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### Making Good Lawyers

Eli Wald

*Sturm College of Law*, [ewald@law.du.edu](mailto:ewald@law.du.edu)

Russell G. Pearce

*Fordham University School of Law*, [rpearce@law.fordham.edu](mailto:rpearce@law.fordham.edu)

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## ARTICLE

# MAKING GOOD LAWYERS

ELI WALD\* & RUSSELL G. PEARCE\*\*

### INTRODUCTION

Critiques of legal education abound.<sup>1</sup> Law schools have long been charged with failing to effectively prepare students for the practice of law,<sup>2</sup> being too theoretical and too detached from the profession,<sup>3</sup> and offering a dehumanizing and alienating educational experience.<sup>4</sup> More recently, legal

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\* Charles W. Delaney, Jr., Professor of Law, University of Denver Sturm College of Law. We thank for their valuable comments the participants in the University of St. Thomas Law Journal symposium on *The Lawyer's Role and Professional Formation*, as well as Steven Bennett, Dick Bourne, Neil Hamilton, Larry Krieger, Brent Newton, Deborah Rhode, David Thomson, and Ian Weinstein.

\*\* Edward & Marilyn Bellet Professor of Legal Ethics, Morality & Religion, Fordham University School of Law.

1. See, e.g., Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735 (2011); Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. (forthcoming Fall 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1994189](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1994189). The recent cycle of critiques has included a proliferation of blogs dedicated to studying legal education. See, e.g., NAT'L L.J. L. SCH. REV., <http://legaltimes.typepad.com/lawschoolreview/> (Nov. 10, 2011); William D. Henderson, *What Is the Legal Whiteboard?*, LEGAL WHITEBOARD (Jan. 22, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/week4/index.html> ("According to a lot of reputable media outlets, the sky is falling for both legal education and legal services."); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARING FOR THE PROFESSION OF LAW 21–46 (2007) [hereinafter CARNEGIE REPORT]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 11–36 (2007) [hereinafter CLEA REPORT]; SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 1–112 (Robert MacCrate ed., student ed. 1992) [hereinafter MACCRATE REPORT].

3. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Chief Justice Roberts has recently joined the critics. See Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, THE VOLOKH CONSPIRACY (July 23, 2011, 11:07 a.m.), <http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship/>; see also Debra Cassens Weiss, *The Costs of Legal Scholarship: \$575M in Tuition and Grads Who Don't Know How to Practice*, A.B.A. J. (Nov. 21, 2011, 7:53 AM), [http://www.abajournal.com/news/article/why\\_new\\_lawyers\\_dont\\_know\\_how\\_to\\_practice\\_law/](http://www.abajournal.com/news/article/why_new_lawyers_dont_know_how_to_practice_law/).

4. Michael Hunter Schwartz, *Humanizing Legal Education: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 235–42 (2008); Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395 (2012); see also Patrick J. Schiltz, *On Being a Happy*,

education has been condemned as too expensive and as offering a product that is declining in value.<sup>5</sup> Moreover, law schools have been disparaged for failing to help students develop a sense of professional identity, professional values, and professionalism.<sup>6</sup>

Law schools, in turn, have been largely unresponsive to challenges.<sup>7</sup> In significant ways, twenty-first century legal education looks a lot like it did in the late nineteenth century.<sup>8</sup> Some contemporary critics, however, believe that transformative changes will now occur because law schools face overwhelming pressures to reform, ranging from the high cost of legal education, concerns regarding whether law graduates receive the training they need to become competent practitioners, and the tough job prospects law graduates encounter.<sup>9</sup>

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*Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 873 (1999); 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, 127–29 (2002); Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 425–35 (2005); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 883–86 (2007); JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* 62–64 (2005).

That is not to deny the existence of additional challenges, for example, that law schools are liberal bastions that unduly influence, even manipulate, American law, see WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* 1–31 (2011), and that law schools mistreat, even discriminate against some of their students, see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

5. Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651 (2012); Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* 23 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 11-42, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1957139](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957139); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 89–94 (2010); see also David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1.

6. CARNEGIE REPORT, *supra* note 2, at 21–46. These critiques, it should be noted, are not new. See LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* 343 (1933); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949, 954 (1995); see also AM. BAR ASS'N, REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM § 1(B) (1996) (discussing the decline in professionalism and increased incivility); Sandra Day O'Connor, *Professionalism*, WYO. LAW., Apr. 2004, at 12, 13 (noting the “growing incivility” among lawyers).

7. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007).

8. See Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 341 (2007) (describing the early Harvard approach as one that involved difficult tests, required courses in the first and second year, and preconditioned admission on a college degree).

9. Henderson, *supra* note 1 (“I am not in the sky-is-falling camp. Instead, I see a lot of opportunities for lawyers, law students, and legal educators to do very important and creative work.”); Martin J. Katz, *Practice-Ready: The False Dichotomy Between Theory and Practice*, EDUCATING TOMORROW'S LAWYERS (Dec. 13, 2011), <http://educatingtomorrowlawyers.du.edu/blog/detail/practice-ready-the-false-dichotomy-between-theory-and-practice>; Erwin Chemerinsky, *Legal Education Must Change, But Will It?*, NAT'L L.J. L. SCH. REV. (Nov. 1, 2011), <http://legal.times.typepad.com/lawschoolreview/2011/11/your-best-friend-calls-you-and-tells-you-heshes-re>

While significant changes may loom on the horizon, such as a two year J.D. degree, a growing emphasis on experiential learning, or undergraduate legal education,<sup>10</sup> law schools continue to reject proposals for new and meaningful steps toward helping students form professional identities and values. Legal educators have responded that “values cannot be taught to formed adult law students;”<sup>11</sup> that in a pluralist society values should not be preached;<sup>12</sup> and that even if values can and should be taught, law schools have no particular expertise in teaching them.<sup>13</sup>

Our contention is that notwithstanding their denial, law schools have been implicitly yet actively engaged in the formation of students’ professional identities. Specifically, law schools have been instilling a very particular brand of professional identity, forming students into autonomously self-interested lawyers.<sup>14</sup> Such attorneys understand their professional role to be the aggressive pursuit of their clients’ interests with little regard to the interests of others, the law itself, or the public; perceive their role as a representative of clients to dominate and supersede their roles as an officer of the legal system and as a public citizen; and believe that their duties to the public interest and to public service are fulfilled by their representation of private client interests such that they have no other responsibility to further the rule of law and access to justice.

Moreover, this active formation of law students’ professional identity and professional values reflects the dominant autonomously self-interested culture of law schools and the legal profession. Therefore, even if law schools were devoted to forming professional identity outside of the mold of autonomous self-interest, which many are not, such a commitment would

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ally-sick-how-do-you-show-you-care.html; *Educator’s Debate: Are Law Schools in Crisis?*, NAT’L L.J., Nov. 7, 2011, at S4–S12.

10. See, e.g., John O. McGinnis & Russell D. Mangas, *First Things We Do, Let’s Kill All the Law Schools*, WALL ST. J., Jan. 17, 2012, at A15. The literature on experiential teaching and learning is vast. See, e.g., Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 522–23 (1995); Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001); Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 LEGAL COMM. & RHETORIC: JALWD 191 (2011).

11. CARNEGIE REPORT, *supra* note 2, at 133; see Neil W. Hamilton & Verna Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921 (2012); Verna E. Monson & Neil W. Hamilton, *Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism*, 8 U. ST. THOMAS L.J. 129, 159–60 (2011) (concluding that values are developed over a lifetime); see also Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 733–35 (1998); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 325–32 (1982).

12. W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711, 726–27 (2002).

13. *Id.* at 713; see also CARNEGIE REPORT, *supra* note 2, at 132–33; Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 LEGAL WRITING 373, 376–77 (2011).

14. See *infra* Part II.

require much more than curricular reform. It would require challenging the dominant professional culture of autonomous self-interest and developing alternatives to it that in time will inform and shape different professional identities.<sup>15</sup> Given the dominance of autonomous self-interest in legal education, the legal profession, and American culture, the task is monumental, but one thing is clear: reform proposals that advocate the formation of professional identity without recognizing that law schools are already engaged in such a formation project, as well as plans to revise legal education that underestimate the power and influence of the culture of autonomous self-interest, are bound to fail.<sup>16</sup>

Part I of this article defines the often confused and misunderstood notions of professionalism and professional identity. That law schools and law professors are frequently baffled by the ideas of professionalism and profes-

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15. On the need to challenge the dominant culture of law schools as a condition for the success of any particular reform, see Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) [hereinafter Cramton, *Ordinary Religion*]; Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987); Sturm & Guinier, *supra* note 7, at 519 (“[H]istory is littered with failed reform efforts of this type. Many brilliant reforms do not take root because they overlook the crucial role of law school culture in determining their meaning and impact.”); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1273 (1994).

16. In a thoughtful article, Steven Bennett argues that law schools are likely to implement reform only when forced to do so by demand in the market for legal education. Bennett, *supra* note 5, at 107–27; see also William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble*, 98 A.B.A. J. 30 (2012). We doubt law schools are likely to face such demand-side pressures, either from students or from the practicing bar. The market for legal education is not a competitive market meaning that even if law schools wanted to reform their ability to do so would be somewhat limited by existing ABA accreditation standards, although it should be noted that the ABA has been contemplating reform of its own standards to conform to the Carnegie Report recommendation. See Neil W. Hamilton, *Analyzing Common Themes in Legal Scholarship on Professionalism* 1–5 (Univ. St. Thomas Sch. of Law Legal Studies Research Paper Series, Working Paper No. 11-24, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917058](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917058).

More importantly, current and prospective law students lack any meaningful bargaining power vis-à-vis law schools, notwithstanding a recent slew of lawsuits by students accusing law schools of fraud and misrepresentation of employment statistics. See Martha Neil, *12 More Law Schools Sued over Reporting of Law Grad Employment and Salary Stats*, A.B.A. J. (Feb. 1, 2012), [http://www.abajournal.com/news/article/12\\_more\\_law\\_schools\\_sued\\_in\\_consumer-fraud\\_class\\_action\\_re\\_reported\\_law/](http://www.abajournal.com/news/article/12_more_law_schools_sued_in_consumer-fraud_class_action_re_reported_law/). Indeed, Henderson & Zahorsky’s own statistics suggest that the “law school bubble” is not about to pop: preliminary LSAC returns show that nearly 80,000 have applied for law school admission in 2012, competing for 60,000 spots at ABA-approved law schools, evidencing significant over-demand for legal education. Henderson & Zahorsky, *supra*, at 32.

Similarly, law firms also likely lack the ability to influence law schools, and it is doubtful that they have a uniform agenda they could agree on, even if they did have the power to force changes in legal education. Robert Stevens, for example, has documented the symbiotic relationship between elite law firms and elite law schools, a relationship that casts a doubt as to the desire of elite law firms to change the status quo in legal education. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 51 (1983); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 28–30 (1977) (describing the symbiotic relationship between elite law schools and elite corporate law firms, matching the so-called “best” law students with the “best” law firms); see also Dennis Curtis, *Can Law Schools and Big Law Firms be Friends?*, 74 S. CAL. L. REV. 65 (2000).

sional identity is not surprising: the subjects hardly ever come up explicitly. Most law professors have not encountered them systematically themselves while they were in law school; have not practiced long enough (if at all) to experience them in practice; and do not research, write, or teach them. Rather, law professors are assumed to have mastered the ability to form professional identity by virtue of becoming non-practicing academic lawyers. Accordingly, they nod ambiguously on the rare occasions when the topics of professional identity and professionalism arise and continue to think of them (if they do) as part of an amorphous black box of values, commitments, and skills. Part I offers workable definitions of professionalism and professional identity that will enable an informed discussion of the formation of professional identity in and by law schools. Our proposed definitions of professionalism and professional identity build on a distinction we have introduced and developed elsewhere between autonomously self-interested and relationally self-interested accounts of lawyering.<sup>17</sup>

Part II explores what and how legal education teaches students, demonstrating that contrary to common wisdom both institutionally (at the law school level) and individually (at the law professor level), legal education is proactively engaged in the formation of professional identity. Moreover, legal education forms a particular professional identity of autonomous self-interest, which is grounded in and reflects the culture of autonomous self-interest prevalent in law schools and in the profession.

Its dominance in legal education notwithstanding, autonomous self-interest is but one, often unpersuasive, account of professionalism and professional identity. Part III turns to the competing vision of relationally self-interested professionalism and professional identity and develops an outline for legal education grounded in this conception. Because legal education reflects a deep commitment to the dominant culture of autonomous self-interest, we think it unlikely that reform proposals that are inconsistent with that culture are likely to succeed in the near future. Yet exposing the dominant culture and the professional identity it fosters is a necessary step toward providing a workable framework for reformers committed to promoting professional values in the long term.

## I. PROFESSIONALISM AND PROFESSIONAL IDENTITY

### A. *A Brief Introduction to Professionalism*

With some wariness we venture into the sticky waters of defining professionalism, bearing in mind Monroe Freedman's admonition that when

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17. Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 25–39 (2011).

surrounded by platitudes about professionalism, one is tempted to join the call for a “Professionalism Non-proliferation Treaty.”<sup>18</sup>

Although commentators have offered varied descriptions of professionalism, these definitions possess three common elements: inaccessible expertise, altruistic commitment to the public good, and autonomy.<sup>19</sup> For example, Wasserstrom’s well-known description of a profession lists the acquisition of formal education, mastery and exercise of intellectual ability, possession of a monopoly over the provision of services coupled with self-regulation, attainment of social prestige and material affluence, representation of vulnerable clients, involvement in interpersonal relationships with clients, and adherence to a role-morality.<sup>20</sup> Roscoe Pound propounded the classic definition of a profession as a “group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”<sup>21</sup> The American Bar Association Model Rules of Professional Conduct’s definition of a lawyer as a “representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice”<sup>22</sup> builds on these notions by recognizing the representation of paying clients as legitimate while making lawyers responsible for public service by deeming them officers of the legal system and public citizens who owe a duty to the quality of justice.<sup>23</sup>

Critics from the left and right have challenged the meaning and purpose of professionalism, arguing that the attainment of social prestige and material affluence is the true purpose of professionals and that they do so by successfully lobbying for a monopoly over the provision of services, which they in turn justify by claiming to possess esoteric knowledge and acting to

18. Monroe Freedman, *A Brief; Points of View; Opinion and Commentary; Cases and Controversy*, LEGAL TIMES, Dec. 17, 1990, at 22; Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 24 (1999) (citing Freedman, *supra*, at 22). For a recent survey of professionalism literature, see Hamilton, *supra* note 16; and Neil W. Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation’s Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012).

19. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238–40 (1995).

20. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1, 2 n.1. (1975).

21. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

22. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 1 (2011).

23. In Wasserstrom’s terms, the representation of clients’ private interests for pay while exercising a monopoly over the provision of legal services will lend lawyers social prestige and material affluence and will in turn impose on them duties to follow a role morality codified in rules of professional conduct, which include a commitment to pursue justice and the public interest. Wasserstrom, *supra* note 20, at 16–19, 23.

serve the public good, and not their own interests.<sup>24</sup> We leave to another day debates over the “true” meaning and desirability of professionalism.<sup>25</sup> For our purposes, suffice it to say that either as a constitutive feature of their professional identity or as an instrumental imperative to retain their professional status, lawyers must prove that the practice of law is in the public interest and is in the spirit of public service.<sup>26</sup>

This, in turn, allows us to frame the narrow question of professionalism to be addressed in this article as follows: assuming that the core of professionalism (inherently or instrumentally) entails a duty to practice in the spirit of public service, what are the contours of such a duty?

Historically, the profession offered a two-part answer. With regard to the representation of paying clients, the public spirit of law practice meant that lawyers were under a duty to provide high quality legal services to presumably vulnerable and unsophisticated clients and to include in client counseling consideration of the spirit of the law and the public good.<sup>27</sup> This the profession purportedly achieved by promulgating and enforcing rules of professional conduct.<sup>28</sup> Next, the spirit of public service meant that in addi-

24. From the left, see MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977) and RICHARD L. ABEL, *AMERICAN LAWYERS* (1989). From the right, Richard Posner has argued that lawyers’ professionalism amounts to little more than a mystique means to elevate the status and pocketbook of lawyers at the expense of clients and competitors. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185–211 (1999); see also David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 *STAN. L. REV.* 1001, 1002 (1996); Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 *SETON HALL L. REV.* 1042, 1049 (2001).

25. However, in the past we have both individually taken a position in these debates. See Pearce, *supra* note 19; Wald, *supra* note 24.

26. We do acknowledge, however, that our working definition does assume either that professionalism, even if flawed and admittedly self-serving, is inherently desirable or at least redeemable, see, e.g., Robert W. Gordon & William H. Simon, *The Redemption of Professionalism, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230–57 (Robert L. Nelson et al. eds., 1992), or that it could be utilized to induce lawyers to behave in desirable ways, if only instrumentally to retain their elevated professional status. Some commentators have explicitly rejected even such a weak definition of professionalism. Tom Morgan, for example, defines professionalism as an anti-competitive apparatus and argues that it is both increasingly irrelevant and undesirable. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66–69 (2010). Proponents of this vision may oppose the very notion of professional education and, in particular, oppose law schools’ formation of professional identity on the ground that it would further perpetrate the undesirable professionalism project.

27. Bruce A. Green & Russell G. Pearce, “*Public Service Must Begin at Home*”: *The Lawyer as Civics Teacher in Everyday Practice*, 50 *WM. & MARY L. REV.* 1207 (2009).

28. See Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 *AM. ECON. REV.* 941, 943 (1963); Wald, *supra* note 24, at 1075 (applying Arrow’s insights to the legal profession and advocating “an implicit social contract in which the legal profession guarantees the quality of legal services, and in return . . . is granted effective self-regulation of the behavior of its members.” (citation omitted)). But see Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *TEX. L. REV.* 639, 648 (1981) (“[S]tudy after study has shown that the current rules of professional conduct are not enforced.”); David B. Wilkins, *Legal Realism for Lawyers*, 104 *HARV. L. REV.* 468, 493 (1990) (noting rules of professional conduct tend to be “systematically underenforced”).



tion to representing clients, lawyers were to serve the public interest as officers of the legal system and as public citizens. In particular, as public citizens, lawyers took leadership positions in public life, politics, and business and served in prominent positions within their communities. Lawyers thus constituted a governing class within American society. These roles entailed a commitment to the rule of law, improving the law, and providing access to legal services to all.<sup>29</sup>

To be sure, professional leaders have never agreed on, and ethical codes have never prescribed, how to apply specifically the commitment to the public good in concrete situations. For example, beyond aspiring to the goal of increasing access to justice, the profession has never undertaken steps to make equal access to legal services a reality, whether through extraordinary voluntary or mandatory pro bono projects or through reform of the legal system,<sup>30</sup> and has not even pursued an effective commitment to enhance access to its own ranks.<sup>31</sup> Nor has it articulated standards that define and measure improvements to the law or commitment to the rule of law.<sup>32</sup> But while the specifics of this public service duty have never been spelled out, there was always an understanding that such a duty existed, that is, that lawyers owed a professional duty to conceive of their role as more than serving as Holmesian bad men and women representing Holmesian bad men and women clients, all in service of instrumentally maximizing selfish interests at the expense of the public good.<sup>33</sup>

### *B. Autonomously Self-Interested and Relationally Self-Interested Professional Accounts*

This conventional account of the public service aspect of professionalism, however, has become increasingly detached from practice realities.

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29. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUND-TABLE 381, 384–87 (2001).

30. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2011). An aspirational pro bono standard is a typical example of an under-developed rhetorical standard without meaningful commitment to implantation. See generally DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969 (2004). While the profession has not articulated a detailed vision of commitment to the public good, prominent lawyers and legal academics have done so. See, e.g., Louis D. Brandeis, *The Opportunity in the Law*, 39 *AM. L. REV.* 555 (1905); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* (2000); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007); WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* (2000).

31. Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 *GEO. J. LEGAL ETHICS* 1079 (2011) (discussing in general the challenges that diverse candidates face in pursuing a legal career).

32. David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 *J. LEGAL EDUC.* 76, 76 (1999) (criticizing the profession and legal education for a general failure to study the legal profession).

33. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1, 2–6 (1988); Pearce, *supra* note 29, at 383.

The profession has been experiencing a paradigm shift,<sup>34</sup> in which the commitment to the autonomous self-interest of clients has taken center stage. In part, this development has been positive. The vague assumption that lawyers possessed superior practical wisdom skills compared with clients has given way to narrower claims of expertise and specialization; the too common practice of paternalism toward clients has become less prevalent as lawyers increasingly seek to ascertain actual client objectives and pursue them systematically; and nebulous, albeit gentlemanly, billing practices have been replaced with more efficient and accountable ones.<sup>35</sup> With these positive developments also came greater emphasis on the role of representation of clients to the exclusion of the roles of the officer of the legal system and of a public citizen.<sup>36</sup> More dramatically, lawyers have begun to deny the existence of the public sphere beyond the aggregate of client interests and of public duties separate from the duty to serve clients' private interests.<sup>37</sup>

Elsewhere, we have called these the *relational self-interest* and *autonomous self-interest* professional ideologies or accounts of professionalism.<sup>38</sup> Relationally self-interested professionalism understands clients as attempting to pursue and maximize their self-interest in relation to others, conducting themselves pursuant to the principles of mutual benefit and mutual respect. It understands lawyers' role, in turn, as facilitators of such relational goals, whose spirit of public service manifests itself in a duty to act as civics teachers educating and advising clients to act relationally and in a commitment to enhance access to legal services.<sup>39</sup>

Autonomous self-interest, in contrast, views clients as individualistic and atomistic entities whose goal is to pursue and maximize their self-interest aggressively without regard to others. In turn, it understands lawyers' role to help clients act as Holmesian bad men and denies the existence of any duties owed by clients or lawyers to the public interest. In this account, the public interest is nothing more than an aggregate of clients' private in-

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34. Pearce, *supra* note 19, at 1230–33 (exploring the notion of ideological paradigm shifts).

35. See Eli Wald, *Glass-Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2264–73 (2010) (discussing large law firms' shifting professional ideology from one based on paternalism to an approach grounded in competitive client-centered service); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 *ST. MARY'S L.J.* 909, 914–16 (2009) (exploring a lawyer's loyalty to client in terms of pursuing actual rather than imputed objectives).

36. Pearce & Wald, *supra* note 17, at 5.

37. *Id.* at 31–32.

38. *Id.* at 3.

39. Russell G. Pearce & Eli Wald, *Law Practice as a Morally Responsible Business: Reintegrating Values into Economics and Law 5* (July 2010) (unpublished manuscript), available at <http://law2.fordham.edu/calfiles/flscal24523.doc>; see also Green & Pearce, *supra* note 27 (explaining the lawyer's role as a civics teacher).

terests, and lawyers serve the public interest best by aggressively pursuing clients' autonomous self-interest.<sup>40</sup>

Autonomous self-interest has become the dominant professional paradigm, well-grounded in the culture of autonomous self-interest prevalent within and outside the legal profession. Relational self-interest, at one point in time a powerful counterforce to autonomous self-interest, has been relegated to marginal status.<sup>41</sup>

Our thesis in this article is that law schools have played a role in elevating autonomous self-interest to its current position of dominance and that they have a duty to help restore relational self-interest as a viable professional account.

### C. *Professional Identity and Legal Education*

The most recent Carnegie Report explains that “[l]aw schools play an important role in shaping their students’ values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyers and the criteria by which they define and evaluate professional success.”<sup>42</sup>

Becoming and acting as a professional entails certain commitments—to think, speak, and behave in certain ways pursuant to a code of conduct.<sup>43</sup> To become a lawyer, one must master a body of knowledge, acquire a proficiency in a certain set of skills, and develop certain ways of thinking, reasoning, and acting. A lawyer must represent clients competently and diligently, communicate with them effectively, charge reasonably, keep client information confidential, and maintain loyalty to clients. A lawyer must also respect the rule of law, strive to improve the law and increase access to it, and practice law in the public spirit. Beyond these responsibilities, the lawyer’s identity is further influenced by the perceptions and expectations of others (clients, colleagues, opposing counsel, the other side, third parties, family, and friends); her practice area; her place of employment; the market

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40. Pearce & Wald, *supra* note 17, at 17–18, 32.

41. *Id.* at 32–36. To avoid confusion, both autonomous self-interest and relational self-interest recognize not only the importance and relevance of self-interest but also its constitutive role in fostering autonomy and self-determination in law students and lawyers alike. Accordingly, our critique of autonomous self-interest is not an attack on but is rather consistent with recent scholarship that emphasizes emotional health, well-being, and attention to law students’ *autonomy support* as inherent aspects of forming professional identity. See, e.g., Lawrence S. Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L.J. 168 (2011).

42. CARNEGIE REPORT, *supra* note 2, at 139.

43. See, e.g., Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661 (2001).

conditions; and, of course, her personal circumstances as well as other facets of her identity.<sup>44</sup>

All of these commitments, perceptions, and values—both personal and professional—form and shape lawyers’ professional identity.<sup>45</sup> The formation of professional identity is a long-term, dynamic, life-long journey.<sup>46</sup> It involves many profound experiences and many complex decisions, both explicit and implicit. Law school plays a foundational role in this journey.<sup>47</sup> Indeed, it plays a constitutive role in introducing and forming professional identity.

Surprisingly, however, law schools’ curricula pay very little to no explicit attention to most aspects of the complex issues that arise during the formation and development of professional identity.<sup>48</sup> Law schools do address the acquisition of esoteric knowledge, ranging from learning to “think like a lawyer;” to mastering bodies of legal doctrine; assessing, justifying, and criticizing the law; and exercising professional judgment. They also teach particular practice skills, mostly outside of the mainstream curriculum and in the context of clinical education. And they offer a required class in legal ethics, albeit one that usually does not even cover the law governing lawyers beyond the ABA Model Rules of Professional Conduct, let alone other aspects of professionalism and professional identity.<sup>49</sup> Yet the curric-

44. David B. Wilkins, *Beyond “Bleached Out” Professionalism: Defining Professional Responsibility for Real Professionals*, in *ETHICS IN PRACTICE* 207 (Deborah H. Rhode ed., 2000).

45. The Carnegie Report does not draw an explicit distinction between professionalism and professional identity. Rather, it implicitly suggests that professional identity is a set of beliefs, convictions, and values that informs and shapes a professional’s conduct, hopefully, but not necessarily, consistent with norms of professionalism. See *CARNEGIE REPORT*, *supra* note 2, at 135. David Thomson interestingly proposes that “[p]rofessionalism relates to behaviors, such as timeliness, thoroughness, respect towards opposing counsel and judges,” whereas “[p]rofessional identity relates to one’s own decisions about those behaviors.” David Thomson, *Teaching Professional Identity with Skills & Values Texts*, LAW SCH. 2.0 (Jan. 21, 2012), <http://www.lawschool2.org/lis2/2012/01/teaching-professional-identity-with-skills-values-discovery.html>. We think of professionalism as a set of rules prescribing conduct and the ideology that informs and explains them, and of professional identity as a set of values and convictions that an individual professional holds. See, e.g., Melissa H. Weresh, *I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 345–46 (2009).

46. Hamilton, *supra* note 16, at 23 (citing “growing empirical evidence that professional formation is developmental over a lifespan”).

47. Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 119–20 (2001).

48. See Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 *HAMLIN L. REV.* 555, 557 (2007) (describing how legal education fails to “focus[ ] on the development of lawyers’ professional identity” and arguing that such a focus “would improve the administration of justice”); Rhode, *supra* note 18, at 28 (explaining that faculty reluctance to address professionalism “reflects skepticism about the value of discussing values in professional school”); see also Gordon, *supra* note 8 (examining the modern American law school curriculum).

49. Instead, the required professional responsibility course tends to focus on the American Bar Association Model Rules of Professional Conduct in preparation for the MPRE examination.

ulum mostly ignores issues such as professional values, commitments, beliefs, and ideologies; the organization and structure of legal workplaces; career development; practice in the public service and the role of lawyers as public citizens. Worse, to the extent that the curriculum implies a generic professional identity—“thinking like a lawyer” suggests that there is one right way of being and thinking like a lawyer—it offers an embellished, bleached-out account of professionalism.<sup>50</sup>

Of course, as many have argued before, significant teaching occurs through decisions law schools make regarding what they exclude from the curriculum.<sup>51</sup> The fact that no serious attempt is made by law schools to tackle and explore issues of professionalism and professional identity results in what Deborah Rhode has called a “curricular irresponsibility towards professional responsibility.”<sup>52</sup> It suggests to students that thinking about what it means to be a lawyer and what kind of a lawyer one wants to be is far less important than “thinking like a lawyer.”

Furthermore, as Roger Cramton, Lani Guinier and Susan Sturm have pointed out, significant implied teaching happens outside of the curriculum, in the shadow of the dominant culture of law schools.<sup>53</sup> Indeed, this implied teaching forms and enforces autonomously self-interested professional identity at the same time that it undermines and delegitimizes relational alternatives.<sup>54</sup>

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Borrowing from Richard Greenstein, one might argue that the required professional responsibility class tends to marginalize and simplify the complex universe of lawyers’ professional obligations reducing it to a set of rules of professional conduct. See Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 328 (2009).

Perhaps not surprisingly, a recent empirical study shows that law students report effectively learning legal ethics in law school, and, in particular, in the required professional responsibility class; but failing to acquire sufficient explicit knowledge and appreciation of professional identity and professionalism while in school. See Silver et al., *supra* note 13, at 399–402, 405.

50. See Levinson, *supra* note 43, at 1578–79 (defining “bleach[ed] out” professionalism as creating “purely fungible” lawyers in which “[s]uch apparent aspects of the self as one’s race, gender, religion, or ethnic background would become irrelevant to defining one’s capacities as a lawyer”). For a discussion of the importance of bleached-out professionalism in the prevailing ideology of legal practice, see Wilkins, *supra* note 44; David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1511–17 (1998).

51. Cramton, *Ordinary Religion*, *supra* note 15, at 253 (discussing the “hidden curriculum” of law schools); Sturm & Guinier, *supra* note 7, at 521–22 (discussing the law school culture as it relates to professional development); Pearce, *supra* note 11, at 734 (describing research that indicates law schools make students less altruistic and less willing to do a public interest job).

52. Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 40 (2000).

53. Cramton, *Ordinary Religion*, *supra* note 15, at 253; Sturm & Guinier, *supra* note 7, at 521–22.

54. See, e.g., ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 98–99 (2007) (studying teaching methodologies employed in legal education, documenting their impact on students’ professional values, commitments and habits of mind, and arguing that such methodologies promote instrumental, adversarial even amoral mindsets at the expense of contextual, emotional, and relational sensibilities).

II. THE FORMATION OF PROFESSIONAL IDENTITY IN LAW SCHOOL:  
THE CONSTRUCTION OF AUTONOMOUSLY SELF-INTERESTED ATTORNEYS

Law schools form law students as competitive and adversarial professionals who are taught to believe that it is legitimate, and indeed desirable, to pursue aggressively the interests of their clients, as well as their own interests, without regard to the interests of their colleagues, neighbors, and communities. Law schools teach law students to view their classmates as competitors and pursue their own autonomous self-interest as students. Autonomously self-interested law students grow into autonomously self-interested attorneys, but law schools do not stop there. Rather, they teach students to understand their clients as autonomously self-interested, and to pursue their clients' autonomous self-interest at the expense of their clients' relational self-interest in considering the interests of opposing parties, third parties, the public good, and the spirit of the law. Indeed, the law itself is taught as a morally-free zone, a body of abstract principles subject to manipulation, in which the public interest is nothing more than an aggregate of clients' private interests, and in which a lawyer's role is to pursue aggressively her client's autonomous self-interest.<sup>55</sup>

A. *Explicit Institutional Adherence to Autonomous Self-Interest*

In both its methodology and content, legal education views law through the lens of the autonomous self, teaching students to understand the law, clients, and themselves from the perspective of the Holmesian bad man.

1. *The Case Method*

When Christopher Columbus Langdell developed the case method approach and the curriculum that is still dominant today, he expressly sought to construct legal knowledge divorced from professional values and the relational experience of law practice.<sup>56</sup> This left little or no place for education in either professional values or skills training. Indeed, Langdell's scientific approach regarded factual understanding of the law to exclude values<sup>57</sup> and rejected the pedagogical potential of apprenticeships.<sup>58</sup> But Langdell and his colleagues could take for granted a pervasive cultural understanding that lawyers were a leadership class of wise counselors and

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55. Cynthia Fuchs Epstein, *Knowledge for What?*, 49 J. LEGAL EDUC. 41, 41 (1999) ("Law faculty need to pay more attention to their explicit and implicit messages to students and to the profession as a whole . . .").

56. See, e.g., WILLIAM LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 22–28 (1994); STEVENS, *supra* note 16, at 52–57.

57. Pearce, *supra* note 11, at 728–30; see also Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5–6 (2000) (discussing the narrow approach taken by the modern casebook method).

58. See STEVENS, *supra* note 16, at 52–57.

meaningful actors in the public sphere.<sup>59</sup> In this era in which lawyers often occupied a position of influence with regard to their clients and their community, acted as statesmen and imparted practical wisdom,<sup>60</sup> the preoccupation of the curriculum with establishing law as a science and law schools as respectable academic institutions did not necessarily undermine the relational aspects of professionalism.<sup>61</sup>

Nonetheless, over time, this pedagogical approach helped shape students' professional identity as autonomously self-interested. As lawyers began to understand their role differently and diminish their commitment to their role as officers of the legal system and as public citizens, legal education's failure to introduce and instill a relational approach to professional identity began to have significant impact on the formation of law students. Placing appellate decisions and the paradigm of adversarial combat at the center of teaching law helped constitute autonomously self-interested professionalism as the dominant ideology of the legal profession.<sup>62</sup>

Today, the case method orients students toward autonomous self-interest through its focus on appellate decisions and "hard cases." The case method posits a universe of autonomous actors engaged in zero-sum competitions<sup>63</sup> in an adversarial and combative legal world, inevitably producing only winners and losers.<sup>64</sup> Although the vast majority of disputes do not

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59. See, e.g., Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (Gerald Gawalt ed., 1984) (examining the status of lawyers as social elites and reformists); Pearce, *supra* note 29, at 384–87 (detailing the rise of lawyers to America's governing class).

60. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 109–12 (1993) (discussing the case-method approach in the era of the lawyer-statesman ideal).

61. See *CARNEGIE REPORT*, *supra* note 2, at 150. See generally Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 *LOY. U. CHI. L.J.* 449, 449–50 (1996) (arguing that law should be taught as a science according to the Langdell method).

62. Cf. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 *VAND. L. REV.* 609, 612–15 (2007) (criticizing traditional law school teaching techniques).

63. Pearce & Wald, *supra* note 17, at 8, 18. Indeed, to the extent that the case method teaches students to focus on distilled facts to the exclusion of their human and emotional context, it implicitly delegitimizes relational approaches to professional identity. See Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic—"Humanity Consciousness"—Perspective*, 31 *N.Y.U. REV. L. & SOC. CHANGE* 467, 475–76 (2007) (describing the feelings of alienation and identity dissonance experienced by nontraditional law students); Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 *SAN DIEGO L. REV.* 465, 467 (2010) (explaining that the case method "trivializes and even suppresses students' values").

64. Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 *J. LEGAL EDUC.* 75, 77–79 (2002) (summarizing the research showing that the law school experience is stressful, intensely competitive, time-consuming, and anxiety producing); see also Gordon, *supra* note 8, at 341 (describing the competitive atmosphere of the Harvard model). But see Paul D. Carrington, *The Pedagogy of the Old Case Method: A Tribute to "Bull" Warren*, 59 *J. LEGAL EDUC.* 457, 460–61 (2010) (documenting educational reforms meant to reduce student stress, if not time-commitment); Clinton W. Shinn, *Lessening Stress of the 1L Year: Implementing an Alternative to Traditional Grading*, 41 *U. TOL. L. REV.* 355, 368 (2010) (same).

result in litigation,<sup>65</sup> and the majority of litigated cases settle,<sup>65</sup> law schools do not focus an equivalent portion of teaching on resolving disputes through reconciliation and settlement. Moreover, only a small number of litigated cases result in appeals and of those only a very few reach the Supreme Court. Teaching law students that the miniscule subset of legal matters that result in appellate decisions represents lawyers' work suggests to students that law is inherently unsettled and controversial. The case method, as a pedagogical matter, further teaches that the lawyer's role is to attack, criticize, and manipulate the law.<sup>66</sup> As a matter of practice, of course, in most cases the law is fairly clear and its meaning undisputed.

## 2. Learning to "Think Like a Lawyer"

In many law schools, and to many law professors, the hallmark of legal education is teaching law students to "think like a lawyer."<sup>67</sup> The precise meaning of this exercise is often ill-defined, but it suggests a combination of two things, mastering analytic skills and exercising professional judgment. In the first year, students become familiar with legal materials. They learn to read case law by extracting the *ratio decidendi*—the holding or the reasoning of the case—from the *obiter dictum*, the nonbinding parts of the decision. They similarly learn to read and interpret statutes and secondary materials, as well as to draft litigation documents. They develop the ability to make, and respond to, legal arguments.<sup>68</sup> In the first year and upper class courses, their teachers impress upon them that even the legal doctrine they have come to master is often open-ended and ambiguous and, at least outside of the trial court level—that is, either before courts of appeal and before governmental agencies—is often open to indeterminate interpretation.<sup>69</sup> The goal of the case method is to arm students with various kinds

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65. Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27–28 (1983) (offering empirical support to the fact that the vast majority of civil suits settle); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994). Indeed, Prof. Clermont concludes that:

settlement is . . . much more important than actual litigation . . . [A]s settlement has blossomed, the civil trial has all but disappeared recently, without any clear single cause. The percentage of filed federal cases that see trial is now dropping toward 1.5%, and state trials too have dropped off.

KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 414–15 (2005). Similarly, a majority of criminal prosecutions end in plea-bargain. See U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 419, 423 (Ann L. Pastore & Kathleen Maguire eds., 1999).

66. Cramton, *Ordinary Religion*, *supra* note 15, at 253–56 (discussing contributing factors of skepticism in law school).

67. Sullivan & Podgor, *supra* note 47, at 117–118; see also Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 353–59 (1998) (examining the relationship between the case method and learning to think like a lawyer).

68. Cramton, *Ordinary Religion*, *supra* note 15, at 249.

69. *Id.* at 255.



and types of arguments they may employ on behalf of clients, with the goal of enabling them to learn the professional craft of lawyering.

Unfortunately, along the way, “thinking like a lawyer” is reduced to the hired-gun ideology of “mak[ing] the best argument on behalf of your client irrespective of the consequences to others.”<sup>70</sup> Law students learn to deploy their newly acquired professional talents to advocate on behalf of clients’ narrow—and ostensibly private—interests, often at the expense of the third parties, and the public interest.<sup>71</sup> As a result, law students develop the habit of using their skills to manipulate the letter of the law on behalf of clients to the exclusion of the spirit of the law and its meaning within context.<sup>72</sup> And they learn to advocate aggressively on behalf of clients to the exclusion of their duties as officers of the legal system and as public citizens.<sup>73</sup>

Moreover, such an approach to “thinking like a lawyer” obscures the richness of what it means to be a lawyer, suggesting a simplified, autonomously self-interested view of lawyering. In particular, the approach suggests that zealous representation of clients’ narrow interests is the only straightforward way of thinking about being a lawyer and excludes meaningful consideration of the rich and complex underlying values and commitments of the legal profession.

To make matters worse, many law professors avoid teaching these values and commitments out of genuine belief that value pluralism requires them to appear neutral before their students.<sup>74</sup> Among that group, a few esteem the spirit of the law but disdain an aspiration to the public good.<sup>75</sup> Even when law professors themselves hold jurisprudential or “evaluative” perspectives, whether grounded in economic efficiency, critical theory, critical race, feminist, or other approaches, they “do not teach about values. They commonly apply an ‘instrumentalist’ approach that assumes that certain policy goals are worthy of pursuit, and then focuses students entirely on whether the law ‘provides an appropriate means for the realization of [those] goals.’”<sup>76</sup> The result is a value vacuum, in which law students are given the powerful tools of lawyering without guidance and direction and then thrown into an increasingly competitive practice of law in which they

70. Pearce & Wald, *supra* note 17, at 4–5.

71. Rhode, *supra* note 18, at 35 (“Legal course work too often seems largely a matter of technical craft, divorced from the broader concern of social justice . . .”).

72. See Epstein, *supra* note 55, at 41 (explaining that professionalism is defined and practiced “as a craft without a moral dimension”).

73. See David Bromwich, *On Privacy*, DISSENT, Winter 1999, at 24 (Law schools’ narrow technical curricular approach trains lawyers to become “pieceworkers” rather than guardians of our liberties.).

74. Wendel, *supra* note 12, at 726–27.

75. W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473 (2006); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

76. Pearce, *supra* note 11, at 730 (quoting Benjamin C. Zipursky, *Legal Coherencism*, 50 *SMU L. REV.* 1679, 1692 (1997)).

encounter significant pressures to employ their skills exclusively on behalf of the autonomous self-interest of clients.<sup>77</sup> This, in turn, reinforces the message that autonomously self-interested professionalism is not only legitimate and inevitable but also desirable.

### 3. *The Curriculum*

The dominance of the autonomous approach extends beyond the case method and learning to “think like a lawyer” to the curriculum itself. The first year, for example, “signals what it means to think and act like a lawyer.”<sup>78</sup> Howard Lesnick has observed that “it is what is imprinted in that initial immersion [in the first semester of the first year], and not any broader message of the three years, that shapes students’ consciousness of what is important and not important to being a lawyer.”<sup>79</sup> The first year showcases private law and marginalizes public law.<sup>80</sup> With the exception of criminal law, the first year curriculum continues to emphasize private law subject matters (contracts, torts, property, and civil procedure); and while public law subject matters are no longer explicitly excluded from the curriculum, they are mostly relegated to electives that only some students will take.<sup>81</sup>

Although private law and public law are both best understood relationally, public law undeniably implicates considerations beyond the autonomous self while private law is more easily susceptible to analysis on the level of the autonomous self. Private law classes tend to focus on the individual client as a Holmesian bad man while marginalizing the role of lawyers as officers of the legal system and as public citizens. The dominance of private law courses in the first year of law school and the corresponding absence of required public law courses reinforces the message and sets the stage for autonomous self-interest to dominate the formation of professional identity of law students. The failure to include professional responsibility, as opposed to legal ethics,<sup>82</sup> and skills teaching, let alone courses on public citizenship and civic responsibility, bolsters the notion that both lawyers and clients are autonomously self-interested and that formalistic, non-relational knowledge suffices to master lawyering.

Consider, for example, the place and role of alternative dispute resolution (ADR) courses on the curriculum. ADR classes have grown in popular-

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77. Rhode, *supra* note 18, at 26–30.

78. Pearce, *supra* note 11, at 736.

79. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1159 (1990).

80. Gordon, *supra* note 8, at 340–41.

81. *Id.* at 350.

82. *See supra* note 49 and accompanying text.

ity and have become an established part of the curriculum.<sup>83</sup> At the same time, the place of ADR in the law school epitomizes the implicit teaching of law school. ADR is generally not included with civil procedure or contracts as a required first year course, but is relegated as an elective to the second or third year. It thus becomes to students and law professors an exception to mainstream law practice, professionalism and professional identity. ADR is implicitly portrayed as a secondary, lesser option.

#### 4. *Implicit Teaching in the Shadow of Autonomous Self-Interest*

Legal education occurs in the shadow of and reflects the legal profession's dominant culture of autonomous self-interest. Law schools do not explicitly teach that lawyers should serve as hired guns at the expense of the clients' relationships, the spirit of the law, the public good, and professionalism. They nonetheless implicitly and consistently promote autonomous self-interest by arming students with powerful tools of reasoning and argumentation and leaving them with little to guide them but the powerful culture of autonomous self-interest, which celebrates aggressive pursuit of narrow client interests as the lawyer's role.

Consider, for example, the concepts of fairness and justice. Law schools could seek to instill in their students commitments to fairness, as well as to procedural and substantive justice, even as they acknowledge possible disagreement about the meaning of these concepts in particular circumstances. Many colleges, for example, teach undergraduates a class called Justice, introducing and exploring the meaning of justice in particular circumstances.<sup>84</sup> Law schools, by contrast, tend to approach justice and fairness primarily from a narrow procedural perspective, and leave even these narrow concepts unexplored.<sup>85</sup> Commentators note stories of law students raising the issue of justice in class and faculty responding that law schools teach law, not justice.<sup>86</sup> This approach flows naturally from the culture of

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83. Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 29–33 (2010).

84. Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLINE L. REV. 513, 535–39 (2007); Floyd, *supra* note 48, at 555–57.

85. *Id.*

86. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 7 (1983); Pearce, *supra* note 11, at 730; see Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 37 (1992) (describing the reluctance of law schools to implement substantial courses in ethics); see also Russell G. Pearce, *Learning from the Unpleasant Truths of Interfaith Conversation: William Stringfellow's Lessons for the Jewish Lawyer*, 38 CATH. LAW. 255, 263 (1998) (citing A KEEPER OF THE WORD: SELECTED WRITINGS OF WILLIAM STRINGFELLOW 32 (Bill W. Kellermann ed., 1994)). As David Barnhizer has noted, "[m]ost faculty in American law schools would deny the appropriateness of any mission that requires them to either understand or advance justice." David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285, 286 (1992). Not surprisingly, similar stories are told regarding Holmes's approach to judging. In one famous account, Judge Learned Hand

autonomous self-interest. In the adversary system, autonomous individuals, with the assistance of their lawyers, pursue their self-interest as zealously as possible and the invisible hand of the judge and jury determine the correct result.<sup>87</sup> Substantive justice has no place in legal education grounded in this understanding.

Too often, justice is relegated to an elective class called jurisprudence, understood by many law professors and law students alike as a “high theory” class divorced from “practice realities.” As Karl Llewellyn has argued, however, jurisprudence could be understood as the most practical and practice-oriented course on the curriculum.<sup>88</sup> Its characterization as a theory class alienates many students and reinforces the message that concepts such as justice are foreign to the core of law practice and belong at the periphery of the curriculum. Worse, sometimes even the few students who elect to study jurisprudence encounter a course taught in a combative and adversarial fashion, chronicling the cultural war between “law and economics” and “critical legal studies,” and further obscuring the substantive examination and understanding of justice.

Interestingly, such an instrumental approach to the law, to clients, and to the role of lawyers is manifested throughout the law school curriculum, even in clinics and in programs committed to the advancement of the public interest. Clinic clients and public interest causes are often treated just like private clients. They are viewed through the lens of autonomous self-interest, and understood to be best represented through aggressive pursuit of their narrow self-interest.<sup>89</sup> In other words, while clinics treat their own

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said to Holmes “Do justice!” to which Holmes responded “That is not my job. My job is to play the game according to the rules.” LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY* 302, 306–07 (Irving Dilliard ed., 3d ed. 1960); see generally Michael Herz, “Do Justice!”: *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996) (exploring the history of the anecdote). Holmes also observed that “I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.” Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), in *THE MIND AND FAITH OF JUSTICE HOLMES* 435, 435 (Max Lerner ed., 1943).

87. As Richard Posner noted, the adversary system “resembles the market in its impersonality, its subordination of distributive considerations. The invisible hand of the market has its counterpart in the aloof disinterest of the judge.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 322 (1972); see also Pearce, *supra* note 30, at 970–71; Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 484, 488 (2004) (comparing analyses of ethics and the role of systematic neutralism in business and legal ethics); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternative Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 305, 312 (2000) (discussing the lawyer as hired gun, particularly to advance the interests of the wealthy); David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 974 (1995) (describing how the adversary system has been used to justify social irresponsibility); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 GEO. L.J. 667, 698–99 (2001) (reviewing ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999)).

88. K.N. LLEWELLYN, *THE BRAMBLE BUSH* 105–22 (10th ed. 1996).

89. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 127–28 (2010).

students and clients relationally, they often teach students to treat other constituencies and legal actors as autonomously self-interested.<sup>90</sup>

In a historical context, the autonomous tilt of law schools' clinics is understandable. Clinics have generally embraced client-centered advocacy to supplant paternalistic approaches in which lawyers imputed goals and objectives to clients and usurped clients' decision-making authority. They challenged the dominant understanding of clients, in Kate Kruse's elegant term, as cardboard clients and replaced that perspective with a commitment to placing clients at the center of the client-attorney relationship. Despite this positive goal, client-centered advocacy, especially when understood out of the context in which it emerged, risks fostering an autonomously self-interested sense of professional identity and professionalism by demonizing not only the other side but also polarizing the law and legal system, collapsing it into simplistic categories of good (public interest) and bad (for-profit "sellout") lawyers.

In sum, whether through express promotion of autonomously self-interested lawyering or the absence of attention to professionalism and professional identity, law schools send students both an express and implicit message that autonomously self-interested professional identity is the inevitable and desirable way of thinking about and becoming a lawyer. As Deborah Rhode eloquently states: "This minimalist approach to legal ethics marginalizes its significance. Educational priorities are apparent in subtexts as well as texts. What the core curriculum leaves unsaid sends a powerful message that no single required course can counteract."<sup>91</sup> The lack of commitment to study the profession and professional responsibility amount not only to "curricular irresponsibility to professional responsibility"<sup>92</sup> but also to participation in the formation of autonomously self-interested professional identity—to the exclusion of other professional visions.

### B. *Implicit Institutional Adherence to Autonomous Self-Interest: Law School's Culture*

In legal education, significant professional formation occurs outside of the curriculum through the institutional culture.<sup>93</sup> Several defining features of the culture of legal education foster autonomous self-interest. From the start, law schools place primary importance on grades, especially in the first year, the formative year of legal education.<sup>94</sup> Grades not only reflect a stu-

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90. Pearce & Wald, *supra* note 17, at 32–36 (exploring the expansion of autonomous self-interest within the profession); cf. Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U. L. REV. (forthcoming 2012).

91. Rhode, *supra* note 18, at 28.

92. *Id.* at 27.

93. Cramton, *Ordinary Religion*, *supra* note 15, at 252–53; Sturm & Guinier, *supra* note 7, at 519–20.

94. Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982) ("First-year grades control the distribution of goodies: honors, law review, job place-

dent's knowledge and mastery of class materials but serve, quite explicitly, as a sorting mechanism for future employers who rely on them in making hiring decisions, especially for the most coveted positions: the law review while in school and clerkships and employment with elite large law firms and selective public interest positions after graduation.<sup>95</sup>

Reliance on grades is, of course, not unique to law schools. After all, strong grades are necessary credentials for admission to law school. Nevertheless, the particular way law schools grade their students is especially powerful in cultivating autonomous self-interest. Most first-year courses and many second-year courses tend to be large classes where students remain anonymous to their professors and grades are assigned based on individual performance on an anonymous exam. While some professors experiment with collaborative learning tools,<sup>96</sup> the basic model of law school instruction is still the lecture (whether Socratic or otherwise), the assignment of lengthy readings, and the individualized final exam. Grades are assigned based on individual performance on an exam and are not, for example, a function of the students' interaction with each other (in group assignments or based on class participation) or with the professor.<sup>97</sup> The experience is both isolating and individualistic. It provides disincentives to group collaborations, or for engagements with colleagues and the professor outside of the classroom.<sup>98</sup> Moreover, most law schools employ a curve that directly pits students against each other. Under the curve, relative performance and competing with one's classmates is as important as objective performance and mastery of knowledge, which makes no actual difference to the curve.<sup>99</sup> With this approach to grading, class rankings exacerbate the competition between students. Finally, the autonomously self-interested

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ment, and, because of the importance placed on these matters by the law school culture, even the student's sense of personal worth."); see Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 773–75 (2004) (summarizing the literature on the importance of first-year grades).

95. Sturm & Guinier, *supra* note 7, at 528–29, 535–37.

96. See, e.g., Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 185, 196–97 (2003) (describing potential applications of collaboration in a legal writing class); Dorothy H. Evensen, *To Group or Not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343, 343 (2004) (relating students' views of collaborative activities such as study groups). See also *Course Portfolios*, EDUCATING TOMORROW'S LAWYERS, <http://educatingtomorrowlawyers.du.edu/course-portfolios/> (last visited Apr. 15, 2012) (showcasing innovative law school lesson plans).

97. Evensen, *supra* note 96, at 190.

98. See, e.g., LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 2* (1997).

99. *Id.*

spirit drives the students to work extremely hard,<sup>100</sup> seeking individual success at the expense of relational activities and pursuits.<sup>101</sup>

As Cynthia Epstein has observed:

[T]here is something of a winner-take-all attitude in the way many schools rank their students and give them access to highly visible opportunities such as law journals. Of course there must be evaluations, but the hypercompetitive atmosphere typical of many law schools is too clearly reproduced in the legal workplace. Were schools to have a model of community . . . they might have not reproduced the hierarchy we see in the profession.<sup>102</sup>

In theory, the third year of law school could offer a different experience. Before the Great Recession, many law students had already secured a job based on their first and second years' grades and summer position, reducing the competitive pressures and encouraging them to enroll in clinics, electives, and seminars.<sup>103</sup> But even when the job situation was more secure than it is today, the reality of the third year of law school was often quite disappointing. Law schools have been unsure about what to do with the third-year curriculum and ambivalent about calls to abandon it all together in favor of a two-year Juris Doctor. Moreover, in the aftermath of the Great Recession, for students without jobs or with conditional offers, third-year grades have become as competitive as those in the first and second years.<sup>104</sup>

Law schools also send a consistent message to students to view their professors and institution with an autonomously self-interested lens. The Case Dialogue Method<sup>105</sup> (sometimes described as the Socratic Method), in which a professor and a student engage in a grueling exchange, continues to

100. While note-sharing does occur at law schools (see, for example, Ayo Griffin, *Zero L*, LEGAL AFF., July–Aug. 2002, at 9, available at [http://www.legalaffairs.org/issues/July-August-2002/scene\\_griffin\\_julaug2002.msp](http://www.legalaffairs.org/issues/July-August-2002/scene_griffin_julaug2002.msp) (referencing HL Central, a note-sharing website utilized by students but not officially affiliated with Harvard Law School)), anecdotes abound regarding law students' refusal to share class notes with colleagues for fear of losing ground in the rat race for grades.

101. Pearce & Wald, *supra* note 17, at 37–39.

102. Epstein, *supra* note 55, at 47 (citing Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993) and Michael Burns, *The Law School as a Model for Community*, 10 NOVA L.J. 329 (1986)).

103. Eli Wald, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2053 (2010) (pointing out that the Great Recession often accelerated ongoing restructuring trends in the legal profession, including hiring practice realities at large firms).

104. AM. BAR ASS'N COMM'N ON MENTAL & PHYSICAL DISABILITY LAW, GOAL III REPORT 5, 9 (2010), available at <http://www.abanet.org/disability/docs/2010GoalIII.pdf> (“For law graduates of the class of 2008, NALP reported that the employment of new law graduates dropped to 89.9%, the first decline since 2003. Also, the legal community saw many of the larger law firms defer the hiring of new associates and overqualified attorneys apply for positions traditionally held by recent law school graduates.”); Gary A. Munneke & Deb Volberg Pagnotta, *Unexpected Career Transitions*, N.Y. ST. B.J., Feb. 2009, at 44 (“Beginning in 2008 and continuing into 2009, lawyer layoffs from firms of all sizes have occurred in record numbers.”).

105. CARNEGIE REPORT, *supra* note 2, at 2.

epitomize legal education.<sup>106</sup> And while fewer professors employ the traditional Case Dialogue Method, especially outside of the first-year curriculum, it symbolizes the essence of law school instruction. Whatever the Case Dialogue Method's virtues;<sup>107</sup> it relies on adversarial relationship between professor and student.<sup>108</sup> Moreover, the Case Dialogue Method fosters an understanding of law professors as hierarchical superiors rather than as mentors, and promotes arm's length instruction rather than professional community and collaboration.<sup>109</sup>

Most law professors further maintain hierarchy and inaccessibility by failing to take proactive mentorship roles.<sup>110</sup> A growing body of literature identifies mentorship as a fundamental aspect of the formation of professional identity,<sup>111</sup> but many law faculty do not establish mentoring relationships with students. With regard to careers, faculty generally do not work with administrators in Students Affairs and Career Offices.<sup>112</sup> Outside of clinics and legal writing classes, most faculty do not teach skills and mentor students in developing them.<sup>113</sup> To the extent that skills mentorship occurs, classroom faculty delegate them to clinical faculty or to legal writing instructors who are often untenured.<sup>114</sup>

Moreover, law schools cultivate a reputation as ivory tower enclaves detached from the concerns of law students and practicing lawyers. Consider how law schools have responded to increasing complaints about the cost of legal education and the perceived decline of the value of the JD degree.<sup>115</sup> When journalists criticized law schools for a lack of transparency—or actual misrepresentation—regarding data generally and especially regarding the employment statistics of their graduates,<sup>116</sup> some law school representatives accepted responsibility but many blamed the American Bar Association and the U.S. News & World Report for any problems. With regard to the cost of legal education, law school representatives defend the status quo and explain that funding scholarship requires high tuition. Few, in contrast, have sought either affirmatively to defend the educational mission of law schools or seriously to consider structural reforms.<sup>117</sup>

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106. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 769 n.37 (2003).

107. *Id.*

108. *Id.*

109. *Id.*; Carasik, *supra* note 1, at 788–90.

110. Sturm & Guinier, *supra* note 7, at 535.

111. See Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism through Mentoring*, 57 LEGAL EDUC. 102 (2007).

112. Carasik, *supra* note 1, at 788–90.

113. *Id.*

114. Weresh, *supra* note 45, at 346–57.

115. See *supra* note 5.

116. See *supra* note 16.

117. Sturm & Guinier, *supra* note 7, at 539–49.



Other cultural influences include attitudes toward public service. Law schools begin the process that renders “law with a compassionate element or a public service component . . . a specialization”<sup>118</sup> and preside over a process in which “many students . . . who bring ‘caring’ as a motivating element in their choice of law as a profession change that perspective during law school.”<sup>119</sup> Regrettably, “[l]egal education channels students away from public interest careers and discourages legal practice on behalf of the poor and the underprivileged[.]”<sup>120</sup>

Law schools similarly shape student attitudes toward gender roles. Cynthia Epstein notes that “[f]or many students law school reinforces the cultural view that it is fitting for women to take care of the underprivileged classes and address low-profit arenas of the law, and fitting for men to practice high-wire transactions in the large firms.”<sup>121</sup> Moreover, “[s]omething goes on in the subculture of law schools, and of course in the larger culture, to reinforce the idea that men must make the money.”<sup>122</sup> Law schools’ reproduction of the dominant ideology of autonomous self-interest, with its culture of adversarial zeal and of individualistic pursuit either produce conditions that create or tolerate gender inequality by suggesting to students that it is not their concern or responsibility to address substantive gender equality in legal education and in the legal profession.

Law schools also permit and reinforce racial inequality. Indeed, the culture of autonomous self-interest denies the existence of any meaningful identity whatsoever but for an autonomously self-interested identity. It therefore defines the dominant whiteness as normal and other racial backgrounds as “other.”<sup>123</sup> The case method, for example, under the guise of “objectivity of legal analysis,” normalizes whiteness and white privilege with the effect of encouraging white students to avoid the reality of “racial subordination” and marginalizing students of color (and white students) who challenge white privilege.<sup>124</sup> As Kimberle Crenshaw explains, “to as-

118. Epstein, *supra* note 55, at 42.

119. *Id.* at 43 (citing Robert Granfield’s study of Harvard Law School students that found that while 65% of first year students were interested in solving social problems and fostering social change, only 32% of third-year students shared these commitments).

120. *Id.*; MERTZ, *supra* note 54.

121. Epstein, *supra* note 55, at 46.

122. *Id.*

123. See, e.g., Rhonda V. Magee, *Competing Narratives, Competing Jurisprudences: Are Law Schools Racist? And the Case for an Integral Critical Approach to Thinking, Talking, Writing, and Teaching About Race*, 43 U.S.F. L. REV. 777, 780–81 (2009); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 639–44 (2008); Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 68 (1994); Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2082–83 (2005); CARRIE YANG COSTELLO, *THE PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS* (2005).

124. See, e.g., Rob Trousdale, *White Privilege and the Case-Dialogue Method*, 1 WM. MITCHELL L. RAZA J. 28, 39–41 (2010). See Margaret E. Montoya, *Silence and Silencing: Their Centrip-*

sume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts.”<sup>125</sup> In these ways, the culture of autonomous self-interest reinforces the racial inequalities that exist within society as a whole and forecloses the opportunity that legal education presents to systemically redress those inequalities among future lawyers and create a community of racial equality among racially diverse students.

As a result of all these factors, the cultural climate of law schools infuses students with professional sensibilities that legitimize and celebrate autonomous self-interest. That law schools become arenas that sustain, legitimize, and reproduce an autonomously self-interested status quo to the exclusion of relational alternatives is particularly lamentable. They have the capacity to—and should—lead the way in the legal profession’s quest for substantive equality, justice and fairness—values that tend to get forgotten, if not undermined, by autonomous self-interest culture and ideology.

### C. *Law Professors’ Modeling of Autonomous Self-Interest*

Law professors themselves very much embody and epitomize autonomous self-interest. Most law professors graduated at the top of their classes at elite law schools, thereby demonstrating their mastery of the dominant culture of autonomous self-interest.<sup>126</sup> Increasingly, moreover, many have limited practice experience, consisting of either prestigious clerkships or relatively short stints in elite positions. Others have no practice experience at all, instead coming to teach law school with a prestigious graduate degree.<sup>127</sup>

Many aspects of becoming and being a successful law professor implicate autonomous self-interest. Most entry-level professors have emerged at the top of hypercompetitive legal education institutions. Although relational connections are an important part of every workplace, they are generally not recognized in the narrative of career advancement for law professors. The narrative identifies success (promotion internally or upward lateral mobility

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*etal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 883–84 (2000).

125. Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 35–36 (1994).

126. Ezra Rosser, *On Becoming “Professor”: A Semi-Serious Look in the Mirror*, 36 FLA. ST. U. L. REV. 215, 221–23 (2009) (describing his experiences at Yale Law School as a newcomer to the dominant culture).

127. In a recent blog post on *The Legal Whiteboard*, Andy Morriss eloquently explains how the proliferation of PhD holders within law professors’ ranks tends to produce a “full-blown, massive infection” of “theory envy,” which in turn elevates theoretical scholarship to the top of the totem pole and belittles and delegitimizes other aspects of being a law professor. See Andrew Morriss, *Theory Envy*, THE LEGAL WHITEBOARD (Feb. 6, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/week6/index.html>.

to a higher ranked law school) with individual merit measured by publications in prestigious law reviews.<sup>128</sup> Moreover, law schools do not tend to give the same value to obviously relational responsibilities, such as teaching or service. As Carasik notes, “[b]ecause efforts unrelated to scholarly output often go unnoticed and unrewarded, both financially and in terms of recognition, it sends a tacit message,” not only to law professors but also to the student body, that “these contributions to the life of the law school are devalued.”<sup>129</sup>

Law professors who lack practice experience are handicapped in forming professional identity. They are in a position of “do as I say, not as I do,” yet it is important to note that this state of affairs is not inevitable. Law professors have chosen to abandon the full-time practice of law (if they ever practiced full time) in favor of full-time academia. One manifestation of this reality is the way many law professors display disdain for lawyers and law practice,<sup>130</sup> and often employ simplistic stereotypes of “good” and “bad” lawyers, suggesting that students who opt for private practice are “sellouts” and that students who commit to public practice are “heroes.”<sup>131</sup> Making this message more problematic is that, as we have seen, law schools’ curricula and culture offer a contrary perspective on public service.<sup>132</sup> Taken together, these negative perspectives alienate students from their future practice of law and from their professors.<sup>133</sup>

This simplistic perspective on practice also prevents law professors from being effective teachers of professional values. Elsewhere we develop the idea that, in their daily practice and in their public role, lawyers act and should act as civics teachers, introducing, educating, and advising clients to act relationally in the public spirit.<sup>134</sup> The case for viewing law professors as civics teachers is even stronger. After all, law professors are teachers, and who is better to teach future lawyers about becoming civics teachers than their own teachers? Unfortunately, law professors who show disdain

128. Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competence Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 136 (2010).

129. Carasik, *supra* note 1, at 808.

130. See, e.g., Amy M. Colton, *Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education*, 27 U. MICH. J.L. REFORM 963, 970 n.38 (1995) (“[T]he faculty’s job is to train students for the practice of law, yet many professors hold the practice in contempt.”).

131. Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 807–08 (1971) (asserting that the movement’s rhetoric, which distinguishes public interest lawyers (so called “good guys”) from other lawyers (“bad guys”) undermines the goal of expanding representation to unrepresented individuals); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law”*, 52 UCLA L. REV. 1223 (2005); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

132. See discussion *supra* Part II.A–B.

133. Sullivan & Podgor, *supra* note 47, at 118–19.

134. Pearce & Wald, *supra* note 17; Green & Pearce, *supra* note 27.

for actual practice and for the law itself undermine their own ability to serve as civics teachers.

Finally, law professors model individualism and often poor relational self-interest. Law professors teach alone and maintain formal hierarchies both vis-à-vis students and vis-à-vis non-tenure-track and tenured faculty. They show little commitment to relational interests and to the public interest, failing, for example, to pursue pro bono commitments vigorously.<sup>135</sup>

As long as the narrative of autonomous self-interest remains dominant among law faculty, they will continue to maintain the fiction of an autonomously self-interested perspective on scholarship (despite its many relational dimensions) and to devalue the obligations of teaching and service where the relational components are clear. They will similarly disdain the reality of law practice with its many relational aspects. Accordingly, they will be hostile—or unreceptive—to proposals to reform legal education in a relational dimension. This resistance is very powerful—the faculty are often the constituency charged with promoting reform and they have a vested interest in the status quo.<sup>136</sup> This is not to ignore the fact that many in legal education genuinely seek reform. But efforts that do not confront the ways the dominant paradigm shapes positions of power in the legal academy, and rewards the autonomously self-interested, are unlikely to succeed. Indeed, these factors help explain the very limited influence of the 1992 MacRate Report,<sup>137</sup> or the more recent 2007 Carnegie and CLEA Reports<sup>138</sup> on the formation of professional identity in law schools. Reforming legal education, therefore, requires more than curricular and institutional changes. It also necessitates a corresponding reimagining of the role of law professors and their duties to students and the legal profession.

### III. THE CASE FOR RELATIONAL SELF-INTEREST IN LAW SCHOOLS

#### A. *Why Law Schools Must Help Form Professional Identity*

Autonomous self-interest has become dominant in American culture generally.<sup>139</sup> Accordingly, by the time students arrive at law school, many are either pre-disposed toward, or have already adopted, an autonomously self-interested perspective. Furthermore, law schools have only a limited opportunity to form the professional identity of their students over three years of legal education. Indeed, formation of professional identity is a life-long proposition, and many other institutions (such as law firms and bar

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135. David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 70–73 (1999).

136. Carasik, *supra* note 1, at 816–17 (“Perhaps the biggest impediment to meaningful reform is the potentially insurmountable challenge of motivating academics to act against their own perceived self-interest in maintaining the status quo.”).

137. See MACCRATE REPORT, *supra* note 2.

138. See CARNEGIE REPORT, *supra* note 2; CLEA REPORT, *supra* note 2.

139. Pearce & Wald, *supra* note 17, at 3.

associations) as well as individuals (judges, practitioners, clients, and third parties) and market forces (competition, specialization, and the commoditization of legal services) will have a longer impact on the professional identity of lawyers than law schools.

Moreover, personal and professional values intersect and are interrelated, such that law students' preexisting personal beliefs, values, and commitments set the stage and inform their perspectives regarding professional ideas. As David Wilkins argues compellingly, the inherent relationship between personal and professional identities is desirable, as opposed to "bleached-out professionalism," which purports to supersede competing personal identities.<sup>140</sup>

Nevertheless, law schools do have a meaningful opportunity to help form their students' professional identity. As Deborah Rhode has explained, law schools "have a distinctive responsibility to examine both the public life that law helps constitute and the professional life of those who help constitute law."<sup>141</sup> While students arrive at law schools as adults holding some established personal values, they generally have little experience in applying those values to the work of a lawyer. Many are therefore likely to seek to understand professional values and identity. Indeed, they probably expect law schools to teach them how to be a lawyer whose conduct satisfies the highest professional standards. And, practically speaking, as we have shown in Part II, law schools have in fact been engaged in the formation of professional identity.

But should they be? One possible reply to our contention that law schools have been engaged in the formation of professional identity is that they should not be engaged in such a project. This seems to us like an implausible position to maintain for two reasons. First, law schools have no choice but to form the professional identity of students. As critical scholars have demonstrated compellingly, it is impossible to analyze and apply the law in a neutral fashion, divorced from political, social, and cultural contexts.<sup>142</sup> Similarly, it would be impossible for law schools to educate lawyers without, at least implicitly, taking a stand either about the meaning of law or the role of lawyers and their professional identity. Simply pretending

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140. See Wilkins, *supra* note 44.

141. Rhode, *supra* note 18, at 24.

142. Gordon, *supra* note 33, at 22–29 (“[P]olitical judgments are virtually inescapable . . . [and] even such tactful and delicate counseling involves discretion, and every exercise of that discretion entails making ‘political’ decisions. For even if the lawyer wanted to, the lawyer simply could not neutrally, objectively, inform the client what the probable legal implications would be . . . . The very language and tone in which lawyers speak of the law to their clients is a local political action that subtly reinforces or subverts [the law].”); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991) (noting that because it is hard to distinguish a judgment that a client’s choice is autonomous from a judgment that a choice is in the client’s best interests, a lawyer often cannot avoid influencing a client when advising about his best interests).

that law schools can successfully avoid taking a position on professional identity is both naïve and implausible.<sup>143</sup> Professional identity is nothing more than a set of values, commitments, and habits of mind associated with the practice of law. At minimum, law schools teach and produce lawyers, and in doing so they necessarily instill in their students a sense of professional identity.

Second, not only do law schools inevitably form the identity of their students, but they have an affirmative responsibility to prepare good lawyers. For better or worse, lawyers play an important role in American society. If not high priests of civic society, they certainly are meaningful actors in the lives of their clients and communities,<sup>144</sup> who play the role of civics teachers in our highly regulated society.<sup>145</sup> Law schools therefore have a duty to educate and inform future lawyers about their duties to clients, the legal system, and the public, and to educate them to professional values that will inform how they fulfill their role. Law schools further have a duty to foster “cultures of commitment” to the profession’s core values of integrity and public service.<sup>146</sup> Teaching professional identity requires a responsibility to examine concrete concerns, such as promoting equal access to justice in light of the inadequate access to justice for low- and moderate-income citizens,<sup>147</sup> equal opportunity given discrimination and under-representation in the legal profession, and compliance with professional values of loyalty and integrity.

Indeed, some have advocated a far grander role for law schools, one that goes beyond the formation of professional identity. Anthony Kronman, for example, calls on law schools to take a lead role in restoring our maligned public life, arguing that “[o]ur public life is in despair,”<sup>148</sup> repairing it “will require patient thought,”<sup>149</sup> and law professors ought to assume a primary responsibility for it, as they are “the legal profession’s intellectual specialists.”<sup>150</sup> Elsewhere we have called upon lawyers to act as civic teachers;<sup>151</sup> and while we believe that all members of the profession are under a

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143. Cramton, *Ordinary Religion*, *supra* note 15, at 262–63; *cf.* Sturm & Guinier, *supra* note 7.

144. Epstein, *supra* note 55, at 41 (“Given lawyers’ central roles in legislating, interpreting, and sometimes in circumventing values, legal educators ought to consider their own powerful roles in professional socialization.”).

145. Pearce & Wald, *supra* note 17; Green & Pearce, *supra* note 27.

146. Rhode, *supra* note 18, at 26.

147. *See, e.g.*, Alex Gourevitch & Aziz Rana, *America’s Failed Promise of Equal Opportunity*, SALON (Feb. 12, 2012, 9:00 a.m.), [http://www.salon.com/2012/02/12/americas\\_failed\\_promise\\_of\\_equal\\_opportunity/](http://www.salon.com/2012/02/12/americas_failed_promise_of_equal_opportunity/).

148. Anthony T. Kronman, *Our Beleaguered Public World*, 49 J. LEGAL EDUC. 50, 56 (1999).  
149. *Id.*

150. *Id.* at 52.

151. Pearce & Wald, *supra* note 17.

duty to proactively restore civility and public life, we agree that law professors have the ability and should lead this effort, if only by example.<sup>152</sup>

It should be noted that while Kronman emphasizes law professors' intellectual capacities and scholarly expertise, we caution that such an exclusive focus may be part of the problem: law schools and law professors, in their celebration of theoretical scholarship, have neglected to develop a commitment to professionalism in terms of teaching, and even more so, service to the student body and the greater community.<sup>153</sup> Implicitly, law schools have embraced a culture of autonomous self-interest that ends up, we submit, eroding efforts to promote professional ideals.

### B. *Why Law Schools Must Help Form Relationally Self-Interested Students*

If law schools accept their duty to engage in the formation of professional identity, why not accept autonomous self-interest as the only legitimate and desirable approach? Should law schools look to reject autonomous self-interest as a sole foundation for lawyers' professional identity?

Elsewhere we develop at great length the concepts of relational and autonomous self-interest and argue that relational self-interest is a more desirable approach to understanding the lawyer's role.<sup>154</sup> Briefly, we contend that people inherently are, and wish to be, relational; and that lawyers and their clients would find more satisfaction in their lives if they pursued relational self-interest.<sup>155</sup> Moreover, lawyers play a vital role in resolving private and public disputes, and in serving as civics teachers to clients and community, should act more relationally and should encourage their clients and their neighbors to do so as well.<sup>156</sup> Indeed, we assert that lawyers owe a particular duty to help restore a culture of relational self-interest precisely because they have played an active role in constructing and advancing the culture of autonomous self-interest and elevating it to its dominant position.<sup>157</sup>

Here we need not go that far. Even assuming that some may disagree that lawyers ought to advance relational self-interest both in how they understand their own role and in how they conceive of their clients, it seems clear that law schools ought to advance and promote relational self-interest

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152. "[T]hinking is our specialty, it is what we do for a living, and it does not seem implausible to hope that by practicing our special discipline we can make a contribution to the search for answers to these questions [of restoring the public life], a search in which many others are engaged." Kronman, *supra* note 148, at 56.

153. See *supra* notes 128–133 and accompanying text.

154. Pearce & Wald, *supra* note 17; Pearce & Wald, *supra* note 39.

155. Pearce & Wald, *supra* note 17, at 43–52.

156. *Id.*

157. *Id.*

as a viable alternative to autonomous self-interest. Law students, unlike mature experienced lawyers, are in the early formative years of their professional development. Rather than implicitly advancing only one approach to professional identity, law schools should explicitly and openly offer their students alternative visions of professional identity, so their students can choose on an informed basis the kind of lawyers they wish to become and the kind of professional values they wish to adopt.<sup>158</sup> Some future lawyers may choose autonomous self-interest as their guiding professional ideology, but the least law schools should do is offer compelling alternatives. Simply advocating autonomous self-interest, and impliedly so, without doing justice to viable alternatives, undermines freedom of inquiry into subjects of exceptional relevance to both students and teachers.

### C. *How Law Schools Can Form Relationally Self-Interested Students*

As described above in Parts I and II, autonomous self-interest is the dominant culture that informs curriculum design, teaching styles, the values of law professors, the organization of law faculties, and, in turn, treatment of law students. It is also, for the most part, an implied approach. As such, it is going to be hard and time consuming to modify. There are no quick fixes or magic solutions law schools can implement, no closed list of practices that ought to be abandoned, and no mandatory prescription for reforms. Cultural change is difficult to achieve. Below we explore ideas across a range of spheres that can help foster relational approaches to professional identity, keeping in mind the ideological hurdles and incentive schemes that sustain the status quo.

While advancing relational self-interest in legal education, at least alongside and in addition to autonomous self-interest, would seem unobjectionable, we anticipate significant opposition to it in practice. As we explain above, the dominant culture among law professors is autonomous self-interested.<sup>159</sup> For them to effectively advance and model relational self-interest, law professors will have to change themselves and become more relationally self-interested with regard to their students, colleagues, law schools, and communities. Because the required change entails not only rethinking how they teach, serve, and practice being a law professor, but also who they are as law professors, law professors are likely to resist it. Current hiring and promotion practices compound the challenge, as they tend to reward and promote the very individuals who tend to comport with autonomous self-interest.

Moreover, relational approaches, by definition, require a significant investment in relationships—with students, colleagues, administrators, and

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158. See, e.g., RUSSELL G. PEARCE, DANIEL J. CAPRA & BRUCE A. GREEN, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 767–901 (2011).

159. See *supra* Part II.C.



other members of the legal community. Law professors are unlikely to embrace a vision of law practice and of their role as law professors that entails such a significant commitment, if only because many prize their autonomy and flexibility above all.<sup>160</sup> Embracing a relational understanding of their role will require them to spend many more hours in the office and to sacrifice valuable scholarly time and energy, risking reduced scholarly productivity.<sup>161</sup>

Nonetheless, because we believe that relational self-interest is a fundamental element of law schools' formation of professional identity, we offer a provisional program for infusing legal education with relational self-interest. In doing so, we seek to open a conversation regarding relational approaches to legal education that draws upon many of the existing proposals for reform.

### 1. *Explaining Professional Values*

Legal education must explain professional values in terms of relational self-interest. Professional values are by definition relational. They implicate relationships with clients, colleagues, and community. To students steeped in a culture of autonomous self-interest, the current approach of appealing to abstract commitments, such as honesty, loyalty, civility, and pro bono, have some, but minimal persuasive effect. The typical strategy for justifying lawyers' professional commitments is to place them in the context of the dichotomy between self-interested business people and altruistic professionals. But students who embrace autonomous self-interest will view lawyers as being just as self-interested as business people and will hear these appeals as hypocritical, cynical, or foolish.<sup>162</sup> In contrast, relational self-interest provides a language for bridging professional values and students' belief that lawyers are self-interested. Because we are all connected, self-interest understood relationally creates a culture of trust, civility, and equal justice.<sup>163</sup> In this way, relational self-interest allows students to move beyond understanding themselves and their clients as Holmesian bad men and women.<sup>164</sup> Relational self-interest also links their being a lawyer with the rest of their lives. It accordingly allows students to draw on their personal values as a resource in their work as law students and lawyers and allows them similarly to understand their clients as full human beings.

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160. *Id.*

161. Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1611 (2011); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 419 (1998).

162. Pearce, *supra* note 19, at 1265.

163. *See, e.g.*, Pearce & Wald, *supra* note 17; Robert K. Vischer, *Trust and the Global Law Firm*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1095 (2011).

164. *See, e.g.*, Eli Wald & Russell G. Pearce, *Beyond Cardboard Lawyers in Legal Ethics*, 15 LEGAL ETHICS 125 (2012); Kruse, *supra* note 89.

## 2. Curricular Reform

The curriculum should reflect a commitment to relationally self-interested professional identity—or at least to formation of professional identity in a way that allows for a variety of perspectives, including relational self-interest. Currently, law schools' curricula do very little expressly to foster any sense of professional identity; or, more accurately, the lack of serious attention in the curriculum sends a message about its minor significance and enhances the background form of autonomous self-interest. By and large, what most law schools do is feature inspirational talks at orientation and graduation, and teach the required class in legal ethics, which focuses heavily on the law governing lawyers, not the formation of professional identity. Law schools could instead make the promotion of professional identity an institutional priority in the required professional responsibility course, as well as throughout the curriculum and the law school culture.

### a. Rethinking “Thinking Like a Lawyer”

Curricular change must begin with the concept of “thinking like a lawyer.” This is where many, but certainly not all, reform efforts stumble. The Carnegie Report, for example, for the most part embraces the existing first-year approach, and its particular conception of “thinking like a lawyer.”<sup>165</sup> As explained above,<sup>166</sup> the Case Dialogue Method, as generally practiced, teaches an understanding of thinking like a lawyer that encourages students to see themselves and their clients as Holmesian bad men and women. Despite the pervasiveness of this approach, the rigorous teaching of analysis and doctrine does not require indoctrination into autonomous self-interest.<sup>167</sup>

Instead, the effort to teach students fluency in the language of the law could readily rely on materials and commitments that reflect the reality of law practice. For example, rather than focus exclusively on litigated, appellate cases, the materials themselves could offer the variety of situations that lawyers encounter, including counseling, transactions, and cooperative dispute resolutions. These materials would further encourage a dialogue between student and professor that is not based in adversarialism, but rather a panopoly of approaches, including making experiential learning an essential component of every course. They would also lend themselves to cooperative exercises, both inside and outside the classroom, where the students learn to work collaboratively and support each other in their efforts to think like a lawyer.<sup>168</sup>

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165. CARNEGIE REPORT, *supra* note 2, (acknowledging that thinking like a lawyer undermines moral reflection but suggesting ways to do both). *See also* MACCRATE REPORT, *supra* note 2. *But see* GUINIER ET AL., *supra* note 4, MERTZ, *supra* note 54.

166. *See supra* Part II.A.1.

167. *See, e.g.*, GUINIER ET AL., *supra* note 4; MERTZ, *supra* note 54.

168. *See supra* note 10.

Expanding the notion of thinking like a lawyer also provides an opportunity to teach students regarding how their work as lawyers is inextricably intertwined with the quality of justice in our society. As noted above, the dominant approach of exclusively focusing on autonomous self-interest leads some faculty to tell students who ask about justice that the subject matter of the class is law, not justice.<sup>169</sup> A broader approach to how lawyers truly think and practice recognizes that the law is a fundamental building block of our society.<sup>170</sup> How lawyers think has implications for society's commitments to justice, fairness and equality, and its relational aspects.<sup>171</sup> Teaching how to think about justice would not be simple, and would require students to learn theoretical approaches to justice, as well as their practical application, but it is the only way to fulfill lawyers' obligations as "public citizens" who will inevitably influence the justness of specific outcomes, as well as of public policy.<sup>172</sup>

Last, integrating the lawyer's role as a public citizen would suggest introducing a greater immersion in public law topics into the first year curriculum. These topics easily lend themselves to consideration of lawyers' inevitable connection to the public good, even though such considerations are present in all aspects of lawyers' everyday work, including the representation of private interests. We include our suggestion for a revised curriculum in the Appendix. Of course, our point is not to debate the specifics of a new curriculum, but rather to suggest that the traditional curriculum "runs out" in part because it neglects public law, a commitment to practicing law in the public spirit, and professionalism. Our proposal would make "thinking like a lawyer" a central inquiry of all three years of law school. The second- and third-year curriculum, in addition to skills instruction, should include consistent explicit treatment of the meaning of professionalism, professional values, habits of mind, and commitments.

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169. See *supra* note 86 and accompanying text.

170. See *supra* notes 154–157 and accompanying text.

171. See *id.*; Pearce & Wald, *supra* note 17; Pearce & Wald, *supra* note 39.

172. See, e.g., Davis, *supra* note 84; Floyd, *supra* note 48. We note that contrary to our position, Kronman rejects the concept of commitment to substantive justice as an inherent aspect of the meaning of professionalism. Kronman, *supra* note 149, at 53. Kronman believes that the erosion of the private/public divide is lamentable and unnecessary and asserts that law, lawyers, and law schools ought to help restore the private and public spheres as at least semi-separate zones by focusing on pursuing formal and procedural justice. *Id.* at 52–53. We believe that the private/public distinction is false and that what is designated as "private" is often an attempt, or has the practical consequence, even when it is a decision by the state, to endorse the status quo. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 845–46 (1985) (explaining there is no natural sphere of private life; rather, the state makes choices regarding which spheres in which it will become involved, thus such "private" is a collective decision). Importantly, for purposes of engaging in a meaningful debate about the culture, content, and future of legal education it does not matter who has the better argument with regard to the private/public divide. Rather, the point is that law schools should engage their students in explicit and open discourse about the competing meaning of justice and their duties to it as professionals, instead of implicitly pushing only the agenda of autonomously self-interested professionalism.

*b. Making Formation of Professional Identity a Priority*

Explicit consideration of the formation of professional identity must become the focus of greater curricular attention both in classes devoted specifically to the topic, as well as in classes more generally insofar as without this express commitment they will teach professional identity implicitly. A minimum commitment is to make professional responsibility a first semester, first-year class so that students understand that it forms an essential component of thinking like—and being—a lawyer.<sup>173</sup> The professional responsibility course would of course include the rules and law of lawyering, but even more important would introduce students to the values and commitments they would undertake as professionals. In the process, the proposed curriculum would include various approaches to and understandings of professionalism, rejecting a blind adherence to autonomous self-interest and exposing students to a rich array of perspectives allowing them to make, more explicitly and on an informed basis, choices about the kind of lawyers they wish to be. If law schools took professional formation seriously, the first year, first-semester course would only serve as the beginning of a professionalism track that would allow students to deepen their understanding of their professional identity and to integrate it into the other coursework and experiences they encounter at law school. In the Appendix, we suggest one possible track that includes courses in Legal Ethics, The Professions, Legal Profession, Pro Bono, and Justice. At the same time, moreover, the formation of professional identity must become pervasive throughout the curriculum to underscore the connection between professional values and all components of lawyers' work.<sup>174</sup>

*c. Expanded Experiential Learning*

Like many other commentators,<sup>175</sup> we urge both special courses and pervasive teaching of experiential learning so that students understand the relational dimension of what they are learning at law school. We caution, though, that such teaching not devolve into viewing lawyers and clients through the lens of autonomous self-interest that understand them as cardboard characters.<sup>176</sup> Mindful of this risk, experiential teaching should also

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173. See, e.g., Pearce, *supra* note 11, at 735–36.

174. See, e.g., Rhode, *supra* note 18, at 30 (“Law schools can support curricular integration of professional responsibility through course development stipends, research assistance, release time, and faculty workshops. Legal ethics topics can be included in orientation programs, writing assignments, skills exercises, moot court competitions, and trial advocacy projects. Coverage can be monitored by reports to the dean and questions on student evaluations.”).

175. See, e.g., CARNEGIE REPORT, *supra* note 2, at 87–125; CLEA REPORT, *supra* note 2.

176. See, e.g., Pearce & Wald, *supra* note 17; *supra* Part II.A.4. One of clinical education's significant contributions to legal education has been its emphasis on client-centered advocacy, meaning paying attention to clients and their actual needs, guarding against lawyers' tendencies to treat their clients as cardboard persons and impute to them generic objectives, and making actual client interests and goals the centerpiece of the attorney-client relationship. Kruse, *supra* note 89,

include either an emphasis on, or an openness toward, relational perspectives that considers the interests of both clients and lawyers as full human beings grounded in webs of relationships.<sup>177</sup>

*d. Mentorship as a Key Component of Legal Education*

As Weresh explains, professional identity is formed and forged in the context of memberships in relevant professional communities.<sup>178</sup> Accordingly, mentorships are relationships that are central to developing professional identity. In particular, law schools should provide mentoring through faculty and through practicing lawyers.

Law professors should mentor students in multiple ways. Law professors should, as some already do, informally mentor students by taking them to lunch or coffee in small groups on a regular basis, creating an arena in which the professor and the students could engage in dialogue regarding professional identity.<sup>179</sup> Law professors could more formally mentor individual students and serve as advisors for student associations.

Equally important, though, is mentoring by practitioners. Unlike faculty, they are members of the professional community, which the students will likely join upon graduation. Practitioner mentorships “provide students with an experiential window through which to view the professional world and exposure to the diverse spectrum of work that lawyers and judges do” and “create opportunities for students to engage in conversations with mentors, full- and part-time faculty, and peers about professionalism, the practice of law, and what they are observing and learning through their mentor experience.”<sup>180</sup> A model mentoring program is that of St. Thomas Law School, which requires each student to develop a “Personal and Professional Development Plan,” including creating “a personal ethic mission,” “identify[ing] a minimum of two lawyer or judicial experiences he or she would like to do or see during the year with the mentor[,]” and “outlin[ing] two or more agreed upon ‘topics’ . . . to discuss . . . during the year.”<sup>181</sup>

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at 127. Defined in this way, client-centered advocacy, in contrast to lawyer-centric paternalistic representation, continues to be an inherently important emphasis of legal education. *Id.* But teaching client-centered advocacy, both in clinics and in doctrinal settings, comes with a dangerous price tag, the possibility that professors will teach and students will understand client-centered advocacy to mean elevating autonomous self-interested client objectives to the core of the attorney-client relationship to the exclusion of considering their impact on opposing parties, third parties, society, and the public interest. Pearce & Wald, *supra* note 17; Pearce & Wald, *supra* note 39, at 5.

177. See Kruse, *supra* note 89, at 127–28; Cantrell, *supra* note 90.

178. Weresh, *supra* note 45, at 346–57. See also Hamilton & Brabbit, *supra* note 111.

179. Such topics include why a student decided to go to law school, how she finds the experience to date, and what are her plans and interests for the future as a lawyer. The professor could also share with the students information about her experiences and choices as a former law student, practitioner, and law professor.

180. Hamilton & Brabbit, *supra* note 111, at 123.

181. *Id.* at 122–23.

*e. Grading for Competence, Not Competition*

Curved grading has no correlation with competence. It serves only to promote competition and a culture of autonomous self-interest.<sup>182</sup> A curved grade tells both the student and potential employers very little about the student's ability—it only describes how the student's ability compares to that of her peers. Even then, if students in a particular class have raw scores that are relatively close to each other, curved grades will actually distort the difference in ability between the students. Competence grades, on the other hand, present faculty with a challenge. They will have to identify benchmarks for achievement and then grade students based on whether they meet those benchmarks. As with teaching in other fields, the ultimate goal should be for each student to obtain mastery of the doctrine and skills taught.

*3. Modeling Community Leadership*

Law schools and their faculty should model community leadership. Law schools can take steps to become hubs of professional relationships. Law schools should foster and demonstrate to their students commitment to the community (local, regional, and national) by requiring or encouraging its faculty to perform pro bono services broadly construed,<sup>183</sup> regularly offering continuing legal education sessions hosted by the law school, systematically inviting alumni to visit the school and meet the students, and by proactively getting involved in issues that matter to the community.<sup>184</sup>

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182. See *supra* notes 99–101 and accompanying text.

183. Consider David Luban's compelling argument in favor of an achievable aspiration of faculty pro bono. Luban's thesis proceeds in two parts: first, Luban establishes that lawyers have a pro bono obligation based on their role as indispensable trustees administering the actual distribution of and access to the law. Luban, *supra* note 135, at 61–66; see also Rhode, *supra* note 18, at 30–36 (“[I]f law schools’ primary goal is to create a culture of commitment to public service, then exempting faculty role models is counterproductive.”). Second, Luban argues that while many law professors see themselves as scholars, not lawyers, their relevant peer group is the practicing bar, not university colleagues. Specifically, because law professors reap significant rewards from the private practice of law and are part and parcel of the same “law economy,” they bear the same pro bono responsibilities as lawyers. Luban, *supra* note 135, at 67–68.

184. A commitment to re-envision and reposition law schools as an important locus of professional activity, drawing practitioners and serving as an arena of law reform is, to be clear, independent of any particular political or jurisprudential commitments of individual faculty members. Historically, law schools outreaching to the community, in the form of establishing clinics and offering legal assistance to under-privileged constituencies, has been associated with a liberal or left-leaning political agenda. From a pedagogical perspective this has been regrettable: the association helped cement a simplified and misleading dichotomy between the so-called “good”/public interest oriented and “sellout”/private client inclined students; and may have discouraged some conservative students from applying and participating in clinics, lending some prima facie credibility to dichotomy. While such simplistic dichotomies are also common in law practice, Southworth, *supra* note 131; Cummings & Rhode, *supra* note 131, law schools should stay clear in both substance and perception of simplistic affiliations, especially those that tend to be correlated with the very private/public divide which relational approaches attempt to challenge.

#### 4. Faculty Leadership

Fundamentally, we conceive of the law professor's role as a relational one, vis-à-vis students, colleagues, the law school community, and the greater community.<sup>185</sup> With regard to students in particular, Brent Evan Newton offers the helpful analogy of law faculty as fiduciaries of the students.<sup>186</sup> While we recognize the inherently important contribution of scholarship,<sup>187</sup> we also expect law professors to invest meaningfully in their teaching and in public service, and as discussed above, their mentoring. Teaching should include collaborating with colleagues (co-teaching), encouraging collaboration and problem solving in classes, teaching more and smaller classes, and reflecting an institutional and professional expectation of incorporating experimental teaching. Service should include significantly increased commitment to pursuing professional relationships with students and alumni as mentors, acting as continuing legal education instructors and Pro Bono consultants, as well as reaching out to the greater community, showcasing a commitment to becoming civics and professionalism teachers to both law students and the practicing bar and active agents of professional socialization as members of the law school community.<sup>188</sup>

But, as noted above, the incentives for faculty favor autonomous self-interest, and do not offer equal reward for relational self-interest. To promote relational self-interest, the incentive structure needs to change to accord value to teaching, service, and mentoring that is equivalent to that currently accorded to scholarship.<sup>189</sup> This equivalence in acknowledgement and rewards should extend to salary and public recognition, as well as hiring and promotion.<sup>190</sup>

#### 5. Plausibility

In this article, we outline several reform proposals, some of which, such as overhauling the curriculum and re-envisioning the role of law professors, are likely to be perceived as fairly radical. While not alone in

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185. See Hamilton & Brabbit, *supra* note 111, at 122–28 (describing the St. Thomas mentoring program that connects law students to alumni and judges).

186. Newton, *supra* note 1.

187. See Brad Wendel, *Law Schools Have a Research Mission Too*, LEGAL ETHICS F. (Feb. 7, 2012), <http://www.legalethicsforum.com/blog/2012/02/law-schools-have-a-research-mission-too.html> (offering a contextual and powerful defense of the inherent place and role of scholarship within law schools).

188. See Weresh, *supra* note 45, at 353–56.

189. This may be easier said than done: as Lauren Carasik notes, a revised incentive scheme that rewards teachers and law professors committed to serving their students may be a tough sell to law schools competing for a U.S. News ranking given the emphasis in the ranking system on perceived scholarly productivity. Carasik, *supra* note 1, at 808 n.379.

190. See, e.g., Newton, *supra* note 1.

making such sweeping suggestions,<sup>191</sup> we offer partial responses to those who may be skeptical.

First, notwithstanding our interest in the details of future reforms, we call attention to the big picture of legal education. Our main goal is to challenge its dominant, although largely implicit, culture. We argue that law schools have been actively engaged in the formation of students' professional identity and that they have been instilling a very particular, limited, and undesirable professional identity in their students—autonomous self-interest. We believe that law schools must be transparent about the project of formation of professional identity in which they are engaged, and that they must inform and educate students about alternatives to the dominant professional paradigm. Specifically, law schools must introduce and explore relationally self-interested approaches to professionalism. As should be evident, we view our specific proposals for integrating relational self-interest as an invitation to dialogue rather than a finished agenda.<sup>192</sup>

Second, relational arguments for reform of legal education offer a more persuasive rationale than that employed by the MacCrate,<sup>193</sup> Carnegie<sup>194</sup> and CLEA<sup>195</sup> reports. Even though they seek changes that would shift legal education in a more relational direction, including a greater emphasis on skills training and formation of professional identity, they do not confront the culture of autonomous self-interest at the core of contemporary legal education, and they do not explain why professional values and training require a commitment to relational self-interest.<sup>196</sup> Their failure to identify and challenge autonomous self-interest culture has undermined their capacity to generate meaningful change to legal education.

Indeed, situating the Carnegie and CLEA reports in the context of relational approaches may provide them with additional compelling grounds and may assist them in successfully reforming legal education. Arguments based solely in the value of experience or on the importance of professional commitments will find minimal traction with faculty and students who see the world through the lens of autonomous self-interest. Relational self-interest, in contrast, offers a vocabulary of self-interest that is a conversation starter—as opposed to the rhetoric of professionalism that assumes that lawyers are altruistic, which tends to serve as a conversation stopper.

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191. See Rhode, *supra* note 18, at 36–37 (calling for diversity in educational and licensing structures).

192. For an alternative detailed reform proposal of legal education, see Newton, *supra* note 1, at 26–45 (advocating for reform of law schools' curriculum); *id.* at 45–63 (calling for a re-conceptualization of law professors' role).

193. MACCRATE REPORT, *supra* note 2.

194. CARNEGIE REPORT, *supra* note 2.

195. CLEA REPORT, *supra* note 2.

196. See, e.g., Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2004).



Moreover, the focus of legal education—the practice of law—is itself largely a relational exercise.<sup>197</sup> Because students and faculty understand—at least to some significant extent—that their lives have significant relational components, they will understand that lawyers’ work does as well. They are therefore more likely to be open to arguments made from relational perspectives, rather than those made from an abstract commitment to either experiential teaching or professional values. In addition, given that law students, faculty, and staff do experience life relationally, they will find relational approaches more fulfilling if they are adopted in the long run. Both the fulfillment that derives from relational approaches and the necessity of incorporating a relational perspective into excellent law teaching, weigh strongly in favor of a program of education grounded in relational self-interest.

Last, one should not underestimate the capacity of law schools to implement changes and pursue commitments that are contrary to the dominant culture of autonomous self-interest. While the task is going to be challenging, law schools should lead the way in reenergizing and reinventing relational approaches in the practice of law.<sup>198</sup> What better legal institutions than law schools to stand behind desirable good ideas and pursue them? Indeed, law schools have proven the ability to do so before.

Law schools’ commitment to affirmative action and diversity in the name of enhancing access to the legal profession is a prime example of their openness and commitment to relational agendas.<sup>199</sup> To be clear, pursuing diversity in their admission policies was and continues to be in the best interest of law schools and their students. But that is exactly the point about relational self-interest. It does not deny the self-interest aspect of individuals and entities. Pursuing diversity is in the best and self-interest of law schools. Affirmative action in admission policies, importantly, is also in the best and self-interest of other constituencies: the legal profession, minorities previously excluded from membership in the profession, and American society at large.<sup>200</sup> And law schools have demonstrated a commitment to their admission policies, to the pursuit of diversity, and to the advancement of relational goals in the face of significant challenges.<sup>201</sup> There is hope, therefore, that other relational commitments may take hold.

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197. See, e.g., Floyd, *supra* note 48.

198. Some commentators are calling for this very kind of reform. For example, Judith Maute has recently argued that “[w]e have duties of stewardship, to spend wisely and produce well-trained, competent lawyers committed to return value to the community.” Judith Maute, *Law School Responsibilities, Higher Yet for Public Schools*, LEGAL ETHICS F. (Feb. 7, 2012), <http://www.legalethicsforum.com/blog/2012/02/law-school-responsibilities-higher-yet-for-public-schools.html>.

199. See Rhode, *supra* note 18, at 40.

200. Wald, *supra* note 31, at 1080–81.

201. See Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861 (2011) (discussing the racial, socio-

## CONCLUSION

“There is so much wrong with legal education today,” writes Morrison Torrey, “that it is hard to know where to begin.”<sup>202</sup> We believe that proponents of reform must start by recognizing the influence and dominance of the culture of autonomous self-interest in legal education and the role it plays in informing and shaping what law schools do. Next, the hegemony of autonomous self-interest must be challenged and relational approaches have to be advanced and promoted to allow law students, lawyers, and law professors room to develop and practice richer conceptions of professionalism and professional identity. People tend to be cooperative and relational, naturally and intuitively understanding their own self-interest as related to and depending on the self-interest of others.<sup>203</sup> Lawyers employing relational approaches in representing clients and in acting as public citizens and as civic teachers can more effectively serve both private and public interests.<sup>204</sup> Law schools and law professors, in particular, have a responsibility to advance relational self-interest as a meaningful alternative to autonomous self-interest, if only to allow their students to more actively choose and participate on an informed basis in the development of their own conceptions of professional identity.

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economic, and ethnic diversity of law schools, and how institutional policy has affected admissions for minority students).

202. Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN'S L.J. 93, 93 (2004); see also Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 481–83 (2009).

203. See Pearce & Wald, *supra* note 17, at 17–18.

204. See *id.*

APPENDIX

A relational first-year curriculum could include the following:

<b>Fall</b>	<b>Spring</b>
Contracts/Torts	Contracts/Torts
Criminal/Property Law	Criminal/Property Law
Professional Responsibility	Administrative/Constitutional Law
Legislative Interpretation <sup>205</sup>	The Professions <sup>206</sup>
Legal Research and Writing	Skills Training

The second year curriculum would reflect the same commitments:

<b>Fall</b>	<b>Spring</b>
Core (Corporations, Constitutional Law, Family Law, Trusts and Estates, Evidence, etc.) <sup>207</sup>	Core (Corporations, Constitutional Law, Family Law, Trusts and Estates, Evidence, etc.)
Jurisprudence <sup>208</sup>	Interdisciplinary Analysis <sup>209</sup>
The Legal Profession <sup>210</sup>	The Law Governing Lawyers / Legal Ethics <sup>211</sup>
International Law	Comparative Law
Lawyering Skills (communications, interviewing, depositions, etc.) <sup>212</sup>	Lawyering Skills Advanced (litigation, transactional, etc.)

205. See, e.g., *The New 1L Curriculum*, HARV. L. SCH., <http://www.law.harvard.edu/current/careers/ocs/employers/about-our-students/the-new-1l-curriculum.html> (last visited Apr. 14, 2012).

206. A course on comparative professionalism (e.g., medicine).

207. Core denotes a grouping of classes covering subject matters commonly tested on the bar exam.

208. See generally LLEWELLYN, *supra* note 88; THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William W. Fisher eds., 2006).

209. See, e.g., LLEWELLYN, *supra* note 88, at 164–67 (on the importance and use of “law and” classes for legal education).

210. A course on the structure, organization, and ideology of the legal profession, including empirical and theoretical findings.

211. A course on the law governing lawyers, akin to the currently required legal ethics course.

212. See, e.g., CARNEGIE REPORT, *supra* note 2, at 87–126.

And the third year would include:

<b>Fall</b>	<b>Spring</b>
Elective	Elective
Elective	Elective
Elective	Elective
Seminar / Writing <sup>213</sup>	Clinical Education <sup>214</sup>
Practicing Law in the Public Spirit: Mandatory Pro Bono / Externships <sup>215</sup>	Practicing Law in the Public Spirit: Justice and Professional Values <sup>216</sup>

213. See, e.g., *id.* at 104–11 (on the importance of upper writing requirements).

214. See, e.g., *id.* at 7–12 (on clinical education).

215. See ABA Standing Comm. on Pro Bono and Pub. Service, *Chart of Law School Pro Bono Programs*, AMERICAN BAR ASSOCIATION (June 24, 2011), [http://www.abanet.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://www.abanet.org/legalservices/probono/lawschools/pb_programs_chart.html). But see Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1404–05 (2007) (“[I]n mandatory [pro bono] programs, the emphasis on skills training may usurp the question of professional commitment to serving underrepresented populations. . . . One potential drawback of mandatory pro bono programs and their tendency to focus on skill-based benefits might be that they unintentionally dilute the meaning and purpose of pro bono.”).

216. See *supra* notes 84–87, 162–164 and accompanying text.