Clark D. Cunningham & Charlotte Alexander

Introduction

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

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

Interviewer: And at that point, once you've read this letter, are you allowed to say hey wait a minute, this is not what I learned in law school ...?
Swift: You know, that's exactly what I thought about. ... This is not how I view myself as an independent lawyer when I represent an individual; and I'm being asked to represent him, not the government. ...

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

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

A year later, in 2007, the highly regarded Carnegie Foundation for the Advancement of Teaching issued a book-length report on American legal education, *Educating Lawyers: Preparation for the Profession of Law* [hereinafter “the Report”].4 The central message of the Report is that law schools should, and can, do much more to produce lawyers who will exercise the type of professional judgment exemplified by Charles Swift: who readily identified a moral dilemma that implicated his professional ethics, reasoned through conflicting values to choose a course of action, committed himself to that action as “the ethical way to do my job” despite risk to his career, and then effectively implemented the decision.

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

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

The Carnegie Foundation for the Advancement of Teaching was founded in 1905 by the philanthropist Andrew Carnegie. Over the past century it has prompted many important changes in higher education. The Foundation’s 1910 critique of medical

education, known as the Flexner Report, is widely credited for establishing the standards for modern medical education.\(^5\) Since 2004, a major initiative of the Foundation has been the Preparation for the Professions Program, which has overseen a series of multi-year comparative studies of education of clergy, engineers, lawyers, doctors, and nurses.\(^6\)

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

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

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

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

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.” 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.”

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 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.”

Moral Psychology Applied to Professional Education

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

Moral psychology’s inquiry into ethical and moral decision-making began with Lawrence Kohlberg’s hypothesis that there are stages of moral judgment development over the course of an individual’s life span. 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.

7 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
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; likelihood of fraud detection by auditors; and willingness to inform superiors or law enforcement of wrong-doing. Low DIT scores have been shown to correlate with disciplinary action in dentistry, and both disciplinary action and malpractice claims in medicine.

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. 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

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].”

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

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

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

Some of the best evidence that these capacities can be effectively taught is found in the ethics curriculum developed by Bebeau at the University of Minnesota School of Dentistry in 1985 and widely adapted throughout American dental education. 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. 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. Significant increases in students’ scores on a dental ethical sensitivity test (similar to the DIT) provided evidence that profession-based ethical sensitivity, Rest’s first capacity for moral action, can be enhanced through instruction along the lines of Bebeau’s model.

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. In 33 studies of the effects of professional education, none showed significant increases in DIT scores without a carefully validated ethics curriculum. 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.

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 capacity -- prioritizing the ethical decision over other interests. Research in moral psychology suggests that for professionals the key to the development of this third capacity is identity formation. Research 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. Research has also shown that, although a professional’s moral identity formation can be facilitated during professional school, students do not internalize the norms of a profession from an educational environment simply by osmosis. Deliberate teaching about professional norms is required, combined with examples of exemplary professionals and a system to promote student self-reflection about their own professional identity formation over the course of their education.

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

---

14 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 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.
Developing Professional Judgment

“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.

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

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

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

Interviewer: Ethical way you can do your job?

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

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

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

The Carnegie Critique and Rest's Model of Moral Behavior

Before the Carnegie Report, the typical approach to ethics and professionalism by American law schools was to require students to take a single course on “professional responsibility” that covered the American Bar Association’s Model Rules of Professional Conduct. 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.”

Students 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.

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),

15 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 postgraduate 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.

16 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.
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.

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] by 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.

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

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:

What 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 ... Cross-professional comparison indicates that although difficult, it is not impossible to systematically provide feedback to students about both their understanding of and performance with regard to the ethical norms of the profession. The analogous clinical training in the health professions and for the clergy offers useful models. ... The key components are close working relationships between students and faculty, opportunity to take responsibility for professional interventions and outcomes, and timely feedback. Unless law schools can provide the proper opportunities, however, little such formation is likely to occur.

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.” 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.”

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

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

The Report suggests that such an integrated program of legal education could begin in the first phase with “well-designed lawyering courses ... taught as intentional complements to doctrinal instruction.” Then “this experience of complementarity would continue in the second and third years as a gradual development of practice knowledge and skill, beginning in simulation and moving into actual responsibility for clients.” Put
another way, a reformed law school curriculum would require students to spot issues and develop ethical sensitivity; would then require them to engage in moral reasoning, in role; and finally would require them to take on the professional identity of attorney and implement their moral judgment in the carefully supervised representation of actual clients.

***

Conclusion

In 1905, the famous Boston lawyer Louis Brandeis – later to become one of the most distinguished justices of the U.S. Supreme Court – was asked to address the Harvard Ethics Society on the topic, “The Opportunity in the Law.” He told his audience that although the “ordinary man thinks of the Bar as a body of men who are trying cases ... by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters.”18 Therefore, the “whole training of the lawyer leads to the development of judgment.” 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.”19 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.” 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.

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.

---