

Chapter One

Reasons for Developing a Statement of Best Practices

A. A Statement of Best Practices Can Help Evaluate the Quality of a Law School's Program of Instruction and Guide Efforts to Improve It.

This document contains statements of principles of best practices in legal education. It also includes comments that more fully explain the meaning of each principle and how it relates to current practices, scholarship about learning and teaching, and recommendations of scholars and practitioners for improving legal education.

A comparison of principles of best practices with the actual practices of a given law school will help evaluate the quality of the school's program of instruction and provide guidance for improving it.

We are aware of Stanley Fish's clever dissection of the term "best practices" in which he concluded that invoking "best practices" is all about saying something incredibly obvious and banal. He included "best practices" among those administrative pieties that should be banned from polite conversation.¹⁹

We concede that many of the best practices described in this document are banal and obvious. But that is the problem. Although they seem obvious, most law schools do not employ the best practices for educating lawyers. Thus, with due deference to Fish's opinion that discussions of best practices should be banned from polite conversation, we believe there is value in describing best practices for legal education and encouraging debate about them.

B. The Need to Improve Legal Education is Compelling.

1. The Licensing Process is Not Protecting the Public.

This document describes best practices for legal education, particularly the initial phases of legal education that occur in law schools. The conundrum that law schools face is that even the most well-designed program of instruction will not prepare students to provide a full range of legal services competently upon graduation after three years. Law school instruction will always be only one segment of the continuum of learning in the life of a lawyer. Lawyers learn throughout their careers from experience, collaboration, self-study, reflection, and continuing legal education. Law school education is only the first step in the process of becoming an effective, responsible lawyer.

The burden of preparing students for law practice should not rest solely on the law schools. Other segments of the legal profession should assume more of the responsibility. For example, bar admissions authorities could impose additional requirements on law school graduates to ensure that they are prepared to provide

¹⁹ Stanley Fish, *Keep Your Eye on the Small Picture*, CHRONICLE OF HIGHER EDUCATION, February 1, 2002.

professional legal services before they are eligible for licenses to provide such services. Although this is the reality in some other countries, it is not yet the reality in the United States.²⁰

Currently, a person's ability to practice law in the United States typically requires only graduating from law school and passing a state licensing examination, the bar examination. For the most part, bar examinations evaluate the ability of an examinee to recognize legal problems embedded in a written fact scenario and to draft a short essay that addresses each problem identified, drawing on the examinee's memory of legal doctrine and ability to communicate to the reader an understanding of the problem and the doctrine.

Bar examinations require applicants to demonstrate only a small amount of the knowledge, skills, and values that are needed for participation in the legal profession. They are not valid indicators of a new lawyer's ability to practice law effectively and responsibly. The nature and effectiveness of bar examinations are widely criticized.²¹ Among other shortcomings, bar examinations require students

²⁰ Vermont and Delaware require new lawyers to spend a period of time working for experienced lawyers before they are fully licensed, but there is no assessment or certification of competency at the end of the experience, just a certification that the requisite time was put in and the requisite tasks were performed. We encourage other states to follow the lead of Vermont and Delaware, even if the quality of the learning experiences cannot be guaranteed. Another effort to improve the transition to practice is being made in Georgia where the Supreme Court authorized a mandatory Transition Into Law Practice Program that went into effect in January, 2006. The core of the program is to assign every beginning lawyer with a mentor for the first year after bar admission. A CLE component will lay the groundwork for and support the mentorships. Commission on Continuing Lawyer Competency, State Bar of Georgia, Transition Into Law Practice Program: Executive Summary (2005), available at <http://www.gabar.org/public/pdf/tilpp/7-G.pdf>.

²¹ See, e.g., *Society of American Law Teachers Statement on the Bar Exam: July 2002*, 52 J. LEGAL EDUC. 446 (2002) (concluding that bar examinations as currently administered fail to adequately measure competence to practice law, negatively affect law school curricular development and the law school admission process, and are a significant barrier to achieving a more diverse bench and bar). See also Clark D. Cunningham, *The Professionalism Crisis: How Bar Examiners Can Make a Difference*, 74 THE BAR EXAMINER 6 (Nov. 2005); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control, and Racial and Ethnic Performance Disparities*, 29 LAW & SOC. INQUIRY 547 (2004); Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805 (2004); Roy T. Stuckey, *Why Johnny Can't Practice Law – and What We Can Do About It: One Clinical Law Professor's View*, 72 THE BAR EXAMINER 32 (2003); Adrian Evans & Clark D. Cunningham, *Specialty Certification as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries*, 54 S.C. L. REV. 987 (2003); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 U. NEB. L. REV. 363 (2002); Beverly Moran, *The Wisconsin Diploma Privilege*, 2000 WISC. L. REV. 645 (2002); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COL. L. REV. 1696 (2002); Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: the Standardized Patient Becomes the Standardized Client*, 51 J. LEGAL EDUC. 212 (2001); Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CINN. L. REV. 929 (2000); MUNRO, *supra* note 4; Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U. SAN FRAN. L. REV. 927 (1997); Daniel R. Hansen, Note, *Do We Need The Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE WES. L. REV. 1191 (1995); Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996); Cecil B. Hunt, *Guests in Another's House*, 23 FLA. ST. U. L. REV. 721 (1996). The Georgia State

to demonstrate much more substantive legal knowledge than new lawyers need for successful law practice,²² much of which is memorized in commercial cram courses and quickly forgotten once bar examinations end.

A law school graduate who passes a bar examination and a character and fitness review receives an unrestricted license to practice law in the licensing jurisdiction. A newly licensed lawyer is permitted to accept any client and provide representation in any type of matter, no matter how complex, guided only by his or her own sense of responsibility and the remote threat of tort liability or disciplinary action for intentionally or negligently mishandling the matter. Without any restriction on a novice lawyer's ability to practice law, there is no mechanism for protecting clients from new lawyers while they try to acquire, on the job, the specialized knowledge and skills required for providing competent legal services.

We encourage the legal profession to develop statements of best practices for bar examinations, licensing regulations, transitions to practice, and continuing legal education programs. Members of the legal profession and others who are concerned about the public's interests should ask why licensing authorities continue to issue unrestricted licenses to practice law without testing for minimal competency in the broad range of skills and values required for the basic practice of law. Moreover, they should investigate why more licensing authorities do not require a period of supervised practice before full licensure, significant post-graduate training,²³ and demonstrations of competency through assessment during and after post-graduate training and experience.

We believe the public would be better served by a process that begins sooner, lasts longer, and includes a mandatory period of supervised practice before full admission to the legal profession, perhaps adapted from the best traditions of British Commonwealth jurisdictions.

Licensing authorities should consider alternatives to the traditional bar exam. For example, Judith Wegner proposed a three part bar examination that would be administered over a period of years. The first part would assess students' abilities to "think like lawyers" and their command of traditional common law subjects; the second would require students to demonstrate more breadth and depth of knowledge and ability to work with more complex legal problems; and the third would evaluate professional skills and values through more in-depth performance testing and a professionalism review.²⁴ In Wegner's three part bar examination:

University School of Law published a symposium issue devoted to examining alternatives to the bar exam, 20 GA. ST. U. L. REV. vii (2004), *available at* <http://gsulaw2.gsu.edu/lawreview/archives/symposium.php>. A series of alternatives to the bar examination are also discussed in 74 THE BAR EXAMINER (Nov. 2005).

²² The issue of how much substantive legal doctrine law students need to know is discussed in Chapter Two.

²³ Although many states have implemented mandatory "bridge-the-gap" programs that provide new lawyers with practical information about law practice, we are not aware of any that require new lawyers to participate in intensive, hands-on "practice modules" as recommended in ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL CURRICULUM FOR BRIDGE-THE-GAP PROGRAMS (1988).

²⁴ Judith Wegner, Thinking Like a Lawyer About Law School Assessment (Draft 2003) (unpublished manuscript on file with Roy Stuckey) [hereinafter Wegner, Assessment]. This material and other related manuscripts by Wegner contain preliminary findings from a study of legal education conducted as part of the Preparation for the Professions Program of the

Part one would test knowledge and skills learned in the first year curriculum. Students would take this test during the summer after their first or second year.

Part two would be administered after graduation, and would concentrate on more in-depth examination using “working files” of materials such as those currently employed for simple “performance-based” tests. Applicants could be asked to select two general areas out of perhaps six available so that they could demonstrate their knowledge in areas with which they had become relatively familiar (perhaps through concentrated work in elective courses in law school). Rather than being asked to rely on memory or face exceedingly constrained time limits, they would be given three-hour blocks to complete each of the two “file” exercises, with evaluation to be based on the quality of their work, not just their speed. A range of essays on subjects relevant to the specific jurisdiction could be posed, while also providing some opportunity for applicants to demonstrate more in-depth thinking and expertise in areas where they may hope to work without the artificial constraints of relying on memory alone. After completing the first two parts of the exam and satisfying character and fitness requirements, applicants would receive a license for the limited interval of two years.

Part three would be administered following two years of practice experience. Satisfactory completion would result in a full license. It would provide a more meaningful assessment of applicants’ performance skills and professionalism, using an “assessment center” system in which applicants could be asked to perform an “in basket” exercise (involving priority setting and relatively quick judgments) and conduct an interview with a simulated client, conduct a negotiation, or prepare a discovery plan. One or more of such tasks could include issues of professional responsibility that the applicant would need to address. In addition, applicants could be required to present a more full-blown portfolio of professional references, a description of their major professional experience to date, and a simple self-assessment regarding their strengths and areas in which they are continuing to focus efforts at professional development. This portfolio could serve as part of the basis for a structured interview designed to determine how applicants have made the transition into practice and how well they understand the increasing weight of professional responsibilities they will face in the years ahead. Applicants who successfully passed part three would receive a full license, while those who fared poorly could continue their provisional licensure until taking this portion of the bar exam once more.

As Wegner explained, in addition to other virtues, “[t]he proposal also has the virtue of creating a bifurcated licensing system that recognizes the level of professional development attained at the time of law school graduation, while focusing afresh on the important process of transition into the early stages of lawyers’

Carnegie Foundation for the Advancement of Teaching. The Preparation for the Professions Program investigates the preparation for various professions offered by academic institutions and compares across the professions the approaches to teaching and learning that these institutions use to ensure the development of professional understanding, skills, and integrity. As a Senior Carnegie Scholar, former AALS President and Dean Judith Wegner led a two year study of legal education which included intensive fieldwork at 16 United States and Canadian law schools in 1999-2001. Wegner is completing a book describing her findings and conclusions, and the Carnegie Foundation will publish its own book, *EDUCATING LAWYERS*, in the Spring of 2007. The drafts produced by Wegner reflect her views, not necessarily the Carnegie Foundation’s.

professional careers.”²⁵

Such a system may also give bar examiners needed flexibility in dealing with complex issues of character and fitness that have led some jurisdictions to adopt conditional licensure rules. The proposal in this respect more closely parallels the Canadian system, which in most instances requires a period of “articling” and additional practice-oriented training before bar admission, yet retains greater flexibility regarding the nature of practice experience gained during the early years of practice that is associated with the American system as it exists today.²⁶

Until licensing authorities face the reality that law schools cannot fully prepare students to represent clients in three years, consumers of new lawyers’ services will remain at risk no matter what law schools accomplish.

2. Law Schools Are Not Fully Committed to Preparing Students for Bar Examinations.

Until bar examiners reform bar examinations, we encourage law schools to improve the odds of their students passing existing bar examinations. The law school curriculum is dictated to a significant degree by the subjects tested on the bar examination, and law schools purport to teach what bar examiners test. However, law schools are not doing a particularly good job of preparing students to pass bar examinations. Bar examination pass rates for first time takers in 2004 ranged from 60% in California to 91% in Mississippi. The average pass rate was 75% in 2004, and over a ten year span was never higher than 79%.²⁷ Thus, one out of every four law school graduates in the United States did not pass a bar examination on his or her first attempt, even though most bar applicants participated in commercial bar cram courses after graduating from law school.

We encourage law schools to reexamine their current practices and make adjustments to enhance their students’ chances of passing a bar examination on their first attempt and without having to pay for and participate in bar preparation courses between law school and the bar examination. At the very least, law schools should help students understand what they are expected to know to succeed on bar examinations and help them locate treatises that contain that information.

Law schools may want to offer bar preparation courses as part of the third year curriculum for credit. The accreditation standards of the ABA allow law schools to offer academic credit for bar examination preparation courses, but they prohibit law schools from requiring students to take such courses or from counting such credits toward the minimum requirements for graduation established in the standards.²⁸ This seems illogical to us. If the knowledge and skills that students are expected to demonstrate on a bar examination are considered essential to the

²⁵ *Id.* at 79.

²⁶ *Id.*

²⁷ *Revised Ten-Year Summary of Bar Passage Rates 1995-2004*, 74 THE BAR EXAMINER 33-35 (Aug. 2005).

²⁸ Interpretation 302-7, AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 19 (2006-2007) [hereinafter ABA STANDARDS].

practice of law by bar admission authorities, law schools should not only be allowed, but should be encouraged to prepare students for bar examinations in the most effective and efficient manner possible for credit and have those credits counted toward the minimum required for graduation by the accrediting authorities. We also see no reason to prohibit a school from requiring students to take such courses if it is inclined to do so.

We are not suggesting that the third year of law school should become one large cram course for the bar examination.²⁹ Law schools still need to concern themselves with helping students develop the additional knowledge, skills, and values required for law practice but not evaluated by bar examiners. All we are saying is that it seems hypocritical for law schools to collect three years of tuition while failing to prepare most students for law practice and while failing to prepare one in four students for the bar examination.

3. Law Schools Are Not Fully Committed to Preparing Students for Practice.

There is general agreement today that one of the basic obligations of a law school is to prepare its students for the practice of law. “With formal legal education maintaining a virtual monopoly over preparation for entry into the legal profession, it is assumed that law schools are or ought to be the primary source of the skills and knowledge requisite to the practice of law.”³⁰

The responsibility of law schools to prepare students for practice was not made clear in the accreditation standards until 1996 after the 1992 MacCrate Report³¹ prompted this clarification. Accreditation Standard 301(a) requires an approved law school to “maintain an educational program that prepares its students for admission to the bar *and effective and responsible participation in the legal profession.*”³² Unfortunately, the implications of this mandate are not fully developed in the accreditation standards.

Law schools serve a number of important functions, but we are concerned only with one in this document – the preparation of new lawyers for practice. From our perspective, a law school can do anything it wants with students who attend law school for purposes other than entering the legal profession. A law school should not, however, try to use the presence of such students as an excuse for not preparing *any* students for the practice of law.

While people educated in the law may fill a variety of societal roles, the principal mission of law school is to prepare students for the practice of law, no matter what

²⁹ This would not be a risk, as discussed earlier, if bar examiners were more realistic about the amount of substantive knowledge that lawyers really need before beginning practice. The issue of how much substantive legal doctrine law students need to know is discussed in Chapter Two.

³⁰ F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 123 (1984).

³¹ AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* [hereinafter *MACCRATE REPORT*].

³² Standard 301(a), *ABA STANDARDS*, *supra* note 28, at 17.

the spillover benefits are for those who will go on to careers as law teachers, judges, politicians, community organizers, or business executives.³³

Without clearer guidance from the accreditation standards and without any significant internal or external motivators to change the *status quo*, law schools have been slow to consider the implications of the ABA's mandate to prepare students for effective and responsible participation in the legal profession. Nevertheless, a growing number of legal educators is beginning to understand the compelling need to reexamine the goals and methods of legal education, and some law schools are taking steps to improve the preparation of their students for practice. This is a trend that we expect to continue and accelerate.

The Carnegie Foundation's study of legal education found "signs that education for practice is moving closer to the center of attention in the legal academy, a positive development and a trend to be encouraged."³⁴

Making part of the standard legal curriculum students' preparation for the transition to practice is likely to make law school a better support for the legal profession as a whole by providing more breadth and balance in students' educations. Educational experiences oriented toward preparation for practice can provide students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work. In addition, we think that practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life, a motivation that is rarely accorded status or emphasis in the present curriculum.³⁵

The preparation of students for practice involves much more than simply training students to perform mechanical lawyering tasks. In reflecting on his students' suggestion that the sole, or virtually sole, purpose of a law school should be to provide training for the practice of law, Alan Watson wrote:

There is so much more to the law, even for the practice of law, than that: issues such as the social functions of law, the factors that influence legal development, patterns of change, the interaction of law with other forms of social control such as religion, and, of course, the relationship of law and ethics. Law students should be trained to have a greater awareness of their role in society. Law school is *the* obvious place and time for presenting the greater dimension of law. Law teachers should cater to the needs of the lawyer philosopher as well as the lawyer plumber. Both types of lawyer are necessary for a healthy society.³⁶

³³ Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 42 (2002).

³⁴ SULLIVAN ET AL., *supra* note 7, at 96.

³⁵ *Id.*

³⁶ Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 93 (2001) (proposing replacing casebooks with books that would be an amalgam of the standard British legal textbook and the American casebook – and other reforms).

We concur with Watson's comments about the value of broad-based legal education. We also agree with his statement that "most law teachers that I am acquainted with deny that law schools are "trade schools." But to some extent law schools are and must be trade schools. The result of the denial is that law schools are poor trade schools"37 We hope this statement of best practices will help law schools become better trade schools, in the best sense of the term.

4. Law Students Can be Better Prepared for Practice.

Even though it is unrealistic to expect law schools to prepare students fully for practice in three years, law schools can significantly improve their students' preparation for their first professional jobs.

Our system of legal education achieves some worthwhile goals. Some students are prepared for the jobs that await them, especially the top students who are hired by appellate judges or by large law firms, government agencies, and corporations that have the resources and patience to complete their education and training, although even these employers are increasingly forcing their new hires to sink or swim.

The unfortunate reality is that law schools are simply not committed to making their best efforts to prepare all of their students to enter the practice settings that await them. This concern is not a recent development.

[L]aw schools must accept responsibility for every graduate to whom they award degrees. Karl Llewellyn's assessment a half-century ago is generally still true:

What has not been done as yet on any important scale at any individual law school is to . . . seek to set up, within the available time, a reasonably rounded, reasonably reliable body of training for a whole student body. That is, as the question of social responsibility raises its head, a sustained effort to make the law school's law degree become a reliable mint mark.

Not long before his death, Llewellyn concluded that anyone "who proposes to practice a liberal art must be technically competent" and that "this minimum competence of each mint-marked law graduate does not appear, as yet, in these United States."³⁸

In order to improve the preparation of law students for practice, law schools should expand their educational goals, improve the competence and professionalism of their graduates, and attend to the well-being of their students.

³⁷ *Id.* at 96.

³⁸ Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, in ERASING LINES: INTEGRATING THE LAW SCHOOL CURRICULUM 51, 62-63 (Pamela Lysaght et al. eds., 2002) [hereinafter ERASING LINES] (citations and emphases omitted).

a. Law schools should expand their educational goals.

Law schools need to expand their educational goals. In 1950, Arthur Vanderbilt wrote that “[t]he keynote we should strike is that all education in the last analysis is self-education . . . that in law schools we are only going to attend to two things, giving them the art of legal reasoning and some of the main principles of law.”³⁹ Some would say this remains a reasonably accurate description of what law schools actually accomplish today, and some academics would probably be content to pursue only these goals. These goals, however, are too limited to meet the needs of law students and the legal profession in today’s world.

Historically, law schools have taken their bearings from a conception of the legal world developed at the end of the last century. This was a world composed of legal doctrines with lines drawn between property, contracts, torts, and other “fields” of law. Law schools ever since have given their students a map of this landscape.

But the landscape encountered in law practice is different. It is not populated with cases and doctrine, but with clients and their problems. The lines between the fields of law are blurred or missing altogether. The landscape is messy and unfamiliar. Not surprisingly, new lawyers report being disoriented and unprepared for this world. Some feel cheated by their legal education as they are left to construct a new map and to do so often without the help of an experienced guide.⁴⁰

The core goal of legal education should be the same as all other forms of professional education, which are, according to the authors of the Carnegie Foundation’s report on legal education, “to initiate novice practitioners to think, to perform, and to conduct themselves (that, is to act morally and ethically) like professionals.”⁴¹ The Carnegie authors observed that toward the goal of knowledge, skills, and attitude, education to prepare professionals involves six tasks:

1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research.
2. Providing students with the capacity to engage in complex practice.
3. Enabling students to learn to make judgments under conditions of uncertainty.
4. Teaching students how to learn from experience.
5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community.
6. Forming students able and willing to join an enterprise of public service.”

The Carnegie Foundation’s report concluded that it is important for law schools to address all of these purposes. “Since in essence, these tasks of professional education represent commonplaces of professional work, a normative model in which

³⁹ SUSAN K. BOYD, *THE A.B.A.’S FIRST SECTION: ASSURING A QUALIFIED BAR* 59 (1993).

⁴⁰ John O. Mudd, *Beyond Rationalization: Performance-Referenced Legal Education*, 35 J. LEGAL EDUC. 189, 197 (1986).

⁴¹ SULLIVAN ET AL., *supra* note 7, at 2.

each feature is essential, we believe that the more effective the preparation for the profession is to be, the more consciously the educational program must actually address all these purposes.”⁴²

The authors of the Carnegie Foundation’s report determined that the near-exclusive focus of law schools on systematic abstraction from actual social contexts suggests two major limitations of legal education:

One limitation is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of practice.

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The second limitation is law schools’ failure to complement the focus on skill in legal analysis with effective support for developing the ethical and social dimensions of the profession. Students need opportunities to learn about, reflect on, and practice the responsibilities of legal professionals.⁴³

Tony Amsterdam made the following observations about the narrowness of the law school curriculum.

Legal education is often criticized for being too narrow because it fails to teach students how to practice law – it fails to develop in them practical skills necessary for the competent performance of lawyers’ work. But I think this criticism, while just to some extent, conceals a deeper, more important problem, a problem that I think Judge Wallace was alluding to when he said we should be training law students to be problem-solvers. Legal education is too narrow because it fails to develop in students ways of thinking within and about the role of lawyers – methods of critical analysis, planning and decision-making that are not themselves practical skills but rather the conceptual foundations for practical skills and for much else, just as case reading and doctrinal analysis are foundations for practical skills and for much else.⁴⁴

Carrie Menkel-Meadow produced the following description of some of the abilities that law school graduates will need in law practice, in addition to

⁴² *Id.* at 3.

⁴³ *Id.* at 240.

⁴⁴ ANTHONY G. AMSTERDAM, *Clinical Education – Modes of Thinking, in A DIALOGUE ABOUT LEGAL EDUCATION AS IT APPROACHES THE 21ST CENTURY* 12 (1987). Amsterdam went on to describe three kinds of analytic thought that are taught in law schools – case reading and interpretation, doctrinal analysis and application, and logical conceptualization and criticism – and “three of perhaps fifteen or twenty that are not” – ends-means thinking, hypothesis formulation and testing in information acquisition, and decision-making in situations where options involve differing and often uncertain degrees of risks and promises of different sorts.

substantive knowledge, research and writing skills, and traditional analytical skills:

The lawyer of the next century will need to be able to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate both economic and emotional components and consequences of human decision-making, and to be creative – to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.⁴⁵

Few of these skills and capacities are given much attention in the traditional law school curriculum even though they are obviously critical for success in law practice.

Law schools should begin by expanding the educational goals of the first year curriculum. The traditional first year curriculum has some strengths, but it also has some shortcomings. Judith Wegner produced the following description of what students learn in the first year curriculum and what they could learn but typically do not.

Intellectual Tasks. “Thinking like a lawyer” involves an array of sophisticated intellectual tasks that are generally not named or described explicitly, but which correspond to widely-recognized cognitive tasks associated with higher-order thinking often familiar to those students with strong earlier academic preparation and less well-known to others with more non-traditional backgrounds.

Legal Literacy. Students are trained to develop legal literacy through emphasis on vocabulary, close reading, and textual interpretation, all of which contribute to their ability to develop their knowledge and comprehension of the field. Faculty often model important ways of “thinking about thinking” particularly with regard to testing one’s own knowledge and understanding, but rarely cue students explicitly about what they are doing or elaborate on the importance of such skills.

Legal Analysis. Students are taught a structured form of analysis that focuses on individual cases or lines of cases within a doctrinal context and emphasizes certain questions relating to relevant facts, doctrinal holdings, lines of argumentation, judicial reasoning, and the use of cases as precedent.

Application. Students learn to apply abstract principles of legal doctrine through experience working with simple hypothetical fact-patterns, consideration of current events, and occasional role-plays, but there is little apparent effort to stretch their thinking by applying the law to more complex problems over time.

Synthesis. Although the abilities to observe complex patterns and construct aggregated “chunks” of knowledge are of considerable

⁴⁵ Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999).

importance, students generally receive little formal instruction about or practice in synthesizing complex ideas, other than through the process of comparing individual cases or observing the models provided by their teachers.

Evaluation. Students are taught to engage in limited forms of evaluation that consider the logic and consistency of doctrinal developments and their relation to conceptual themes developed within a particular course, but are rarely asked to engage in external critiques of the law emphasizing such considerations as fairness or justice, leaving the impression that these topics are of little concern or importance, and providing little chance for them to develop their abilities to evaluate such matters on their own.

Implicit Messages. Students receive subtly different cues regarding the process of learning, the relation of law to the outside world, and the collaborative or competitive nature of professional interaction, depending on instructional strategies used, including classroom roles and forms of dialogue employed.

Learning in Context. Students who receive instruction that is contextualized by reference to problems or professional settings seem to believe that more is expected of them, and treat associated intellectual tasks with a greater seriousness of purpose and a higher level of engagement.

Notable Gaps: The Profession and Perspectives. Students generally receive little systematic grounding in the roles and responsibilities of lawyers, the interrelation between cases and statutes or doctrinal areas, and the broader intellectual and social context in which law operates, with the possible result that these matters are devalued or misimpressions of them are formed.⁴⁶

The first year curriculum gives students a skewed and inaccurate vision of the legal profession and their roles in it. Wegner made the following observations about the negative impact of our failure to give more attention to the issues of role assumption and professional norms in the first year curriculum.

Students wonder, very early, what carefully structured questions and reasoning, the legal universe and its language signify for their future lives as lawyers. As they confront the directive to “think” and function intellectually “like lawyers” they must confront at least two associated types of uncertainty: what it means to assume the role of “lawyer,” as distinguished from their ordinary self-concept, and what responsibilities and values are associated with that role. The notion of “thinking like a lawyer,” strikingly skirts these questions, in contrast to its treatment of other uncertainties that it meets head on. Instead, uncertainties are blunted as a result of persistently superficial treatment of the exceedingly complex issues of

⁴⁶ Judith Wegner, *Theory, Practice, and the Course of Study – The Problem of the Elephant 51* (Draft 2003) (unpublished manuscript on file with Roy Stuckey) [hereinafter Wegner, *Theory and Practice*].

role assumption and professional norms. By taking professional roles and values as givens rather than probing the depths of associated quandaries, faculty members avoid troubling uncertainties they often feel uncertain in addressing because of their own inexperience with the practicing profession and their discomfort in negotiating different value claims. As a result, students' underlying uncertainties are held in abeyance, postponing the inevitable confrontations between personal commitments and professional responsibilities in problematic and unhealthy ways.⁴⁷

Wegner further pointed out that “[s]uperficial exposure to the work of lawyers and judges who populate first-year casebooks causes students to absorb professional expectations and norms while putting aside more deep-seated personal uncertainty about future professional roles for the time being” and that narrowing the forms of evaluative judgment that can acceptably be brought to bear, raises “concerns that marginalizing legitimate forms of social criticism may in due course cause personal values gradually to fade from view.”⁴⁸

“[T]his is by no means an even contest for the hearts and minds of law students. The first year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as Llewellyn put it, away from cultivating the humanity of the student and toward the student’s re-engineering into a ‘legal machine.’”⁴⁹

Wegner noted that some first year teachers are making efforts to integrate broader intellectual conceptions of the law and its relation to it into first year classes “in order to provide thematic unity, provide comparative insights from other cultures, bring to bear new theoretical critiques, or integrate aspects of their scholarship into their teaching.”⁵⁰ She lamented, however, the absence in first year classes of “efforts to link ideas or legal doctrine from one subject to the next.”⁵¹

Even within single courses it appears difficult for students to grapple with the relationship between case law, statutes, regulations, and rules. There was rarely a sense that faculty members worked together to convey a coherent sense of the field of law to their students or shared such views among themselves, even though it is certainly conceivable that common first-year subjects could be seen to contribute in unique and complementary ways to an overall vision of the field⁵²

Wegner also discovered that “[s]urprisingly, given its relevance, jurisprudence is rarely introduced in a meaningful way.”⁵³

⁴⁷ Judith Wegner, “Law is Gray:” “Thinking Like a Lawyer” in the Face of Uncertainty 25-26 (Draft 2003) (unpublished manuscript on file with Roy Stuckey) [hereinafter Wegner, Thinking Like a Lawyer].

⁴⁸ *Id.* at 31.

⁴⁹ SULLIVAN ET AL., *supra* note 7, at 91.

⁵⁰ Judith Wegner, Thinking Like a Lawyer: the Lessons of Experience 48 (Draft 2003) (unpublished manuscript on file with Roy Stuckey) [hereinafter Wegner, Experience].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Programs of instruction during the second and third year at most law schools are little more than a series of unconnected courses on legal doctrine. The educational goals of the programs of instruction and most courses in them are unclear, and no effort is made to help students progressively acquire the knowledge, skills, and values needed for law practice.

After the first year, some teachers continue to stress the development of basic analytical skills, rather than incorporating “some additional mental stretch to higher levels of cognitive functioning or other modalities of learning and knowing. Absent such progression in the nature of learning or knowing, students who have mastered introductory ‘thinking’ are apt to be bored, while those who are still struggling are apt to tune out and relinquish expectations of becoming engaged.”⁵⁴ By and large, the focus of instruction after the first year turns toward content.

While the first year of law school gives pride of place to particular forms of legal reasoning (with the goal of developing higher level cognitive capabilities against the backdrop of common law subject matter), the later years reverse this priority, emphasizing content with forms of knowing or reasoning taking second place.⁵⁵

We encourage law schools to expand their educational objectives to more completely serve the needs of their students and to provide instruction about the knowledge, skills, and values that will enable their students to become effective, responsible lawyers. Specific proposals are discussed later.

b. Law schools should improve the competence and professionalism of their graduates.

Law schools are not producing enough graduates who provide access to justice, are adequately competent, and practice in a professional manner.

(1) Access to justice is lacking.

The legal profession, due in part to the shortcomings of legal education, is failing to meet its obligation to provide access to justice.

According to most estimates, about four-fifths of the civil legal needs of low income individuals, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Less than one percent of the nation’s legal expenditures, and fewer than one percent of its lawyers assist the seventh of the population that is poor enough to qualify for aid. Our nation prides itself on a commitment to the rule of law, but prices it out of reach for the vast majority of its citizens.⁵⁶

Many of the nation’s biggest law firms – inundated with more business than they can often handle and pressing lawyers to raise their billable hours to pay escalating salaries – have cut back on pro bono work so sharply that they fall far below professional guidelines

⁵⁴ Wegner, *Theory and Practice*, *supra* note 46, at 7.

⁵⁵ *Id.* at 5.

⁵⁶ Deborah Rhode, *Access to Justice: Connecting Practices to Principles*, 17 *Geo. J. of Legal Ethics* 369, 371 (2004).

for representing people who cannot afford to pay. The roughly 50,000 lawyers in the nation's 100 highest-grossing firms spent an average of just eight minutes a day on pro bono cases in 1999 . . . [or] about 36 hours a year, down significantly from 56 hours in 1992 . . .⁵⁷

"The best available research finds that American lawyers average less than half an hour work per week and under half a dollar a day in support of pro bono legal assistance. . . . And only 18 of the nation's 100 most financially successful firms meet the Model Rules' standard of 50 hours per year of pro bono service. The approximately 50,000 lawyers at these firms averaged less than 10 minutes per day on pro bono activities."⁵⁸ "And seventeen firms were so embarrassed by their pro bono commitment that they refused to share pro bono statistics with *The American Lawyer* at all, even though they proudly shared their income and revenue figures."⁵⁹

The failure of our system to provide adequate legal services to poor people is not a new problem, of course, but it remains an important issue for our society to resolve. Perhaps the importance of providing access to justice for those who cannot afford it was best explained by William Rowe in 1917.

Our system is highly legalistic. Based as it is upon individual liberty and freedom of justice, all citizens are constantly forced into contact with the law in order to advance their liberty by an ascertainment and protection of individual legal rights, in other words, by seeking justice under law. In this process, lawyers are an absolutely essential element, but, for a majority of our people, the expense of the process, especially under the complicated conditions of modern life, is prohibitive. Hence, the righteous complaint that the liberty and rights of the mass of the people are now crushed and lost beneath the weight of the system. The remedy is plain. The public must, where necessary, bear these particular burdens of government. The people at large and their government must take over and organize the work of legal aid societies, not as a charity or social-service enterprise, but as a necessary and long-neglected government function. For those who cannot bear the burden of expense, legal advice and justice must be free. Otherwise, our boast of freedom, our whole system, indeed, becomes a mockery.⁶⁰

Law schools do not even produce lawyers who meet the needs of the middle class. "The academy has failed to train lawyers who provide legal services to the middle and working classes, which, of course, constitute the overwhelming majority of American society."⁶¹

Delivering affordable legal services to the middle class is a challenge that the legal profession has been unable to meet. Advice

⁵⁷ Greg Winter, *Legal Firms Cutting Back on Free Services to Poor*, N.Y. TIMES, Aug. 17, 2000, at A1.

⁵⁸ DEBORAH RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 20 (2005) (citations omitted). See also, Lawrence J. Fox, *Should We Mandate Doing Well by Doing Good?*, 33 FORDHAM URB. L.J. 249, 250 (2005) (reporting similar data).

⁵⁹ Fox, *supra* note 58, at 250.

⁶⁰ Rowe, *supra* note 2, at 592.

⁶¹ John B. Attanasio, *Out-of-the-Box Dialogs: Foreword*, 52 J. LEGAL EDUC. 473, 475 (2002).

on topics of daily importance in the lives of individuals, such as landlord/tenant law, child custody disputes, and testamentary dispositions is priced beyond the reach of millions of working Americans. Equal Justice Under the Law is an ideal whose pursuit is becoming increasingly futile. Wealthy individuals and large organizations have the financial means to purchase the legal services they need, while members of the middle class and small business owners are left to struggle in a legal maze from which extrication is almost impossible.⁶²

Law schools should give more attention to educating students about the importance of providing access to justice and to instilling a commitment to provide access to justice in their students.

(2) Graduates are not sufficiently competent.

Most law school graduates are not sufficiently competent to provide legal services to clients or even to perform the work expected of them in large firms. The needs and expectations of the workplaces awaiting law school graduates have changed since the traditional law school curriculum was developed, even in the large law firms that serve the legal needs of corporate America. Research conducted by the American Bar Foundation in the early 1990's reached the following conclusion:

The [hiring] partners today, in contrast to the mid-1970s, expect relatively less knowledge about the content of law and much better developed personal skills. It appears that the law firms in the 1970s could afford to hire smart, knowledgeable law graduates with as yet immature communication and client skills, place them in the library, and allow them to develop. Today there is much less tolerance for a lack of client and communication skills; there is perhaps more patience with the development of substantive and procedural expertise in a world of increasing specialization.⁶³

Potential clients should be able to hire any licensed lawyer with confidence that the attorney has demonstrated at least minimal competence to practice law. Doctors' patients reasonably expect that their doctors have performed medical procedures multiple times under the supervision of fully qualified mentors before performing them without supervision. Clients of attorneys should have similar expectations, but today they cannot.

Legal education today is effectively an indoctrination into the ideology of the rule of law, seen as the law of rules. Maybe that was fine fifty years ago. Maybe then, a time that Anthony Kronman unaccountably waxes romantic about it didn't matter what students were taught. Like some students today, they could ignore the normativity, keep their nice doctrinal outlines, and pass the bar. Thereafter they would find someone who would teach them to practice law. But, as Kronman recognizes, today the world where

⁶² Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 484 (2002).

⁶³ Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence* 27 (Am. B. Found., Working Paper No. 9212, 1992).

new associates were getting patiently taught how to practice law is long past, if it ever existed for those at the bottom of the profession. Today's world is one where, even in the biggest firms, mentoring is hit or miss at best, and associates are hired in quantities and put to work in ways that ought to remind one of riflemen at Gettysburg or Passendale. In less fancy practices, conditions are even worse, if that is possible.⁶⁴

We encourage law schools to do more to prepare their graduates for the jobs they are likely to have and the contexts they are likely to encounter as new lawyers.

(3) Too many graduates conduct themselves unprofessionally.

The public has lost much of its trust in lawyers and respect for them. “Survey after survey of public opinion shows lawyers gradually slipping below politicians and journalists, and even approaching car salesmen and advertising executive levels in the public’s esteem.”⁶⁵ “Public opinion polls and surveys indicate that lawyers are poorly viewed by the public and that lawyers’ public image has been worsening in the past decade or so. It has been said that attorneys ‘have become symbols of everything crass and dishonorable in American public life.’”⁶⁶

In 1984, the ABA established a Commission on Professionalism to study the professionalism of lawyers at the suggestion of United States Supreme Court Chief Justice Warren E. Burger. He observed that the Bar “might be moving away from the principles of professionalism and that it was so perceived by the public.”⁶⁷ In 1999, the National Conference on Public Trust and Confidence in the Justice System reported that “poor customer relations with the public and the role, compensation and behavior of the bar in the justice system were ranked in the top ten ‘Top Priority National Agenda Issues’ affecting public trust and confidence in the justice system.”⁶⁸ Also in 1999, the National Conference of Chief Justices developed a national action plan on lawyer conduct and professionalism in “response to concerns about a perceived decline in lawyer professionalism.”⁶⁹

Walter Bennett has stated that changes in legal education are essential if the legal profession is to regain its ideals and identity as a moral community.

In order to restore ideals to the practice of law and rebuild the profession as a moral community, the legal academy must find ways to recontextualize its educational process. This does not mean abandoning

⁶⁴ John Henry Schlegal, *Walt Was Right*, 51 J. LEGAL EDUC. 599, 608 (2001) (citation omitted).

⁶⁵ W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 SC L. REV. 527, 528 (Spring 2002) (citing multiple sources).

⁶⁶ SUSAN SWAIN DAICOFF, *LAWYER KNOW THYSELF* 5 (2004) (citations omitted).

⁶⁷ AMERICAN BAR ASSOCIATION, COMMISSION ON PROFESSIONALISM, . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF PROFESSIONALISM (1986).

⁶⁸ CONFERENCE OF CHIEF JUSTICES, IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES’ NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 3 (2002) (citing *the National Conference on Public Trust and Confidence in the Justice System, National Action Plan: A Guide for State and National Organizations* 16 (1999)).

⁶⁹ *Id.* at 7.

the teaching and practice of rigorous legal analysis. Rather, it requires undertaking something far more difficult: continuing to teach rigorous legal analysis as well as other lawyerly skills, such as the emerging curricula in alternative dispute resolution, while making all of it morally relevant.

.....

The first step toward making the legal academy operate as a moral community is for it to begin to perceive itself as a community that is part of the larger moral community of the profession. For many law faculties and faculty members, this will require a reorientation on the purpose of legal education. An essential purpose of legal education should be to teach the Holmesian skills of legal analysis and prediction. But it should also be to teach and practice professional ideals. Both law students and faculty should feel the presence of those ideals in the work of law school. At present, ideals receive intermittent attention in law school, and some aspects of legal education actually work to defeat ideals and the promotion of community.⁷⁰

After noting that “[l]awyers have come to be the all-too-frequent butt of mean spirited humor,” Bill Sullivan observed that American society needs the professions today as examples of ethical work. “The ethical dimension – living ‘as within a larger life,’ as Lawrence Haworth has put it – is what is institutionalized in the professions’ social contract. This is the essential, but jeopardized, civic dimension of professionalism.”⁷¹ Sullivan further explained that the core of professionalism is to recognize that we have a civic identity that comes with duties to the public.

Chief among these duties is the demand that a profession work in such a way that the outcome of the work contributes to the public value for which the profession stands.

What has been missing, then, is not understanding or even appreciation of the value of professionalism so much as trust that professional groups are serious about their purposes. It is not that assertions of good faith on the part of the organized bar or medicine have been lacking in recent years. Rather, the public has seen these professions (in the other sense) as gestures that must be redeemed by concerted action. What has been missing is action in which the professions take public leadership in solving perceived public problems, including the problems of abuse and privilege and refusal of public accountability.⁷²

It is not clear to what extent law schools have contributed to the public’s loss of trust in lawyers, but we should be trying to be part of the cure by educating students about the traditions and values of the legal profession, by serving as role models, and by striving to infuse in every student a commitment to professionalism.

⁷⁰ WALTER BENNETT, *THE LAWYER’S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION* 169-70 (2001).

⁷¹ WILLIAM M. SULLIVAN, *WORK AND INTEGRITY* 23 (2005).

⁷² *Id.*

Ours is an era marked by a growing body of lawyers trained by an increasing number of law schools who then enter unstable and highly competitive domains of practice. Under these conditions, it has proven hard to make the old ideals of independent public service the basis of everyday legal practice. The result has been confusion and uncertainty about what goals and values should guide professional judgment in practice, leaving many lawyers “wandering amidst the ruins of those [past] understandings.”

Not in spite of but precisely because of these social pressures, legal education needs to attend very seriously to its apprenticeship of professional identity. Professional education is highly formative. The challenge is to deploy this formative power in the authentic interests of the profession and the students as future professionals. Under today’s conditions, students’ great need is to begin to develop the knowledge and abilities that can enable them to understand and manage these tensions in ways that will sustain their professional commitment and personal integrity over the course of their careers. In a time of professional disorientation, the law schools have an opportunity to provide direction. Law schools can help the profession become smarter and more reflective about strengthening its slipping legitimacy by finding new ways to advance its enduring commitments.⁷³

Many legal scholars have encouraged law schools to change,⁷⁴ and some law schools are making greater efforts to provide instruction about professionalism.⁷⁵ So far, however, not enough is being done to change the outcomes at most law schools. All legal educators should take leadership roles in making professionalism instruction a central part of law school instruction.

c. Law schools should attend to the well-being of their students.

The problems with legal education extend far beyond educational shortcomings. There are clear and growing data that legal education is harmful to the emotional and psychological well-being of many law students.⁷⁶

⁷³ SULLIVAN ET AL., *supra* note 7, at 153-54 (citations omitted).

⁷⁴ Annotated lists of books and articles about the need to improve professionalism instruction are located on the Professionalism of Lawyers and Judges website at <http://professionalism.law.sc.edu>. See also, *Symposium Issue: Therapeutic Jurisprudence in Clinical Education and Legal Skills Training*, 17 ST. THOMAS L. REV. (2005). An especially creative and insightful article is Joseph G. Allegretti, *In a Dark Wood: Dante as a Spiritual Guide for Lawyers*, 17 ST. THOMAS L. REV. 875 (2005).

⁷⁵ Some of the professionalism programs at law schools are described on the Professionalism of Lawyers and Judges website, <http://professionalism.law.sc.edu>. The Professionalism Committee of the American Bar Association conducted a survey and published a report on law school professionalism programs in 2006, available at http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf.

⁷⁶ The following list includes some of the more well-known articles about the negative impacts of legal education. They include cites to many studies, some of which are ongoing. Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) [hereinafter, Krieger, *Professionalism and Personal Satisfaction*]; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the*

It is well-known that lawyers suffer higher rates of depression, anxiety and other mental illness, suicide, divorce, alcoholism and drug abuse, and poor physical health than the general population or other occupations.⁷⁷ These problems are attributed to the stress of law practice, working long hours, and seeking extrinsic rather than intrinsic rewards in legal practice.⁷⁸

It is less well-known that these problems begin in law school. Although law students enter law school healthier and happier than other students, they leave law school in much worse shape. “It is clear that law students become candidates for emotional dysfunction immediately upon entry into law school and face continued risks throughout law school and subsequent practice.”⁷⁹

The harm to students is caused by the educational philosophies and practices of many law school teachers. Educational theorists tell us that we should strive to create classroom experiences where “[t]he classroom is and must be a protected place, where students discover themselves and gain knowledge of the world, where they are free of all threats to their well-being, where all received opinion is open to evaluation, where all questions are legitimate, where the explicit goal is to see the world more openly, fully, and deeply.”⁸⁰ Instead, too many law school classrooms, especially during the first year, are places where students feel isolated, embarrassed, and humiliated, and their values, opinions, and questions are not valued and may even be ridiculed.

Daisy Hurst Floyd vividly described the impact that current educational practices have on many law students.

Students come to law school with an idea that being a lawyer is something meaningful, something important and valuable. They are drawn to a vision that includes a job undertaken in relationship with and on behalf of other people, helping clients to solve problems or move through difficult times. While they may not have a detailed or even realistic picture of what lawyers do, students envision themselves engaged in professional work that is intellectually challenging and that has value and meaning. They arrive at law school with hope and expectation that their work as lawyers will have a positive impact for society as a whole.

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Silence, 52 J. LEGAL EDUC. 112 (2002) [hereinafter, Krieger, *Institutional Denial*]; Gulati et al., *supra* note 3; Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524 (1998); Lawrence S. Krieger, *What We’re Not Telling Law Students (and Lawyers) That They Really Need to Know: Some Thoughts in Action Toward Revitalizing the Profession from its Roots*, 13 J. LAW AND HEALTH 1 (1998) [hereinafter, Krieger, *What We’re Not Telling*]; Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998); R. GRANFIELD, *MAKING ELITE LAWYERS* (1992); Barbara A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627 (1991).

⁷⁷ See, e.g., Schiltz, *supra* note 76.

⁷⁸ See, e.g., *id.*

⁷⁹ Iijima, *supra* note 76, at 526.

⁸⁰ JAMES M. BANNER, JR. & HAROLD C. CANNON, *THE ELEMENTS OF TEACHING* 37 (1997).

Upon beginning law school, students quickly learn that law school values rational, objective analysis to the exclusion of other qualities, such as self-awareness and interpersonal relationships. They also learn that winning – as measured by the prizes of grades, law review membership, and certain jobs – is the most important goal. They believe that they must adopt those values as part of their changing professional identities. They believe that their personal visions of lawyering are naive and unrealistic. As a result, students replace their hopeful expectations for finding meaning and purpose in their work. They will accept unfulfilling work environments because they think there is no other option.⁸¹

Hurst's conclusion is that "law school causes students to lose the sense of purpose that made them want to become lawyers. This loss is not only harmful to individual students, but it also has enormous negative consequences for the profession and for those served by the profession."⁸²

Susan Daicoff described similar negative consequences produced by legal education.

Although everyone who has been through it knows that law school has dramatic effects, there is empirical evidence to flesh out what actually changes when one learns to "think like a lawyer." People who come to law school with a rights orientation either keep it or it becomes more ingrained. Many of those who come to law school with an ethic of care appear to lose it and adopt a rights orientation by the end of the first year. Law students become less interested in community, intimacy, personal growth, and inherent satisfaction and more interested in appearance, attractiveness, and garnering the esteem of others. Cynicism about the legal profession increases and opinions of lawyers and the legal system become more guarded and negative by the end of the first year of law school, but an elitist protectiveness of the profession also emerges. Interest in public interest and public service work decreases as a result of law school. Students also become less intellectual (i.e., less philosophical and introspective and less interested in abstractions, ideas, and the scientific method) perhaps in favor of more realistic, practical values. Law school inadvertently discourages collaborative peer relationships, instead fostering more competitive interactions. It unintentionally rewards introversion and pessimistic attitudes.⁸³

There are empirical data that the law school experience can cause psychological harm. A substantial empirical study of psychological distress in law students was conducted in 1986 by G. Andrew Benjamin and others. The study found that "[l]evels of psychological distress rose significantly for first year students and persisted throughout law school and for two years after graduation. The results are especially strong because they remained consistent regardless of age, gender, and

⁸¹ Daisy Hurst Floyd, *Reclaiming Purpose – Our Students' and Our Own*, 10 THE LAW TEACHER 1 (2003).

⁸² *Id.*

⁸³ DAICOFF, *supra* note 66, at 76-77.

law school grades.”⁸⁴ Symptoms of distress included depression, obsessive-compulsive behavior, interpersonal sensitivity (feelings of inadequacy and inferiority), anxiety, hostility, paranoia, and psychoticism (social alienation and isolation).

“Many students report that the law school environment results in loss of self-esteem and alienation. Large percentages believe that they were more articulate and intelligent before beginning their legal education and that they felt pressure to put aside their values in law school. These negative effects appear to be especially prevalent among women and people of color.”⁸⁵

Christophe Courchesne concluded that “[b]y and large, one can attribute this range of disastrous outcomes, namely the severance of supportive social ties, eventual disengagement with academics, and marginalization of women and minorities, to institutional failures of the law school in adapting the Langdellian model, particularly its fixation with grades-based elitism and its lack of attention to non-academic student needs.”⁸⁶

Gerry Hess identified the sources of law student distress and alienation as the grading and ranking system that serve as gatekeepers to the reward system during and after law school; the high cost of legal education, which pressures students to qualify for the best paying jobs; the overwhelming workload of law school that leaves little time for sleep, relaxation, and relationships with friends and family; and the narrowly focused curriculum that concentrates on analytical skills while minimizing the development of the interpersonal skills that are critical for law practice.⁸⁷

[The curriculum] teaches that tough-minded analysis, hard facts, and cold logic are the tools of a good lawyer, and it has little room for emotion, imagination, and morality. For some students, “learning to think like a lawyer” means abandoning their ideals, ethical values, and sense of self.⁸⁸

Kirsten Edwards placed some of the blame on professors who intimidate students, demean their opinions and insult their values.

[I]t can be argued that the problem stems not from what is being said to the students, nor even the method by which it is said, but rather the attitude of the people doing the talking. . . . Is it possible that students’ sense of justice, humanity and common good are harmed less by the lack of certainty of legal principle, or lack of reverence for the traditions of the law, than by teachers who deliberately and systematically undertake to ruin students’ sense of

⁸⁴ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002) (citing *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225).

⁸⁵ *Id.* at 77 (citing Joan M. Drauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 328 (1994); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN’S L. J. 52 (1990)).

⁸⁶ Courchesne, *supra* note 13, at 31. See also GRANFIELD, *supra* note 76, at 71 (reaching similar conclusions).

⁸⁷ Hess, *supra* note 84, at 78.

⁸⁸ *Id.* at 79.

self-worth and the value of their own ideas?⁸⁹

Larry Krieger and Ken Sheldon recently undertook a longitudinal study of law students, and the data produced from their study provide new insights into the harm that legal education in the United States does to many students, particularly how it undermines the values and motivation that promote professionalism.

[I]ncoming students were happier, more well-adjusted, and more idealistic/intrinsically oriented than a comparison undergraduate sample. This refutes the idea that problems in law schools and the profession may result from self-selection by people with skewed values or who are already unhappy.

Well-being and life satisfaction fell very significantly during the first year. More fundamentally, the general intrinsic values and motivations of the students shifted significantly towards the more extrinsic orientations. These shifts have distinct negative implications for the students' well-being. In the sample followed for the final two years of law school, these measures did not rebound. Instead, students experienced a further and troubling diminution of all of their valuing processes (both intrinsic and extrinsic) beginning in the second year, suggesting a sense of disinterest, disengagement, and loss of enthusiasm. This loss of valuing is a serious occurrence and a likely cause of the continued loss of well-being measured among these students. It may well mark the beginning of the destructive "values-neutral" approach of many lawyers.

The findings that students became depressed and unhappy in the first year and remained so throughout law school are consistent with previous studies. Our further investigation of values and motivation was the first such study of which I am aware. All of the data provides empirical support for the concern that our legal training has precisely the opposite impact on students from that suggested by our rhetoric – it appears to undermine the values and motivation that promote professionalism as it markedly diminishes life satisfaction. All indications are that when students graduate and enter the profession, they are significantly different people from those who arrived to begin law school: they are more depressed, less service-oriented, and more inclined toward undesirable, superficial goals and values.⁹⁰

Krieger and Sheldon concluded from their data that "[s]omething distinctly bad is happening to the students in our law schools."⁹¹ While calling on law teachers and other researchers to review their attitudes and educational practices to identify those most likely to have a deleterious effect on the basic needs of law students, Krieger suggests that some of the likely culprits include the belief held by many

⁸⁹ Kirsten Edwards, *Found! The Lost Lawyer*, 70 *FORDHAM L. REV.* 37, 70 (2001).

⁹⁰ Krieger, *Professionalism and Personal Satisfaction*, *supra* note 76, at 433-34 (citations omitted). Krieger and Sheldon also determined that the students who made the highest grades in law school "suffered losses in well-being and life satisfaction to the same extent as the rest of their class." Krieger, *Institutional Denial*, *supra* note 76, at 123.

⁹¹ Krieger, *Institutional Denial*, *supra* note 76, at 115.

students that success in law school is measured by being in the top ten percent of the class, appointment to a law review, and similar academic honors; the corollary sense that personal worth depends on one's place in the hierarchy of academic success; the belief that the American dream is achieved by financial affluence and other external indicia of achievement (and that success in law school will secure the dream); and the emphasis on one form of "thinking like a lawyer" converts students into people who define people primarily according to their legal rights, who learn to resolve legal problems by linear application of legal rules to those rights, and using competitive approaches to resolving problems. "Thinking 'like a lawyer' is fundamentally negative; it is critical, pessimistic, and depersonalizing. It is a damaging paradigm in law schools because it is usually conveyed, and understood, as a new and superior way of thinking, rather than an important but strictly limited legal tool."⁹²

All of these paradigms share a powerful, atomistic worldview and a zero-sum message about life in the law and in law school. For every winner there is a loser, and if anything beyond winning or losing matters, it doesn't matter much. The theme for law students is constant: you must work very, very hard, and you must excel in the competition for grades and honors, in order to feel good about what you have done, have the respect of your teachers and peers, get a desirable job, and generally be successful.⁹³

Krieger has proposed that law schools should "investigate our predilection to work students exceptionally hard," because "it teaches students to accept constant stress and to associate it with a law career."⁹⁴ The contingent-worth and top-ten-percent paradigms, coupled with mandatory grade curves and law schools' over reliance on the Socratic dialogue and case method, produce constant tension and insecurity about outperforming other students, and create the impression that personal values, ideals, and intentions are largely irrelevant to law school or law practice. "One could hardly design purposely a more effective belief system for eroding the self-esteem, relatedness, authenticity, and security of an affected population."⁹⁵

While Steven Hartwell agrees with Krieger that law school unnecessarily harms some students, he believes that depression among law students is primarily caused by the negative impact that legal education has on students' moral development. "Attending law school arrests the moral development of many if not most students, a halt that most likely would not occur if these same students had attended a different graduate program."⁹⁶ Hartwell begins his article with "a quote from Carl Jung to the effect that neurosis, that is, a 'psychiatric disorder characterized by depression, anxiety and hypochondria,' is the suffering of a soul, that is, the suffering of one's 'essence, the deepest and truest nature' that has not discovered its meaning."⁹⁷

⁹² *Id.* at 117.

⁹³ *Id.*

⁹⁴ *Id.* at 124.

⁹⁵ *Id.*

⁹⁶ Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 1 CLINICAL L. REV. 115, 118-19 (2004).

⁹⁷ *Id.* at 115.

“Meaning” here refers to an “inner importance” in a psychological, spiritual or moral sense. Law students in great numbers are classically neurotic, suffering from alarmingly high levels of reported depression and anxiety. Many suffer, in my view, because law school education arrests student moral development such that law students fail to advance towards postconventional moral reasoning as they might anticipate in attending a graduate program. They remain mired at the same level of conventional moral reasoning at which they entered law school. They have not discovered their moral meaning. The reason students fail to advance may result from the nature of law as a subject matter, from the way law is taught, from the moral development level of the instructors, from some combination of these reasons or from other reasons I have not understood.⁹⁸

Hartwell does not think his theory is inconsistent with Krieger’s conclusions.

In other ways, Krieger’s assessment that students fall into depression because of their shift to extrinsic motivation and my assessment that they fall into depression because their expectations of continued development in their moral reasoning are not that different. As individuals move from basing moral decisions on personal interest to conventional and then to postconventional moral thinking, they also move from extrinsic moral motivators to intrinsic moral motivators. Personal interest motivators are completely extrinsic. They involve avoiding punishment and obtaining awards. The motivators of conventional moral thinking are a mix of extrinsic and intrinsic. On the one hand, they entail the extrinsic motivators of social acceptance for being seen as a “good person” as well as the intrinsic motivation of incorporating civic rules in support of society. Postconventional moral thinking is almost entirely intrinsically motivated. Postconventional motivators entail the conscious choice of rational values that will lead to a healthier and more just society.⁹⁹

Hartwell proposed that law schools can promote moral development and reduce the degree of depression among students by being more candid with students about the nature and risks of legal education and by using more experiential teaching methods. Experiential teaching is student centered, takes clients seriously, and values feelings as much as thinking, whereas the Socratic dialogue and case method is teacher centered, gives little consideration to clients, and treats feelings as irrelevant.

I see two ways to help these students. One way would be for law school faculty and administrations to be more candid in warning law school applicants about the real “meaning” of a law school education. Students would be healthier if the law schools were not in denial. A second way would be for law schools to change their pedagogy so as to encourage growth in moral reasoning. The data reported in this article from experientially taught professional responsibility courses suggest that students can make dramatic

⁹⁸ *Id.* at 146 (citations omitted).

⁹⁹ *Id.* at 140 (citations omitted).

strides towards postconventional moral reasoning over the course of a single semester.¹⁰⁰

Whatever the causes, something about legal education in the United States is unnecessarily harming students. For law schools to provide students with the knowledge, skills, and values they will need to participate effectively and responsibly in the legal profession and live satisfied, healthy lives, legal educators should reexamine their attitudes and paradigms, as well as their methods of instructing students.

5. Principles of Accountability and Consumer Protection Require Change.

The accountability movement in higher education is likely to force law schools to improve the preparation of students for practice, whether or not all law teachers want to move in this direction.

The assessment movement is knocking at the door of American legal education. Legal education in the United States is renowned for its adherence to traditional case books, Socratic teaching method, single end-of-the-semester final exams, and an unwillingness to change. Now, regional accrediting bodies, acting under the aegis of the U.S. Department of Education, are demanding that law schools, as units of accredited colleges and universities, state their missions and outcomes, explain how their curricula are designed to achieve those outcomes, and identify their methods for assessing student performance and institutional outcomes.¹⁰¹

Consumerism is the driving force behind the accountability movement. If law schools cannot find ways to improve their performance on their own, they can expect increasing pressure from outside forces seeking to protect the consumers of law schools' products – students, employers, and clients.

For most of its 366-year history, American higher education has been a largely self-regulated industry of nonprofit, private, and public institutions. Colleges and universities have been accountable principally to colleagues and peers in regional and specialized accrediting groups and state and federal departments of higher education. In recent years, however, the level and type of accountability have changed. Colleges and universities are now increasingly responding to questions and criticisms from non-educational groups including political leaders and elected representatives at the state and federal level, from various non-educational agencies including the Internal Revenue Service, the Environmental Protection Agency, the Federal Bureau of Investigation, the Justice Department, the Human Rights Commission, and so on, as well as the media and general public. In addition, the accreditation groups and educational bodies traditionally responsible for evaluating higher education are also under attack for their ineffectiveness in protecting the consumer.

¹⁰⁰ *Id.* at 147.

¹⁰¹ MUNRO, *supra* note 4, at 3.

And to make matters worse, as we well know in legal education, when accrediting groups have attempted to uphold standards and accountability, they have been assailed and even sued by institutions that did not agree with their decisions.

In an age of increasing consumerism, one thing is certain: higher education will be closely watched, evaluated, and criticized by more people and from more quarters in the future than at any other time in its history. To what extent the balance of this evaluation will be shifted from the traditional collegial peer evaluation to extend to groups including politicians, non-educational governmental agencies, the media, and the general public remains to be seen.¹⁰²

The Best Practices Project was undertaken in the spirit of fixing our own house before reform is imposed from the outside. Hopefully, the product of our work will help law schools broaden their educational goals, improve the preparation of students for practice, and become more accountable for their products and more consumer-oriented in their educational practices.

¹⁰² John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528, 528-29 (2002) (citations omitted).

