5–6 (regarding analytical skills); *id.* at 87–89 (regarding lawyering skills); *id.* at 126 (regarding cultivation of professional identity).

## 2. Teaching Methods Available in Law Schools to Help Cultivate the Fundamentals of Practical Judgment

It is unrealistic to expect law students to fully develop practical wisdom in the three years of law school. Expecting them to develop the foundational skills necessary to make practically wise decisions, however, and equipping students with a framework to approach judgment calls, is possible.<sup>288</sup> With this foundation, students can then build a framework that allows them to reach sound judgments that they develop throughout law school.

The remaining question for many schools will then be how to encourage students to move beyond these foundational skills to develop the art of making professional judgments. Clinics and externships were among the first efforts in law schools to nurture students' reflection on what it means to be a professional and to exercise practical judgment in practice.<sup>289</sup> However, clinical or externship experiences are typically electives.<sup>290</sup> Thus, many students graduate without the benefit of this formational experience.<sup>291</sup> This section therefore addresses how clinical and externship experiences have been employed—and can still be employed—as a means of developing practical judgment. To ensure that students who do not take clinics or participate in externships receive training in forming professional judgments, this section also offers suggestions for teaching methods that can be employed in other courses.

### (a) *Clinical Programs and Externships that Integrate Education on Developing Judgment*

Clinical experiences and externships appear to have been the initial means by which modern legal educators attempted to develop students' self-reflection and, in turn, their professional judgment and practical wisdom.<sup>292</sup> One clinical program director observed: "If there is a universal

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<sup>288</sup> See *supra* Part IV.C.

<sup>289</sup> See, e.g., Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 *HAMLIN J. PUB. L. & POL'Y* 1, 4–5, 16, 33 (2002) (citing the development of legal clinics as early as the late 1800s and their importance in teaching law students fundamental practical skills).

<sup>290</sup> See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 32 (2000) ("[A]lthough clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.").

<sup>291</sup> Jessica Dopierala, Note, *Bridging the Gap Between Theory and Practice: Why Are Students Falling off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 *U. DET. MERCY L. REV.* 429, 444 (2008).

<sup>292</sup> See McCaffrey, *supra* note 289, at 4–5, 33, 62.

# KEEPING HOME IN HOMESCHOOLING: EXAMINING ILLINOIS'S LOOSE HOMESCHOOLING LAWS IN LIGHT OF HEAVIER INTERNATIONAL AND DOMESTIC REGULATION

## INTRODUCTION

On the morning of August 29, 2013, the Wunderlich children were safe at home preparing for another day of their homeschooling routine.<sup>1</sup> By the end of the same day, they were in an unfamiliar place, separated from their parents.<sup>2</sup> However, kidnappers were not the culprits of the Wunderlich children's abduction. Rather, it was their very own German government using its legal authority to take the children.<sup>3</sup>

What had begun as a routine morning quickly turned into a nightmare when Dirk Wunderlich looked outside to see twenty German "social workers, police officers, and special agents" armed and ready to storm the Wunderlich residence.<sup>4</sup> Dirk attempted to ask questions, but the officers' preparation of a battering ram prompted him to allow the police to enter his home.<sup>5</sup> Once inside, the officers held Dirk in a chair and "forcibly" took his children.<sup>6</sup> Although there were "no other allegations of abuse or neglect," the raid was allowed simply because the Wunderlichs decided to teach their children at home rather than send them to a German public school.<sup>7</sup> Despite Germany's virtual prohibition on homeschooling,<sup>8</sup> Dirk and Petra Wunderlich had decided to educate their children at home, and that decision cost them dearly.<sup>9</sup> The Wunderlichs had already lost legal custody of their children in 2012, but homeschooling had now cost them physical custody of their children.<sup>10</sup> The German police told the parents nothing except that the parents would not see their

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<sup>1</sup> *Germany: Children Seized in Shocking Raid*, HSLDA (Aug. 30, 2013), <http://www.hslda.org/hs/international/Germany/201308300.asp>.

<sup>2</sup> See Damien Gayle, *Armed Police Turn Up at Family Home with a Battering Ram to Seize Their Children After They Defy Germany's Ban on Home Schooling*, DAILYMAIL.COM (Aug. 30, 2013, 8:23 PM), <http://www.dailymail.co.uk/news/article-2407655/Armed-police-turn-family-home-battering-ram-seize-children-defy-Germanys-ban-homeschooling.html>.

<sup>3</sup> *Germany: Children Seized in Shocking Raid*, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See generally *Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355 (rejecting a challenge grounded in a religious objection to Germany's compulsory education laws).

<sup>9</sup> *Germany: Children Seized in Shocking Raid*, *supra* note 1.

<sup>10</sup> *Id.*

children “ ‘anytime soon.’ ”<sup>11</sup> Three long weeks passed before the Wunderlich family was reunited, but this reunification also brought the requirement that the children attend state school.<sup>12</sup>

The Wunderlich family’s situation presents an extreme case of government regulation of home education. However, Germany is not the only country that prohibits or severely restricts homeschooling.<sup>13</sup> Currently, at least twenty-eight countries prohibit homeschooling, and thirty others allow it with heavy restrictions.<sup>14</sup> Despite international hostility, home education is allowed in all fifty states in the United States.<sup>15</sup> Several of those states, such as Illinois, impose little regulation on home education.<sup>16</sup> Despite this minimal regulation in the United States, some are calling for greater restrictions.<sup>17</sup> This Note examines whether states like Illinois should change their home education requirements when parents have a right to choose their children’s education, other states more strictly regulate homeschooling, and many countries impose severe restrictions and prohibitions on homeschooling. Part I discusses the history and background of homeschooling as well as its current status in the United States. Part II examines domestic regulation of homeschooling by focusing on the loose regulation of Illinois as well as the stricter regulation of other states. Part III focuses on international regulation and prohibition of homeschooling, and Part IV explains why states like Illinois should not increase their regulation of home education.

## I. BACKGROUND

Homeschooling may appear to be a recent phenomenon, but it has a long history. In fact, some of history’s most influential men, such as George Washington and Thomas Edison, received a home education.<sup>18</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Press Release, Home Sch. Legal Def. Assoc., Wunderlich Children Returned on Condition of School Attendance (Sept. 19, 2013), <http://www.hslda.org/docs/media/2013/20130919.asp>.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> Alicia Bayer, *Which Countries Have Banned Homeschooling?*, EXAMINER.COM (May 26, 2013, 2:34 PM) <http://www.examiner.com/article/which-countries-have-banned-homeschooling>.

<sup>15</sup> Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 87 (2002); *State Laws*, HSLDA, <https://www.hslda.org/laws/> (last visited Apr. 13, 2015).

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> NAT’L EDUC. ASS’N, 2014-2015 NEA RESOLUTIONS Res. B-83 (2014-2015), available at <http://www.nea.org/assets/docs/nea-resolutions-2014-15.pdf>.

<sup>18</sup> See RONALD W. CLARK, EDISON: THE MAN WHO MADE THE FUTURE 9 (1977); THOMAS S. LANGSTON & MICHAEL G. SHERMAN, GEORGE WASHINGTON 16 (2003).

Homeschooling is an American tradition,<sup>19</sup> and a brief examination of its history and the legal rights affecting it provides a helpful starting point.<sup>20</sup>

### A. *The History of Homeschooling in the United States*

Homeschooling was a part of American history even before the United States gained its independence.<sup>21</sup> “From colonial times until well into the nineteenth century,” children often had some sort of home education within their lifetime.<sup>22</sup> Compulsory attendance laws did not exist in the United States until Massachusetts passed the first one in 1852.<sup>23</sup> However, that law allowed children to attend other schools chosen by the parents—and, one might argue, allowed for home education.<sup>24</sup> The compulsory attendance laws eventually clashed with the right of parents to choose whether their children would be taught at home. This basic idea of parental choice was eventually established for the entire nation in *Meyer v. Nebraska*.<sup>25</sup> In that case, the United States Supreme Court found that parents had the right to direct the upbringing of their child.<sup>26</sup> This ruling was later reaffirmed in *Pierce v. Society of Sisters*.<sup>27</sup>

In *Pierce*, the Supreme Court held that an Oregon compulsory attendance law “unreasonably interfere[d] with the *liberty* of parents and guardians to direct the upbringing *and education* of children under their control.”<sup>28</sup> Thus, based on *Pierce*, parents may direct the education of their

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<sup>19</sup> See McMullen, *supra* note 15, at 76.

<sup>20</sup> A detailed history of homeschooling and the legal rights affecting it are beyond the scope of this Note.

<sup>21</sup> McMullen, *supra* note 15, at 76.

<sup>22</sup> *Id.*

<sup>23</sup> ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 563 (1947); see 1852 Mass. Acts 170–71 (“SECT. 1. Every person who shall have any child under his control, between the ages of eight and fourteen years, shall send such child to some public school within the town or city in which he resides, during at least twelve weeks, if the public schools within such town or city shall be so long kept, in each and every year during which such child shall be under his control, six weeks of which shall be consecutive.”).

<sup>24</sup> See 1852 Mass. Acts 171 (“SECT. 4. If, upon inquiry by the school committee, it shall appear, or if upon the trial of any complaint or indictment under this act it shall appear, that such child has attended some school, not in the town or city in which he resides, for the time required by this act, or has been otherwise furnished with the means of education for a like period of time, or has already acquired those branches of learning which are taught in common schools, or if it shall appear that his bodily or mental condition has been such as to prevent his attendance at school, or his acquisition of learning for such a period of time, or that the person having the control of such child, is not able, by reason of poverty, to send such child to school, or to furnish him with the means of education, then such person shall be held not to have violated the provisions of this act.” (emphasis added)).

<sup>25</sup> 262 U.S. 390 (1923).

<sup>26</sup> See *id.* at 400–01.

<sup>27</sup> 268 U.S. 510, 534–35 (1925).

<sup>28</sup> *Id.* (emphases added).



children.<sup>29</sup> Additionally, the Court states, “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the *right*, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>30</sup> Although this case does not directly deal with homeschooling,<sup>31</sup> the right the Court so strongly emphasizes is a foundational element of the parental right to educate children at home.<sup>32</sup> However, *Pierce* does not limit the government’s ability to regulate schools, teachers, or child attendance.<sup>33</sup> Despite this fact, *Pierce* and *Meyer* establish a foundation for parental rights that supports parents’ ability to educate their children at home.<sup>34</sup> The right of parents to direct the upbringing of their children has often been the basis for arguments against restrictive state homeschooling laws.<sup>35</sup> As a result, “the battle has intensified around the fundamental issue of whether the parental right or the state’s duty should prevail in the education of children.”<sup>36</sup>

Some people, such as Judith G. McMullen, express doubt as to the relevance of *Meyer* and *Pierce* to the homeschooling debate. McMullen, a law professor at Marquette University Law School, points out that although *Meyer* is used as a foundational case for parental rights in the homeschooling debate, “the opinion itself does not seem to contemplate a homeschooling situation.”<sup>37</sup> While McMullen correctly points out that *Meyer* is not a homeschooling case, the opinion supports parents’ right to determine the upbringing of their children, and this parental right extends to homeschooling.<sup>38</sup> The only reason *Meyer* did not consider homeschooling was because homeschooling was not the situation at hand.<sup>39</sup> Despite these concessions, the *Meyer* Court stated that the “education of the young is only possible in schools conducted by especially

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<sup>29</sup> CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL* 35 (2d ed. 1998).

<sup>30</sup> *Pierce*, 268 U.S. at 535 (emphasis added).

<sup>31</sup> *Pierce* deals with the Oregon Compulsory Education Act, which required parents and guardians to send children between the ages of eight and sixteen in their care to the public school in the district where they resided. *Id.* at 530. Society of Sisters, an operator of private schools, sued and received an injunction against the law’s implementation. *Id.* at 529–30, 536.

<sup>32</sup> See KLICKA, *supra* note 29.

<sup>33</sup> *Pierce*, 268 U.S. at 534.

<sup>34</sup> KLICKA, *supra* note 29, at 33.

<sup>35</sup> See McMullen, *supra* note 15, at 91, 93.

<sup>36</sup> Aaron T. Martin, Note, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT’L & COMP. L. 225, 254 (2010).

<sup>37</sup> McMullen, *supra* note 15, at 75, 91.

<sup>38</sup> See KLICKA, *supra* note 29, at 34.

<sup>39</sup> The appellee in *Meyer* challenged his conviction under a Nebraska state law that forbade any person from teaching students below ninth grade any subject in a language other than English. *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

qualified persons who devote themselves thereto.”<sup>40</sup> This statement may include homeschooling for several reasons. First, “especially qualified persons” is a broad, vague term that could include parents.<sup>41</sup> Second, homeschooling parents often “devote themselves” to educating their children.<sup>42</sup> While it may be true that some homeschooling parents do not fully devote themselves to educating their children, it is also true that some public or private school teachers fail in the same area.<sup>43</sup> Thus, *Meyer* applies to homeschooling, but the strongest application is based on the parents’ right to direct their children’s upbringing.

McMullen also questions whether *Pierce* is applicable to the homeschooling situation. She claims that “one cannot reasonably read *Pierce*’s defense of parental prerogatives in a child’s education to discredit compulsory education laws, nor did later Supreme Court cases treat it that way.”<sup>44</sup> However, McMullen’s argument is problematic because challenging compulsory education laws and supporting homeschooling are two different topics.<sup>45</sup> *Pierce* simply establishes parental rights in education, and those rights support homeschooling.<sup>46</sup> Even if McMullen were correct about *Meyer* and *Pierce* supporting the state’s ability to regulate the education of children,<sup>47</sup> these two cases do not prohibit homeschooling. Rather, *Meyer* and *Pierce* establish parental rights that support home education.<sup>48</sup>

Another case that aided the establishment of parental rights was *Prince v. Massachusetts*.<sup>49</sup> In this case, the Supreme Court determined that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>50</sup> Like *Meyer* and *Pierce*, this case strengthens parental rights.<sup>51</sup> However, some suggest that *Prince* “can be read both to support unrestricted homeschooling and homeschooling

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<sup>40</sup> *Id.* at 400.

<sup>41</sup> *See id.* The Court does not provide any guidance as to what sort of qualifications allow a person to effectively educate the young.

<sup>42</sup> *See id.* This statement begs the question: Who is more devoted to seeing a child succeed than the child’s parents?

<sup>43</sup> *See* Martin, *supra* note 36, at 255.

<sup>44</sup> McMullen, *supra* note 15, at 93.

<sup>45</sup> Rather than focusing on the value of compulsory education laws, this Note focuses on a suggested response to homeschooling regulations.

<sup>46</sup> *See* Louis A. Greenfield, Note, *Religious Home-Schools: That’s Not a Monkey on Your Back, It’s a Compelling State Interest*, 9 RUTGERS J.L. & RELIGION 1, 4 (2007).

<sup>47</sup> *See* McMullen, *supra* note 15, at 91–93.

<sup>48</sup> *See* KLICKA, *supra* note 29, at 33.

<sup>49</sup> 321 U.S. 158 (1944).

<sup>50</sup> *Id.* at 166.

<sup>51</sup> KLICKA, *supra* note 29, at 36.

regulation.”<sup>52</sup> Although the case discusses the “obligation to care for the child and to prepare him for life in society,” it also appears to support regulation of homeschooling by seemingly recognizing “that the state has a legitimate interest in protecting children from dangers that their parents have not adequately protected against.”<sup>53</sup> Thus, *Prince* highlights the tension between parents’ right to direct their children’s upbringing and the state’s interest in protecting the best interests of every child.

The Supreme Court did not consider a homeschooling situation until it examined *Wisconsin v. Yoder*.<sup>54</sup> In this case, Amish parents desired to keep their children from attending school after eighth grade.<sup>55</sup> Further, they wished to educate their children within the Amish community rather than allow them to enter the public school system.<sup>56</sup> The parents therefore challenged Wisconsin’s compulsory attendance law.<sup>57</sup> This challenge eventually came before the Supreme Court, and the Court ruled in favor of the Amish family by refusing to force the children into public school.<sup>58</sup> However, McMullen contends that *Yoder* “would easily support regulation of homeschoolers who were not motivated primarily by religious belief but would impose a much higher burden on the state in justifying regulation of homeschooling undertaken for religious purposes.”<sup>59</sup> Due to this belief, McMullen concludes that loose regulation of homeschooling is made possible by the “burden of separating religious motivations from non-religious motivations” in addition to the difficulty of determining a person’s religious sincerity.<sup>60</sup> *Yoder* does not clarify everything about the homeschooling debate, but it provides additional support for the parental right to choose home education for children.<sup>61</sup> Although the religious motivation of some parents who teach their children at home plays a role in the regulation of home education, the basic right of parents to direct their children’s upbringing allows them to educate their children at home.

Despite McMullen’s arguments, *Meyer*, *Pierce*, *Prince*, and *Yoder* form the bedrock for parents’ right to choose homeschooling for their children.<sup>62</sup> Because parents have the right to direct the upbringing of their children, they may choose to educate those children through

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<sup>52</sup> McMullen, *supra* note 15, at 94.

<sup>53</sup> *Id.*

<sup>54</sup> 406 U.S. 205 (1972).

<sup>55</sup> *Id.* at 207.

<sup>56</sup> *Id.* at 209.

<sup>57</sup> *Id.* at 208–09.

<sup>58</sup> *Id.* at 234.

<sup>59</sup> McMullen, *supra* note 15, at 97.

<sup>60</sup> *Id.*

<sup>61</sup> See *Yoder*, 406 U.S. at 233–34; Greenfield, *supra* note 46, at 5.

<sup>62</sup> See KLICKA, *supra* note 29, at 33–37.

homeschooling. Some may interpret these foundational cases differently, but it is difficult, if not impossible, to deny the parental rights that have been established. America has a rich history of home education,<sup>63</sup> and home education continues despite various attacks.<sup>64</sup> However, there are challenges on the horizon as homeschooling is assailed both domestically and internationally.

*B. The Current Status of Homeschooling in the United States*

The current legal status of homeschooling is fluid. While all fifty states currently allow some form of home education,<sup>65</sup> the fact that “the United States has a far more developed body of law on the subject” compared to other nations does nothing to ensure a bright future for American homeschooling.<sup>66</sup> Despite abundant tension between homeschoolers and state officials within the United States, “homeschooling has moved from being a fringe movement to a thriving mainstream practice.”<sup>67</sup> However, other cases have raised questions in spite of this wider general acceptance of homeschooling. In *Runyon v. McCrary*,<sup>68</sup> the Supreme Court examined a private education case<sup>69</sup> that could be applicable to homeschooling. The Court stated that “while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by *reasonable* government regulation.”<sup>70</sup> The Third Circuit used similarly vague terminology in *Combs v. Homer-Center School District*.<sup>71</sup> In that case, the Third Circuit determined that there was no constitutional right for parents “to avoid *reasonable* state regulation of their children’s education.”<sup>72</sup> Based on the two cases above, the natural question is: What is reasonable? Summarizing the scholarship on the subject, one writer suggests that reasonable regulation “should withstand challenges from

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<sup>63</sup> McMullen, *supra* note 15, at 76–77.

<sup>64</sup> See Kevin D. Williamson, *They Are Coming for Your Children*, NAT’L REV. ONLINE (Oct. 7, 2014, 4:00 AM), <http://www.nationalreview.com/article/389680/they-are-coming-your-children-kevin-d-williamson> (noting opposition to homeschooling and government efforts to restrict homeschooling access).

<sup>65</sup> McMullen, *supra* note 15; *State Laws*, *supra* note 15.

<sup>66</sup> Martin, *supra* note 36, at 272.

<sup>67</sup> *Id.* at 254.

<sup>68</sup> 427 U.S. 160 (1976).

<sup>69</sup> *Id.* at 163–67.

<sup>70</sup> *Id.* at 178 (emphasis added).

<sup>71</sup> 540 F.3d 231 (3d Cir. 2008).

<sup>72</sup> *Id.* at 249 (emphasis added).

parents seeking to circumvent those regulations.”<sup>73</sup> Despite the different courts’ use of vague terminology, homeschooling is still legal—and growing.

Outside of the legal realm, the current status of homeschooling appears to be positive. Traditionally, religion has been the primary reason for homeschooling, and it is still an important factor in the decision to educate children at home.<sup>74</sup> About eighty-three percent of those who educate their children at home claim religion as one of their reasons for homeschooling, and the majority of these are conservative Christians.<sup>75</sup> These parents choose homeschooling to ensure that their children receive “a religious education that inculcates values and beliefs not taught in public schools.”<sup>76</sup> However, religion is not the only reason for homeschooling.<sup>77</sup> Many parents have found a variety of other reasons to teach their children at home, such as “dissatisfaction with the local school system, caring for special-needs kids, safety concerns, flexibility to travel and the chance to spend more time with their children.”<sup>78</sup> Based on these reasons, the number of families choosing home education has been steadily increasing.<sup>79</sup> According to the National Home Education Research Institute (NHERI), homeschooling has been increasing an estimated two to eight percent per year over the last few years.<sup>80</sup> In the spring of 2010, there were “an estimated 2.04 million home-educated students . . . in the United States.”<sup>81</sup> As for academic performance, home-educated students often perform better academically than their public school counterparts.<sup>82</sup> In fact, children who are educated at home usually score fifteen to thirty percentile points higher than public school students do on standardized academic achievement tests.<sup>83</sup> This positive status of home education in the United States provides a helpful backdrop for examining the types of laws and regulations that several states have put in place.

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<sup>73</sup> Martin, *supra* note 36, at 272.

<sup>74</sup> Vidya Rao, *As Home-Schooling Moves to Mainstream, Stigma Fades*, TODAY (Sept. 27, 2010, 9:12 AM), [http://www.today.com/id/39342787/ns/today-parenting\\_and\\_family/t/home-schooling-moves-mainstream-stigma-fades/#.UkWbURafY20](http://www.today.com/id/39342787/ns/today-parenting_and_family/t/home-schooling-moves-mainstream-stigma-fades/#.UkWbURafY20).

<sup>75</sup> *Id.*

<sup>76</sup> McMullen, *supra* note 15, at 78.

<sup>77</sup> Brian D. Ray, *Research Facts on Homeschooling*, NHERI (Jan. 6, 2015), <http://www.nheri.org/ResearchFacts.pdf>.

<sup>78</sup> Rao, *supra* note 74.

<sup>79</sup> *See* Ray, *supra* note 77.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

## II. DOMESTIC REGULATION OF HOMESCHOOLING

Each state takes a different approach to regulating home education. For example, some states treat home schools as private schools, while other states have stricter laws directly aimed at homeschooling.<sup>84</sup> Other states allow children to avoid the requirements of a compulsory education law if the parents prove they are providing an education equivalent to what the state requires under the compulsory education laws.<sup>85</sup> These regulations “vary greatly from state to state and may include requirements for home teacher certification, curriculum, and other restrictions.”<sup>86</sup> To simplify the many different approaches, it is helpful to examine the states based on whether they impose loose, moderate, or heavy regulations on home education. The following section examines specific states as examples of these differing levels of regulation on homeschooling.

### A. States with Loose Requirements on Homeschooling

Illinois is one of several states that do not require parents to initiate contact with the state before beginning home education.<sup>87</sup> Illinois provides a good example of a state with loose regulation on home education. For instance, home-educated students in Illinois are not required to take standardized tests, and parents teaching their children at home do not need any specific teacher qualifications.<sup>88</sup> A basic overview of Illinois law reveals that Illinois does not have a statute specifically dealing with homeschooling.<sup>89</sup> As a result, it is necessary to examine other Illinois statutes that affect education. The Illinois School Code does not require children to attend public schools as long as the children attend a school where they “are taught the branches of education . . . in the English language.”<sup>90</sup> In addition to the English requirement, the branches of education must be the same as those taught to public school children who

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<sup>84</sup> McMullen, *supra* note 15, at 87, 89.

<sup>85</sup> *Id.* at 88–89.

<sup>86</sup> *Id.* at 89.

<sup>87</sup> *State Laws, supra* note 15 (listing Alaska, Connecticut, Guam, Idaho, Illinois, Indiana, Iowa, Michigan, Missouri, New Jersey, Oklahoma, Puerto Rico, and Texas as jurisdictions which do not require homeschooling parents to initiate contact with the state); *see also* 105 ILL. COMP. STAT. 5/2-3.25o(b), (e) (Westlaw through P.A. 98-1174, 2014 Reg. Sess.) (allowing “non-public” schools to voluntarily register with the state, but excluding any “home-based” school from the definition of “non-public school”).

<sup>88</sup> HOME SCH. LEGAL DEF. ASS’N, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS—ILLINOIS IL-2 (2014-2015 ed.) [hereinafter A LEGAL ANALYSIS—ILLINOIS], available at <http://www.hslda.org/laws/analysis/Illinois.pdf>.

<sup>89</sup> *Id.* at IL-1.

<sup>90</sup> 105 ILL. COMP. STAT. ANN. 5/26-1(1) (Westlaw through P.A. 98-1150, 2014 Reg. Sess.).

are the same age and in the same grade.<sup>91</sup> The “areas of education” in which a child must be taught “include the language arts, mathematics, the biological, physical and social sciences, the fine arts and physical development and health.”<sup>92</sup> Thus, parents who meet the statutory requirements are allowed to decide how, when, and what to teach their children.<sup>93</sup> In fact, Illinois considers homeschooling “a form of private education” as long as home-educated students satisfy the requirements of Section 26-1 of the Illinois School Code.<sup>94</sup>

In addition to statutory law, some Illinois case law also affects the state’s regulation of home education. In *People v. Levisen*,<sup>95</sup> the Illinois Supreme Court held that the compulsory education laws were “enacted to enforce the natural obligation of parents to provide an education for their young, an obligation which corresponds to the parents’ right of control over the child.”<sup>96</sup> In addition to explaining the reason for enactment of compulsory education laws, the court determined that the goal of these laws is simply the education of children rather than a requirement that they be “educated in any particular manner or place.”<sup>97</sup> By not interpreting compulsory education laws as limiting education to a specific procedure or location, the court essentially allowed homeschooling.<sup>98</sup> In addition to its analysis of compulsory education laws, the court defined school as “a place where instruction is imparted to the young” regardless of the number of people being taught there.<sup>99</sup> This definition clearly includes home education, and the court clarified itself when it stated, “[w]e do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or more a school.”<sup>100</sup> Thus, the *Levisen* decision, which is still good law,<sup>101</sup> includes homeschooling as an acceptable form of education in Illinois.

In the event of a truancy action against homeschooling parents in Illinois, the parents must prove that they are acting in accordance with

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* § 27-1 (Westlaw).

<sup>93</sup> See *Illinois Home Schooling*, ILL. STATE BD. EDUC., <http://www.isbe.state.il.us/homeschool/> (last visited Apr. 13, 2015).

<sup>94</sup> *Id.*; see § 26-1(1) (Westlaw).

<sup>95</sup> 90 N.E.2d 213 (Ill. 1950).

<sup>96</sup> *Id.* at 215.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Gallarneau ex rel. Gallarneau v. Calvary Chapel of Lake Villa, Inc.*, 992 N.E.2d 559, 562 (Ill. App. Ct. 2013) (citing the holding in *Levisen* to support the conclusion that the generic term “school” has several meanings).

the law.<sup>102</sup> Because parents are given so much freedom in choosing how their child will be educated, they are also given “near-total responsibility . . . for their student’s education while they are being home-schooled.”<sup>103</sup> Thus, parents have the burden to prove their home education program complies with the law.<sup>104</sup> If a parent cannot satisfy this burden of proof, “the regional superintendent may request the regional or school district truant officer to investigate to see that the child is in compliance with the compulsory attendance law.”<sup>105</sup> In the event that a parent’s home education program does not satisfy state requirements, the parent may be guilty of a Class C misdemeanor, while the child will be considered truant.<sup>106</sup> Thus, Illinois imposes loose requirements on home education, but it also has laws in place to penalize homeschooling parents who do not properly educate their children.

Compared to the rest of the United States, the homeschooling requirements in Illinois are quite loose. However, some states such as Indiana, Iowa, Michigan, Missouri, and Texas are like Illinois in that they do not require parents to initiate contact with the state.<sup>107</sup> Other states require parental notification, but do not have many other requirements.<sup>108</sup> Among these states are Alabama, California, Kentucky, Mississippi, and Wisconsin.<sup>109</sup> Regardless of this distinction, all of these states are similar to Illinois. In fact, Indiana and Kentucky, two states that border Illinois, also do not have home school statutes.<sup>110</sup> Another similarity is that neither Indiana nor Kentucky has teacher qualifications or standardized tests.<sup>111</sup> These two states also primarily rely on case law and statutory law that is not directed specifically toward homeschooling.<sup>112</sup> Interestingly, Indiana

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<sup>102</sup> A LEGAL ANALYSIS—ILLINOIS, *supra* note 88.

<sup>103</sup> *Illinois Home Schooling*, *supra* note 93.

<sup>104</sup> *Levisen*, 90 N.E.2d at 215–16; *see also Illinois Home Schooling*, *supra* note 93.

<sup>105</sup> *Illinois Home Schooling*, *supra* note 93.

<sup>106</sup> *See* 105 ILL. COMP. STAT. 5/26-11 (Westlaw through P.A. 98-1174, 2014 Reg. Sess.); *Illinois Home Schooling*, *supra* note 93.

<sup>107</sup> *See State Laws*, *supra* note 15.

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> HOME SCH. LEGAL DEF. ASS’N, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS—INDIANA IN-1 (2013-2014 ed.) [hereinafter A LEGAL ANALYSIS—INDIANA], *available at* <http://www.hslda.org/laws/analysis/Indiana.pdf>; HOME SCH. LEGAL DEF. ASS’N, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS—KENTUCKY KY-1 (2013-2014 ed.) [hereinafter A LEGAL ANALYSIS—KENTUCKY], *available at* <http://www.hslda.org/laws/analysis/Kentucky.pdf>.

<sup>111</sup> A LEGAL ANALYSIS—INDIANA, *supra* note 110, at IN-1 to IN-2; A LEGAL ANALYSIS—KENTUCKY, *supra* note 110, at KY-2.

<sup>112</sup> *See* A LEGAL ANALYSIS—INDIANA, *supra* note 110, at IN-1 to IN-2; A LEGAL ANALYSIS—KENTUCKY, *supra* note 110, at KY-1 to KY-2.



has case law that is nearly identical to the *Levisen* case in Illinois.<sup>113</sup> In *State v. Peterman*, the Indiana Appellate Court held that a school “is a place where instruction is imparted to the young.”<sup>114</sup> That court also stated, “[w]e do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or more a school.”<sup>115</sup> Thus, Illinois is not alone in its loose regulation of home education.

### *B. States with Moderate Requirements on Homeschooling*

Several states impose moderate regulation on home education including Florida, Minnesota, Ohio, Tennessee, and Virginia.<sup>116</sup> Of these states, Virginia provides a clear example of this moderate regulation. To begin homeschooling in Virginia, parents must choose from four options for home education.<sup>117</sup> These options include homeschooling under the home school statute, under the religious exemption statute, as a certified tutor, or under the umbrella of a private or denominational school.<sup>118</sup>

Unlike Illinois, Virginia has a statute that directly applies to homeschoolers.<sup>119</sup> This statute begins by explaining the parental requirements for homeschooling. Under Section 22.1-254.1(A) of the Virginia Code, a parent may teach his or her children at home as long as that parent has a high school diploma, is a qualified teacher according to the Virginia Board of Education, gives a correspondence or distance learning course of study, or gives evidence to prove the parent’s ability to “provide an adequate education for the child.”<sup>120</sup> As is evident in the Code, the parent need only meet one of these requirements to legally provide home education.<sup>121</sup> Parents who choose home education in Virginia must notify the division superintendent every year, give a description of the

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<sup>113</sup> Compare *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950) (defining school as “a place where instruction is imparted to the young”), with *State v. Peterman*, 70 N.E. 550, 551 (Ind. App. 1904) (defining school as “a place where instruction is imparted to the young”).

<sup>114</sup> *Peterman*, 70 N.E. at 551.

<sup>115</sup> *Id.*

<sup>116</sup> *State Laws*, *supra* note 15 (listing American Samoa, Arkansas, Colorado, D.C., Hawaii, Louisiana, Maine, Maryland, New Hampshire, North Carolina, North Dakota, the Northern Mariana Islands, Oregon, South Carolina, South Dakota, Washington, and West Virginia as the other moderate regulation jurisdictions).

<sup>117</sup> HOME SCH. LEGAL DEF. ASS’N, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS—VIRGINIA VA-1 to VA-2 (2014-2015 ed.) [hereinafter A LEGAL ANALYSIS—VIRGINIA], available at <http://www.hslda.org/laws/analysis/Virginia.pdf>; see also VA. CODE ANN. §§ 22.1-254(A), (B)(1), 22.1-254.1(A), (B) (Westlaw through 2014 Reg. Sess.).

<sup>118</sup> §§ 22.1-254(A), (B)(1), 22.1-254.1(A), (B) (Westlaw); A LEGAL ANALYSIS—VIRGINIA, *supra* note 117, at VA-1 to VA-2.

<sup>119</sup> § 22.1-254.1 (Westlaw).

<sup>120</sup> *Id.* § 22.1-254.1(A) (Westlaw).

<sup>121</sup> *Id.*

curriculum used, and prove that one of the Section 22.1-254.1(A) requirements has been satisfied.<sup>122</sup> In addition to these basic requirements, parents who choose to teach their children under the homeschooling statute may be required to have their children take standardized tests.<sup>123</sup>

Once homeschooling has begun, the parents must provide annual proof that their child is receiving an adequate education.<sup>124</sup> Evidence showing this adequate education may include acceptable results on a standardized test; an evaluation by a state-licensed teacher who is familiar with the child's academic progress; or a report card, transcript, or similar document.<sup>125</sup> If proof is not provided or the evidence is not acceptable, parents will be required to prove their ability to provide an adequate education for the child as well as a one-year remediation plan.<sup>126</sup> Failure to satisfy these requirements will result in the termination of a child's home education.<sup>127</sup> Based on the amount of requirements alone, Virginia's home education laws are clearly stricter than those in Illinois. Other states are even stricter than Virginia.

### *C. States with Heavy Requirements on Homeschooling*

There are several examples of states with heavy requirements on homeschooling. These states, stricter than Illinois and Virginia, are Massachusetts, New York, Pennsylvania, Rhode Island, and Vermont.<sup>128</sup> Pennsylvania provides a clear example of a state with heavy regulations on home education. Interestingly, the Pennsylvania Department of Education states, "[h]omeschooling is a right and the school's permission is not needed, as long as the required documentation is submitted with the affidavit."<sup>129</sup> Although Pennsylvania considers homeschooling a right, this fact is one of few in the state's laws that support home education. One important regulation requires that parents who desire to educate their children at home must have a high school degree.<sup>130</sup> While this requirement appears reasonable, it is still a regulation. Pennsylvania's

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<sup>122</sup> *Id.* § 22.1-254.1(B) (Westlaw).

<sup>123</sup> *See id.* § 22.1-254.1(C) (Westlaw); A LEGAL ANALYSIS—VIRGINIA, *supra* note 117, at VA-2 to VA-3.

<sup>124</sup> § 22.1-254.1(C) (Westlaw).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *State Laws, supra* note 15.

<sup>129</sup> *Overview of Homeschooling*, PA. DEP'T EDUC., [http://www.portal.state.pa.us/portal/portal/server.pt/community/overview\\_of\\_homeschooling/20312](http://www.portal.state.pa.us/portal/portal/server.pt/community/overview_of_homeschooling/20312) (last visited Apr. 13, 2015).

<sup>130</sup> 24 PA. CONS. STAT. ANN. § 13-1327.1(a), (b)(1) (Westlaw through Acts 1-171, 173-98, 200-04, 2014 Reg. Sess.).

compulsory attendance laws require attendance at the age of eight.<sup>131</sup> This requirement applies throughout Pennsylvania except in Philadelphia, where the compulsory attendance age is six.<sup>132</sup> Also, once the child begins first grade or above in public, private, or home school, the child must continue education until he or she turns seventeen.<sup>133</sup> These compulsory attendance laws appear more complicated, but they are only the beginning of Pennsylvania's regulation of home education.

Pennsylvania's regulation of home education provides a significant contrast to the loose requirements of Illinois. Parents in Pennsylvania are limited to choosing from five options for teaching their children at home: homeschooling under Pennsylvania's homeschooling statute, through a private tutor, as a satellite of a church school, as a satellite of an accredited boarding school, or under the protection of the Pennsylvania Religious Freedom Protection Act (RFPA).<sup>134</sup> As a result of these restrictions, home education is never a completely independent endeavor.

Of all of Pennsylvania's regulations, the most burdensome is the state's determination to oversee children's work through portfolios.<sup>135</sup> Pennsylvania law requires a homeschooling parent to record his or her child's work and progress in a detailed portfolio for a state supervisor to review later.<sup>136</sup> Another requirement involves statewide tests that homeschoolers are required to take in third, fifth, and eighth grade.<sup>137</sup> The portfolio must include the results of these tests.<sup>138</sup> The state also requires homeschoolers to have "one hundred eighty (180) days of instruction or nine hundred (900) hours of instruction per year at the elementary level, or nine hundred ninety (990) hours per year at the secondary level."<sup>139</sup> Finally, Pennsylvanian homeschoolers are subject to laws that impose specific requirements on the course material that they must study.<sup>140</sup> Based on the amount of regulations listed in this section, Pennsylvania clearly imposes more regulations on home education than Illinois.

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<sup>131</sup> *Id.* § 13-1326 (Westlaw).

<sup>132</sup> *Overview of Homeschooling*, *supra* note 129.

<sup>133</sup> § 13-1326 (Westlaw); *Overview of Homeschooling*, *supra* note 129.

<sup>134</sup> § 13-1327 (Westlaw); see 71 PA. CONS. STAT. ANN. § 2402 (Westlaw through 2014 Reg. Sess.); HSLDA, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS—PENNSYLVANIA PA-1 to PA-4 (2014-2015 ed.), available at <http://www.hslda.org/laws/analysis/Pennsylvania.pdf>.

<sup>135</sup> See 24 PA. CONS. STAT. ANN. § 13-1327.1(e)(1) (Westlaw through Acts 1-171, 173-98, 200-04, 2014 Reg. Sess.).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; *Overview of Homeschooling*, *supra* note 129.

<sup>138</sup> § 13-1327.1(e)(1) (Westlaw); *Overview of Homeschooling*, *supra* note 129.

<sup>139</sup> § 13-1327.1(c) (Westlaw).

<sup>140</sup> *Id.*

### III. INTERNATIONAL REGULATION AND PROHIBITION OF HOMESCHOOLING

Just as the fifty United States have had differing responses to homeschooling, so has the international community. In particular, Europe has responded to home education in various ways. While many European countries have heavily regulated or completely prohibited homeschooling,<sup>141</sup> it is legal in other European countries such as Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, Norway, Portugal, Slovenia, Ukraine, and the United Kingdom.<sup>142</sup> Because all fifty states in the United States allow homeschooling, it is necessary to examine the international landscape for examples of governments that prohibit homeschooling as well as those that regulate homeschooling more than the United States.

#### A. *International Regulation of Homeschooling*

Many countries that heavily regulate home education lie just across the Atlantic Ocean. In fact, recent events in Europe have suggested “more hostility and support for the regulation of homeschooling.”<sup>143</sup> One example of these recent events was the new regulations on homeschooling imposed by Belgium’s Flemish parliament.<sup>144</sup> These regulations, known as Education Decree XXIII, became effective on September 1, 2013, and they require eleven- and fifteen-year-old home school students to take state tests.<sup>145</sup> While this is not a very heavy regulation of home education, other European countries have imposed far more excessive regulations. For example, Sander Dekker, the Netherlands’s State Secretary for Education, has made it clear that he desires to eradicate homeschooling from the Netherlands.<sup>146</sup> This news raises more concern since the Netherlands already prohibits homeschooling unless the “parents cannot find a school fitting their beliefs in their area.”<sup>147</sup> Homeschoolers in the Netherlands are trying to stop this potential crackdown through a petition.<sup>148</sup> Across the continent, Spain is struggling with its

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<sup>141</sup> See *infra* Part III.

<sup>142</sup> Inés Benítez, *Homeschoolers Want Legal Vacuum Filled in Spain*, IPS (Apr. 24, 2013), <http://www.ipsnews.net/2013/04/homeschoolers-want-legal-vacuum-filled-in-spain/>.

<sup>143</sup> *Belgium: Controlling Homeschoolers: New Regulations Impose State Testing*, HSLDA (Sept. 30, 2013), <http://www.hslda.org/hs/international/Belgium/201309300.asp>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Netherlands: State Wants to Ban Homeschooling*, HSLDA (Sept. 24, 2013), <http://www.hslda.org/hs/international/Netherlands/201309240.asp>.

<sup>147</sup> Bayer, *supra* note 14.

<sup>148</sup> See *Netherlands: State Wants to Ban Homeschooling*, *supra* note 146; *Stop the Ban on Home Education in the Netherlands*, CHANGE.ORG, <https://www.change.org/p/stop-the->

homeschooling laws.<sup>149</sup> Currently, Spain requires ten years of compulsory education.<sup>150</sup> However, it is unclear whether this compulsory education law merely requires school attendance or if the law criminalizes homeschooling.<sup>151</sup> A Spanish court recently attempted to provide some clarity.<sup>152</sup> On December 2, 2010, the Spanish Constitutional Court “ordered a group of homeschooling parents to send their children to school in the southern Spanish city of Málaga.”<sup>153</sup> Thus, Spain is regulating homeschooling and may be moving toward prohibiting it altogether. Belgium, the Netherlands, and Spain are only some of the countries that have increased restrictions on homeschooling to some degree.<sup>154</sup>

Despite the increased regulation of home education, homeschooling is still legal in a number of European countries.<sup>155</sup> However, homeschoolers may face other challenges in these countries. For example, a court in the United Kingdom recently imposed severe regulations on a child who was being homeschooled.<sup>156</sup> In this situation, a mother who had taught three children at home for ten years was forced to send her disabled son to a school 100 miles away.<sup>157</sup> After the eighteen-year-old son spent some time in the hospital in 2011, the Northamptonshire County Council told the mother that her son could not return home.<sup>158</sup> The council’s only reason was that the mother’s decision to utilize home education was not in her son’s “best interests.”<sup>159</sup> The mother challenged the decision and claimed that the disabled teenager was “clever enough to study

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ban-on-home-education-in-the-netherlands (last visited Apr. 13, 2015) (displaying the petition online, but listing the petition as closed).

<sup>149</sup> See Benítez, *supra* note 142.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *id.*

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., GRAHAM BADMAN, REPORT TO THE SECRETARY OF STATE ON THE REVIEW OF ELECTIVE HOME EDUCATION IN ENGLAND 38–45 (June 11, 2009), available at <https://www.education.gov.uk/consultations/downloadableDocs/PDF%20FINAL%20HOME%20ED.pdf>; Mike Donnelly, *Ireland: State Prosecutes in Spite of Constitution*, HSLDA (Oct. 14, 2014), <http://www.hslda.org/hs/international/Ireland/201410070.asp> (discussing increased regulation in Ireland); Mike Donnelly, *Sweden: Homeschooling Family Appeals to Supreme Court*, HSLDA (Jan. 6, 2015), <http://www.hslda.org/hs/international/Sweden/201501060.asp> (discussing increased regulation in Sweden).

<sup>155</sup> See Bayer, *supra* note 14.

<sup>156</sup> See Sam Marsden, *Mother Loses Fight to Home-School Disabled Son*, THE TELEGRAPH (Nov. 12, 2013, 3:45 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/10444352/Mother-loses-fight-to-home-school-disabled-son.html>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

Shakespeare's *Romeo and Juliet*,"<sup>160</sup> but the court determined that he "lacked the mental capacity to make decisions about his welfare and should be enrolled at a school a long way from his family."<sup>161</sup> The appeal judge even expressed a lack of confidence that the mother would make sure her disabled son would finish his last year of school.<sup>162</sup> Faced with this opposition, the mother lost the case.<sup>163</sup> As they move forward, states like Illinois should consider the potential for dangerous situations like this case from the United Kingdom.

### *B. International Prohibition of Homeschooling*

Home education is illegal in a number of countries, including Brazil, Cuba, Greece, and Turkey.<sup>164</sup> In other countries, such as Bulgaria, homeschooling is illegal unless the child has special needs.<sup>165</sup> Even if a child has special needs, the Bulgarian government still heavily regulates the child's education by dictating the curriculum and requiring a traditional school to oversee the child's progress.<sup>166</sup> In fact, some of the most hostile governmental responses to home education have come from countries in Western Europe. The governments of Germany and Sweden, for instance, "have gotten tough on homeschoolers in recent years" and now criminalize homeschooling.<sup>167</sup>

In Sweden, homeschooling is illegal unless certain "exceptional circumstances" are satisfied.<sup>168</sup> However, the government rarely, if ever, allows home education based on these circumstances,<sup>169</sup> and Swedish parents who teach their children at home in violation of the law will face government threats, fines, and removal of the children.<sup>170</sup> In one recent Swedish case, the Supreme Administrative Court imposed a \$15,000 fine on a family due to the fact that the parents had homeschooled their twelve-year-old daughter for the 2011–2012 school year.<sup>171</sup> In a more

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Bayer, *supra* note 14.

<sup>165</sup> *Bulgaria*, HSLDA, <http://www.hslda.org/hs/international/Bulgaria/default.asp> (last visited Apr. 13, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> Benítez, *supra* note 142.

<sup>168</sup> *Sweden: New Education Law Makes Homeschooling Illegal*, HSLDA (July 7, 2010), <http://www.hslda.org/hs/international/Sweden/201007070.asp>.

<sup>169</sup> *See id.*

<sup>170</sup> Bayer, *supra* note 14.

<sup>171</sup> Press Release, Riksföreningen för Hemundervisning i Sverige—Rohus [National Association for Homeschooling in Sweden—Rohus], *Homeschooling Family Fined 15 000 USD by the Swedish Supreme Court*, MYNEWSDESK (Aug. 19, 2013, 09:46 CEST),

recent situation in Sweden, Annie and Christer Johansson have been separated from their son, Domenic, for four years due to “state seizure” and “forced adoption” as punishment for homeschooling him.<sup>172</sup> The situation began in June of 2009 when police boarded a plane just before takeoff in order to seize the Johannsons’ son “for the flimsiest of reasons.”<sup>173</sup> The Johannsons had disagreed with the government about whether they could utilize home education, but when they presented their plan to emigrate to a court, “the court took note without any conditions.”<sup>174</sup> Nevertheless, Domenic was taken, though the government officials had “no warrant or court action [that] authorized the seizure,” and the parents have been separated from their son for over four years with no contact for over two years.<sup>175</sup> Outside of some dental cavities and the fact that Domenic “had not received all recommended vaccinations,” the government has provided “no legitimate justification . . . to defend the seizure or the ongoing custody of the boy.”<sup>176</sup> When the case went to court, a lower court held that it was in the child’s best interests for him to be with his parents.<sup>177</sup> However, the appeals court reversed that decision and removed “permanent guardianship of Domenic in December 2012.”<sup>178</sup> These cases starkly illustrate Sweden’s harsh prohibition of homeschooling.

In addition to Sweden, Germany has imposed harsh regulations on home education. In fact, Germany’s virtual criminalization of home education prompted Georgia and Tennessee to pass resolutions urging Germany to legalize homeschooling.<sup>179</sup> Despite the states’ efforts, it appears that their resolutions were not effective. Currently, homeschooling is illegal in Germany unless “continued school attendance would create undue hardship for an individual child.”<sup>180</sup> The basic German compulsory attendance law requires six-year-old children to attend school,

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<http://www.mynewsdesk.com/se/view/pressrelease/homeschooling-family-fined-15-000-usd-by-the-swedish-supreme-court-895446>.

<sup>172</sup> *Sweden: HSLDA Asks for Help for Swedish Family*, HSLDA (Nov. 5, 2013), <http://www.hsllda.org/hs/international/Sweden/201311050.asp?elq=119398ebbbd144428d9bd3b9484d722d&elqCampaignId=186>.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See* H.R. 850, 2009–2010 Reg. Sess. (Ga. 2009); H.R. 87, 106th Gen. Assemb. (Tenn. 2009).

<sup>180</sup> Bayer, *supra* note 14. Interestingly, the German laws restricting home education are rooted in the Nazi era when the young Nazi government used the education system to spread its propaganda. *See* Martin, *supra* note 36, at 226, 229–30.

and there is no exemption for home education.<sup>181</sup> This compulsory attendance law was eventually challenged based on a religious freedom argument in *Konrad v. Germany*, but the German Constitutional Court upheld the attendance requirements.<sup>182</sup> Germany's Basic Law "seems to provide significant rights for parents and families, [but] the actual protections are thin."<sup>183</sup> Although German parents are responsible for their child's education, the method of education that they choose for their child cannot conflict with the German government's policy.<sup>184</sup> As a result, "[n]o matter what rights parents possess to direct the upbringing of their children in Germany, those rights are overshadowed by the control of the State."<sup>185</sup> These regulations clearly portray Germany's hostility toward home education.

#### IV. HOW STATES LIKE ILLINOIS SHOULD RESPOND TO THE REGULATION OF HOMESCHOOLING

States like Illinois have many examples of how to treat home education. They could follow other states' examples by increasing their restrictions without interfering with the parents' foundational right to direct the upbringing of their children.<sup>186</sup> However, states like Illinois could also follow the international example by increasing the regulation of home education beyond those restrictions found in the United States.<sup>187</sup> The regulation of homeschooling brings some benefits, but it also brings many dangers. Before making a decision on whether to increase the regulation of home education, it is helpful to examine the pros and cons to such regulation.

##### *A. The Pros and Cons of Regulating Homeschooling*

Like most government regulation, the regulation of home education presents many positives and negatives. Clearly, increased regulation of homeschooling offers some advantages. For instance, increased regulation could help solve some of the existing problems with home education. These problems include vague standards with no ability to enforce them and a lack of health and safety standards for homeschoolers.<sup>188</sup> More regulation would clarify the existing vague standards or establish statutory law to specifically explain the regulation. This clarification would then result in the advantage of true enforcement of the regulations. Once enforced, these

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<sup>181</sup> Martin, *supra* note 36, at 226, 243.

<sup>182</sup> *Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355, 363, 367–68.

<sup>183</sup> Martin, *supra* note 36, at 238–39; *see also Konrad*, 2006-XIII Eur. Ct. H.R. at 366.

<sup>184</sup> *Konrad*, 2006-XIII Eur. Ct. H.R. at 362, 365.

<sup>185</sup> Martin, *supra* note 36, at 241.

<sup>186</sup> *See supra* Part II.B–C.

<sup>187</sup> *See supra* Part III.

<sup>188</sup> McMullen, *supra* note 15, at 98–99.



regulations would ensure that parents are actually educating their children as they claim they are. Other mechanisms such as required state tests and portfolios would provide an adequate measurement of the child's education level, and requiring home schools to function as satellites of private schools would increase the chances of the child receiving an appropriate education. Imposing a high school diploma requirement on parents would also be beneficial since it would ensure that parents are fully capable of teaching and overseeing their children's education. Another potential advantage to increased regulation could be preventing abusive parents from using homeschooling as a cover for their harmful actions. Imposing the same medical and health standards as are imposed on public school students is another potential advantage that increased regulation can bring. Such a regulation would counteract the current lack of incentive of homeschooling families to comply with school vaccination deadlines.<sup>189</sup>

Despite its potential advantages, increased regulation of home education also raises many disadvantages. One of these disadvantages is the danger of steadily increasing regulation. A slight increase in homeschooling requirements may set the precedent for more regulation until the once simple requirements become burdensome. In addition to this potential problem of bad precedent, there is also the problem of forcing home-educated students back into the public school system. This action may risk overcrowding the system and perhaps lead to an increase in the academic failure rates.<sup>190</sup> However, one of the most detrimental disadvantages arises when sending a child to a public or private school interferes with a parent's right to direct his or her child's upbringing. In this regard, satellite home schools, portfolio submissions, and educational requirements on parents arguably infringe on parental rights. Thus, increasing regulation of home education may result in many potential problems.

#### *B. A Proposed Response for States Like Illinois*

States like Illinois with loose regulation of home education should not increase that regulation. It is apparent from the domestic and international regulation of homeschooling that an increase in regulation presents a danger to parents who simply want to educate their children at home. States like Illinois should not follow the examples of states like Virginia or Pennsylvania<sup>191</sup> by imposing heavier regulation on home education. Although it is more plausible for Illinois and its counterparts to mimic the regulations of reasonable sister states rather than stringent

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<sup>189</sup> See *id.* at 103.

<sup>190</sup> See *id.* at 99.

<sup>191</sup> See *supra* Part II.B-C.

international governments, even reasonable regulations present the danger of creating harmful precedent for home education in the United States. As state governments become more comfortable with regulating home education, the national government will likely follow the same trend. Increased regulation may also lead to a societal acceptance of regulating home education. Such an acceptance could potentially lead to more restrictions in the state and national governments. As a practical matter, increased regulation of home education may not be necessary because “the state could accomplish some of its goals, especially in the child-protection area, by enforcement of existing statutes rather than by further regulation of homeschooling.”<sup>192</sup> Thus, a state may simply be wasting resources by imposing more regulations.<sup>193</sup>

While more statutory law may seem necessary to combat the vagueness that plagues states’ homeschooling laws, this vagueness is actually beneficial because it signifies low governmental involvement. Due to the fact that homeschoolers usually perform better academically than their public school counterparts,<sup>194</sup> regulations in the form of portfolios and standardized tests may not be as necessary, or as useful, as they appear. Requiring satellite schools also seems effective for oversight of the child’s education. However, this type of regulation may essentially preclude some parents who are not comfortable with a satellite system of home education. One seemingly sensible regulation of homeschooling is requiring homeschoolers to receive vaccinations and medical treatment equivalent to what public school students receive.<sup>195</sup> This regulation could be accomplished by requiring parents to register their children upon applying for permission to utilize home education.<sup>196</sup> Such a regulation could further vaccination aims and also ensure that the parent is not abusive.<sup>197</sup> Even so, it would seem more plausible for the state to require all children to be vaccinated rather than imposing a registration mechanism on homeschooling. Simply drafting a mandate requiring applicable children to be vaccinated would accomplish the same purpose. Such a requirement, however, raises many other issues that are beyond the scope of this Note.

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<sup>192</sup> McMullen, *supra* note 15, at 99.

<sup>193</sup> *Id.*

<sup>194</sup> See Ray, *supra* note 77.

<sup>195</sup> See McMullen, *supra* note 15, at 86, 103.

<sup>196</sup> See *id.* at 106.

<sup>197</sup> *Id.* A homeschooling registration system which required the parent’s name would provide supervisors with an opportunity to check the parent’s criminal record for instances of abuse or neglect. See *id.*

Because parents have the right to direct the upbringing of their children,<sup>198</sup> they should also have the freedom to direct their children's education. Imposing more regulations on home education prevents parents from fully exercising this right. Minimal regulation sounds attractive if it is "aimed less at intrusive oversight and more at identifying the small minority of homeschooling parents who are not in fact providing their children with an education."<sup>199</sup> For example, this type of regulation could require the testing of a child to determine if the parent can continue homeschooling and create a homeschooling agency to monitor these tests.<sup>200</sup> However, limited regulations are dangerous because it is difficult to draw a line that would prevent expanded regulation in the future. Thus, these seemingly reasonable ideas could sacrifice the stability of parental choice in the present and future. Unfortunately, some children tragically suffer when their parents abuse this right. Nevertheless, only parents who abuse their rights should be punished, not those who responsibly exercise them. While the government should protect children from receiving a poor education due to poor parental oversight or poor parenting, the imposition of more restrictions only interferes with the parents' right to direct the upbringing of their children. States like Illinois therefore should avoid adding restrictions that are similar to other states.

Illinois and other states should also avoid the example of the international community. Heavy restrictions on home education such as those in Germany and Sweden<sup>201</sup> would clearly interfere with parents' right to direct the upbringing of their children. High regulation virtually removes any parental choice from the decision of whether to choose homeschooling. This type of governmental interference only seems to allow governmental control of parents and their children. This would result in the removal of parental oversight of their children's education as well as the removal of the parents' right to direct their children's upbringing.

Countries like the United Kingdom provide other examples of why the government should not impose increased regulations.<sup>202</sup> With more regulation comes the potential for more governmental involvement and less parental choice. If the government and parent disagree as to the best interests of the child, the government will nearly always win. As is evident throughout history, governments tend to increase in power, resulting in a

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<sup>198</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923).

<sup>199</sup> McMullen, *supra* note 15, at 106.

<sup>200</sup> *Id.*

<sup>201</sup> *See supra* Part III.B.

<sup>202</sup> *See supra* Part III.A.

subsequent loss of citizen power.<sup>203</sup> In the home education situation, the parents are the people losing power. Thus, taking power from the parent and giving it to the government reduces parental decision-making and forces parents to leave their children's education in the government's hands.<sup>204</sup> Germany demonstrates that parents may be given rights on paper, but those rights may not translate into literal rights under the laws of the state.<sup>205</sup> Following the international community's pattern of high regulation of home education will only encroach on citizens' parental right to direct the upbringing of their children.

#### CONCLUSION

In light of these considerations, states like Illinois should not change their educational laws to reflect either the international community or their sister states. Following international examples of regulating home education would violate parents' right to direct the upbringing of their children. Homeschooling offers parents another option for the education of their children, and the current laws in Illinois and similar states enable parents to retain that option. High regulation and actual prohibition encroach on this fundamental parental right and should not be allowed or even considered in the United States. However, Illinois and its counterparts should also avoid following the examples set forth by their sister states. In those states, what appear to be helpful or harmless regulations such as portfolios or satellite home education can eventually lead to heavier regulation or outright prohibition. Laws often evolve over time rather than simply jumping to a specific point. Thus, increasing regulation may solve some of today's minor issues, but it sacrifices the security of parental choice in the future. Simply allowing a restricted form of homeschooling is not enough because heavy regulation may eventually degenerate into a Wunderlich situation.<sup>206</sup> Illinois and other states with similar laws should retain their current education laws not only to remain consistent with the parental right to direct the upbringing of their children, but also to avoid becoming the next Germany.

*Nathaniel L. Miller\**

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<sup>203</sup> See Tom Mayer, *The Collapse of Soviet Communism: A Class Dynamics Interpretation*, 80 SOC. FORCES 759, 775–76 (2002).

<sup>204</sup> See Martin, *supra* note 36, at 236.

<sup>205</sup> See *id.* at 236–37, 241.

<sup>206</sup> See *supra* notes 1–12 and accompanying text.

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## CALL OF DUTY: FAMILY WARFARE EDITION

### INTRODUCTION

Meet John. John is a career soldier. He is a Captain in the United States Army, and he serves with the 3rd Battalion, 75th Ranger Regiment out of Fort Benning, Georgia. As a member of Special Forces, John is a highly trained, in-demand soldier. But John is not just a soldier; he is also a father. His daughter, Zoe, is six years old.

Now, meet Kim. Kim is a bartender at a local bar. She often works the late shift and extra hours on weekends since the tips are better. Kim also happens to be John's ex-wife. Their fifteen-year marriage ended three years ago when John discovered that Kim was having an affair with a regular at the bar while John was deployed to Afghanistan.

When John and Kim's divorce was finalized last year, John was awarded primary custody of Zoe. The judge felt that it was in Zoe's best interests for her to live with John. Kim was given regular periods of visitation with Zoe during the week so as to not interfere with Kim's work hours.

Two weeks ago, John received orders that he is to deploy to Camp Buehring in Kuwait to be on hand should U.S. military ground forces be needed in Iraq to assist in the fight against ISIS. If the situation stabilizes, then John expects that his unit will be re-routed to Afghanistan for a short tour before ending up in South Korea to partake in training exercises. Although details are sparse, John believes he will be overseas for at least nine months. This will be his sixth deployment since the Global War on Terror began. The foremost question on John's mind is, "What does this mean for Zoe?" He calls his ex-wife, who asks for Zoe to stay with her temporarily until John returns to the United States. John's original plan was to send Zoe to his parents' house and to let her stay with her Nana and Pa, but Kim convinces John that she will make sure Zoe's needs come before her work.

Fast-forward nine months. John has just returned home from deployment. While he was fighting in the trenches, the one thought that kept John going day-after-day was returning home and holding his little girl once again. His first act is to call up Kim and inform her that he is back in town and on his way to pick up Zoe. To his surprise, Kim tells him that she has custody of Zoe now, and John had better stay away. He sits in his truck feeling the joy of being mere minutes away from a happy reunion with his daughter ebbing from his numb body. He drops his head into his hands and wonders, "What do I do now?" The question haunts him. "Did I answer the call of duty to my country only to lose my daughter?"

Sadly, the picture painted above is not that uncommon.<sup>1</sup> Since 2001, over 2.5 million servicemembers<sup>2</sup> have deployed to Iraq and Afghanistan, with at least 400,000 of those men and women having completed three or more deployments.<sup>3</sup> With over 150,000 single-parent servicemembers currently serving in the Armed Forces,<sup>4</sup> and more single parents on the

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<sup>1</sup> John's story is a fictional one. For a non-exhaustive collection of chilling tales and true stories of non-custodial parents using the servicemember's military obligations (such as an absence from the home due to military orders) as a tool to wrest away custody, see *In re Marriage of Bradley*, 137 P.3d 1030, 1031–32 (Kan. 2006); *Crouch v. Crouch*, 201 S.W.3d 463, 464 (Ky. 2006); Lyndsey M. D. Kimber, *Talk is Cheap; Defending Your Rights as a Servicemember is Not*, MINN. J., Feb. 2008, at 8, 9–10 (2008) (telling of a Minnesota case where, upon the death of the child's mother, the maternal grandparents were given custody of the child instead of the child's father because his military training schedule was deemed too disruptive); Janine Robben, *Military Deployment Raises Family Law Issues*, OR. ST. B. BULL., Dec. 2007, at 23, 23 (describing a situation where the father, who previously had had little contact with his child, took the child to Texas after the child's mother deployed); Pauline Arrillaga, *Deployed Parents Confront Custody Battles*, TELEGRAPH HERALD (Dubuque, IA), May 7, 2007, at D3 (citing four cases where a custody battle erupted after the servicemember was mobilized on military orders); Jon Monk, *US Navy Officer Deployed on Submarine Fights for Custody of Daughter*, TOLEDO NEWS NOW, June 20, 2014, <http://www.toledonewsnow.com/story/25833158/us-navy-officer-deployed-on-submarine-fights-for-custody-of-daughter>; Kristi Tousignant, *Volunteer Corps of Lawyers Helps Service Members*, CBS BALTIMORE (Oct. 6, 2013, 11:31 AM), <http://baltimore.cbslocal.com/2013/10/06/volunteer-corps-of-lawyers-helps-service-members/> (describing a custody case where the judge denied custody to the servicemember-parent because her military responsibilities “interfered with her being a mother”).

<sup>2</sup> Both “servicemembers” and “service members” are widely used in this area. Compare Tousignant, *supra* note 1 (using “service members”), with *Bradley*, 137 P.3d at 1033 (using “servicemember”). The author has elected to use the spelling of “servicemembers” to model the Servicemembers Civil Relief Act, a key federal statute which is discussed throughout this Note. 50 U.S.C. app. § 501 (2012).

<sup>3</sup> Chris Adams, *Millions Went to War in Iraq, Afghanistan, Leaving Many with Lifelong Scars*, MCCLATCHY NEWSPAPERS, Mar. 14, 2013, <http://www.mcclatchydc.com/2013/03/14/185880/millions-went-to-war-in-iraq-afghanistan.html>. Over 600,000 reservists and members of the National Guard have been involved in U.S. Central Command operations since 2001, including tours of duty in both Iraq and Afghanistan. Kristen M.H. Coyne et al., *The SCRA and Family Law: More Than Just Stays and Delays*, 43 FAM. L.Q. 315, 316 (2009). The increased use of Reservists and National Guard soldiers means that military custody issues are not confined to military bases where there is ready access to JAG lawyers. Christopher Missick, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 WHITTIER L. REV. 857, 858 (2008).

For the story of a member of the 2nd Battalion, 75th Ranger Regiment who perished in 2011 during his *fourteenth* deployment, see Luis Martinez & Christina Caron, *Army Ranger Dies on 14th Deployment*, ABC NEWS, Oct. 25, 2011, <http://abcnews.go.com/US/army-ranger-dies-14th-deployment/story?id=14811227>.

<sup>4</sup> U.S. DEPT OF DEF., U.S. DEPT OF HOMELAND SEC. & U.S. DEPT OF VETERANS AFFAIRS, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT (2011).

way,<sup>5</sup> the likelihood of deployed servicemembers having to grapple with child custody issues either during deployment or after their return is significant. There is no doubt that military deployments take a great toll on this Nation's servicemembers.<sup>6</sup> It is extremely difficult for a soldier to concentrate on the task at hand when he learns from his mother that his ex-wife is petitioning for custody of their daughter, and he knows there is nothing he can do about it while stuck 7,000 miles away in Iraq.<sup>7</sup> Servicemembers have to worry not only about IEDs, snipers, and suicide bombers, but also about whether they are going to lose custody of their son or daughter due to a mandatory deployment.<sup>8</sup> This may be the military

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<sup>5</sup> See Stephen Losey, *AF Opens Doors to Single Parents, Pregnant Women*, AIR FORCE TIMES, Aug. 12, 2013, at A14 (explaining that the Air Force is changing its enlistment and officer candidacy policies to allow single parents with minor children to join the ranks).

<sup>6</sup> Jeffrey P. Sexton & Jonathan Brent, *Child Custody and Deployments: The States Step in to Fill the SCRA Gap*, ARMY LAW., Dec. 2008, at 9, 9; see also Coyne et al., *supra* note 3, at 316 ("Some units report that approximately 10 percent of first-time deployed soldiers and 33 percent of second-time deployed servicemembers experience separation or divorce."); Gregg Zoroya, *Alcohol Abuse by GIs Soars Since '03—Stress on Army Seen in Rate of Treatment*, USA TODAY, June 19, 2009, at 1A.

It is also well-recognized that frequent parental deployment can have a negative effect on children. See Anita Chandra et al., *Children on the Homefront: The Experience of Children from Military Families*, 125 J. AM. ACAD. PEDIATRICS 16, 17, 21, 23–24 (2010); James Dao, *Deployments Taking Toll on Military's Children*, N.Y. TIMES, Dec. 7, 2009, at A16; Karen Jowers, *Study Shows Deployments Take Toll on Children*, AIR FORCE TIMES, Jul. 20, 2009, at 8; John Ramsey, *Stress of Military Deployments Take Toll on Youngest of Family Members*, FAYETTEVILLE OBSERVER, Jul. 28, 2013, [http://www.fayobserver.com/military/stress-of-military-deployments-takes-toll-on-youngest-of-family/article\\_202f6607-bf15-599b-976b-a92dffa536ec.html](http://www.fayobserver.com/military/stress-of-military-deployments-takes-toll-on-youngest-of-family/article_202f6607-bf15-599b-976b-a92dffa536ec.html).

However, some believe the military community is better suited to looking after these kids than the private sector. See Jeri Hanes, *Fight For Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice*, ARMY LAW., Feb. 2011, at 4, 15 ("[T]he military community is better equipped to provide support to children to minimize stress after a parent's deployment."). For a discussion of the many benefits associated with being the child of a servicemember, see *id.* at 14–15. See also Mark E. Sullivan, *Military Family Law: Thirteen Common Questions*, GPSOLO, Jan./Feb. 2005, at 34, 38.

<sup>7</sup> This is the story of Marine Corporal Levi Bradley. *In re Marriage of Bradley*, 137 P.3d 1030, 1032 (Kan. 2006). After learning of court proceedings brought against him for custody, he was distracted at work and rolled a Humvee, earning him a reprimand from his commanding officer. See Arrillaga, *supra* note 1. For a full analysis of the case, see Lauren S. Douglass, *Avoiding Conflict at Home When There is Conflict Abroad: Military Child Custody and Visitation*, 43 FAM. L.Q. 349, 352–54 (2009).

<sup>8</sup> Sexton & Brent, *supra* note 6, at 9. The civilian parent uses the servicemember's lengthy deployment to establish a new status quo: new living arrangements for the child, new schools, new friends, new routine, and a whole new way of life. Then, because the child has become accustomed to her new surroundings, the civilian parent argues that the child should not be forced to relocate again just because the servicemember has returned home. See Missick, *supra* note 3, at 873. This puts the servicemember at a severe disadvantage. See Sara Estrin, *The Servicemembers Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. 211, 232–33 (2009).



warrior's greatest battle because his fate lies within the hand of an unknown "enemy"—the judge—armed with a mighty weapon—the doctrine of the "best interests of the child."<sup>9</sup>

This Note will examine the problems associated with a servicemember's military deployment when it comes to child custody and evaluate the solutions that have been promulgated to solve these problems. Part I studies the military's method of addressing custody during deployment, specifically examining the role the Family Care Plan plays in military custody situations. Part II considers federal legislation that could potentially offer assistance to servicemembers embroiled in custody battles, looking first at the Servicemembers Civil Relief Act ("SCRA"). Following the discussion of the SCRA is a review of newly enacted federal legislation championed by Representative Michael Turner of Ohio that will amend the SCRA to include more substantive child custody provisions. Part III of this Note examines the types of legislation at the state level that have developed in this area. Part IV analyzes the recently approved Uniform Deployed Parents Custody and Visitation Act ("UDPCVA"). The UDPCVA was approved by the National Conference of Commissioners on Uniform State Laws in the summer of 2012 and has already been adopted by a handful of states.<sup>10</sup> Finally, Part V suggests which solution would be the most effective in protecting servicemember-parents who risk losing custody of their children in order to serve their country.

## I. FAMILY CARE PLANS

The Family Care Plan is a form the military requires all single-parent servicemembers to complete before commencing military duties.<sup>11</sup> If a

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<sup>9</sup> Sexton & Brent, *supra* note 6, at 9–10; see Kimber, *supra* note 1, at 9 (stating that many courts have elevated the best interests of the child doctrine above the Servicemembers Civil Relief Act, a federal statute designed to protect servicemembers engaged in litigation while deployed). For a historical look at the best interests of the child doctrine, see generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008).

In general terms, the doctrine requires judges to weigh a variety of factors in making a child custody determination, such as:

the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with his or her parents, siblings, and other persons who may significantly affect the child's best interests; the child's adjustment to his or her home, school, and community; and, the mental and physical health of all individuals involved.

Estrin, *supra* note 8, at 222.

<sup>10</sup> See *infra* notes 146–48 and accompanying text.

<sup>11</sup> Duncan D. Aukland, *Five Tips that Pro bono Attorneys Need to Know When a Servicemember is a Party to a Family Law Case*, 43 CLEARINGHOUSE REV. 232, 233 (2009);

servicemember does not complete a Family Care Plan, then he or she is subject to disciplinary action and risks being discharged from service.<sup>12</sup> The purpose of the plan is to make sure that the servicemember puts in place “the logistical, financial, medical, educational, and legal documentation necessary to ensure continuity of care and support for dependent family members.”<sup>13</sup>

If servicemembers complete a Family Care Plan to designate the person they want to take care of their child during deployment, then why all the fuss? The problem is that sole reliance on the Family Care Plan to address custody is flawed. One complication in depending on the Family Care Plan to solve deployment-related custody issues is that servicemembers often prepare the plans without legal guidance.<sup>14</sup> Servicemembers tend to view the Family Care Plan as a weapon they can employ to completely cut off the non-custodial parent from the child for the duration of the servicemember’s deployment, and they neglect to consider the legal ramifications of such an act.<sup>15</sup> The Department of Defense suggests that servicemembers work with the non-custodial parent to complete the Family Care Plan and recommends that the servicemember secure the non-custodial parent’s consent if the servicemember plans to leave the child with a third party (such as the child’s grandparents).<sup>16</sup> Yet, no contact with the non-custodial parent is actually required by the Department of Defense to complete the Family Care Plan.<sup>17</sup>

Another reason why it is inadequate to rely solely on the Family Care Plan is that, even if the non-custodial parent and the servicemember work out an agreement on custody for the period of deployment, there is nothing preventing the non-custodial parent from later refusing to follow the Plan.<sup>18</sup> After all, the Family Care Plan “is not a legal document that can

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*see* DEPARTMENT OF DEFENSE, DODI 1342.19, FAMILY CARE PLANS 2, 8 (2010) [hereinafter DODI].

<sup>12</sup> DODI, *supra* note 11, at 8.

<sup>13</sup> *Id.*

<sup>14</sup> Aukland, *supra* note 11, at 233 (explaining that, instead of giving the Family Care Plan to judge advocate generals who are licensed attorneys, servicemembers give the completed form to their commanding officer who is not likely to question whether the plan is in conflict with an existing court order).

<sup>15</sup> *See id.*

<sup>16</sup> DODI, *supra* note 11, at 8.

<sup>17</sup> *See id.* (requiring only an attempt to contact the non-custodial parent).

<sup>18</sup> *See* DEP’T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATION, OPNAVINST, 1740.4C(4)(b) (2007) (“[T]he Family Care Plan may not be accepted by or enforceable against the natural or adoptive parent(s) of the minor child(ren) in question . . . .”); David Kocieniewski, *Soldier’s Service Leads to a Custody Battle at Home*, N.Y. TIMES, Sept. 1, 2009, at A1, available at [http://www.nytimes.com/2009/09/01/nyregion/01guard.html?\\_r=0](http://www.nytimes.com/2009/09/01/nyregion/01guard.html?_r=0).

change a court-mandated custodial arrangement.”<sup>19</sup> Courts have held that they are not bound by the servicemember’s plan in determining custody because “[t]o hold otherwise would effectively provide the United States Secretary of Defense or his delegates not simply the right to control the nation’s armed forces but also the opportunity to control some cases in the states’ family courts. Our law does not permit such a result.”<sup>20</sup> The best one can hope for is to use the Family Care Plan or other agreement made between the servicemember-parent and the non-custodial parent as supporting evidence at a custody hearing.<sup>21</sup>

One of the most widely publicized military custody cases is that of Lieutenant Eva Crouch (now Eva Slusher).<sup>22</sup> Crouch, a member of the Kentucky National Guard, received mobilization orders.<sup>23</sup> In response, she arranged with her ex-husband for him to take care of their daughter while she was gone.<sup>24</sup> They agreed that this was just a temporary set-up.<sup>25</sup> In spite of their agreement, when the time came for Crouch to resume custody of her daughter, the ex-husband refused.<sup>26</sup> The trial court reviewed the parties’ agreement and found that “at the time the agreed order was executed it was the intent of both parties that the child would be returned to the physical custody of [Crouch] at the conclusion of [her] military alert.”<sup>27</sup> Nevertheless, the court promptly disposed of the agreement saying that if it “had been a contract for a sale of goods, the parties’ intent would control as a matter of law. However, in the present arrangement the Court must consider the best interests of the child.”<sup>28</sup>

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<sup>19</sup> ARMY REGULATION, 600-20, para. 5-5 (2012). The Family Care Plan’s “sole purpose is to document . . . the plan by which [servicemembers] provide for the care of their [family members when military duties prevent the [servicemember] from doing so.” *Id.*

<sup>20</sup> Tallon v. DaSilva, No. FD02-4291-003 (Ct. Com. Pl. Alleghany Cnty. 2005); *see also* Lebo v. Lebo, 2004-0444, p.3 (La. App. 1 Cir. 6/25/04); 886 So.2d 491, 492 (deciding that implementing the servicemember’s plan would give him the power to “unilaterally change custody of a minor child”).

<sup>21</sup> DAVID F. BURRELLI & MICHAEL A. MILLER, CONG. RESEARCH SERV., R43091, MILITARY PARENTS AND CHILD CUSTODY: STATE AND FEDERAL ISSUES, CONGRESSIONAL RESEARCH SERVICE 9 (2013).

<sup>22</sup> *See, e.g.*, Douglass, *supra* note 7, at 356; Shawn P. Ayotte, Note, *Protecting Servicemembers from Unfair Custody Decisions While Preserving the Child’s Best Interests*, 45 NEW ENG. L. REV. 655, 656-57 (2011); Arrillaga, *supra* note 1; Pauline Arrillaga, *Law Shields Military Parents; Custody Fights Delayed for Deployment*, SUN-SENTINEL (Fort Lauderdale), Jan. 31, 2008, at 2A.

<sup>23</sup> Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006).

<sup>24</sup> *Id.* at 464.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

The trial court then awarded custody to the ex-husband.<sup>29</sup> Though Crouch was eventually able to get the trial court's decision overturned on appeal, the cost to her for responding to the call of duty was \$25,000 in fees and expenses plus two years of her life fighting through the Kentucky court system simply to get the custodial arrangement that she and her ex-husband had agreed to before she ever left.<sup>30</sup> If a signed agreement between the parties does not prevent ongoing custody battles, then a Family Care Plan developed solely by the servicemember with zero input from the other party has little chance of surviving a challenge by the non-custodial parent.

Finally, the Family Care Plan is not a realistic solution to military custody issues because courts are concerned about servicemembers using the Family Care Plan to subvert the non-custodial parent's constitutional protections.<sup>31</sup> Many of the custodial challenges that arise during deployments are birthed at the moment the non-custodial parent learns that the servicemember has deployed and the child is staying with a stepparent or grandparent pursuant to the Family Care Plan instead of with the non-custodial parent.<sup>32</sup> The Supreme Court has held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>33</sup> Consequently, the "laws in most states favor natural parents over any other guardian, [which means] the non-servicemember parent has a good chance of prevailing" when challenging the rights of a third party to exercise custody in the absence of the servicemember-parent.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 464–65, 467; Arrillaga, *supra* note 1.

<sup>31</sup> See *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000) (plurality opinion); see also Aukland, *supra* note 11, at 233; *infra* Part V.C.

<sup>32</sup> Aukland, *supra* note 11, at 233. Some suggest that the civilian parent strategically waits for the servicemember to be deployed before filing a custody suit. That way, the civilian parent has physical custody of the child and develops a pattern of being the one responsible for the daily welfare for the child. This sets up the civilian parent nicely heading into a custody hearing. See Nakia C. Davis, *Child Custody and the SCRA: My Child or My Country?*, HUMAN RIGHTS, Spring 2008, at 10, 11 (2008).

<sup>33</sup> *Troxel*, 530 U.S. at 66. For a look at how the laws of the states have evolved with respect to third-party visitation in light of *Troxel*, see Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 5 (2013).

<sup>34</sup> Sexton & Brent, *supra* note 6, at 9.

## II. FEDERAL LEGISLATION

A. *Servicemembers Civil Relief Act*

The Servicemembers Civil Relief Act (“SCRA”), formerly known as the Soldiers and Sailors Civil Relief Act of 1940 (“SSCRA”) was enacted in 2003

(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.<sup>35</sup>

The SCRA offers protections to active duty servicemembers, as well as those in the National Guard or Reserves who are called up to active duty.<sup>36</sup> Most of the protections are in the commercial arena (such as limiting the interest rate on all liabilities of the servicemember upon mobilization or the prohibition against the commencement of foreclosure proceedings by a bank without first obtaining a court order).<sup>37</sup> Civilian attorneys whose client base includes military personnel are likely aware that the SCRA also prohibits the entry of a default judgment against a servicemember for failure to appear and dictates that the court appoint an attorney to represent the servicemember-defendant.<sup>38</sup>

For family law and, more particularly, for custody cases involving deployed servicemembers, the key piece of the SCRA by which servicemembers often live and die is the stay provision.<sup>39</sup> The provision requires courts, upon application by the servicemember, to stay (*i.e.*, put on hold) an ongoing legal battle for ninety days.<sup>40</sup> The court could also issue a stay *sua sponte*.<sup>41</sup> When servicemembers petition for a stay, they must provide the court with a written statement explaining how their current military duties prevent them from appearing before the court and offer a date upon which they would be available.<sup>42</sup> In addition, the servicemember has to include a written statement from the commanding officer that describes how the servicemember’s current duties do not allow

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<sup>35</sup> 50 U.S.C. app. § 501-02 (2012).

<sup>36</sup> *Id.* § 511.

<sup>37</sup> *Id.* §§ 527, 533.

<sup>38</sup> *Id.* § 521.

<sup>39</sup> *Id.* §§ 521(d), 522(b). A section 521 stay is for the servicemember who has not yet made an appearance in the court proceeding. *See id.* § 521(a). A section 522 stay is available when the servicemember has received notice of a court proceeding. *See id.* § 522(a).

<sup>40</sup> *Id.* § 522(b)(1).

<sup>41</sup> *Id.* §§ 521(d), 522(b)

<sup>42</sup> *Id.* § 522(b)(2).

him or her to be present in court and that military leave has not been authorized.<sup>43</sup> As long as those two written components are present, then the judge, according to the statute, must issue a ninety-day stay.<sup>44</sup>

The effectiveness of the SCRA stay in military custody cases is limited for two reasons. First, a stay of ninety days is undoubtedly insufficient when an average deployment is nine months.<sup>45</sup> In order to be a truly effective protection for servicemembers, the stay should last for the duration of the deployment.<sup>46</sup> The SCRA does allow the servicemember to petition for additional stays, but the decision of whether to grant an additional stay is within the judge's discretion.<sup>47</sup> As discussed below, when military personnel consistently run into obstacles trying to persuade the judge to honor the *mandatory* ninety-day stay provision of the SCRA,<sup>48</sup> it is not hard to imagine the roadblocks the servicemember must overcome to have a *discretionary* stay issued.<sup>49</sup>

The second, and bigger, problem is the failure of judges to adequately balance the competing interests of the servicemember and the child.<sup>50</sup> When weighing the state's best interests of the child standard against the stay provisions of the SCRA, the federal statute often loses.<sup>51</sup> Rather than blame judges for ignoring federal law, some commentators reason that

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<sup>43</sup> *Id.* § 522(b)(2)(B). The two factors most commonly considered by the court in evaluating whether military duties have a material effect on the servicemember's ability to participate in a court proceeding are "the servicemember's availability, and . . . the necessity of the servicemember's presence." Estrin, *supra* note 8, at 217–18.

<sup>44</sup> See 50 U.S.C. app. § 522(b).

<sup>45</sup> In 2011, the Army reduced the average soldier's deployment length to nine months, but at times during the military engagements in Iraq and Afghanistan, Army deployments were as long as fifteen months. Larry Shaughnessy, *Army to Reduce Deployment Time in War Zone to 9 Months*, CNN.COM (Aug. 5, 2011), <http://www.cnn.com/2011/US/08/05/army.afghan.deployment/>. Marines have seen their standard six-month deployment schedule increase to eight- and nine-month intervals in the past year. Sam Fellman & Gina Harkins, *7 1/2- to-8 Month MEU Pumps 'the New Norm,'* ARMY TIMES, Dec. 2, 2013, <http://archive.armytimes.com/article/20131202/CAREERS/312020007/7-8-month-MEU-pumps-new-norm>. A ninety-day stay provision in the face of a nine-month, one-year, or fifteen-month deployment amounts to a Band-Aid at best.

<sup>46</sup> See Sexton & Brent, *supra* note 6, at 9–10.

<sup>47</sup> 50 U.S.C. app. § 522(d) (2012).

<sup>48</sup> See Dennis Pelham, *Submarine Duty No Defense in Child Custody Case*, DAILY TELEGRAM (June 17, 2014), <http://www.lenconnect.com/article/20140617/NEWS/140619158>.

<sup>49</sup> See BURRELLI & MILLER, *supra* note 21, at 4.

<sup>50</sup> See Missick, *supra* note 3, at 858 ("An inherent conflict exists between placing the highest priority on the needs of the child and protecting those called to national service.")

<sup>51</sup> *In re Marriage of Bradley*, 137 P.3d 1030, 1032 (Kan. 2006) (denying the servicemember's petition for a stay, in part, because it believed that family law trumped federal law and opining that "this Court has a continuing obligation to consider what's in the best interest of the child"); see BURRELLI & MILLER, *supra* note 21, at 5; see also Kimber, *supra* note 1, at 9 (stating that many state courts have elevated the best interests of the child doctrine above the SCRA).

this result is to be expected when a civilian court is trying to implement a military-related law.<sup>52</sup> Some posit that confusion and lack of education among state court judges causes the inequity, not a flaw in the law itself.<sup>53</sup> Still others lay the blame at the feet of the servicemember.<sup>54</sup> After all, the servicemember has the burden of submitting the necessary paperwork to the judge in order to get the stay, they say.<sup>55</sup> In the words of the Kansas Supreme Court, “where there is a failure to satisfy the conditions of the [SCRA], then the granting of a stay is within the discretion of the trial court.”<sup>56</sup> The root of the problem may be in dispute, but there is no debate over the fact that judges are not adhering to the SCRA.<sup>57</sup>

The Supreme Court has held that the statute is to be “liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”<sup>58</sup> Under the SSCRA, courts retained discretion as to whether to grant a stay.<sup>59</sup> However, when the SCRA was enacted in 2003, Congress decided to change the law to make the first ninety-day stay mandatory upon petition by the servicemember.<sup>60</sup> Congress eliminated the “judicial discretion” element for the first stay, yet judges are still injecting themselves into the proceedings and eschewing the SCRA in favor of the best interest of the child.<sup>61</sup> The judges’ actions are inconsistent with the notion that the Act “is to be administered as an instrument to accomplish substantial justice.”<sup>62</sup> “Substantial justice” would be better achieved by extending grace to servicemembers who are trying to manage the strenuous requirements of being in a hostile fire zone

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<sup>52</sup> Missick, *supra* note 3, at 858, 869.

<sup>53</sup> BURRELLI & MILLER, *supra* note 21, at 5; Douglass, *supra* note 7, at 354–55.

<sup>54</sup> See BURRELLI & MILLER, *supra* note 21, at 5 (referring to a 2010 Department of Defense Priority Appeal to the FY 2010 Defense Authorization Bill in which the Department of Defense argued that “in many of the high-visibility child custody cases, the basic and generally easily met prerequisites for automatic 90-day stays under the SCRA were simply not followed”).

<sup>55</sup> Estrin, *supra* note 8, at 217.

<sup>56</sup> *Bradley*, 137 P.3d at 1034.

<sup>57</sup> Sexton & Brent, *supra* note 6, at 9–10. “The bottom line is that despite the . . . SCRA stay provisions, servicemembers are still at the mercy of the individual court’s approach to the contentious issues surrounding military service and child custody rights.” *Id.*

<sup>58</sup> *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (referring to the SCRA’s predecessor, the SSCRA); see also *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948) (maintaining that the SSCRA “must be read with an eye friendly to those who dropped their affairs to answer their country’s call”).

<sup>59</sup> Estrin, *supra* note 8, at 214–15.

<sup>60</sup> 50 U.S.C. app. § 522(b) (2012).

<sup>61</sup> See *supra* notes 48–57 and accompanying text.

<sup>62</sup> *In re Watson*, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003).

while also meeting the state court's demands, often acting without the benefit of legal counsel.<sup>63</sup>

In an attempt to address the pandemic of judge's ignoring the SCRA in custody cases, the SCRA was amended in 2008.<sup>64</sup> The phrase "including any child custody proceeding" was inserted into the two sections of the Act authorizing a stay of proceedings.<sup>65</sup> The revision clarified the intent of Congress for the SCRA and its procedural protection of a mandatory stay to apply to custody cases.<sup>66</sup> However, the 2008 amendments included no substantive protection for servicemembers on custody-specific issues.<sup>67</sup> For example, the SCRA did not forbid the court from using military service as a factor in determining custody.<sup>68</sup> Neither did it restrict judges from entering temporary custody orders; orders which are used as a tool to get around the servicemember's inability to be present in court.<sup>69</sup> Even after the 2008 amendment to the SCRA, the substantive gaps in the Act and the ability of judges to circumvent the stay provisions render it an unreliable solution to the deployed parent's custody problem.

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<sup>63</sup> Estrin, *supra* note 8, at 230–31. "Servicemembers in remote or hostile locations may find it difficult to communicate with, let alone retain, legal counsel to represent them." *Id.* Why should servicemembers receive grace in such situations?

What occupation sends you to places where bullets are flying, for months or years, and your employer can imprison you if you don't obey these "travel opportunities"? What occupation requires your presence on the job every morning at 6:00 a.m. for physical training and at 7:30 for work, with the option of criminal charges if you don't show up? What occupation has over eight million former employees being treated by a department of the federal government for wounds, illnesses, and other conditions incurred during employment?

Mark E. Sullivan, *Introduction to the Uniform Deployed Parents Custody and Visitation Act*, 47 FAM. L.Q. 97, 103–04 (2013). Employing grace and a "liberal construction" of the SCRA stay provision requirements seems like the least the court could do for this Nation's warriors.

<sup>64</sup> National Defense Authorization Act for Fiscal Year 2008 § 584, Pub. L. No. 110-81, 122 Stat. 3, 128 (2008).

<sup>65</sup> *Id.*

<sup>66</sup> Ayotte, *supra* note 22, at 664.

<sup>67</sup> *Id.* at 663–64.

<sup>68</sup> BURRELLI & MILLER, *supra* note 21, at 4.

<sup>69</sup> *Compare* Ratliff v. Ratliff, 15 N.W.2d 272, 274 (Iowa 1944) (refusing to overturn the stay granted by the trial court and declaring that "a hearing on an application to change the status of the custody of [children] while [a parent] is in military service and when he is not in a position to be personally present, would materially affect his right to properly present his side of the case and would have a disturbing and emotional effect upon him"), *with* Tallon v. DaSilva, No. FD02-4291-003 at 8 (Ct. Com. Pl. Alleghany Cnty. 2005) (awarding temporary custody to the non-servicemember parent because "a child does not exist in 'suspended animation' during the pendency of any stay entered pursuant to the SCRA" and "custody during a parent's deployment must perforce be addressed"), *and* Lenser v. McGowan, 191 S.W.3d 506, 507 (Ark. 2004) (holding that the SCRA does "not prevent the circuit court from entering a temporary order of custody").



### B. Representative Michael Turner's Federal Legislation

One of the leading advocates for further amending the SCRA to include greater substantive protections is Representative Michael Turner, a Republican from Ohio's Tenth District, which includes Wright Patterson Air Force Base.<sup>70</sup> Disturbed by the stories he had heard of military parents losing custody because of serving their country, Turner made military custody and the rights of servicemember-parents his platform.<sup>71</sup> Beginning in 2006, Turner has introduced a military custody bill each year in an effort to provide protections at the federal level for servicemembers engaged in custody litigation.<sup>72</sup> In 2013, Turner's military custody provisions were buried deep in the Veterans Economic Opportunity Act of 2013, and though the bill passed through the House (as did each previous incarnation of his custody bill), it never made it out of the Senate Committee on Veterans' Affairs.<sup>73</sup>

Turner finally saw success in 2014.<sup>74</sup> Section 566 of House Bill 3979 calls for the SCRA to be amended to offer more protection to servicemembers embroiled in custody battles than does the current SCRA.<sup>75</sup> Turner's legislation consists of three major components: (1) limitations on the court's ability to modify custody arrangements after the servicemember has deployed; (2) resumption of the pre-deployment custodial arrangement upon the servicemember's return if a temporary custody order has been entered during his or her absence; and (3) prohibition against the consideration of military service (and particularly, the servicemember-parent's absence due to past or future deployments) in

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<sup>70</sup> Tom Philpott, *House Custody Bill Unnecessary*, DAILY PRESS (Newport News, VA), June 11, 2012, at A2.

<sup>71</sup> Rick Maze, *Bill Would Safeguard Deployed Troops' Child Custody Rights—Measure Dropped from '08 Defense Act*, AIR FORCE TIMES, June 9, 2008, at 26 [hereinafter Maze, *Safeguard Deployed Troops' Child Custody Rights*]. Turner's bill in 2008 would have greatly expanded the SCRA's application to child custody matters, but by the time the National Defense Authorization Act was signed by then-President Bush, Turner's language had been removed and replaced with the "including any child custody proceeding" phrase. Missick, *supra* note 3, at 873–74.

<sup>72</sup> Rick Maze, *Lawmaker Renews Push for Troops' Child Custody Rights*, AIR FORCE TIMES, May 14, 2012, at 15.

<sup>73</sup> H.R. 1898, 113th Cong. (2013). This bill was consolidated into H.R. 2481 along with a number of other bills. H.R. REP. NO. 113-207 (2013); Veterans Economic Opportunity Act of 2013, H.R. 2481, 113th Cong. § 14 (2013). See *H.R. 2481—Veterans Economic Opportunity Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/2481/all-info#all-actions> (last visited Apr. 13, 2015).

<sup>74</sup> Press Release, Turner Secures Important Protections for the Parental Rights of Our Service Men and Women (Dec. 12, 2014), <http://turner.house.gov/media-center/press-releases/turner-secures-important-protections-for-the-parental-rights-of-our>.

<sup>75</sup> Compare H.R. 3979, 113th Cong. § 566 (2014), with 50 U.S.C. app. § 521–22 (2012).

evaluating the best interests of the child.<sup>76</sup> This third prong of Turner's legislation might be the most important as many of the highly publicized custody battles have involved judges who are loathe to uproot the child and to disrupt the status quo (developed while the servicemember was gone) once the servicemember returns.<sup>77</sup>

Turner has met with strong opposition in his attempt to federalize military custody through the passage of his bill.<sup>78</sup> Attorneys, judges, and military organizations have all publicly decried Turner's legislation.<sup>79</sup> These individuals and organizations recognize that there is a problem, for as one judge put it, "[p]eople serving their country and putting themselves at risk, and coming back and losing their kids, is not good public policy."<sup>80</sup> However, these groups do not believe that federal legislation is the answer.<sup>81</sup> Even the Department of Defense at one point went on record as being against Turner's position. In an unsigned statement released to CBS News, the Department of Defense said that it

opposes efforts to create Federal child custody legislation affecting Service members. . . . We strongly believe that Federal legislation in this area of the law, which has historically and almost exclusively been handled by the States, would be counterproductive.

The Department applauds the efforts by those States that have passed legislation . . . and encourages other States to consider similar legislation.<sup>82</sup>

The American Bar Association's opposition to Turner's bill is well-documented. In 2009, the ABA passed Resolution 106, which made its position on the issue of federal legislation official.<sup>83</sup> In 2011, the ABA published a white paper on federal military custody that contained strong

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<sup>76</sup> Missick, *supra* note 3, at 871–73.

<sup>77</sup> *See id.* at 872–73. Though, it is worth noting that these judges do not show the same level of concern over uprooting the child during the soldier's deployment.

<sup>78</sup> Turner's continued effort to push through a military custody bill "is opposed by the National Governors Association, the Adjutants General Association of the United States, . . . the National Council of Juvenile and Family Court judges, the Conference of Chief Justices and State Court Administrators, the National Conference of State Legislatures, the Uniform Law Commission . . . and the National Military Family Association." Am. Bar Ass'n, *White Paper on Federal Military Custody* 1 (Sept. 2013), [http://www.americanbar.org/content/dam/aba/administrative/family\\_law/201304\\_turneramendment\\_whitepaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/family_law/201304_turneramendment_whitepaper.authcheckdam.pdf) (internal references omitted) [hereinafter 2013 White Paper].

<sup>79</sup> *Id.*

<sup>80</sup> Robben, *supra* note 1 (quoting Dale Koch, past-president of the National Council of Juvenile and Family Court judges).

<sup>81</sup> BURRELLI & MILLER, *supra* note 21, at 14–17.

<sup>82</sup> *Department of Defense Position*, CBS NEWS, [http://www.cbsnews.com/htdocs/pdf/DOD\\_position\\_child\\_custody.pdf](http://www.cbsnews.com/htdocs/pdf/DOD_position_child_custody.pdf). Based on information gleaned from Major Jeri Hanes in order to authenticate the statement for her 2011 article, it appears as if the Department of Defense's statement was released in 2009. *See* Hanes, *supra* note 6, at n.89.

<sup>83</sup> BURRELLI & MILLER, *supra* note 21, at 14.

language against federalizing custody.<sup>84</sup> An updated white paper was posted in September of 2013 that retained much of the 2011 version while incorporating additional arguments against the need for a federal military custody statute.<sup>85</sup> The ABA labels Turner's legislation as "a solution in search of a problem."<sup>86</sup>

The ABA has also called Turner's bill "misguided" and an "intrusion" into an area of the law that is "the responsibility of the states."<sup>87</sup> In its most recent critique of Turner's legislation, the ABA declared that

[i]t is not the province of federal law to provide detailed and specific instructions on how to handle child custody cases, whether these involve custodial parents who are members of the armed forces, the State Department, the Central Intelligence Agency or the federal civil service. Congress should not interject itself into writing rules for custody and visitation; this is the responsibility of state courts.

. . . If the "national military—national standard" argument were valid, then we would have a national set of laws for servicemembers on drivers' licenses, voting requirements, child support, the age of majority, and a host of other issues.<sup>88</sup>

As one family law scholar noted, Congress would be "tip-toeing atop a slippery slope" by entering into the custody arena, and "frankly, that would be a nightmare."<sup>89</sup>

Another concern of the ABA is that Turner's bill would create a right of removal for those parties unhappy with the state judge's decision.<sup>90</sup> Turner's response was to include language in his bill mandating that "[n]othing in this section shall create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal."<sup>91</sup> However, legal experts agree that Turner's language does not actually bar removal to the federal courts.<sup>92</sup>

There is also worry that the federal statute on child custody would forever tilt the delicate balance between the servicemember's parental interests and those of the child in the favor of the servicemember.<sup>93</sup> Those who oppose Turner believe that his legislation "ignore[s] any potential

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<sup>84</sup> Am. Bar Ass'n, *White paper on Federal Military Custody* (Aug. 2011) (on file with Regent University Law Review) [hereinafter 2011 White Paper].

<sup>85</sup> See 2013 White Paper, *supra* note 78, at 1–3.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.* at 1, 3.

<sup>88</sup> *Id.* at 2–3.

<sup>89</sup> Davis, *supra* note 32, at 12.

<sup>90</sup> 2013 White Paper, *supra* note 78, at 5–6.

<sup>91</sup> H.R. 3979, 113th Cong. § 566 (2014).

<sup>92</sup> BURRELLI & MILLER, *supra* note 21, at 7; see 2013 White Paper, *supra* note 78, at 6.

<sup>93</sup> BURRELLI & MILLER, *supra* note 21, at 2.

effects deployments would or could have on a child and . . . ultimately place[s] the rights of servicemembers over those of the best interest of the child—which is and should be the ultimate determinant in child custody cases.”<sup>94</sup> The newly passed piece of legislation amending the SCRA dictates that the deployment of the servicemember cannot be used as the sole factor in entering a permanent custody order.<sup>95</sup> Furthermore, it requires that temporary custody orders entered while a servicemember-parent is deployed must expire when the period of deployment is over.<sup>96</sup> This is disconcerting because the statute fails to consider the high rates of post-traumatic stress disorder and increased instances of suicide that have soared since the wars in Iraq and Afghanistan.<sup>97</sup> Turner’s opponents believe that it is neither safe nor advisable to make an automatic return of custody to the servicemember once the deployment ends without considering the possible effect on the child.<sup>98</sup>

Though Turner was finally able to push through his platform, it is questionable whether support for the bill is genuine.<sup>99</sup> A few years ago, Turner’s highest-profile backer was former-Defense Secretary Robert Gates who, in 2011, announced that the Department of Defense was reversing its previously stated position and throwing its support behind Turner.<sup>100</sup> This marked a major shift from comments Gates made in 2009 asserting that “it would be unwise to push for federal legislation in an area

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<sup>94</sup> *Id.* at 7 (emphasis omitted); 2013 White Paper, *supra* note 85, at 3 (“Congress should *not* be directing our courts, whether state or federal, on how to look after the best interest of a child, which is exactly what [Turner’s] legislation does.”).

<sup>95</sup> H.R. 3979, 113th Cong. § 566 (2014).

<sup>96</sup> *Id.*

<sup>97</sup> See Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 851 (2012). In 2012, there were over 500 suicides by active, reserve, and National Guard servicemembers. In the first 6 months of 2014, the total number of suicides among military personnel was 224. See JACQUELINE GARRICK, DEFENSE SUICIDE PREVENTION OFFICE, DEPARTMENT OF DEFENSE QUARTERLY SUICIDE REPORT CALENDAR YEAR 2014 2ND QUARTER 2 (2014).

<sup>98</sup> See Missick, *supra* note 3, at 873. “[T]he well-being of children may be placed at risk if protections afforded servicemembers trumped current child-protection laws.” *Id.* at 869.

<sup>99</sup> See Philpott, *supra* note 70, at A2 (revealing that the Congressman “has coaxed, harangued, . . . even bullied colleagues, defense officials and service associations into supporting his bill, always citing the same few cases of members who lost or nearly lost custody of children following deployment or temporary stateside reassignment. Family law experts who have reviewed details of these cases say the outcomes would not have been different had Turner’s bill been in effect”); see also Maze, *Safeguard Deployed Troops’ Child Custody Rights*, *supra* note 71, at 26 (referencing comments made by fellow House Republican, Steve Buyer, who questioned the wisdom of implementing federal legislation in this area).

<sup>100</sup> See Karen Jowers, *Gates Now Supports Law to Protect Child Custody*, AIR FORCE TIMES, Feb. 28, 2011, at 15.

that is typically a matter of state law concern.”<sup>101</sup> In announcing the position change, Gates explained that federal legislation that protects servicemembers “in cases where it is established that military service is the sole factor involved in a child custody decision,” is beneficial.<sup>102</sup> Ironically, in 2010, the Department of Defense reviewed thirty-three military custody cases and concluded that there was not a single instance where military service (including deployments or the threat of deployments) was the “sole factor” involved in a child custody dispute.<sup>103</sup> Furthermore, the 2010 study concluded that “[f]ederal legislation in this area would be counter-productive at best and harmful at worst.”<sup>104</sup>

The impetus for Gates’ change of heart is unknown.<sup>105</sup> Not even lawyers working at the Pentagon were aware that Gates was going to execute an about-face on the issue.<sup>106</sup> It has been suggested that Gates made a political move to curry favor from Turner who, at the time, was the Chairman of the Strategic Forces Subcommittee of the House Armed Services Committee.<sup>107</sup> Perhaps the growing media attention, including soldier interviews on the Oprah Winfrey show, put pressure on Gates to reverse course.<sup>108</sup>

Gates’ successors have not been as transparent with their thoughts on Turner’s efforts to pass a military custody statute. While in office, Leon Panetta conveyed mixed signals.<sup>109</sup> When testifying before the House Armed Services Committee, Panetta said he supported efforts to pass legislation in this area.<sup>110</sup> However, after the bill passed the House that year, Panetta wrote Turner a letter in which he stated that the bill needed a slight revision so that it would not “constitute a federal mandate to state courts that they, in certain circumstances, subordinate the best interest of the child.”<sup>111</sup> Panetta recommended inserting the phrase “as the sole factor” in the section of the bill that sought to prevent courts from using

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<sup>101</sup> BURRELLI & MILLER, *supra* note 21, at 10.

<sup>102</sup> *Id.* at 13.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> *Id.* at 12. “[I]t is abundantly clear that the legislatures of the states are the appropriate venue for balancing the competing equities of the deploying servicemember and the best interest of the child.” *Id.*

<sup>105</sup> 2013 White Paper, *supra* note 78, at 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Charlie Reed, *Pentagon to Support Bill to Protect Troops’ Child Custody Rights*, STARS & STRIPES (Feb. 17, 2011), <http://www.stripes.com/news/us/pentagon-to-support-bill-to-protect-troops-child-custody-rights-1.135134>; see also *Female Soldiers’ Custody Battles*, OPRAH.COM (Oct. 13, 2010), <http://www.oprah.com/oprahshow/Fighting-for-Their-Children>.

<sup>109</sup> BURRELLI & MILLER, *supra* note 21, at 13–14.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> *Id.* at 13–14.

instances of deployment in determining custody.<sup>112</sup> The version of Turner's bill that was recently approved by the Senate incorporates Panetta's suggested revision.<sup>113</sup>

### III. STATE LEGISLATION

Representative Michael Turner's doggedness to pass a federal military custody statute has paid dividends in the state law arena in that it has forced states to act.<sup>114</sup> As recently as 2010, there were only fifteen states that had laws in place to address custody issues that arise in families where a parent is in the military.<sup>115</sup> That number rose dramatically to forty-six states and the District of Columbia by 2013.<sup>116</sup> In 2014, New Mexico became the forty-seventh state to pass legislation addressing military custody issues.<sup>117</sup> The three states which have yet to enact substantive laws in this area are Alabama, Massachusetts, and Minnesota.<sup>118</sup>

The ways in which the states have approached military custody issues are varied, but most state laws can be categorized as one of three types of statutes: one that (1) only prohibits the entry of permanent custody orders during the servicemember's deployment; (2) excludes past and/or future deployments from being used as a factor in custody decisions; or (3) addresses a wide spectrum of issues including expedited hearings prior to deployment, delegation of custody or visitation rights during deployment, and allowance for electronic testimony in hearings that transpire while the servicemember is deployed.<sup>119</sup> As an example of a

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<sup>112</sup> *Id.* at 14.

<sup>113</sup> H.R. 3979, 113th Cong. § 566 (2014). The language reads, "If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a servicemember, no court may consider the absence of the servicemember by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child."

*Id.* (emphasis added).

<sup>114</sup> Philpott, *supra* note 70.

<sup>115</sup> Rick Maze, *5th Try to Protect Child Custody for Troops*, NAVY TIMES (May 14, 2010) [hereinafter Maze, *5th Try to Protect Custody*], <http://www.navytimes.com/article/20100514/NEWS/5140309/5th-try-to-protect-child-custody-troops.html>.

<sup>116</sup> BURRELLI & MILLER, *supra* note 21, at 18; D.C. CODE § 16-914.02 (Westlaw through Jan. 5, 2015).

<sup>117</sup> N.M. STAT. ANN. § 40-10D (Westlaw through 2014 Reg. Sess.).

<sup>118</sup> See BURRELLI & MILLER, *supra* note 21, at 18. Minnesota, however, does have legislation pending that, if approved, would see the state adopt the Uniform Deployed Parents Custody and Visitation Act. S.F. 73, 2015 Leg., 89th Sess. (Minn. 2015); H.F. 260, 2015 Leg., 89th Sess. (Minn. 2015).

<sup>119</sup> Sexton & Brent, *supra* note 6, at 10. For a chart providing a state-by-state breakdown of the provisions in place for custody issues involving deployed parents as of early-2013, see Sullivan, *supra* note 63, at 107 app. I.

category one provision, the law in Arkansas is that a custody order cannot be permanently modified while the servicemember-parent is involuntarily deployed, but a temporary modification of custody is acceptable.<sup>120</sup> Wisconsin's statute prohibiting the court from considering the servicemember's past and future deployments in an action to modify custody is an example of a category two provision.<sup>121</sup> Florida has a very comprehensive statute that would be representative of the types seen in category three.<sup>122</sup> The statute forbids the use of deployments as a factor in determining the best interests of the child, only allows for temporary orders during deployment, grants the servicemember the ability to delegate his visitation rights to a relative or step-parent of the child, allows for an expedited hearing on custody upon motion by either party, and provides for the servicemember to "attend" a court hearing via electronic or telephonic means.<sup>123</sup> The protections crafted by the states are, in large part, more extensive than those offered in Turner's legislation.<sup>124</sup>

Even though the actions taken by the individual states to enact military custody statutes have been heralded,<sup>125</sup> there are still some, including Representative Turner, who remain unsatisfied.<sup>126</sup> One of the problems, as Turner sees it, is that there is no single standard.<sup>127</sup> In his mind, letting each state draft and enact its own laws encourages the non-custodial parent to forum shop to find a custody statute that is more favorable to his or her position.<sup>128</sup> Turner also believes that, without a national standard, servicemembers will receive disparate treatment based on the state in which the parent is domiciled.<sup>129</sup> While this may be true,<sup>130</sup> the ABA views the lack of a national standard as a non-issue.<sup>131</sup>

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<sup>120</sup> ARK. CODE ANN. § 9-13-110(b), 110(c)(1) (LEXIS through 2014 Fiscal Sess.).

<sup>121</sup> WIS. STAT. § 767.451(5m)(c) (Westlaw through 2013).

<sup>122</sup> FLA. STAT. § 61.13002 (Westlaw through 2014 2d Reg. Sess.).

<sup>123</sup> *Id.*

<sup>124</sup> 2013 White Paper, *supra* note 78, at 3.

<sup>125</sup> See *Department of Defense Position*, *supra* note 82; 2013 White Paper, *supra* note 78, at 7.

<sup>126</sup> See Estrin, *supra* note 8, at 239; Maze, *5th Try to Protect Custody*, *supra* note 115.

<sup>127</sup> Maze, *5th Try to Protect Custody*, *supra* note 115.

<sup>128</sup> Press Release, *supra* note 74. Turner's fear is unfounded since it fails to take into account the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), which dictates the appropriate forum for custody cases. For a discussion of the UCCJEA, see Brittany A. Jenkins, Comment, *My Country or My Child?: How State Enactment of the Uniform Deployed Parents Custody and Visitation Act Will Allow Service Members to Protect Their Country & Fight for Their Children*, 45 TEX. TECH. L. REV. 1011, 1018–24 (2013).

<sup>129</sup> Maze, *5th Try to Protect Custody*, *supra* note 115.

<sup>130</sup> For a comparative analysis of how one fact-pattern would yield four different results in four different states, see Hanes, *supra* note 6, at 10–12.

<sup>131</sup> 2011 White Paper, *supra* note 84, at 2.

For example, there are a number of different state laws governing how child support is calculated.<sup>132</sup> Also, the methodology behind dividing the servicemember's military pension upon divorce differs widely among the states.<sup>133</sup> Even the requirements for obtaining a divorce, such as the period of separation needed prior to filing an action for dissolution of the marriage, vary among the fifty states.<sup>134</sup> Accordingly, the ABA sees no reason for custody to be singled out.<sup>135</sup> Instead, the ABA sees the states as having the "background and expertise to write, pass and enforce [military custody] legislation," not the federal government.<sup>136</sup>

#### IV. UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT

##### *A. Implementation of the UDPCVA*

In March, 2011, the President of the Uniform Law Commission ("ULC"),<sup>137</sup> Robert Stein, wrote to members of the House Committee on Veterans' Affairs to express concerns about Turner's repeated attempts to federalize military custody.<sup>138</sup> In the letter, Stein declared that "[c]omplex family matters are best reserved to the state courts, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military parents and their minor children."<sup>139</sup> Even though Stein favored leaving legislation in the hands of the states as opposed to the federal government, the ULC recognized that the states needed guidance as to the content of said legislation.<sup>140</sup> Also, the

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<sup>132</sup> Compare MD. CODE ANN., FAM. LAW § 12-204 (LEXIS through 2014 legis.) (calculating child support using gross income and allowing deductions only for other alimony and child support obligations) with MISS. CODE ANN. § 43-19-101(3), (LEXIS through 2014 Reg. Sess.) (calculating child support using net income).

<sup>133</sup> Compare IND. CODE ANN. § 31-9-2-98(b) (Westlaw through 2014 2d Reg. Sess.) (only vested pensions are divisible as marital property), with N.C. GEN. STAT. § 50-20.1 (LEXIS through 2014 Reg. Sess.) (allowing for the division of both vested and nonvested pensions).

<sup>134</sup> Compare CONN. GEN. STAT. ANN. § 46b-40(c)(2) (Westlaw through 2014) (requiring an eighteen-month period of separation between the parties) with MONT. CODE ANN. § 40-4-104 (Westlaw through 2013 Reg. Sess.) (requiring the parties to remain separated for 180 days prior to filing).

<sup>135</sup> 2011 White Paper, *supra* note 84, at 2.

<sup>136</sup> 2013 White Paper, *supra* note 78, at 2.

<sup>137</sup> The ULC was formed over a hundred years ago with support from the ABA. At its inception, seven states appointed individuals to meet and discuss the possibility of developing uniformity among the laws of the several states. Currently, every state, plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, appoints commissioners to serve on the ULC. Elizabeth Kent, *The Uniform Law Commissioners*, HAW. B.J., Dec. 2012, at 30, 30 (2012).

<sup>138</sup> 2013 White Paper, *supra* note 78, at 13.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*



ULC was concerned with “the mobile nature of national service,” and the likelihood that a child’s parents would reside in two different states.<sup>141</sup>

[T]here are many times that that [sic] these custody issues involve two or more states. Yet different states now apply very different substantive law and court procedures from one another when custody issues arise on a parent’s deployment. The resulting patchwork of rules makes it difficult for the parents to resolve these important issues quickly and fairly, hurts the ability of deploying parents to serve the country effectively, and interferes with the best interest of children.<sup>142</sup>

Consequently, the ULC began work on a uniform statute that would “go well beyond the federal legislation” and “establish a comprehensive set of procedures and protections for the custody issues that military families face.”<sup>143</sup> The goal was to “increase predictability and certainty” and “increase fairness” for military families.<sup>144</sup> To accomplish that, the drafting committee reviewed the existing legislation in the states along with relevant case law and pulled out the best principles and protections to form the new uniform statute.<sup>145</sup> The uniform statute, which was completed and approved in July 2012, is called the Uniform Deployed Parents Custody and Visitation Act (“UDPCVA”).<sup>146</sup> The ABA House of Delegates approved the UDPCVA in February 2013.<sup>147</sup> Currently, eight states have enacted the uniform statute: Arkansas, Colorado, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, and Tennessee.<sup>148</sup>

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<sup>141</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 1 (2012), available at [http://www.uniformlaws.org/shared/docs/Deployed\\_Parents/2012\\_DPCVA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Deployed_Parents/2012_DPCVA_Final.pdf).

<sup>142</sup> *Why States Should Adopt the Uniform Deployed Parents Custody and Visitation Act*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/Shared/Docs/Deployed\\_Parents/UDPCVA%20Why%20States%281%29.pdf](http://www.uniformlaws.org/Shared/Docs/Deployed_Parents/UDPCVA%20Why%20States%281%29.pdf) (last visited Apr. 13, 2015).

<sup>143</sup> 2013 White Paper, *supra* note 78, at 13 tbl.3.

<sup>144</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 1 (2012).

<sup>145</sup> Sullivan, *supra* note 63, at 98.

<sup>146</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

<sup>147</sup> 2013 White Paper, *supra* note 78, at 8.

<sup>148</sup> S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015); COLO. REV. STAT. § 14-13.7-101 (LEXIS through 2014 Reg. Sess.); L.B. 219, 104th Leg., 1st Sess. (Neb. 2015); NEV. REV. STAT. § 125C.0601 (Westlaw through 2014 Spec. Sess.); N.C. GEN. STAT. § 50A-350 (LEXIS through 2014 Reg. Sess.); N.D. CENT. CODE § 14-09.3-01 (LEXIS through 2013 Reg. Sess.); S.D. CODIFIED LAWS § 25-4B-101 (Westlaw through 2014 Reg. Sess.); TENN. CODE ANN. § 36-7-101 (LEXIS through 2014 Reg. Sess.).

Although New Mexico passed the “Deployed Parents Custody and Visitation Act” in 2014, the state is not included in this list of enacting states because it only adopted limited portions of the first three articles of the UDPCVA. Compare N.M. STAT. ANN. §§ 40-10D-2 to 40-10D-9 (Westlaw through 2014 Reg. Sess.), with UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

### B. Articles of the UDPCVA

The UDPCVA is divided into five articles.<sup>149</sup> Throughout each of the five parts, custody and visitation rights are primarily referred to under one umbrella term—“custodial responsibility.”<sup>150</sup> Custodial responsibility is then broken down into three components, each of which can be delegated to another during a servicemember’s deployment.<sup>151</sup> The three components are “caretaking authority,” “decision-making authority,” and “limited contact.”<sup>152</sup> In the parlance of state law, caretaking authority is often referred to as “primary physical custody,” whereas decision-making authority is frequently termed “legal custody.”<sup>153</sup> “Limited contact” is used in the articles of the UDPCVA to refer to the ability of the servicemember to designate another person to spend time with the child while the servicemember is deployed.<sup>154</sup> The Act is drafted to offer protections to all active duty members of the armed forces as well as reservists and those serving with the National Guard.<sup>155</sup> This level of protection is in stark contrast to the application of the SCRA, which only applies to those men and women in the National Guard or the Reserves who are called up to active duty.<sup>156</sup>

Article 1 of the UDPCVA consists of definitions and general provisions relating to military custody issues.<sup>157</sup> One of the general provisions requires the servicemember to communicate with the other parent about custody issues immediately upon learning of the impending deployment.<sup>158</sup> Another general provision, which is included to permit the Act to work in concert with the Uniform Child Custody Jurisdiction Enforcement Act (“UCCJEA”), declares that the residence of the servicemember is not changed by reason of his deployment.<sup>159</sup> In other words, the servicemember’s absence from the state cannot be used as

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<sup>149</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT (2012).

<sup>150</sup> *Id.* § 102 cmt.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 102(18).

<sup>156</sup> 50 U.S.C. app. § 511 (2012).

<sup>157</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 101–107.

<sup>158</sup> *Id.* § 105. This is a significant improvement from the military’s Family Care Plan regulations, which merely recommends, but does not require, communication between the parents leading up to deployment. *See supra* text accompanying notes 16–17.

<sup>159</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 104. This should alleviate Turner’s concerns about forum shopping by the non-custodial parent, since there has been no change in the military parent’s residence; thus, there is no change to warrant transferring the custody case to another state. *See supra* note 128 and accompanying text.

grounds to challenge or change jurisdictions, except in case of an emergency.<sup>160</sup> Provisions in Article 1 also prevent the court from using the servicemember's future or past deployment as a reason to not award custody to the servicemember absent a "significant impact on the best interest of the child."<sup>161</sup>

The terms of Articles 2 and 3 apply to situations that may transpire either prior to or during the servicemember's deployment.<sup>162</sup> Article 2 promotes the notion that parents should develop their own parenting agreement, without involving the courts, by setting out easy procedures for parents to follow.<sup>163</sup> It even gives parents a list of ten clauses that should be included in the agreement, such as setting out a schedule for the deployed parent and the child to contact each other by electronic means, arranging for the deployed parent and the child to have time together when the servicemember is granted a period of leave, and specifying if a nonparent is to have any type of custodial responsibility with the child during the deployment.<sup>164</sup> To avoid the type of nasty surprise that awaited Lieutenant Eva Crouch upon her return home when her ex-husband refused to honor their parenting agreement,<sup>165</sup> the UDPCVA mandates that any agreement entered into under the statute automatically terminates, using the terms set out in Article 4, once the servicemember-parent returns from deployment.<sup>166</sup>

Article 3 is the most extensive of the five articles and encompasses court proceedings and other actions to bring judicial resolution to custody cases.<sup>167</sup> Several of the terms seen in state statutes are included here, such as expedited hearings and testimony by electronic means.<sup>168</sup> Article 3 also

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<sup>160</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 104 cmt.

<sup>161</sup> *Id.* § 107. This seems a better rule than Turner's absolute prohibition against using deployment as a factor because, for example, it allows the court the flexibility to consider the mental state of the servicemember upon his return from war where warranted. *See supra* notes 95–98 and accompanying text. Yet, it also requires that the effect on the child be "significant," not something trivial like having to transfer schools. UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 107 cmt. (2012). Turner's legislation "focuses the court's analysis on the best interest of the parent, whereas the UDPCVA focuses on the best interest of the child." Jenkins, *supra* note 128, at 1036. Turner, however, is critical of this provision of the UDPCVA. He feels that it gives courts leeway to use the servicemember's absence from home against him in analyzing the best interests of the child and the result will be that servicemembers will continue to lose their children. BURRELLI & MILLER, *supra* note 21, at 17.

<sup>162</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT art. 2, 3.

<sup>163</sup> *Id.* §§ 201–204.

<sup>164</sup> *Id.* § 201.

<sup>165</sup> Crouch v. Crouch, 201 S.W.3d 463, 464 (Ky. 2006).

<sup>166</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT art. 4.

<sup>167</sup> *Id.* §§ 301–311.

<sup>168</sup> *Id.* §§ 303–304.

forbids the judge from entering a permanent custody order before or during deployment without the servicemember-parent's consent.<sup>169</sup> The UDPCVA does allow for the entry of temporary orders for custody, but only to the extent said orders are not prohibited by the SCRA.<sup>170</sup> To assist judges unfamiliar with the nuances of military service, the UDPCVA contains a clause listing the things that should be covered in the temporary custody order.<sup>171</sup> As with the parenting agreement, custodial responsibility awarded by the court through a temporary order under Article 3 terminates when the servicemember returns home.<sup>172</sup>

Article 4 governs termination of the temporary custody arrangement once the deployment has ended and the servicemember-parent has returned home.<sup>173</sup> A construction of three different procedures allows the Act to cover almost every eventuality. One set of procedures applies when the parents mutually agree on termination of the temporary custody agreement.<sup>174</sup> The second set applies only when the parents mutually agree on termination of a temporary custody order.<sup>175</sup> The final set of procedures applies when there is no agreement between the parents and court intervention is necessary to resolve custody.<sup>176</sup> If there is a delay between the deployed parent returning home and the temporary agreement or order being terminated, then the UDPCVA directs the court to "issue a temporary order granting the [servicemember-parent] reasonable contact with the child unless it is contrary to the best interest of the child, even if the time of contact exceeds the time the [servicemember] spent with the child before deployment."<sup>177</sup> This is a key provision, because it is widely recognized that "both parents are important for a child's emotional needs and development. By restricting a child's access to his or her servicemember-parent once that parent returns home, courts may be harming not only the [servicemember], but also the child."<sup>178</sup> The final article of the UDPCVA contains administrative

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<sup>169</sup> *Id.* § 302.

<sup>170</sup> *Id.*

<sup>171</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 309 (2012).

<sup>172</sup> *Id.* § 308.

<sup>173</sup> *Id.* §§ 401–404.

<sup>174</sup> *Id.* § 401.

<sup>175</sup> *Id.* § 402.

<sup>176</sup> *Id.* § 404.

<sup>177</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 403 (2012).

<sup>178</sup> Rachelle L. Paquin, Note, *Defining the "Fit": The Impact of Gender and Servicemember Status on Child Custody Determinations*, 14 J. GENDER RACE & JUST. 533, 562 (2011) (footnote omitted).

provisions, such as the date of effectiveness of the Act (to be set by the enacting state).<sup>179</sup>

The UDPCVA shows that the ULC took great care to respect the individuality of the states.<sup>180</sup> The Act allows each state to add state-specific terminology to the definitions section.<sup>181</sup> It also permits enacting states to change both the default length of time that constitutes a “deployment” and the number of days that must run after the servicemember-parent gives notice of his return before the temporary order or agreement terminates.<sup>182</sup> In addition, it is the intent of the ULC for each state to supplement the UDPCVA with its own custody statutes.<sup>183</sup> Eric Fish, legal counsel for the ULC, has championed the uniform statute as a way to protect men and women in uniform and maintain the sovereignty of the states in this area “without creating an invasive federal system that is just going to confuse child custody.”<sup>184</sup>

#### V. ACHIEVING THE OBJECTIVE

Out of the five possible solutions considered (the Family Care Plan, the SCRA, Representative Turner’s bill, state legislation, and the UDPCVA), both Turner’s legislation and the UDPCVA are armed with a “master statute” that would promote uniformity across the nation. Uniformity and predictability is something that servicemen and servicewomen need. Furthermore, both the federal statute and the UDPCVA take positive steps toward limiting the “degree to which the child’s living arrangements during the servicemember parent’s deployment” is factored into the judge’s custody order.<sup>185</sup> There are benefits to using federal legislation to solve the military custody conundrum.<sup>186</sup> Nevertheless, for the reasons explored below, the UDPCVA

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<sup>179</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 501–504 (2012).

<sup>180</sup> *See, e.g., id.* § 102 cmt. (describing custody using new generic terms instead of showing preference for one state’s terminology over another).

<sup>181</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT, Prefatory Note 2 (2012).

<sup>182</sup> *See, e.g.,* UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT §§ 102(8), 401(c), 404(a) (2012).

<sup>183</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT Prefatory Note 2. “For example, where state law would give a child’s preferences significant weight in a custody determination, significant weight should also be given to a child’s preferences in a temporary custody determination pursuant to this Act.” *Id.*

<sup>184</sup> BURRELLI & MILLER, *supra* note 21, at 17.

<sup>185</sup> Ayotte, *supra* note 22, at 658.

<sup>186</sup> *Id.* at 676 (“Federal legislation has the benefit of being uniform, allowing servicemember parents to feel comfortable in the knowledge that their state of residence will not determine the outcome of a custody battle. [It] also has the benefit of being fast; instead of waiting for each state to adopt some measure of protection, a federal law could, in one act, apply equally to all servicemembers, regardless of home state.”) (footnotes omitted).

is the best means of achieving the objective, which is to safeguard the servicemember-parent's custodial rights while still balancing the competing interests of the child and the civilian parent.

*A. Domestic Relations Exception*

The Constitution vests Congress with the authority to “raise and support Armies,” “provide and maintain a Navy,” and to regulate “land and naval Forces.”<sup>187</sup> It is to this authority that Turner links his federal legislation governing military custody cases.<sup>188</sup> Turner and his supporters “insist there is precedence for federal intervention where federal interests—such as the rights of servicemembers—are at stake.”<sup>189</sup> However, custody is about taking care of the child, not the servicemember. The standard is “the best interest of the child,” not “the best interest of the servicemember-parent.”

Despite Turner's assurances to the contrary, if there is a federal custody act, then custody matters could be litigated in federal courts under federal question jurisdiction.<sup>190</sup> However, this runs afoul of the traditional domestic relations exception, which is the principle that federal courts lack jurisdiction over certain family law matters.<sup>191</sup> In *Ankenbrandt v. Richards*, the United States Supreme Court admitted that the historical background of the exception was blurred, but the Court was “unwilling to cast aside an understood rule that ha[d] been recognized for nearly a century and a half.”<sup>192</sup> The result is that the federal courts lack the “power to issue divorce, alimony, and *child custody* decrees.”<sup>193</sup> Furthermore, over a hundred years ago, the Court held that

[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of th[e] child, . . . it is one in regard to which neither the Congress of the United

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<sup>187</sup> U.S. CONST. art. I, § 8, cl.12–14.

<sup>188</sup> See BURRELLI & MILLER, *supra* note 21, at 1–2.

<sup>189</sup> *Id.* at 1.

<sup>190</sup> “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2; see also *supra* notes 90–92 and accompanying text.

<sup>191</sup> Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1443–46 (2006). For a look at the history of the domestic relations exception, see generally *id.*

<sup>192</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 694–95 (1992). “[W]e have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.” *Id.* at 703.

<sup>193</sup> *Id.* (emphasis added).

States nor any authority of the United States has any special jurisdiction.<sup>194</sup>

Federal courts should not and do not have the authority to enter child custody orders. This is the province of the states.<sup>195</sup> Accordingly, the UDPCVA is the best solution that respects state sovereignty while offering comprehensive uniform protections for servicemembers, regardless of where they are stationed.

### B. Logistics

It would be a logistical nightmare for custody cases to be handled by federal courts. First of all, custody cases would bombard the federal court docket.<sup>196</sup> As the Supreme Court recognized in *Ankenbrandt*, the “[i]ssuance of [custody] decrees . . . not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts.”<sup>197</sup>

Additionally, the state courts are the ones with the expertise in this area of the law, not the federal courts.<sup>198</sup> The judges in state courts adjudicate over custody cases routinely, whereas federal judges have little to no experience presiding over such emotionally-charged cases. Moreover, because family law practice occurs in state courts, family law attorneys do not generally need to be admitted to federal practice and typically do not practice in federal court. Thus, if custody cases go to federal court, then not only are the federal judges inexperienced in this area, but also the attorneys.<sup>199</sup>

Locality of the courts is also a concern. It is unreasonable for a member of the 185th Engineer Company, Maine National Guard, based out of Caribou, Maine, to have to travel 170 miles one way to the federal district court in Bangor, Maine every time his custody case comes up on

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<sup>194</sup> *In re Burrus*, 136 U.S. 586, 593–94 (1890).

<sup>195</sup> U.S. CONST. amend. X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.*

<sup>196</sup> See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011–2012: “DOMA” Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471, 519 (2013) (concluding that custody cases are often among the twenty percent of a court’s caseload that takes up eighty percent of the court’s time).

<sup>197</sup> *Ankenbrandt*, 504 U.S. at 703–04.

<sup>198</sup> See *id.* at 704.

<sup>199</sup> A servicemember is faced with retaining either a family law attorney who handles custody cases every day but who has never stepped foot in a federal courtroom and has no knowledge of the Federal Rules of Civil Procedure aside from what they recall from their first year law class, or retaining an attorney used to practicing in federal court with no familiarity with the substantive law in this area. Whatever choice he or she makes, it is the servicemember who pays the price for the attorney’s steep learning curve.

the court calendar when there's a state-level district court well-versed in family law matters right there in Caribou.<sup>200</sup> As previously mentioned, custody cases rarely involve a single appearance before the judge. Frequent appearances in court are the norm, especially when dealing with young children who are years away from attaining the age of majority.<sup>201</sup> There can be hearings to enter a temporary order,<sup>202</sup> hearings to make a permanent award of custody,<sup>203</sup> hearings to modify custody,<sup>204</sup> show cause hearings for violating terms of an order,<sup>205</sup> hearings because one parent wants to relocate out of the state,<sup>206</sup> and more. Having to make a 170-mile trip—one way—to the federal courthouse each and every time is absurd. Yet, the caring parent seems to have no other choice.

Interestingly, the new federal statute allows that [i]n any case where State law applicable to a child custody proceeding involving a temporary order as contemplated in this section provides a higher standard of protection to the rights of the parent who is a deploying servicemember than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher State standard.<sup>207</sup>

This concession all but guarantees substantial litigation between parties over which law “provides a higher standard of protection”: the state or the new federal statute. Turner believes his legislation will help servicemembers, but by placing custody in the realm of the federal courts, he is actually creating more stress for military personnel.

### C. Delegated Visitation

Delegated visitation is one of the most powerful provisions in the UDPCVA, and it is completely missing from Turner's legislation. As one scholar wrote, “it is important to protect the interests of children to

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<sup>200</sup> *185th Engineer Support Company*, MAINE ARMY NATIONAL GUARD, <http://www.me.ngb.army.mil/units/185EN.aspx> (last visited Apr. 13, 2015); United States District Court, District of Maine, <http://www.med.uscourts.gov/> (last visited Apr. 13, 2015); State of Maine Judicial Branch, Maine District Court—Caribou, [http://www.courts.maine.gov/maine\\_courts/findacourt/caribou\\_district.shtml](http://www.courts.maine.gov/maine_courts/findacourt/caribou_district.shtml) (last visited Apr. 13, 2015). For the 170-mile distance, the author used Google Maps to determine the fastest driving route between the two and recorded the mileage.

<sup>201</sup> *See, e.g.*, *Dion v. Blake*, No. C052005, 2008 WL 2918151 at \*3 (Cal. Ct. App. July 30, 2008) (describing a “record setting number of court appearances”); *Hartley v. Hartley*, 886 P.2d 665, 668 (Colo. 1994); *Van Dyke v. Van Dyke*, 538 N.W.2d 197, 199–200 (N.D. 1995); *Johns v. Cioci*, 865 A.2d 931, 934 (Pa. Super. Ct. 2004).

<sup>202</sup> *See, e.g.*, *Buttle v. Buttle*, 196 P.3d 174, 176 (Wyo. 2008).

<sup>203</sup> *See, e.g.*, *Pace v. Pace*, 700 S.E.2d 571, 572 (Ga. 2010).

<sup>204</sup> *See, e.g.*, *J.L.P. v. V.L.A.*, 30 P.3d 590, 593, 595 (Alaska 2001).

<sup>205</sup> *See, e.g.*, *Jackson v. Jackson*, 665 S.E.2d 545, 547–48 (N.C. App. 2008).

<sup>206</sup> *See, e.g.*, *Tropea v. Tropea*, 665 N.E.2d 145, 146–48 (N.Y. 1996).

<sup>207</sup> H.R. 3979, 113th Cong. § 566 (2014) (enacted).



maintain contact with persons with whom they have had a particularly close relationship . . . . The third party with the close relationship with the child also has an interest that should be protected.”<sup>208</sup> The UDPCVA does this.

Section 306 allows the servicemember to petition the court to delegate his or her share of custodial responsibility to a nonparent while deployed. The delegee must be either a family member or someone with whom the child has a “close and substantial relationship”—like a stepparent.<sup>209</sup> The court must consider the petition in light of the best interest of the child, for there is no presumption in favor of or against such a delegation of custodial responsibility.<sup>210</sup> The court is limited in that it can only give the nonparent an aspect of custodial responsibility that the servicemember already possessed, and even then, in the case of decision-making authority, that custodial right could be narrower than what the servicemember enjoys.<sup>211</sup>

Section 307 lets the servicemember petition the court to grant “limited contact” (i.e., visitation) to a nonparent.<sup>212</sup> This Section does carry with it a rebuttable presumption that such a grant is in the best interest of the child.<sup>213</sup> The good thing about this type of custodial responsibility under the Act is that it is not limited to adults. Limited contact is extended to children, which means step-siblings or half-siblings (whether young or old) can be given time with their brother or sister during the servicemember-parent’s deployment.<sup>214</sup>

Third-party visitation statutes came under challenge in *Troxel v. Granville*.<sup>215</sup> In that case, the United States Supreme Court struck down a Washington statute that provided for nonparent visitation because it was too broad.<sup>216</sup> After the death of the girls’ father, the paternal grandparents sought to have two weekends of visitation with their granddaughters every month, but the girls’ mother objected to them having more than one day of visitation per month.<sup>217</sup> In affirming the state supreme court’s decision denying visitation to the grandparents, the United States Supreme Court interpreted the Fourteenth Amendment as

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<sup>208</sup> Atkinson, *supra* note 33, at 13.

<sup>209</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 306 & cmt. (2012). For the definition of “close and substantial relationship,” see *id.* § 301.

<sup>210</sup> § 306 cmt.

<sup>211</sup> *See id.*

<sup>212</sup> *Id.* § 307. For a definition of “limited contact,” see *id.* § 102(10).

<sup>213</sup> UNIF. DEPLOYED PARENTS CUSTODY & VISITATION ACT § 307 cmt. (2012).

<sup>214</sup> *Id.* § 102 cmt.

<sup>215</sup> 530 U.S. 57 (2000) (plurality opinion).

<sup>216</sup> *See id.* at 67, 73.

<sup>217</sup> *Id.* at 61.

protecting “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>218</sup> Since the grandparents had not alleged that the mother was an unfit parent, there was “no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”<sup>219</sup>

Still, the Court did not hold that nonparent visitation statutes were in violation of the Due Process Clause *per se*.<sup>220</sup> Thus, after *Troxel*, the states began amending their third-party visitation statutes to recognize the rights of parents in decision-making.<sup>221</sup> The result is a smorgasbord of legislation in this area<sup>222</sup>—a problem the UDPCVA seeks to fix and one that Turner’s legislation completely ignores, which is interesting considering one of the driving forces behind Turner’s federal legislation was the idea of creating a “national standard” to prevent disparate results under different state laws.<sup>223</sup>

Pro-military groups have advocated for six major protections for servicemembers in this area: (1) prohibiting the entry of permanent custody orders during deployment; (2) terminating temporary orders entered during deployment upon the servicemember’s return home; (3) eliminating deployment from the factors to be considered in determining custody; (4) allowing delegation of custody or visitation for the period of deployment; (5) providing for expedited hearings and electronic testimony

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<sup>218</sup> *Id.* at 66.

<sup>219</sup> *Id.* at 68–69.

<sup>220</sup> *Id.* at 68, 73. For a detailed analysis of the constitutionality of Article 3 of the UDPCVA in light of the *Troxel* decision, see Memorandum from the Unif. Law Comm’n to State legislators (Apr. 1, 2014), *available at* [http://www.uniformlaws.org/shared/docs/deployed\\_parents/Troxel%20Memo%20final.pdf](http://www.uniformlaws.org/shared/docs/deployed_parents/Troxel%20Memo%20final.pdf).

<sup>221</sup> Atkinson, *supra* note 33, at 1. For a summary of the changes implemented by the states, see *id.* at 5.

<sup>222</sup> *E.g.*, *In re Marriage of DePalma*, 176 P.3d 829, 831–32 (Colo. App. 2007) (determining that the servicemember-father can assign his custody rights to his new wife, the children’s stepmother, during his deployment); *Webb v. Webb*, 148 P.3d 1267, 1270–71 (Idaho 2006) (allowing the servicemember to delegate his custody time to his parents during deployment); *In re Marriage of Sullivan*, 795 N.E.2d 392, 395–96 (Ill. App. 2003) (reasoning that the best way to make sure the father was focused on his military duties during deployment was to resolve his concern as to the care of his children by allowing delegated visitation to the servicemember’s parents); *Fischer v. Fischer*, 157 P.3d 682, 686–87 (Mont. 2007) (holding that a guardianship for the minor child during the servicemember’s deployment is not allowed when the non-custodial civilian parent’s rights have not been terminated or abridged); *Smallwood v. Mann*, 205 S.W.3d 358, 365 (Tenn. 2006) (rejecting assignment of the servicemember-father’s parental rights to the grandparents); *Lubinski v. Lubinski*, 2008 WI App 151, 761 N.W.2d 676, 681 (Wisc. Ct. App. 2008) (prohibiting the deployed servicemember from delegating his period of custody during the summer to his new wife).

<sup>223</sup> See *supra* notes 126–30 and accompanying text.

capabilities; and (6) extending these protections to reservists as well as to those in the National Guard.<sup>224</sup> The only solution that addresses all six areas of reform is the UDPCVA.

#### CONCLUSION

Military custody warfare affects a wide spectrum of people—attorneys, judges, servicemember-parents, civilian parents, and most importantly, children. One thing is clear; something has to be done. Captain John should not have to sue his ex-wife Kim to get back custody of his daughter, Zoe, when the only thing that caused him to lose custody in the first place was his deployment. Lieutenant Eva Crouch should not have had to spend \$25,000 of her hard-earned money to get the court to give her something she and her ex-husband had already agreed she was to receive upon her return. The only thing Corporal Bradley should be concerned with is doing his job and coming home in one piece, not worrying about whether his daughter will be there when he gets back. This Nation's Armed Forces could be losing out on excellent leaders and warriors who fear losing custody of their children should they heed the country's call to duty.<sup>225</sup>

This Note has considered five possible solutions to the problems that arise in a military custody battle, but only one covers the whole field of reform that is needed—the Uniform Deployed Parents Custody and Visitation Act. The eight states that have already enacted the UDPCVA represent only about 15% of the current active duty military force and less than 12% of Reserve and Guard members.<sup>226</sup> Clearly, a greater push is needed to get state legislatures on board to best address the custodial rights of the servicemember-parent. It is not enough to rely on the newly-passed federal legislation shepherded by Representative Turner. The new statute amending the SCRA leaves Reservists and Guardsmen

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<sup>224</sup> Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL LAW. 311, 327 (2013).

<sup>225</sup> See M. Turner Pope, Jr., *PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families*, ARMY LAW., June 2012, at 5, 16; Paquin, *supra* note 178, at 560–61; see also Joe Duggan, *Serving the Nation Need Not Mean Losing Kids*, OMAHA WORLD-HERALD (IOWA), Mar. 2, 2015, at A1 (telling the story of Danelle Nelson who deployed six times in fifteen years and testified before the Nebraska Legislature that she would leave the military before completing a seventh deployment because of “the stress she felt on being a divorced military parent who could not transfer to another adult the visitation rights to her two children”).

<sup>226</sup> See OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF., DEP'T OF DEF., 2012 DEMOGRAPHICS—PROFILE OF THE MILITARY COMMUNITY 34, 85 (2012), available at [http://www.militaryonesource.mil/12038/MOS/Reports/2012\\_Demographics\\_Report.pdf](http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf); see also *supra* note 148 and accompanying text.

hanging in the wind, and to its detriment, it also lacks the breadth of the UDPCVA.

It is worth noting that Turner's bill became federal law on December 19, 2014,<sup>227</sup> and within a month or so of its enactment, legislators in six states introduced bills to modify their state's existing custody statute: Michigan,<sup>228</sup> Mississippi,<sup>229</sup> Minnesota,<sup>230</sup> Nebraska,<sup>231</sup> New York,<sup>232</sup> and South Carolina.<sup>233</sup> In March of this year, Arkansas became the seventh state to introduce a new military custody bill.<sup>234</sup> Of the bills introduced in

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<sup>227</sup> Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

<sup>228</sup> H.B. 4071, 2015–2016 Sess. (Mich. 2015). The bill was introduced on January 27, 2015. *House Bill 4071 (2015)*, MICHIGAN LEGISLATURE, [http://www.legislature.mi.gov/\(S\(4dfwyj45qjeem3yeahe2uvvy\)\)/mileg.aspx?page=GetObject&objectname=2015-HB-4071](http://www.legislature.mi.gov/(S(4dfwyj45qjeem3yeahe2uvvy))/mileg.aspx?page=GetObject&objectname=2015-HB-4071) (last visited Apr. 13, 2015).

<sup>229</sup> H.B. 239, 2015 Reg. Sess. (Miss. 2015). The bill was introduced on January 12, 2015 but died in committee in February. *HB 239—History of Actions/Background*, MISSISSIPPI LEGISLATURE, <http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB0239.xml> (last updated Feb. 3, 2015).

<sup>230</sup> S.F. 73, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 260, 89th Leg., Reg. Sess. (Minn. 2015). The Senate bill was first introduced on January 12, 2015, followed by the House bill on January 20, 2015. *SF 73 Status in the Senate for the 89th Legislature*, MINNESOTA STATE LEGISLATURE, <https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF0073&ssn=0&y=2015> (last visited Apr. 13, 2015); *HF 260 Status in the Senate for the 89th Legislature*, MINNESOTA STATE LEGISLATURE, <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF0260&ssn=0&y=2015> (last visited Apr. 13, 2015).

<sup>231</sup> L.B. 219, 104th Leg., 1st Sess. (Neb. 2015). The bill was introduced on January 13, 2015. *LB219-Change and eliminate child custody provisions and adopt the Uniform Deployed Parents Custody and Visitation Act*, NEBRASKA LEGISLATURE, [http://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=24425](http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=24425) (last visited Apr. 10, 2015). The Nebraska bill passed and was signed into law by the Governor on February 26, 2015. *Id.*

<sup>232</sup> Assemb. B. A03787, 238th Leg., 2015–2016 Reg. Sess. (N.Y. 2015). The bill was introduced on January 26, 2015. *Bills: A03787*, NEW YORK STATE ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03787&term=2015&Summary=Y&Actions=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03787&term=2015&Summary=Y&Actions=Y&Text=Y) (last visited Apr. 13, 2015). An identical bill was introduced in the State Senate on February 4, 2015. S.B. S03297, 238th Leg., 2015–2016 Reg. Sess. (N.Y. 2015); *Bills: S03297*, NEW YORK STATE ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=S03297&term=2015&Summary=Y&Actions=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=S03297&term=2015&Summary=Y&Actions=Y&Text=Y) (last visited Apr. 13, 2015).

<sup>233</sup> H. 3156, S.C. Gen. Assemb., 121st Sess. (S.C. 2015); S. 6, S.C. Gen. Assemb., 121st Sess. (S.C. 2015). The two bills were introduced on January 13, 2015. *Bill Search by Bill Number: S 0006*, SOUTH CAROLINA LEGISLATURE, <http://www.scstatehouse.gov/billsearch.php?billnumbers=6&session=0&summary=B> (last visited Apr. 13, 2015); *Bill Search by Bill Number: H 3156*, SOUTH CAROLINA LEGISLATURE, <http://www.scstatehouse.gov/billsearch.php?billnumbers=3156&session=0&summary=B> (last visited Apr. 13, 2015).

<sup>234</sup> S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015). The bill was filed on March 4, 2015. *SB792-To Enact the Uniform Deployed Parents Custody and Visitation Act*, ARKANSAS STATE LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/>

these states, the legislation in Arkansas, Minnesota, Nebraska, and South Carolina each proposed that their state adopt the UDPCVA.<sup>235</sup>

Before former Secretary of Defense Gates changed his mind on this topic, he was said to have corresponded with the governors of each state to encourage them to pass legislation addressing military custody issues at the state level.<sup>236</sup> What a welcome sight it would be if the newly-confirmed Secretary of Defense Ashton Carter<sup>237</sup> would reach out to the governors once again—this time to encourage them to enact the UDPCVA in each and every state. It is the best and brightest hope for all warrior moms and dads who have answered the call of duty to serve “We the People of the United States.”<sup>238</sup>

*Amy M. Privette\**

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BillInformation.aspx?measureno=SB792. The Arkansas bill passed the House and Senate on March 31, 2015 and was delivered to Governor the next day. *Id.*

<sup>235</sup> S.B. 792, 90th Gen. Assemb., Reg. Sess (Ark. 2015); S.F. 73, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 260, 89th Leg., Reg. Sess. (Minn. 2015); L.B. 219, 104th Leg., 1st Sess. (Neb. 2015); H. 3156, S.C. Gen. Assemb., 121st Sess. (S.C. 2015); S. 6, S.C. Gen. Assemb., 121st Sess. (S.C. 2015).

<sup>236</sup> BURRELLI & MILLER, *supra* note 21, at 11.

<sup>237</sup> Stephen Dinan, *Senate Approves Ashton Carter As Next Defense Secretary*, THE WASHINGTON TIMES, Feb. 13, 2015, available at 2015 WLNR 4472499.

<sup>238</sup> U.S. CONST. pmb1.

\* J.D. Candidate, Regent University School of Law, 2015. I would like to say a special thank you to my family for their endless love and support. I am blessed beyond measure to have the privilege of calling you mine, and I thank God for each of you. I would also like to thank my mentor, Mark Sullivan, for not only introducing me to the intricacies of military family law, but also for believing in me and pushing me to leave the nest and go to law school. Lastly, I am eternally grateful to my faculty advisor, Professor Lynn Marie Kohm, for her constant encouragement and unwavering belief that my Note was worthy of publication.

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