

THE EMPEROR HAS NO CLOTHES, BUT DOES ANYONE
REALLY CARE? HOW LAW SCHOOLS ARE FAILING TO
DEVELOP STUDENTS' PROFESSIONAL IDENTITY AND
PRACTICAL JUDGMENT

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INTRODUCTION

Criticism of law schools has come often of late. Although some of this criticism may be unjustified, this Article contends that the deficiency exposed in two recent and influential studies of law teaching is accurate. Most law schools fail to cultivate students' professional ethical identity and practical judgment. The two studies, one by the Carnegie Institute for the Advancement of Teaching and Learning in *Educating Lawyers (Carnegie Report)*,¹ and the other by the Clinical Legal Education Association in *Best Practices for Legal Education (Best Practices Report)*² (collectively, the 2007 Reports), represent arguably the most comprehensive evaluations of law school education in more than a century. The reports categorize law teaching in three broad categories: (1) analytical skills or legal analysis; (2) practical and experiential lawyering skills; and (3) development of a "professional identity"—a rich but often misunderstood term that encompasses a person's self-concept, values, and philosophy of lawyering.³

¹ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

² ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES].

³ The *Carnegie Report* uses the term "professional identity." Although the *Best Practices Report* uses the term "professionalism," it describes this concept similarly to how "professional identity" is described in the *Carnegie Report*. See BEST PRACTICES, *supra* note 2, at 207 (regarding analytical skills); *id.* at 165 (regarding lawyering skills); *id.* at 27–29 (regarding cultivation of professional identity); CARNEGIE REPORT, *supra* note 1, at 27–29 (providing an overview of these "three apprenticeships"); *id.* at 5–6 (regarding analytical skills); *id.* at 87–89 (regarding lawyering skills); *id.* at 126 (regarding cultivation of professional identity).

In assessing law schools in each category, the two reports rely not only on empirical studies and assessments by respected educators, but also on their own comprehensive investigation of law school teaching.⁴ The studies found that students received excellent instruction in developing analytical skills.⁵ The reports then observe how law schools are addressing the need to develop students' practical lawyering skills but that schools still have much work to do in this area.⁶ Finally, the reports identify that the most glaring deficiency in law teaching is the failure to cultivate professional ethical identity and practical judgment.⁷ Even more disturbing, the reports suggested that law schools, perhaps unintentionally, prepared students in a manner that led them to engage in unprofessional conduct, to be prone to personal dissatisfaction, and to exercise poor judgment in practice.⁸

This Article explores the meaning of professional identity and of practical judgment. By understanding these concepts more precisely, the reader should appreciate the connection that the 2007 Reports draw between the deficiency in professional formation and the ills that have plagued the legal profession—lawyer dissatisfaction, unethical and unprofessional conduct, and poor representation of clients.⁹ Law schools have responded to the *Carnegie* and *Best Practices Reports'* recommendation to enhance lawyering skills training and experiential learning.¹⁰ Conversely, most law schools have either ignored or responded insufficiently to the reports' appeal to concentrate on professional formation as fully as on legal analysis and skills.¹¹

This Article considers the potential reasons for the delay in embracing the challenge to help law students cultivate a professional identity so that they can exercise practical judgment in practice. Ultimately, the Article concludes that law schools would more likely embrace this challenge if (a) the meaning of professional identity formation were clear, (b) legal educators more fully appreciated the connection between such formation and the exercise of practical judgment in law practice, and (c) law schools realized that the educational methods

⁴ BEST PRACTICES, *supra* note 2, at 1; CARNEGIE REPORT, *supra* note 1, at 15–17.

⁵ See BEST PRACTICES, *supra* note 2, at 211; CARNEGIE REPORT, *supra* note 1, at 2.

⁶ See BEST PRACTICES, *supra* note 2, at 171–72; CARNEGIE REPORT, *supra* note 1, at 89.

⁷ See BEST PRACTICES, *supra* note 2, at 81; CARNEGIE REPORT, *supra* note 1, at 31, 188.

⁸ See BEST PRACTICES, *supra* note 2, at 35–36; CARNEGIE REPORT, *supra* note 1, at 140–42.

⁹ See CARNEGIE REPORT, *supra* note 1, at 127–28 (citing studies analyzing the “growing sense of demoralization in legal practice”).

¹⁰ See *infra* notes 92–101 and accompanying text.

¹¹ See *infra* notes 102–09 and accompanying text.

that would nurture growth in ethical identity and judgment are not as difficult to design and implement as many believe.

This Article unfolds in four parts. Part I clarifies the meaning of professional identity formation and explores the connection between such formation and the development of practical judgment or wisdom. Part II addresses why ethical professional identity formation and cultivation of practical judgment ought to be priorities. This Part specifically discusses research from the *Carnegie Report*, the *Best Practices Report*, and other sources that affirm the connection between forming ethical professional identity and the degree of fulfillment a lawyer finds in practice.

Part III gathers the evidence of disparity in law school curricula. This section discusses evidence demonstrating that, among ABA-approved law schools, (1) doctrinal courses heavily outweigh either skills and experiential courses or ethics and professional formation courses and (2) skills and experiential courses outweigh ethics and professional formation courses. Part III further explores the reasons that may explain law schools' delay in addressing the call to develop students' ethical professional identity and judgment.

Part IV presumes that law schools will, at some point, begin to develop educational methods that address the goals of forming professional identity and practical judgment. The section clarifies a threshold issue that much of the literature on professional identity formation fails to address—the need to approach students' formation as an incremental process. Thus, the concluding section of this Article offers recommendations which schools can use to structure an integrated program designed to help students learn skills such as self-awareness before they advance to exercises that develop reflection and decision-making skills. This section also makes concrete recommendations on structuring curricula and suggests teaching methods designed to nurture students' ethical professional identity and practical judgment.

I. DEVELOPING PROFESSIONAL ETHICAL IDENTITY AS A PREREQUISITE TO EXERCISING PRACTICAL JUDGMENT IN LAW PRACTICE

Neither law schools nor others can appreciate the depth of the implications of the deficiency exposed in the *Carnegie Report* and the *Best Practices Report* without a clear understanding of “professional identity” and “practical judgment.” The concept of “professional identity” is a concept new to legal education. It seeks many of the same goals as the professionalism movement in law but is not synonymous with professionalism. As explained below, the concept focuses not so much on external conduct, but rather on internal beliefs and standards. The concept of practical judgment is a modern term for Aristotle's notion of

“phronesis.”¹² The objective embraced here is the kind of counseling and decision-making that engages all of a person’s faculties, including one’s intellect, emotional intelligence, and experience.

This Part begins with a brief introduction to the centrality of these concepts to students’ formation. A more extended discussion in Part II.A. then demonstrates the impact on lawyers who lack the skills that accompany intentional formation and development of judgment. Conversely, Part II.B. discusses lawyers who have the integrity and sound judgment characteristic of such formation. These lawyers avoid the ills that afflict the legal profession. They appear to have formed a professional identity and developed wise judgment despite the lack of attention in law school and can credit good mentors. Part II.B. also addresses the development in practice of professional identity and judgment, as well as changes in the legal environment that have made such mentoring less likely.

A. The New Concept: Professional Identity Versus Professionalism

The concept referred to as “professional identity” needs to be clarified before one can appreciate its significance to a lawyer’s development and its connection to the ancient concept of phronesis, or practical wisdom. Scholars have already had difficulty agreeing on a definition of “professionalism.”¹³ It should be no surprise, then, that “professional identity” has required clarification. The phrase is not clearly defined even within the seminal reports introducing the concept.¹⁴

One thing, however, is clear: professionalism and professional identity formation are not the same thing. Although lawyer professionalism has been defined in various ways, its focus historically has been on the outward conduct the legal profession desires its members to exhibit.¹⁵ Lawyer professionalism has often referred to adherence to

¹² See ARISTOTLE, THE NICOMACHEAN ETHICS bk. VI, at 106 (David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

¹³ Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 480 (2008).

¹⁴ See Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 200 (2012).

¹⁵ The professionalism movement in the American legal system has its own history. The movement can be traced to the ABA’s Commission on Professionalism, prompted by the urging of then Chief Justice Warren E. Burger. See, e.g., Donald J. Weidner, *The Common Quest for Professionalism*, 78 FLA. B.J., March 2004, at 18, 18. At its August 1988 meeting, the ABA House of Delegates further encouraged this movement by adopting as a policy that state and local bar associations “encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyers’ creed of professionalism.” THOMAS D. MORGAN & RONALD D. ROTUNDA, 2015 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 661 (2015). The Commission has helped state bar associations throughout the country adopt statements on professionalism and civility. A recent 2011 count indicates

standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others.¹⁶

Civility and respect for others are undeniably important to a lawyer's professional identity,¹⁷ but professional identity engages lawyers at a deeper level because it challenges lawyers to internalize principles and values such that their professional conduct flows naturally from their individual moral compass. Professional identity therefore encompasses the manner in which a lawyer internalizes values such that, for instance, she views herself as a civil person who treats others with civility and respect even in hotly disputed matters. The only difference between a lawyer told to be professional who acts in this way and one who acts this way because of her professional identity is that the lawyer *herself* believes that this is the way she should act. Incorporating "identity" into the description of this concept thus is central to the innovation it brings.¹⁸ It reflects the difference between someone who acts because an external influence (such as a bar association or judge) says that is how she "should" act and someone who has internalized those standards and herself believes that is how she should act.

After discussing the struggle to articulate the deep meaning of "professional identity," one scholar offers the following definition: "Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being."¹⁹ Others have recognized that engaging students in this process of professional identity development "put[s] students up against the fundamentals of who they are, what they want the world to be, and their role in, and responsibility for, creating both."²⁰

that thirty-two states have adopted official statements on professionalism. See Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 107 & n.53 (2011) (listing jurisdictions that have adopted statements on professionalism).

¹⁶ See CARNEGIE REPORT, *supra* note 1, at 126–27.

¹⁷ See *id.*

¹⁸ See *id.* at 132.

¹⁹ Floyd, *supra* note 14, at 201–02; see also Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 430 (2005) [hereinafter Krieger, *Inseparability*].

²⁰ Patti Alleva & Laura Rovner, *Seeking Integrity: Learning Integratively from Classroom Controversy*, 42 SW. L. REV. 355, 370 (2013).

B. An Ancient (but Timeless) Concept: Phronesis—Practical Wisdom or Good Judgment

Intimately tied with professional identity formation is the goal that lawyers act professionally as part of who they are, and, as a result of their integrity, develop the practical wisdom and good judgment required to practice law. As previously mentioned, Aristotle's *Nicomachean Ethics* is the source of the classical concept called "phronesis."²¹ Aristotle viewed practical wisdom as the cardinal virtue implicit in the other virtues, including courage, self-control, fairness, gentleness, loyalty, friendliness, and honesty.²² Significantly, Aristotle's emphasis was on one who knew how to employ these virtues "practically" in human affairs in order to be wise.²³ Good judgment required a combination of intellectual and moral considerations.²⁴ As one scholar correctly assessed Aristotle's conception of practical wisdom:

The objective is not to seek truth abstractly and let the chips fall where they may, but to give due consideration to moral concerns and the immediate, human consequences of our actions. The point is that how we exercise judgment in legal practice depends on both our mental development and our moral development.²⁵

A recent book by psychologist Barry Schwartz and political scientist Kenneth Sharpe titled *Practical Wisdom: The Right Way to Do the Right Thing*²⁶ offers helpful insights on teaching good judgment. One aspect of applying practical wisdom that Schwartz and Sharpe highlight is the need to develop skill in balancing empathy with detachment as one reaches a decision.²⁷ As another scholar explains the same concept,

Being empathetic requires heightened sensitivity to the interpersonal dynamics of human relationships If I am to put myself in someone else's shoes, I need to imagine how things look from the other's standpoint. . . .

. . . Having spotted the potentially relevant issues, one has to step back and decide what really needs to be acknowledged and what does not.²⁸

Although Schwartz and Sharpe do not directly apply their interpretation of Aristotelian principles to legal education, Professor Daisy Hurst Floyd,

²¹ ARISTOTLE, *supra* note 12.

²² *See id.* at 106–07, 116.

²³ *See id.* at 107.

²⁴ *Id.* at 114–15.

²⁵ Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258 (1998) [hereinafter Aaronson, *Practical Judgment*].

²⁶ BARRY SCHWARTZ & KENNETH SHARPE, *PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING* (2010).

²⁷ *See id.* at 39–41.

²⁸ Aaronson, *Practical Judgment*, *supra* note 25, at 269.

a pioneer in advocating formative education in law schools, has gleaned from Schwartz and Sharpe's work the following principles that help in forming both the professional identity and practical wisdom of law students:

1. Know the proper aim or purpose of both being a lawyer and of this particular representation;
2. Know how to improvise, which requires "balancing conflicting aims and interpreting rules and principles in light of the particularities" of the situation;
3. Know how to read context and to see the particularities in a situation;
4. Know how to take the perspective of another, including developing empathy for others;
5. Know how to make emotion "an ally of reason;" and
6. Know how to make use of their accumulated experiences as a person and lawyer.²⁹

Significantly, Aristotle referred to practical wisdom as a "faculty."³⁰ A faculty in Aristotle's view could be learned, nurtured, and taught.³¹ Without appreciating Aristotle's emphasis on the need to apply a faculty to the infinite variety of human circumstances, and without putting the philosopher's lessons into a modern context, some perceive Aristotle's emphasis on virtues as setting an unrealistic standard.³² However, the emphasis Aristotle places on the combination of intellect and moral or ethical sensitivity—and on how the key to good judgment is being able to apply both in the context of human life—shows that practical wisdom is within the reach of those who seek it. One's judgment will improve with experience, and it can also be developed through instruction. A legal educator who aims to teach practical judgment in clinical courses says it this way:

[P]ractical judgment is the process by which we take into account relevant information and values, and then determine what ought to take priority in a particular context. To help students improve their judgment, we need to alert them to a variety of . . . considerations, some information-based and some value-based, that affect legal problem solving.³³

²⁹ Floyd, *supra* note 14, at 205–06 (footnotes omitted) (citing SCHWARTZ & SHARPE, *supra* note 26, at 25–26).

³⁰ See ARISTOTLE, *supra* note 12, at 112–13.

³¹ See *id.* bk. X, at 199–200.

³² See Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 261 (2002) (stating that the "perfect 'Aristotelian agent'" exercising practical wisdom would have to inhabit a fictional world, whereas lawyers inhabit the real world and presumably cannot be "perfect 'Aristotelian agents,'" though they can do their best in circumstances to reach decisions).

³³ Aaronson, *Practical Judgment*, *supra* note 25, at 262.

In other words, students can learn the process of exercising judgment. They ought to improve as they gain experience, but the notion that this faculty is reserved for a few is at best, mistaken, and at worst, elitist.

The next sections, as noted above, will underscore how formational education and developing practical judgment impact a lawyer's quality of life, the degree to which lawyers value civility and other professional conduct, and finally, their effectiveness in representing clients. Lawyers who leave law school and enter practice without the development of professional identity skills such as self-awareness, ethical decision-making, or practical judgment tempt the prospect of not only dissatisfaction, but also dysfunction.³⁴ By contrast, lawyers who have formed these skills, identity, and judgment are more fulfilled and are more inclined to treat others professionally and represent their clients well.³⁵

II. THE CONNECTION BETWEEN FORMATION OF PROFESSIONAL IDENTITY AND JUDGMENT, A LAWYER'S QUALITY OF LIFE, AND THE QUALITY OF LEGAL SERVICES THE LAWYER PROVIDES

Significant data now supports the need for lawyers to develop a professional identity and be equipped to make good judgments. We have too much evidence showing the link between the degree to which law students develop skills associated with professional identity—including the ability to make judgments consistent with their internal values—and the extent to which they are either fulfilled in practice and live healthy lives or are unfulfilled and develop unhealthy, dysfunctional means of coping with their dissatisfaction.³⁶ If nothing else, the data supporting this connection should motivate legal educators and law students to take seriously the need to address professional formation. Law students and lawyers can find a reasonable degree of fulfillment if law schools prepare students both to know themselves and to develop strategies by which they will make professional judgments.

Law students who do not develop a sense of their internal values and honor those as part of their judgments in practice are far more likely to lose their sense of self.³⁷ Professor Reed Elizabeth Loder has described this process well:

³⁴ See *infra* Part II.A.

³⁵ See *infra* Part II.B.

³⁶ See BEST PRACTICES, *supra* note 2, at 22–24, 35–36 (connecting the current method of legal education with the development of a destructive view of the lawyer's role in the legal system); CARNEGIE REPORT, *supra* note 1, at 31–32 (describing how the “hidden curriculum” sends messages undermining ethical values and “misshapes” professional education); *id.* at 140–42 (underscoring the importance of “clarify[ing] the relationship between moral and legal concerns” in order to avoid creating “people who are smart without a purpose.”).

³⁷ *But cf.* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 910 (1999) (stating that being an ethical lawyer requires living an ethical and balanced life).

The lawyer who suppresses moral scrutiny can fall prey to a kind of self-loathing that those with integrity can resist. By ignoring early dissonance, a lawyer suppresses her moral identity instead of silencing it. She may overcome alienation by subtly reshaping who she is as a person. Incrementally, these changes are almost imperceptible. This is human character in moral drift. Although personal change can signify moral progress, not all fluidity is compatible with integrity. Moral development emerges from braving the discomforts of self-scrutiny. It arises from caring about personal betterment and moral knowledge. Self-protective maneuvers produce dissonance and alienation instead. Eventually, the lawyer adapts to avoid discomfort and remove moral impediments. Instead of humble, she becomes servile. What was at first professional inauthenticity slips into a newly authentic, lesser self. Self-loathing emerges because squelching the moral self leaves lingering guilt and regret.³⁸

The phrase “self-loathing” powerfully describes a lawyer who loses herself by ignoring the all-too-common internal conflict she feels in making decisions against her ethical compass. Another way to describe the conflict or dissonance to which Loder refers is when the lawyer feels in her gut that something is wrong but suppresses that feeling. If those who have studied the link between lack of professional formation and dysfunction are correct, the greatest contribution of the *Carnegie Report* and the *Best Practices Report* could well be that they affirm the conclusion that many of the legal profession’s ills derive, at least in part, from the failure of legal education to help students cultivate a philosophy of what it means to be a lawyer who stays true to herself.³⁹ In other words, professional formation will guard against the dangerous path of ignoring internal dissonance and will help maintain integrity. Such formation encourages individuals to pay attention to internal guidance and address issues that cause anxiety rather than ignore them.

Again, although some authors had already suggested as much,⁴⁰ the *Carnegie Report* and *Best Practices Report* affirmed that law schools’ method of emphasizing legal analysis and dismissing other considerations

³⁸ Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 877 (2002).

³⁹ See BEST PRACTICES, *supra* note 2, at 29–30 & n.76 (citing articles and studies reflecting lawyer dissatisfaction, substance abuse, depression, mental illness, and even emotional problems beginning in law school); CARNEGIE REPORT, *supra* note 1, at 134–35.

⁴⁰ Larry Krieger and Ken Sheldon’s longitudinal studies comparing law students to students in other forms of higher education were among the first to demonstrate the effects law schools’ methods were causing. See, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School*, and *Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002) [hereinafter Krieger, *Institutional Denial*]; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 262–63 (2004).

such as fairness, morality, and social consequences sent a depressing message to law students; in essence, students' maladjustment began in law school.⁴¹ In other words, rather than helping students develop as healthy professionals, law schools have encouraged the opposite.

The first subsection below discusses the nature of the dysfunction and how its seeds are sown in law school. The second subsection suggests how an emphasis on professional identity formation and judgment can change this phenomenon.

A. Dysfunction in the Legal Profession—A More Accurate Explanation of the Causes

The evidence of dysfunction among legal professionals should trouble anyone who cares about the profession and the public it serves. The existence of depression, substance abuse, and emotional maladjustment occurring at much higher rates among lawyers than the average population is well known.⁴² Additional studies since 2007 have done nothing to suggest that the rates of lawyer substance abuse, depression, or other dysfunctions are declining.⁴³

⁴¹ BEST PRACTICES, *supra* note 2, at 34, 36; CARNEGIE REPORT, *supra* note 1, at 31.

⁴² See, e.g., Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 532 (2008).

⁴³ For instance, a 2014 survey of attorneys in Virginia found that nearly one-third of the respondents reported that either mental health or substance abuse problems had affected their personal or professional lives. Linda McElroy, *Lawyers Helping Lawyers Remains Important Resource*, 63 VIRGINIA LAWYER, Dec. 2014, at 22, 22, <http://virginialawyer.vsb.org/i/434138>. Another study explained the following: a) according to a 2008 study by the Brain and Mind Research Institute at the University of Sydney, one in five Australian lawyers suffers from clinical depression, and depression in the Australian legal profession is four times higher than the general population; and (b) according to a 2007 study by Beaton Consulting and BeyondBlue, Australian lawyers are significantly more likely to suffer from depression than the general population, and Australian "lawyers are more likely than any other profession to use alcohol or other drugs to manage depression or anxiety." Michelle Sharpe, *The Problem of Mental Ill-Health in the Profession and a Suggested Solution*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 269, 270–71 (Francesca Bartlett et al. eds., 2011). In addition, a Johns Hopkins University study conducted in 1990 found that three to five percent of the general population suffers from major depressive disorders, while more than ten percent of lawyers suffer major depression. NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER* 6 (2010). A still widely accepted 1991 survey of lawyers in the state of Washington estimated that one in five lawyers suffers substance abuse problems—almost twice the national average. *Id.* Finally, "[a]ccording to the American Bar Association Commission of Lawyer Assistance Programs, fifteen to eighteen percent of attorneys suffer from alcoholism, compared with only ten percent of the general population." Rachel Tarko Hudson, *Pick Your Poison: Abuse of Legal Versus Illegal Substances as Mitigation in Attorney Disciplinary Cases*, 22 GEO. J. LEGAL ETHICS 911, 911 (2009).

Before the 2007 Reports, many people readily accepted alternative reasons for the cause of the dysfunction and lawyer unhappiness—reasons that did not acknowledge law schools' role.⁴⁴ Data before the 2007 Reports and data included in them, however, affirm that law schools play a role in creating lawyer dysfunction.⁴⁵ Certainly, the legal profession has a role in encouraging the continued formation of lawyers' professional identity and judgment after they leave law school. Nonetheless, if law schools do not provide a solid foundation, the ability of inexperienced lawyers to develop their identity and judgment on their own is more difficult in the modern legal workplace than it ever has been.⁴⁶

Authors have identified the emotional maladjustment that can occur when a lawyer adopts role differentiation in which she has one set of values on the job and another in other aspects of her life.⁴⁷ The seeds of such maladjustment begin in law school, which often emphasizes analysis and logic and deemphasizes, if not openly denigrates, ethical and moral considerations.⁴⁸ Law students are not predisposed to be discontented.⁴⁹ Indeed, extensive studies contrasting new law students to undergraduate students showed just the opposite.⁵⁰ In their study comparing undergraduate students with law students, Professors Lawrence Krieger and Ken Sheldon concentrated on the happiness and overall emotional health of law students upon entering law school, late in the first year, and the next fall semester, as contrasted with that of undergraduate students.⁵¹ The authors found that, early in their legal studies, law students were generally happier, better emotionally adjusted, and more

⁴⁴ Mental illness and substance abuse problems can easily be blamed for lawyer dissatisfaction. *See, e.g.*, Rothstein, *supra* note 42, at 533.

⁴⁵ BEST PRACTICES, *supra* note 2, at 34, 36; CARNEGIE REPORT, *supra* note 1, at 31.

⁴⁶ *See infra* notes 77–78 and accompanying text (demonstrating that mentoring and the ability of inexperienced lawyers to develop under the tutelage of a more experienced lawyer have been declining for many years). Mentoring, though valuable, was already a “hit or miss” proposition, as it depended on the mentor’s own professional formation and ability to teach such matters to an inexperienced lawyer.

⁴⁷ *See, e.g.*, Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 247 (2004).

⁴⁸ *See, e.g.*, BEST PRACTICES, *supra* note 2, at 139 (“Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant—in fact ‘irrelevant’ and inappropriate in the context of legal discourse—and their traditional ways of thinking and feeling are wholly unequal to the task before them”); CARNEGIE REPORT, *supra* note 1, at 31 (“[L]aw school typically blares a set of salient, if unintentional, messages that undercut the likely success of efforts to make students more attentive to ethical matters.”).

⁴⁹ Krieger, *Institutional Denial*, *supra* note 40, at 122.

⁵⁰ *Id.* at 123 & n.44.

⁵¹ *Id.* at 122.

oriented toward promoting ideals than the undergraduates to which they were being compared.⁵² As they progressed in school, however, the law students became not only more depressed, but also more disinterested and less concerned with values about which they previously cared.⁵³

Krieger and Sheldon concluded that law schools' pressure to succeed according to external standards of success, such as placement in the top ten percent of the class or getting a prestigious job, led to the deterioration in ideals, values, and satisfaction.⁵⁴ Moreover, Krieger and Sheldon urged law schools to shift school culture to help students find satisfaction in doing their legal work well, not in impressing others.⁵⁵ An attitude toward legal work that ignores the reason for which lawyers are doing the work leads students away from seeing the purpose of their work, a key ingredient to fulfillment.⁵⁶

Observers have long suspected that the well-known dysfunction and unhappiness among lawyers is largely a direct result of this disconnection between lawyers' internal values and their actions.⁵⁷ Other explanations exist for the dysfunction and unhappiness in the legal profession, such as the stress of billable hours and of law practice generally,⁵⁸ but the ability to account for lawyer unhappiness and dysfunction solely on these grounds seems less persuasive than ever. Both legal educators and lawyers must face the prospect that the dysfunction in the legal profession begins in law school.⁵⁹

B. The Benefits of Developing Methods to Cultivate Students' Professional Identity and Practical Wisdom

Those who participate in forming a professional ethical identity and in learning to exercise practical wisdom are more likely to be fulfilled in their professional lives. As Professor Floyd writes:

There is another advantage to practical wisdom. It addresses not just how we prepare our students for ethical action, but also how we prepare them for fulfilled lives. Aristotle believed that practical wisdom is essential to human flourishing, which to him was the purpose of life. Modern happiness studies show that Aristotle's hypothesis is confirmed by science. . . . [P]eople are happiest when their work has meaning and provides the discretion to use their judgment. That discretion allows the

⁵² *Id.*

⁵³ *Id.* at 122–23.

⁵⁴ *Id.* at 123–24.

⁵⁵ *See id.* at 124.

⁵⁶ *Id.* at 125–26.

⁵⁷ Krieger, *Inseparability*, *supra* note 19, at 438; *see also* Gantt, *supra* note 47, at 255.

⁵⁸ *See* Schiltz, *supra* note 37, at 888–89.

⁵⁹ *See* Krieger, *Institutional Denial*, *supra* note 40, at 122–23.

development of the wisdom needed to do the work well. In turn, people are motivated to develop judgment so that they can do their work well and serve others, which makes them happy. "It turns out that the characteristics of work that most demand the exercise of practical wisdom are the same characteristics that make work engaging, meaningful, and potentially satisfying."⁶⁰

Some have also suggested that one of the most crucial facets of leading a healthy professional life is maintaining consistency between personal beliefs and behavior.⁶¹ Someone is bound to feel better about herself if she possesses self-awareness, knows her limits, and engages in the process of balancing competing values that arise in resolving difficult ethical decisions. Although it may be tempting to avoid deliberating over a question and just do whatever seems to benefit one's client so long as one does not violate the ethical rules, this approach avoids the world of gray known by those who are committed to the deliberation and introspection required to exercise practical judgment. Most ethical and professional dilemmas involve conflicting values,⁶² and reaching a good judgment requires self-knowledge and fortitude to avoid having personal motives interfere in the decision-making. When questions and answers fall into a gray area, consideration of the many possible courses of actions, such as who will be affected and how, must be weighed within the specifics of the context of the situation.

Lawyers' quality of life is impacted by their choice to consider the competing values and consequences of each course of action and then confidently make principled decisions based on that consideration.⁶³ Those who engage in practical judgment have self-respect and the respect of their colleagues throughout their practice of law.⁶⁴ Cultivating practical judgment thus creates a ripple effect by increasing the quality and integrity of the legal profession. Conversely, those who take the easy path, ignore personal values (especially when their "gut" tells them otherwise), and only try to avoid sanctions when advocating their client's best interest, are prone to dissonance that, with enough repetition, festers into self-loathing.

⁶⁰ Floyd, *supra* note 14, at 217 (footnote omitted) (quoting SCHWARTZ & SHARPE, *supra* note 26, at 284).

⁶¹ *E.g.*, Gantt, *supra* note 47, at 247, 255.

⁶² *See id.* Finding a work-life balance is a classic professional dilemma. It can become an ethical one if the lawyer works so much that her competence is affected.

⁶³ *See* Kennon M. Sheldon et al., *What Is Satisfying About Satisfying Events? Testing 10 Candidate Psychological Needs*, 80 J. PERSONALITY & SOC. PSYCHOL. 325, 337 (2001) (illustrating the importance of satisfying intrinsic motivations and needs versus extrinsic ones).

⁶⁴ *See* LEVIT & LINDER, *supra* note 43, at 220.

Psychologists suggest that fulfillment derives from satisfying personal intrinsic values rather than extrinsic values merely proffered by others.⁶⁵ Ironically, intrinsic values, such as fostering meaningful relationships and finding purpose in what one does, tend to resemble the kinds of messages that law students and lawyers have heard from those sounding the call for professionalism.⁶⁶ However, the reason someone is more likely to be motivated to act based on principles is that she has decided that the values underlying the principles are ones she deems important, and not because she is trying to meet someone else's definition of what is important.⁶⁷ Relying on the theories of Abraham Maslow and later work of other psychologists, Professor Krieger convincingly argues that intrinsic motivation will typically result in the kind of lawyering most would respect:

[Research confirming Maslow's work] demonstrates that well-being results from experiences of *self-esteem*, *relatedness to others*, *autonomy*, *authenticity*, and *competence*. Fulfillment of any of these needs provides a sense of well-being and thriving, while lack of such experiences produces distress, depressed mood or loss of vitality. Self-esteem and relatedness show the very strongest correlation to happiness. As we look to our ideals for attorneys, we see again that the preferred professional behaviors will tend to fulfill these basic human needs and hence support a satisfying life experience. The truly professional lawyer will be competent in legal skills, but beyond that she will feel closely connected to others in her community because she respects and is respected by them. She will experience the authenticity and integrity that comes from loyalty to her deepest values, and she will feel good about herself for all of the above reasons.⁶⁸

An increasing number of educators recognize that an approach that helps students find internal satisfaction from lawyering will likely increase the quality of lawyers' lives and, by doing so, improve their effectiveness as counselors and advocates.⁶⁹ Some may believe lawyers who are fulfilled, have a strong sense of professional identity, know their values, recognize their limits, and exercise practical wisdom do not exist. Professor Neil Hamilton and Dr. Verna Monson, however, tested this view in a project in which they interviewed lawyers whose peers deemed them

⁶⁵ See Sheldon, *supra* note 63.

⁶⁶ See Krieger, *supra* note 19, at 427.

⁶⁷ See *id.* at 429.

⁶⁸ *Id.* at 430 (footnote omitted).

⁶⁹ See Schiltz, *supra* note 37, at 924 (arguing that happy lawyers are ethical lawyers); Neil W. Hamilton et al., *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 16 (2012) [hereinafter Hamilton et al., *Empirical Evidence*].

“exemplary.”⁷⁰ The results of the interviews showed lawyers who had found fulfillment by developing an internalized set of professional values that enabled them to exercise practical wisdom in counseling and advocating for clients.⁷¹ Hamilton and Monson’s observations on the common themes of the lawyers they interviewed are telling:

Interviews with peer-honored lawyers exploring the meaning of professionalism revealed four primary, overarching themes, including the ideas that:

1. Professionalism is linked to a lawyer’s moral core or moral compass, and includes a deep commitment to clients, colleagues, the firm, and broader society. The foundation of this moral core is trustworthiness, which serves to “hold together” the day-to-day functions of practicing law, and serves as an important marker in both establishing and maintaining a lawyer’s credibility and reputation. A major part of this foundation of trustworthiness is honesty, with self and others. Honesty serves also as an internal mechanism that is part of an ongoing practice of self-reflection and growth.
2. Counseling the client with independent judgment and candid advice is central to the lawyer’s role.
3. Self-reflection becomes habitual, and ongoing, and is related to ongoing growth in a lawyer’s professionalism.
4. A lawyer’s understanding of professionalism evolves over a career.⁷²

Not surprisingly, Hamilton and Monson found that these lawyers displayed the ability to evaluate practice dilemmas by considering potential responses through their own lenses of professionalism.⁷³

For those who may believe that exemplary lawyers are the rare few who find satisfaction in law practice, Nancy Levit and Douglas Linder’s interviews of lawyers in all walks of law practice suggest that satisfaction is available to anyone who aligns the manner in which she practices with her values.⁷⁴ The common theme of the interviews of these lawyers is that the person needs to decide what kind of lawyer she wants to be, that her purpose will come from helping others rather than from money or glory, and that aligning work and values is a must.⁷⁵

One significant difference between the exemplary lawyers discussed by Hamilton, Monson, Levit, and Linder and new lawyers today is that

⁷⁰ Neil W. Hamilton & Verna E. Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921, 931–32 (2012) [hereinafter Hamilton & Monson, *Ethical Professional (Trans)Formation*].

⁷¹ *See id.* at 948–49.

⁷² *Id.* at 957.

⁷³ *See id.* at 958.

⁷⁴ *See* LEVIT & LINDER, *supra* note 43, at 220.

⁷⁵ *Id.* at 220–21.

the exemplary lawyers learned to practice in an environment in which firms and lawyers were more inclined to mentor less experienced lawyers.⁷⁶ Such mentoring, however, is on the decline because clients are far less willing to pay for work for which a more senior lawyer and a less experienced lawyer both bill.⁷⁷ Although mentors can be found, this task is more difficult now than in the past.⁷⁸ Thus, the need for law schools to begin the process of forming lawyers' professional ethical identity and equipping them with a framework in which to resolve ethical and professional issues is more pressing than ever.

III. DISPARITY IN THE LAW SCHOOL CURRICULUM—EXPLORING REASONS WHY LAW SCHOOLS ARE FAILING TO MAKE CULTIVATION OF PROFESSIONAL IDENTITY AND JUDGMENT A PRIORITY WHILE RESPONDING TO THE RECOMMENDATION FOR ENHANCED SKILLS TRAINING

A. Imbalance in Law School Curricula

Law school curricula remain heavily weighted toward doctrinal courses.⁷⁹ As will be discussed below, lawyering skills courses have significantly increased in prominence since the 2007 Reports.⁸⁰ In contrast, most law schools have been slow to respond to the critiques that legal education is severely wanting in developing students' professional ethical identity and practical judgment.⁸¹ This slow response is evidenced by observations of legal scholars teaching in the field of professional formation, by an ABA survey of law school curricula, and by a survey of associate deans for academic affairs at ABA-approved law schools conducted by the authors.

Having observed and written on educational methods designed to address formation of students' skills beyond analysis and technical lawyering, Professor Susan Daicoff is an authority in the field of

⁷⁶ Cf. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–82 (2000) (describing the decline of mentoring in law firms and its adverse effect on junior attorneys, their firms, and clients).

⁷⁷ See *id.* at 281 & n.257, 282 (describing how billable hour constraints often decrease a firm's commitment to mentoring, training, and supervision).

⁷⁸ Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 739–46 (1998).

⁷⁹ Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 173 (2013) (“[T]he evidence from the [2002–2010] ABA curriculum survey indicates that . . . the majority of curricular hours offered still continue to be in doctrinal-focused courses.”).

⁸⁰ See *infra* Part III.B.

⁸¹ See *infra* Part III.C.

professional formation in the legal education context.⁸² In a recent article, Professor Daicoff largely confirms the view that law schools have paid far more attention to the 2007 Reports' recommendation to adopt skills and experiential courses than to promote development of ethical professional identity among students.⁸³ She notes that the most comprehensive survey of lawyer skills and competencies to date—a study conducted by Marjorie Shultz and Sheldon Zedeck⁸⁴—includes the following twenty-six skills associated with effective lawyers, grouped under eight umbrella categories:

- 1: intellectual & cognitive
 - analysis and reasoning
 - creativity/innovation
 - problem solving
 - practical judgment
- 2: research & information gathering
 - researching the law
 - fact finding
 - questioning and interviewing
- 3: communications
 - influencing and advocating
 - writing
 - speaking
 - listening
- 4: planning and organizing
 - strategic planning
 - organizing and managing one's own work
 - organizing and managing others (staff/colleagues)
- 5: conflict resolution
 - negotiation skills
 - able to see the world through the eyes of others
- 6: client & business relations—entrepreneurship
 - networking and business development
 - providing advice & counsel & building relationships with clients
- 7: working with others
 - developing relationships within the legal profession
 - evaluation, development, and mentoring

⁸² See generally Susan Daicoff, *Lawyer, Form Thyself: Professional Identity Formation Strategies in Legal Education Through "Soft Skills" Training, Ethics, and Experiential Courses*, 27 REGENT U. L. REV. 205 (2015).

⁸³ See Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 810–11 (2012).

⁸⁴ MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 15 (September 2008), <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

8: character

- passion and engagement
- diligence
- integrity/honesty
- stress management
- community involvement and service
- self-development.⁸⁵

Professor Daicoff then observes:

Of these twenty-six competencies, perhaps seven (about twenty-seven percent) are skills traditionally taught in law school. Three to six more skills are often taught in elective clinical courses in law school. The remaining thirteen to sixteen (fifty to fifty-seven percent) are skills that may not be typically explicitly covered by most legal educators. This highlights the imbalance between legal education's current focus and what competencies are determined by those in the occupation as necessary to be professionally prepared to practice law.⁸⁶

She notes progress in lawyering skills and experiential courses but highlights the disparity in law school curricula between doctrinal and lawyering skills courses and courses aimed at cultivating professional development, emotional intelligence, awareness of values, and judgment.⁸⁷ Professor Daicoff then reasons that lawyers will also “find themselves in professional situations that call for judgment, maturity, self-awareness, self-control, interpersonal awareness, the ability to influence people, relationship-building, teamwork, collaboration, problem solving, and strategic planning.”⁸⁸ She observes that “law schools have begun expanding their curricula to include . . . less traditional skills training (e.g., they may include professionalism, values, interviewing, counseling, and negotiating . . .).”⁸⁹ However, Professor Daicoff clearly advocates for an expanded role of teaching that matches the factors associated with effective lawyers as outlined in studies such as that performed by Shultz and Zedeck, as well as several others that reached similar conclusions.⁹⁰ Professor Daicoff is not alone in observing the imbalance in law school curricula. Other scholars have noted the lack of law school courses aimed at cultivating emotional intelligence and

⁸⁵ Daicoff, *supra* note 83, at 822–23 (quoting SHULTZ & ZEDECK, *supra* note 84, at 26–27).

⁸⁶ *Id.* at 823–24 (footnotes omitted).

⁸⁷ Compare *id.* at 833 (recognizing the rise in experiential and skills courses), with *id.* at 834–35 (discussing competencies dealing with students' self-awareness, values, and other aspects of professional ethical identity).

⁸⁸ *Id.* at 834.

⁸⁹ *Id.* at 835.

⁹⁰ *Id.* at 864–68.

relational and other skills not associated with analysis or technical legal skills.⁹¹

B. Recent ABA Curricular Survey

In its 2002–2010 *Survey of Law School Curricula* (“ABA Curricular Survey”), the ABA’s Section of Legal Education and Admissions to the Bar reported the findings of a comprehensive survey of law school curricular offerings.⁹² The survey confirms the imbalance in law school curricula. Curricular hours in doctrinal courses continue to greatly outnumber both lawyering skills and ethics courses.⁹³ The survey shows that law schools have begun to offer more curricular hours in technical lawyering skills.⁹⁴ It also found that, in required courses “[l]aw schools have increased all aspects of skills instruction, including clinical, simulation, and externships, to meet [then-]recently adopted ABA Standard 302(a)(4), which requires that students receive ‘other professional skills’ instruction.”⁹⁵ In its findings on elective curricula, the survey reported that schools “offered a wide range of professional skills opportunities, with half the respondents reporting ten or more types of professional [lawyering] skills courses.”⁹⁶ By contrast, although the survey mentions more elective courses in “professionalism and professional identity,”⁹⁷ only twenty-seven schools are listed as having a “significant increase” in their “[l]egal [e]thics/[p]rofessionalism” curriculum.⁹⁸ Thus, while doctrinal

⁹¹ See, e.g., Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 68–70 (2012); Heidi K. Brown, *The Emotionally Intelligent Law Professor: A Lesson from the Breakfast Club*, 36 U. ARK. LITTLE ROCK L. REV. 273, 286–89 (2014); Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should Be Learning and Doing*, 45 MCGEORGE L. REV. 133, 154–55 (2013).

⁹² *A Survey of Law School Curricula: 2002–2010*, 2012 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 13 (2012) [hereinafter *2002–2010 A.B.A. Curricular Survey*].

⁹³ See *id.* at 52 (noting that 11% of schools surveyed required first-year students to take a course in “Professionalism/Professional Responsibility” and 10% of schools surveyed offered professional skills instruction to first-year students).

⁹⁴ For instance, the survey included the following in its list of curricular offerings that showed a “significant increase”: alternative dispute resolution, drafting (contract, legislative, other), trial and appellate advocacy, and advanced legal research. *Id.* at 74.

⁹⁵ *Id.* at 15 & n.11 (referencing “ABA Standard 302(a)(4), adopted in 2004 [sic]”). ABA Standard 302(a)(4), first adopted in 2006, requires that students “receive substantial instruction in: . . . (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.” 2006–2007 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(a)(4) (2006).

⁹⁶ *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 16.

⁹⁷ *Id.*

⁹⁸ *Id.* at 74. “Professional Responsibility/Ethics” is listed as a separate category, with eighteen schools reporting a “significant increase” in their curricular offerings in that category. *Id.*

courses remain the dominant curricular offerings in law schools,⁹⁹ lawyering skills courses have made progress in required curricular offerings,¹⁰⁰ as well they should.¹⁰¹

The survey suggests some awareness of the much needed attention to professionalism. The report's executive summary states that "[m]any law schools also added courses and course components on professionalism and professional identity."¹⁰² However, study of the full survey reveals that the "professionalism and professional identity" curricula to which the executive summary refers is difficult to gauge because law schools' narratives seemed to assert that the topics could be taught in many ways—even in non-class settings. "Some respondents added courses or components on professionalism to existing courses in the first-year curriculum. Some respondents created professional development centers and/or lawyering electives that emphasized the various roles and obligations of attorneys."¹⁰³ Unfortunately, as noted above, only twenty-seven schools listed legal ethics and professionalism among curricula with significant increases.¹⁰⁴ Other than a relatively small percentage of schools stating that they include a professionalism component in first-year courses,¹⁰⁵ the implication from the survey is that "professionalism" is being addressed by electives rather than required courses. Indeed, it is the section on upper-division curricula, many of which are electives, in which the survey states that a number of schools reported offering more courses on professionalism.¹⁰⁶

Moreover, the report uses the term "professional identity" in at least one instance in conjunction with professionalism,¹⁰⁷ but nothing clearly indicates that any courses involving a formative element are actually

⁹⁹ Fines, *supra* note 79, at 172.

¹⁰⁰ *Id.* at 173–74 & n.102 (stating that "skills-focused courses in the first year such as legal research and writing have expanded in credit hours over time" and "[o]ver half [of] the law schools [participating in the ABA's 2002–2010 *Survey of Law School Curricula*] offer ten or more courses to satisfy the professional skills requirement").

¹⁰¹ See Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 320–23 (2008) (arguing that using experiential and skills-based teaching methods in conjunction with Socratic dialogue produces better learning outcomes).

¹⁰² 2002–2010 A.B.A. *Curricular Survey*, *supra* note 92, at 16.

¹⁰³ *Id.* at 102.

¹⁰⁴ *Id.* at 74.

¹⁰⁵ *Id.* at 52 (reporting that "11% required a course in Professionalism/Professional Responsibility"). The survey does not indicate the breakdown of the schools that deal solely with the ABA Model Rules of Professional Conduct in the first year, nor does it note whether these courses are in any way formational rather than just focusing on doctrinal instruction in the ethics rules and standards.

¹⁰⁶ *Id.* at 73–74.

¹⁰⁷ *Id.* at 102.

being offered. The survey includes a reference in the context of the reported professionalism courses that describes them as covering “various roles and obligations of attorneys.”¹⁰⁸ This description, however, does not imply that such courses contain a formative element. The description could mean only that schools are offering various types of Professional Responsibility courses because such courses include instruction on the ABA Model Rules of Professional Conduct (“Model Rules”), which are the source most schools use for understanding the roles and obligations of attorneys.¹⁰⁹

Without more facts, the reader can infer that law schools have gotten the message that they need to emphasize lawyering skills and address professionalism. Beyond stating that schools are aware of the significance of professionalism, ethics, or something similar, the survey provides no verification that most schools are taking the recommendations of the 2007 Reports seriously. Indeed, all indications are that the skills recommendations are being earnestly implemented but that schools are not making professional formation a priority.

C. Authors’ Survey of Law School Associate Deans for Academic Affairs

The 2002–2010 *ABA Curricular Survey* is inconclusive on the nature of courses with a professionalism component. In response, the authors gleaned data by sending a survey to associate deans for academic affairs at all ABA-approved law schools.¹¹⁰

In December 2014 and January 2015, Professor Gantt sent e-mails to the associate deans for academic affairs at all ABA-approved law schools asking them to complete a survey composed by the authors. The e-mail invitation stated that the survey’s purpose was to assess the extent to which law schools are employing courses and extra-curricular activities to cultivate the formation of professional identity in students. The e-mail

¹⁰⁸ *Id.*

¹⁰⁹ See Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 372 (2013) (noting that the Model Rules influence enforceable court rules).

¹¹⁰ REGENT UNIV. SCH. OF LAW, SUMMARY OF RESULTS: SURVEY OF ASSOCIATE DEANS ON PROFESSIONAL IDENTITY CURRICULUM AND PROGRAMMING (Benjamin V. Madison, III & Larry O. Natt Gantt, II eds., 2015) [hereinafter SURVEY OF ASSOCIATE DEANS] (on file with authors). In addition to this survey, Professor Madison gathered curricular data on all ABA-approved law schools by reviewing the schools’ websites. The data supports the findings from the survey. Specifically, the data shows that law schools overall are offering many more credit hours in experiential and skills courses than in ethics, professionalism, and professional formation courses. BENJAMIN V. MADISON, III, REVIEW OF CURRICULAR INFORMATION ON LAW SCHOOL WEBSITES (2015) [hereinafter REVIEW OF CURRICULAR INFORMATION] (on file with authors). This Article does not discuss this website data in detail because the authors consider the dean survey data to be more empirically sound.

provided a definition of “professional identity” to guide the respondents as they worked through the questions. The e-mail read in pertinent part:

As discussed in *Educating Lawyers: Preparation for the Profession of Law* (the “Carnegie Report”), “professional identity” goes beyond “professionalism,” as the latter term is often interpreted. Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules. Professional identity engages students at a deeper level by challenging them to internalize principles and values such that their professional conduct is a natural outgrowth of their internal moral compass. Please use this definition of professional identity as a common reference point as you complete the survey.¹¹¹

By providing this definition at the outset, the authors sought to avoid the problem in the ABA survey in which schools’ responses to questions on “professionalism” could have little to do with “professional identity formation” as the concept is described in the *Carnegie Report*.

Sixty schools responded by completing at least a portion of the authors’ survey.¹¹² The survey consisted of nine questions, seven of which gave the respondents choices from which to select and two of which allowed the respondents to provide narrative answers.¹¹³

The first question focused on the extent to which schools are addressing professional identity formation in their course offerings.¹¹⁴ Two questions asked respondents to indicate how many courses in their law school’s required and elective J.D. curricula have “components that include as a learning outcome or goal the development of students’ professional identity.”¹¹⁵ Sixty (60) schools responded to the question regarding required courses as follows:

- “0”—6 responses
- “1-3”—28
- “4-6”—9
- “7-9”—5
- “10 or more”—12¹¹⁶

¹¹¹ E-mail from Professor Larry O. Natt Gantt, II to Assoc. Deans for Academic Affairs at ABA Accredited Law Sch. (Dec. 9, 2014, 3:47 PM) [hereinafter E-mail to Associate Deans] (on file with authors).

¹¹² Of the sixty schools that completed the survey, sixteen responded only to the first question. SURVEY OF ASSOCIATE DEANS, *supra* note 110, at 1. To incentivize the associate deans to complete the survey, the e-mail indicated that all respondents would receive a summary of the results and all respondents who completed the survey would be entered in a random drawing to win one of five fifty-dollar gift cards to Amazon.com. E-mail to Associate Deans, *supra* note 111.

¹¹³ SURVEY OF ASSOCIATE DEANS, *supra* note 110, at 1–3.

¹¹⁴ *Id.* at 1.

¹¹⁵ *Id.* at 1–2.

¹¹⁶ *Id.* at 1.

Forty-four (44) schools responded to the question regarding elective courses as follows:

- “0”—6 responses
- “1-3”—12
- “4-6”—7
- “7-9”—2
- “10 or more”—17¹¹⁷

Two follow-up questions to these questions then asked the respondents to list the names and credit hours of the courses included in the calculations above.¹¹⁸

Another question focused on the schools’ instruction in Professional Responsibility, asking, “To what extent does your law school’s course in Professional Responsibility include as a learning outcome or goal the development of students’ professional identity as opposed solely to learning the content of the ABA Model Rules of Professional Conduct or related state ethics rules[?]”¹¹⁹ Of forty-four (44) responses, the answers were as follows:

- “not addressed”—1 response
- “addressed but not emphasized”—5
- “emphasized but not as much as learning the content of the rules”—26
- “emphasized as much as learning the content of the rules”—11
- “emphasized more than learning the content of the rules”—1¹²⁰

Concluding the specific questions on courses, another question asked schools to report how they assess students’ professional identity development in courses that include such development as a learning outcome or goal.¹²¹ The question gave respondents choices outlining different levels of assessment. Out of twenty-eight (28) responses, the answers were as follows:

- “not assessed in any course”—5 responses
- “assessed in some courses but not all courses, but in no course is it factored into the students’ final course grade”—2
- “assessed in some but not all courses, and in some is factored into the students’ final course grade”—15
- “assessed in all courses and in some is factored into the students’ final course grade”—5

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.* at 1–2. This summary of the survey results does not describe these lists of class names, but they are on file with the authors.

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.*

¹²¹ *Id.*

- “assessed in all courses and in all is factored into students’ final course grade”—1¹²²

The survey then turned to questions related to extra-curricular programming at the law schools. The first of such questions asked, “Which of the following extra-curricular activities at the law school significantly address the development of professional identity . . . [?]”¹²³ The question then listed several activities from which respondents could select and provided an option for “other activities.”¹²⁴ Thirty-three (33) schools responded to this question, and the numbers below indicate the number of schools that indicated that the corresponding activity significantly addresses professional identity:

- “orientation for incoming students”—33 responses (all respondents)
- “presentations sponsored by the law school and given by members of the judiciary and/or the practicing bar”—29
- “activities sponsored by student organizations and led by students”—26
- “teams that participate in competitions, such as moot court, trial advocacy, negotiation, and client counseling”—27
- “events in which the law school’s career services office makes presentations”—27
- “presentations by faculty outside of the context of a particular course”—17
- “internships in which students work under the supervision of a judge or lawyer”—30
- “activities sponsored by local bar associations, American Inns of Court, or similar groups comprised primarily of judges and lawyers”—23
- “other activities”—4¹²⁵

The second of these questions focused on mentoring as a tool to develop students’ professional identity. The question specifically asked, “To what extent is mentoring provided to students in matters related to development of professional identity . . . [?]”¹²⁶ Thirty-three (33) schools responded to this question, and the numbers below indicate the number of schools that indicated how such mentoring was occurring at their institutions:

- “is provided by faculty informally”—29 responses

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 2–3.

¹²⁶ *Id.* at 3.

- “is provided by faculty formally in required meetings between a student and faculty advisor to discuss not only course selection but also matters related to professional identity”—6
- “is provided by judges and lawyers informally”—20
- “is provided by judges and lawyers formally in a mentor program organized through the law school but in which students are not required to participate”—16
- “is provided by judges and lawyers formally in a mentor program organized through the law school and in which students are required to participate”—1¹²⁷

The final survey question asked the respondents to assess overall how their schools prioritized students’ professional identity formation (the *Carnegie Report’s* Third Apprenticeship) in relation to the *Carnegie Report’s* other two apprenticeships. The question specifically asked, “Out of 100%, please approximate the percentage that your law school devotes its efforts and resources to developing students’ analytical abilities (The Carnegie Report’s First Apprenticeship), developing students’ lawyering skills (Carnegie’s Second Apprenticeship)[,] and developing students’ professional identity (Carnegie’s Third Apprenticeship)”¹²⁸ Twenty-eight (28) schools responded to this question with specific percentages totaling 100%, and the following results indicate the average percentage for each Apprenticeship:

- First Apprenticeship—55.6%
- Second Apprenticeship—29.6%
- Third Apprenticeship—14.8%¹²⁹

These results support and augment the findings of the *ABA Curricular Survey* by indicating that law schools’ efforts in promoting professional identity formation have concentrated on extra-curricular settings while significantly ignoring their required curricula. For instance, every school that responded to the question on extra-curricular programming indicated that its orientation program addresses issues related to professional identity formation.¹³⁰ In sharp contrast, over half, or 57%, of the schools responded that only as many as three of their required courses include as a learning outcome or goal the development of

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* While thirty-three schools responded to this question, three schools declined to provide specific percentages. Two schools provided specific percentages, but their responses were not included because they did not total 100. One school answered “100” for all three. The other school supported the overall findings in that it heavily weighted the first two apprenticeships over the third; it answered “40,” “40,” and “10.”

¹³⁰ *Id.* at 2.

students' professional identity.¹³¹ Similarly, even among schools' more numerous courses in their elective curricula, 41% responded that only as many as three of their elective courses include as a learning outcome or goal the development of students' professional identity.¹³² Assessment of students' professional identity formation in these courses is also lacking, as illustrated by the fact that only 21% of schools indicated that professional identity formation is assessed in all courses in which it is a learning outcome or goal.¹³³

Furthermore, although students can experience broad exposure to extra-curricular programming and both informal faculty and other mentoring events, this programming and mentoring may not reach many students because it may not be required beyond orientation. For instance, only 18% of schools responding to the question regarding mentoring indicated that such mentoring by faculty occurs in required meetings with students.¹³⁴ Similarly, only 3% of the schools responding to the question indicated that such mentoring by lawyers or judges occurs in a mentoring program in which students are required to participate.¹³⁵

Most telling is the participants' responses to the final question about the *Carnegie Report's* apprenticeships. Schools estimated that only 14.8% of their efforts and resources are devoted to developing students' professional identity.¹³⁶ The 2007 Reports did not advocate that law schools' focus on professional identity formation should be less emphasized than students' cognitive and skills development.¹³⁷ The *Carnegie Report's* three-apprenticeship model, in fact, indicates the three are equally important; given that report's discussion of how law schools have historically harmed students' ethical development, one could imply that the third apprenticeship should perhaps be given greater weight than the others. Moreover, the Shultz and Zedeck list of lawyer competencies indicates that many lawyer competencies—certainly more than 14.8%—involve traits that do not pertain solely to lawyers' cognitive or practical

¹³¹ *Id.* at 1.

¹³² *Id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.* at 3.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 65–66 (2012) (“The [Carnegie] Report suggests that without emphasis and development of all three apprenticeships throughout the entire law school curriculum, legal education fails to prepare students adequately for the practice of law.”).

skills development.¹³⁸ The responses to this survey question therefore affirm that schools are not properly allocating their efforts and resources in ways that cultivate these effectiveness factors.

Perhaps we ought not be surprised that law schools are offering more skills/experiential courses since the ABA adopted a standard in 2006 requiring them to do so.¹³⁹ A question thus looms about whether new ABA Standard 302, adopted in 2014, will encourage law schools to implement more instruction in professional formation. Specifically, Standard 302 now requires law schools to establish learning outcomes that include competency in the “[e]xercise of proper professional and ethical responsibilities to clients and the legal system; and . . . [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”¹⁴⁰

In sum, the assessment of knowledgeable scholars, the 2002–2010 *ABA Curricular Survey*, a review of law schools’ curricula and programming on their websites, and a survey of associate deans at ABA-approved law schools all point to the same conclusion: law schools have not responded appropriately to the 2007 Reports’ critique of their failure to develop students’ character as professionals.

Although scholars have highlighted law schools’ recent progress in teaching students about professionalism,¹⁴¹ strong evidence supports the conclusion that such progress is sparse and that many schools have not significantly altered their curriculum to accomplish the goals of cultivating students’ professional identity or enhancing their ability to make good practical judgments.¹⁴² The irony here is that probably the most important education law schools can provide students—how to incorporate their moral compass and values into lawyering to become practically wise lawyers—receives the least emphasis.

D. Reasons Why Law Schools May Be Delaying Emphasis on Developing Professional Identity and Practical Judgment Skills

Several reasons may explain law schools’ less-than-enthusiastic response in developing curricular initiatives that foster professional

¹³⁸ See SHULTZ & ZEDECK, *supra* note 84, at 26–27. For instance, of their twenty-six competencies, all six “Character” competencies, both “Working with Others” competencies, and the competencies of “Able to See the World Through the Eyes of Others” and “Providing Advice & Counsel & Building Relationships with Clients”—or 38% of the competencies—relate directly to students’ professional identity formation. *See id.*

¹³⁹ See *supra* note 95 and accompanying text.

¹⁴⁰ 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302(c), (d) (2014).

¹⁴¹ Kehner & Robinson, *supra* note 137, at 99 (“[M]any law schools have answered the call in the *Carnegie Report* and *Best Practices* to teach students about professionalism.”).

¹⁴² See *supra* notes 130–38 and accompanying text.

formation. First, the myth exists that students have fully formed their values and moral codes by the time they reach law school.¹⁴³ Second, some in the legal academy resist efforts to cultivate professional identity and practical judgment on the theory that it would involve inculcating values.¹⁴⁴ Third, law schools may be clinging to the unrealistic notion that a single course, Professional Responsibility, can teach students not only the content of the Model Rules of Professional Conduct, but also how to practice professionally and reach sound judgments.¹⁴⁵ Finally, a view not often stated—but which may best explain the delay most law schools have shown—is the belief that it is difficult to adopt educational initiatives that cultivate development of professional identity and practical judgment.¹⁴⁶

This Part of the Article will address the first three reasons articulated above. However, the reason that most needs to be addressed—the notion that it is too difficult to develop teaching methods to cultivate professional identity and judgment—will take up the entirety of Part IV, the concluding section of this Article. That discussion will demonstrate methods that already exist or that can be borrowed from methods in other professional schools so that law schools need not delay further in addressing what may be the most important part of students' law school education.

1. The Myth that Law School Students Are Not Able to Benefit from Formative Exercises in Professional Values and Judgment

The myth that law students' ethical compasses and values are fully formed by the time they enter law school has been proven false.¹⁴⁷ The

¹⁴³ See CARNEGIE REPORT, *supra* note 1, at 133 (noting that faculty “often argue that by the time students enter law school it is too late to affect their ethical commitment and professional responsibility”).

¹⁴⁴ See *id.* at 135 (“Many faculty who doubt the value of education for professional responsibility in law schools equate efforts to support students' ethical development with inculcation, which they see as illegitimate and ineffective.”).

¹⁴⁵ Cf. Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 46 (2009) (“Almost all schools require courses in professional responsibility, and three quarters of those responding to the [2004] Law School Survey on Student Engagement reported that their school placed ‘very much’ or ‘quite a bit’ of emphasis on the ethical practice of the law. Yet only a minority of students felt that these efforts had significantly helped them develop ‘a personal code of values and ethics.’”) (quoting LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2004 ANNUAL SURVEY RESULTS: STUDENT ENGAGEMENT IN LAW SCHOOLS 12 tbl.4 (2004), available at http://lssse.iub.edu/2004_annual_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf).

¹⁴⁶ See *id.* (noting that the lack of professional responsibility coverage outside of required courses is the result of teachers who “believe that their efforts are undermined by a mandatory format and the perceived need to prepare students for a rule-oriented multistate bar ethics exam”).

¹⁴⁷ CARNEGIE REPORT, *supra* note 1, at 133–35; see also Cheryl Armon & Theo L. Dawson, *Developmental Trajectories in Moral Reasoning Across the Life Span*, 26 J. MORAL

myth parallels a myth about intelligence in general. The past few decades have produced a better understanding of the multiple intelligences of human beings and their capacity to develop these well into adulthood.¹⁴⁸ Many refer to these developing forms of intelligence as emotional intelligence, sometimes called “EQ,” which is not fixed at a point in human development in the same manner as one’s intelligence quotient (IQ). Emotional intelligence is something necessary to the development of one’s professional identity, and by exploring the concepts of emotional intelligence and development of professional identity and judgment, we can see that they are alike in many ways.¹⁴⁹

(a) *Emotional Intelligence as a Framework for Understanding the Ability to Develop Skills and Values as One Matures*

Before Daniel Goleman’s *Emotional Intelligence* became a best-seller in the 1990s, many believed that personality traits were fixed in the same way as IQ.¹⁵⁰ Goleman dealt with intelligences other than cognitive intelligence—forms of intelligence that he called “emotional intelligence.”¹⁵¹ He categorized these forms as (1) knowing one’s emotions, (2) managing one’s emotions, (3) motivating oneself, (4) recognizing emotion in others, and (5) handling relationships.¹⁵² As Goleman observed: “[E]ven though a high IQ is no guarantee of prosperity, prestige, or happiness in life, our schools and our culture fixate on academic abilities, ignoring *emotional* intelligence, a set of traits—some might call it character—that also matters immensely for our personal destiny.”¹⁵³

Goleman discussed the essential need to include intuition in decision-making alongside cognitive analysis. Life’s personal “decisions

EDUC. 433, 433–34 (1997). See generally Muriel J. Bebeau, *Evidence-Based Character Development*, in 10 ADVANCES IN BIOETHICS: LOST VIRTUE: PROFESSIONAL CHARACTER DEVELOPMENT IN MEDICAL EDUCATION 47 (Nuala Kenny & Wayne Shelton eds., 2006).

¹⁴⁸ See *infra* notes 150–68 and accompanying text.

¹⁴⁹ This section is on emotional intelligence as an area in which law schools need to become more familiar so that they can develop educational methods that foster emotional intelligence as a part of students’ professional judgment. The following section concerns the contributions of moral psychologists and others in the field of moral, ethical, and human development as another area legal educators need to rely on in shaping their efforts in this area. Both sections are inspired by the discussion of these subjects in Larry O. Natt Gantt, II & Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville et al. eds., forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562507.

¹⁵⁰ See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 34 (1995).

¹⁵¹ *Id.*

¹⁵² *Id.* at 43.

¹⁵³ *Id.* at 36.

cannot be made well through sheer rationality; they require gut feeling, and the emotional wisdom garnered through past experiences.¹⁵⁴ Thus, unlike IQ, one's emotional intelligence is not fixed at a certain age.¹⁵⁵ Even into adulthood, a person can improve her ability to understand her own emotions and be aware of the emotions and motivations of others.

(b) Whether Values, Ethical Development, and Decision-Making Skills Are Fixed Before Young Adulthood

Some hold to the belief that a person's values and moral compass have been formed by the time she reaches law school.¹⁵⁶ Empirical studies, however, have confirmed that the moral and ethical development of the average adult continues well into mid-life, and probably even later.¹⁵⁷ Inspired by the work of Jean Piaget, Lawrence Kohlberg is the architect of the modern theory of the development of moral reasoning.¹⁵⁸ Kohlberg developed the classic formulation of six stages of moral development.¹⁵⁹ In his theory, Kohlberg opined that individuals develop in their moral reasoning as they move through these six stages, which are grouped into three levels.¹⁶⁰ Volumes have been written on Kohlberg's stage theory.¹⁶¹ Although critics have challenged Kohlberg's approach,¹⁶² his work still serves as the foundation of much thought on moral reasoning and has

¹⁵⁴ *Id.* at 53.

¹⁵⁵ *See id.* at 37.

¹⁵⁶ *See* Floyd, *supra* note 14, at 221 (stating that practical wisdom, as old as Aristotle's teaching, "responds to skeptics who argue that we have no responsibility for students' ethical formation because their characters are already formed by the time they begin law school").

¹⁵⁷ *See* Hamilton & Monson, *Ethical Professional (Trans)Formation*, *supra* note 70, at 927 & n.14 (collecting authorities on developmental research in higher education programs).

¹⁵⁸ 2 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT*, at xxvii–xxx (1984).

¹⁵⁹ *Id.* at 170.

¹⁶⁰ *Id.* at 170, 173–76.

¹⁶¹ *See generally, e.g.*, RONALD DUSKA & MARIELLEN WHELAN, *MORAL DEVELOPMENT: A GUIDE TO PIAGET AND KOHLBERG* (1975); LAWRENCE KOHLBERG: *CONSENSUS AND CONTROVERSY* (Sohan Modgil & Celia Modgil eds., 1986); LAWRENCE KOHLBERG, *THE MEANING AND MEASUREMENT OF MORAL DEVELOPMENT* (Heinz Werner Lecture Ser. Vol. 13, 1981); LAWRENCE KOHLBERG ET AL., *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* (J.A. Meacham ed., 1983); *MORAL DEVELOPMENT FOUNDATIONS: JUDEO-CHRISTIAN ALTERNATIVES TO PIAGET/KOHLBERG* (Donald M. Joy ed., 1983); *MORAL DEVELOPMENT, MORAL EDUCATION, AND KOHLBERG* (Brenda Munsey ed., 1980).

¹⁶² *See* Israela Ettenberg Aron, *Moral Philosophy and Moral Education: A Critique of Kohlberg's Theory*, 85 SCH. REV. 197, 197 (1977). *See generally* John G. Gibbs, *Kohlberg's Stages of Moral Judgment: A Constructive Critique*, 47 HARVARD EDUC. REV. 43 (1977).

spawned “neo-Kohlbergian” approaches by such theorists such as James Rest.¹⁶³

If one uses the Kohlberg paradigm, a law student, like any other human being, will fall somewhere along the six stages of decision-making. The “pre-conventional” stages include: focusing on making decisions to avoid punishment (stage 1) or to obtain rewards (stage 2).¹⁶⁴ The “conventional” stages include: making decisions to be a good person in one’s own eyes and the eyes of others (stage 3) or to comply with one’s sense of duty to society (stage 4).¹⁶⁵ The “post-conventional” or “principled” stages include: decision-making motivated by the “social contract” for the “welfare of all” (stage 5) or to comply with one’s commitment to universal ethical principles (stage 6).¹⁶⁶ James Rest and his colleagues at the Center for the Study of Ethical Development modified Kohlberg’s stage theory into “schema theory,” but this theory resembles Kohlberg’s approach by identifying three schemas that influence how individuals view and resolve moral problems.¹⁶⁷

These constructs in developmental stages of decision-making show a number of things legal educators should notice. First, educators are badly mistaken if they believe every law student enters law school at the same level of ethical development. Law students will vary in their ability to grapple with questions of ethics and professional conduct. Law schools thus have the ability to influence students’ emotional intelligence and prudence. Second, challenging students to address issues pertinent to ethical decision-making spurs their further development.¹⁶⁸

¹⁶³ See generally, e.g., JAMES REST ET AL., POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH (1999).

¹⁶⁴ KOHLBERG, *supra* note 158, at 174.

¹⁶⁵ *Id.* at 174–75.

¹⁶⁶ *Id.* at 176.

¹⁶⁷ Neil Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 334–35 (2011) [hereinafter Hamilton & Monson, *Legal Education’s Ethical Challenge*].

The Rest schemas maintain that a person’s reasoning processes is driven by one of the following:

(1) *personal interests*, or simplistic reasoning dominated by egocentric self-interest arguments, fear of punishment and authority, and early immature notions of social reciprocity (e.g., “You scratch my back, I’ll scratch yours”); (2) *maintaining norms*, or reasoning focused on existing norms, rules, codes, and laws; and (3) *post-conventional*, or reasoning involving concepts of justice, fairness, duty, and the evolutionary nature of morality in society.

Id. at 335.

¹⁶⁸ See F. CLARK POWER ET AL., LAWRENCE KOHLBERG’S APPROACH TO MORAL EDUCATION 133–34 (1989) (discussing research related to cultivating moral development in the educational context).

2. Exploring the Belief that Law Schools Should Not Inculcate Values and, at Most, Teach Only the Rules of Professional Conduct

The belief that cultivating professional identity and practical judgment requires inculcating values may be another reason legal educators are balking in response to the challenges to engage students in such formation.¹⁶⁹ Ironically, law schools and professors *are* addressing values when they make the effort to avoid them. Both the *Carnegie Report* and the *Best Practices Report* recognize that by avoiding discussion of ethical, social, and personal values, law schools are already showing their hand.¹⁷⁰ As the 2007 Reports conclude, the message law schools send by not addressing values, justice, and similar issues tells students that those issues are not important—and that what matters is competition, legal acumen, and how well one answers a professor's questions.¹⁷¹

Prior to the 2007 Reports, others had reached similar conclusions regarding the importance of teaching values in law school. For instance, after surveying the development of law schools from the advent of the Langdellian case-based Socratic Method through practice in modern law schools, Robert Stevens in his book *Law School: Legal Education in America from the 1850s to the 1980s* considered it fair to question “whether [law schools] tendency was to produce analytic giants but moral pygmies.”¹⁷² In his colorful metaphor, Stevens intended to convey that, in an effort to focus on cognitive skills and to ignore ethical, social, and moral questions, law schools were neglecting an important role.¹⁷³ Additionally, in his seminal 1978 article titled *The Ordinary Religion of the Law School Classroom*, Dean Roger Cramton observed:

The law teacher typically avoids explicit discussion of values in order to avoid “preaching” or “indoctrination.” His value position or commitment is not thought to be relevant to class discussion; students are left to decipher his views from the verbal and non-verbal cues that he provides. The teacher, moreover, has strong interests in the substantive niceties of his subject and is concerned about “coverage.” There is so much law

¹⁶⁹ CARNEGIE REPORT, *supra* note 1, at 135 (reflecting comments from law professors to the authors expressing the view that dealing with professional development and values would be illegitimate indoctrination of values).

¹⁷⁰ See *supra* notes 1–8 and accompanying text.

¹⁷¹ See BEST PRACTICES, *supra* note 2, at 30; CARNEGIE REPORT, *supra* note 1, at 140 (claiming that, by ignoring ethical and social issues, faculty members “are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students’ habits of mind, with important long-term effects on how they approach their work”); Daisy Hurst Floyd, *Reclaiming Purpose—Our Students’ and Our Own*, L. TCHR., Spring 2003, at 1, 1.

¹⁷² ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 53, 121 (1983).

¹⁷³ See *id.* at 121–22.

to study! Exploration of value positions on particular questions has a lower priority. This would not be troublesome if the priorities of other instructors differed, but it is likely that systematic neglect of values results from similar choices being made by most instructors.¹⁷⁴

In responding to Dean Cramton, Professor Katharine Bartlett directly addressed the paradox that attempting to avoid values actually teaches students a value system. The dilemma is one she perceives as inherent in addressing this field because professors cannot really be value-neutral, and “we merely mask our lack of neutrality by failing to address it.”¹⁷⁵ She adds that the professors should therefore discuss values in their classes “because it is right to do so.”¹⁷⁶ At the same time, Professor Bartlett observes that law professors cannot truly “teach” their students to adopt certain values because students are individual moral actors who come to law school with certain influences and views and who will not automatically abandon those.¹⁷⁷ The tension between these competing perspectives, however, ought not to deter law schools from the crucial task of addressing value formation.¹⁷⁸ Indeed, law professors should accept discussion and development of values as a challenge. The challenge will involve respecting the difference between the professor’s values, the institutional values of the legal profession, and the student’s values—at whatever stage in the ethical development process the student then finds herself.¹⁷⁹

In sum, the *Carnegie Report* and the *Best Practices Report* echoed observations that keen observers had been making for years. Law schools have never really been value-neutral. Law inherently deals with matters other than pure logic. Even in the sterile universe of an appellate opinion, students will realize the social, economic, and moral issues surrounding decisions. The exercise of practical judgment requires reasoning, but it also entails considering factors beyond the analytical realm. Without education that prepares students to exercise practical judgment using all of the elements that form sound decisions, students are receiving less than they deserve.

¹⁷⁴ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 256 (1978).

¹⁷⁵ Katharine T. Bartlett, *Teaching Values: A Dilemma*, 37 J. LEGAL EDUC. 519, 519 (1987).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 519–20.

¹⁷⁸ *Id.* at 521.

¹⁷⁹ *Id.*

3. How a Single Course in the Rules of Professional Conduct Cannot Satisfy the Law School's Obligation to Form Students and Help Them Develop Judgment

To remain accredited by the ABA, law schools must require students to complete one course of at least two credits in professional responsibility,¹⁸⁰ in which the schools typically teach the Model Rules.¹⁸¹ Law schools' emphasis on teaching the Model Rules goes hand-in-hand with the mandate from most states that students obtain a certain score on the Multistate Professional Responsibility Exam (MPRE) in order to be licensed.¹⁸² That exam tests a student's knowledge of the Model Rules¹⁸³ and, as a hurdle to receiving a state bar license, motivates schools to teach students the Model Rules so that each student knows what conduct is subject to discipline. These Rules do not encourage lawyers to practice beyond the minimal standards of competency.¹⁸⁴ Students are not encouraged to explore how the values of the profession may lead lawyers through their practical judgment to resolve competing values.¹⁸⁵ The focus is on avoiding sanctions.¹⁸⁶ Moreover, "[w]hen legal ethics courses focus

¹⁸⁰ 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014).

¹⁸¹ The ABA adopted the Model Rules of Professional Conduct in 1983. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44 (1995). The Model Rules replaced the Model Code of Professional Responsibility that divided Disciplinary Rules, for which a lawyer could be sanctioned, and Ethical Considerations, to which lawyers were asked to aspire. *See id.* One commentator made the following observation on this shift: "The effect of the move from general aspirations to detailed standards . . . became a move from a reach for professionalism to a search for loopholes that would justify lower and lower standards of behavior." Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 419 (2001); *see also* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 412 (2005) (reaching a similar conclusion and arguing for a move away from the Model Rules toward overarching moral guidelines).

Without an incentive to strive for values exceeding minimum standards, the Model Rules offer a lawyer the license to do everything not proscribed by the Model Rules. *See, e.g.*, Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 550 (2002).

¹⁸² For the list of states that require applicants to take the MPRE, see *Jurisdictions Requiring the MPRE*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Apr. 11, 2015).

¹⁸³ Jeremy M. Miller, *Legal Ethics and Classroom Teaching: The Apology*, 14 WIDENER L.J. 365, 421 (2005).

¹⁸⁴ *See id.* at 421–22.

¹⁸⁵ *See* Joshua E. Perry, *Thinking Like a Professional*, 58 J. LEGAL EDUC. 159, 159–60 (2008).

¹⁸⁶ *See* CARNEGIE REPORT, *supra* note 1, at 149. In a 1996 ABA Symposium on Teaching and Learning Professionalism, then-Professor (later Dean) Roger Cramton recalled the practice of law in the not-too-distant past when a lawyer was expected to balance her

exclusively on teaching students what a lawyer can and cannot get away with, they can inadvertently convey a sense that knowing this is all there is to ethics.”¹⁸⁷

The authors’ survey results indicate that many schools are now doing more than singularly focusing on the Model Rules in their Professional Responsibility courses. As noted above, only 16% of the schools responding to the question on professional responsibility instruction indicated that the development of students’ professional identity was not emphasized in their course. At the same time, over half of the respondents (57%) reported that professional identity was “emphasized but not as much as learning the content of the rules.”¹⁸⁸

The results affirm that it may be unrealistic to expect professors who teach Professional Responsibility in two- or three-credit hour courses to teach the Model Rules while equally emphasizing the cultivation of students’ ethical professional identity. After all, a course in the Model Rules is not in reality a course in “legal ethics” in a comprehensive sense. The Model Rules neither refer to ethics in name nor seek to provide a method of developing practical judgment.¹⁸⁹ The drafters of the Model Rules recognized that the Rules’ focus is on regulating conduct.¹⁹⁰ Geoffrey Hazard, chief drafter of the Model Rules, noted that they were never intended to be a code of “ethics,” but are more properly understood as a code of “legal obligations.”¹⁹¹ Similarly, the National Conference of Bar Examiners plainly states that the MPRE “is not a test to determine an individual’s personal ethical values.”¹⁹² The limited role of the Model Rules is not a criticism; it is a statement of fact. However, law schools need to ensure students know this limitation.

duties to the client with her duties to the judicial system. Professor Cramton observed that a shift has occurred and lawyers now believe “the modern heresy, endlessly repeated in multiple settings, that ‘the client comes first,’ meaning ‘first and only.’” Roger C. Cramton, Robert S. Stevens Emeritus Prof. Law, Cornell Univ., On Giving Meaning to “Professionalism,” Keynote Address at American Bar Association Symposium on Teaching and Learning Professionalism (Oct. 2–4, 1996), in *Teaching and Learning Professionalism*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 7–8 (1997).

¹⁸⁷ CARNEGIE REPORT, *supra* note 1, at 149; *see also* Schiltz, *supra* note 37, at 909 (“[C]omplying with the formal rules will not make you an ethical lawyer, any more than complying with the criminal law will make you an ethical person. . . . Complying with the rules is usually a necessary, but never a sufficient, part of being an ethical lawyer.”).

¹⁸⁸ *See supra* Part III.C.

¹⁸⁹ Luban & Millemann, *supra* note 181, at 45.

¹⁹⁰ *Id.*

¹⁹¹ *See* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 109 (3d ed. 1994); Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 571, 574 (1981).

¹⁹² *Jurisdictions Requiring the MPRE*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Apr. 11, 2015).

Given the number of Rules and the complexity of many of them, a two- or three-credit hour course can do little more than ensure the students learn the Rules and the other relevant professional standards. One school candidly stated an observation about professional responsibility that no doubt is not exclusive to that school: “Most students took the course only because it was required for graduation. They put it off until the last semester; they did not care about their grade, for they were assured of graduation and most of them had jobs lined up; and they did as little work as possible.”¹⁹³

Despite this constraint, law schools can ensure that students are informed in their Professional Responsibility course that the Rules should not be the *only* considerations in resolving ethical and professional questions. It would not take a great deal of effort to put the Model Rules in context, and the survey results support that many schools are indeed encouraging students to look beyond the Rules for decision-making guidance. Professional Responsibility professors, for instance, can explain that students will have to develop their own ethical guidelines to accompany the Rules and help them resolve dilemmas in those many areas where the Rules leave matters to an attorney’s discretion.

As one way of promoting such decision-making, all students in Regent University School of Law’s required Professional Responsibility course must write their personal philosophy of lawyering, an assignment adapted from the discussion of developing a philosophy of lawyering in the Professional Responsibility casebook authored by Nathan Crystal.¹⁹⁴ In the paper, which is graded and counts as a percentage of each student’s final course grade, students are instructed to set forth a decision-making “framework that will guide them as they: (1) integrate their personal and professional lives; and (2) approach ethical issues in their practice as lawyers.”¹⁹⁵

If a school does not add such a component to the Professional Responsibility course to address the relationship between the Model Rules and principles beyond them, it can offer a separate required course to ensure every student receives a more comprehensive view of ethical

¹⁹³ Edmund B. Spaeth, Jr. et al., *Teaching Legal Ethics: Exploring the Continuum*, 58 *LAW & CONTEMP. PROBS.* 153, 154 (1995).

¹⁹⁴ See NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 52–55 (5th ed. 2012).

¹⁹⁵ Larry O. Natt Gantt, II, *Professional Responsibility Syllabus 5–6* (Spring 2015) (on file with the Regent University Law Review). The syllabus also provides that students must set forth particular ethical principles that will guide them as they integrate their personal and professional lives and as they approach ethical issues as lawyers. Students should discuss how they will prioritize these principles when they face ethical dilemmas that involve conflicts between two competing virtues or goals.

Id. at 6.

principles. Students must be taught the role of the Model Rules in conjunction with other inherent values and principles to learn how to reach sound judgments. The bottom line is that a single course in Professional Responsibility can enhance students' professional identity, but it cannot produce the level of professional formation law schools must seek to attain in their students.

IV. HOW CURRICULUM AND TEACHING METHODS AIMED AT DEVELOPING ETHICAL PROFESSIONAL IDENTITY CAN ULTIMATELY LEAD TO THE FOUNDATION FOR PRACTICAL JUDGMENT

Any law school that decides to value the cultivation of ethical professional identity and practical judgment should consider the need to approach such objectives incrementally. We should not be surprised that law students, who are mostly young adults, do not enter law school with fully developed moral compasses. A recent longitudinal study that tested the moral development and ethical progress of incoming law students and then employed the same testing tools immediately before the students left school provides hope that law schools can positively affect their students' ethical professional identity development.¹⁹⁶ Because these students experienced an intentional, well-designed curriculum that fostered their ethical development from the first to the third year, a closer look at the study and the school's curricular approach is in order.

A. Recent Study Which Supports the Need to Structure the Educational Program to Develop Law Students' Professional Identity and Judgment

The longitudinal study focused on law students at the University of St. Thomas School of Law. In the fall of 2009, the study first collected the results of 168 entering law students' responses to two measures; (1) the Defining Issues Test (DIT), an accepted test for measuring moral development, and (2) the students' essay on professional formation.¹⁹⁷ Then, the study gathered results from the same students in the spring of 2012, employing the same test instruments—the DIT and the same professional formation essay.¹⁹⁸ The students showed a marked improvement in their moral and ethical judgment.¹⁹⁹

The University of St. Thomas Law School has a well-conceived curricular focus that seeks to nurture students' professional formation in each year of law school.²⁰⁰ While acknowledging the potential limits of the

¹⁹⁶ Hamilton et al., *Empirical Evidence*, *supra* note 69, at 48.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 55, 58.

²⁰⁰ *Id.* at 31–34.

study, the results of this school's longitudinal study suggest that the school's curricular emphasis on professional formation and judgment improved students' results on the assessments of their moral development.²⁰¹ Those who administered the study observed that many of the "law students gr[e]w in moral reasoning and ethical professional identity during the three years of law school."²⁰²

The emphasis the school places on nurturing students' professional formation is considerable. A first-year course that explores legal systems, the values of lawyers, broad moral and ethical issues—and which requires students to begin reflecting on these issues—provides a solid foundation.²⁰³ Additional required education, including a mentor externship and seminar that extends to the second and third years, offers the opportunity to help students further their professional formation.²⁰⁴ Though it appears to focus on developing practical skills, a required lawyering skills course includes an intentional effort to reinforce the professional formation begun in other courses.²⁰⁵ Moreover, the required Professional Responsibility course includes more than simply teaching the Model Rules.²⁰⁶ Instead, it helps students appreciate that the Model Rules are a necessary part of the information they need to make professional decisions, but that they must rely on ethical principles that transcend the Rules. In some professors' versions of the course, students prepare reflective papers to demonstrate their understanding of how the Model Rules and their value systems assist them in professional decision-making.²⁰⁷ Moreover, professors of doctrinal courses include exercises in their courses that require students to reflect on "lawyering, morality, and justice."²⁰⁸ Finally, students are encouraged to take a number of elective courses and participate in activities that further nurture their ethical professional identity and judgment.²⁰⁹

The results of this law school's study suggest that an integrated approach to teaching professional ethical formation and judgment can accomplish formative goals. The implications of this school's approach and its study results suggest that law schools should—if they are serious about professional ethical formation and development of practical judgment—

²⁰¹ *Id.* at 62–63.

²⁰² *Id.* at 63.

²⁰³ *Id.* at 31–32.

²⁰⁴ *Id.* at 32–34.

²⁰⁵ *See id.* at 34.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 35.

²⁰⁹ *See id.* at 35–39 (discussing, among other things, the school's clinical and experiential learning offerings, course in ethical leadership, and public service requirement).

structure their curricula to reflect that commitment. As noted, foundational courses in the first year need to introduce students to legal systems, professional values, and the ethical dilemmas students are likely to encounter in practice. Courses that carry through into the second and third years should concentrate on helping students formulate a method for reflectively deliberating on such dilemmas, a process which helps students grow in their ability to use their moral compass. Even with such an emphasis, a student may not develop practical wisdom in law school such that she can model Aristotle's phronesis²¹⁰ of (1) balancing competing values with empathy and detachment, (2) considering the variable courses of action and the consequences to others from each option, and (3) resolving the question in a way that is the best alternative in the circumstances.²¹¹ However, a student who has received training like that described in the University of St. Thomas study and proposed by this Article will be far more likely to develop phronesis than one whose ethical professional identity is neglected.

Despite the encouragement offered by this study of law students' development, questions remain. Over the long term, will students who experience cultivation of their ethical professional identity continue to develop in law practice? Will they realize that attending to their moral compass affects their well-being and fulfillment, as well as all those whom they serve in practice? Or will law students regress in the heat of practice and resort to the shortcut of doing whatever seems to advantage the client and avoids sanctions? A longitudinal study that tested students while in law school and again at a later point in time, such as ten years into practice, would help clarify the answers to these questions. For now, however, this study provides empirical evidence that a well-designed curriculum aimed at developing law students' ethical professional identity and judgment can have a favorable impact.

B. Recommendations of Curricular Changes and Specific Teaching Methods Which Provide Additional Evidence that Law Schools Can Affect Students' Ethical Professional Identity

More law schools need to adopt curricular and extracurricular programming to enhance their students' professional identity formation. In particular, introducing professional formation in the first year is likely crucial to the success of any three-year effort, given that students' development in this area is incremental and begins with foundational

²¹⁰ For a discussion of the meaning of phronesis—most simply translated “practical wisdom”—see *supra* Part I.B.

²¹¹ See *supra* Part I.B.

skills.²¹² Most law schools do not seem to be taking this approach. The recent *ABA Curricular Survey* suggests that, to the extent law schools are offering professional development or professional identity opportunities, these options are typically in the upper-division courses.²¹³ The authors' review of law school course offerings, moreover, indicates that these upper-division courses must be electives because so few required ethics credits were found.²¹⁴ Currently, the approach seems to fall into three categories. First, a relatively small minority of schools are making professional identity part of the curriculum and intentionally seeking to structure their efforts to best promote formation.²¹⁵ Second, some schools appear to be offering a series of electives without an integrated structure that students sequentially take for skill and professional identity development.²¹⁶ Third, the majority of law schools are paying less attention to professional identity formation—or even to developing ethics courses—than to skills and experiential courses.²¹⁷

If a school took the findings of the 2007 Reports to heart, its curriculum would look much different. It would have at least a component of some first-year course in which the foundational skills necessary for developing an ethical professional identity were part of the curriculum. These foundational skills are discussed fully below.²¹⁸ Furthermore, students should be aware from the start of law school that, although Professional Responsibility and the Model Rules are a necessary part of their education and formation, these are not sufficient to prepare them to make sound judgments. Ideally, Professional Responsibility would address the Model Rules and include elements of instruction on how one's moral compass, informed by principles important to both the person and to the profession, needs to guide the decision-making process. Finally,

²¹² See *supra* Parts III.D.1.b., IV.A.; see *infra* Part IV.C.1.

²¹³ See *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 16 (indicating the addition of courses on professionalism and professional identity in a review of law schools' upper division curricula).

²¹⁴ See REVIEW OF CURRICULAR INFORMATION, *supra* note 110 (showing only twenty-four schools with required ethics-related offerings beyond Professional Responsibility). For an in-depth discussion of the authors' survey results, see *supra* Part III.C.

²¹⁵ As discussed in the preceding section, the University of St. Thomas is a good example of this approach. See *supra* notes 196–209 and accompanying text.

²¹⁶ See REVIEW OF CURRICULAR INFORMATION, *supra* note 110 (concluding that if the courses are not required ethics courses, they must be electives). Moreover, the more typical curriculum included a wide range of courses that touched on matters involving ethics, but not on the method of ethical formation and judgment. *Id.* at n.1.

²¹⁷ See *2002–2010 A.B.A. Curricular Survey*, *supra* note 92, at 74 (indicating that, whereas skills and experiential courses were increased at between thirty and sixty schools, only twenty-seven schools reported an increase in legal ethics and professionalism curricular offerings).

²¹⁸ See *infra* Part IV.C.1.

upper-division courses other than Professional Responsibility would build on the foundational skills students learn in their first year and would challenge them to grow by exercising their judgment in course exercises.

Law schools have sufficient teaching method models to develop students' foundational skills and form higher order skills. A variety of teaching methods—some developed in legal education and some borrowed from other professional schools—can help students improve in understanding themselves and resolving value conflicts.²¹⁹ The key is to weave these teaching methods intentionally into a well-designed curriculum. Certain skills need to be developed before students can proceed. By recognizing what we know about human emotional and moral development,²²⁰ legal educators should ultimately gravitate to a curriculum that first addresses foundations skills, such as self-awareness and empathy for others, and later addresses complex problem-solving exercises designed to exercise practical judgment. Because certain skills are foundational, students can develop higher order faculties such as empathy and relational aptitude only after they are equipped to develop such faculties. The ultimate goal should be for students to have the framework from which to exercise practical judgment in resolving challenging ethical and professional dilemmas. If schools do not accept that the development of a professional ethical identity is an incremental process, they risk undermining the effectiveness of any effort to cultivate students' professional identity and judgment. The lack of required ethics credits and the scattered electives offered to students suggest that many schools have failed to design curricula that will best serve their students in this area.²²¹

Law schools certainly can take different approaches to reach the goal outlined above, but a guiding principle needs to be the incremental nature of the development of ethical professional identity and judgment.²²² If they remember that principle and sequence the curriculum accordingly, educators can reasonably debate the teaching methods most effective at their schools.²²³

The following suggested methods are drawn from the pioneers in law teaching who have ventured into the realm of developing self-awareness, emotional intelligence, and/or how to exercise practical judgment.²²⁴ Other

²¹⁹ See *infra* Part IV.C.

²²⁰ See *supra* Parts II.B, III.D.1.

²²¹ See *supra* notes 213–17 and accompanying text.

²²² See Kehner & Robinson, *supra* note 137, at 99.

²²³ *Id.* (“[T]here is no ‘one size fits all’ approach to teaching students the habits and traits that embody one’s sense of professional identity.”).

²²⁴ See *infra* Part IV.C.1.

exercises are drawn from education in other professions, such as medical schools.²²⁵

C. Incremental Skills and Faculties Necessary to Professional Identity and Practical Judgment

Students do not come to law school as fully-formed, self-aware persons who are able to deliberate thoughtfully over ethical and professional questions.²²⁶ By helping them develop skills that are foundational to ethical professional identity and then building on those skills, law schools give students the opportunity to grow.

1. Foundational Skills

The following skills are foundational to the development of a well-developed ethical compass: (1) self-awareness, (2) ethical sensitivity, (3) relational skills and cultural competency, (4) the ability to recognize one's own lack of objectivity and the related need to have others (e.g., mentors) serve as a check on one's lack of objectivity and on one's tendency to rationalize, and (5) self-reflection on values in light of ethical issues and a method for reaching a practical judgment between competing values.²²⁷

These skills cannot all be gained at once.²²⁸ Some students will be stronger in certain skills than in others.²²⁹ Each student needs to have the opportunity to identify the skills in which she needs development. Students can then move to experiences that challenge them to apply these skills and see clearly how they will relate to their effectiveness as lawyers. Because working with and understanding other people (clients, opposing counsel, witnesses, judges, and court personnel) is crucial to effective lawyering, as it is to so many professions, developing relational skills should be a priority.²³⁰ An integrated program of instruction would sequence the educational methods so as to help students grow in their understanding of themselves and in their ability to resolve value and ethical conflicts.²³¹ Such a program would develop foundational skills in

²²⁵ See *infra* Part IV.C.2.

²²⁶ See *supra* Part III.D.1.

²²⁷ See *infra* Parts IV.C., IV.D.2.; Julie A. Oseid, *When Big Brother Is Watching [Out for] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues from My Mentor*, 59 S.C. L. REV. 393, 420–21 (2008). For one of the best sources on the subject of relational skills, see RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden eds., 2010) [hereinafter RELATIONSHIP-CENTERED LAWYERING].

²²⁸ See *supra* Part III.D.1.

²²⁹ See *supra* Part III.D.1.b.

²³⁰ See generally RELATIONSHIP-CENTERED LAWYERING, *supra* note 227.

²³¹ As Professor Timothy Floyd contends,

the early part of law school and build on those skills as students progress. The following are suggestions for such a program.

(a) *Developing Self-Awareness as a Beginning*

A reasonable point of departure is to help students develop greater self-awareness. A self-aware person recognizes her strengths, weaknesses, emotions, thoughts, and beliefs.²³² A self-aware person displays the qualities of emotional intelligence discussed above.²³³ Indeed, recent studies—most notably the one performed by Marjorie Shultz and Sheldon Zedeck—have suggested that such qualities have as much to do with lawyer effectiveness than cognitive skills.²³⁴

(b) *Teaching Methods to Enhance Self-Awareness*²³⁵

(1) Journaling and Class Discussion

Journaling probably was among the first efforts in law school to help students develop a degree of self-awareness. As one leading educator has observed: “The long list of impressive benefits of journal writing for students included promoting self-awareness and reflection, enhancing learning from experience, releasing stress, and developing lifelong

the focus on professional identity and integrity must be intentional, it must be pervasive, and it must start in the first year. The Carnegie Report insists that it will not be helpful to simply add on another elective course or two as an adjunct to the core curriculum. The strategy must be integrative rather than additive.

Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity*, 28 MISS. C. L. REV. 339, 348 (2009).

²³² See Victor Lipman, *All Successful Leaders Need This Quality: Self-Awareness*, FORBES (Nov. 18, 2013, 4:54 PM), <http://www.forbes.com/sites/victorlipman/2013/11/18/all-successful-leaders-need-this-quality-self-awareness> (summarizing the qualities of self-awareness and their importance to the success of leaders).

²³³ GOLEMAN, *supra* note 150, at 43; *see supra* Part III.D.1.a.

²³⁴ *See supra* notes 82–91 and accompanying text. Of the twenty-six factors identified by Shultz and Zedeck as indicative of lawyer effectiveness, at least half of the skills associated with effective lawyers are ones that (1) many would associate with emotional intelligence and (2) would be the kind enhanced by training in self-awareness. These range from the ability to listen and work with others, to empathy, or the ability to “see the world through the other’s eyes,” to regulating one’s level of stress and spending time on self-development. *See supra* notes 82–91 and accompanying text. As one commentator observed about the implications of the Shultz-Zedeck study, “the results . . . suggest that academic factors are profoundly under-inclusive of future lawyering potential.” William D. Henderson, *Successful Lawyer Skills and Behaviors*, in AM. BAR ASS’N, ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER 59, 69 (Paul A. Haskins ed., 2013).

²³⁵ This section is inspired by a discussion of the topic in Gantt & Madison, *supra* note 149.

self-directed learning habits.”²³⁶ Other professional schools have long used journaling to help students develop self-awareness through reflection.²³⁷

In law schools, clinical programs and externships appear to have been among the first to use journals and reflective writing to help students develop self-awareness and to provide them feedback on their journals.²³⁸ Journaling offers law students the rare opportunity to express feelings:

There is seldom a place in a law school curriculum for a student to regard awareness of and expression of her feelings as an integral part of the educational experience. This is especially true of the doubts and anxieties that students often encounter when faced with the reality of their own role in the legal system.²³⁹

More recently, doctrinal courses have begun to include journaling as part of the course. For instance, the *Context & Practice* series of casebooks, edited by Michael Hunter Schwartz includes professional formation questions in each casebook.²⁴⁰ These questions are designed primarily to focus on the gray areas of the Model Rules, thereby requiring the students to exercise their own discretion in solving the lawyer’s dilemma.²⁴¹ Moreover, many of the questions ask students to reflect in journals on emotions they may experience in a scenario outlined for them.

For instance, students in Regent University School of Law’s course in State Civil Pretrial Practice and Procedure journal on assuming the role of a lawyer meeting with a client. In the meeting, the lawyer must deliver unfavorable news about claims that are not sustainable along with

²³⁶ Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 GONZ. L. REV. 129, 130 (2003).

²³⁷ See, e.g., Karen Hinett, *Improving Learning Through Reflection—Part One*, HIGHER EDUC. ACAD., available at http://www-new1.heacademy.ac.uk/assets/documents/resources/database/id485_improving_learning_part_one.pdf (describing the usefulness of reflection to doctors, dentists, social workers, and architects).

²³⁸ See J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 55 (1996); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 249–51 (2009).

²³⁹ Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLINICAL L. 7, 34 (1997).

²⁴⁰ See Michael H. Schwartz, *Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, 3 ELON L. REV. 27, 34, 51–53 (2011); Flier for *Context and Practice Series*, CAROLINA ACAD. PRESS, http://www.cap-press.com/pdf/C&P%20december%202013_schwartz%20series.pdf (last visited Apr. 11, 2015). Other series, to a greater or lesser extent, include some forms of educational methods aimed at improving students’ professional formation and judgment. See, e.g., BRIDGE TO PRACTICE (West Academic Publishing); DEVELOPING PROFESSIONAL SKILLS (West Academic Publishing); EXPERIENCING LAW (West Academic Publishing); SKILLS & VALUES (LexisNexis); LEARNING SERIES (West Academic Publishing).

²⁴¹ See, e.g., BARBARA GLESNER FINES, PROFESSIONAL RESPONSIBILITY: A CONTEXT AND PRACTICE CASEBOOK, at xx (2013).

positive news that other claims can be brought.²⁴² The students are encouraged to journal on how they feel about delivering bad news. Many, if not most students, report a feeling of some anxiety. Recognizing that inexperienced lawyers often have difficulty expressing unfavorable news to clients, journaling is employed as a means to introduce students to the value of self-awareness.

After students have journaled their reactions, they discuss their experience as a class.²⁴³ Inevitably, as some students acknowledge feeling uncomfortable about bearing unfavorable news, a dialogue proceeds on how feeling that way as a new lawyer is fairly typical. Some students acknowledge that until they realized the anxiety that was leading them to do so, they planned solely to discuss the positive news and avoid discussing the bad news. Such a phenomenon of avoiding negative feelings—and of being unconscious of that fact—is not unusual.²⁴⁴ If students have not recognized these feelings before, the discussion helps them build self-awareness. They begin seeing that their emotions are a useful guide to which they should pay attention in representing a client. When addressing a lawyer's role and obligations to the client, the professor can guide a discussion that explores why the best approach is to be thorough and honest with the client.

(2) Assigned Readings and Class Discussion to Improve Emotional Intelligence

Professors can help students develop self-awareness in other ways. For instance, Professor Robin Slocum describes how she uses readings that relate to ethical issues likely to evoke emotional responses from students.²⁴⁵ For example, Professor Slocum selects readings describing “a grim portrayal of an actual lawyer's experiences in a law firm in which colleagues pressured him to conform to a variety of billing practices that he believed were unethical and immoral.”²⁴⁶ She then suggests a way to spur discussion in class: “As a prompt, [the professor] ask[s] whether any students felt sad, angry, afraid, or disheartened about the profession they

²⁴² BENJAMIN V. MADISON, III, CIVIL PROCEDURE FOR ALL STATES: A CONTEXT AND PRACTICE CASEBOOK 21–22 (2010) [hereinafter MADISON, CIVIL PROCEDURE].

²⁴³ Students are not required in class to disclose what they wrote in their journals. Most students are willing to engage in the discussion and to say what they wrote. After the discussion they will provide comments such as whether they have revised their view.

²⁴⁴ See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 48, 59 (2012).

²⁴⁵ Robin Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, 45 CREIGHTON L. REV. 827, 847–48 (2012).

²⁴⁶ *Id.* at 847 (describing readings taken from LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 519–26 (2d ed. 2008)).

were preparing to enter.”²⁴⁷ Professor Slocum helps students realize that their emotional reactions can signal the internal tension they feel (and should feel) with unethical practices. “Because students become viscerally aware of the emotional impact that various unethical practices would have on them, this discussion also makes their personal values become more alive within them.”²⁴⁸ The self-awareness that students gain through such a method is only the beginning of a process. As explained below, students will learn other skills that enhance their ability to exercise practical judgment.

(3) Mindfulness and Contemplative Practices

For those who wish to be more self-aware, contemplative practices have for ages served to help them live better lives. Recognizing the value of these practices in developing self-awareness, Professor Rhonda Magee includes in her definition of “contemplative practice” a variety of practices but highlights primarily “mindfulness meditation” techniques.²⁴⁹ She contends that this practice leads to “increased awareness, increased capacity to regulate emotions . . . and a felt sense of interconnection with others.”²⁵⁰

Beyond simply introducing students to meditation, Professor Magee incorporated the practice into a class in which students played the role of a lawyer facing a variety of stressful circumstances.²⁵¹ She found that the students who meditated became more aware of their emotions, improved their ability to regulate these emotions, and showed the capacity to develop a sense of connection to others.²⁵² In other words, they were more conscious in the process of performing a legal task and were better able to maintain composure.²⁵³

2. A Step Further—Developing Empathy and Moral Sensitivity²⁵⁴

Students who are self-aware are not necessarily empathic. They are at least more aware of their own emotions and perhaps even their motivations, ideals, and other insights that come with self-awareness.

²⁴⁷ *Id.* at 848.

²⁴⁸ *Id.*

²⁴⁹ Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 539–40 (2011). For a collection of articles on the value of teaching mindfulness to law students, see Symposium, *Mindfulness*, 61 J. LEGAL EDUC. 634 (2012).

²⁵⁰ Magee, *supra* note 249, at 589.

²⁵¹ *Id.* at 588.

²⁵² *See id.* at 589.

²⁵³ *See id.* at 589–90.

²⁵⁴ This section is inspired by a discussion of the topic in Gantt & Madison, *supra* note 149.

With heightened emotional intelligence, the next challenge in cultivating students' professional identity and their ability to exercise practical judgment is to help them develop empathy.

The reason empathy is so important to a lawyer's professional identity and judgment is that empathizing with others affected by her decisions improves the lawyer's ability to evaluate and choose between potential courses of action.²⁵⁵ An ethically sensitive person recognizes the competing values in any ethical dilemma, and considers the impact *on others* of the potential choices as she chooses the best one under the circumstances.

(a) Teaching Methods and Exercises Used in Other Professional Schools to Develop Empathy and Moral Sensitivity

Even though law schools typically have not developed methods to encourage the skills of empathy and moral sensitivity, other professional schools have. For instance, "[i]n the last decade in graduate medical and dental education, research on how to assess empathy and the effects of the curriculum and specific pedagogies on students' abilities to empathize with patients, has flourished, providing some insights for legal education."²⁵⁶ Likewise, medical schools highlight the value of empathy in a variety of ways. For instance, medical students are taught to empathize with patients during simulations with community members trained to role play difficult patient situations.²⁵⁷ Medical schools also use other educational models in which students role play, such as by taking on the role of a patient hospitalized with a specific condition, facing some of the frustrations patients experience in hospitals.²⁵⁸ Dental schools have also made progress in encouraging and assessing ethical sensitivity. One example is in the use of a Dental Ethical Sensitivity Test, in which students role play as dentists listening to a patient's problem, after which the student continues in role to respond to the situation.²⁵⁹ A student then meets with her dentist-mentor, and they discuss the degree of ethical sensitivity the student displayed, how to improve the student's sensitivity, and how to convey that sensitivity to the patient.²⁶⁰

²⁵⁵ Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1, 18, 22 (2008).

²⁵⁶ Hamilton & Monson, *Legal Education's Ethical Challenge*, *supra* note 167, at 358.

²⁵⁷ See Helen R. Winefield & Anna Chur-Hansen, *Evaluating the Outcome of Communication Skill Teaching for Entry-Level Medical Students: Does Knowledge of Empathy Increase?*, 34 MED. EDUC. 90, 91, 93 (2000).

²⁵⁸ See, e.g., Michael Wilkes et al., *Towards More Empathic Medical Students: A Medical Student Hospitalization Experience*, 36 MED. EDUC. 528, 529–30 (2002).

²⁵⁹ See Hamilton & Monson, *Legal Education's Ethical Challenge*, *supra* note 167, at 361.

²⁶⁰ See *id.* at 361–62.

(b) *Law Students “Role Playing” a Lawyer Representing a Seriously Injured Client*

Law schools could adapt the methods used in medical and dental schools. A law student, for example, could role play a lawyer meeting with a client who was paralyzed in an accident. Before meeting the client, the student could be asked to prepare by considering, if she were that client, how she would likely feel in the client’s situation, how she would feel about no longer being able to do the job she had done all her life, and how she would likely feel about having to adapt to life after the accident. After considering these questions, the student could be asked what she should do in the first client meeting that she might not otherwise have thought to do.

An alternative approach that would match the method used in medical schools would be to have the student role play the paralyzed client but then have another student, or the professor, play the role of the lawyer. The lawyer could then purposefully fail to show concern for the client and demonstrate how a client might feel when consulting with a lawyer who has no idea what it is like to be paralyzed and seems to think that litigation can solve all the client’s problems. As with a medical student who is forced to role play a patient and be subjected to the frustrations of hospitalization, taking on the role of the injured client may more effectively show to students why they need to develop empathy.

(c) *Law Students “Role Playing” a Lawyer Dealing with a Rambo Opposing Counsel*

Having become the client’s advocate, lawyers without foundational skills to help them remain balanced and true to their values can become singularly focused on the client’s interests.²⁶¹ Such a lawyer often is blind to the views and feelings of witnesses in the case, of opposing counsel, or even of the judge.²⁶² Lawyers should represent their clients diligently and with the clients’ best interests in mind. However, lawyers who lack the broader perspective that comes with emotional intelligence, empathy, and moral sensitivity often yield to the temptation to act in ways that go

²⁶¹ Cf. CRYSTAL, *supra* note 194, at 22 (asserting that the traditional approach to decision-making is the client-centered philosophy which requires lawyers to take any action that will advance the client’s interests as long as it does not violate the law).

²⁶² See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75, 86–87 (2000) (describing the two principles underlying this type of lawyering as 1) zealous partisanship on behalf of clients that will do everything possible to obtain client’s goals short of violating a rule and 2) the belief that such lawyers are neither morally nor legally accountable when functioning as this type of advocate).

beyond the bounds of proper advocacy.²⁶³ The truth is, moreover, that taking such an approach usually does not serve, but often hurts, the client's best interests.²⁶⁴ A lawyer, for instance, may try to impress his client by acting aggressively in depositions, by insulting deponents, and arguing with opposing counsel.²⁶⁵ These are classic examples of behaviors that occur regularly, but which serve no good purpose.

A law student (or lawyer) who has reflected on the professional identity and values she wants to display would be unlikely to engage in such behaviors. The hardball approach often is a role that lawyers adopt because they somehow have the notion that effective lawyers have to play tough at all times.²⁶⁶ In reality, the lawyers who have a sense of their principles will not adopt the role of a "Rambo" lawyer and are able to educate clients that hardball lawyering can do more damage than good. It often is damaging because the disrespectful, overly aggressive treatment of others backfires and motivates one's opponent and her lawyer to fight the case more vigorously.

Role playing can be effective in developing one's ethical sensitivity in a way that discourages hardball lawyering. Students can take on the role, for instance, of counsel in a deposition facing an opposing counsel who constantly objects in ways to convey information to the client. Known as "speaking objections," such objections are prohibited by the Federal Rules of Civil Procedure.²⁶⁷ However, the practice is still prevalent because depositions typically occur outside the court and, thus, the lack of a judge often emboldens a lawyer to feel more freedom to act as she pleases.²⁶⁸ A deposition simulation in which opposing counsel makes inappropriate speaking objections should teach students at least two things. First, the student "lawyer" will appreciate how inappropriate it is for a lawyer to take her client's interests to such an extreme that she will interfere with another lawyer's questioning and suggest answers. The professor could ask the class observing such behavior, "Do you want to be that kind of lawyer?" Most should see they do not. Those who say they have no problem with it can be engaged in a dialogue that explores how they will deal with

²⁶³ Cf. *supra* CRYSTAL, note 194, at 23 (describing how critics of a client-centered approach contend that such an approach leads to attorneys' pursuing morally objectionable goals and unfair strategies on behalf of their clients).

²⁶⁴ See Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 79, 79–81.

²⁶⁵ See *id.* at 79. The phrase "Rambo lawyering" likens overly aggressive lawyers who use hardball tactics to Sylvester Stallone's character in the Rambo movies, most of which were released in the 1980s.

²⁶⁶ *Id.*

²⁶⁷ See FED. R. CIV. P. 30(c)(2); *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at *4 (D. Kan. Jan. 5, 2012).

²⁶⁸ Bruce Ching, *Narrative Implications of Evidentiary Rules*, 29 QUINNIPIAC L. REV. 971, 983 (2011).

such behavior when they are taking a deposition. They can be asked whether they have considered that antagonizing an opponent will make the case more difficult. Or the professor can simply ask, “Isn’t it deceptive to make objections that send messages to a witness? If a lawyer cannot answer for a witness, why do you believe they can do indirectly what they cannot do directly?” Second, the student “lawyer” will learn that the way to deal with such practices is to ask the court reporter to mark the pertinent parts of the record and, if opposing counsel continues to interfere, call the court and find a judge who will order objecting counsel to cease.

(d) Allowing Students to Develop Moral Sensitivity in Externships Guided by the Supervising Lawyer and Faculty Advisor

Finally, law schools clearly need to offer opportunities for students to interact with clients in clinical settings and externships, under the supervision of a lawyer and a faculty advisor. In such one-on-one relationships, the mentor can—as the mentor-dentist does with the dentistry student—explain how opportunities for empathy arise in every case.²⁶⁹ The clinical program and externship program highlight for the supervising lawyer, the faculty advisor, and the student the importance of the student’s seeking and receiving guidance on evaluating the choices that inevitably arise in handling cases. Encouraging students to see the impact of their ethical choices on clients and all others affected by their decisions, and to make consideration of these a habitual part of their way of dealing with clients and others, will likely increase the degree to which students pay attention to the feelings and limitations of others and the need to attend to these as part of their lawyering practice.

D. Equipping Students to Develop Practical Judgment

The previous sections have suggested that the cultivation of foundational skills is necessary in forming professional identity and developing good practical judgment. The root of that process is for students to become more aware of themselves and to develop skills that require capacities other than purely cognitive ones, such as their intuition and knowledge of human nature.²⁷⁰ Persons with emotional intelligence as outlined in this Article, who can use both their intellect and other forms of intelligence, are prepared to engage the higher order skill of exercising practical judgment.²⁷¹ Because the ability to develop practical judgment continues throughout the practice of law, law schools can at best provide

²⁶⁹ See *supra* note 260 and accompanying text.

²⁷⁰ See *supra* Part IV.C.1.

²⁷¹ See *supra* Part III.D.1.

students with a framework in which to begin making decisions.²⁷² Yet, if law schools do not attempt to equip students with the tools necessary to identify factors, such as competing values, that will affect their professional decisions, they are failing to offer arguably the most important part of a professional education.

1. Elements of Decision-Making that Aims for Practical Wisdom

No one can expect to provide a formula by which students or lawyers will easily reach good judgments. Typically, the deliberative process requires holding more than one possible course of action in mind. After deliberation, a person exercising practical wisdom or judgment decides upon what she deems the best resolution in the circumstances. This best resolution does not mean the resolution is one in which no one is affected adversely; more often than not, judgments are made that represent the best decision under the circumstances but do not resolve every issue neatly. Because most ethical or professional judgments involve “gray areas,” students can, as they progress in phronesis or practical wisdom, realize that exercising thoughtful judgment in these circumstances is better than avoiding reflective deliberation on the path of least resistance.²⁷³

In this process, students will see that one of the facets of Aristotle’s concept of phronesis is the tension between seemingly opposite points. As Anthony Kronman observed, the process is, in a way, “bifocal,” with tension between one’s sympathy for a person or position and the simultaneous need for detachment.²⁷⁴ Commenting on Kronman’s insight, Mark Aaronson recognized how the tension implicit in exercising practical wisdom serves as valuable guidance for educators: “[Kronman’s] explanation provides, in effect, an analytic roadmap on how to improve one’s judgment, particularly when seeking to choose among competing considerations in factually specific contexts.”²⁷⁵ In making a judgment call, someone needs to both empathize with those potentially affected and maintain enough detachment to be objective.²⁷⁶ Although it does not provide a complete roadmap, this method of reaching practical judgments from both empathy and detachment leads to better decisions, and instructing students on such methods will improve their decision-making

²⁷² See *supra* Part III.D.1. Legal educators have recognized that law schools should borrow other professional schools’ methods of helping their students develop the ethical judgment necessary in those disciplines. See *supra* Part IV.C.2.a.

²⁷³ See *supra* notes 21–33 and accompanying text.

²⁷⁴ ANTHONY T. KRONMAN, *THE LOST LAWYER* 72 (1993).

²⁷⁵ Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 144 (1995).

²⁷⁶ *Id.*

generally.²⁷⁷ In emphasizing the importance of understanding the *process* of good decision-making, Aaronson writes:

Lawyers and law students often are too quick to jump to ultimate value judgments. The effects frequently are the per se dismissal of opposing value premises and an automatic self-justification of one's own without any real reflection. In separating the process from the substance of moral decision making, my intention has been to draw attention to a moral foundation for lawyering that acknowledges the contextual nature of the choices that attorneys make but does not sanction a false relativism.²⁷⁸

Likewise, empirical studies demonstrate that law students learn professional decision-making most effectively when presented with “cognitive disequilibrium or optimal conflict on issues relating to the person's moral core within a context of psychological safety.”²⁷⁹ In other words, students learn when confronted with questions that are not easily resolved and that they can work through without fear of criticism or judgment. Once students have developed the foundational skills suggested in this Article, legal educators should ensure they are confronted with challenges that will require the student to grow. However, they should learn to work through their disequilibrium in a safe environment in which they are not expected to have the practical wisdom of a seasoned, respected lawyer. Perhaps they will be inarticulate in their first attempts to deal with difficult questions. With practice and experience, they should improve their ability to exercise judgment. It may be years before someone truly displays practical wisdom consistently, but she will at least be on the path to doing so. In his influential book, *The Reflective Practitioner*, Donald Schön describes a professional who has mastered the ability to evaluate multiple solutions: “When the practitioner reflects-in-action . . . , paying attention to phenomena and surfacing his intuitive understanding of them, his experimenting is at once exploratory, move testing, and hypothesis testing. The three functions are fulfilled by the very same actions. And from this fact follows the distinctive character of experimenting in practice.”²⁸⁰

Other guides to practical judgment in the face of difficult questions should be mentioned. Although not often the basis for a definitive answer to a question in practice, knowledge of the Model Rules and other relevant ethical standards remains essential to developing professional judgment.

²⁷⁷ See *id.* at 144–45.

²⁷⁸ *Id.* at 152–53.

²⁷⁹ Neil W. Hamilton et al., *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW., no. 3, 2012, at 1, 11.

²⁸⁰ DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 147 (1983).

If the matter is client confidentiality, for instance, the Model Rules will often leave little room for alternative courses of action.²⁸¹ However, most of the Model Rules allow for the exercise of discretion, especially when different Rules are in tension. For instance, the Rule on Diligence (Model Rule 1.3) and the Rule on Fairness to Opposing Counsel (Model Rule 3.4) are often in tension with scenarios that implicate hardball lawyering.²⁸² As the Model Rules' Preamble itself states, one needs to be ethically and morally sensitive so as to exercise wise judgment in situations in which the Rules give lawyers discretion in ethical decision-making.²⁸³

In addition, good decision-makers pay attention to their emotions and process them without allowing them to dominate their decisions. This practice is known as making emotions "an ally of reason."²⁸⁴ Moreover, a person's life experiences are also part of the factors employed in evaluating all of the considerations that bear on making the decision.²⁸⁵ Perhaps the essence of practical wisdom is relying on everything a person knows and has experienced to decide a course of action in specific circumstances: "[P]ractical judgment is the process by which we take into account relevant information and values, and then determine what ought to take priority in a particular context."²⁸⁶

Students who follow the guidance suggested above will become increasingly skilled at exercising practical judgment. The 2007 Reports went to great lengths to emphasize, and this Article seeks to highlight, that such decision-making might be the difference between lawyers who develop internal tension and dissonance by acting inconsistently with their values, and those who enjoy a fruitful and happy career practicing law by following their moral compass.²⁸⁷ The connection between a lawyer's decisions and the degree to which she finds that she can respect herself for at least seeking to reach sound decisions cannot be undervalued. If the lawyer has a framework in which she can begin to develop awareness and a method of resolving issues, she can deal with the tension that arises when she faces a decision.

²⁸¹ See MODEL RULES OF PROF'L CONDUCT R. 1.6 & cmt. 2 (2013).

²⁸² See *id.* RR. 1.3, 3.4.

²⁸³ *Id.* pmbl. para. 9 ("Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.").

²⁸⁴ SCHWARTZ & SHARPE, *supra* note 26, at 26.

²⁸⁵ See *id.*

²⁸⁶ Aaronson, *Practical Judgment*, *supra* note 25, at 262.

²⁸⁷ For a discussion of this connection, see *supra* notes 39–69 and accompanying text.

2. Teaching Methods Available in Law Schools to Help Cultivate the Fundamentals of Practical Judgment

It is unrealistic to expect law students to fully develop practical wisdom in the three years of law school. Expecting them to develop the foundational skills necessary to make practically wise decisions, however, and equipping students with a framework to approach judgment calls, is possible.²⁸⁸ With this foundation, students can then build a framework that allows them to reach sound judgments that they develop throughout law school.

The remaining question for many schools will then be how to encourage students to move beyond these foundational skills to develop the art of making professional judgments. Clinics and externships were among the first efforts in law schools to nurture students' reflection on what it means to be a professional and to exercise practical judgment in practice.²⁸⁹ However, clinical or externship experiences are typically electives.²⁹⁰ Thus, many students graduate without the benefit of this formational experience.²⁹¹ This section therefore addresses how clinical and externship experiences have been employed—and can still be employed—as a means of developing practical judgment. To ensure that students who do not take clinics or participate in externships receive training in forming professional judgments, this section also offers suggestions for teaching methods that can be employed in other courses.

(a) *Clinical Programs and Externships that Integrate Education on Developing Judgment*

Clinical experiences and externships appear to have been the initial means by which modern legal educators attempted to develop students' self-reflection and, in turn, their professional judgment and practical wisdom.²⁹² One clinical program director observed: "If there is a universal

²⁸⁸ See *supra* Part IV.C.

²⁸⁹ See, e.g., Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 *HAMLIN J. PUB. L. & POL'Y* 1, 4–5, 16, 33 (2002) (citing the development of legal clinics as early as the late 1800s and their importance in teaching law students fundamental practical skills).

²⁹⁰ See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 32 (2000) ("[A]lthough clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.").

²⁹¹ Jessica Dopierala, Note, *Bridging the Gap Between Theory and Practice: Why Are Students Falling off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 *U. DET. MERCY L. REV.* 429, 444 (2008).

²⁹² See McCaffrey, *supra* note 289, at 4–5, 33, 62.

tenet in clinical legal education, it is the importance of being self-consciously and critically reflective about one's practice experiences."²⁹³ His observations exemplify that the learning experiences they are encouraging are ones that foster practical judgment:

Perhaps the hardest thing for many law students to accept is that there is no formula on how to proceed. There is always a significant degree of uncertainty about what one knows and what may happen. Yet one still has to come up with good reasons for proceeding along one course and not another. As teachers, we cannot ignore the discomfort students may feel in making decisions in such open-ended circumstances. Without necessarily noting that psychologically such discomfort in part may be developmental, we have to acknowledge and affirm that notwithstanding such uncertainty, options have to be proposed and choices made²⁹⁴

(b) Employing Simulated Cases to Expand Opportunities for Students to Exercise Practical Judgment

Not every law student will take part in a clinic. The students who do not participate in clinics could be required to take courses using simulated cases in which they are asked to consider questions of professional identity and decision-making. In this regard, schools that have adopted programs that rely heavily on case simulations are good models.²⁹⁵ Law schools could require students to take either a clinical course geared toward fostering practical judgment or a course that relies heavily on simulated cases. These simulations provide the context within which students can discuss, journal, role play, or engage in any variety of methods that help them develop (a) the internalized sense of professional values that distinguishes professional identity training and (b) a framework for determining how they will resolve challenges in practice. The course should address questions of work-life balance, ethical dilemmas, such as how to deal with a supervising lawyer who might be verbally abusive or indifferent to the associate's well-being and development, and other real-life questions that new lawyers face.

Arizona Summit Law School developed a course that allows students to study seven aspects of law practice which the student will likely

²⁹³ See Aaronson, *Practical Judgment*, *supra* note 25, at 304–05.

²⁹⁴ *Id.* at 305–06.

²⁹⁵ See, e.g., Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: Perspectives on Curriculum Reform, Mercer Law School's Woodruff Curriculum, and . . . "Perspectives,"* 63 MERCER L. REV. 975, 1007–08 (2011) (describing how Mercer Law School, in an effort to teach practical and professional judgment skills, "chose to make extensive use of simulations instead of live-client clinics in order to ensure that all students, not just a relatively select few, received the desired skills training").

encounter as a lawyer.²⁹⁶ As described by those who developed it, the program offers students a set of skills derived from surveys of lawyer effectiveness.²⁹⁷ Two of the learning objectives ensure that students have “experienced how lawyers solve legal problems, interviewed and counseled clients,” and “demonstrated a commitment to high ethical standards and professionalism in dealing with clients, opposing counsel, courts, and the community.”²⁹⁸

Students studying each of the seven areas of practice analyze simulated cases developed by lawyers and faculty.²⁹⁹ The simulated modules consist of these different areas: “(1) law office organization and management; (2) family law; (3) small business entities law; (4) debtor/creditor law; (5) wills and estates law; (6) criminal law; and (7) personal injury law.”³⁰⁰ As part of the students’ experience, the teaching lawyers and faculty focus on ethical issues and value traits in the context of one of the seven practice modules.³⁰¹ Each faculty/lawyer teaching team seeks to demonstrate how the traits they identified are significant in the area of practice.³⁰² The course seeks to teach students—in the context of the subject area of the module—the goals of “(1) acting honestly and with integrity; (2) showing reliability and willingness to accept responsibility; (3) striving to provide competent, high quality legal work for each client; (4) treating clients, lawyers, judges, and staff with respect; (5) demonstrating creativity and innovation; and [(6) showing tolerance, patience, and empathy.”³⁰³

Such simulated case courses can form part of an intentionally designed curriculum that allows students, before leaving law school, to engage in the kind of professional and ethical judgments lawyers face. Through such simulations, students learn what those in the clinical setting learn: few questions requiring true judgment are black and white; most questions are in the gray area. Seeing alternative courses of action within this uncertainty, the students will be doing exactly what anyone

²⁹⁶ See Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 527–28 (2009) (describing the General Practice Skills course as incorporating seven “modules,” including law office management, family law, wills, and criminal law). The article refers to the course at Phoenix School of Law, but the school changed its name to Arizona Summit Law School in 2013. Press Release, Ariz. Summit Law Sch., Phoenix School of Law Announces New Name (Nov. 4, 2013), https://www.azsummitlaw.edu/sites/default/files/final_asls_new_name_announcement_v4.pdf.

²⁹⁷ Gerst & Hess, *supra* note 296 at 523–26.

²⁹⁸ *Id.* at 527–28.

²⁹⁹ *Id.* at 530–31.

³⁰⁰ *Id.* at 528.

³⁰¹ *Id.* at 536.

³⁰² *Id.* at 536–37.

³⁰³ *Id.* at 529–30.

capable of practical judgment does—having empathy for the different persons and entities affected by different courses of action, while remaining detached enough to judge which course of action is the best in the circumstances. Again, no one can expect law students to develop practical wisdom overnight. However, if they are introduced to the process of reaching professional judgments, they are more likely to continue resolving professional and ethical dilemmas in a principled manner.

(c) *Incorporating Teaching of Practical Judgment in Doctrinal Courses*

Another approach that is receiving increased attention is including professional and ethical dilemmas within traditional doctrinal courses.³⁰⁴ This method is specifically geared towards students who learn better “by being exposed to moral philosophy in the classroom, discussing situations in which moral judgment is needed and reflecting on choices others made.”³⁰⁵ As the editor of a series of casebooks designed to include professional formation as part of the fabric of the course, Dean Michael Hunter Schwartz explains why the emphasis on professional formation was so important:

[The] series was designed specifically to respond to and to begin to address the concerns raised by *Educating Lawyers*, *Best Practices for Legal Education*, and [Lawrence] Krieger’s findings. Thus, in addition to the questions aimed at developing students’ self-regulated learning skills described above, [the casebooks in this series] include[] questions that prompt students to consider professional ethics and their identity as professionals and to reflect on the intersection of legal ethics and values and their personal values and needs.³⁰⁶

For the last six years, Regent University School of Law has offered an advanced civil pretrial practice and procedure course in which students assume the role of an associate in a case and proceed through the stages of the civil litigation process.³⁰⁷ The course casebook authored by Professor

³⁰⁴ See Paula Schaefer, *Integrating Professionalism into Doctrinally-Focused Courses*, in BUILDING ON BEST PRACTICES, *supra* note 149.

³⁰⁵ Clare Keefe Coleman, *Teaching the Torture Memos: “Making Decisions Under Conditions of Uncertainty,”* 62 J. LEGAL EDUC. 81, 92 (2012).

³⁰⁶ Schwartz, *supra* note 240, at 52. Dean Schwartz refers to Professor Madison’s casebook, *Civil Procedure for All States*, as adopting educational methods that address the concerns raised in the *Carnegie Report* and *Best Practices Report*. *Id.* at 33.

³⁰⁷ See MADISON, CIVIL PROCEDURE, *supra* note 242, at 9. (Although the casebook was published in 2010, Professor Madison used a manuscript of the casebook to teach the class in the first few semesters in which he taught the course.) The casebook presents a Master Case, in which a plaintiff is suing a city, the state, and a manufacturer—all related to an accident in which the city (allegedly grossly negligent) and the state created a dangerous condition that led to an accident in which the vehicle the plaintiff was driving failed to protect her when the roof collapsed. *Id.* at 9–10. The course requires students, for part of

Madison responds to the recommendations of the *Carnegie Report* and *Best Practices Report*.³⁰⁸ The course therefore presents students with a variety of professional identity questions and a concluding reflective essay assignment.

Through the professional identity questions, the course encourages students to form their professional identity by discussing skills, values, and ways of approaching professional and ethical questions that they are likely to encounter practicing law. These generally start with ones designed to raise self-awareness and emotional intelligence. They proceed to the more challenging ones that ask students to consider alternative courses of action. Students receive clear guidance on the manner in which they should approach the journaling process. The course syllabus asks students, in journaling, to identify: (1) the value conflicts within the situation presented in each question, (2) any Model Rule(s) that are applicable, (3) at least one source other than the Model Rules that has a bearing on the question (e.g., the work of a philosopher such as Aristotle), (4) what the student's discussion with a mentor of their choosing (other than a law student in the class) reveals, and (5) the student's suggested course of action in light of the question.³⁰⁹ Psychological research suggests that, in answering such questions, the person responding will have a tendency to predict that she will act ethically (idealizing oneself) and downplay pragmatic factors that, in reality, can lead one to act differently.³¹⁰ The class discusses this psychological evidence so that students are aware of the phenomenon. The disclosure may not preclude students from such idealization, but it makes them conscious of that possibility.

their grade, to write intra-office memoranda addressing matters such as the statutes of limitations on each claim, *see id.* at 46, whether the out-of-state manufacturer is subject to the long-arm statute and personal jurisdiction in the court where suit is filed, *see id.* at 71, and determining the value of plaintiff's case according to the valuation methods set forth in the casebook, in preparation for a settlement conference, *see id.* at 250. Other graded assignments include drafting pleadings such as a complaint, *see id.* at 99, a motion to dismiss for failure to state a claim on which relief can be granted, *see id.* at 150, a discovery plan that identifies the evidence plaintiff will need to prove at trial and determines the ideal means to develop evidence that is in the hands of defendants, *see id.* at 213–14, and a summary judgment motion, *see id.* at 229. These assignments foster the kind of lawyering skills that the 2007 Reports encourage. The professional identity questions, while strengthened from placement at the point in the stage of a case where they often arise in practice, are not dependent on the lawyering skills assignments.

³⁰⁸ *Id.* at xxi–xxii.

³⁰⁹ *See* Benjamin V. Madison, III, State Civil Pretrial Practice and Procedure Syllabus 9–10 (Spring 2015) [hereinafter Madison, State Pretrial Syllabus] (on file with the Regent University Law Review).

³¹⁰ ROBBENNOLT & STERNLIGHT, *supra* note 244, at 389.

The professional identity questions are thus presented as they would arise in the course of an actual lawsuit. An explicit course objective highlighted in the syllabus is “to give [students] the skills, knowledge and values [they] need to be able to learn and grow as a professional.”³¹¹ To achieve this objective, the course makes professional development an explicit and graded part of the course; students satisfy this objective by keeping a journal and submitting their entries to the professor at regular intervals.³¹² Each question raises some issue or problem that arises in practice.³¹³ The questions are designed to help students progressively acquire more self-knowledge about the connection between their emotions, which provide valuable clues to consider in reaching professionally sound judgments,³¹⁴ and resolving ethical dilemmas that arise in litigation.³¹⁵

The casebook’s professional identity questions aimed at developing emotional intelligence include the example mentioned above, in which the student “lawyer” recognizes feeling uncomfortable about delivering bad news to a client but must do it anyway.³¹⁶ A later question presents students with the array of deadlines that a litigator typically faces—often conflicting ones—and asks them to acknowledge what feelings the pressure of meeting deadlines and juggling cases evokes.³¹⁷ Likewise, another question describes a choice between filing suit in two courts—one in which the case will proceed for the client (a plaintiff) more swiftly and in which the court strictly enforces the rules, including discovery rules, and another in which the case will likely take longer but involves less risk of having deadlines and strict enforcement of rules.³¹⁸ Students know at this point that a court that keeps deadlines and enforces rules is likely one that will serve the client’s interests by resolving the case more quickly and limiting costs. The question of where to sue thus raises the issue of whether a student will allow her own self-interest influence her decision. As an inexperienced lawyer who may be fearful of litigating in a court with tight deadlines and strict rules, these dynamics may lead the lawyer to

³¹¹ Madison, State Pretrial Syllabus, *supra* note 309, at 9.

³¹² Professor Madison does not grade students on whether they express values with which he agrees, but on the thoughtful completion of the assignments. Students are assigned professional identity questions and, at appointed due dates, turn in journal entries. *See id.* at 9–10.

³¹³ *See* MADISON, CIVIL PROCEDURE, *supra* note 242, at 8.

³¹⁴ *See id.* at 21.

³¹⁵ *See id.* at 34, 40, 51.

³¹⁶ *See supra* note 242 and accompanying text.

³¹⁷ *See* MADISON, CIVIL PROCEDURE, *supra* note 242, at 34.

³¹⁸ *See id.* at 51.

file in the court in which she is more likely to feel comfortable.³¹⁹ Students have to recognize that, unless they remain conscious of their motivations, they can make such decisions without properly weighing the client's best interests as opposed to their own preferences.

The professional identity questions also address other dilemmas inexperienced lawyers face. For instance, a number of the questions involve an associate's being instructed by a supervising partner to take a dubious course of action. In one, the senior partner tells the associate to find some basis to file a counterclaim, regardless of whether the law really supports it, because the partner has found that this tactic often scares off plaintiffs.³²⁰ Another has a senior partner instructing the associate to file a baseless Rule 11 motion against the opponent because, in the partner's experience, sometimes such motions discourage litigants who are not serious.³²¹

The most difficult professional identity questions seek to explore the gray areas of ethical and professional dilemmas. Some of the questions address outright aggressive lawyering methods this Article previously referred to as "Rambo" style litigation.³²² The reality that lawyers can get away with many forms of hardball lawyering with little risk of sanctions³²³ makes the question as to whether one could act in an overly aggressive fashion more debatable than it ought to be.

For example, routinely, one of the students' favorite questions is a question on service of process. The professional identity question poses a scenario in which the client is angry at a corporation, and on the day suit is filed, the client tells the lawyer she wants to have the president of the defendant corporation served at a press conference on the following day to embarrass him.³²⁴ The Model Rule on Respect for Rights of Third Persons (Model Rule 4.4) states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."³²⁵ Although the Rule prohibits certain conduct intended to embarrass one's opponent, the reality is that such conduct is not often the

³¹⁹ For example, this phenomenon can occur for those who fear federal court as being somehow more challenging than state court.

³²⁰ MADISON, CIVIL PROCEDURE, *supra* note 242, at 91.

³²¹ *Id.* at 79. This question presumes that the applicable version of Rule 11 does not contain the safe harbor provision added in the 1993 amendments to Federal Rule of Civil Procedure 11. *Id.* at 78.

³²² See *supra* note 265 and accompanying text.

³²³ See, e.g., Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 83 (1991) (maintaining that lawyer misconduct "has grown in incidence and severity largely because of judges' tolerance").

³²⁴ See MADISON, CIVIL PROCEDURE, *supra* note 242, at 115.

³²⁵ MODEL RULES OF PROF'L CONDUCT R. 4.4 (2013).

subject of disciplinary proceedings.³²⁶ Another formation question in this category involves the practice of overloading an opponent with as many documents as possible in an effort to keep the opponent from finding pertinent material (colloquially known as a “document dump”)—a method that, though the responding attorney’s motives likely violate the Model Rules, rarely results in sanctions.³²⁷

The students’ last assignment is a reflective essay in which they address several matters. First, they discuss whether they have developed awareness of any strengths and weaknesses that could affect their decision-making in practice. Second, they outline the process they intend to use in considering and resolving ethical dilemmas in practice. Third, they provide specific practices they plan to adopt to help them reach sound decisions, such as discussing questions with a mentor. Finally, they describe the kind of lawyer they want to be, meaning what qualities they want to exhibit in practice.³²⁸

A review of students’ professional identity journals and reflective essays in this course allows for some general observations. Although the number of students who have submitted journals at this point would qualify as a legitimate sample size,³²⁹ the following observations are not offered as formal study results. The authors did not develop the criteria, controls, and methods that would be necessary to reach empirical conclusions. Instead, the goal was to observe students over a period of time so as to develop some preliminary observations and, if appropriate, follow up with empirical research.

The results of the journaling indicate students’ growth in professional formation and, in some cases, in their display of practical judgment.³³⁰ Over the course of each semester, most students demonstrate progress in professional formation as they complete journal entries and, ultimately, their reflective essays. For instance, the most frequent result of the students’ professional formation work is their increased self-awareness. Representative comments from the reflection essays summarizing the students’ observations from the journaling include:

³²⁶ For a recent example in which a famous defendant was served in a public setting, see the video of singer Ciara being served at a concert. TMZ, *Ciara—Served with Lawsuit While on Stage!*, YOUTUBE (June 9, 2013), http://www.youtube.com/watch?v=jV-yG0_fbBk.

³²⁷ See MADISON, CIVIL PROCEDURE, *supra* note 242, at 180; Kanner, *supra* note 323.

³²⁸ Madison, State Pretrial Syllabus, *supra* note 309, at 10–11.

³²⁹ Professor Madison first taught the course in the spring semester of 2009 and since then has received journals and reflective essays from over 500 students.

³³⁰ In their journal entries and essays, many students note how completing their personal philosophy of lawyering paper in Professional Responsibility served as a foundational exercise from which they drew in answering the professional identity questions in this course. See *supra* Part III.D.3 (discussing the philosophy of lawyering assignment).

[A] certain weakness I have is a lack of confidence. If I am nervous, I become unsure about the situation. I have realized that this weakness can lead to accommodation if I am not careful. . . . [M]y insecurity and lack of confidence . . . could result in failing to advocate for my client.³³¹

I have also begun to realize weaknesses that can hinder my practice of law, which include hyperactivity, idolizing people, inexperience, and naivety. . . .

. . . [T]o overvalue what others think of me . . . could be a significant conflict when I need to be forthright with clients or supervisors about my personal convictions in difficult situations.³³²

The first [weakness I discovered] is prejudice. As a guy who grew up in a single parent family characterized by periods of homelessness and poverty, it can be too easy to believe that the plaintiff in a case is always a victim. I can imagine someone coming into my office, telling me a story of how a corporation wronged them, and [in my overzealous response, not] asking tough questions that party opponents' lawyers would ask. My prejudice could make me less effective for my clients.³³³

Most students demonstrate increased awareness of their emotions, motives, and values. In several ways, their journals on formation questions and their reflective essays demonstrate growth in emotional intelligence. First, the journal entries and essays reveal students' recognition of how their own feelings and motivations affect their decisions in life. Second, the entries and essays show a consistent pattern of students recognizing how they need to work with their emotions to separate irrational fears (matters, perhaps triggered by their life experiences, that can interfere with their objectivity) from passionate convictions (that will help them represent their client). Third, the students' work reflects increasing consciousness that having a process in place for evaluating questions, and resources such as mentors, will likely improve the degree to which they act consistently with the professional identity they seek.

The professional identity questions designed to require students to engage in deliberations so as to reach practical judgments have produced journaling and reflective essays that display more modest progress. One consistent measure of progress is that students seem to be more keenly aware after the journaling process of the subtle nature of professional and ethical judgments. One student's reflective essay is typical of this progress:

³³¹ Student 1, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

³³² Student 2, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

³³³ Student 3, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

After the completion of Professional Responsibility [in] my 2L year, I became aware that there was a potential for conflicts in the practice of law. Things like conflicts of interest and payment disputes seemed like . . . things that would definitely come up eventually, but not things that I would face regularly. The questions and situations presented this semester in our Professional Identity Questions have shown me that . . . these situations . . . come up very regularly.

. . . I have [also] come to realize ethical situations do not always present themselves with answers that are either black or white. . . . Examining the situations presented made it clear that sometimes the answer may lie in the gray. I have come to the realization that in determining my course of action when presented with a difficult situation, I may need to not only examine the Rules of Professional Conduct, but also my own ethical values . . . and to consult with trusted friends, family members, and colleagues . . .³³⁴

Despite their progress in developing professional skills, self-knowledge, and the awareness they need to go beyond the Model Rules in many circumstances to resolve questions, the students usually do not demonstrate “the sophisticated deliberation” of someone who possesses practical wisdom.

An example of journaling that reflects more sophisticated deliberation is the following entry:

The question asked whether I would instruct my client on how to give testimony that will result in a mistrial if the case is not going well for us. . . . I’ll run it through my moral calculus:

. . . .
 . . . Is it prohibited by the Professional Rules of Conduct? Probably: “It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.” Virginia Rules of Professional Conduct Rule 8.4 C. Also, more directly on point: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” Virginia Rules of Professional Conduct Rule 3.1.³³⁵

The student went on to evaluate this question through a philosophical lens, having introduced philosopher Immanuel Kant’s so-called “Categorical Imperative” in several prior journal entries. As explained by the student, the Categorical Imperative is an ethical framework that requires a decision-maker to universalize the question before reaching a conclusion. By framing the question in universal terms—e.g., what would

³³⁴ Student 4, Final Reflective Essay (on file with the Regent University Law Review) (used with permission).

³³⁵ Student 5, Journal on Professional Identity Question (on file with the Regent University Law Review) (used with permission).

happen if everyone faced with such a decision acted (or failed to act) in the same way—one could see the implications of the student's decision from a broader perspective. Thus, in the journal entries, the student translated each professional identity question by asking whether, if every attorney answered the question by acting (or not acting) in a certain way, the implications would help answer the question. In line with this approach used throughout the semester, the student asked in response to this particular formation question:

. . . Would it violate Kant's categorical imperative? If every attorney did this every time, what result? If every attorney did this every time they thought they were losing a case, no case would ever come to completion. Our legal system would become a joke, and no one would ever get relief. It would create an absurdity, so therefore I should not engage in this kind of conduct.

So because this violates all . . . of my variables within the moral calculus, it's safe to say that I would consider this sort of behavior to be unethical. So if I was ever faced with this sort of temptation in my practice, I would endeavor to avoid it based on the reasons I gave above. The better practice would be to move for non-suit if possible, or if that's not available, then finish the trial as best as you are able . . .³³⁶

The above journal entry is one of the more thoughtful entries submitted by a student. Expecting all students in the course of a semester to develop such sophistication is unrealistic. Most students typically identify competing values because the course syllabus instructs them to do so. Most journal entries identify some ethical conflicts and cite to potential sources that suggest possible resolutions.

Some students do express the path of least resistance and suggest that, as long as they are arguably acting in the client's best interests and their decision does not violate the Model Rules, they will do whatever is necessary. Those students receive comments on their entries and an opportunity to meet with the professor to discuss the questions. Together the student and professor explore the various options and their consequences. The professor will, when applicable, share personal experiences on the issue. The student will be provided time to ask questions and discuss how she came to her decision and whether now she would consider other options.

As noted, each student's final assignment is to prepare a reflective essay on the philosophy she has developed for how she wants to practice law. As shown in the sampling of quotes above, the essay requires students to reflect on what they have learned about themselves (particularly areas of challenge or "weakness") and how these can affect the way in which they practice law. A student likewise synthesizes her view of a professional—the identity she has developed in responding to a

³³⁶ *Id.*

number of gray-area professional scenarios, by reviewing comments from her professor on her entries, and by discussing with the professor, other students, and practicing lawyers, the values and convictions to which she has committed. Moreover, students project a plan for continuing the cultivation of their professional development.³³⁷

Although it cannot be empirically proven at this time that this professional formation component of Regent's course helps students, evidence exists that it does. First, the entries and essays show that most students during the course of the semester improve their self-awareness, their understanding of their strengths and weaknesses, and their recognition of how their weaknesses could present problems in practice. The process of journaling on the questions makes them more conscious of matters of which many were unaware. Second, the entries and essays show that students learn that the Preamble to the Model Rules and the Rules themselves encourage students to develop ethical values that exceed the requirements of the Rules. They learn that often the process of resolving a "gray question" will involve both a Model Rule and their moral compass. Third, the entries and essays show that students are learning a framework for reflective deliberation that—if a student continues to practice resolving questions according to the process she internalizes—should result in a lawyer who makes good decisions and, ultimately, will likely be one who cultivates practical wisdom. That the journaling shows some growth in deliberative reasoning gives reason to hope that, if a curriculum designed to develop these skills over the entire law school career were in place, students would truly develop this framework for making judgments and would increase their emotional intelligence.

Furthermore, although the data is not tied to specific curricular causes, data from the Law School Survey of Student Engagement (LSSSE) suggests that Regent's curricular efforts, such as its Professional Responsibility course and State Civil Pretrial Practice and Procedure course, positively affect students' professional identity development. Most notably, in the 2014 LSSSE survey, 84.5% of the third-year Regent students responding to the survey reported that because of their law school experience they "quite a bit" or "very much" "developed a personal code of ethics," as compared with the national average of 54.3%.³³⁸ Given

³³⁷ See Madison, State Pretrial Syllabus, *supra* note 309, at 9; Benjamin V. Madison, III, Civil Pretrial Practice & Procedure Class Assignments and Due Dates 5 (Spring 2015) (on file with the Regent University Law Review).

³³⁸ LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT 2014 LAW SCHOOL REPORT (REGENT UNIVERSITY SCHOOL OF LAW) 120 (on file with authors) (indicating that fifty-eight third-year students responded to this question). In the same survey, 94.9% of the fifty-nine third-year respondents reported that their law school environment "quite a bit" or "very much" "encourages the ethical practice of law," as compared with the national average of 79.3%. *Id.* at 116. The adjusted sample size of Regent third-year students for this 2014 survey was 120. *Id.* at 1.

the more than thirty-point difference between Regent students' reported development and the reported development at other schools, it is hard to deny that intentional curricular efforts at developing students' professional identity can have an impact.

CONCLUSION

This Article emphasizes how professional identity formation and learning to exercise practical judgment together serve as the thread that unites lawyer effectiveness and satisfaction in practicing law. And yet, even after the *Carnegie* and *Best Practices Reports* disrobed law schools by showing that they not only fail to teach students these faculties, but actually often do more harm than good in students' ethical maturation, many law schools have not changed. The conclusions of scholars, an ABA curricular survey, a survey of law school associate deans for academic affairs, and a review of course offerings at U.S. law schools reveal that the response to the 2007 Reports has been to increase courses in technical legal skills without making significant progress in teaching ethical professional identity and practical judgment.

Unless schools inspire students to be ethical professionals with sound judgment, the technical skills students gain in law school are as likely to be used as weapons in the name of zealous advocacy as they are tools for resolving disputes in a civil fashion. The ABA's recent survey, the survey of associate deans, and the review of law school course offerings suggest that ethical professional development is not the priority the 2007 Reports contended it should be. In response to the critique of the 2007 Reports, law schools must require courses that intentionally provide formative experiences for the purpose of developing principled judgment. Most law schools offer only electives in professional formation and do not have an integrated curriculum that emphasizes that the Model Rules are a necessary but insufficient criteria in students' decision-making development. As suggested in the last Part of this Article, required courses that include professional formation components ought to be part of an intentional effort to provide foundational experiences in which students develop self-awareness and other skills associated with emotional intelligence, followed by courses that develop higher order deliberative skills.³³⁹

We must ask ourselves the question posed in the title of this Article: "Does anyone really care?" When law schools seem to have responded vigorously to a major criticism (the lack of skills and experiential learning), but most have largely ignored in required curricula the other critique (the failure to nurture professional identity and judgment), the

³³⁹ See *supra* Part IV.

temptation is to answer that law schools do not care. Alternatively, an objective observer could say that law schools simply remain in denial.³⁴⁰ Our hope is that law schools do care, but for the reasons given in this Article are delaying their response to the most glaring deficiency in legal education.³⁴¹ If the main reason for delay is the one least articulated—an apparent belief that educating students to develop ethical professional identity and exercise practical judgment is too challenging a task for law schools—then sufficient groundwork has already been done to allow law schools to see that they can take on this challenge.

As in other professional school settings, the process of developing professional identity should be incremental. In the first year, students should receive an introduction to the profession and complete exercises that begin developing self-awareness and emotional intelligence. In the last two years, further teaching should develop the faculty Aristotle called *phronesis*. Teachers and mentors should equip students with a framework for decision-making. Without this framework, too many lawyers will likely fall into the pattern of doing the client's bidding so long as the Model Rules do not forbid it.

At this juncture, the ones who most obviously care about law schools' most glaring deficiency are the educators who see the problem and have acted to change legal education. Law students—who pay a great deal to receive a legal education lacking the most important features students can and should be taught—also ought to care. Judges who should by now be tired of incompetent and overly aggressive lawyers ought to care. The American Bar Association ought to care. But, ultimately, a majority of the faculty in law schools needs to care enough to bring about more quickly the changes that are far overdue. As scholars have observed, “[f]aculty buy-in is essential to any successful professionalism initiative.”³⁴²

Law schools and educators who are consciously implementing required formative ethical development beyond the Model Rules actively seek to robe the legal profession in the majesty of virtuous ideals, use of a moral compass, principled decision-making, and practical judgment. These and other inherent virtues are foundations to a satisfying and sustainable legal practice. The restoration of the nobility of legal practice must be embraced by the entirety of the legal profession: lawyers, judges, professors, students, bar associations, and Inns of Court. Failure to

³⁴⁰ Well before the 2007 Reports, Professors Larry Krieger and Kennon Sheldon published the result of their longitudinal study comparing law students with students in other schools and concluding that law schools were in “institutional denial” about the damage they were doing to students’ identity and ability to make sound professional decisions. See Krieger, *supra* note 40, at 112–16. The authors agree that the characterization of law schools’ approach to this important issue could be characterized as one of denial.

³⁴¹ See *supra* notes 143–46 and accompanying text.

³⁴² Kehner & Robinson, *supra* note 137, at 104.

address the exposure of the legal profession's ineptitude at cultivating healthy professional identity formation demonstrates the degree to which empathy and practical wisdom have devolved in legal practice. Until more than a few care to implement the necessary changes in legal education, the naked dissatisfaction of lawyers and clients will continue to pervade the legal profession.

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INTRODUCTION

Criticism of law schools has come often of late. Although some of this criticism may be unjustified, this Article contends that the deficiency exposed in two recent and influential studies of law teaching is accurate. Most law schools fail to cultivate students' professional ethical identity and practical judgment. The two studies, one by the Carnegie Institute for the Advancement of Teaching and Learning in *Educating Lawyers (Carnegie Report)*,¹ and the other by the Clinical Legal Education Association in *Best Practices for Legal Education (Best Practices Report)*² (collectively, the 2007 Reports), represent arguably the most comprehensive evaluations of law school education in more than a century. The reports categorize law teaching in three broad categories: (1) analytical skills or legal analysis; (2) practical and experiential lawyering skills; and (3) development of a "professional identity"—a rich but often misunderstood term that encompasses a person's self-concept, values, and philosophy of lawyering.³

¹ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

² ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter BEST PRACTICES].

³ The *Carnegie Report* uses the term "professional identity." Although the *Best Practices Report* uses the term "professionalism," it describes this concept similarly to how "professional identity" is described in the *Carnegie Report*. See BEST PRACTICES, *supra* note 2, at 207 (regarding analytical skills); *id.* at 165 (regarding lawyering skills); *id.* at 27–29 (regarding cultivation of professional identity); CARNEGIE REPORT, *supra* note 1, at 27–29 (providing an overview of these "three apprenticeships"); *id.* at 5–6 (regarding analytical skills); *id.* at 87–89 (regarding lawyering skills); *id.* at 126 (regarding cultivation of professional identity).

2. Teaching Methods Available in Law Schools to Help Cultivate the Fundamentals of Practical Judgment

It is unrealistic to expect law students to fully develop practical wisdom in the three years of law school. Expecting them to develop the foundational skills necessary to make practically wise decisions, however, and equipping students with a framework to approach judgment calls, is possible.²⁸⁸ With this foundation, students can then build a framework that allows them to reach sound judgments that they develop throughout law school.

The remaining question for many schools will then be how to encourage students to move beyond these foundational skills to develop the art of making professional judgments. Clinics and externships were among the first efforts in law schools to nurture students' reflection on what it means to be a professional and to exercise practical judgment in practice.²⁸⁹ However, clinical or externship experiences are typically electives.²⁹⁰ Thus, many students graduate without the benefit of this formational experience.²⁹¹ This section therefore addresses how clinical and externship experiences have been employed—and can still be employed—as a means of developing practical judgment. To ensure that students who do not take clinics or participate in externships receive training in forming professional judgments, this section also offers suggestions for teaching methods that can be employed in other courses.

(a) *Clinical Programs and Externships that Integrate Education on Developing Judgment*

Clinical experiences and externships appear to have been the initial means by which modern legal educators attempted to develop students' self-reflection and, in turn, their professional judgment and practical wisdom.²⁹² One clinical program director observed: "If there is a universal

²⁸⁸ See *supra* Part IV.C.

²⁸⁹ See, e.g., Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 *HAMLIN J. PUB. L. & POL'Y* 1, 4–5, 16, 33 (2002) (citing the development of legal clinics as early as the late 1800s and their importance in teaching law students fundamental practical skills).

²⁹⁰ See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 *CLINICAL L. REV.* 1, 32 (2000) ("[A]lthough clinical legal education is a permanent feature in legal education, too often clinical teaching and clinical programs remain at the periphery of law school curricula.").

²⁹¹ Jessica Dopierala, Note, *Bridging the Gap Between Theory and Practice: Why Are Students Falling off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 *U. DET. MERCY L. REV.* 429, 444 (2008).

²⁹² See McCaffrey, *supra* note 289, at 4–5, 33, 62.