

DEVELOPING PROFESSIONAL JUDGMENT: A MORE AMBITIOUS GOAL FOR THE PROFESSIONAL RESPONSIBILITY COURSE

Adapted from Clark D. Cunningham & Charlotte Alexander, *Developing Professional Judgment: Law School Innovations in response to the Carnegie Foundation's Critique of American Legal Education*, in Michael Robertson, Lillian Corbin, Kieran Tranter and Francesca Bartler (Eds.), **The Ethics Project in Legal Education** (London: Routledge 2010)

The Carnegie Foundation for the Advancement of Teaching was founded in 1905 by the philanthropist Andrew Carnegie. Over the past century it has prompted many important changes in higher education. The Foundation's 1910 critique of medical education, known as the Flexner Report, is widely credited for establishing the standards for modern medical education.¹ Since 2004, a major initiative of the Foundation has been the Preparation for the Professions Program, which has overseen a series of multi-year comparative studies of education of clergy, engineers, lawyers, doctors, and nurses.²

There have been a number of critiques of American legal education that both laid a foundation for the Carnegie Report and foreshadowed many of its conclusions, but all were from within the legal academy or the profession; the Carnegie Report in contrast offers an independent, outside perspective. One of the co-authors is a distinguished legal educator, but the other four come from other disciplines. Three are social scientists, including the Carnegie Foundation's president at that time, and the other is a moral philosopher. Their methodology was to focus on how teaching and learning really happens through classroom observations and interviews with teachers and students at 16 law schools. As the authors explain: "We adopted an unusual angle of vision ... by focusing on the daily practices of teaching and learning ... We compared these practices with those in other professions ... [and] also looked at them through the lens of contemporary understanding of how learning occurs."³

The Report begins with the observation that the modern American law school is heir to "a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes

¹ A. Flexner, A. *Medical Education in the United States and Canada*, Carnegie Foundation for the Advancement of Teaching, 1910.

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

³ Report at 1-2.

introduction to the practice of law.”⁴ Probably the signal contribution of the Report is the way it draws upon comparative study of other forms of professional education and upon recent social science research to propose “hope for healing [these] old rifts.”⁵ And the keystone of the bridge it would build between these opposing views of legal education is a revitalized approach to teaching legal ethics.

The Foundation’s extensive comparative study of various professions leads the authors of the Report to an understanding of “professional practice as judgment in action.”⁶

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

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

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

“In practice, knowledge, skill, and ethical comportment[s] are literally interdependent: a practitioner cannot employ one without involving the others at the same time.”⁷ Thus, “the goal of professional education cannot be analytic knowledge alone or, perhaps, even predominantly. Neither can it be analytic knowledge plus merely skillful performance.”⁸

The Report concludes that “this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice.” This new approach to legal education would “combine ... conceptual knowledge, skill, and moral discernment ... into the capacity for judgment guided by a sense of professional responsibility.” The authors of the Report “believe that if legal education had as its focus forming legal professionals who are both

⁴ *ibid.*, p. 8.

⁵ *ibid.*

⁶ *ibid.*, p. 9.

⁷ *ibid.*, p. 172.

⁸ *ibid.*, p. 160.

competent and responsible to clients and the public, learning legal analysis and practical skills would [**both**] be more fully significant to both the students and faculty.”

The Carnegie Report's focus on the development of professional judgment draws on insights from the field of moral psychology into how students learn and schools teach ethical decision-making. Moral psychology's inquiry into ethical and moral decision-making began with Lawrence Kohlberg's hypothesis that there are stages of moral judgment development over the course of an individual's life span.⁹ Subsequently, James Rest built on Kohlberg's work in several important ways. First, he created an easily administered assessment instrument, the Defining Issues Test (DIT), that presents ethical dilemmas and then measures the proportion of times an individual selects arguments to resolve the dilemma that appeal to each of three conceptually different moral frameworks.¹⁰ The DIT has been extensively validated, including studies showing links between high DIT scores and actual behavior such as clinical performance in nursing, medicine, and dentistry;¹¹ likelihood of fraud detection by auditors;¹² and willingness to inform superiors or law enforcement of wrongdoing.¹³ Low DIT scores have been shown to correlate with disciplinary action in dentistry,¹⁴ and

⁹ J. Rest and D. F. Narvaez (eds.), *Moral Development in the Professions*, Hillsdale, NJ: Lawrence Erlbaum Associates, Inc., pp. 1-3. One of the co-authors of the Carnegie Report, Anne Colby, co-authored with Kohlberg *The Measurement of Moral Judgment*, New York: Cambridge University Press, 1987; see also L. Kohlberg., *The Psychology of Moral Development: Moral Stages and the Life Cycle*, San Francisco, CA: Harper Row, 1984.

¹⁰ These three frameworks are: a personal interests (PI) framework; a maintaining norms (MN) framework; or a post-conventional (P) framework that is based upon moral ideals or principles. DIT scores indicate which framework predominates for the individual, whether the person is consolidated on a particular moral framework, or the extent to which an individual has difficulty distinguishing among arguments that represent each framework.

¹¹ M.J. Bebeau, 'The Defining Issues Test and the Four Component Model: Contributions of Professional Education,' *Journal of Moral Education*, 2002, 31(3), 279-81.

¹² L.A. Ponemon and D.R.L. Gabhart, 'Ethical Reasoning Research in the Accounting and Auditing Professions,' in Rest & Narvaez, *Moral Development in the Professions*, pp. 101-18.

¹³ D. Arnold, D., & L.A. Ponemon, 'Internal Auditors' Perceptions of Whistle-Blowing and the Influence of Moral Reasoning: An Experiment,' *Auditing: A Journal of Practice and Theory*, 1991, 10, 1-15; R.A. Bernardi, 'Suggestions for Providing Legitimacy for Accounting Ethics Research,' *Issues in Accounting Education*, 2004, 19(1), 145-146.

¹⁴ M.J. Bebeau, 'Enhancing Professionalism Using Ethics Education as Part of a Dental Licensure Board's Disciplinary Action. Part I: An Evidence-Based Process,' *Journal of the American College of Dentists*, 2009, 76(2), 38-50.

both disciplinary action and malpractice claims in medicine.¹⁵

The moral reasoning measured by the DIT is not, however, a conclusive determinant of actual behavior. Rest therefore articulated what is known as the Four Component Model for explaining how cognition, affect and social dynamics interact to influence moral behavior.¹⁶ He began by identifying four different possible reasons for moral failure:

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

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

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

¹⁵ D.C. Baldwin, Jr., T.E. Adamson, Sheehan, D.J. Self, and A.A. Oppenberg, 'Moral Reasoning and Malpractice: A Pilot Study of Orthopedic Surgeons,' *American Journal of Orthopedics*, 1996, 25(7), 481-84. The phrases "high DIT scores" and "low DIT scores" in the text refer to scores indicating the proportion of times an individual indicates a preference for post-conventional moral arguments (called the "P score").

¹⁶ M.J. Bebeau and V.E. Monson, 'Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education,' in D. Narvaez & L. Nucci (eds.), *Handbook on Moral and Character Education*, Hillsdale, NJ: Routledge, 2008, pp. 557-82.

Four Component Model of Morality (FCM) (Rest, 1983)

Reasons (Predictors)

Moral
Blindness

Faulty
Reasoning

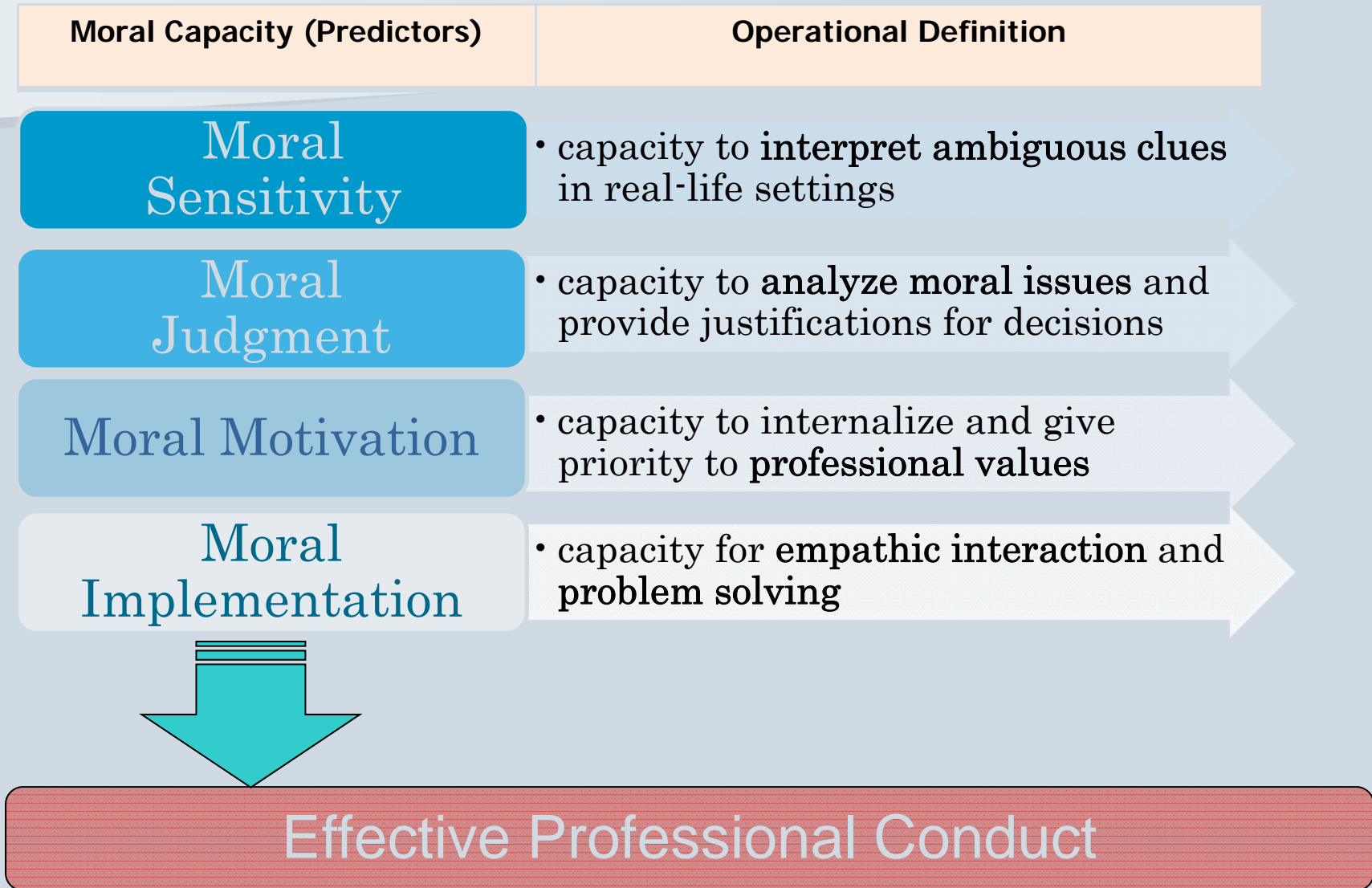
Lack of
Motivation

Ineffectiveness



Moral Behavior
Unethical, Ethical, Unprofessional, Professional

Four Component Model of Morality (FCM) (Rest, 1983)



The Carnegie Report's call for development of law students' professional judgment echoes Rest's first three capacities for moral action: "Law school graduates . . . need the capacity to recognize the ethical questions their cases raise, even when those questions are obscured by other issues and therefore not particularly salient [Rest's first capacity]. They need wise judgment when values conflict [Rest's second capacity], as well as the integrity to keep self-interest from clouding their judgment [Rest's third capacity]."¹⁷

Dr. Muriel Bebeau, a colleague of Rest, has developed a number of practical applications of Rest's Four Component Model for professional education. Bebeau's work indicates that a well designed curriculum can promote each of the four capacities in ways that are connected to professional behavior. Such educational programs:

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

Some of the best evidence that these capacities can be effectively taught is found in the ethics curriculum developed by Bebeau at the University of Minnesota School of Dentistry in 1985 and widely adapted throughout American dental education.¹⁸ Bebeau's work confirms that the capacity to identify issues that require professional judgment requires much more than just a mastery of professional conduct rules (although such knowledge is of course necessary). Equally critical is the ability to engage imaginatively as a situation unfolds, constructing various possible scenarios, often with limited cues and partial information, combined with the ability to foresee realistic cause-consequence chains of events.¹⁹ Empathy and role-taking skills are often required, involving both cognitive and affective processes. Therefore, both teaching and assessment strategies must avoid reliance on what Bebeau calls "predigested" or already interpreted fact scenarios (of which the appellate cases used for conventional classes in American law schools are a prime example).²⁰ Significant

¹⁷ Report, p. 146

¹⁸ This curriculum requires 44 contact hours (the equivalent of a one semester, 3 credit American law school course) spent primarily in small group instruction with an emphasis on performance, self-assessment and personalized feedback. Both high status professionals and full time faculty are involved in teaching the curriculum.

¹⁹ M.J. Bebeau, J.R. Rest, and C.M. Yamoor, 'Measuring Dental Students' Ethical Sensitivity,' *Journal of Dental Education* 1985, 49, 225-35.

²⁰ Bebeau & Monson, 'Guided by Theory, Grounded in Evidence.'

increases in students' scores on a dental ethical sensitivity test (similar to the DIT) provided evidence that profession-based ethical sensitivity, Rest's first capacity for moral action, can be enhanced through instruction along the lines of Bebeau's model.²¹

Bebeau's research also provided evidence that ethical sensitivity, the first capacity, is distinct from the second capacity, moral reasoning. Research has shown a great deal of variability among professional students in their ability to reason about moral issues, regardless of their level of ethical sensitivity.²² In 33 studies of the effects of professional education, none showed significant increases in DIT scores without a carefully validated ethics curriculum.²³ However, significantly increased DIT scores are produced by the use of small group dilemma discussions that require students to present criteria for well-reasoned arguments, exercising Rest's second capacity, moral reasoning.²⁴

There is ample evidence that professionals are sometimes aware of the ethical implications of a situation, yet either fail to act or act in ways inconsistent with that awareness – evidencing a deficiency in Rest's third moral capacity -- prioritizing the ethical decision over other interests.²⁵ Research in moral psychology suggests that for professionals the key to the development of this third capacity is identity formation. Research indicates that differing levels of professional identity formation can be distinguished. Studies of professionals identified by their peers as moral exemplars reveal a common theme: these exemplars feel that actions that prioritize the needs of clients and society over the self are obligatory rather optional because of the unity of their sense of self with the profession's moral values.²⁶ Research has also shown that, although a professional's moral identity formation can be facilitated during professional school, students do not internalize the norms of a profession from an educational

²¹ M.J. Bebeau, 'Evidence-Based Character Development,' in N. Kenny and W. Shelton (eds.), *Lost Virtue: Professional Character Development in Medical Education, Volume 10 (Advances in Bioethics)*, Oxford, UK, Elsevier Ltd., 2006, pp. 47-86.

²² Bebeau, 'The Defining Issues Test and the Four Component Model.'

²³ *ibid.*

²⁴ *ibid.*, p. 282.

²⁵ For example, while approximately 40% of Scottish medical students in one study said they should report misconduct, only 13% of the same group said they actually would do so. Bebeau & Monson, 'Guided by Theory, Grounded in Evidence.' Sixty-five percent of US medical students in another study expressed discomfort at challenging other members of the medical team over wrongdoing. *ibid.*

²⁶ J.T. Rule and M.J. Bebeau, *Dentists Who Care: Inspiring Stories of Professional Commitment*, Chicago, IL, Quintessence Publishing Co., Inc., 2005. Carnegie Report co-author Anne Colby has written one of the leading studies of such moral exemplars. A. Colby and W. Damon, *Some Do Care: Contemporary Lives of Moral Commitment*, New York: Macmillan, 2002. Rule and Bebeau patterned their study of moral exemplars in the dental profession after the Colby and Damon study.

environment simply by osmosis. Deliberate teaching about professional norms is required, combined with examples of exemplary professionals and a system to promote student self-reflection about their own professional identity formation over the course of their education.²⁷

Although the ability to identify ethical issues (the first capacity), to reason to the contextually appropriate decision in the face of conflicting values (the second capacity), and to internalize professional identity to motivate moral commitment (the third capacity), are all necessary to the exercise of professional judgment, actual and effective implementation, the fourth capacity, is also required. Bebeau points out that the professional cannot stop with “what is happening” [the first capacity] and “what ought to be done” [the second capacity], but must always consider questions such as “what should I say” and “how should I say it?” Therefore, the teaching strategies developed by Bebeau for addressing the fourth capacity, implementation, require students to develop action plans and even specific dialogue for resolving tough problems.²⁸

Before the Carnegie Report, the typical approach to ethics and professionalism by American law schools was to require students to take a single course on “professional responsibility” that covered the American Bar Association’s Model Rules of Professional Conduct.²⁹ At many law schools, this was the only required course after the first year. The Report describes this typical ethics course as teaching “the law of lawyering.”³⁰

²⁷ For a review of this research see M.J. Bebeau and V.E. Monson, in A. McKee and M. Eraut (eds.) *Professional Learning Over the Life Span: Innovation and Change*, New York, Springer, forthcoming 2010.

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

²⁹ The American Bar Association (ABA), which serves as the accrediting agency for most law schools in the United States, requires that during the three years of post-graduate law school that constitute American legal education students take a course in professional responsibility. This requirement has been in place since the mid 1970s. Course coverage must include the ABA’s Model Rules of Professional Conduct (Model Rules or “MRs”), approved by the ABA’s governing body, the House of Delegates, with the intent that the states, which actually regulate attorney conduct, will adopt them. In addition to the influence of the ABA accreditation standards, all but one state require as a condition of law licensure that the applicant pass the Multistate Professional Responsibility Examination (MPRE), a 60 question multiple choice test administered by the National Conference of Bar Examiners largely based on the Model Rules.

³⁰ However, a number of law schools have either developed alternative curricular methods for meeting the ABA’s requirement or teach considerably more than just “the law of lawyering” in their legal ethics course.

[S]tudents learn the profession's ethical code as represented in the [ABA] Model Rules, how those rules have been interpreted and applied, and the circumstances under which sanctions have been imposed. ... Often these courses are structured around legal cases that concern alleged violations of the Model Rules. Students apply their analytical skills to these cases, approaching them in much the same way they have learned to approach challenging legal cases in torts or contracts.³¹

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

[Teaching ethics through the law of lawyering] misses an important dimension of ethical development – the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice.³²

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

When legal ethics courses focus exclusively on teaching students what a lawyer can and cannot get away with, they inadvertently convey a sense that knowing this is all there is to ethics. ... [Thus] [b]y defining 'legal ethics' as narrowly as most legal ethics course is do, these courses are likely to limit the scope of what graduates perceive to be ethical issues.³³

The conventional "law of lawyering" course also failed to engage with the second capacity, moral reasoning. The Report cites several studies showing that students who completed a traditional ethics course did not show significantly more sophisticated moral reasoning, as measured by DIT scores, at the end of the course than at the beginning. The most thorough of these studies, however, indicates that a law school course built around small group discussions of realistic ethical dilemmas that cannot be resolved by legalistic application of the Model Rules *can* produce very significant

³¹ Report, p. 148.

³² Report, p. 149.

³³ Report, p. 149; B. Green, 'Less is More: Teaching Legal Ethics in Context,' *William & Mary Law Review*, 1998, 39, 362 n. 29 ("Students have a tendency to think that insofar as professional obligations are left to be interpreted and enforced by individual lawyers at the level of conscience, these obligations are not taken seriously by the law or the legal profession, and so need not be taken very seriously by lawyers or law students.").

increases in DIT scores.³⁴ The Report thus concludes that “research makes quite clear that higher education can promote the development of more mature moral thinking,” and that specially designed courses on professional responsibility and legal ethics do support that development. However, for most students, traditional legal ethics courses did not contribute to greater development of moral reasoning.³⁵

The Report concludes its critique of American law schools’ traditional Model Rules-based ethics courses with a focus on the third and fourth capacities required for moral action: formation of professional identity and competence to implement a moral decision. Once again, the authors summarize what has been learned in other professions and from the social sciences to set an aspirational standard for legal education: “[W]hat kinds of pedagogies and assessment procedures are effective in developing professional dispositions and good judgment [?] ... [C]ritical analysis of students’ own experience in both simulated and actual situations of practice, including expert feedback, is a pedagogical process with enormous power ... [C]ross-professional comparison indicates that although difficult, it is not impossible to systematically provide feedback to students about both their understanding of and performance with regard to the ethical norms of the profession.”³⁶

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

In addressing Rest’s fourth capacity, effective implementation, the Report provides this concise paraphrase: “the ‘bottom line’ [is] ... not ... what [students] know but what they can do. They must come to understand thoroughly so they can act competently, and they must act competently in order to serve responsibly.”³⁷ Students in the traditional legal ethics course take the role of observer rather than actor. According to the Report, to build the fourth capacity, teaching and assessment must instead “take place in role rather than in the more detached mode that the law-of-lawyering courses typically foster.”³⁸

In 1905, the famous Boston lawyer Louis Brandeis – later to become one of the

³⁴ S. Hartwell, ‘Promoting Moral Development Through Experiential Teaching,’ *Clinical Law Review*, 1994-95, 1(1), 505.

³⁵ Report, p. 134.

³⁶ Report, p. 177-78.

³⁷ Report, p. 23.

³⁸ Report, p. 178.

most distinguished justices of the U.S. Supreme Court – was asked to address the Harvard Ethics Society on the topic, “The Opportunity in the Law.” He told his audience that although the “ordinary man thinks of the Bar as a body of men who are trying cases ... by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters.”³⁹ Therefore, the “whole training of the lawyer leads to the development of judgment.”⁴⁰ However, as Karl Llewellyn, one of the greatest of America’s law teachers, told a group of beginning law students several decades later, the first year of law school has the effect of knocking “your ethics into temporary anesthesia.”⁴¹ Llewellyn then said with fine irony: “It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment.”⁴² Llewellyn promised those students, though, that in the subsequent years of law school that their teachers “shall then duly endeavor” to restore the capacity for ethical judgment that had been anesthetized in the first year.⁴³

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

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

40 *ibid.*

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

42 *ibid.*

43 *ibid.*