

*"The whole training of the lawyer leads to the development of judgment."
Louis Brandeis*

"The first year of law school has the effect of knocking your ethics into temporary anesthesia. ... It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment." Karl Llewellyn

To: Steven Bahls, Chair
Learning Outcomes Subcommittee
Standards Review Committee, ABA Section of Legal Education and Admissions to the Bar

From: Clark D. Cunningham, W. Lee Burge Professor of Law & Ethics
Georgia State University College of Law and
Director, National Institute for Teaching Ethics & Professionalism¹

Date: November 4, 2010

Re: June 10, 2010 Proposals of the ABA Standing Committee on Professionalism

I am planning to observe the deliberations of the Standards Review Committee this coming Sunday, in particular in relation to proposed Standards 302 and 303. Just this week I became aware that your subcommittee in its most current draft of Standard 303 now proposes to delete 303(a)(3) from the May 2010 draft, which would have required an upper level learning experience in which students engage in professional performance (either simulated or real-life). If the full committee adopts this change, this action will greatly undermine the potential for achieving the proposed learning outcome in 302(b)(2)(ii) requiring "competency in the professional skills of ... recognizing and resolving ethical and other professional dilemmas."

I write to further explicate this concern and to provide some background on three changes to your committee's May draft of Standard 302 and 303 proposed by the ABA Standing Committee on Professionalism in its June 10, 2010 letter to Donald Polden. I had a consulting role to the Professionalism Committee in developing these proposed changes. I note that the June 10 letter does not appear to be posted on the SRC webpage on the ABA website and attach a copy.

The last page of the June 10 letter is a two column chart comparing the May draft Standards 302 and 303 with the Professionalism Committee's proposed revisions. I have prepared Attachment A, which is an expansion of that chart to 3 columns: (1)

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current Standard 302, (2) your committee's May draft of 302 and 303 and (3) the Professionalism Committee's proposed changes (indicated using "track changes"). As mentioned above, I have now seen the "red-line" revision of the May draft which has been prepared for the upcoming meeting which does not incorporate either the Professionalism Committee's requested change to 302 or to 303(a)(1) and also (to my surprise) deletes 303(a)(3) which had been the focus of the third requested change.

All three changes requested by the Professionalism Committee are consistent with, and informed by, the powerful and increasingly accepted critique of American legal education published by the Carnegie Foundation in 2007 (William Sullivan et al, *Educating Lawyers* or "the Carnegie Report"). In brief, the Carnegie Report indicates that despite many strengths, American legal education (in contrast to education for other professions) does not include among its required learning outcomes the development of professional judgment and identity – a particularly critical inadequacy given the lack of any post-degree period of required further professional education or training before granting an unrestricted license to practice law (again in marked contrast to other professions).

The approach taken by many if not most law schools to meeting the current requirement of the ABA to provide "substantial instruction" in professional responsibility is accurately described by the Carnegie Report as merely teaching "the law of lawyering," an approach which is not only inadequate but in some ways counterproductive:

"[Teaching ethics through the law of lawyering] misses an important dimension of ethical development -- the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice. (Report 148) ... When legal ethics courses focus exclusively on teaching students what a lawyer can and cannot get away with, they inadvertently convey a sense that knowing this is all there is to ethics. ... [Thus] [b]y defining 'legal ethics' as narrowly as most legal ethics courses do, these courses are likely to limit the scope of what graduates perceive to be ethical issues. (Report 149)."

Although it is good that both the May and current draft of 302 require "competency" in "recognizing and resolving ethical and other professional dilemmas" rather than mere substantive knowledge of the "law of lawyering," the Professionalism Committee has asked that this competency be expanded to "the exercise of professional judgment consistent with the values of the profession" – which competence would necessarily include, but NOT be limited to, the ability to recognize and resolve ethical and other professional dilemmas.

What is the significance of requiring competence in exercising professional judgment? Attachment B is a forthcoming book chapter I have co-authored with Charlotte Alexander entitled “Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation's Critique of American Legal Education.” (The chapter can also be downloaded from: www.teachinglegalethics.org/content/developing-professional-judgment I hope you (and perhaps your colleagues on the committee) will find these 26 pages a useful summary and analysis of the Carnegie Report. We explicate the recommendations of the Carnegie Report by applying a widely accepted approach for ethical education in the professions, the Four Component Model first developed by James Rest and further refined by Muriel Bebeau. As applied to professional education, the Four Component Model requires four interrelated learning outcomes:

1. Create sensitivity to ethical issues likely to arise in practice
2. Build the capacity for reasoning carefully about conflicts inherent in practice
3. Establish a sense of personal identity that incorporates professional norms and values
4. Develop competence in problem solving including necessary interpersonal skills

As we explain in the book chapter:

“Bebeau’s work confirms that the capacity to identify issues that require professional judgment requires much more than just a mastery of professional conduct rules (although such knowledge is of course necessary). Equally critical is the ability to engage imaginatively as a situation unfolds, constructing various possible scenarios, often with limited cues and partial information, combined with the ability to foresee realistic cause-consequence chains of events. ... Bebeau’s research also provide[s] evidence that ethical sensitivity, the first capacity, is distinct from the second capacity, moral reasoning. ... There is ample evidence that professionals are sometimes aware of the ethical implications of a situation, yet either fail to act or act in ways inconsistent with that awareness - evidencing a deficiency in Rest's third moral capacity -- prioritizing the ethical decision over other interests. Research in moral psychology suggests that for professionals the key to the development of this third capacity is identity formation. ... Research has also shown that, although a professional’s moral identity formation can be facilitated during professional school, students do not internalize the norms of a profession from an educational environment simply by osmosis. Deliberate teaching about professional norms is required, combined with examples of exemplary professionals and a system to promote student self-reflection about their own professional identity formation over the course of their

education. Although the ability to identify ethical issues (the first capacity), to reason to the contextually appropriate decision in the face of conflicting values (the second capacity), and to internalize professional identity to motivate moral commitment (the third capacity), are all necessary to the exercise of professional judgment, actual and effective implementation, the fourth capacity, is also required. Bebeau points out that the professional cannot stop with “what is happening” [the first capacity] and “what ought to be done” [the second capacity], but must always consider questions such as “what should I say” and “how should I say it?” Cunningham & Alexander 8-10.”

The development of all four of these capacities requires that “teaching and assessment take place in role rather than in the more detached mode that law-of-lawyering courses typically foster” (Report 178). As the Carnegie Report further explains:

“ [W]hat kinds of pedagogies and assessment procedures are effective in developing professional dispositions and good judgment [?] ... [C]ritical analysis of students' own experience in both simulated and actual situations of practice, including expert feedback, is a pedagogical process with enormous power ... The key components are close working relationships between students and faculty, opportunity to take responsibility for professional interventions and outcomes, and timely feedback. Unless law schools can provide the proper opportunities, however, little such formation is likely to occur.”

Given this understanding of how professional judgment should be developed, you can see why the Professionalism Committee focused on 303(a)(3) in the May draft which **required** that every student complete “one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter.” By adding to this requirement the language found in current ABA Standard 302(b)(1) [real-life practice experiences] that the learning experience be “designed to teach the values and responsibilities of the legal profession” the Professionalism Committee saw the opportunity to achieve, albeit to a limited degree, all four learning outcomes of the Four Component Model, and also to provide the basis for performance based assessment, which is the best mode of measuring outcomes for the objective of learning professional judgment.

Because the new draft of Standards 302 and 303 before the committee this coming weekend

- deletes the requirement of an upper level learning experience in which students engage in professional performance (either simulated or real-life)
- merely requires “one course in professional responsibility” without continuing the

current requirement in ABA 302(a)(4) for “substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members”

- and does not include the requested addition of “competency in the ... exercise of professional judgment”

this draft does not do enough to address the continued inadequate approach to developing professional judgment that the Carnegie Report found dominant among American law schools.²

A final note. Australia is currently engaged in a similar project of refining required learning outcomes for legal education, though under the auspices of the federal government rather than a professional body. The current draft threshold learning outcomes, which I understand are close to the final version, do require as part of “Ethics and Professional Responsibility” (under both options currently under consideration) that law graduates demonstrate “a developing ability to exercise professional judgment.” (Attachment C).

cc:

Melvin F. Wright, Jr., Chair, ABA Standing Committee on Professionalism
Arthur Garwin, Professionalism Counsel, ABA Center for Professional Responsibility
Dennis Rendleman, Associate Professionalism Counsel, ABA Center for Professional Responsibility
Charlotte Stretch, ABA Assistant Consultant on Legal Education

² I have downloaded from the SRC webpage the July 1, 2010 Comments from the Clinical Legal Education Association (CLEA) and the related comments dated July 14, 2010 from Professors Richard Neumann and Roy Stuckey that are critical of Standard 303(a)(3) as proposed in the May draft. The suggestions that a performance-based upper level learning experience be a “faculty-supervised, rigorous course” (CLEA) or be more than a single experience (Neumann/Stuckey) are consistent with the recommendations of the Carnegie Report quoted in this memo. However, the total elimination of a required performance-based learning experience should not be the only alternative to not adopting the recommendations of CLEA or Professors Neumann and Stuckey.

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June 10, 2010

Donald J. Polden, Chair
ABA Accreditation Standards Review Committee

Dear Dean Polden:

Thank you for the continuing opportunity to comment on aspects of the Accreditation Standards Review Committee's work. On behalf of the Standing Committee on Professionalism, I am submitting the attached recommendations, which are based upon the May 5, 2010 draft from your Student Learning Outcomes Subcommittee.

1) Consistent with the recommendations of the Carnegie Report, we urge that the link of "knowledge" and "skills" be emphasized in describing learning outcomes in the new Standard 302. In particular "the ability to recognize and resolve ethical dilemmas" should be identified as more than a "skill." On a hierarchy of learning outcomes, recognizing and resolving ethical dilemmas is an elevated and important attribute of lawyers, equal to application of any legal principle. For these reasons, we propose that all the learning outcomes described under proposed 302(b) be simply listed as 302(b)(1) - (6).

2) Under our proposed renumbered 302(b)(3) we expand the learning outcome as "the exercise of professional judgment consistent with the values of the profession and professional duties to society," a competence which includes but is not limited to "the ability to recognize and resolve ethical dilemmas."

3) We suggest that the requirement of a course in professional responsibility in 303(a)(1) include the specific provision found in the current Standard 302(a)(5) requiring "substantial instruction" in "the history, goals, structure, values, rules and responsibilities of the legal profession and its members."

4) We also request that the reference in the current Standard 302(b)(1) to learning "the values and responsibilities of the legal profession" in "real-life practice experiences" be carried over to the requirement in 303(a)(3) for an "appropriately supervised learning experience after the first year that engages students in the performance of professional skills." There is now considerable scholarly literature documenting the value and efficacy of teaching professional values and responsibilities in simulation courses as supplement to clinics and field placements.

The Standing Committee on Professionalism will continue to follow your committee's deliberations and may provide you with additional recommendations at a later date.

Again, thank you for the opportunity to participate in this difficult and important review.

Sincerely,

Melvin F. Wright, Jr.

Melvin F. Wright Jr.

Student Learning Outcomes Subcommittee May 5, 2010 Draft	Standing Committee on Professionalism Proposal June 16, 2010
<p>Standard 302. LEARNING OUTCOMES</p> <p>(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.</p> <p>(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:</p> <p>(1) knowledge and understanding of substantive law and procedure;</p> <p>(2) competency in the following skills:</p> <p>(i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;</p> <p>(ii) the ability to recognize and resolve ethical and other professional dilemmas; and</p> <p>(iii) a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession.</p> <p>(3) knowledge and understanding of the following values:</p> <p>(i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;</p> <p>(ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and</p> <p>(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.</p> <p>(4) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals.</p> <p>Standard 303. CURRICULUM</p> <p>(a) A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302 and which, in addition, requires every student to complete satisfactorily at least:</p> <p>(1) one course in professional responsibility;</p> <p>(2) one faculty supervised, rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; and</p> <p>(3) one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter. The learning experience shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement complying with Standard 305(e).</p> <p>(b) A law school shall provide substantial opportunities to students for:</p> <p>(1) live-client clinics or other real-life practice experiences; and</p> <p>(2) participation in pro bono legal services or law-related public service activities.</p>	<p>Standard 302. LEARNING OUTCOMES</p> <p>(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.</p> <p>(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:</p> <p>(1) knowledge and understanding of substantive law and procedure;</p> <p>(2) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;</p> <p>(3) the exercise of professional judgment consistent with the values of the profession and professional duties to society, including the ability to recognize and resolve ethical and other professional dilemmas; and</p> <p>(4) a depth and breadth of professional skills sufficient for effective, responsible and ethical participation in the legal profession.</p> <p>(5) knowledge and understanding of the following values:</p> <p>(i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;</p> <p>(ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and</p> <p>(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.</p> <p>(6) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals.</p> <p>Standard 303. CURRICULUM</p> <p>(a) A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302 and which, in addition, requires every student to complete satisfactorily at least:</p> <p>(1) one course in professional responsibility that includes substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members</p> <p>(2) one faculty supervised, rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; and</p> <p>(3) one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter and designed to teach the values and responsibilities of the legal profession. The learning experience shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement complying with Standard 305(e).</p> <p>(b) A law school shall provide substantial opportunities to students for:</p> <p>(1) live-client clinics or other real-life practice experiences; and</p> <p>(2) participation in pro bono legal services or law-related public service activities.</p>

ATTACHMENT A

Current ABA Standard	Student Learning Outcomes Subcommittee May 5, 2010 Draft	ABA Committee on Professionalism: Proposed Changes to May 5, 2010 Draft
<p>Standard 302. Curriculum</p> <p>(a) A law school shall require that each student receive substantial instruction in:</p> <p>(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;</p> <p>(2) legal analysis and reasoning, legal research, problem solving, and oral communication;</p> <p>(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;</p> <p>(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and</p> <p>(5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.</p> <p>(b) A law school shall offer substantial opportunities for:</p> <p>(1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;</p> <p>(2) student participation in pro bono activities; and</p> <p>(3) small group work through seminars, directed research, small classes, or collaborative work.</p>	<p>Standard 302. LEARNING OUTCOMES</p> <p>(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.</p> <p>(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:</p> <p>(1) knowledge and understanding of substantive law and procedure;</p> <p>(2) competency in the following skills:</p> <p>(i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;</p> <p>(ii) the ability to recognize and resolve ethical and other professional dilemmas; and</p> <p>(iii) a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession.</p> <p>(3) knowledge and understanding of the following values:</p> <p>(i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;</p> <p>(ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and</p> <p>(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.</p> <p>(4) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals.</p> <p>Standard 303. CURRICULUM</p> <p>(a) A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302 and which, in addition, requires every student to complete satisfactorily at least:</p> <p>(1) one course in professional responsibility;</p> <p>(2) one faculty supervised, rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; and</p> <p>(3) one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter. The learning experience shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement complying with Standard 305(e) .</p> <p>(b) A law school shall provide substantial opportunities to students for:</p> <p>(1) live-client clinics or other real-life practice experiences; and</p> <p>(2) participation in pro bono legal services or law-related public service activities.</p>	<p>Standard 302. LEARNING OUTCOMES</p> <p>(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.</p> <p>(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:</p> <p>(1) knowledge and understanding of substantive law and procedure;</p> <p>(2) competency in the following skills:</p> <p>(i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context;</p> <p>(3<i>ii</i>) the exercise of professional judgment consistent with the values of the profession and professional duties to society, including the ability to recognize and resolve ethical and other professional dilemmas; and</p> <p>(4<i>ii</i>) a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession.</p> <p>(5<i>3</i>) knowledge and understanding of the following values:</p> <p>(i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;</p> <p>(ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and</p> <p>(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.</p> <p>(6<i>4</i>) any other outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals.</p> <p>Standard 303. CURRICULUM</p> <p>(a) A law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302 and which, in addition, requires every student to complete satisfactorily at least:</p> <p>(1) one course in professional responsibility, <u>that includes substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members ;</u></p> <p>(2) one faculty supervised, rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year; and</p> <p>(3) one appropriately supervised learning experience after the first year that engages students in performances of professional skills involving a type of case or problem that practitioners encounter <u>and designed to teach the values and responsibilities of the legal profession.</u> The learning experience shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement complying with Standard 305(e) .</p> <p>(b) A law school shall provide substantial opportunities to students for:</p> <p>(1) live-client clinics or other real-life practice experiences; and</p> <p>(2) participation in pro bono legal services or law-related public service activities.</p>

ATTACHMENT B

**DEVELOPING PROFESSIONAL JUDGMENT:
LAW SCHOOL INNOVATIONS IN RESPONSE TO THE CARNEGIE FOUNDATION'S
CRITIQUE OF AMERICAN LEGAL EDUCATION**

[Draft as of 15 February 2010]

To appear in

The Ethics Project in Legal Education

Michael Robertson, Lillian Corbin, Francesca Bartlett and Kieran Tranter, eds.
(London: Routledge-Cavendish 2010)

Clark D. Cunningham & Charlotte Alexander¹

Abstract

In 2007, the Carnegie Foundation for the Advancement of Teaching issued a book-length report on American legal education, criticizing American law schools and issuing a call for reform. This chapter draws on concepts from the field of moral psychology, which have been used in other American professional schools, to explain the Carnegie Report's critique as a call for teaching professional judgment in legal education. The chapter then describes innovations taking place since the publication of the Carnegie Report at three American law schools. The first innovation summarized is the new approach to clinical education at Stanford Law School, which includes a semester-long "rotation" in which students are entirely immersed in clinical education, and a new course taught exclusively for clinical students in which students act as the "ethics committee" to resolve actual professional and ethical challenges arising in one or more of Stanford's many clinics. The second innovative law school described is the Indiana University Maurer School of Law (Bloomington) which has become the first American law school to move the required course in legal ethics into the first year curriculum with the same number of credits as other core courses such as contracts and property. The course at Indiana employs a number of teaching methods intended to develop professional judgement: students learn about professional norms in a variety of settings, including interacting with exemplary members of the legal profession, and reflect about their own developing identities as legal professionals. The third, and perhaps most innovative, development is taking place at the Washington & Lee School of Law where an entirely experiential program replaces the traditional classroom-based third year

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curriculum and teaches professional judgment through simulated and actual practice experiences. Using insights from moral psychology as an analytical framework, this chapter explores the way that these three innovations respond to the Carnegie Report's call for change and point the way for the American legal academy toward the effective development of professional judgment.

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Introduction

On June 29, 2006, the United States Supreme Court issued one of its most important decisions of the past decade in the case of *Hamdan v. Rumsfeld*,² holding that detainees at the Guantanamo Bay military prison were entitled to the protections of the Geneva Conventions. The successful plaintiff, Salim Ahmed Hamdan, is most frequently identified as the personal driver for Osama Bin Laden prior to the events of September 11, 2001. That case would never have reached the Supreme Court but for the exemplary professional judgment exercised by Lieutenant Commander Charles Swift, the military lawyer assigned to Hamdan at the prison at Guantanamo Bay, who defied the terms of his appointment, which was limited for the purpose of negotiating a guilty plea. Here is Swift's explanation, given to an interviewer for National Public Radio, for why he acted as he did:

I was surprised when the letter conditioned my access to Mr. Hamdan on a guilty plea. ... [T]he letter made quite plain that you would see the prosecutor to get access, and that if for some reason you were unable to negotiate a guilty plea, [then] that access could be cut off.

Interviewer: And at that point, once you've read this letter, are you allowed to say hey wait a minute, this is not what I learned in law school ...?

Swift: You know, that's exactly what I thought about. ... This is not how I view myself as an independent lawyer when I represent an individual; and I'm being asked to represent him, not the government. ...

Interviewer: Let me ask you Commander Swift, when you decided to file the lawsuit [that led to the Supreme Court decision]... did you think, oh boy, this might be a career killer?

Swift: ... I didn't think about it in those terms. I thought about it as this is the ethical way that I can do my job.³

A year later, in 2007, the highly regarded Carnegie Foundation for the Advancement of Teaching issued a book-length report on American legal education, *Educating Lawyers: Preparation for the Profession of Law* [hereinafter "the Report"].⁴

² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³ National Public Radio, Talk of the Nation, 'Navy Lawyer Discusses Hamdan, Guantanamo' (15 February 2007). Available at <http://www.npr.org/templates/transcript/transcript.php?storyId=7422513> (accessed 22 January 2010).

⁴ W.M. Sullivan, A. Colby, J.W. Wegner, L. Bond and L.S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, San Francisco, CA: Jossey-Bass, 2007. (hereinafter 'Report').

The central message of the Report is that law schools should, and can, do much more to produce lawyers who will exercise the type of professional judgment exemplified by Charles Swift: who readily identified a moral dilemma that implicated his professional ethics, reasoned through conflicting values to choose a course of action, committed himself to that action as “the ethical way to do my job” despite risk to his career, and then effectively implemented the decision.

This chapter first summarizes the Carnegie Report, its call for reform in American legal education, and its focus on the development of professional judgment. It then discusses concepts from the field of moral psychology that have been used in other American professional schools to assess how schools teach and students learn professional judgment and applies those concepts to the Report’s critique of the conventional American approach to teaching legal ethics. The chapter concludes by highlighting innovative approaches to teaching ethics and professionalism that three American law schools have implemented since the Carnegie Report and analyzes them using these concepts from moral psychology.

The Carnegie Report’s Focus on the Development of Professional Judgment

The Carnegie Foundation for the Advancement of Teaching was founded in 1905 by the philanthropist Andrew Carnegie. Over the past century it has prompted many important changes in higher education. The Foundation’s 1910 critique of medical education, known as the Flexner Report, is widely credited for establishing the standards for modern medical education.⁵ Since 2004, a major initiative of the Foundation has been the Preparation for the Professions Program, which has overseen a series of multi-year comparative studies of education of clergy, engineers, lawyers, doctors, and nurses.⁶

There have been a number of critiques of American legal education that both laid a foundation for the Carnegie Report and foreshadowed many of its conclusions, but all were from within the legal academy or the profession; the Carnegie Report in contrast offers an independent, outside perspective. One of the co-authors is a distinguished legal educator, but the other four come from other disciplines. Three are social scientists, including the Carnegie Foundation’s president at that time, and the other is a moral philosopher. Their methodology was to focus on how teaching and learning really happens through classroom observations and interviews with teachers and students at 16 law schools. As the authors explain: “We adopted an unusual angle of vision ... by focusing on the daily practices of teaching and learning ... We compared these practices

⁵ A. Flexner, *A. Medical Education in the United States and Canada*, Carnegie Foundation for the Advancement of Teaching, 1910.

⁶ Carnegie Foundation for the Advancement of Teaching (2009) Preparation for the Professions Program at 1-2. Available at <http://www.carnegiefoundation.org/programs/sub.asp?key=30> (accessed 10 August 2009).

with those in other professions ... [and] also looked at them through the lens of contemporary understanding of how learning occurs.”⁷

The Report begins with the observation that the modern American law school is heir to “a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.”⁸ Probably the signal contribution of the Report is the way it draws upon comparative study of other forms of professional education and upon recent social science research to propose “hope for healing [these] old rifts.”⁹ And the keystone of the bridge it would build between these opposing views of legal education is a revitalized approach to teaching legal ethics.

The Foundation’s extensive comparative study of various professions leads the authors of the Report to an understanding of “professional practice as judgment in action.”¹⁰

Skillful practice, whether of a surgeon, a judge, a teacher, a legal counselor, or a nurse, means involvement in situations that are necessarily indeterminate from the point of view of formal knowledge. Professional practice ... [therefore] depends on judgment in order to yield an outcome that can further the profession's intended purposes. ... The mark of professional expertise is the ability to both act and think well in uncertain situations.¹¹

Research in the social sciences has helped identify the components that comprise professional judgment and demonstrates that it is possible to promote the development of such judgment through university-based professional education.

By focusing on the development of professional judgment, the Report is able to insist that knowledge, skill and ethics — and the teaching of them — are inseparable.

“In practice, knowledge, skill, and ethical comportment[s] are literally interdependent: a practitioner cannot employ one without involving the others at the same time.”¹² Thus, “the goal of professional education cannot be analytic knowledge alone or, perhaps, even predominantly. Neither can it be analytic knowledge plus merely skillful performance.”¹³

⁷ Report at 1-2.

⁸ *ibid.*, p. 8.

⁹ *ibid.*

¹⁰ *ibid.*, p. 9.

¹¹ *ibid.*, pp. 8-9.

¹² *ibid.*, p. 172.

¹³ *ibid.*, p. 160.

The Report concludes that “this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice.”¹⁴ This new approach to legal education would “combine ... conceptual knowledge, skill, and moral discernment ... into the capacity for judgment guided by a sense of professional responsibility.”¹⁵ The authors of the Report “believe that if legal education had as its focus forming legal professionals who are both competent and responsible to clients and the public, learning legal analysis and practical skills would [*both*] be more fully significant to both the students and faculty.”¹⁶

Moral Psychology Applied to Professional Education

The Carnegie Report’s focus on the development of professional judgment draws on insights from the field of moral psychology into how students learn and schools teach ethical decision-making. These insights, which have been applied in other professional schools, provide a useful framework for understanding the development of professional judgment and assessing law schools’ innovations in response to the Carnegie Report.

Moral psychology’s inquiry into ethical and moral decision-making began with Lawrence Kohlberg’s hypothesis that there are stages of moral judgment development over the course of an individual’s life span.¹⁷ Subsequently, James Rest built on Kohlberg’s work in several important ways. First, he created an easily administered assessment instrument, the Defining Issues Test (DIT), that presents ethical dilemmas and then measures the proportion of times an individual selects arguments to resolve the dilemma that appeal to each of three conceptually different moral frameworks.¹⁸ The DIT has been extensively validated, including studies showing links between high DIT scores and actual behavior such as clinical performance in nursing, medicine, and dentistry;¹⁹ likelihood of fraud detection by auditors;²⁰ and willingness to inform

¹⁴ *ibid.*, p. 12.

¹⁵ *ibid.*

¹⁶ *ibid.*, p. 14.

¹⁷ J. Rest and D. F. Narvaez (eds.), *Moral Development in the Professions*, Hillsdale, NJ: Lawrence Erlbaum Associates, Inc., pp. 1-3. One of the co-authors of the Carnegie Report, Anne Colby, co-authored with Kohlberg *The Measurement of Moral Judgment*, New York: Cambridge University Press, 1987; see also L. Kohlberg., *The Psychology of Moral Development: Moral Stages and the Life Cycle*, San Francisco, CA: Harper Row, 1984.

¹⁸ These three frameworks are: a personal interests (PI) framework; a maintaining norms (MN) framework; or a post-conventional (P) framework that is based upon moral ideals or principles. DIT scores indicate which framework predominates for the individual, whether the person is consolidated on a particular moral framework, or the extent to which an individual has difficulty distinguishing among arguments that represent each framework.

¹⁹ M.J. Bebeau, ‘The Defining Issues Test and the Four Component Model:

superiors or law enforcement of wrong-doing.²¹ Low DIT scores have been shown to correlate with disciplinary action in dentistry,²² and both disciplinary action and malpractice claims in medicine.²³

The moral reasoning measured by the DIT is not, however, a conclusive determinant of actual behavior. Rest therefore articulated what is known as the Four Component Model for explaining how cognition, affect and social dynamics interact to influence moral behavior.²⁴ He began by identifying four different possible reasons for moral failure:

1. Missing the moral issue
2. Defective moral reasoning
3. Insufficient moral motivation
4. Ineffective implementation

He then defined four corresponding capacities for moral action, each of which is necessary, but none by itself sufficient:

1. Moral sensitivity that can interpret the need for a moral decision
2. Clear ethical reasoning that can reach a morally defensible decision
3. Identity formation that will support the prioritization of the moral decision over competing interests
4. Competence to implement the moral decision

Contributions of Professional Education,' *Journal of Moral Education*, 2002, 31(3), 279-81.

²⁰ L.A. Ponemon and D.R.L. Gabhart, 'Ethical Reasoning Research in the Accounting and Auditing Professions,' in Rest & Narvaez, *Moral Development in the Professions*, pp. 101-18.

²¹ D. Arnold, D., & L.A. Ponemon, 'Internal Auditors' Perceptions of Whistle-Blowing and the Influence of Moral Reasoning: An Experiment,' *Auditing: A Journal of Practice and Theory*, 1991, 10, 1-15; R.A. Bernardi, 'Suggestions for Providing Legitimacy for Accounting Ethics Research,' *Issues in Accounting Education*, 2004, 19(1), 145-146.

²² M.J. Bebeau, 'Enhancing Professionalism Using Ethics Education as Part of a Dental Licensure Board's Disciplinary Action. Part I: An Evidence-Based Process,' *Journal of the American College of Dentists*, 2009, 76(2), 38-50.

²³ D.C. Baldwin, Jr., T.E. Adamson, Sheehan, D.J. Self, and A.A. Oppenberg, 'Moral Reasoning and Malpractice: A Pilot Study of Orthopedic Surgeons,' *American Journal of Orthopedics*, 1996, 25(7), 481-84. The phrases "high DIT scores" and "low DIT scores" in the text refer to scores indicating the proportion of times an individual indicates a preference for post-conventional moral arguments (called the "P score").

²⁴ M.J. Bebeau and V.E. Monson, 'Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education,' in D. Narvaez & L. Nucci (eds.), *Handbook on Moral and Character Education*, Hillsdale, NJ: Routledge, 2008, pp. 557-82.

The Carnegie Report's call for development of law students' professional judgment echoes Rest's first three capacities for moral action: "Law school graduates . . . 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 [Rest's first capacity]. They need wise judgment when values conflict [Rest's second capacity], as well as the integrity to keep self-interest from clouding their judgment [Rest's third capacity]."²⁵

Dr. Muriel Bebeau, a colleague of Rest, has developed a number of practical applications of Rest's Four Component Model for professional education. In fact, we have found that becoming familiar with Bebeau's work has greatly enhanced our understanding of both the critiques and the recommendations found in the Report. Accordingly, in the balance of this chapter we will be using Rest's Four Component Model as applied by Bebeau to explicate the Report's critique of the conventional American approach to teaching legal ethics and to analyze American innovations in teaching professional judgment now being implemented in the wake of the Report.

Bebeau's work indicates that a well designed curriculum can promote each of the four capacities in ways that are connected to professional behavior. Such educational programs:

1. Create sensitivity to ethical issues likely to arise in practice
2. Build the capacity for reasoning carefully about conflicts inherent in practice
3. Establish a sense of personal identity that incorporates professional norms and values
4. Develop competence in problem solving including necessary interpersonal skills

Some of the best evidence that these capacities can be effectively taught is found in the ethics curriculum developed by Bebeau at the University of Minnesota School of Dentistry in 1985 and widely adapted throughout American dental education.²⁶ Bebeau's work confirms that the capacity to identify issues that require professional judgment requires much more than just a mastery of professional conduct rules (although such knowledge is of course necessary). Equally critical is the ability to engage imaginatively as a situation unfolds, constructing various possible scenarios, often with limited cues and partial information, combined with the ability to foresee

²⁵ Report, p. 146

²⁶ This curriculum requires 44 contact hours (the equivalent of a one semester, 3 credit American law school course) spent primarily in small group instruction with an emphasis on performance, self-assessment and personalized feedback. Both high status professionals and full time faculty are involved in teaching the curriculum.

realistic cause-consequence chains of events.²⁷ Empathy and role-taking skills are often required, involving both cognitive and affective processes. Therefore, both teaching and assessment strategies must avoid reliance on what Bebeau calls “predigested” or already interpreted fact scenarios (of which the appellate cases used for conventional classes in American law schools are a prime example).²⁸ Significant increases in students’ scores on a dental ethical sensitivity test (similar to the DIT) provided evidence that profession-based ethical sensitivity, Rest’s first capacity for moral action, can be enhanced through instruction along the lines of Bebeau’s model.²⁹

Bebeau’s research also provided evidence that ethical sensitivity, the first capacity, is distinct from the second capacity, moral reasoning. Research has shown a great deal of variability among professional students in their ability to reason about moral issues, regardless of their level of ethical sensitivity.³⁰ In 33 studies of the effects of professional education, none showed significant increases in DIT scores without a carefully validated ethics curriculum.³¹ However, significantly increased DIT scores are produced by the use of small group dilemma discussions that require students to present criteria for well-reasoned arguments, exercising Rest’s second capacity, moral reasoning.³²

There is ample evidence that professionals are sometimes aware of the ethical implications of a situation, yet either fail to act or act in ways inconsistent with that awareness – evidencing a deficiency in Rest’s third moral capacity – prioritizing the ethical decision over other interests.³³ Research in moral psychology suggests that for professionals the key to the development of this third capacity is identity formation. Research indicates that differing levels of professional identity formation can be distinguished. Studies of professionals identified by their peers as moral exemplars reveal a common theme: these exemplars feel that actions that prioritize the needs of clients and society over the self are obligatory rather optional because of the unity of

²⁷ M.J. Bebeau, J.R. Rest, and C.M. Yamoore, ‘Measuring Dental Students’ Ethical Sensitivity,’ *Journal of Dental Education* 1985, 49, 225-35.

²⁸ Bebeau & Monson, ‘Guided by Theory, Grounded in Evidence.’

²⁹ M.J. Bebeau, ‘Evidence-Based Character Development,’ in N. Kenny and W. Shelton (eds.), *Lost Virtue: Professional Character Development in Medical Education, Volume 10 (Advances in Bioethics)*, Oxford, UK, Elsevier Ltd., 2006, pp. 47-86.

³⁰ Bebeau, ‘The Defining Issues Test and the Four Component Model.’

³¹ *ibid.*

³² *ibid.*, p. 282.

³³ For example, while approximately 40% of Scottish medical students in one study said they should report misconduct, only 13% of the same group said they actually would do so. Bebeau & Monson, ‘Guided by Theory, Grounded in Evidence.’ Sixty-five percent of US medical students in another study expressed discomfort at challenging other members of the medical team over wrongdoing. *ibid.*

their sense of self with the profession's moral values.³⁴ Research has also shown that, although a professional's moral identity formation can be facilitated during professional school, students do not internalize the norms of a profession from an educational environment simply by osmosis. Deliberate teaching about professional norms is required, combined with examples of exemplary professionals and a system to promote student self-reflection about their own professional identity formation over the course of their education.³⁵

Although the ability to identify ethical issues (the first capacity), to reason to the contextually appropriate decision in the face of conflicting values (the second capacity), and to internalize professional identity to motivate moral commitment (the third capacity), are all necessary to the exercise of professional judgment, actual and effective implementation, the fourth capacity, is also required. Bebeau points out that the professional cannot stop with “what is happening” [the first capacity] and “what ought to be done” [the second capacity], but must always consider questions such as “what should I say” and “how should I say it?” Therefore, the teaching strategies developed by Bebeau for addressing the fourth capacity, implementation, require students to develop action plans and even specific dialogue for resolving tough problems.³⁶

Illustrating Rest's Model of Moral Behavior with the Story of Charles Swift

The unscripted reflections in the National Public Radio interview of Lt. Commander Charles Swift on his representation of Hamdan illustrate vividly the interconnected dynamics of Rest's four capacities of ethical sensitivity, moral reasoning, professional identity, and effective implementation. The quote that begins this chapter illustrates how his ethical sensitivity was immediately alerted when he learned of the unusual conditions of his appointment. Swift also realized that difficult moral reasoning was required: “I asked myself some very hard ethical questions. And I came back with the answer that .. A, maybe he wants to plead guilty, and I don't know; and B ... if I can offer him another choice, if there's something else other than plead guilty ... then I see that I can do this ethically.”³⁷

³⁴ J.T. Rule and M.J. Bebeau, *Dentists Who Care: Inspiring Stories of Professional Commitment*, Chicago, IL, Quintessence Publishing Co., Inc., 2005. Carnegie Report co-author Anne Colby has written one of the leading studies of such moral exemplars. A. Colby and W. Damon, *Some Do Care: Contemporary Lives of Moral Commitment*, New York: Macmillan, 2002. Rule and Bebeau patterned their study of moral exemplars in the dental profession after the Colby and Damon study.

³⁵ For a review of this research see M.J. Bebeau and V.E. Monson, in A. McKee and M. Eraut (eds.) *Professional Learning Over the Life Span: Innovation and Change*, New York, Springer, forthcoming 2010.

³⁶ Bebeau & Monson, ‘Guided by Theory, Grounded in Evidence.’

³⁷ National Public Radio, ‘Navy Lawyer Discusses Hamdan, Guantanamo.’

Swift could have followed orders, ignoring the insights of his ethical sensitivity and moral reasoning, or could have declined to represent Hamdan at all, passing the dilemma on to the next military lawyer assigned to Hamdan. But instead, Swift's internalized professional identity powerfully motivated him to act on the results of his moral reasoning. When Swift tells the interviewer that he did not think about the consequences to his career but rather that "this is the ethical way that I can do my job," the interviewer seems almost startled as he echoes back Swift's words:

Interviewer: Ethical way you can do your job?

Swift: Exactly. I mean, I couldn't sit down there - as a defense attorney, if I'd been assigned to zealously represent somebody, if I was going to be their defense counsel, I couldn't be there to force a man to plead guilty when he didn't want to plead guilty. ... [F]ollowing an order that you believe to be absolutely unconstitutional without challenging it when you're in a position to do so, I saw as simply wrong. This was the ethical way to carry out my duties.³⁸

To implement his professional judgment, Swift not only needed to develop a litigation strategy that could address the extraordinary constraints of his client's detention at Guantanamo Bay, but even perhaps more challenging, he needed superb client relationship skills in order to gain the trust of his client:

And so when I went down to meet with Hamdan, I went down and said ... they would like you to plead guilty. They haven't said to what, and they haven't said what kind of time you'd do. And they have said they can keep you after you plead guilty and that you by no means would ever be released. But I can offer you an alternative, and that is to sue in federal court. And I explained why I thought the law of war, the Constitution and other law applied here, and his answer to me was that the guard said there was no law in Guantanamo. It didn't exist. And I said to him, you know, I don't believe that, but perhaps ... we're going to have to go the United States Supreme Court and win that. And you know, he ultimately agreed to that level of representation, and that began a three-year odyssey that got us to the Supreme Court, where we won.³⁹

The Carnegie Critique and Rest's Model of Moral Behavior

Before the Carnegie Report, the typical approach to ethics and professionalism by American law schools was to require students to take a single course on

³⁸ *ibid.*

³⁹ *ibid.*

“professional responsibility” that covered the American Bar Association’s Model Rules of Professional Conduct.⁴⁰ At many law schools, this was the only required course after the first year. The Report describes this typical ethics course as teaching “the law of lawyering.”⁴¹

[S]tudents learn the profession’s ethical code as represented in the [ABA] Model Rules, how those rules have been interpreted and applied, and the circumstances under which sanctions have been imposed. ... Often these courses are structured around legal cases that concern alleged violations of the Model Rules. Students apply their analytical skills to these cases, approaching them in much the same way they have learned to approach challenging legal cases in torts or contracts.⁴²

Although courses on the law of lawyering might seem adequate to teach the students sensitivity to ethical issues (the first capacity for moral action in Rest’s model), the Report echoes Bebeau’s view that ethical sensitivity cannot be effectively taught using only “pre-interpreted” factual scenarios such as presented in decided cases.

[Teaching ethics through the law of lawyering] misses an important dimension of ethical development – the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice.⁴³

The Report raises an even more serious concern that the “law of lawyering” approach may actually be counterproductive to the formation of the capacity for ethical sensitivity required for professional judgment.

⁴⁰ The American Bar Association (ABA), which serves as the accrediting agency for most law schools in the United States, requires that during the three years of post-graduate law school that constitute American legal education students take a course in professional responsibility. This requirement has been in place since the mid 1970s. Course coverage must include the ABA’s Model Rules of Professional Conduct (Model Rules or “MRs”), approved by the ABA’s governing body, the House of Delegates, with the intent that the states, which actually regulate attorney conduct, will adopt them. In addition to the influence of the ABA accreditation standards, all but one state require as a condition of law licensure that the applicant pass the Multistate Professional Responsibility Examination (MPRE), a 60 question multiple choice test administered by the National Conference of Bar Examiners largely based on the Model Rules.

⁴¹ However, a number of law schools have either developed alternative curricular methods for meeting the ABA’s requirement or teach considerably more than just “the law of lawyering” in their legal ethics course.

⁴² Report, p. 148.

⁴³ Report, p. 149.

When legal ethics courses focus exclusively on teaching students what a lawyer can and cannot get away with, they inadvertently convey a sense that knowing this is all there is to ethics. ... [Thus] [b]y defining 'legal ethics' as narrowly as most legal ethics course is do, these courses are likely to limit the scope of what graduates perceive to be ethical issues.⁴⁴

The conventional "law of lawyering" course also failed to engage with the second capacity, moral reasoning. The Report cites several studies showing that students who completed a traditional ethics course did not show significantly more sophisticated moral reasoning, as measured by DIT scores, at the end of the course than at the beginning. The most thorough of these studies, however, indicates that a law school course built around small group discussions of realistic ethical dilemmas that cannot be resolved by legalistic application of the Model Rules *can* produce very significant increases in DIT scores.⁴⁵ The Report thus concludes that "research makes quite clear that higher education can promote the development of more mature moral thinking," and that specially designed courses on professional responsibility and legal ethics do support that development. However, for most students, traditional legal ethics courses did not contribute to greater development of moral reasoning.⁴⁶

The Report concludes its critique of American law schools' traditional Model Rules-based ethics courses with a focus on the third and fourth capacities required for moral action: formation of professional identity and competence to implement a moral decision. Once again, the authors summarize what has been learned in other professions and from the social sciences to set an aspirational standard for legal education:

[W]hat kinds of pedagogies and assessment procedures are effective in developing professional dispositions and good judgment [?] ... [C]ritical analysis of students' own experience in both simulated and actual situations of practice, including expert feedback, is a pedagogical process with enormous power ... [C]ross-professional comparison indicates that although difficult, it is not impossible to systematically provide feedback to students about both their understanding of and performance with regard to the ethical norms of the profession. The analogous clinical training in the health professions and for the clergy offers useful models. ... The key components are close working relationships between students and faculty,

⁴⁴ Report, p. 149; B. Green, 'Less is More: Teaching Legal Ethics in Context,' *William & Mary Law Review*, 1998, 39, 362 n. 29 ("Students have a tendency to think that insofar as professional obligations are left to be interpreted and enforced by individual lawyers at the level of conscience, these obligations are not taken seriously by the law or the legal profession, and so need not be taken very seriously by lawyers or law students.").

⁴⁵ S. Hartwell, 'Promoting Moral Development Through Experiential Teaching,' *Clinical Law Review*, 1994-95, 1(1), 505.

⁴⁶ Report, p. 134.

opportunity to take responsibility for professional interventions and outcomes, and timely feedback. Unless law schools can provide the proper opportunities, however, little such formation is likely to occur.⁴⁷

Unfortunately, the conventional legal ethics course, by focusing on whether conduct could result in discipline or civil liability, unintentionally appeals primarily to narrow self-interest – the desire to avoid punishment – rather than encourage development of a mature professional identity in which lawyers feel they must act consistently with sound professional judgment because their professional and personal identities have become intertwined.

In addressing Rest's fourth capacity, effective implementation, the Report provides this concise paraphrase: "the 'bottom line' [is] ... not ... what [students] know but what they can do. They must come to understand thoroughly so they can act competently, and they must act competently in order to serve responsibly."⁴⁸ Students in the traditional legal ethics course take the role of observer rather than actor. According to the Report, to build the fourth capacity, teaching and assessment must instead "take place in role rather than in the more detached mode that the law-of-lawyering courses typically foster."⁴⁹

For the authors of the Report, the development of the professional judgment required of all lawyers cannot be left to a single course, but should be the motivating goal of the entire three-year curriculum which allows development of all four of Rest's capacities for moral action:

The framework we propose seeks to mediate between the claims for legal theory and the need of practice, in order to do justice to the importance of both while responding to the demands of professional responsibility. ... [The process of developing both theoretical and practical knowledge in a mutual relationship] will progress best when it is directed by a focus on the professional formation of law students. ... In short, we propose an integration of student learning of theoretical and practical legal knowledge and professional identity.⁵⁰

The Report suggests that such an integrated program of legal education could begin in the first phase with "well-designed lawyering courses ... taught as intentional complements to doctrinal instruction." Then "this experience of complementarity would continue in the second and third years as a gradual development of practice knowledge

⁴⁷ Report, p. 177-78.

⁴⁸ Report, p. 23.

⁴⁹ Report, p. 178.

⁵⁰ Report, p. 12-13.

and skill, beginning in simulation and moving into actual responsibility for clients.”⁵¹ Put another way, a reformed law school curriculum would require students to spot issues and develop ethical sensitivity; would then require them to engage in moral reasoning, in role; and finally would require them to take on the professional identity of attorney and implement their moral judgment in the carefully supervised representation of actual clients.

Innovations in American Legal Education after the Carnegie Report

In December 2007, nine months after publication of the Carnegie Report, “[b]elieving that this is a critical moment for the future of legal education,” deans and faculty representatives from ten American law schools gathered in Palo Alto, California, for a meeting convened by the lead author of the Report, William Sullivan, and Associate Dean Lawrence Marshall of Stanford Law School.⁵² Out of that meeting three working groups were formed. Eighteen months later, in March 2009, this consortium of law schools – now named the Legal Education Analysis and Reform Network (LEARN)⁵³ – announced a detailed program of action intended to “maintain and enhance the momentum for law schools across the country” to create a “wider array of learning environments” including simulations and clinical work and to further integrate the teaching of substantive knowledge, legal skills, and professional values.⁵⁴ Noting that 2010 will be the 100th anniversary of the Carnegie Foundation’s Flexner Report that helped transform medical education, the LEARN group concluded that “now, one century later, again with the involvement of the Carnegie Foundation for the Advancement of Teaching, we have a spectacular opportunity to effect dramatic and much-needed changes in legal education.”⁵⁵

⁵¹ Report, p. 195.

⁵² The ten law schools represented were the City University of New York, Georgetown, Harvard, Indiana University (Bloomington), New York University, Southwestern, Stanford, University of Dayton, University of New Mexico, and Vanderbilt. Several of these schools are routinely listed among the top ten in the United States. A number of consultants on legal education, including one of the authors of this chapter, were also invited to the meeting.

⁵³ The March 2009 announcement acknowledged that the list of ten schools comprising the LEARN consortium was “substantially under-inclusive” and that “many other law schools are also deeply engaged” in rethinking their curricula in light of the Carnegie Report. The announcement indicated the expectation that the network would grow to include more schools who are also committed to the goals articulated by the LEARN group. Legal Education Analysis and Reform Network (LEARN) (2009). Available at http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf (accessed 14 August 2009).

⁵⁴ *ibid.*

⁵⁵ *ibid.*

Clinical Education at Stanford Law School

At the time of the LEARN meeting, Stanford, under the leadership of Dean Larry Kramer, was in the midst of a major reshaping of its upper level curriculum with a strong focus on expanding and deepening clinical teaching.⁵⁶ In a 2006 press release describing the new approach as the “3D JD,” Dean Kramer had said:

Talk to any lawyer or law school graduate and they will tell you they were increasingly disengaged in their second and third years. It's because the second and third year curriculum is for the most part repeating what they did in their first year and adds little of intellectual and professional value. They learn more doctrine, which is certainly valuable, but in a way that is inefficient and progressively less useful.⁵⁷

Stanford has not only added two new clinics and created a dean-level position for “Public Interest and Clinical Education,” but has developed a “clinical rotation” where students take only a clinic during a particular term — with no competing exams or classes. This innovation is intended to “mirror the way that medical students have been trained as doctors for the past century. The clinical rotation will enable the school to deliver a much more intensive experience, including a better professional ethics component”⁵⁸

It is significant that Stanford has chosen to justify its new clinical rotation as modeling medical education in providing a more “intensive” experience that provides “a better professional ethics component” than what is currently offered by most American law schools. The Carnegie Report also emphasizes the value of clinical education, not merely in terms of skills development, but in the formation of professional identity, and does so by reference to medical education: “[where] beyond the inculcation of knowledge and the simulation of skills, it proves to be the assumption of responsibility

⁵⁶ Several of the other schools in the LEARN consortium have been at the vanguard of the clinical education movement for decades. New York University and Georgetown have long distinguished themselves among top-ranked law schools in the number of faculty members involved in clinical teaching and the variety and range of offerings. The City University of New York and the University of New Mexico are among the few law schools that require all students to take a clinical course before graduation. According to data collected in 2001-2002, approximately thirty-five percent of students at ABA-accredited U.S. law schools participated in an in-house clinical course before graduation. P.A. Joy, ‘The Ethics of Law School Clinic Students as Student Lawyers,’ *South Texas Law Review*, 2003-2004, 45, 822.

⁵⁷ Stanford Law School, ‘A ‘3D’ JD: Stanford Law School Announces New Model for Legal Education,’ November 28, 2006. Available at <http://www.law.stanford.edu/news/pr/47/> (accessed 15 January 2010).

⁵⁸ *ibid.*

for patient outcomes that enables the student for the first time to fully enter and grasp the disposition of a physician.”⁵⁹ The Report views such guided “real world” experience as providing genuine content to hortatory lessons about professional purpose, fueling the motivation to give greater priority to the client than one’s own self and forcing students to reflect on their own identity as lawyers. “Compassion and concern about injustice become much more intense when students develop personal connections with those who have experienced hardship or injustice. This has been a persistent theme among students in some of the clinical courses we observed.”⁶⁰ Well-taught, intensive clinical experiences are designed not only to promote the third ethical capacity of Rest’s model – moral commitment – in ways and to a degree not found elsewhere in the law school curriculum, but, as pointed out by the Report, they can also develop the critical fourth capacity – moral implementation. “It is in these situations of intensive analysis of practice that the fundamental norms and expectations that make up professional expertise are taught. They are reinforced by the feedback that students receive as they attempt various approximations to expert practice.”⁶¹

The effectiveness of traditional law school clinics has been questioned, though, as to the development of ethical sensitivity.

A problem with the clinical setting for addressing ethical and moral issues . . . is that the primary focus of clinic activity is solving the client’s legal problems rather than examining ethical questions. Students often miss these questions in the hurly-burly of drafting a complaint or getting ready for a hearing. Ethical issues in the clinic setting arise haphazardly and cannot be anticipated, so the clinic course cannot be relied upon to raise specific ethical questions.⁶²

Stanford’s new clinic initiative offers an unusual solution to this critique by offering a parallel course on ethics and professional responsibility exclusively for students enrolled in nine of the law school’s clinics. These students act as the clinics’ collective ethics committee, much in the same way that many law firms have an ethics committee to resolve issues referred by members of the firm. Each week, the course’s teacher, Associate Dean Lawrence Marshall, who is also the co-convenor of the LEARN consortium, presents a real ethical issue that has arisen in the clinics. Students must work through the issue, applying the rules of professional conduct when appropriate, and come to an actual decision, which the clinics then implement. When a useful ethical problem has not arisen during a particular week, the students tackle an ongoing

⁵⁹ Report, p. 160.

⁶⁰ Report, p. 146.

⁶¹ Report, p. 10-11.

⁶² D. Turner, ‘Infusing Ethical, Moral, and Religious Values Into a Law School Curriculum: A Modest Proposal,’ *University of Dayton Law Review*, 1998-1999, 24, 292-293.

policy question facing the clinics, concerning the clinics' conflict-of-interest rules or intake guidelines, for example. Because Marshall draws on a pool of nine clinics for real-life ethical dilemmas, and because he has prepared a set of policy issues as fall-backs, the course exposes students to a broad range of ethical questions, not limited by the haphazard nature of clinical practice, and provides structured guidance for students as they reason to a moral conclusion.

To the extent that Marshall is not also directly supervising the clinical case under discussion, his separate role also addresses a concern that the clinical setting may not promote moral reasoning, Rest's second component. Steven Hartwell, who is both an experienced clinical teacher and one of the few American law professors to apply principles of moral psychology to teaching ethics,⁶³ has pointed out the danger of the "persuasion mode" of instruction in clinics, in which the clinical supervisor "attempt[s] to convince [his or her] students" to take the course that the instructor deems ethical, rather than guiding the students through their own process of moral reasoning.⁶⁴ Marshall's separation from the role of supervisor, and explicit responsibility for promoting class deliberation over difficult issues, creates superb opportunities for blending moral reasoning with issues of professional identity and effective implementation.⁶⁵

A number of other American law schools are experimenting with ways to integrate the teaching of professional judgment with real-life educational experiences. One such experiment is described in another chapter in this book by David Chavkin – an experienced clinical teacher at American University's Washington College of Law. Rather than add a legal ethics class to accompany one or more existing clinical courses, Chavkin has expanded his professional responsibility course by one credit hour to add a modest client representation component in which students provide assistance in drafting wills and advance directives regarding end-of-life medical

⁶³ Hartwell, 'Promoting Moral Development Through Experiential Teaching,' 505.

⁶⁴ S. Hartwell, 'Moral Development, Ethical Conduct, and Clinical Education,' *New York Law School Law Review*, 1990, 35, 131.

⁶⁵ In the mid-1990s there were also experiments with having a legal ethics teacher offer a parallel course to clinic students to analyze ethical issues arising from their cases. See, e.g., T. Shaeffer, 'On Teaching Legal Ethics in the Law Office,' *Notre Dame Law Review*, 1995, 71, 613 (describing an ethics seminar at Notre Dame Law School in which students in the school's legal aid clinic were "asked to decide - decide - whether to reveal information to a lawyer on the other side, or the child protective office in the welfare department, or the judge. Revelation or silence may become irrevocable within hours of the time the seminar adjourns."); Luban, D. and Millemann, M., 'Good Judgment: Ethics Teaching in Dark Times,' *Georgetown Journal of Legal Ethics*, 1995-96, 9, 64-85 (describing in particular the role of the ethics teacher, Luban, in enabling students to openly discuss ethical issues raised by various courses of action proposed by the professor supervising the clinical work, Millemann).

treatments.⁶⁶ At Mercer University's law school, an upper-level externship course has been restructured to make "formation of professional identity the primary educational goal through readings, reflections, discussions, and exercises."⁶⁷ A new law school at the University of St. Thomas in Minneapolis has developed a very ambitious program in which every student is required to participate in a Mentorship Externship Program, involving more than 550 lawyers and programs, which is also specifically focused on professional identity formation.⁶⁸

Legal Ethics in the First Year at Indiana University School of Law

At the November 2007 meeting that founded the LEARN Consortium, the law school at Indiana University (Bloomington) announced that effective in the 2008-2009 academic year it would move the required legal ethics course into the core first year curriculum with the same four credit hours as such venerable subjects as Torts, Contracts and Property. In making this significant change to the almost canonical first year of American legal education, the Indiana faculty wanted to "send a clear and unambiguous signal ... that the ethical practice of law is a foundational value that will affect [students'] long-term job satisfaction, reputation, and career advancement ... instill a deep appreciation for ethics and professional values, and equip our students with the perspective and judgment to eventually become leaders in the profession."⁶⁹ The faculty also hoped that their innovative course "could become the gold-standard through[out] the legal academy."⁷⁰ The Carnegie Report's critique of conventional teaching of legal ethics was explicitly cited as a justification for this innovation.

At least 50% of the curricular content of this new first year course goes beyond doctrinal analysis of legal ethics,⁷¹ focusing primarily on precisely those pedagogic strategies identified by Bebeau for developing professional identity formation: deliberate teaching about professional norms, examples of exemplary professionals, and a system to promote student self- reflection about their own identity formation. Building on Indiana's strong tradition in social science approaches to the study of law, the course

⁶⁶ D.F. Chavkin, 'Experience is the *Only* Teacher: Bringing Practice to the Teaching of Ethics,' [chapter citation in this book].

⁶⁷ T.W. Floyd, 'Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity,' *Mississippi Law Review*, 2009, 339, 351. This externship course builds upon Mercer's innovative first year course on the legal profession, described below at text accompanying note 85, *infra*.

⁶⁸ N. Hamilton and L.M. Brabbitt, 'Fostering Professionalism through Mentoring,' *Journal of Legal Education*, 2007, 102.

⁶⁹ Indiana University Maurer School of Law, 'Proposal for New One-L Legal Professions Course,' *Memorandum from Committee on Professionalism in the Curriculum* (April 4, 2007), 6, 10.

⁷⁰ *ibid.*, p. 10.

⁷¹ *ibid.*, p. 2.

begins with “an accurate, systematic, and factually rich introduction to the structure and substance of the modern legal profession.”⁷² Distinctive to this overview of the legal profession is careful analysis of a variety of specific practice settings — e.g., family law, criminal defense, personal injury, large law firm, in-house counsel, prosecution, public interest -- using carefully edited ethnographies, with an exploration of “the ethical problems that can predominate” in each form of practice.”⁷³ Woven into this review and analysis of specific practice settings is exposure to theories of professionalization as well as a comparative study of the legal profession in other countries.⁷⁴

Each student is assigned to a “Practice Group,” a unit of six or seven students who are assigned to several group projects during the course of the semester which culminate in formal presentations to the entire class.⁷⁵ Indiana reports that it designed these complex group projects in consultation with experts at the Carnegie Foundation in particular to teach “professionalism.”⁷⁶ The course website informs students that although “careful, precise legal analysis is an important element of effective lawyering ... success as a lawyer - or more broadly, as a professional - also requires a wider array of abilities and perspectives.”⁷⁷ The website continues: “ Virtually every law firm partner, government agency supervisor, public interest lawyer, or corporate general counsel can recount examples of lawyers who, despite stellar ‘law review’ credentials, failed to progress professionally and eventually left the organization. Conversely, when lawyers reflect upon truly great lawyers who have influenced their careers, descriptions often encompass traits such as character, integrity, diligence, discretion, kindness, judgment, wit, communication, empathy, and creativity ...”⁷⁸

The first project requires each group to distill from a series of readings up to three attributes of a successful young lawyer and to propose ways that those attributes could be acquired or fostered during law school. The pedagogical method not only requires students to talk about such traits as diligence, communication and creativity but to put them into practice through the group dynamics of the activity. Each student is

⁷² *ibid.*

⁷³ *ibid.*, p. 3.

⁷⁴ *ibid.* This approach is consistent with the following advice from Bebeau: “In my experience, one needs to begin an ethics curriculum by exploring the role of the lawyer in society. Without developing some kind of ground rules on ethical expectations, working on ethical reasoning can become a very time-consuming process as much time can be spent on whether or not professionals have particular duties.” Email correspondence with authors dated December 16, 2009.

⁷⁵ Indiana University Maurer School of Law, ‘The Legal Profession: Spring 2009,’ Course website available at <http://www.law.indiana.edu/instruction/profession/> (accessed 15 January 2010).

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

required to reflect critically about both the student's own role within the group and the performance of other group members. In particular students must discuss noteworthy contributions of individual group members that contributed to the success of the group, such as "displays of ... humility, intellectual courage ... empathy ... perseverance ... and fair-mindedness."⁷⁹

A variety of different topics is assigned for the second and third group projects. Common to all of the third group projects is the presentation of a detailed hypothetical problem which requires students to identify ethical issues and propose an appropriate course of action; all of these projects are "imbedded in a practice environment that students have just learned about."⁸⁰ As discussed above, such small group discussion of moral dilemmas that go beyond legalistic application of the "law of lawyering" have been shown to develop moral reasoning, as measured by DIT scores, whereas other pedagogical methods, including conventional legal ethics courses, have no measurable effect.⁸¹

The final group project involves interviewing a practicing lawyer and preparing a group report to the class on that lawyer's professional development and experience in handling challenging problems of professional judgment. These interviews are then reinforced by "Practice Forums" in which lawyers who represent the various practice areas studied in the course appear as guest speakers to the entire class.

In the academic year following the introduction of Indiana's first year course, two other American law schools added required courses on the legal profession to their first year curriculum. The new law school at the University of California at Irvine – intended to be "the first top-tier American law school founded in more than 50 years"⁸² – requires all first year students to take 2 credits of "Legal Profession" in both the first and second semesters. This course, like the class at Indiana, not only teaches legal ethics but also provides instruction on the economics and sociology of the legal profession.⁸³ The law school at the University of Minnesota has added a required course on "Practice and Professionalism" to the second semester of the first year, but the course differs from both the courses at Indiana and Irvine in that it does not take the place of an upper-level required course in legal ethics and incorporates a number of simulation exercises.⁸⁴

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ Hartwell, 'Promoting Moral Development Through Experiential Teaching,' 1994-95.

⁸² R.M. Zahorsky, 'Irvine by Erwin: Can a Top Legal Academic Create a Law School That is Both Innovative and Elite?' *American Bar Association Journal*, August 2009, 46, 47.

⁸³ University of California at Irvine School of Law, First Year Curriculum. Available at <http://www.law.uci.edu/registrar/curriculum.html> (accessed 22 January 2010).

⁸⁴ N. Cook, 'University of Minnesota Law School's Practice and Professionalism Course: Story Exchange Exercise,' presented at Fall 2009 Workshop of the National Institute for

Also worthy of note is the first year course on the legal profession added to the required curriculum at the Mercer Law School in 2004; this three credit course, which does not replace the upper level course in legal ethics, is designed to enable to students to learn: (1) a vocabulary and structure for understanding “what professionalism means for lawyers,” (2) about the pressures that lead lawyers to engage in unprofessional conduct, (3) how expectations of professionalism are promoted and enforced, and (4) the connection between professionalism and students’ own personal sense of fulfillment.⁸⁵

The Experiential Third Year at Washington & Lee School of Law

Probably the most ambitious educational innovation that has been implemented in the United States since the publication of the Carnegie Report is taking place at a law school that is not a member of the LEARN consortium. In March 2008 the Washington and Lee University School of Law -- more than 150 years old and ranked by U.S. News & World Report among the top 30 law schools in the USA -- announced that it was “embarking on a dramatic revision of its law school curriculum, entirely reinventing the third year to make it a year of professional development through simulated and actual practice experiences.”⁸⁶ In that announcement, Dean Rodney Smolla described the new third-year curriculum as “a creative blend of intellectually rigorous study of legal theory and doctrine ... with the development of professional identity, ethical sensibilities, problem-solving, and the exercise of judgment in action.” He also explicitly invoked the Carnegie Report as “forcefully explain[ing]” that the traditional American legal education provides “an incomplete vision of what it should need to prepare a lawyer for the profession.” When later interviewed by the American Bar Association in September 2009, Smolla provided the following explanation for this initiative:

We thought we were superb at teaching students to think like lawyers. But

Teaching Ethics and Professionalism. Webcast available at <http://law.gsu.edu/niftep/WorkshopF09-Program.htm> (accessed 22 January 2010). See also B. McDonnell, ‘Curricular Reform,’ presented at 2008 International Conference on the Future of Legal Education. Available at <http://law.gsu.edu/FutureOfLegalEducationConference/Papers/McDonnell.pdf> (accessed 22 January 2010).

⁸⁵ P.E. Longan, ‘Teaching Professionalism,’ *Mercer Law Review*, 2009, 60:2, pp. 659, 664. Another important experiment has been the Legal Skills course taught over the first two years at the William and Mary Law School since 1988 in which legal ethics, legal writing and a number of lawyering skills are integrated together. J.E. Moliterno, ‘Teaching Legal Ethics In a Program of Comprehensive Skills Development,’ *Journal of the Legal Profession*, 1990, 15: 145.

⁸⁶ Washington and Lee, ‘Third Year Reform. Washington & Lee School of Law.’ Available at <http://law.wlu.edu/thirdyear/> (accessed 15 January 2010).

to be like lawyers? We were only scratching the surface. Extremely bright students had very little sense of the complexities of client counseling, of working with opposing counsel – and they had no sense of judgment.⁸⁷

In an article he authored for Legal Times, when Smolla described the "core intellectual experiences in the third-year," the first attribute he ascribed to the new curriculum was that it "will require students to exercise professional judgment."⁸⁸

The new third year consists of two 12-week semesters consisting of 14 credit hours each. Each semester begins with a two-credit course that takes up the entire first two weeks, immersing students in practice-intensive training in both transactional and dispute resolution skills. The remaining 10 weeks of each semester consist of two five-credit experiential courses – practicums, clinics or externships – plus one credit for a professionalism program that extends over both semesters (for a total of two credits) and one credit for "law-related service" such as working on student-edited law reviews, moot court, community service or pro bono representation.

Although students will have already taken a course in professional responsibility during their second year, the third year professionalism program (currently taught by Dean Smolla) continues to "develop ethical judgment in context and in action" by presenting students "with simulated practice conundrums in which ethical judgment must be exercised in simulated, real-world environments."⁸⁹ The professionalism program also seeks to promote the development of professional identity "beyond mere adherence to disciplinary ethics rules" and to address the challenges that "arise in managing one's life as a lawyer."⁹⁰

Washington & Lee's catalog lists three ten-credit, year-long clinics and one five-credit clinic that could be taken for either one or both semesters, as well as one ten-credit, year-long externship and four one-semester five-credit externships. (Thus, like Stanford, Washington & Lee is creating a number of more intensive clinic experiences than typically found at an American law school.) Although some students may spend the majority of their third year in a combination of clinic and externship, it appears that for most students the heart of the third year experience will consist of taking a number of the 23 practicums listed in the 2009-2010 law catalog. In the announcement of the new program, Washington & Lee insisted that any course subject typically taken in the third

⁸⁷ L.A. Gordon, 'Rodney Smolla: Running a New Play.' 2009. Available at http://www.legalrebels.com/profiles/rodney_smolla_running_a_new_play (accessed 15 January 2010).

⁸⁸ R. Smolla, 'We're Preparing 3Ls for Professional Life: New Curriculum at Washington and Lee Aims to Give Students Practical Experiences.' Available at <http://law.wlu.edu/news/storydetailpr.asp?id=420> (accessed 15 January 2010).

⁸⁹ Washington and Lee, 'Third Year Reform. Washington & Lee School of Law.'

⁹⁰ *ibid.*

year of a traditional law school curriculum can be offered “through a practicum course with no fall off in breadth of coverage or intellectual depth or rigor.”⁹¹ And indeed 19 of the practicums listed in the catalogue appear to correspond with traditional subject matter topics.⁹²

Nonetheless, the school appears to be making a serious effort to teach both practical skills and professional judgment while also providing subject matter coverage.⁹³ The advanced family law practicum, for example, is described as involving seven different simulated lawyering activities⁹⁴ and thus in the process “emphasizes the

⁹¹ *ibid.*

⁹² The subject areas addressed by these 19 practicums are appellate advocacy, bankruptcy, business planning, business tax planning, civil litigation, corporate counsel, criminal practice, e-commerce, entertainment law, family law, federal energy regulation, fiduciary litigation, higher education, intellectual property, jury advocacy, labor and employment law, patent law, sports law, and torts and insurance.

⁹³ A new law school in Arizona, the Phoenix School of Law, has introduced a six-credit, one semester course required of all third year students that integrates the teaching of professional values with thirteen different professional skills. S. Gerst and G. Hess, Professional Skills and Values in Legal Education: The GPS Model, *Valparaiso University Law Review*, 2009, 43, 513-57. The Pierce Law School in New Hampshire has collaborated with the state supreme court, state bar, and the state bar examiners to develop a two-year ‘honors’ curriculum for selected students that combines simulation, externship and clinical teaching; “issues of ethics and professionalism are integrated into the fact pattern” of the simulations. J.B. Garvey and A.F. Zinkin, Making Law Students Client-Ready: A New Model in Legal Education, *Duke Forum for Law & Social Change* 2009, 1, 101-29, 123. Students who successfully complete the program are admitted to practice in New Hampshire immediately upon graduation without being required to take the conventional bar examination. L.S. Dalianis and S.M. Sparrow, New Hampshire’s Performance-Based Variant of the Bar Examination: The Daniel Webster Scholar Program, *The Bar Examiner*, November 2005, 23-26; For other examples of using skills simulation exercises to teach professional judgment see R.P. Burns, Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism, *Law & Contemporary Problems* 1995, 58, 37-50; C.B. Liebman, The Profession of Law: Columbia Law School’s Use of Experiential Learning Techniques to Teach Professional Responsibility, 58 *Law & Contemporary Problems* 1995, 58, 73-86; C.D. Cunningham, ‘How Can We Give Up Our Child?’ A Practice-Based Approach to Teaching Legal Ethics, *The Law Teacher: The International Journal of Legal Education* 2008, 42, 312-28; C.D. Cunningham, How to Explain Confidentiality?, *Clinical Law Review* 2003, 9, 579-621.

⁹⁴ These activities are negotiating a prenuptial agreement, representing the intended father in a surrogate parenting arrangement, oral argument in a contested custody proceeding between a biological father and a surrogate mother, representing a surviving family member before the federal fund established for the victims of 9/11, preparation of a legal memorandum to characterize stock funds as marital property, preparation of

art of lawyering ... and explore[s] the roles and relationships between attorneys and clients – and between attorneys, senior partners, judges, and opposing counsel.” The course description further states that students “will consider the potential effects of... ethical rules” and will specifically consider “how ethical doctrines like confidentiality may constrain their choices in representing a client.” By embedding ethical issues in realistic and complex fact patterns, set in a variety of subject-matter courses, these practicums offer great potential for developing sophisticated ethical sensitivity, described by Bebeau as “the ability to engage imaginatively as a situation unfolds, constructing various possible scenarios, often with limited cues and partial information, combined with the ability to foresee realistic cause-consequence chains of events.”⁹⁵

In addition to the 19 “subject matter” practicums, the catalog also identifies four one-semester, five-credit courses in “transnational” human rights that combine elements of practicums, externships and clinics. For example, students in the Transnational Access to Justice course will partner with a law school in Liberia, including two weeks spent in that country, working on access to legal aid in the criminal justice system. Students in the European Court of Human Rights course will work with a law school in Serbia representing disadvantaged persons there, and will travel to Belgrade and the Court of Human Rights in Strasbourg as part of the course. These courses, along with the more traditional clinics and externships in the third year curriculum, can provide important experience in implementing professional judgment and in development of moral commitment.⁹⁶

Enthusiasm for the new program among current students is high. Even though the new third-year program is not scheduled to become mandatory for all students until the 2010–2011 academic year, as early as the 2009–2010 academic year two-thirds of

affidavit in support of a motion for support, and negotiation of a divorce settlement.

⁹⁵ Bebeau, Rest, and Yamoore, ‘Measuring Dental Students’ Ethical Sensitivity.’ Such practicum courses can be seen as fulfilling the vision of one of America’s leading experts on legal ethics, Deborah Rhode, who has advocated for more than two decades the “pervasive” teaching of legal ethics throughout the curriculum and developed extensive materials for use in a wide variety of subject matter courses. See, e.g., D.L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, New York: Aspen Law & Business, 1998.

⁹⁶ It is reported that every student is required to have at least one experience in representing a real client. K. Sloan, ‘Reality’s Knocking: the Recession Is Forcing Schools to Bow to Reality,’ *National Law Journal*, September 7, 2009. Available at: <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463> (accessed 15 January 2010). All third-year students participating in the program are required to obtain a third-year practice certificate, enabling students to handle real client matters in Virginia courts, the state where the law school is located. Also, all students are assigned an alumni mentor. Washington and Lee, ‘Third Year Reform. Washington & Lee School of Law.’

the students had voluntarily chosen the new curriculum.⁹⁷ The innovation also apparently appeals to prospective students. Applications to the law school are up by 33%, a “remarkable” increase that Dean Smolla attributes entirely to the new third-year curriculum.⁹⁸

Conclusion

In 1905, the famous Boston lawyer Louis Brandeis – later to become one of the most distinguished justices of the U.S. Supreme Court – was asked to address the Harvard Ethics Society on the topic, “The Opportunity in the Law.” He told his audience that although the “ordinary man thinks of the Bar as a body of men who are trying cases ... by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters.”⁹⁹ Therefore, the “whole training of the lawyer leads to the development of judgment.”¹⁰⁰ However, as Karl Llewellyn, one of the greatest of America’s law teachers, told a group of beginning law students several decades later, the first year of law school has the effect of knocking “your ethics into temporary anesthesia.”¹⁰¹ Llewellyn then said with fine irony: “It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment.”¹⁰² Llewellyn promised those students, though, that in the subsequent years of law school that their teachers “shall then duly endeavor” to restore the capacity for ethical judgment that had been anesthetized in the first year.¹⁰³

The Carnegie Report powerfully makes the case that Llewellyn’s promise to develop the judgment that Brandeis considered to be “the whole training of the lawyer” has not been fulfilled in contemporary American legal education. But the serious reception the Report has received among legal educators, and the concrete innovations already taking place in response to its critique, give hope that the vision of Brandeis and the promise of Llewellyn may both begin to be more fully realized as the 21st century enters its second decade.

⁹⁷ Sloan., ‘Reality’s Knocking.’

⁹⁸ Gordon, ‘Rodney Smolla: Running a New Play.’

⁹⁹ L.D. Brandeis, ‘The Opportunity in the Law.’ 1905. Available at <http://www.law.louisville.edu/library/collections/brandeis/node/222> (accessed 22 January 2010).

¹⁰⁰ *ibid.*

¹⁰¹ K. Llewellyn, K., *The Bramble Bush* (10th ed.), New York: Oceana Publications, 1996, p. 116. Quoted at Report, pp. 77-78.

¹⁰² *ibid.*

¹⁰³ *ibid.*

ATTACHMENT C

Learning and Teaching Academic Standards Project: Law Draft 6 of the Threshold Learning Outcomes October 2010

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An Initiative of the Australian Government
Department of Education, Employment and Workplace Relations
<http://www.altc.edu.au/standards>

Threshold Learning Outcome 1: Knowledge

Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes

- a. the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts,
- b. the broader contexts within which legal issues arise, and
- c. the principles and values of justice and of ethical practice in lawyers' roles.

Threshold Learning Outcome 2: Ethics and Professional Responsibility

Version 1: Ethics and Professional Responsibility

Graduates of the Bachelor of Laws will demonstrate:

- a. an ability to recognise and reflect upon
 - i. ethical issues likely to arise in professional contexts, and
 - ii. broader questions of justice,
- b. an understanding of approaches to ethical decision-making, and
- c. **a developing ability to**
 - i. respond appropriately to ethical issues, and**
 - ii. exercise professional judgement.**

Version 2: Ethics and Professional Responsibility

Graduates of the Bachelor of Laws will demonstrate:

- a. an understanding of approaches to ethical decision-making, and
- b. an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts
- c. an understanding of the professional principles and values associated with the goals of justice and service to the wider community, and
- d. **a developing ability to exercise professional judgement.**