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## Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)

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ARTICLE

**LEGAL EDUCATION’S ETHICAL  
CHALLENGE: EMPIRICAL RESEARCH ON  
HOW MOST EFFECTIVELY TO FOSTER  
EACH STUDENT’S PROFESSIONAL  
FORMATION (PROFESSIONALISM)**

NEIL HAMILTON  
VERNA MONSON

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I. INTRODUCTION

Based on over fifty site visits to study how professional schools educate lawyers, physicians, clergy, engineers, and nurses, Carnegie Foundation for the Advancement of Teaching president Lee Shulman found that “the most overlooked aspect of professional preparation was the formation of a professional identity with a moral core of service and responsibility” around which each student’s habits of mind and practice are organized.<sup>1</sup>

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1. We are grateful to James Power, our research assistant on this paper for outstanding assistance with the footnotes. Thanks also to John Berry for suggestions to improve the paper, Lee

Higher education for the professions faces the same ethical challenge: how to most effectively foster each student's formation of an ethical professional identity with a moral core of service to and responsibility for others. This is a foundational educational objective for the peer-review professions in general and for the legal profession in particular for four reasons:

- (1) The unwritten social contract (whereby society gives the peer-review professions, including the legal profession, substantial autonomy and control over the work compared to other occupations) depends upon each professional's internalized fiduciary duty and self-restraint to put responsibility to the person served (the client) first.<sup>2</sup>
- (2) A lawyer who has internalized an ethical professional identity of service to and responsibility for others is a more effective lawyer as evaluated by clients and senior lawyers.<sup>3</sup> It is in a law student's and practicing lawyer's enlightened self-interest to demonstrate high professionalism to clients and senior lawyers.
- (3) Empirical research points toward the higher probability of (a) increased physical health and longevity from reaching out to

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S. Shulman, *Foreword to MOLLY COOKE ET AL., EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY*, at ix (2010); *see also* ANNE COLBY ET AL., *RETHINKING UNDERGRADUATE BUSINESS EDUCATION: LIBERAL LEARNING FOR THE PROFESSION* 21 (2011) (highlighting the relative lack of training in leadership and judgment compared to training in formal procedures); RAKESH KHURANA, *FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION* 7, 291 (2007) (describing how the concept of professionalism was abandoned).

2. *See* Neil Hamilton, *Academic Freedom's Duties: A Review of Stanley Fish's Save the World on Your Own Time*, 36 J.C. & U.L. 295, 299–300 (2009) (book review); Neil Hamilton, *Professionalism Clearly Defined*, 18 A.B.A. PROF. LAW., no. 4, 2008, at 5–6 [hereinafter Hamilton, *Professionalism Clearly Defined*]; Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 470–71 (2008) [hereinafter Hamilton, *Assessing Professionalism*]; Neil W. Hamilton, *The Ethics of Peer Review in the Academic Professions*, 42 S. TEX. L. REV. 227, 229 (2001).

3. Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 140 (2011) [hereinafter Hamilton & Monson, *Positive Empirical Relationship*]; *see* Sylvia R. Cruess & Richard L. Cruess, *The Cognitive Base of Professionalism*, in *TEACHING MEDICAL PROFESSIONALISM* 7, 22–23 (Richard L. Cruess, Sylvia R. Cruess & Yvonne Steinert eds., 2009). In the increasingly competitive market in law firms, retaining clients is a key strategy to improving the financial bottom-line of firms. Yet recent law firm industry research showed that 87.1% of clients would consider switching law firms if another law firm could deliver better services or results. THE BTI CONSULTING GRP., 2011 BTI CLIENT SERVICE A-TEAM: SURVEY OF LAW FIRM CLIENT SERVICE PERFORMANCE 160 (2010). This study found superior service to clients, in which relationship abilities are central, also increases profit by thirty-three percent and client retention rates by thirty-five percent. *Id.* at 3. Further, in a data-driven world, clients have access to an unprecedented amount of data on prospective law firms. Prospective clients can now purchase reports on law firm characteristics like “the most arrogant firms.” *Id.* at iii. Lawyers who have internalized an ethical professional identity of service build reputations that are the opposite of “most arrogant.” *Id.* at 3, 160.

others and giving back to friends and community<sup>4</sup> and (b) increased levels of happiness and well-being from service to others and some suppression of self-serving impulses.<sup>5</sup>

(4) Beyond the profession's and each student's enlightened self-interest as a reason to foster formation of an ethical professional identity, the major faith traditions and moral philosophy call each person toward lifelong growth in understanding and living "the moral insight." Business ethicist Ken Goodpaster, looking to nineteenth century philosopher Josiah Royce, observes that ethics is grounded in "the moral insight" or what philosophers today call "the moral point of view." Goodpaster notes, "The moral insight is the realization of one's neighbor, in the full sense of the word realization. . . . We see the reality of our neighbor, that is, we determine to treat him as we do ourselves."<sup>6</sup> One's "neighbor" in many faith traditions includes especially the poor and disadvantaged.<sup>7</sup> Goodpaster argues that the field of ethics is about understanding the full implications of the moral insight.<sup>8</sup> The moral insight leads to growth of shared ethical norms and each individual's ethical principles—what philosophy calls normative ethics.<sup>9</sup>

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4. Starting in 1921, Stanford psychologist Lewis Terman studied 1,528 San Francisco school children over their lifetime. The correlation between increased physical health/longevity and reaching out to others and giving back to a person's friends and community is a major finding of an extension of Terman's work. HOWARD FRIEDMAN & LESLIE MARTIN, *THE LONGEVITY PROJECT* 213–15 (2011).

5. See Neil Hamilton & Emily Semo, *New Empirical Findings on Happiness Relevant to the Practice of Law*, MINN. LAW., Dec. 20, 2010, available at <http://blogs.stthomas.edu/ethicalleadership/tag/emily-semo/>; Joshua Wolf Shenk et al., *What Makes Us Happy?*, ATLANTIC MONTHLY, June 2009, at 36, 46.

6. KENNETH GOODPASTER, *CONSCIENCE AND CORPORATE CULTURE* 52 (2007). Respecting the dignity of the neighbor, Goodpaster notes, is foundational to all major religious traditions. See Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 383–84 (2009).

7. Caring for the poor and disadvantaged is a theme across all of the world's major religions. For Christians, the Bible, especially stories such as the parable of the Good Samaritan, emphasizes that any person who is suffering and in need is a "neighbor" whom we should help. See, e.g., *Luke* 10:25–37, 16:19–31. In the Jewish faith, charitable giving to the poor and needy is considered an essential and meritorious act of faith. Raphael Posner et al., *Charity*, in 4 *ENCYCLOPAEDIA JUDAICA* 569, 569–75 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007), available at Gale Virtual Reference Library, File No. CX2587504163. For Muslims, charitable giving is a yearly religious obligation. FREDERICK MATHEWSON DENNY, *AN INTRODUCTION TO ISLAM* 2 (4th ed. 2011). Buddhism emphasizes compassion for all living beings as a way to achieve enlightenment. DAMIEN KEOWN, *BUDDHISM: A VERY SHORT INTRODUCTION* 45 (1996); ELIZABETH J. HARRIS, *WHAT BUDDHISTS BELIEVE* 48 (1998). Compassion to others also leads to liberation in the Hindu religion. HAROLD G. COWARD ET AL., *READINGS IN EASTERN RELIGIONS* 85 (2d ed. 2007).

8. See GOODPASTER, *supra* note 6, at 52–56.

9. Normative ethics is aimed at judgments of right and wrong, virtue and vice. It provides criteria to support or refute claims of rightness or wrongness, or virtue or vice. Descriptive ethics is a social science aimed at empirically neutral description of the values of individuals and groups. Meta-ethics (sometimes called analytical ethics) examines

the meaning and objectivity of ethical judgments. Meta-ethics is therefore at a level removed from normative ethics. At this remove, one might [for example] explore the

For these reasons, higher education accrediting authorities for other professions, particularly medicine, now require more emphasis on fostering each student's formation of an ethical professional identity.<sup>10</sup> The probabilities seem high that the American Bar Association (ABA) will also amend the accreditation standards for law schools to place more emphasis on formation of an ethical professional identity with a moral core of service to and responsibility for others. For example, the late-stage accreditation draft proposals by the ABA Standards Review Committee propose changes to Accreditation Standard 302 on Learning Outcomes to require that accredited law schools have learning outcomes including competency in "the professional skills of . . . the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas."<sup>11</sup> Additionally, the proposed standard requires learning outcomes that include "knowledge, understanding and appreciation of the following values: . . .

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differences among scientific, religious and ethical perspectives; the relation of legality to morality; the implications of cultural differences for ethical judgment; and so forth.

KENNETH E. GOODPASTER & LAURA L. NASH, *POLICIES AND PERSONS: A CASEBOOK IN BUSINESS ETHICS* 522 (3d ed. 1998).

There are two general approaches to normative ethics. A rational approach uses analysis and logic in any situation to determine right conduct from a set of first ethical principles. This "ethics of principle" approach can be derived from faith or religious teachings, cultural norms, or moral philosophy, such as Kant's Categorical Imperative or John Stuart Mills' Utilitarianism. A second general source emphasizes the virtues and good habits of character in any situation and is more intuitive about the right conduct that a virtue or habit of character demands in the situation. Some people using this "ethics of character" approach find the relevant virtues or habits of character in faith or religious teachings. Others look to moral philosophy or cultural norms. *See* WILLIAM SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 262-67 (2d ed. 2004).

10. *See* NELSON MILLER, *TEACHING LAW: A FRAMEWORK FOR INSTRUCTIONAL MASTERY* 13 (2010). For example, the Accreditation Council for Graduate Medical Education is in charge of accreditation for residency programs. The Council requires competency in six areas, three of which concern ethics and professionalism. Their standards from 2003 state in part that medical residents must demonstrate

[p]atient care that is compassionate, appropriate, and effective for the treatment of health problems and the promotion of health . . . . Interpersonal and communication skills that result in effective information exchange and teaming with patients, their families, and other health professionals . . . . Professionalism, as manifested through a commitment to carrying out professional responsibilities, adherence to ethical principles, and sensitivity to a diverse patient population.

INSTITUTIONAL REVIEW COMM., *ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., INSTITUTIONAL REQUIREMENTS* § III.E.1. (2003), *available at* [http://www.acgme.org/acWebsite/irc/irc\\_IR\\_Cpr703.pdf](http://www.acgme.org/acWebsite/irc/irc_IR_Cpr703.pdf).

11. These accreditation changes have largely come about because of the work of the National Organization of Bar Counsel and the ABA Standing Committee on Professionalism. John Berry in particular has played a substantial role in promoting these changes. *See* NATIONAL ORGANIZATION OF BAR COUNSEL, *LAW SCHOOL PROFESSIONALISM INITIATIVE REPORT* (Dec. 2009), *available at* [http://www.nobc.org/uploadedFiles/About\\_Us/Law\\_School\\_Professionalism\\_Initiative\\_Report\\_Final.doc](http://www.nobc.org/uploadedFiles/About_Us/Law_School_Professionalism_Initiative_Report_Final.doc); ABA STANDING COMMITTEE ON PROFESSIONALISM, *REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONAL PROGRAMS* (Mar. 2006), *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool\\_ProfSurvey.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/LawSchool_ProfSurvey.pdf).

the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law."<sup>12</sup>

An initial point of confusion in the scholarship on this educational objective is the variety of terms used to describe it. The term "professionalism" has historical roots that have motivated the practicing bar's national and state commissions and committees on professionalism. While the historical tradition associated with professionalism is important, the term has some definitional ambiguity. For example, since 1980, thirty-five legal scholars have tried to define professionalism explicitly. While all understand that a lawyer's moral core is the foundation of professionalism, only twenty-seven continue further to define professionalism in terms of the internalization of the profession's foundational principles into each practicing lawyer's moral core. In addition, there is disagreement among the twenty-seven about which of the profession's core principles and ideals are the most important.<sup>13</sup> Section II below returns to this topic.

The five Carnegie Foundation studies of higher education in the professions also use different terms as synonyms for what the Carnegie Foundation calls the third apprenticeship, including professional formation, formation of a professional identity, professionalism, and ethical comportment.<sup>14</sup> *Educating Physicians*, the last of the studies published in 2010, adopts "professional formation" rather than "professionalism" as the best term to use in order to emphasize the developmental and multifaceted nature of the construct.<sup>15</sup> The term professional formation indicates "an ongoing self-reflective process involving habits of thinking, feeling, and acting."<sup>16</sup> It is a lifelong commitment to continued progress toward technical excellence and the aspirational goals of the profession.<sup>17</sup> In the balance,

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12. Standards Review Comm., Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Draft for July Meeting 1, 2 (July 9, 2011) (draft of law school accreditation standards), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july2011meeting/20110621\\_ch\\_3\\_program\\_of\\_legal\\_education\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_clean_copy.authcheckdam.pdf); see Neil W. Hamilton & Verna Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. (forthcoming 2012) (manuscript at 4–5) [hereinafter Hamilton & Monson, *Exemplary Lawyers*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1804419](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804419).

13. See Neil Hamilton, *Analyzing Common Themes in Legal Scholarship on Professionalism* 20 (Univ. of Saint Thomas Legal Studies Research, Paper No. 11-24, 2011) [hereinafter Hamilton, *Analyzing Common Themes*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917058](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917058).

14. See Neil W. Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. (forthcoming 2012) (manuscript at 12) [hereinafter Hamilton, *Lessons from Carnegie*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1908453](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908453).

15. MOLLY COOKE ET AL., *EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY* 108 (2010).

16. *Id.* at 41 (quoting D. Wear & B. Castellani, *The Development of Professionalism: Curriculum Matters*, 75 ACAD. MED. 602, 603 (2000)).

17. *Id.* at 141.



“professional formation” or “professional formation toward a moral core of service to and responsibility for others” seem to be the best terms because “formation” captures the developmental nature of the educational challenge.

Focusing on “professional formation toward a moral core of service to and responsibility for others,” we move in Section II to identify and analyze the specific elements of this educational objective. Section III analyzes the empirical data on the most effective pedagogies to help each student achieve the elements of the educational objective. Based on our analysis of the data, we suggest that law schools help students to internalize through repetition—not just the habit of “thinking like a lawyer” (the application of legal doctrine and legal analysis to messy facts to diagnose and solve the client’s legal problem) but also the habit of actively seeking feedback, engaging in moral dialogue about the tough ethical calls, and self-reflection. We call this the habit of FDR (Feedback, Dialogue, and Reflection). Section IV asks what the empirical data on the most effective pedagogies for professional formation suggest about the counseling role of the lawyer with clients.

## II. SPECIFIC ELEMENTS OF PROFESSIONAL FORMATION

Following the general principle that we could best understand the elements of professional formation by using a variety of qualitative and quantitative research methods,<sup>18</sup> and then looking for general areas of convergence, we have done six earlier studies analyzing different perspectives on the elements of professional formation. Our earlier studies used “professionalism” as a synonym for “professional formation.” We first looked at how the organized profession nationally has defined professionalism in its reports and the ABA Model Rules of Professional Conduct.<sup>19</sup> In another article, we analyzed how all legal scholars writing since 1980 have defined the elements of professionalism.<sup>20</sup> In a third article, we analyzed how the five Carnegie studies of higher education for the professions (based on over fifty site visits) defined the elements of professionalism.<sup>21</sup> Finally we did three qualitative empirical research studies asking how entering law students, early-career lawyers, and peer-honored exemplary lawyers understood professionalism.<sup>22</sup>

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18. See *infra* Appendix A.

19. See Hamilton, *Professionalism Clearly Defined*, *supra* note 2, at 6–8; Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 103–05 (2007); Neil Hamilton, *Assessing Professionalism*, *supra* note 2, 482–83.

20. Hamilton, *Analyzing Common Themes*, *supra* note 13.

21. Hamilton, *Lessons from Carnegie*, *supra* note 14.

22. Verna E. Monson & Neil W. Hamilton, *Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385 (2011) [hereinafter Monson & Hamilton, *Entering Law Students*] (conducting a pilot study of law students’ understanding of professionalism); Verna E. Monson & Neil W. Hamilton, *Ethical Professional (Trans)Formation in Law: Early Career Lawyers Make Sense of Professionalism*, 8 U. ST.

A. *The Organized Profession's Understanding of the Elements of Professionalism*

Through an analysis and synthesis of the ABA's and Conference of Chief Justices' professionalism reports and the ABA Model Rules, Hamilton defined a tripartite model of professionalism consisting of a foundation of personal conscience (moral core or moral compass) into which the lawyer integrates both an understanding of the law of lawyering (the Rules of Professional Conduct and the law of malpractice) and an understanding of the core principles and ideals of the profession. The concept of personal conscience in the reports includes internalizing the habits of seeking feedback from others and self-reflection.<sup>23</sup> The core principles and ideals of the profession include, for example, self-interest overbalanced by devotion to the client's interest, loyalty and confidentiality, public service, excellence in lawyering skills, respect for the legal system and its participants, independent professional judgment, peer-review responsibilities, integrity, and honesty.<sup>24</sup>

B. *Legal Scholars' Definition of the Elements of Professionalism*

Since 1980, thirty-five legal scholars have tried to define the elements of professionalism, and all thirty-five include the concept that the foundation of professionalism is a law student's or practicing lawyer's moral core or personal conscience (either by explicitly arguing for a strong moral core or arguing that each lawyer must internalize the ideals of the profession, implying that the internalization must be into the person's moral core). Twenty-seven address which specific core principles and ideals are the most important to internalize, but there is some disagreement on which are most important. Sixteen include adequate access to legal services for the disadvantaged or the promotion of justice; thirteen, excellence at the technical skills of lawyering; twelve, integrity; ten, respect for the legal system, rule of law, or participants in the legal system; nine, honesty; nine, rule compliance; eight, deep responsibility and service to others; eight, the importance of independent judgment and candid counsel; eight, the importance of ethical peer culture and peer review; six, the concept that growth as an ethical lawyer is developmental over a career; and four, the importance of self-reflection and self-assessment.

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THOMAS L.J. 129 (2011) [hereinafter Monson & Hamilton, *Early Career Lawyers*] (investigating early career lawyers' understanding of professionalism); Hamilton & Monson, *Exemplary Lawyers*, *supra* note 11, at 4 (performing an empirical study of the concept of professionalism through the lens of a group of exemplary lawyers).

23. See Hamilton, *Assessing Professionalism*, *supra* note 2, at 484.

24. See *id.* at 492.

C. *The Five Carnegie Studies of Higher Education for the Professions and the Elements of Professionalism*

All five of the Carnegie Foundation's studies on professional education, *Educating Physicians*, *Educating Nurses*, *Educating Clergy*, *Educating Engineers*, and *Educating Lawyers*, agree that a fundamental element of professional formation is internalizing a deep responsibility to the person being served.<sup>25</sup> Four of the Carnegie Studies agree on the following elements of professional formation: (1) competency and a commitment to excellence in all domains of the profession; (2) moral reasoning; and (3) an understanding of interpersonal relationships. Three of the Carnegie Studies include the following elements: (1) adherence to ethical codes, (2) integrity, and (3) social responsibility (a responsibility to the community and to the promotion of the public good). The elements of professional formation shared by two of the Carnegie Studies include (1) compassion, (2) honesty/trustworthiness, and (3) the concept that professional formation is related to the developmental stage of the student.

D. *Three Studies of Entering Law Students, Early-Career Lawyers, and Peer-Honored Exemplary Lawyers Showing Developmental Growth in Understanding Professionalism*

Many law professors are skeptical that graduate education can foster the moral capacities of law students.<sup>26</sup> They believe that moral capacities are established much earlier in life; and by the time students enter law school, it is too late to affect their ethical commitments and capacities. This understanding ignores the last thirty years of accumulated knowledge in other fields, particularly moral psychology.<sup>27</sup> For example, a moral reasoning assessment called the Defining Issues Test (DIT) has been used in hundreds of empirical studies to assess an individual's ability to provide a sound rationale for decisions about a moral problem.<sup>28</sup> As we progress in our education and encounter challenging life experiences, our moral reasoning and judgment become more complex, moving from justifications based on self-interest to a fuller analysis of the implications of our conduct on others and society more broadly.<sup>29</sup> The late James Rest and his colleagues,

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25. Hamilton, *Lessons from Carnegie*, *supra* note 14, at 15.

26. See Neil Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, 20 A.B.A. PROF. LAW., no. 4, 2011, at 3, 3 [hereinafter *Answering the Skeptics*].

27. See *id.*

28. See Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. ST. THOMAS L.J. 366, 399–400 (2008) [hereinafter Bebeau, *Promoting*]; Muriel J. Bebeau, *The Defining Issues Test and the Four Component Model: Contributions to Professional Education*, 31 J. MORAL EDUC. 271, 271 (2002) [hereinafter Bebeau, *The Defining Issues Test*]; JAMES REST ET AL., *POSTCONVENTIONAL MORAL THINKING* 35–36 (1999).

29. See Bebeau, *Promoting*, *supra* note 28, at 380; REST ET AL., *supra* note 28, at 2–3.

of the Center for the Study of Ethical Development, conceptualized moral reasoning and judgment as three moral schemas, or mental maps, that shape how we perceive moral problems and reason how to resolve them: (1) *personal interests*, or simplistic reasoning dominated by egocentric self-interest arguments, fear of punishment and authority, and early immature notions of social reciprocity (e.g., “You scratch my back, I’ll scratch yours”); (2) *maintaining norms*, or reasoning focused on existing norms, rules, codes, and laws; and (3) *post-conventional*, or reasoning involving concepts of justice, fairness, duty, and the evolutionary nature of morality in society.<sup>30</sup> Post-conventional reasoning appeals to a coherent moral theory or ideal (that is subject to critique) for organizing social cooperation to justify an action.<sup>31</sup>

Empirical evidence from many studies using the DIT demonstrates that junior high and high school students generally face the challenge of growing from a personal or self-interest schema toward a maintaining norms schema.<sup>32</sup> Undergraduate and graduate students who operate within a maintaining norms schema can, with appropriate educational engagements, continue growing toward a post-conventional schema.<sup>33</sup> Later stages in moral reasoning include the ability to apply earlier stages to appropriate contexts.<sup>34</sup>

There is no evidence that the standard law school curriculum, without the appropriate educational engagements on professional formation discussed in Section III of this paper, improves moral reasoning. A longitudi-

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30. See REST ET AL., *supra* note 28, at 36–43. Schemas were derived using psychometric procedures that examined the patterns of responses to items in different stages, using a large sample from hundreds of DIT studies ( $n = > 44,000$ ). The results indicated that the six stages, using the Kohlberg framework, could be reduced to three. See *id.* at 36. The *personal interests* schema reflects Kohlberg’s stages two and three. See *id.* The *maintaining norms* schema views laws and rules as immutable and is equivalent to Kohlberg’s stage four. See *id.* at 36–40. The *post-conventional* schema represents stage five and six items combined. See *id.* at 40–43.

31. E-mail from Muriel Bebeau to Neil Hamilton (Jan. 8, 2010) (on file with author).

32. See Anne Colby, *Fostering the Moral and Civic Development of College Students*, in HANDBOOK OF MORAL AND CHARACTER EDUCATION 391, 391–92 (Larry P. Nucci & Darcia Narvaez eds., 2008); Muriel J. Bebeau, *Can Ethics Be Taught?*, N.Y. ST. DENTAL J., Jan. 1994, at 51, 54.

33. See Bebeau, *Promoting*, *supra* note 28, at 384–87. Education is the strongest factor that predicts moral judgment ability. The effect is strengthened for undergraduate institutions that emphasize liberal arts education. See 2 ERNEST T. PASCARELLA & PATRICK T. TEREZINI, HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH 345–71 (2005) (discussing how college affects moral development); Yukiko Maeda et al., *Understanding the Relationship Between Moral Judgment Development and Individual Characteristics: The Role of Educational Contexts*, 101 J. EDUC. PSYCHOL. 233, 244–45 (2009) (finding a correlation between medical education and variation in DIT test results).

34. See Bebeau, *Promoting*, *supra* note 28, at 384–87. Bebeau and colleagues note that people draw on a mix of moral schemas in decision making, based on evidence from thirty years of DIT research involving thousands of subjects. More complex moral schemas do not presuppose abandonment of simple ones (i.e., based on laws, rules, or social relationships). This view addresses criticisms of Kohlberg’s model, which viewed individuals as reasoning at primarily one predominant stage. See REST ET AL., *supra* note 28, at 17–18.

nal study of moral reasoning at one law school utilizing the DIT found no increases over the three years for students as a whole but found significant differences based on the degree of inherent altruism in projected areas of practice (i.e., legal aid vs. corporate law).<sup>35</sup> Another DIT study at one law school found positive effects on students' moral reasoning in a course focused on student-centered ethical dilemma discussions; this study is discussed in a later section.<sup>36</sup>

Our research has focused on the question of whether professional formation continues in graduate education and in practice by examining the understanding of professionalism of entering law students, early-career lawyers, and peer-honored exemplary lawyers. We modified Harvard psychologist Robert Kegan's in-depth interview methodology to create a short essay assessment of professional formation for entering law students and early-career lawyers<sup>37</sup> similar to those used in professional military education,<sup>38</sup> dental education,<sup>39</sup> medical education,<sup>40</sup> and collegiate coaching.<sup>41</sup> We used interviews in our exemplary lawyer study. After compiling a master list of the forty-five professionalism award winners from the Minnesota or Hennepin County (Minneapolis) bar associations who are still practicing law, we randomly selected twelve lawyers from a diverse range of organizations, including large and medium firms, legal aid organizations, and non-profits.<sup>42</sup> Appendix B outlines questions used in these assessments and an excerpt from a coding guide used in the studies in law.<sup>43</sup> Figures 1 and 2 below show a gradual shift toward later stages<sup>44</sup> of professional formation in our studies of law students and lawyers<sup>45</sup> and by researchers in profes-

35. Maury Landsman & Steven P. McNeel, *Moral Judgment of Law Students Across Three Years: Influences of Gender, Political Ideology and Interest in Altruistic Law Practice*, 45 S. Tex. L. Rev. 891, 904–05, 907 (2004); see Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 341, 352–57 (1981).

36. See *infra* Part III.B.1.a.

37. See Monson & Hamilton, *Entering Law Students*, *supra* note 22, at 386–87.

38. George Forsythe, *Identity Development in Professional Education*, 80 ACAD. MED. S-112, S-114 (2005).

39. See Muriel J. Bebeau & Verna E. Monson, *Professional Identity Formation and Transformation Across the Life Span*, in *LEARNING TRAJECTORIES, INNOVATION AND IDENTITY FOR PROFESSIONAL DEVELOPMENT* 135, 135 (Anne McKee & Michael Eraut eds., 2011).

40. See Richard L. Cruess, Sylvia R. Cruess & Yvonne Steinert, *Introduction to Teaching Medical Professionalism* 1, 1 (Richard L. Cruess et al. eds., 2009).

41. Maya G.B. Hamilton, *Ethical Professional Identity: A Pilot Study of NCAA Division I and Division III Swimming Coaches' Conceptions of Professionalism* 29–30 (May 2011) (unpublished Master's thesis, University of Minnesota) (on file with authors).

42. We do not list the organizations because of our confidentiality agreement with participants.

43. See *infra* Appendix B.

44. For an introduction to the underlying theory and research, see ROBERT KEGAN, IN *OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE* 185 (1998).

45. Hamilton & Monson, *Exemplary Lawyers*, *supra* note 12, at 27–28.

sional military education.<sup>46</sup> The four stages most relevant to adulthood and their fundamental characteristics are shown below:

**Instrumental Mind (Stage 2):** Views self in terms of own interests and desires, is egocentric; thinking is concrete, black and white (adolescence and early adulthood).

**Socialized Mind (Stage 3):** Characterized by increased shared interconnections, values, and mutual expectations. Can be idealistic and internally self-reflective, but the self can be subsumed within the social surrounding of peers, friends, spouse, or family (some adolescents and most adults are in this stage).<sup>47</sup>

**Self-Authored Mind (Stage 4):** Hallmarked by a self-defined system of values that can be distinct from one's social groups. Is increasingly self-reflective and intentional in examining the sources of one's understanding. Can self-define as a professional with a moral core of responsibility and service to others.

**Self-Transforming Mind (Stage 5):** Characterized by the ability to examine the limitations of one's self-authored personal authority, recognize the limits of any one system of constructing meaning, and seek out novel or alternative systems. Increasing recognition of the interdependencies of different systems or ways of understanding the self and the professional role.

Kegan's own longitudinal studies show similar distributions, providing evidence that professional formation toward an internalized moral core that is less egocentric and more responsible to and for others can develop across the lifespan.<sup>48</sup> Further, this construct is an analog to Rest's concept of moral identity—a capacity that moral psychologists view as critical in bridging the gap between knowing the right thing and doing it.<sup>49</sup>

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46. *Id.* at 14, 32; see Monson & Hamilton, *Early Career Lawyers*, *supra* note 22, at 140.

47. In Kegan's longitudinal studies, about two out of three adults are in Stage 3 or below. See ROBERT KEGAN & LISA LASKOW LAHEY, *IMMUNITY TO CHANGE*, at xiii, 13–17 (2009).

48. See KEGAN, *supra* note 44, at 185, 188–97.

49. The term *construct* refers to mental capacities that cannot be directly observed such as empathy, thinking, or gender. Theories of constructs are studied through developing measures that permit inferences to be made that support the validity of the construct. See *infra* Appendix A; Daniel K. Lapsley & Darcia Narvaez, *A Social-Cognitive Approach to the Moral Personality*, in *MORAL DEVELOPMENT, SELF, AND IDENTITY* 189, 194–98 (Daniel K. Lapsley & Darcia Narvaez eds., 2004).

FIGURE 1. STAGES OF PROFESSIONAL IDENTITY DEVELOPMENT AMONG LAW STUDENTS AND LAWYERS

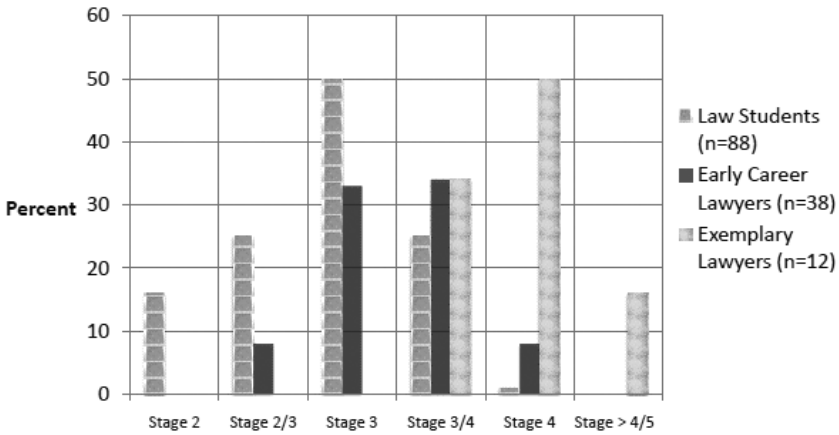
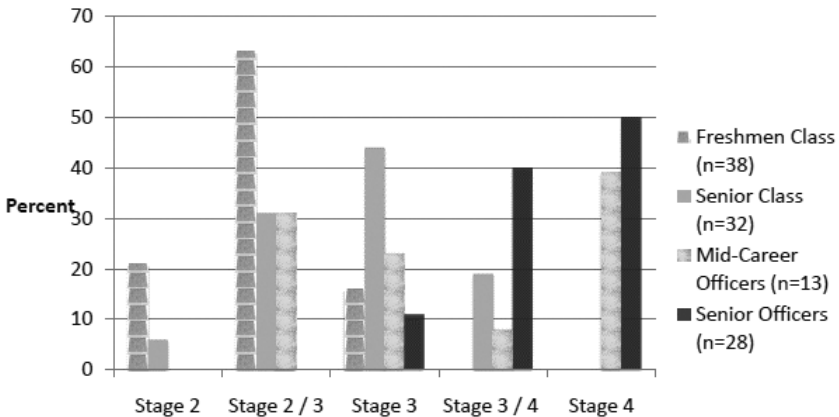


FIGURE 2. STAGES OF PROFESSIONAL IDENTITY DEVELOPMENT AMONG U.S. PROFESSIONAL MILITARY



These data support the hypothesis that professionals can move through a continuum of moral identity development in sequence from an early self-interest construct through a socialized framework toward an internalized less egocentric, more responsible, and more complex understanding of human relationships and making sense of the self in relationships.<sup>50</sup> We conclude from the data that a student’s stage of moral identity development will influence how the student understands an ethical professional identity; it follows that the learning outcomes and curriculum that each law school adopts regarding professional formation must be designed to engage each student at the student’s present developmental stage. Note that growth of

50. KEGAN & LAHEY, *supra* note 47, at xii, 16; Hamilton & Monson, *Positive Empirical Relationship*, *supra* note 3, at 149–50.

this type may be slower than growth in the cognitive and practical skills necessary for effective lawyering.

E. Peer-Honored Exemplary Lawyers' Understanding of Professionalism

Our twelve exemplary lawyers all agreed on some key elements defining their understanding of professionalism.<sup>51</sup> These are set forth in Figure 3.

FIGURE 3. MAJOR THEMES ON PROFESSIONALISM—RESULTS OF CODING

Themes, the Meaning of Professionalism
Moral core or moral compass, including: <ul style="list-style-type: none"> <li>• deep sense of responsibility to others</li> <li>• trustworthiness in relationships with others (including clients, colleagues, the profession, the justice system, and broader society)</li> <li>• honesty with self and others as an important basis of trust</li> </ul>
Counseling the client, including: <ul style="list-style-type: none"> <li>• giving independent judgment</li> <li>• candid and honest counsel informed by the lawyer's moral core</li> <li>• lawyer as facilitator in helping the client to identify the client's long-term interest, growth, or movement towards healing and forgiveness</li> </ul>
Ongoing reflection and learning (1) from mistakes or losses and (2) about the limitations of the status quo of legal practice, including: <ul style="list-style-type: none"> <li>• professional setbacks (i.e., failing to meet internalized standards of excellence or losing important cases)</li> <li>• personal setbacks (i.e., experiencing depression or loss of loved ones)</li> <li>• alternative methods of practice (e.g., mediation)</li> <li>• the limitations of the justice system in serving the poor or oppressed, or imbalances of power</li> </ul>
Self-assessment of how the meaning of professionalism has evolved: <ul style="list-style-type: none"> <li>• continuous dynamic growth in understanding and internalizing the meaning of professionalism (including reflection and learning from mistakes)</li> </ul>

The main finding of our exemplary lawyer study is that exemplars understand professionalism in a qualitatively more complex, or expert manner, than do early-career lawyers and entering law students. Our exemplars' understanding of professionalism represents a high level of competence or expertise in professionalism, providing law schools and bar associations with a clear benchmark to use in defining levels of competencies in professional-

51. Hamilton & Monson, *Exemplary Lawyers*, *supra* note 12, at 20–26.



ism.<sup>52</sup> This methodology ensures the definition of the elements of professionalism is captured, not theoretically, but in a way grounded in the realistic context of practice.

#### F. *Common Elements of Professional Formation from the Studies*

The most important finding of these studies is that a student's or practicing professional's understanding of professional formation depends upon the person's stage of development. A student can eventually grow over a career toward the internalization of a later-stage understanding of professional formation.

These studies also clarify what are the key elements of a later-stage understanding of professional formation. The studies of the understandings of professionalism from the organized profession, the legal scholars who have written on professionalism, and the five Carnegie studies on higher education for the professions, combined with the exemplary lawyers study, all agree that professionalism (professional formation) is an internalized moral core characterized by a deep responsibility or devotion to others—particularly the client—and some restraint on self-interest in carrying out this responsibility. Three of the four studies also agree that professionalism includes these elements: ongoing solicitation of feedback and self-reflection, an internalized standard of excellence at lawyering skills, integrity, honesty, adherence to the ethical codes, public service (especially for the disadvantaged), and independent professional judgment and honest counsel.

### III. ANALYZING EMPIRICAL DATA ON THE MOST EFFECTIVE PEDAGOGIES TO FOSTER PROFESSIONAL FORMATION

Essentially we are proposing that a major educational objective of legal education should be to foster internalization of the elements of professional formation in as large a proportion of students as possible. This means legal education regarding ethics would shift from its current emphasis on just the law of lawyering toward an educational objective that includes also fostering an internalized moral core, including deep responsibility to others—particularly the client—with some restraint on self-interest, a standard of excellence for technical skills, integrity, honesty, public service (especially for the disadvantaged), and independent professional judgment and honest counsel. Andrew Carnegie argues that, for medical education, “[f]ormation is the most fundamental goal of the learning process.”<sup>53</sup> The same should be true for legal education.

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52. *Id.* at 29. The literature in medical education is especially informative about the concepts and processes of defining and measuring professional competencies. For example, see Ronald M. Epstein & Edward M. Hundert, *Defining and Assessing Professional Competence*, 287 JAMA 226, 226 (2002); David C. Leach, *Competence Is a Habit*, 287 JAMA 243, 243–44 (2002).

53. COOKE ET AL., *supra* note 15, at 41.

This section analyzes the empirical evidence available on the best practices in teaching in the professions to foster these elements of professional formation.<sup>54</sup> Our conclusion from the empirical evidence is that adults are capable of cognitive, emotional, social, and moral growth throughout the lifespan, and that well-designed educational engagements can foster further growth at each stage of adult life.<sup>55</sup> We integrate historical<sup>56</sup> and holistic perspectives<sup>57</sup> with empirically-validated learning theories and applied studies in education psychology,<sup>58</sup> medical, dental,<sup>59</sup> legal, management, and engineering education<sup>60</sup> to analyze which pedagogies most effectively foster students' internalized understanding of what constitutes a moral core of both deep responsibility to others and the other elements. These pedagogies provide legal educators with practical insights on implementing classroom-based teaching methods that foster formation of this moral core.<sup>61</sup>

The central ideas of these pedagogies are that learning of this type requires both feedback from and dialogue with others plus individual reflection and that pedagogies treating students as passive receivers of information about ethics or just analytical technicians regarding the ethics rules or ethics theories are ineffective in fostering students' professional forma-

54. Our assumption, based on a wide body of theoretical and empirical evidence, is that adult students are capable of cognitive, emotional, social, and moral growth throughout the lifespan. See JAMES R. REST, *MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY* 176–77 (1986); KEGAN & LAHEY, *supra* note 47, at 309–10. Our research philosophy is that there are multiple ways of knowing (i.e., epistemological assumptions) about the relative effectiveness of a particular pedagogy; hence, the integration of holistic education with more traditionally scientific approaches throughout this article. See *infra* Appendix A for an overview of educational research paradigms.

55. See REST, *supra* note 54, at 176–77; KEGAN & LAHEY, *supra* note 47, at 309–10.

56. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* 402–18 (1916).

57. See, e.g., *id.* However, holistic and developmental approaches are central to the field of organizational development and adult education.

58. David W. Johnson & Roger T. Johnson, *Academic Controversies as a Vital Instructional Tool*, UPDATE ON LAW, Fall 1997, at 17, 17 [hereinafter Johnson & Johnson, *Academic Controversies*].

59. See Cruess & Cruess, *supra* note 3 (evaluating and identifying methods for teaching professionalism in the medical fields). Selecting studies of the effectiveness of specific pedagogies related to moral formation is complicated by two factors: (1) the fact that moral behavior results from a complex dynamic process that is itself a holistic process that presents considerable challenges to disaggregate and (2) the fact that classroom pedagogies are similarly dynamic and very few studies exist based on experimental evidence due to ethical problems of randomly assigning students to a control group and one or more pedagogies. For a summary of major educational theories and paradigms, see *infra* Appendix C.

60. Karl A. Smith et al., *Pedagogies of Engagement: Classroom-Based Practices*, 94 J. ENGINEERING EDUC. 1, 1–11 (2005).

61. For a review of cooperative learning or group learning strategies for legal educators, see Verna Monson, *Group Learning in Law Schools: A Key to Fostering Professional Formation* (Mar. 13, 2012) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=2021455>.

tion.<sup>62</sup> These active feedback, dialogue, and reflection pedagogies are not new and are as relevant to education in the professions today as more than a century ago. In 1916, John Dewey cautioned

[l]essons “about morals” signify as matter of course lessons in what other people think about virtues and duties. It amounts to something only in the degree in which pupils happen to be already animated by a sympathetic and dignified regard for the sentiments of others.<sup>63</sup>

To Dewey, moral education equated with the formation of “qualities of mind” including “open-mindedness, single-mindedness, sincerity, [and] breadth of outlook.”<sup>64</sup> Similar to the present-day Carnegie Foundation’s emphasis on professional formation as an active, ongoing reflective process of internalizing service and responsibility to others within the professional role, Dewey emphasizes that achievement of these characteristics of mind and morality is not the goal, but that the “end is *growth* itself.”<sup>65</sup> This implies that moral education’s aim is less about inculcating fixed moral traits or virtues as much as it is instilling a way of being, a state of mind in which there is constant openness to understanding the perspectives of others we encounter as professionals and a certain amount of humility at the limitations of our human capacities. It means recognizing we have the capacity for continued moral growth and our goal is not to arrive at some fixed point of what it means to someone else to be a moral person. Instead, moral education is fostering habits of mind aimed at actively seeking to understand others and stretching our moral imagination towards greater sensitivity and creativity in solving moral problems. This, according to Dewey, is the point of moral education.

Dewey’s ideas guided the major transformation of U.S. medical education a century ago led by Abraham Flexner, an educator commissioned by the Carnegie Foundation to conduct a rigorous review of medical education and make recommendations to ensure quality and uniformity of competencies among physicians.<sup>66</sup> Flexner visited all 155 medical schools existing at

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62. See DEWEY, *supra* note 56, at 411–18. Other constructivist and social learning theorists of the day included Lev Vygotsky, whose notion of engaging learners in “scaffolding” undergirds numerous education theories and approaches. Jean Piaget’s study of children’s morality similarly pointed out the social nature of moral judgment development, which later guided Lawrence Kohlberg, and more recently, to James Rest and his colleagues. See John Dewey, *The Reflex Arc Concept in Psychology*, 3 PSYCHOL. REV. 357, 370 (1896); see also *infra* Appendix C.

63. DEWEY, *supra* note 56, at 411. We make the distinction between constructivist pedagogies useful in moral education and the obligation of the professions and professional education to convey core values of the profession. See Bebeau, *Promoting*, *supra* note 28, at 386.

64. See DEWEY, *supra* note 56, at 414.

65. JOHN DEWEY, *THEORY OF THE MORAL LIFE* 172 (Arnold Isenberg ed., Holt, Rinehart & Winston 1960) (1908).

66. At the time, medical school curricula varied widely and largely consisted of lecture and rote memorization. Some schools produced physicians without either adequate scientific grounding or an ethic of service and responsibility to patients and society. As a result, there was an oversupply of poorly trained physicians. The Flexner Report resulted in closing many of the mass-

the time and analyzed the effectiveness of their pedagogies. The 1910 Flexner Report fundamentally changed how physicians are taught to practice medicine, emphasizing hands-on preparation in practicing medicine and helping medical students to internalize the core value of the profession—that the physician's moral duty is to place the interests of patients and the public above self-interest.<sup>67</sup> The Flexner Report transformed medical education toward fostering students' moral core of service and responsibility to the patient and society.<sup>68</sup>

Building on this historical backdrop of interpretive<sup>69</sup> empirical evidence,<sup>70</sup> this section reviews more recent empirical scholarship on pedagogies for professional formation.

#### A. *The Carnegie Studies and Effective Pedagogies for Professional Formation*

Based on tens of classroom visits and interviews with professors identified by colleagues as effective teachers at fifty-one site visits, the five Carnegie studies of higher education for the professions analyze the pedagogies most effective for professional formation (or what Andrew Carnegie calls the third apprenticeship for work in the professions).<sup>71</sup> One or more of the five Carnegie studies identifies twenty-two different pedagogies relevant to professional formation, but only six of the twenty-two pedagogies uniquely focus on professional formation in terms of the internalization of elements like a deep responsibility to the person served (and implicitly some restraint on self-interest), social responsibility to the community, and

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producing larger medical schools. See, e.g., Kenneth M. Ludmerer, *Abraham Flexner and Medical Education*, 54 PERSP. BIOLOGY & MED. 8, 8–9 (2011). See also *infra* Appendix C.

67. See, e.g., ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* 13, 18–19 (1910), available at [http://www.carnegiefoundation.org/elibrary/docs/flexner\\_report.pdf](http://www.carnegiefoundation.org/elibrary/docs/flexner_report.pdf). A similar effort attempted by Carnegie in 1918 in legal education, however, failed to have a similar transformative effect. For a critical analysis of the Carnegie efforts in 1918 and 2007, see James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. LEGAL INFO. 1 (2007).

68. See Maxeiner, *supra* note 67, at 6. Similar ideas founded on constructivist principles migrated to management practice around the same period, again with moral core and formation as central ideas. See, for example, MARY PARKER FOLLETT, *CREATIVE EXPERIENCE* 300–03 (1924), which applied constructivist principles to management science, foreshadowing the work of Peter Drucker, Edward Deming, and others who transformed management for decades. While the scope of this essay necessarily limits detail of the extent of this historical perspective, the pervasiveness of changes resulting from the Flexner Report and other constructivists of the day provide compelling evidence that a similar paradigm shift for legal education is overdue. See Hamilton & Monson, *Answering the Skeptics*, *supra* note 26, at 3; see also *infra* Appendix C. Unfortunately, for legal education, a similar effort to transform legal education fell in the middle of World War I, which some scholars think is the reason the Redlich Report did not have the impact in law that Flexner did in medicine. See Maxeiner, *supra* note 67, at 36.

69. For a discussion of empirical research and debate about what constitutes credible evidence, see *infra* Appendix A.

70. *Id.*

71. Hamilton, *Lessons from Carnegie*, *supra* note 14, at 9–10.

the promotion of the common good in the area of the profession's expertise. These six pedagogies specifically engage each student to answer questions on meaning and purpose such as "Who am I as a member of this profession? What am I like and what do I want to be like in my professional role? What place do ethical-social values have in my core sense of professional identity?"<sup>72</sup> A sixth and later Carnegie study of undergraduate business education uses the term "the reflective exploration of meaning" to capture the most self-reflective aspects of learning related to meaning and purpose and responsibilities to others and self.<sup>73</sup>

The following analysis will address the pedagogies that the Carnegie Foundation scholars observed in their site visits in order of the frequency that each of the professions uses these pedagogies. All five Carnegie studies found that three pedagogies uniquely focus on professional formation: (1) reflecting on the responsibilities of the profession; (2) integrating the three apprenticeships throughout education for the professions; and (3) fostering the habit of actively seeking feedback, dialogue with others about the tough calls, and reflection.<sup>74</sup> Four of the studies, *Educating Physicians*, *Educating Nurses*, *Educating Engineers*, and *Educating Lawyers*, also agree that (1) each school should give broad curricular attention to professional formation—for example, by integrating modules on professional formation into a number of courses—and (2) teacher-facilitated discussions of ethics were an effective method of incorporating professional formation into the curriculum.<sup>75</sup> *Educating Physicians* and *Educating Nurses* both note that relating content to students' developmental stage is an important element of curriculum and pedagogy in professional formation.<sup>76</sup>

The remaining sixteen pedagogies that the five studies analyzed with respect to professional formation can also promote student development for both Carnegie's first apprenticeship of knowledge of the basic doctrine of the profession and cognitive analytical skills applied to the doctrine and Carnegie's second apprenticeship of all the other practical skills necessary for effective professional work. These sixteen pedagogies will be particularly effective for professional formation when combined with pedagogies involving: (1) reflection on the responsibilities of the profession; (2) development of the habit of seeking feedback, dialogue with others on the tough ethical calls, and reflection and self-assessment; (3) teacher-facilitated discussion of ethics; and (4) awareness that educational engagements must take into account that students are at different developmental stages on pro-

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72. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 135 (2007).

73. COLBY ET AL., *supra* note 1, at 60.

74. Hamilton, *Lessons from Carnegie*, *supra* note 14, at 24.

75. *Id.* at 26–27.

76. *Id.* at 27.

fessional formation.<sup>77</sup> This paper focuses just on the most strongly endorsed of the sixteen additional pedagogies.

All five Carnegie studies found that (1) clinical education and practical experience, (2) coaching, and (3) modeling are pedagogies that can foster technical skills as well as professional formation.<sup>78</sup> *Educating Physicians*, *Educating Nurses*, *Educating Clergy*, and *Educating Lawyers* also recognize the importance of institutional intentionality<sup>79</sup> consisting of faculty setting educational goals and then actively planning to achieve those goals.<sup>80</sup> These four studies likewise found that scaffolding is an effective pedagogy.<sup>81</sup> Scaffolding provides support and guidance to enable students to perform educational objectives.<sup>82</sup>

Combining clinical education and practical experience, coaching, modeling, institutional intentionality, and scaffolding with feedback and reflection on responsibilities to the person served and others are the heart of recommendations on most effective pedagogies for professional formation based on the Carnegie Foundation's most recent reports as well as the early constructivists from John Dewey to Lawrence Kohlberg.<sup>83</sup> The central theme is exposing each student repeatedly to the context of professional practice combined with encouragement of the habit of solicitation of feedback, dialogue with others on the tough calls, and reflection on responsibilities to others and to self.<sup>84</sup>

### B. *Empirical Research Using the Four Component Model on Pedagogies of Professional Formation*

Moral psychology offers a useful analytical framework with which to explore and understand the concept of personal conscience or moral core

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77. *Id.*

78. *Id.* at 28.

79. *Id.* at 30.

80. Hamilton, *Lessons from Carnegie*, *supra* note 14, at 30–31.

81. *Id.* at 30–31.

82. *Id.*

83. *See id.* at 23–28.

84. The idea of assessment as a dynamic process forming a feedback loop is emphasized by learning theorists with the condition of support for learners—in other words, assessment and feedback can be designed as either constructive or destructive. *See, e.g.*, PATRICIA M. KING & KAREN S. KITCHENER, *DEVELOPING REFLECTIVE JUDGMENT* 230 (1994); Johnson & Johnson, *Academic Controversies*, *supra* note 58, at 17, 23. Although these pedagogies closely resemble those used in clinical legal education, our focus is on doctrinal legal courses and the relevance of constructivist pedagogies within that context. *See, e.g.*, ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 132–33 (2007), available at [http://www.law.sc.edu/faculty/stuckey/best\\_practices/best\\_practices-full.pdf](http://www.law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf); GREGORY S. MUNRO, *OUTCOME ASSESSMENT FOR LAW SCHOOLS* 16 (2000). The Standardized Client pedagogy utilizes actors playing the role of clients who are interviewed by law students. Based on this interview, the trained actor can provide formative feedback on how well the student performed in the professional role. *See* Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 *CLINICAL L. REV.* 1, 3, 19 (2006).

which is the foundation of professional formation. The moral psychology literature starts with the question, *What must we suppose happens psychologically in order for moral behavior to take place?* Morality in this meaning focuses on the social condition that humans live in groups and what one person does can affect others.<sup>85</sup> In light of this understanding that what each person does can affect others, morality provides guidelines for both optimizing the mutual benefit of people living in groups and resolving conflicts among them. Morality asks, *What do we owe others? What are our duties to them? What rights can they claim?* Scholars posit that four distinct capacities, called the Four Component Model (FCM),<sup>86</sup> are necessary in order for moral behavior to occur and that a capacity that is underdeveloped may interfere with moral behavior.

### **Component 1: Moral Sensitivity (Perceptual Clarity and Empathy)**

Moral sensitivity is

the ability to interpret the reactions and feelings of others. It involves being aware of alternative courses of action, knowing cause-consequence chains of events in the environment and how each could affect the parties concerned. . . . For individuals being socialized to professional practice, ethical sensitivity involves the ability to see things from the perspective of other individuals and groups . . . and more abstractly, from legal, institutional and national perspectives. Thus, it includes knowing the regulations, codes and norms of one's profession, and recognizing when they apply.<sup>87</sup>

Rest viewed empathy—the vicarious experience of another person's feelings, thoughts, and situation—as an analog to moral sensitivity.<sup>88</sup> We fol-

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85. This body of scholarship understands “morality” as rooted in the human psyche and the social condition that what one person does can affect others. REST, *supra* note 54, at 1 (“The function of morality is to provide basic guidelines for determining how conflicts in human interests are to be settled and for optimizing mutual benefit of people living together in groups. It provides the first principles of social organization; it remains for politics, economics, and sociology to provide the second-level ideas about the specifics for creating institutions, role-structure, and practices.”).

86. The first reference to the Four Component Model was in James Rest, *Morality*, in 3 HANDBOOK OF CHILD PSYCHOLOGY: COGNITIVE DEVELOPMENT 556–58 (Paul Mussen et al. eds., 4th ed. 1983).

87. Bebeau, *The Defining Issues Test*, *supra* note 28, at 283. Ethical sensitivity tests in dentistry, teacher education, engineering, and science have been developed and validation studies support the ability to assess this capacity. In teacher education, the test is focused on sensitivity to race and gender issues. We use “Perceptual Clarity” to refer to the human tendencies to over-rely on intuition or mental shortcuts that may interfere with perception of ethical issues. For an overview of this area of scholarship and research, see DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011); Di You, Yukiko Maeda, & Muriel J. Bebeau, *Gender Differences in Moral Sensitivity: A Meta-Analysis*, 21 ETHICS & BEHAV. 263 (2011).

88. James R. Rest, *A Psychologist Looks at the Teaching of Ethics*, HASTINGS CENTER REP., Feb. 1982, at 30; REST ET AL., *supra* note 28, at 41. The capacity for professionals to empathize

low Rest's interpretation that the meaning of morality and ethics are equivalent and thus use the words interchangeably.

### Component 2: Moral Reasoning and Judgment

"Once the person is aware of possible lines of action and how people would be affected by each line of action (Component [One]), then Component [Two] judges which line of action is more morally justifiable—which alternative is just, or right."<sup>89</sup> It involves deliberation regarding the various considerations relevant to different courses of action and making a judgment regarding which of the available actions would be most morally justifiable. It entails integrating both shared moral norms and individual moral principles.<sup>90</sup>

We looked at the DIT, which is a moral reasoning assessment, and three moral schemas underlying the DIT earlier in Section II.D. In general, these moral reasoning and judgment studies indicate that as individuals advance in both education and age, their reasoning and judgment become more complex and can move from personal interest schemas to maintaining norms schemas and eventually to a post-conventional schema involving appeals to normative ethics.<sup>91</sup>

### Component 3: Moral Motivation and Identity

The third component is conceptualized as *motivation and commitment* as well as *identity formation*, referring to how the individual conceptualizes

with patients, clients, or customers is associated with reduced malpractice claims and increased customer service satisfaction. For example, some medical insurers now offer training for physicians in how to communicate with the patient and/or the family following an adverse event. Effective, empathic communication reduces malpractice civil claims and reduces the size of settlement offers. For an introduction to the topic, see Pauline W. Chen, *Well; Once Sued, Many Are Twice Shy*, N.Y. TIMES, Dec. 20, 2011, <http://query.nytimes.com>; Howard Beckman et al., *The Doctor-Patient Relationship and Malpractice: Lessons from Plaintiff Depositions*, 154 ARCHIVES INTERNAL MED. 1365 (1994). In management, empathy in customer relationships is conceptualized as a means of achieving customer loyalty and gaining a competitive advantage in the market. See, e.g., TRACI ENTEL ET AL., THE EMPATHY ENGINE: TURNING CUSTOMER SERVICE INTO A SUSTAINABLE ADVANTAGE 8–12 (2007), available at [http://www.booz.com/media/uploads/The\\_Empathy\\_Engine.pdf](http://www.booz.com/media/uploads/The_Empathy_Engine.pdf); Sundar G. Bharadwaj et al., *Sustainable Competitive Advantage in Service Industries: A Conceptual Model and Research Propositions*, 57 J. MARKETING 83, 84, 86–87 (1993).

89. JAMES R. REST & DARCI NARVAEZ, MORAL DEVELOPMENT IN THE PROFESSIONS: PSYCHOLOGY AND APPLIED ETHICS 23–24 (1994). More recent scholarship on moral judgment is de-emphasizing any implication that there is a linear sequence of psychological processes leading to moral behavior. Recent articles frame the four component process as an interactive, dynamic process model. See, e.g., Muriel Bebeau & Verna Monson, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education*, in HANDBOOK ON MORAL AND CHARACTER EDUCATION 560 (Larry Nucci et al. eds., 2008).

90. Over a lifetime, the two most important factors influencing growth in moral judgment as measured by the moral reasoning tests developed in this body of scholarship are education and age, with education being a far more powerful predictor of moral judgment development. REST & NARVAEZ, *supra* note 89, at 13–15; REST ET AL., *supra* note 28, at 35–43; Bebeau, *Promoting*, *supra* note 28, at 367, 370 (asserting that young people are naturally more self- rather than other-centered and learning to serve others is a mark of moral maturity).

91. See REST & NARVAEZ, *supra* note 89, at 13–15; REST ET AL., *supra* note 28, at 35–43.



the moral self. The prioritization of moral values involving concern for others over other competing values, needs, or interests are key features of the formation of the moral self. Daniel Lapsley and Darcia Narvaez describe the role of the moral self as pivotal in closing the gap between knowing and doing what is just or good.<sup>92</sup> Professional identity formation also involves weighing the obligation of the profession to the client and to society against one's self interest.

How individuals make sense of the self tends to evolve over time from less to more complex. In childhood, self-interest may dominate our thinking and our perspectives of people or problems are shaped or defined by our family or peers. But as we encounter new challenges and resolve them, our thinking can grow to encompass more diverse and complex perspectives. Research of Robert Kegan and Lisa Laskow Lahey reveals a developmental continuum of identity, proceeding in a sequence from self-interest and concreteness of thought to more other-oriented and abstract ways of making sense of the self.<sup>93</sup> At more complex levels of identity formation, the individual's personal and moral values are fully integrated and consistent across context and situation. We looked at research on the stages of professional identity formation earlier in Section II.D.

#### **Component 4: Moral Implementation—Conscience in Action—Interpersonal Abilities**

The fourth component involves the process of *implementation* of the decision, which involves *moral character and competence*. According to Rest,

Component 4 involves executing and implementing a plan of action. . . [and] involves figuring out the sequence of concrete actions, working around impediments and unexpected difficulties, overcoming fatigue and frustration, resisting distractions and allurements, and keeping sight of the eventual goal.<sup>94</sup>

Moral implementation consists of carrying out a moral decision. In the professions, moral implementation is typically social, involving interpersonal interaction among clients, peers, colleagues, superiors, or others in the community including adversaries. Elements of morality are reflected in interpersonal relationships through demonstrating respect for others, being fair, showing concern for others' well-being, taking responsibility for one's errors or misjudgments, or taking risks to contribute to the greater good. Moral implementation involves informing, persuading, or negotiating with others with respect to the moral dimensions of problems. It may involve sustained efforts over time to address a problem in society or to build trust in situations torn by conflict or strife. Perseverance, creative problem solv-

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92. Lapsley & Narvaez, *supra* note 49, at 193–95.

93. KEGAN & LAHEY, *supra* note 47, at 16–17.

94. REST, *supra* note 54, at 15.

ing (including strategic thinking and the selection of strong allies), and resistance in conforming to corrupt peers or authority are also important in moral implementation.

In the remainder of this Section, we review empirical research on effective pedagogies for each FCM component in the order of how much empirical research we could find on effective pedagogies for each FCM component.<sup>95</sup> We suggest several caveats. First, how specific pedagogies, or facilitative educational engagements, shape specific moral capacities are empirical questions. This paper analyzes the current empirical studies that point out significant relationships between pedagogies and specific moral capacities—but the reality is the study of professional formation is a field that is in itself still in formation, with more work needed on the development of measures that yield valid and reliable data in order to study the relation between various pedagogies and one or more individual moral capacities. Second, Rest cautioned against the oversimplification that the FCM is a sequential, four-step model that results in moral behavior where each component is independent of the other three.<sup>96</sup> It would be a misunderstanding of the FCM to assume that any particular pedagogy promotes formation in only one component—there are likely effects that “spill over” into multiple capacities. Again, professional formation and the study of pedagogies related to fostering growth in moral capacities will be challenging because of overlap in the concepts, the spillover effects of any pedagogy on other capacities, and the need to take into account a large number of variables, including the social, environmental, or historical factors that shape behavior. This suggests the value of holistic approaches to judging effectiveness should be kept foremost in mind. In the final analysis, Rest’s FCM is holistic in nature, and throughout this paper professional formation and holistic professional formation are used as synonyms.<sup>97</sup>

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95. See *infra* Appendix A for discussion of different paradigms of educational research and judging the trustworthiness or validity of conclusions based on different types of empirical research. Because educators and psychologists can never “get inside someone’s head” or directly observe another person’s thinking or feeling directly, we must rely on inferences from complex sources of data, unlike hard sciences, in which observations can be made directly. Observations and inferences about learning, as well as other latent psychological processes, thus contain some measurement error.

96. REST, *supra* note 54, at 15. Despite this caveat, the empirical literature in higher education and the professions contains dozens, if not hundreds, of studies based on the FCM that make this error. The FCM is a dynamic process model—meaning that the complexities of human thinking and behavior exceed scientists’ ability to mathematically model each factor involved with decision making or behavior. Moral behavior is a more complex phenomenon involving individual and environmental variables. See *id.* at 1–3, 56; see also REST ET AL., *supra* note 28, at 35.

97. The fact that the FCM is a model, and not theory, implies a large number of variables are involved in a complex process—both within the individual and the environment.

*1. Pedagogies for Moral Judgment and Reasoning (Component Two)*

We start by looking at studies using the DIT discussed earlier in Section II.D. to analyze which pedagogies increase moral reasoning or judgment.<sup>98</sup> The DIT has a strong track record of validity and reliability in higher education studies.<sup>99</sup>

*a. The Use of Teacher-Facilitated Discussion of the Ethical Dimension of Cases to Foster Moral Judgment*

The strongest body of empirical evidence on the use of teacher-facilitated discussion of the ethical dimension of cases to foster moral reasoning and judgment comes from a meta-analysis of thirty-three studies of ethics education in the professions.<sup>100</sup> Muriel Bebeau found that “[u]nlike college education, professional school curricula seems not to promote reasoning development . . . unless there is an ethics component that involves students in the discussion of ethical issues.”<sup>101</sup>

For Bebeau, discussion of ethical issues in cases that are richly layered with competing duties, responsibilities, and rights promotes the development of moral judgment.<sup>102</sup> Cases should reflect a wide variety of opinions or interpretations. The protagonist of the case should be a professional facing an ethical dilemma.

In order to foster moral judgment, the instructor assigns a case with a complex problem. Students take a position on how the problem should be resolved, identifying the issues, affected parties, consequences, and duties raised by the case. After a brief discussion in class, the instructor asks students to reverse their position; reassess their original position; and again, list arguments or reasons to support this position, which is then used to develop a short essay on the case. A checklist or scoring rubric for each case can be developed to assess students’ recognition of the multiple ethical issues contained within each case.<sup>103</sup> The resulting scores can be used as a formative assessment, offering students a chance to review the case and resubmit their responses for re-grading.<sup>104</sup> Included as Appendix D are examples of how cases in law can be adapted to foster growth in each of the moral capacities.<sup>105</sup>

98. See Rest, *supra* note 86.

99. Bebeau, *The Defining Issues Test*, *supra* note 28, at 289; see PASCARELLA & TERENZINI, *supra* note 33, at 346–47.

100. Bebeau, *The Defining Issues Test*, *supra* note 28, at 273, 289.

101. *Id.* at 289.

102. See *infra* Appendix E.

103. Bebeau, *The Defining Issues Test*, *supra* note 28, at 287; see also The Don Glidden Case (unpublished handout) (on file with second author); Evaluating Ellen’s and Todd’s Responses: The Don Glidden Case Scoring Guide (unpublished handout) (on file with second author).

104. Bebeau, *The Defining Issues Test*, *supra* note 28, at 287.

105. See *infra* Appendix E.

In facilitating discussion, instructors should recognize that students will have multiple and varied epistemic beliefs on the nature of knowledge and of truth. Another scholar using cases as a pedagogy to foster professional formation recommends challenging students' assumptions about what they know.<sup>106</sup> "When their responses are dogmatic, I foster all their doubts; when they seem mired in skepticism or paralyzed by complexity, I push them to make judgments; when their tactics are not fully reflective, I encourage their best efforts to use critical, evaluative thinking."<sup>107</sup>

A pedagogy called constructive controversy is a variation of case discussion to foster moral judgment.<sup>108</sup> With this method, students working in teams take an initial position on a complex ethical issue and then reverse positions, requiring them to prepare strong oral arguments for both positions. Research shows constructive controversy is effective in promoting development in moral reasoning, moral motivation, and moral implementation.<sup>109</sup> This pedagogy also fosters integrative thinking—a more complex view of a problem that integrates the interests of two or more positions by developing a third integrative position.<sup>110</sup>

Empirical research on fostering moral judgment specifically in legal education is undeveloped, but a few correlational or convenience sample studies should be noted. For example, Hartwell assigned realistic legal

106. See BARRY M. KROLL, *TEACHING HEARTS AND MINDS* 13 (1992). Developing students' reflective capacities can also be facilitated through writing assignments (e.g., journals and essays). Reflective writing has a strong presence in medical education and methods of reliable and valid assessment of the depth of reflection have been developed. See, e.g., Hedy S. Wald et al., *Fostering and Evaluating Reflective Capacity in Medical Education: Developing the REFLECT Rubric for Assessing Reflective Writing*, 87 *ACAD. MED.* 41, 41–50 (2012).

107. KROLL, *supra* note 106, at 13.

108. For a review of the literature on constructive controversy in legal education, see DAVID W. JOHNSON & FRANK P. JOHNSON, *JOINING TOGETHER: GROUP THEORY AND GROUP SKILLS* 348–51 (10th ed. 2009); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 *SAN DIEGO L. REV.* 347, 379–83 (2001); ROY STUCKEY ET AL., *supra* note 84, at 138–39. See generally James E. Moliterno, *On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010*, 46 *J. LEGAL EDUC.* 67, 67–78 (1996) (describing the shift in legal education to include clinical and role-sensitive education that develops the thought processes inherent to lawyering); David Dominguez, *Principle 2: Good Practice Encourages Cooperation Among Students*, 49 *J. LEGAL EDUC.* 386 (1999) (providing examples of cooperative learning exercises that enhance student performance in stressful situations and enable them to challenge the status quo); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 *J. LEGAL EDUC.* 313 (1995) (suggesting that progress in cognitive science provides insight into understanding how lawyers develop judgment, wisdom, expertise, and problem-solving capacities).

109. Michelle Tichy et al., *The Impact of Constructive Controversy on Moral Development*, 40 *J. APPLIED SOC. PSYCHOL.* 765, 785 (2010). In this study, researchers did not find increases in moral sensitivity with constructive controversy pedagogy. *Id.* at 779. The research design was experimental, with a control group. *Id.* at 770. The setting was a middle school. *Id.* at 769. Further studies are needed to replicate this study with law students.

110. See Smith et al., *supra* note 60, at 9; see ROGER FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 71, 80 (2011).

cases to formal groups, asking them to formulate a consensus opinion; at the end of the course, he found statistically significant gains in moral judgment<sup>111</sup> and the change sustained for at least four months after the course concluded.

*b. Service Learning and Moral Judgment*

In higher education studies, there is a well-established body of work that service-learning experiences can foster moral reasoning. In order to be most effective, service learning needs to be integrated with formal ethics instruction, including reflection.<sup>112</sup> The reflection component can be facilitated through journal assignments, professor- or student-led discussions, student presentations, or creative projects.<sup>113</sup> Service learning positively influences the extent to which students view giving back to the community and striving for social justice as important.<sup>114</sup> There is additional evidence, based on Pascarella and Terenzini's comprehensive review of educational research, that focusing on diversity content within courses "such as racism, sexism, classism, and homophobia positively influences growth in principled moral reasoning."<sup>115</sup>

*c. Pedagogies of Reflective Judgment*

Reflective judgment<sup>116</sup> is a developmental construct similar to moral judgment. It is closer, in a sense, to the holistic formation that Dewey discussed in his writing in the 1930s,<sup>117</sup> noting the importance of reflecting upon the complexity of problems and frequent lack of clear-cut solutions. Reflective judgment can be assessed through an in-depth interview that is also useful as a formative assessment or outcome assessment measure.

Based on their studies, King and Kitchener suggest practical pedagogies for fostering growth in reflective judgment. In the early stages of reflective judgment, there is a reliance on what experts or authorities think. In later stages, there is an increased appreciation for the limitations of evidence and for multiple ways of understanding problems. In later stages of reflective judgment, there is recognition "that knowledge claims must be evaluated in relationship to the context in which they were generated to determine their validity . . . [there is a] willingness to reevaluate the ade-

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111. Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 522–23, 527 (1995). It is important to note that research design is very challenging and to understand threats to validity are inherent in this kind of research.

112. PASCARELLA & TEREZINI, *supra* note 33, at 369.

113. HARRY C. SILCOX, A HOW TO GUIDE TO REFLECTION: ADDING COGNITIVE LEARNING TO COMMUNITY SERVICE PROGRAMS 46–73 (1993); JOHN DEWEY, HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS 8 (1933).

114. See SILCOX, *supra* note 113, at 24–25.

115. PASCARELLA & TEREZINI, *supra* note 33, at 369.

116. See KING & KITCHENER, *supra* note 84, at 6–8.

117. See DEWEY, *supra* note 113.

quacy of their judgments as new data or new methodologies become available.”<sup>118</sup>

King and Kitchener developed general pedagogical guidelines for instructors that provide a good summary of constructive-developmental approaches.<sup>119</sup> These include:

- Show respect for students' assumptions, regardless of the developmental stage(s) they exhibit. Their assumptions are genuine, sincere reflections of their ways of making meaning, and are steps in a developmental progression. If students perceive disrespect or lack of emotional support, they may be less willing to engage in challenging discussions or to take the intellectual and personal risks required for development.
- Discuss controversial, ill-structured issues with students throughout their educational activities, and make available resources that show the factual basis and lines of reasoning for several perspectives.
- Create many opportunities for students to analyze others' points of view for their evidentiary adequacy and to develop and defend the evidentiary accuracy of their own points of view about controversial issues.
- Teach students strategies for systematically gathering data, assessing the relevance of the data, evaluating data sources, and making interpretive judgments based on the available data.
- Give students frequent feedback, and provide both cognitive and emotional support for their efforts.
- Help students explicitly address issues of uncertainty in judgment-making and to examine their assumptions about knowledge and how it is gained.
- Encourage students to practice their reasoning skills in many settings, from their other classes to their practicum sites, student organizations . . . and elsewhere, to gain practice and confidence applying their thinking skills.<sup>120</sup>

## 2. *Pedagogies for Moral Motivation/Identity Formation* (Component Three)

The importance of fostering moral motivation and professional identity relates to the body of literature from lifespan human development pointing to its role in bridging the “moral judgment/action gap”—or the difference

118. Patricia M. King & Karen S. Kitchener, *The Reflective Judgment Model: Twenty Years of Research on Epistemic Cognition*, in PERSONAL EPISTEMOLOGY: THE PSYCHOLOGY OF BELIEFS ABOUT KNOWLEDGE AND KNOWING 37, 40 (Barbara K. Hofer & Paul R. Pintrich eds., 2002).

119. Patricia M. King, *Educational Implications*, REFLECTIVE JUDGMENT, <http://www.umich.edu/~refjudg/edimplications.html> (last visited Aug. 6, 2012); see KING & KITCHENER, *supra* note 84, at 231–55.

120. King, *supra* note 119.

between knowing what is the right thing to do (from moral reasoning in Component Two) and actually following through on it.<sup>121</sup> Section II.D. earlier analyzed empirical studies of the stages of professional identity for military professionals, law students, and lawyers. These studies indicate that professionals over their careers can move through a continuum of identity development in sequence from an early self-interest construct through a socialized framework toward an internalized less egocentric, more responsible understanding of human relationships and making sense of the self in those relationships.<sup>122</sup> However, in lifespan development research, this component is also one of the most challenging to measure;<sup>123</sup> the majority of experts utilize in-depth interviews requiring extensive background and training in order to score the interviews reliably.<sup>124</sup>

### a. *Holistic Approaches*

Based on their empirical research, Kegan and Lahey suggest holistic approaches to foster growth in professional identity. They conclude that cognitive disequilibrium is the condition for development.<sup>125</sup> These engage-

121. See Lapsley & Narvaez, *supra* note 49, at 195–200.

122. See Monson & Hamilton, *Entering Law Students*, *supra* note 22, at 388 tbl.1; Monson & Hamilton, *Early Career Lawyers*, *supra* note 22, at 136–39.

123. Understanding what pedagogies are most effective at fostering moral motivation and identity formation is more challenging than moral judgment because it is commonly defined operationally as cognition, emotion, and social capacities. This level of complexity of what psychologists call a “latent construct”—an ability measured based on inferences—requires holistic approaches to assessment and a high level of knowledge in order to demonstrate fidelity to the underlying theory. Research designs that would establish clear causal linkages between specific pedagogies and growth in specific aspects of identity formation do not exist. Depending on the perspective of the theorist, reductionist approaches to measuring such a complex construct may be imprudent, depending on how the assessment is to be used. Reductionist approaches to measuring this construct, if not used as a formative assessment pedagogy, also run the risk of labeling individuals inaccurately, stereotyping, or self-fulfilling prophecy. Constructivism requires a co-construction of meaning—best practices in measuring discuss the importance of dialogue and relationship with students in determining the assessment. See, e.g., Marcia B. Baxter Magolda & Patricia M. King, *Interview Strategies for Assessing Self-Authorship: Constructing Conversations to Assess Meaning Making*, 48 J.C. STUDENT DEV. 491, 504 (2007). Indices of reliability and validity of such approaches, while meeting standards such as formative assessment tools do not meet clinical standards of test validity. Nonetheless, the value of identity formation assessments as a pedagogy to promote dialogue and foster growth is endorsed by contemporary constructivist theorists and lifespan developmental psychologists.

124. LISA LAHEY ET AL., A GUIDE TO THE SUBJECT-OBJECT INTERVIEW: ITS ADMINISTRATION AND INTERPRETATION 356–60 (1988).

125. REST ET AL., *supra* note 28, at 32. The term *cognitive disequilibrium* was first used by cognitive developmental psychologist Jean Piaget to describe the active process involved as a child encounters new information which challenges his current ideas, and subsequently, through a process of assimilation and accommodation, constructs new, more complex cognitive abilities. Thus learning is viewed as an active process of the children interacting with the social and physical environment, guided by teachers or parents—as opposed to the notion of the teacher “filling up” the child with facts or knowledge. Kohlberg, Rest, and Kegan all build upon Piaget’s work. For an introduction to Piaget’s work, see JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932).

ments should ask questions to create cognitive disequilibrium appropriate for each student's stage of professional identity (and also moral reasoning).<sup>126</sup>

Kegan and Lahey point to the importance of shaping the social environment that surrounds the learner—what they call a climate of “optimal conflict.”<sup>127</sup> Four conditions describe this type of social learning environment, including:

1. for growth to occur, a problem must represent a “persistent experience of some frustration” or “quandary”;
2. the problem must challenge one's assumptions and beliefs or “our current way of knowing”;
3. the underlying issues must connect deeply to who we are and what we value; and
4. social support from instructors, supervisors, mentors, peers, and others must be effective to prevent the student from being overwhelmed or able to “escape or diffuse it.”<sup>128</sup>

*b. Case Method Approaches to Fostering Identity Formation*

Based on her empirical studies, Bebeau suggests the use of case discussion to promote moral motivation or identity formation to encourage the “learner to think about their future as a [professional].”<sup>129</sup> This pedagogy aims to clarify the role and responsibilities of the professional as well as to highlight role conflicts and conflicts of interest that professionals must often face. She recommends the following questions for use in classrooms focusing on case discussion:

1. What are the conflicts in the case about?
2. What do you, personally, plan to do when such conflicts arise?
3. What role models have you observed?
4. What do you think someone that you admire as a role model, might do?
5. [W]hat do you think [the protagonist of the case] would do?<sup>130</sup>

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126. See Neil Hamilton, Foreword, *The Formation of an Ethical Professional Identity in the Peer-Reviewed Professions*, 5 U. ST. THOMAS L.J. 361, 363 (2008).

127. See KEGAN & LAHEY, *supra* note 47, at 54.

128. *Id.* at 54. Colby and Sullivan discuss the serious misalignment between the educational goal of fostering each student's ethical professional identities and the contexts and cultures in which students presently matriculate. Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404, 406 (2008).

129. Michael Zigmond & Muriel Bebeau, Developing Abilities Using Cases 3 (2007) (unpublished handout to accompany Bebeau's presentation, *Guided by Theory, Grounded in Evidence: A Way Forward for Business Ethics*, at the Mendoza College of Business, Notre Dame University) (on file with second author), available at [www.crlt.umich.edu/inst/Bebeau/DevAbilUsingCases.doc](http://www.crlt.umich.edu/inst/Bebeau/DevAbilUsingCases.doc).

130. *Id.*



If time does not permit in-class discussion, short essay assignments that utilize these types of questions can be used as a formative assessment pedagogy or as an outcome assessment tool.<sup>131</sup>

*c. Coaching*

In one of the initial studies that utilized essays, Muriel Bebeau and Philip Lewis used students' responses to essay questions to facilitate individual identity formation growth. The instructor needs to understand the underlying key developmental challenges for each student and ask questions that then foster cognitive growth.<sup>132</sup> Below is an example and analysis of how the instructor can target key questions to that student's level of development. Note that the stages referred to below were discussed earlier in Section II.D.

TABLE 1.

Coaching a Student at Stage 2 who is grappling with self-interest and dualism.<sup>133</sup>

*Strategy: When the student sees only his/her interest in the situation, encourage perspective taking.*

**Ask:**

Does everyone see it the way you do? How did the other person think about what you did or said? Is there any evidence to support your view? Some people think there are situations which are not clearly right or wrong. Can you think of such examples?

**Ask:**

What does (name other party) care about? How does the profession think about that? How would you feel if you were on the

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131. Muriel J. Bebeau & Verna Monson, *Professional Identity Formation and Transformation Across the Life Span*, in 7 *LEARNING TRAJECTORIES, INNOVATION AND IDENTITY FOR PROFESSIONAL DEVELOPMENT* 135, 155 (Anne McKee & Michael Erait eds., 2012); see KEGAN & LAHEY, *supra* note 47, at 114–15 (highlighting that most faculty surveyed considered teaching methods other than formal lectures to be more appropriate for meeting learning objectives); Monson & Hamilton, *Entering Law Students*, *supra* note 22, at 391–93 (describing a method of using short answer essays to assess ethical professional identity); Hamilton & Monson, *Exemplary Lawyers*, *supra* note 12, at 32–33 (providing questions to promote further thinking about respondents' written replies).

132. Muriel J. Bebeau & Philip Lewis, *Manual for Assessing and Promoting Formation 1* (2004) (unpublished manuscript) (on file with author). The general approach to developmental coaching should not guard against labeling or judging students but rather engage them in a dialogue and encourage them to be reflective. For a summary of interview techniques that are used in coaching, see Magolda & King, *supra* note 123. The growth to Kegan's stage of self authorship is an inherent goal of the type of interview strategies described in Bebeau and Lewis, and Magolda and King—they are essentially coaching techniques. Coaching is based on the assumption that the student is not suffering from mental illness or personality disorder, which would require a licensed counselor or psychotherapist.

133. See *infra* Appendix D.

receiving end of that action? How would your friend (or family) feel? Do you actually know what your friend (parent, superior, subordinate) thought about what you did? Did you ask? It is helpful to ask and to collect evidence on how others see things. Ask the student to *take the other's perspective with respect to his or her intent or experience.*

**Ask:**

Do you think the other person perceived what you did as helpful, disrespectful, dishonest, etc.?

The most critical point for this pedagogy is that educators must facilitate dialogue with individual students, in which the student can freely reflect on the student's current system of meaning making, without fear of being labeled or judged.<sup>134</sup> Section III.C., later in the paper, discusses the importance of formative assessment that fosters growth. For example, presenting a student with a single number representing the student's level of development is not the goal of this pedagogy.<sup>135</sup> It is highly recommended that educators study the method before applying it.<sup>136</sup>

### 3. *Pedagogies for Perceptual Clarity and Empathy (Component One)*

Perceptual clarity and empathy, more commonly referred to as moral sensitivity, is the ability to detect moral issues from ambiguous clues in cases or clinical settings.<sup>137</sup> The empirical study of pedagogies of moral sensitivity in legal education tend to be confined to clinical legal education.<sup>138</sup> John Montgomery, of the University of South Carolina School of Law, discusses the importance of empathy more broadly to the legal profession and professionalism, stating:

I suggest that a useful conceptualization of professionalism should include empathetic understanding. Stated differently, professionalism requires empathetic understanding of the interests of others, in addition to competency. This focuses specifically on the areas most associated with professionalism's decline; lack of re-

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134. The opposite scenario, of dealing with students who display arrogance or intolerance, presents more challenges using this pedagogy. Bebeau, *Promoting*, *supra* note 28, at 382 (citing Maxine S. Papadakis, Carol S. Hodgson, Arianne Teherani & Neal D. Kohastu, *Unprofessional Behavior in Medical School Is Associated with Subsequent Disciplinary Action by a State Medical Board*, 79 ACAD. MED. 244 (2004)).

135. For this assessment approach to be used in a counseling or clinical setting requires special training and certification to ensure compliance with codes of ethics for student assessment by the American Educational Research Association and the American Psychological Association.

136. See KEGAN, *supra* note 44, at 3.

137. See Bebeau & Monson, *supra* note 89, at 569. Rest viewed empathy as an analog for moral sensitivity.

138. See Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1, 1 (2006).

spect and failure to support the profession. Empathetic understanding touches all aspects of professionalism.<sup>139</sup>

Montgomery's assertion that empathy is central to professionalism is timely in light of recent empirical studies that show empathy is declining in society.<sup>140</sup> In the last decade in graduate medical and dental education, research on how to assess empathy and the effects of the curriculum and specific pedagogies on students' abilities to empathize with patients, has flourished, providing some insights for legal education.<sup>141</sup> The impetus for this research stems from a movement to define professionalism competencies of physicians, and to research that shows numerous benefits of physician empathy including improved diagnostic accuracy, patient satisfaction, patient motivation to follow a treatment plan, patient outcomes, and decreased complaints or malpractice claims.<sup>142</sup>

With Montgomery's recommendation in mind, we identified empirical studies on the most effective pedagogies of teaching empathy, taking advantage of the abundance of scholarship and empirical research within the health professions education. Because of the breadth of the empirical research we identified, we will provide a condensed summary of the topic, acknowledging a full review would require a much more comprehensive review. We first summarize the definition of empathy we are using, the major approaches and issues involved with measurement of the construct, and provide a sample of studies that control for different possible sources of bias through the research design.<sup>143</sup>

Definitions of empathy emphasize vicariously experiencing another person's emotions in ways that lead to greater understanding or sensitivity to the situation.<sup>144</sup> It differs from sympathy, which can be perceived as pity, causing the sympathizer to focus on the self, rather than helping the person who is suffering.<sup>145</sup> Hoffman defines empathy "as an affective response more appropriate to another's situation than one's own," and states that it is

139. John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 336 (2008).

140. There is evidence that empathy is declining among college students over the past two decades. See Sara H. Konrath, Edward H. O'Brien & Courtney Hsing, *Changes in Dispositional Empathy in American College Students over Time: A Meta-Analysis*, 15 PERSONALITY & SOC. PSYCHOL. REV. 180, 185-87 (2011).

141. A search of the database PubMed using keywords empathy and education yielded 3,907 results.

142. See Kathy A. Stepien & Amy Baernstein, *Educating for Empathy: A Review*, 21 J. GEN. INTERNAL MED. 524, 524-530 (2006).

143. Educational research on non-cognitive capacities such as empathy present many challenges for researchers. See *infra* Appendix A.

144. See MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT 29-30 (2001).

145. *Id.* at 30. Recent studies in neuroscience point to the developmental aspects of empathy, with early manifestations associated with the amygdala and later developments associated with the prefrontal cortex. See Jean Decety, Kalina J. Michalska & Katherine Kinzler, *The Developmental Neuroscience of Moral Sensitivity*, 3 EMOTION REV. 305, 305-07 (2011).

one of the most fundamental of moral emotions.<sup>146</sup> In the health professions, however, it is defined as a multidimensional construct that is cognitive, emotional, and moral.<sup>147</sup> Decades of work in developing measures for assessing empathy in medical education provide insight into the outcomes of graduate medical education and the effectiveness of different pedagogies of empathy.<sup>148</sup>

The literature in medical education on teaching empathy is divided by measurement philosophy. One group of measures rely on short surveys and self-report or self-assessment. Others rely on observation of behaviors such as interaction with peers, patients, or actors playing the role of the patient or coding of transcripts of dialogue with patients or role plays.<sup>149</sup> Over the past decade, several studies claimed that empathy declines among medical and dental students from entry to the program to graduation.<sup>150</sup> More recently, this claim was challenged by a re-analysis of data from these studies, which revealed that sampling procedures may have led to bias.<sup>151</sup>

**Medical education.** A recent review of studies of pedagogies of empathy in medical education states four general types.<sup>152</sup> These include: (1) narratives based on reflective writing, theater, or literature;<sup>153</sup> (2) experiential learning, ranging from role play to activities aimed at experiencing what having an illness is like as a patient;<sup>154</sup> (3) pedagogies incorporating communication skills training; and (4) pedagogies that are aimed at fostering psychological, emotional, or spiritual health.<sup>155</sup>

146. HOFFMAN, *supra* note 144, at 4.

147. Susan Rosenthal et al., *Humanism at Heart: Preserving Empathy in Third-Year Medical Students*, 86 *ACAD. MED.* 350, 350–58 (2011).

148. For background on the theoretical and applied research on empathy in health professions, see Verna Monson, *Moral Judgment, Role Concepts, and Empathic Response as Predictors of Dental Student Clinical Effectiveness 2* (Jan. 2009) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author).

149. For a review of the issues surrounding measuring empathy, see Jerry A. Colliver et al., *Reports of the Decline of Empathy During Medical Education Are Greatly Exaggerated: A Re-examination of the Research*, 85 *ACAD. MED.* 588 (2010).

150. *Id.* at 588.

151. *Id.* at 592.

152. See Stepien & Baernstein, *supra* note 142, at 524–30.

153. Pedagogies utilizing classic literature, theater, or plays can be useful pedagogies in increasing empathy when combined with reflection on the experience. See, e.g., Linda A. Deloney & C. James Graham, *Wit: Using Drama to Teach First-Year Medical Students About Empathy and Compassion*, 15 *TEACHING & LEARNING MED.* 247, 247–51 (2003).

154. An example of this pedagogy involves assigning medical students to visit a teaching hospital, giving essentially a false diagnosis in order to experience how they are treated by attending physicians or other personnel in the process. See, e.g., Michael Wilkes et al., *Towards More Empathic Medical Students: A Medical Student Hospitalization Experience*, 36 *MED. EDUC.* 528, 528–33 (2002).

155. See, e.g., Lisabeth F. DiLalla, Sharon K. Hull & J. Kevin Dorsey, *Effect of Gender, Age, and Relevant Course Work on Attitudes Toward Empathy, Patient Spirituality, and Physician Wellness*, 16 *TEACHING & LEARNING MED.* 165, 169 (2004).

An experiment examined communication skills training as a means of fostering empathy.<sup>156</sup> The different pedagogies within the training included (a) a written assessment of the physicians' skills based on a videotaped clinical interview followed by a three-day course; (b) the course alone; (c) the written assessment alone; and (d) a control group. A pre-test and post-test was administered to all groups. In the post-test, the groups that had received training demonstrated significantly higher levels of empathic communication, more frequent responses to empathic opportunities presented by the patient, fewer leading questions, and fewer closed-end questions within the interview assessment. Group A (course plus feedback) also showed improvement in the ability to paraphrase patient statements (i.e., checking for understanding and summarizing information). The groups receiving only written feedback and the control group did not show significant improvement. The significance of this study is the strength of the research design in providing unambiguous evidence of the efficacy of instruction in communication skills and empathy. The authors support the need for more, not less, training in communication skills, noting that in a pilot study, physicians who attended a three-day course benefited more than those attending a one-and-a-half-day course.

A quasi-experimental study investigated whether narrative reflection in clinical training would positively influence pre-clinical medical students' capacity for empathy, professionalism, communication skills, and sense of well-being.<sup>157</sup> Pre-clinical students were randomly assigned to a clinical reasoning (CR) section ( $n = 45$ ) or a Point-of-View (POV) section ( $n = 47$ ). The CR section focused on medical decision making, reasoning about clinical issues, and the development of justifications for decisions. The POV section involved training students in a technique that fosters the ability to take the patient's perspective about the emotional and social impact of the patient's illness and the long-term ramifications. The analysis involved coding of written responses to cases by both groups and Standardized Patient (SP) ratings within an Objective Structured Clinical Examination (OSCE). Students in the POV group were more likely to express empathy for the treating physician in the case and less likely than the CR group to blame the patient for his illness. For the SP ratings in the OSCE, no significant differences in ratings of communication, empathy, and professionalism were found. The reason for the disparate findings, according to the authors, may relate to the difficulty involved with transfer of skills (from a writing task to verbal communication in the OSCE) and with the fact that SPs, in

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156. See Lesley Fallowfield et al., *Efficacy of a Cancer Research UK Communication Skills Training Model for Oncologists: A Randomised Controlled Trial*, 359 LANCET 650, 650 (2002).

157. See Johanna Shapiro et al., *Point-of-View Writing: A Method for Increasing Medical Students' Empathy, Identification and Expression of Emotion, and Insight*, 19 EDUC. FOR HEALTH J. 96, 97-100 (2006).

their role play, may have not been able to adequately discriminate empathic communication levels, or may undervalue its importance.

Another random control study investigated the effect of a stress reduction course on self-reported levels of empathy and depression among medical students ( $n = 73$ ).<sup>158</sup> Students were randomly assigned to a seven-week course in mindfulness or a control group; pre- and post-tests were administered.<sup>159</sup> The intervention had a significant positive impact on indicators of psychological health and on overall levels of empathy.<sup>160</sup> Trait anxiety was negatively related to empathy ( $b = -.39, p = .001$ ).<sup>161</sup> The reasons for the impact of stress on empathy may be because controlling stress permits more focused listening to patients, along with more openness towards alternative factors on overall health and well-being. Mindfulness training appears to foster growth towards cognitive and emotional self-regulation, thus indirectly increasing empathic capacity.<sup>162</sup>

Other approaches to teaching and assessing empathy range from observations and checklists to direct instruction on empathy.<sup>163</sup> For example, direct instruction about empathy, including its importance and how patients perceive physician communication, resulted in increases in empathy, measured by coding short responses to case vignettes, ranging from “aggressive or derogatory” to a “facilitative” empathic response.<sup>164</sup>

**Dental education.** In Bebeau’s dental ethics curriculum, awareness of moral issues is addressed throughout the curriculum, but a specific pedagogy in the third year of a four-year curriculum involves the Dental Ethical Sensitivity Test (DEST).<sup>165</sup> The DEST assessment is done individually, with students first listening to recorded case vignettes, and then verbally responding in the role of the dentist. A transcript of this recorded response is coded and scored; results are given to the student’s mentor, a practicing mentor-dentist, who then debriefs with them one-on-one on how

158. See Shauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction on Medical and Premedical Students*, 21 J. BEHAV. MED. 581, 582 (1998).

159. *Id.* at 585–86. Measures included the Empathy Construct Rating Scale (ECRS), La Monica, 1981; the Hopkins Symptom Checklist 90 (Revised) SCL-90-R, Derogatis, 1977; and state and trait anxiety. *Id.* at 587.

160. *Id.* at 589. Psychological health was measured by the SCL-90-R. *Id.* at 587.

161. *Id.* at 590. Trait anxiety refers to the connection of a person’s mood or trait and their level of anxiety. David H. Barlow, *Unraveling the Mysteries of Anxiety and Its Disorders from the Perspective of Emotional Theory*, 55 AM. PSYCHOLOGIST 1247, 1251–52 (2000).

162. See Richard J. Davidson, *Empirical Explorations of Mindfulness: Conceptual and Methodological Conundrums*, 10 EMOTION 8, 10 (2010); Heleen A. Slagter et al., *Mental Training as a Tool in the Neuroscientific Study of Brain and Cognitive Plasticity*, FRONTIERS HUM. NEUROSCIENCE, Feb. 5, 2011, at 1, 10; Shapiro et al., *supra* note 157, at 592–94.

163. Monson, *supra* note 148, at 38–39.

164. Helen R. Winefield & Anna Chur-Hansen, *Evaluating the Outcome of Communication Skill Teaching for Entry-Level Medical Students: Does Knowledge of Empathy Increase?*, 34 MED. EDUC. 90, 92–93 (2000).

165. Muriel Bebeau et al., *Measuring Dental Students’ Ethical Sensitivity*, 49 J. DENTAL EDUC. 225, 225–35 (1985).

well they are “seeing” moral issues in complex cases.<sup>166</sup> Similar pedagogies have been developed for teacher education, specifically aimed at sensitivity to racial bias.<sup>167</sup>

#### 4. *Pedagogies for Moral Implementation: Translating Moral Intentions to Behavior and Results (Component Four)*

Rest’s Fourth Component, moral implementation, is defined as the capacities and skills necessary to carry out the individual’s moral judgment in the real world. The concept acknowledges that an individual might recognize an issue as a moral one, reason adequately about the issue, and possess the motivation and identity to carry out the individual’s moral judgment, but still fall short of his or her intentions to act upon these issues in the social world.<sup>168</sup> Moral implementation is alternatively operationalized to include emotional intelligence, self-regulation, interpersonal skills, the ability to work in a team, counseling or coaching others, listening, persuasion, negotiation, mediation, and character. A failure of moral implementation occurs for example when the individual may be paralyzed with fear and fails to act assertively with others.

For example, moral implementation is addressed in Bebeau’s dental ethics curriculum by using realistic recordings of a patient with a complex problem and challenging students to take on the role of the dentist by developing a treatment plan and preparing a dialogue with the patient.<sup>169</sup> Each dialogue is reviewed by the instructor and feedback on the students’ verbal patterns is given on the effectiveness of the response. Specific communication strategies this coaching pedagogy focuses on include: (1) using lay language and avoiding technical jargon in talking with the patient, (2) using descriptive rather than judgmental language, (3) eliciting the patient’s goals and facilitating his or her prioritizing those goals, (4) conveying empathy through perspective taking, (5) paraphrasing the patient’s statements to ensure understanding, and (6) clarifying the boundaries between patient and clinician by avoiding pronouns such as “we,” which convey a false sense of shared responsibility and lack of patient autonomy.<sup>170</sup> Other feedback on the extent that the language used would convey respect and compassion is

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166. *Id.*

167. See Mary M. Brabeck et al., *Increasing Ethical Sensitivity to Racial and Gender Intolerance in Schools: Development of the Racial Ethical Sensitivity Test*, 10 *ETHICS & BEHAV.* 119, 119–37 (2000).

168. *Id.*

169. Personal Conversation with Muriel J. Bebeau, Professor, Univ. of Minn. (2007). For a report of an empirical review of Bebeau’s dental ethics curriculum, see Muriel J. Bebeau & Stephen J. Thoma, *The Impact of a Dental Ethics Curriculum on Moral Reasoning*, 58 *J. DENTAL EDUC.* 684, 684–92 (1994).

170. See Monson, *supra* note 148, at 115–28.

also given.<sup>171</sup> Following feedback and coaching, students can revise their dialogue for additional points.<sup>172</sup>

What are the pedagogies that build the interpersonal skills necessary for the lawyer in these situations both to empower the client to make and implement good moral decisions? What pedagogies help lawyers to influence peers, including teams of attorneys and staff, adversaries, decision makers, and others, to implement the client's and the lawyer's moral judgments?<sup>173</sup> We explore in Section IV how these pedagogies can help a lawyer become a more effective counselor empowering a client to make and implement good decisions. There is a broad base of empirically-validated approaches from health professions education, organizational development, and the social psychology of groups, or cooperative learning. The following review starts with formal cooperative learning as a pedagogy to foster moral implementation capacities. We then review the topic of peer coaching, taking a viewpoint that learning through coaching can take place not only between educators and students but among students themselves.

#### a. *Formal Cooperative Learning Pedagogy*

Formal cooperative or group learning, group dynamics education, and team skills training are all pedagogies of moral implementation that have a strong empirical and theoretical foundation in social interdependence theory, cognitive-developmental theory, and social learning theory.<sup>174</sup> High-performing teams or groups demonstrate positive social interdependence, defined as the condition that occurs when the "outcomes of individuals are affected by their own and others' actions."<sup>175</sup> Positive social interdependence or cooperation in groups is reflected throughout literature and history

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171. *Id.*

172. This pedagogy is similar to the Objective Structured Clinical Exam used in medical education and the Standardized Client method developed for legal education. Like Bebeau's cases, these pedagogies involve realistic cases, only in role play as a clinical encounter with a patient or client. See NANCY STEVENS, *THE OBJECTIVE STRUCTURED CLINICAL EXAMINATION FOR THE RESIDENT PHYSICIAN* (2010).

173. Relationships exist not as specific individual traits or abilities, but as qualities of the interactions between individuals. Just as one cannot communicate or listen in a vacuum, interpersonal skills depend on at least two-way communication. See DAVID W. JOHNSON, *REACHING OUT* 46–47 (9th ed. 2006). Interpersonal skills depend on awareness of the self and sharing the self with others. *Id.* Self-disclosure, or the extent of how open we are to others, is a key to encouraging others to open up to us, and to build an effective relationship. *Id.* Self-disclosure begins with (1) self-awareness, (2) self-acceptance, and (3) trust. Self-disclosure is just one of the interpersonal skills taught as a prerequisite of formal group learning. *Id.* at 46.

174. See David W. Johnson & Roger T. Johnson, *An Educational Psychology Success Story: Social Interdependence Theory and Cooperative Learning*, 38 *EDUC. RESEARCHER* 365, 365–79 (2009). For a review of group learning strategies for legal educators, see Verna Monson, *Group Learning in Law Schools: A Key to Fostering Professional Formation* (Mar. 23, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2021455>.

175. Johnson & Johnson, *supra* note 174, at 366.



in such quotes as “all for one, one for all.”<sup>176</sup> According to a quote attributed to the entrepreneur and philanthropist Andrew Carnegie, teamwork “is the fuel that allows common people to attain uncommon results.”

Positive social interdependence is associated with moral values and effective communication abilities. Recent research found a positive relationship between formal cooperative learning and moral development growth.<sup>177</sup> In a study of law firm size and culture, lawyers practicing in firms with more cooperation had a greater awareness of ethical issues and voluntarily chose higher ethical standards than required by law.<sup>178</sup> Moral values are intrinsic to positive social interdependence or cooperation in teams according to teamwork researchers Katzenbach and Smith.<sup>179</sup> They state, “Teamwork represents a set of values that encourage listening and responding constructively to views expressed by others, giving others the benefit of the doubt, providing support, and recognizing the interests and achievements of others.”<sup>180</sup>

Research on teamwork in business, medicine, and government shows effective teamwork is related to increased customer loyalty, reduction of medical errors, and reduced groupthink, in which members remain silent against the majority opinion.<sup>181</sup> The ability to work effectively in a team is a critical competence of professionalism in the legal, medical, nursing, and related health professions as well as in management, the military, intelligence, civil aviation, law enforcement, and defense agencies.<sup>182</sup> Research on law firm dissolutions found lack of cohesion within the leadership team to be an important predictor.<sup>183</sup> Leaders in legal education view teamwork as an important emphasis for preparing students for practice.<sup>184</sup> Georgetown law professor Donald Langevoort states, “The most innovative law schools are coming to see the need to reform a portion of their curriculum to more

176. ALEXANDRE DUMAS, *THE THREE MUSKETEERS* 74 (George Routledge & Sons 1878) (1844).

177. See Tichy et al., *supra* note 109, at 784–85.

178. MILTON REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 28 (2006).

179. Jon R. Katzenbach & Douglas K. Smith, *The Discipline of Teams*, HARV. BUS. REV., Mar.–Apr. 1993, at 111, 111–12.

180. *Id.* at 112.

181. See JOHNSON & JOHNSON, *supra* note 108, at 13, 296.

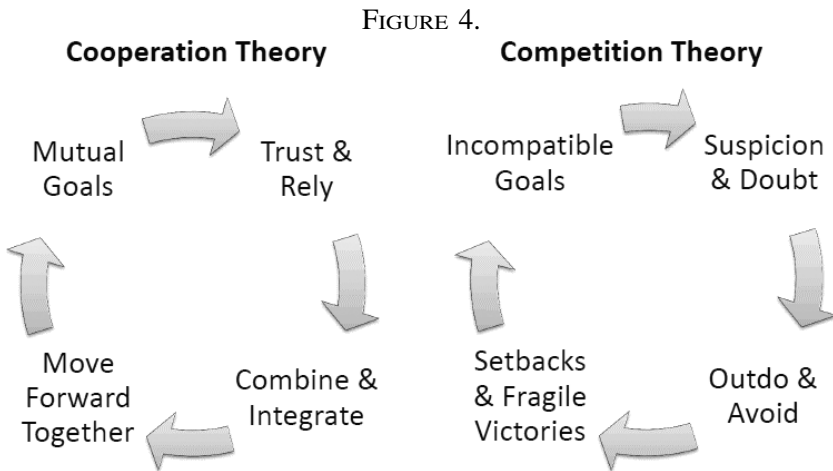
182. See INSTITUTIONAL REVIEW COMM., *supra* note 10, § III.E.1.a. Graduate medical education similarly emphasizes interpersonal skills training and dynamic assessment of teamwork skills in residency. See *id.*; Hamilton & Monson, *Positive Empirical Relationship*, *supra* note 3, at 163, 173 (presenting empirical evidence that teamwork is an essential skill); see also J. RICHARD HACKMAN, *COLLABORATIVE INTELLIGENCE: USING TEAMS TO SOLVE HARD PROBLEMS* 1–2 (2011) (identifying six enabling conditions that increase the likelihood that teams will be effective in any setting); DAVID P. BAKER ET AL., *MEDICAL TEAMWORK AND PATIENT SAFETY: THE EVIDENCE-BASED RELATION* 6 (2005), available at <http://www.ahrq.gov/qual/medteam/>.

183. WILLIAM G. JOHNSTON, *ANATOMY OF LAW FIRM FAILURES* 7 (2004).

184. Donald C. Langevoort, *Teaching Problem Solving: New Business Lawyers Need to Know How to Find the Deal: An Academic's Perspective*, BUS. L. TODAY, July–Aug. 1999, available at <http://apps.americanbar.org/buslaw/blt/8-6problem.html>.

closely resemble that found in MBA programs, with an emphasis on richly detailed case studies, strategic decision-making and teamwork solutions.”<sup>185</sup>

In research comparing teams with positive interdependence (cooperation) to teams with negative interdependence (competition), different social dynamics are revealed.<sup>186</sup> Figure 4 shows this relationship.



Research based on thousands of interviews and hundreds of empirical studies of groups over several decades concludes that groups that work cooperatively towards a common goal are more effective in terms of productivity and quality of work product than individuals working alone.<sup>187</sup> Similarly, groups that are highly adept at giving and receiving constructive feedback and making ongoing improvements are more effective than groups that are not as capable in these processes.<sup>188</sup> A key goal of group learning is for each member to support the development of communication and interpersonal capacities of other members.<sup>189</sup>

In formal group learning, group members are responsible not only for their own productivity but for the productivity and performance of all group members.<sup>190</sup> Formal group learning differs from the casual use of groups in classrooms, which can result in some members taking on a disproportionate

185. *Id.*

186. Figure adapted from DEAN TIOSVOLD & MARY M. TIOSVOLD, *PSYCHOLOGY FOR LEADERS: USING MOTIVATION, CONFLICT, AND POWER TO MANAGE MORE EFFECTIVELY* 99 (1995). For an extensive review of research on interdependence in relation to conflict, see MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973).

187. Johnson & Johnson, *supra* note 174, at 371.

188. *Id.* at 369–70; see Katzenbach & Smith, *supra* note 179, at 119. The principle of Gestalt theory—that the whole is greater than the sum of the parts—is the foundational theory for empirical research on group dynamics. See JOHNSON & JOHNSON, *supra* note 108, at 39–40.

189. See JOHNSON & JOHNSON, *supra* note 108, at 133–34.

190. See Johnson & Johnson, *supra* note 174, at 367.

amount of responsibility and others “free riding,” or unfairly relying on the efforts of others, or dysfunctional social dynamics such as exclusion or ostracizing group members.<sup>191</sup>

The pedagogy of cooperative groups does not typically occur naturally but requires discipline and forethought on how to structure interdependence.<sup>192</sup> Cooperative learning works by bringing together the pedagogical elements of modeling, coaching, scaffolding, self-reflection, and formative assessment. There are four conditions necessary for formal cooperative learning, including (1) individual accountability and personal responsibility, (2) promotive interaction, (3) appropriate use of social skills, and (4) group processing.<sup>193</sup>

Cooperative learning works by structuring positive social interdependence. There are two major kinds of interdependence: outcome and means. Outcome interdependence refers to the shared goals and rewards of the cooperative group. Legal educators can structure outcome interdependence by apportioning a percentage of the grade in their class to a group paper or project.<sup>194</sup> Means interdependence includes (1) role interdependence, (2) resource interdependence, and (3) task interdependence. Each of these is discussed below.

In the professions, **role interdependence** is critical to professional effectiveness. For example, surgical teams require not only a surgeon but an anesthesiologist, a surgical technician, and a nurse. Lawyers structure interdependence by working with clients, other lawyers and staff in teams, or members of the court. In formal group learning, students take on specific roles to ensure effective team functioning. Some examples of roles include (1) a scribe who records meetings, (2) a facilitator who helps the group focus on next steps or process, and (3) a coordinator who monitors the group for cohesion or encourages participation from all members.<sup>195</sup>

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191. *See id.* at 373–74.

192. *See id.* at 373. For a general guide to using cooperative learning in higher education, see DAVID W. JOHNSON, ROGER T. JOHNSON & KARL A. SMITH, *ACTIVE LEARNING: COOPERATION IN THE COLLEGE CLASSROOM* (1991).

193. *See* Johnson & Johnson, *supra* note 174, at 368–70.

194. DAVID W. JOHNSON & ROGER T. JOHNSON, *MEANINGFUL ASSESSMENT* 251–54 (2002); *see* DAVID W. JOHNSON & ROGER T. JOHNSON, *ASSESSING STUDENTS IN GROUPS* 19–20, 31–32 (2004) [hereinafter JOHNSON & JOHNSON, *ASSESSING STUDENTS IN GROUPS*].

195. Role interdependence within cooperative groups should be defined by discussion within the group, according to Johnson and Johnson. Other approaches to structuring role interdependence contend that specific roles are necessary in groups in order for the team to function properly, and that individuals gravitate towards certain roles based on preferred behavioral patterns, loosely based on personality theory or self-perception of behavioral patterns. R. MEREDITH BELBIN, *MANAGEMENT TEAMS: WHY THEY SUCCEED OR FAIL* 50, 76 (1981). This approach suggests teams should be formed based on these role types, which were identified through empirical research on management teams in the United Kingdom in the 1970s. These include a coordinator, shaper, completer-finisher, team worker, monitor-evaluator, resource investigator, and plant. However, there is conflicting empirical evidence supporting the validity of team role theory. *See, e.g.*, Jane S. Prichard & Neville A. Stanton, *Testing Belbin’s Team Role Theory of Effective*

**Resource interdependence**<sup>196</sup> can be structured by giving each group member a different set of assigned readings with instructions to students to brief each other on the content. Supplemental discussion questions offered through a course website can be divided along special interests and responses from students offered as a resource for the whole class, distributing the content knowledge and expertise across the course.

**Task interdependence**<sup>197</sup> can be structured into small group assignments through group papers in which each student takes a different section of the readings and prepares to teach it to other students in the class or group. Task interdependence occurs when students divide up tasks involved with group papers or research projects. In large lecture-based classrooms, a methodology called the jigsaw also involves assigning different sections of readings to different students.<sup>198</sup> Students take responsibility to teach their assigned content to others in their group or class.

**Empirical research on cooperative learning.** Because the empirical literature on this pedagogy is sparse in legal education, we turn to a substantial body of research on the effectiveness of cooperative learning in general education.<sup>199</sup> In a recent meta-analysis that examined 148 studies involving more than 17,000 students, researchers found that positive interpersonal relationships with peers in cooperative learning groups accounted for thirty-three percent of the variance associated with academic achievement.<sup>200</sup> In a meta-analysis comparing cooperative, competitive, and individualistic learning, instruction in interpersonal skills, combined with formal group learning, is shown to increase (1) academic achievement (effect size of .67 over competitive learning);<sup>201</sup> (2) interpersonal attraction

*Groups*, 18 J. MGMT. DEV. 652, 652–53, 661 (1999); Adrian Furnham, Howard Steele & David Pendleton, *A Psychometric Assessment of the Belbin Team-Role Self-Perception Inventory (BTR-SPI)*, 66 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 245, 254 (1993); Stephen G. Fisher, W.D.K. Macrosson & Gillian Sharp, *Further Evidence Concerning the Belbin Team Role Self-Perception Inventory*, 25 PERSONNEL REV., no. 2, 1996 at 61, 66–67. Belbin contends that the BTRSPI is valid and reliable. See, e.g., BELBIN ASSOC., METHOD, RELIABILITY & VALIDITY, STATISTICS & RESEARCH: A COMPREHENSIVE REVIEW OF BELBIN TEAM RULES 11–13 (2009).

196. JOHNSON & JOHNSON, *supra* note 108, at 93; see Johnson & Johnson, *supra* note 174, at 369.

197. JOHNSON & JOHNSON, *supra* note 108, at 93.

198. Karl A. Smith, *Going Deeper: Formal Small-Group Learning in Large Classes*, NEW DIRECTIONS FOR TEACHING AND LEARNING, Spring 2000, at 25, 32–36.

199. The exception is a body of research out of Griffith University. See, e.g., Sally Kift & Geoffrey Airo-Farulla, *Throwing Students into the Deep End, or Teaching Them How to Swim? Developing “Offices” as a Technique of Law Teaching*, 6 LEGAL EDUC. REV. 53 (1995).

200. Cary J. Roseth, David W. Johnson & Roger T. Johnson, *Promoting Early Adolescents’ Achievement and Peer Relationships: The Effects of Cooperative, Competitive, and Individualistic Goal Structures*, 134 PSYCHOL. BULL. 223, 235 (2008).

201. See Johnson & Johnson, *supra* note 174, at 371. By “effect size,” we mean the extent that the mean for each type of study (competitive or cooperative) varied, using the Standard Deviation as the unit of comparison. An effect size of .67 can be interpreted to mean that the statistical average for cooperative learning classes was .67 standard deviation units higher than competitive.

among group members (effect size of .67);<sup>202</sup> (3) level of perceived social support in the classroom (effect size of .62 compared to competitive learning);<sup>203</sup> (4) self-esteem (effect size of .58);<sup>204</sup> (5) quality of reasoning (effect size of .93);<sup>205</sup> and (6) perspective taking (effect size of .61).<sup>206</sup>

**Assessment or group processing.** Instructors can facilitate group processing and reflection on positive social interdependence by requiring students to reflect on and self-assess their groups' effectiveness periodically—for example at the end of every meeting—through the use of checklists or surveys. Questions can include items such as: (1) we used everyone as a resource; (2) we used our time effectively; (3) we made good use of the information available to us; (4) we adhered to our team meeting norms; (5) we stayed focused on our tasks; (6) we followed logical steps in conducting our discussions; (7) we listened to each other; (8) we resolved our differences in opinion positively; (9) our conversation was typically concrete; and (10) no person dominated the conversation.<sup>207</sup>

Instructors can also foster group processing and reflection by utilizing a mid-semester peer evaluation form in which group members evaluate their own and others' performance and efforts.<sup>208</sup> The instructor can then use this data as a formative assessment, giving feedback to students on dysfunctional patterns of behavior that are evident in peers' feedback, and coach students to improve their group processes. Instructors can also use this assessment to detect dynamics that might warrant more frequent monitoring or intervention; cases in which a members' behavior appears to be symptomatic of mental health or substance abuse issues might warrant referrals to school counseling staff.<sup>209</sup>

Assessment also takes place informally and dynamically between students in working out roles and processes, and working under pressure to meet deadlines. Giving students the tools to conduct regular "group processing," in which the groups share constructive feedback and give positive reinforcement, supports their learning and builds group camaraderie. Through this process, students can reflect on the limitations of their own perspectives and build upon strengths as perceived by other group members. The capacity for ongoing self-reflection is likely enhanced when negative competition is replaced with positive social interdependence. If group members lack the interpersonal skills to give constructive feedback or the

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See JOHNSON & JOHNSON, *supra* note 108, at 112.

208. Personal Conversation with Jerry Organ, Professor, Univ. of St. Thomas Sch. of Law (Feb. 2011) (describing that the use of this form is a formative assessment tool).

209. See AMY L. REYNOLDS, *HELPING COLLEGE STUDENTS: DEVELOPING ESSENTIAL SUPPORT SKILLS FOR STUDENT AFFAIRS PRACTICE* 160 (2008).

group lacks positive interdependence, this process can lead to conflicts. This illustrates why group dynamics education or training is important. Student development staff with expertise in group dynamics can provide coaching to groups experiencing conflict or dysfunction.

**Informal groups, without instructor guidance.** Law students independently form study groups and can utilize cooperative learning techniques. Mastery of course content and academic achievement can be enhanced when teams study together using such techniques as the jigsaw, in which each team member teaches a section of the material to other students.<sup>210</sup>

*b. Peer Coaching for Interpersonal Effectiveness*

Coaching is defined in various ways. In organizational development, coaching is defined as “a conversation that exists to help the client reach his or her goals, one-on-one.”<sup>211</sup> Because one-on-one coaching conversations with law students are time- and resource-intensive, one-on-one coaching may not be feasible in large enrollment courses. Peer coaching is a pedagogy based on group dynamics theory in which students coach one another in the context of a course or curriculum.

How can peer coaching as a pedagogy foster the capacities and skills of giving constructive feedback and making ongoing improvements? Peer coaching is commonly used in professional education and graduate management education within formal groups; training is provided in communication and interpersonal skills necessary to build trust and ensure team cohesion.<sup>212</sup> Training is conducted by an expert in group dynamics in a two- to four-hour workshop, typically held during orientation.<sup>213</sup> Second-year graduate students can assist with training; their involvement models the importance of cooperation and teamwork within the school culture, an important aspect of the hidden curriculum of professional education.<sup>214</sup>

Peer coaching teaches students how to observe group members communicating and interacting with one another, while also participating in the process.<sup>215</sup> Students receive instruction in how to give constructive feed-

210. See Verna E. Monson & Jerry Organ, Structuring Positive Social Interdependence in Law Schools: A Key to Fostering Professional Formation 1, 13 (Mar. 23, 2012) (unpublished manuscript) (on file with author). For a discussion of strategies law students use in groups to process course content and general issues related to group learning in legal education, see DOROTHY H. EVENSEN, GROUP LEARNING CONTEXTS AND PROCESSES WITHIN LAW SCHOOLS (GR 04-01) (2006), available at <http://www.lsac.org/lisacresources/Research/GR/GR-04-01.asp>.

211. See Judith A. Gebhardt, *From Therapist to Executive Coach: Insight, Intervention, and Organizational Change*, in CONSULTATION FOR ORGANIZATIONAL CHANGE 155, 159 (Anthony F. Buono & David W. Jamieson eds., 2010).

212. JOHNSON & JOHNSON, *supra* note 108, at 125, 129, 539.

213. See *id.* at 539–40.

214. Fred Hafferty, *Measuring Professionalism: A Commentary*, in MEASURING MEDICAL PROFESSIONALISM 281, 290 (David Stern ed., 2005).

215. See JOHNSON & JOHNSON, ASSESSING STUDENTS IN GROUPS, *supra* note 194, at 120–38.

back to one another.<sup>216</sup> The task of observing group process should be rotated to give everyone experience in practicing communicating with peers and giving constructive feedback. As the semester progresses, group members who skip class, are not prepared for meetings, fail to meet deadlines, or dominate discussion<sup>217</sup> learn how they are perceived by other group members and should reflect on that feedback. Students can then set goals for improvement and modify their behavior.<sup>218</sup> These processes can be applied in any group, formal or informal.

The relevance of this option for coaching students' moral implementation capacities directly relates to what will be a reality once in the law firm, where partners and associates are routinely evaluated on such dimensions as "clarity of instructions," "adequacy of feedback," or "fosters team cohesion."<sup>219</sup> Peer coaching is similar to a 360-degree assessment<sup>220</sup>—a formal assessment of interpersonal capacities involving multiple sources rating an individual (e.g., clients, colleagues, or patients). The advantage of peer coaching is that it promotes professional competence in giving timely feedback while using interpersonal abilities that build trust. Feedback given soon after the observation improves the chances that behaviors will change as a result.<sup>221</sup>

*c. Summary of Formal Cooperative Learning and Peer Coaching*

In sum, by integrating aspects of formal cooperative learning and peer coaching into legal education, instructors increase the number of opportunities for (1) feedback and dialogue from peers (not just faculty) and (2) reflection, and thus foster greater growth in not only moral implementation but all four of Rest's moral capacities. Instruction in cooperative learning and peer coaching is also a timely choice in that many law students, as members of the Millennial generation,<sup>222</sup> prefer working in teams or groups to working alone. Learning to work effectively in a team is also an increasing reality for new associates.

Implementing cooperative learning and peer coaching within the curriculum may require planning at the school-wide level in order for the effort to be successful. We offer four suggestions below:

216. *Id.*

217. This is not intended to be an exhaustive list of dysfunctional behaviors in groups.

218. See discussion *infra* Part III.E.2.

219. IDA O. ABBOTT, DEVELOPING LEGAL TALENT: BEST PRACTICES IN PROFESSIONAL DEVELOPMENT FOR LAW FIRMS 92–93 (2001).

220. *Id.* at 92.

221. See *id.* at 92, 94.

222. Tom Gimbel, *Managing Millennials: Learning How to Work Optimally with the Newest Generation of Lawyers Will Drive Success for Forward-Thinking Law Firms*, LEGAL MGMT., Oct.–Nov. 2007, at 20, 22.

1. Students can benefit from a relatively short workshop by a group dynamics expert frontloaded in the curriculum. In graduate management education, this is typically held in orientation. Student leaders and counseling staff can work collaboratively with faculty sponsors to signal school-wide endorsement of collaboration and cooperation.

2. If cooperative learning or peer coaching is introduced into the curriculum, thus requiring collaboration, students who prefer individualistic learning may resist or discount the efforts.<sup>223</sup> This may create conflict or dysfunction. In some cases, faculty or administrators may choose to allow individuals to work alone or disband a group, but only in extraordinary circumstances. Coaching these individuals individually may be an option.

3. In order for cooperative learning or peer coaching efforts to succeed within courses, faculty themselves may need to acquire a baseline of knowledge and skills in the use of groups.<sup>224</sup> Some will remain skeptical about such pedagogies; some courses will not be well suited to group learning, but appropriately used, it is an important instructional tool that research supports and is effective in fostering professional formation. The overall objectives of introducing cooperative learning or peer coaching efforts (i.e., that there is a strong link between interpersonal abilities and effectiveness in practicing law) should be reinforced throughout the school, from admissions materials through career advising.<sup>225</sup>

4. In choosing a group dynamics expert or consultant, there are many options within consulting firms or communication coaches, with varying levels of empirical or theoretical grounding. There are some approaches that have a great deal of face validity or intuitive appeal but little in the way of validation within peer-reviewed social-science literature. One option for many law schools is to partner with faculty in the business school or school of education to find scholars who do empirically validated work in group dynamics, organizational development, or social psychology. A second viable option is to identify an organizational development consultant who specializes in teamwork and group dynamics.<sup>226</sup>

This discussion of moral implementation does not constitute an exhaustive inventory of pedagogies fostering moral implementation capacities. We highlighted cooperative learning and peer coaching to give a reader an overview of the most commonly used pedagogies with a foundation in peer-reviewed scholarly publications. Topics such as the nature of conflict,

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223. See Johnson & Johnson, *supra* note 174, at 366.

224. Yvonne Steinhart, *Faculty Development for Teaching and Learning Professionalism*, in *TEACHING MEDICAL PROFESSIONALISM*, *supra* note 3, at 165–67.

225. See Hamilton & Monson, *Positive Empirical Relationship*, *supra* note 3, at 174–83.

226. See Léon de Caluwé & Elsbeth Reitsma, *Competencies of Management Consultants*, in *CONSULTATION FOR ORGANIZATIONAL CHANGE*, *supra* note 211, at 32–38.



mediation, and negotiation are equally important aspects of moral implementation.

We conclude this section in Parts C and D with a short analysis of pedagogies that some educators intuit are effective in professional formation, including (1) emotionally powerful, short-term interventions<sup>227</sup> and (2) fear-based persuasive appeals to foster a moral core.<sup>228</sup> In Part E, we summarize the discussion of effective pedagogies; and in Part F, we point out how fostering the habit of actively seeking feedback, engaging in moral dialogue on the tough calls, and reflection (the habit of FDR) builds on legal education's existing signature pedagogy, the case-dialogue method.

### C. *Length of Time Necessary for a Pedagogy to be Effective*

We sometimes hear legal educators voice their personal beliefs or theories about how professional ethical formation occurs, including the idea that if an instructor or a specific pedagogy is sufficiently engaging or compelling, then lasting developmental change can occur. We have personally heard speakers who were outstanding at crafting a convincing and inspiring message. Are short-term, one-shot interventions effective in fostering any of the Four Component Model capacities? Moral development studies indicate that an intervention that is less than three weeks will likely have little or no effect on fostering long-term change.<sup>229</sup> Moral education interventions need to be sustained over a period of months, not weeks; and frequently, the temporal unit of marking developmental change is across a multi-year course of study—and not within a specific unit or semester.<sup>230</sup> Recall that moral development is a lifespan human capacity—one's fundamental view of self and others can change, but it is incremental change.<sup>231</sup>

Despite this consensus among moral development scholars, we did find some evidence that short-term interventions can foster developmental growth. In a quasi-experiment that used a case-dialogue pedagogy to foster moral judgment growth in a business ethics course, David Allen Jones<sup>232</sup> found students in the experimental section made significant moral judgment

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227. We draw here upon moral development intervention studies that examined the length of the intervention related to moral judgment growth outcomes.

228. For this topic, we draw upon research in psychology on the effectiveness of juvenile crime deterrent programs made popular through the media in the 1970s through the documentary *Scared Straight*. The belief that fear is an effective motivator of change continues, and the media's fascination with the topic likely fuels the belief in the effectiveness of this approach. See Anthony Petrosino et al., *Well-Meaning Programs Can Have Harmful Effects! Lessons from Experiments of Programs Such as Scared Straight*, 46 *CRIME & DELINQ.* 354, 354 (2000).

229. Andre Schlaefli et al., *Does Moral Education Improve Moral Judgment? A Meta-Analysis of Intervention Studies Using the Defining Issues Test*, 55 *REV. EDUC. RES.* 319, 345 (1985).

230. See TIMOTHY D. SHELDON ET AL., *YOUTH FRONTIERS INTERIM EVALUATION REPORT 9* (2009).

231. See REST, *supra* note 54, at 28, 176.

232. David Allen Jones, *A Novel Approach to Business Ethics Training: Improving Moral Reasoning in Just a Few Weeks*, 88 *J. BUS. ETHICS* 367, 367, 373–74 (2009).

growth in five seventy-five minute sessions and individual assignments spread out over less than three weeks. Studies or evaluations of shorter-term moral education interventions or training exist, and with positive outcomes; but in some studies we reviewed, the results are based on volunteer samples or measuring student or trainee satisfaction<sup>233</sup>—which is not the same as measuring developmental capacities. People can enjoy or be impressed with the drama of a presentation of moral development interventions, and can rate it highly in terms of satisfaction, but that does not mean that a true increase in the psychosocial capacities of ethical professional formation took place.

It makes common sense that one-shot, short-term professional formation programs may be effective as one part of an overall curricular engagement to foster professional formation. Providing students with multiple opportunities to hear a variety of speakers and perspectives on professional formation enriches the environment and overall should have an assessable impact.

#### *D. Do Fear-Based Warnings Work to Foster Developmental Growth?*

Another theory is the idea that an effective pedagogy involves instilling “the fear of God” among law students—involving exposure to lawyers who have faltered ethically. In these programs, students receive personal testimonials and warnings that ethical failures can happen to anyone. The underlying belief is that developmental change can best be fostered through appealing to a student’s fears that the student could fail to uphold his or her ethical standards and values and wind up paying a steep price for the mistake. The popularity of this theory may stem from a television documentary called “Scared Straight,” which reported on the results of the Juvenile Awareness Project Help in the 1970s, and later on, in the 1990s.<sup>234</sup> The objective of this program was to help deter teens in the juvenile court system from re-offending. The program brought teens with criminal offenses into the Rahway State Prison in New Jersey to fully experience what it was like to be locked up and have almost all freedoms removed. At Rahway, the teens were given stern warnings by prisoners to change their ways or lose all freedoms and be forced to endure the isolation and humiliation of prison. The program was hailed by academics and the media as an immediate success in reducing repeat offenses. Academics published studies on the effectiveness of Rahway in peer-reviewed journals through the 1970s and 1980s. But in a meta-analysis of randomized experiments between 1967 and 1992,

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233. Readers should note the Kirkpatrick model of training evaluation articulates four levels to guide the evaluation of programs or training, including (1) trainee satisfaction, (2) learning or change, (3) the duration of the learning or change, and (4) the organizational impact of the training. See DONALD L. KIRKPATRICK & JAMES D. KIRKPATRICK, *EVALUATING TRAINING PROGRAMS: THE FOUR LEVELS* 29–39 (3d ed. 2006).

234. Petrosino et al., *supra* note 228, at 356–58.

researchers<sup>235</sup> found that the Rahway program actually had negative effects, with crimes committed by former participants increasing. Other studies on using a fear-based persuasion appeal indicate that it is most effective with individuals at both extremes of the normal curve<sup>236</sup>—and since law students tend to be very smart people, it suggests that fear-based appeals are not the best informed approach to fostering ethical professional formation.

### *E. Summary of Effective Pedagogies for Professional Formation*

In addition to the current educational objective that the student achieve a threshold competence level of doctrinal knowledge and analysis on the law of lawyering, we are proposing that legal education should adopt also an educational objective to foster internalization of the elements of professional formation in as large a proportion of students as possible. Professional formation means the growth of each student's internalized moral core including deep responsibility to others, particularly the client, with some restraint on self-interest; a standard of excellence for technical skills; integrity; honesty; public service (particularly for the disadvantaged); and independent judgment and honest counsel. We will use "internalized moral core" to include all the above sub-objectives for professional formation.

In the analysis of effective pedagogies for professional formation above, we see some convergence. Different studies conducted by different researchers using different methods point toward some common themes set forth below.

#### *1. Stage-Appropriate Educational Engagements*

Effective pedagogies must take into account that students are at different developmental stages of growth toward an internalized moral core. In terms of the Four Component Model, each student is at different stages of development in each of the four components, and the pedagogy used must engage the student at his or her current developmental stage.

#### *2. Cognitive Disequilibrium and Optimal Conflict*

Central to pedagogies of professional formation is the idea that each person needs to experience cognitive disequilibrium<sup>237</sup> or optimal conflict

235. *Id.* at 359–62.

236. William J. McGuire, *The Probabilistic Model of Cognitive Structure and Attitude Change*, in *COGNITIVE RESPONSES IN PERSUASION* 291, 291–307 (Richard E. Petty et al. eds., 1981).

237. Cognitive disequilibrium is a term used by learning theorists and moral psychologists to describe how learners benefit from facing multiple perspectives of significantly challenging problems and how it promotes development of cognitive, social, and emotional capacities and skills. Optimal conflict refers to necessity of a balance between providing sufficient challenge and sufficient support for learners. For a practical overview of this topic, see ROBERT KEGAN & LISA LASKOW LAHEY, *IMMUNITY TO CHANGE*, at xiii, 13–17 (2009).

on issues relating to the person's moral core within a context of psychological safety. Each law school's curriculum should offer repeated opportunities for each student to engage with stage-appropriate questions that create optimal conflict.

### 3. *The Habit of Feedback, Dialogue, and Reflection (FDR)*

Both the Carnegie Foundation studies and the FCM studies of effective pedagogies emphasize the effectiveness of helping each student internalize the habit on matters involving the student's internalized moral core of actively seeking feedback from others, dialogue with others about the tough calls, and reflection on matters involving the student's moral core. We have called this the habit of FDR.

### 4. *Structuring Repeated Opportunities for Practicing the Habit of FDR, Especially Through Formative Assessment, Throughout the Curriculum*

The Carnegie studies recommend giving broad attention to professional formation throughout the curriculum by integrating modules on professional formation and formative assessment into a number of courses.<sup>238</sup> Based on twenty-five years of empirical research using the FCM, Bebeau also recommends a curriculum that "provides students with multiple assessment and reflective self-assessment opportunities on professional formation, including feedback from multiple sources."<sup>239</sup> The curriculum should help students become reflective and self-directed over an extended period of time in the context of the overall program.<sup>240</sup> There is no empirical evidence that a single ethics course focused on doctrinal knowledge and critical analysis of ethics without some reflective exploration of the student's own internalized moral core makes any difference on any of the FCM capacities.<sup>241</sup> Essentially, empirical research is suggesting that structured opportunities for practicing and rehearsing the habit of FDR should occur throughout the curriculum in teacher-facilitated discussions of ethics, clinical education and practical experiences, coaching, modeling, scaffolding, reflective writing, storytelling and narrative, service learning, and small group discussion. The habit of FDR will help a student and practicing professional improve both in technical skill and in professional formation.

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238. Hamilton, *Lessons from Carnegie*, *supra* note 14, at 25.

239. Bebeau, *Promoting*, *supra* note 28, at 391.

240. *Id.*

241. *Id.* at 392.

F. *Building on Legal Education's Signature Pedagogy of the Case-Dialogue Method*

1. *The Case-Dialogue Method Through Repetition Builds the Habit of Thinking Like a Lawyer*

Legal education's signature pedagogy is the case-dialogue method which students repeatedly practice for three years until the habit of thinking like a lawyer inherent in the method becomes automatic.<sup>242</sup> The habit of thinking like a lawyer "emerges as the ability to translate messy [factual] situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument to advance a client's cause . . . ."<sup>243</sup> The case-dialogue method involves teacher-initiated questions where the focus initially is on facts that contribute to the client's legal position<sup>244</sup> and then on legal reasoning to translate the facts into the distinctive frame defined by legal points of reference and legal doctrine.<sup>245</sup> The instructor shapes the students' habit of thinking like a lawyer by modeling (making thinking like a lawyer visible), giving feedback to the students by both direct and indirect praise and criticism, and scaffolding to simplify a task as much as necessary to enable the student to engage in the process (e.g., by giving hints and suggestions).<sup>246</sup>

The case-dialogue method is dialectical in the sense that it is initiated principally by the instructor's questions and encouragement of oppositional points of view to test the initial point of view, but the professor usually signals which student's efforts to think like a lawyer have more strength in terms of the excellence of the technical analysis. Students are invited to shift quickly among points of view by walking around any situation to frame the arguments convincingly from all the opposing strategic positions.<sup>247</sup> Hypotheticals induce the students to test their legal reasoning by applying their reasoning to different facts. The instructor also encourages the students' ability to transfer learning quickly from one context to another different context.<sup>248</sup>

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242. SULLIVAN ET AL., *supra* note 72, at 54.

243. *Id.*

244. *Id.* at 52–53.

245. *Id.*

246. *Id.* at 61.

247. *Id.* at 56.

248. *Id.* at 62.

## 2. *Case-Dialogue Pedagogy in Comparison to Professional Formation Pedagogy*

### a. *Repeated Practice Until the Habit of FDR also Becomes Automatic*

The case-dialogue method helps students internalize the habit of thinking like a lawyer through constant repetition for three years. We are proposing that legal education should also focus continuing repetition and rehearsal on the habit of actively seeking feedback, engaging in dialogue with others on the tough calls, and reflection (FDR) until it becomes automatic.

### b. *Questions and Feedback*

In the case-dialogue method, the instructor asks questions and then gives feedback through direct and indirect praise and criticism to signal the instructor's judgment of the degree to which the student responses demonstrate excellence in thinking like a lawyer. Questions and feedback for purposes of professional formation are different in two ways:

- First, except for the subset of professional formation issues relating to compliance with the Rules of Professional Conduct, the questions and feedback the instructor gives to foster professional formation are not for the purpose of weighing and judging the relative merit of student responses against a standard of technical excellence. With professional formation, the instructor's questions engage the student at the student's developmental stage and invite the consideration of the perspectives of the next stage. Questions and feedback always show respect for the student's current stage and do not put the student on the defensive. They engage the student positively to help the student think through what the material and discussion and others' views mean for him or her personally in terms of the student's internalized moral core. The message is always that the instructor is trying to help the student think through the issues for him or herself.
- Second, while the case-dialogue method acclimates the student to the passive role of waiting for the professor to ask questions and give feedback, an educational objective of professional formation on matters relating to the student's internalized moral core is to help the student to pro-actively assume responsibility for asking questions and seeking feedback from others.

### c. *Dialogue with Others*

The case-dialogue method is a type of dialectic that emphasizes oppositional views to test the initial point of view with the instructor signaling which point of view shows greater technical excellence in thinking like a

lawyer. Professional formation dialogue is also a type of dialectic where the instructor encourages each student to express a point of view on the issues raised that relate to each student's internalized moral core. Some student views or the instructor's own view may be oppositional, but the instructor does not signal that some points of view are superior. The instructor can ask questions that are nonconfrontational and nonjudgmental both to clarify points of view and the reasons for them, and to ask whether other considerations might be relevant. The instructor can help students walk around a problem to look at it from the point of view of each stakeholder in the situation. Professional formation requires respect for each student's developmental stage, so the instructor is essentially asking each student to listen carefully to understand other persons' points of view and reasons for the point of view. Ultimately the goal is not to search for analyses that serve some client advantage but to ask each student to let the other students' and the instructor's words regarding an issue relating to each student's internalized moral core sit on the student's heart. In addition, the instructor is not trying to acclimate the students to wait passively for the instructor to initiate dialogue with others but rather to internalize the habit of actively seeking opportunities for dialogue with others on the tough questions.

*d. Reflection*

The case-dialogue method does not generally emphasize the habit of actively reflecting on the student's own performance of thinking like a lawyer. In contrast, professional formation consistently encourages the habit of reflection on behavior that involves the student's internalized moral core.

IV. WHAT DO THE MOST EFFECTIVE PEDAGOGIES FOR PROFESSIONAL FORMATION SUGGEST ABOUT COUNSELING THE CLIENT?

As we saw in the empirical studies on moral judgment and reasoning analyzed in Section III.B. and in the studies of moral identity in Section II.D., people, including law students, lawyers, and clients, are at different developmental stages on each of the Four Component Model capacities. Each individual client brings different combinations of stages for moral sensitivity, moral judgment and reasoning, moral motivation and identity, and moral implementation. Each client will understand his or her best interests in the representation in the context of the client's combination of developmental stages.

Business ethicist Ken Goodpaster hypothesizes that organizations also have developmental stages of ethical culture and a type of corporate conscience.<sup>249</sup> Organizational cultures can move over time from Type 1 thinking, which is simple self-interest in relating to others, to Type 2 thinking,

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249. GOODPASTER, *supra* note 6, at 69.

which emphasizes legal or market forces or an enlightened self-interest, to Type 3 thinking, which embraces unconditional respect for others in the sense of the Golden Rule. An organization that has internalized Type 3 thinking has a fully developed corporate conscience.<sup>250</sup> Type 3 thinking does not assume that corporate conscience is simply a matter of altruism or selflessness. It presupposes a concern for self (“as you would have your neighbor do to you”). The challenge of corporate conscience in the end, Goodpaster writes, is not the suppression of self-interest but the coordination of self-interest alongside respect for others.<sup>251</sup>

Goodpaster outlines several characteristics of an ethical organizational culture that encourage Type 3 thinking. The first is reflectiveness as a cultural disposition to encourage regular self-scrutiny and assessment. Such cultures make time for stepping back periodically out of the “busy-ness” and goal-directedness of everyday business life for both personal and collective reflection. The second is humility—the willingness to acknowledge both mistakes and gaps between the aspirations of the organization and actual practice, and to learn from and correct the mistakes and gaps. Access to candid feedback from peers (including the lawyers representing the organization) fosters this type of humility.<sup>252</sup>

A lawyer seeking to help the individual or organizational client think through the client’s best interest in the context of the representation should try, to the degree possible, to see the issues from the client’s stage of development on each of the four components and help the client think through best interests from the client’s shoes.

The lawyer seeking to be a good counselor on each component must dedicate him or herself to self-development on each of the four components. This lifelong process of self-development will consequently improve the lawyer’s counseling skills. For example, a lawyer whose moral judgment is in a personal interest schema will be unable to adequately counsel a client whose moral judgment is in a maintaining norms or post-conventional schema.

On the other hand, a lawyer whose moral judgment is at a post-conventional schema could counsel a teenage client in a personal interest schema. The lawyer could ask questions to help the client think through the issues within a personal interest schema and then ask questions to help the client to consider issues from a maintaining norms schema.

Narvaez and Bock emphasize research demonstrating that individuals often use moral judgment schemas that are *not stored verbally*. “The foundation of moral schemas lies in implicit or tacit knowledge that has been

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250. *Id.* at 69–71.

251. *See id.* at 70.

252. *See id.* at 106–08.



garnered through social experience.”<sup>253</sup> Schemas are activated without intention or conscious control and may be beyond the individual’s ability to articulate verbally: “Individuals have, use, and are influenced by a great deal of knowledge without awareness.”<sup>254</sup> However, “[i]ndividuals are often able to understand something without being able to explain it to others. The inability to articulate understandings is not a matter of forgetting—because the correct explanation is recognisable—rather, the individual has not learned to put the understanding into words.”<sup>255</sup>

The lawyer’s role as a counselor is to go beyond merely listening to the client. The lawyer can verbalize considerations relevant to the client’s moral judgment schema that the client cannot verbalize. The lawyer, through questions, can assist the client in tapping into the client’s implicit fundamental moral judgment schema.

For instance, assume an individual client is at earlier stages of development regarding moral sensitivity and empathy, moral judgment and reasoning, moral motivation and identity, and moral implementation. Is it appropriate for the lawyer to go beyond simply trying to help the client understand the client’s best interest from the client’s developmental stages? Should the lawyer try to help the client grow toward later stages? As we covered in the Introduction, it is in the client’s enlightened self-interest to demonstrate later-stage capacities in terms of each of the four components. Others will see the client as more effective. If the client is open to thinking about normative ethics beyond enlightened self-interest, there are also moral reasons to help the client grow in terms of moral capacities. We think the client benefits by moving toward an internalized moral core.

Section III’s analysis of effective pedagogies for professional formation provides useful concepts to guide a lawyer’s counseling engagement to foster a client’s growth in terms of the client’s internalized moral core. For example, with respect to each of the client’s four component capacities, ask the client stage-appropriate questions and share stage-appropriate stories of others’ experiences that ask the client to consider factors at the next later stage from where the client is at currently. The lawyer must give the client time for reflective processing of the issues raised by the lawyer. In longer-term engagements, the lawyer could use the pedagogies of repeated engagement suggested earlier to encourage the client to internalize the habit of actively seeking feedback, engaging in dialogue on the tough calls, and reflecting on the feedback and dialogue.

Finally, it bears emphasizing again that a lawyer using these pedagogies to counsel a client is not dictating the client’s morality. The objective is to help the client think through the client’s best interest from the client’s

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253. Darcia Narvaez & Tonia Bock, *Moral Schemas and Tacit Judgement or How the Defining Issues Test Is Supported by Cognitive Science*, 31 J. MORAL EDUC. 297, 309 (2002).

254. *Id.* at 299.

255. *Id.* at 302–03.

developmental stage, but with the possibility of creating some cognitive disequilibrium and growth through the optimal conflict suggested by Kegan and Lahey. The lawyer is always showing respect for the client and not judging or creating a defensive reaction from the client.

## V. CONCLUSION

### A. Concrete Proposals

This essay puts forward concrete proposals to address a foundational learning objective for all of higher education for the professions articulated by Carnegie Foundation president Lee Shulman: "The most overlooked aspect of professional preparation was the formation of a professional identity with a moral and ethical core of service and responsibility" around which each student's habits of mind and practice are organized.<sup>256</sup> We call this professional formation.

Section II analyzed a number of studies providing different windows on what are the specific elements of professional formation. The studies clarify that a later-stage understanding of professional formation includes an internalized moral core characterized by a deep responsibility to others, particularly the client, and some restraint on self-interest to serve this responsibility. The internalized moral core also reflects the virtues and capacities of ongoing solicitation of feedback and self-reflection, a standard of excellence at lawyering skills, integrity, honesty, adherence to the ethical codes, public service (especially for the disadvantaged), independent professional judgment, and honest counsel. We are proposing that a major educational objective for legal education should be to foster a later-stage internalized moral core in as large a proportion of students as possible. We argue that growth toward a later-stage internalized moral core means the lawyer can more effectively serve his or her clients.

Section III analyzed all the empirical studies we could find on the most effective pedagogies to foster each student's growth toward a later-stage internalized moral core. Different studies conducted by different researchers using different methods point toward several most effective pedagogies.

1. Because students are at different developmental stages in terms of the Four Component Model capacities, to be effective in terms of fostering a later-stage internalized moral core, pedagogies must provide stage-appropriate educational engagements. The pedagogies used are in general asking the student to explore the meaning of the topics, materials, experience, and discussion to the individual student's internalized moral core.
2. Each law school's curriculum and pedagogy should offer each student multiple stage-appropriate opportunities to experience

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256. Shulman, *supra* note 1, at ix; see COLBY ET AL., *supra* note 1, at 21; KHURANA, *supra* note 1, at 7, 291.

cognitive disequilibrium or optimal conflict on issues relating to the student's moral core.

3. Through repetition and rehearsal similar to the case-dialogue method to help students learn the habit of thinking like a lawyer, each law school's curriculum and pedagogy should help students internalize the habit, on issues involving the moral core, of actively seeking feedback from others, dialogue with others about the tough calls, and reflection (FDR). This habit of FDR will promote growth of both a student's technical skills as well as a student's professional formation.

4. Empirical research suggests that structural opportunities for practicing the habit of FDR should occur throughout the curriculum in teacher-facilitated discussion of ethics, clinical education and practical experience, coaching, modeling, scaffolding, reflective writing, storytelling and narrative, service learning, small group discussion, cooperative learning, and peer coaching. These structured FDR opportunities will help each student move from the passivity of many undergraduate students toward the active self-responsibility of a later-stage professional for his or her own development.

## B. *Three Challenges*

### 1. *Empirical Research on Professional Formation*

While existing research is converging on a clear definition of the educational objective of professional formation in terms of clearly defined elements, there is still much empirical work needed to identify and refine pedagogies, and develop diagnostic, formative, and summative assessments that are most effective to foster the elements of professional formation. As *Educating Lawyers* noted, "As far as we know, there is no research on the extent to which this influence [of three years in law school] results in greater incorporation of the ethical-social values of the profession into students' personal and professional identities."<sup>257</sup> In particular, we need empirical research to develop assessment measures that yield valid and reliable data to study the relationship between various pedagogies and one or more moral capacities. Addressing this absence of empirical research is one of the Holloran Center's major goals. We can also continue to learn from empirical research on professional formation in higher education for other professions.

### 2. *Faculty Culture and Capacity for Professional Formation Teaching*

Ideally each law school faculty would take a stance of institutional intentionality toward professional formation where the faculty is explicit

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257. SULLIVAN ET AL., *supra* note 72, at 135.

about professional formation learning outcomes and actively plans curricula and pedagogies to achieve the learning outcomes.<sup>258</sup> The faculty would give broad curricular attention to professional formation in a number of courses and integrate the three apprenticeships throughout the curriculum.<sup>259</sup> There would be a substantial alignment of the learning outcomes of professional formation and the actual culture of the law school.<sup>260</sup>

In actual reality, Anne Colby and William Sullivan report that in the five Carnegie studies of higher education for the professions, they rarely saw an entire professional school take an activist stance toward professionalism.<sup>261</sup> With respect to law schools in particular, Colby and Sullivan found that law faculty “often commented that professional educators are not responsible for shaping students’ ethical development, that this enterprise is not entirely legitimate, and that it is no longer feasible to influence the ethical development of students once they are young adults.”<sup>262</sup> As noted earlier, this understanding ignores the last thirty years of accumulating knowledge in other fields, particularly moral psychology.<sup>263</sup>

In contrast, Foster found in the Carnegie study of seminary education that some faculties did take a faculty-wide stance toward professional formation. In these seminaries, “the curriculum maps an integrative journey for students,” and faculty members “model and coach students” toward a holistic ethical professional identity. At these seminaries, Charles Foster observed a vital conversation among faculty about professional formation.<sup>264</sup>

Law faculties contemplating more emphasis on professional formation should adopt a strategy of educational programs or workshops designed to introduce faculty members to the empirical research on adult moral development and professional formation. These programs can help faculty understand how to use the different pedagogies for professional formation, particularly how to help students (and faculty) internalize the habit of FDR. The goal is to create a vital conversation among the faculty about professional formation. At the minimum, the programs could create a critical mass of faculty interested in experimentation on professional formation in their teaching. These conversations will also have to deal with the issue of how to introduce professional formation pedagogies at a reasonable cost. A mentor externship program is one option to consider.<sup>265</sup>

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258. *Id.* at 180–81.

259. *See* discussion *supra* Part III.A.

260. Hamilton, *supra* note 126, at 363.

261. Colby & Sullivan, *supra* note 128, at 420.

262. *Id.* at 420.

263. *See* discussion *supra* Part II.D.; Hamilton & Monson, *Answering the Skeptics*, *supra* note 26, at 3.

264. Charles R. Foster, *Identity and Integrity in Clergy Formation*, 5 U. ST. THOMAS L.J. 457, 468 (2008).

265. *See* Hamilton & Brabbit, *supra* note 19, at 102–03.

### 3. *Learn by Doing, Patience, and Humility*

Our experience developing stage-appropriate educational engagements to foster students' professional formation over the past eleven years at the University of St. Thomas School of Law has taught many lessons in humility and patience. Among the biggest challenges has been designing and implementing professional formation pedagogies into the required curriculum that interest and engage the entire spectrum of students who are at different stages in terms of the Four Component Model capacities.<sup>266</sup> We have had much trial and error in the required curriculum trying to find the most effective pedagogies to engage each student where he or she is in terms of developmental stage. One clear lesson is that a significant subset of students "will adopt ideas and skills to the extent they find them useful and efficient in solving practical problems."<sup>267</sup> For example, medical students found a curriculum to improve communication between cancer patients and their physicians useful to solve practical problems when the instructor used open-ended questions to ask if any student had been frustrated or had difficulty in communication with a case in the past week and used the practical problems raised to engage the students in discussion about relationship capacities and skills. Students also found a practice-oriented video feedback program useful in relationship capacities and skills development.<sup>268</sup>

It will be challenging for some law faculty to move from the case-dialogue method for teaching thinking like a lawyer (where the instructor is shaping "right" doctrinal answers and analytical processes with a clear standard of professional excellence at the technical skills involved) toward a bottom-up, student-centered moral discourse where student development may be much slower. Any instructor who is willing to model the habit of FDR and ask open-ended questions relating to professional formation should be able with practice to facilitate student-centered moral discourse.

In college, Hamilton heard a speech by former Vice President Hubert Humphrey with words that have grown in meaning over the years. Humphrey said, "Regardless of occupation, we are all teachers. We teach each other about how to live life." When an instructor is willing to embark on the lifelong journey toward professional formation with students, both the instructor and the students can teach each other how to live life.

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266. *Id.* at 124.

267. Howard B. Beckman & Richard M. Frankel, *Training Practitioners to Communicate Effectively in Cancer Care: It Is the Relationship that Counts*, 50 *PATIENT EDUC. & COUNSELING* 84, 85 (2003).

268. *Id.* at 86–87.

## APPENDIX A

**JUDGING THE CREDIBILITY OF EMPIRICAL EVIDENCE IN EDUCATIONAL RESEARCH: FREQUENTLY ASKED QUESTIONS (FAQ) FOR LEGAL EDUCATORS**

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Since the ABA is eventually going to follow all other accrediting bodies for higher education for the peer-review professions to specify learning outcomes, curriculum, and assessment relating to professional formation (and taking into account the shift within legal education to empirical research), legal educators must prepare to judge the credibility of educational research in making decisions about instruction and assessment of instruction. The process of judging the credibility of research is aided by understanding the underlying different assumptions inherent in educational research, which are in turn informed by traditions in psychology, sociology, anthropology, economics, and philosophy. At the heart of these differences are divergent beliefs about the nature of knowing and of validity (i.e., whether we can reasonably conclude that inferences made from empirical data are credible or valid). In addition, there are underlying ethical issues that require attention. Because pedagogies of professional formation can involve assessing psychological, social, and emotional capacities of professional students, which can deal with sensitive personally held beliefs and values, schools should adopt rigorous ethical standards.

The following are questions that we hear from legal educators that will hopefully clarify some of the terms and concepts used in empirical research and provide an introduction to the ethics of measurement and assessment in education and psychology. We hope you find this FAQ useful. A brief list of sources is provided at the end, for those who wish to study in more depth.

A. *What Do You Mean by “Empirically-Validated” Theories or Pedagogies?*

**Empirically-validated theories** are validated and refined through a process of scientific research and peer review to ensure the robustness of the methods and validity of conclusions. **Empirical** refers to research based on data collected in a systematic way, following rigorous ethical and professional standards. Empirical data consists of respondents' language or numbers. **Qualitative** studies focus primarily on language and **quantitative** research on numbers. Although the quantitative paradigm once dominated research in education, educational research and evaluation now commonly utilize a synthesis of these methodologies, increasing the overall validity, credibility, and meaningfulness of the conclusions.

Educational researchers sometimes refer to complex processes or ideas about how something works as a **model** instead of a theory. The term can be used interchangeably with theory, but models more often depict phenomenon using graphs that display the relationships between different components of a process (e.g., a logic model or flow chart).<sup>269</sup> If measures of each component process are available in relation to a desired outcome, models can be tested using advanced statistical techniques. In qualitative research, component processes and relationships to outcomes are not tested statistically, but a parallel process of verifying interpretations is conducted (which is discussed in a later section).

A **pedagogy**, or an instructional method, is an application of one or more theories or models to an educational or training and development context. Because pedagogies involve many variables (e.g., the underlying theory or theories used, students, instructor, school, curriculum, and program), studying the validity of pedagogies is challenging, but of value to schools that rely on empirical data to make curricular or instructional decisions. Some educators view education as too complex to reduce to discrete theories or components and prefer instead to view the process as **holistic**—meaning that to identify and precisely measure elements of cognition, emotion, and social interactions with pedagogical techniques is not possible. Educators studying holistic pedagogies utilize qualitative, exploratory methodologies with the goal of capturing the essence or lived experience of instructors and learners. In a similar vein, some adult education theorists believe that the term pedagogy implies the use of methods more appropriate for children and advocate instead for the use of **andragogy**, in which the instructor’s objective is to foster the development of students towards becoming more self-directed.

### *B. What Is Meant by the Terms Validity and Reliability?*

Although people tend to talk about an assessment tool or measure as “validated,” and many commercially available tests or measures claim to be “validated,” **validity** is instead an ongoing process. Validity is not a characteristic of a test or a measure but a characteristic of the data. Construct validity explores whether a test is measuring what it claims to measure. Content validity explores what subject-matter experts view as important or valid within a test or assessment. Predictive validity looks at how well scores on a test predicted some type of outcome, such as whether LSAT scores predict class grade rank at the end of law school. Through replication of studies, validity accrues.

**Reliability** contributes to the overall validity of a test or measure. Reliability is estimated by looking at how similar items on a survey or mea-

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269. A logic model is a graphical depiction of a complex process that is used in modeling how a program works, breaking down components of inputs, outputs, and outcomes.

sure correlate or how different versions of a test or measure given at the same time or some weeks or months apart correlate. If researchers are coding narrative data or rating responses using a scale, reliability between coders can be calculated. The widely accepted definition of sufficient reliability of a test or measure is a number—with a coefficient of approximately .80. Reliability is increased by controlling conditions in which students are given the assessment, limiting the length of the interview or survey to avoid fatigue and distraction, and training raters or coders.

Validity and reliability are terms used by quantitative researchers to describe psychometric properties of tests and measures of human psychological, emotional, or social capacities. In qualitative research, these terms are used more judiciously, reserved for instances when quantitative and qualitative methods are used in tandem, a notion thought to increase overall validity. To a qualitative researcher whose focus is singularly on qualitative methodologies, the words that have the equivalent meaning are “credible, balanced, fair, complete, sensitive, rigorously subjective, coherent, internally consistent, appropriate, plausible, and helpful.”<sup>270</sup>

The validity of a test or measure is of the highest concern if the use of the test is a **high-stakes norm-referenced assessment** (e.g., the LSAT or MPRE exams). Developing an assessment for a course based on the instructor’s knowledge and familiarity with students’ goals or abilities is called a **criterion-referenced assessment**. Instructors informally assess how effective these pedagogies are in fostering dialogue or a process of feedback, dialogue, and reflection, using principles of **action research**.<sup>271</sup> Similarly, **self assessments** of interpersonal and communication abilities are useful in fostering development and need not be validated.

If an instructor uses measures of complex cognitive construct, such as an assessment of moral judgment or ethical sensitivity, validity is of greater concern, particularly if individual scores and feedback are given. If an instructor intends to give back individual scores, a qualified professional should assess the ethical risk of assessment use. Many tests of psychological capacities of professional formation are made available only to qualified professionals. Legal educators can also minimize the risks and chances of any negative repercussions from assessment by using these assessments as educational tools for formative feedback, discussion, and reflection rather than summative assessment.

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270. Philip W. Jackson, *Looking for Trouble: On the Place of the Ordinary in Educational Studies*, in *QUALITATIVE INQUIRY IN EDUCATION* 153, 154 (Elliot W. Eisner & Alan Peshkin eds., 1990).

271. Action research is a type of qualitative methodology that was introduced by social psychology in which the researcher is part of the context, the research is qualitative/naturalistic, and is focused on improving a school or program.



C. *Is Research Based on Interviews Considered Too Subjective to Be Valid?*

In the **quantitative/experimental paradigm**, researchers assume people have limited verbal ability and insight into their own experience, and thus reliance on verbal reports leads to erroneous conclusions. Instead, researchers use scales or systematic observations that count behaviors or measure time. Scientific sampling can permit the results of surveys or tests to generalize to the population. With **random assignment and control groups in experiments**, also called **random control trials**, researchers isolate factors found **causally related** to learning or developmental growth. Random control trials can create ethical challenges when students are assigned randomly to the control group. Schools find it hard to justify ethically withholding programs from students who could benefit from a particular pedagogy or instructional method. In this case, researchers identify similar programs without the instructional method to use as a comparison in a **quasi-experiment**. Quality in the quantitative/experimental paradigm is judged by how well the researcher can control or account for factors that might reduce validity through the use of research designs, and reduce the extent of **measurement** or **sampling error** in survey research.

In the **qualitative/naturalistic paradigm**, researchers assume that if the interviewer is sufficiently skilled and the topic is non-threatening, people can meaningfully respond to questions in a survey, interview, or focus group without bias or error. For example, in the qualitative paradigm, researchers view students as having access to insights into their own thoughts about becoming a professional. Researchers conduct their work in naturalistic settings instead of a laboratory. They analyze verbal or narrative data to identify patterns across other responses, develop a taxonomy of themes, or a visual model of processes. In this paradigm, researchers focus on understanding participants' experiences and perceptions in depth—thus meaningful research is typically conducted with small sample sizes. Despite this focus, care should be taken to reduce or eliminate sampling error, particularly if the focal point of the research affects all students. The researcher may purposefully interview students from different subgroups to guard against sampling error or bias. Researchers may also purposefully seek out individuals with knowledge or experience related to the phenomenon that a school might wish to address in some way (e.g., international students who may be worried about family at home during a time of war or civil unrest).

Quality in the qualitative/naturalistic paradigm is judged on the depth or richness of the narratives, the rigor of the data analytic techniques, the use of a peer review process, and whether the results are useful. Researchers can increase validity by **searching for alternative explanations** for the results, ruling them out through the data. This is the equivalent of testing an alternative hypothesis in quantitative research.

The quality of research results is strengthened by **searching for negative cases**. Following up with non-respondents helps determine if there is a pattern that might indicate bias. Researchers should report a concise description of procedures, discuss the limitations of the methodologies employed, and suggest future research directions.

The credibility of qualitative research is enhanced when **triangulation** is utilized. With triangulation, the researcher uses different methods to determine if the results will corroborate other findings. Triangulation can involve (a) **methods**, comparing results from surveys, interviews, or other data; (b) **sources of data**, comparing results from different schools or different subgroups; (c) **analysts**, in which data is analyzed by other researchers or subject matter experts and results compared; (d) **theoretical triangulation**, in which similar theories or models are used as lenses to interpret data, and (e) **triangulation of quantitative and qualitative data**, comparing the level of agreement between numerical and narrative results.

#### *D. How Do I Judge the Quality of a Test or Assessment?*

When judging the quality of a test or assessment, the researcher should consider the validity and reliability of the measure or scale used and its track record in the literature. **Off-the-shelf paper-and-pencil tests and assessments** of complex capacities of professional formation may offer an efficient way to assess the effectiveness of programs but can lack face validity<sup>272</sup> or realism for students and may not lend themselves to helping students develop. Some of these assessments rely on self-report responses to questions about values and self perceptions that some experts believe are subject to biased responses. Reputable assessment or test owners of off-the-shelf assessments provide information on test development procedures along with validity and reliability information.

In contrast, **performance assessments** more closely resemble the context in which students will practice than do paper-and-pencil tests. Writing legal documents or giving oral arguments are types of performance assessments used in legal education. Performance assessments utilize **rubrics** that detail levels of competencies that instructors then use to score the assessment and provide feedback. Levels of competencies are defined by experts in the field for use in a rubric, which are used by one or more raters of the performance. **Checklists or observation forms** are useful in rating interpersonal abilities, either for observing students in a practice simulation or observing students with clients. Multiple raters providing feedback is called a **360-degree assessment**, which can be used by peers or professors over an extended period, such as a semester or academic year. **Portfolios and journals** are other types of naturalistic assessment that are rated according to

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272. Face validity describes the extent that participants taking a test or filling out a survey view the information and items as relevant and meaningful.

criteria developed by experts on the relevant topics. Quality is gauged by how well the rubric covers the domain of abilities or competencies. Rating data from rubrics are analyzed to estimate reliability and validity.

Reputable testing and assessment firms should supply prospective users with publications, research reports, and coding manuals upon request. There should be a track record of publication in **peer-reviewed** journals, where authors are subjected to rigorous critique of their methods. Consumers can request information on the validity and reliability of associated instruments. Consumers can inquire if the vendor is a member of the American Educational Research Association, American Psychological Association, or the National Council on Measurement in Education, which set high ethical standards.

### E. Summary

In sum, as legal education enters a new era of empirically informed definitions of learning outcomes, curriculum development, and assessment the first step is to consider what knowledge already exists in the educational research literature and applied psychology. Graduate medical education provides a relevant model for legal education because of the shared goals of professional formation or professionalism of students. Care should be taken to avoid any unintended consequences of tests or assessments by adhering to ethical standards from education and psychology.

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APPENDIX B

EXCERPTS FROM CODING GUIDE

*Personally, What Does Professionalism Mean to You?*

<b>Stage 2: The Independent Operator</b>	
<i>Criteria</i>	<i>Examples</i>
<ul style="list-style-type: none"> <li>• Professionalism is understood as meeting specific and concrete role expectations created by and imposed by others</li> <li>• Professional organizations or external others specify correct behavior and punishments</li> <li>• Describe professionalism in terms of enacting requisite behaviors (“act like” or “conduct myself like”)</li> <li>• Speak of professional success in terms of personal success, self-interest, and competent performance (skills, technical expertise)</li> <li>• Speak of meeting professional standards in terms of skill, knowledge/expertise, and continuing education</li> </ul>	<ul style="list-style-type: none"> <li>• Professionalism means the way you conduct yourself while at your job. To be professional means to conduct yourself in a manner that expresses that you mean business.</li> <li>• The ability to perform your tasks and duties in a proficient and skilled manner.</li> <li>• Professionalism to me is a set of behaviors that meet or exceed the expectations of those who are engaged in, or related to, a specific profession.</li> <li>• Acting in a way which is in accordance to the profession you are in and to the people who you are offering your services to.</li> <li>• Professionalism to me means maintaining composure and acting in a manner which is appropriate for a particular situation, or more specifically, a profession.</li> <li>• Professionalism means that a person fulfills his or her job duties to the best of his or her ability. It means that one fulfills these duties every day, even if one does not feel like it. A professional is well-trained and is able to do the job well.</li> <li>• Presenting your “best” self in both appearance and personality. Following through. Working hard, yet keeping an emotional distance from your work.</li> </ul>

## APPENDIX C

**MAKING SENSE OF THE DIFFERENT PARADIGMS OF LEARNING AND PEDAGOGIES**

Described below are three major paradigms of education or learning that are founded in empirical social sciences, including psychology, sociology, and anthropology as well as philosophy and linguistics. These paradigms explicitly or implicitly guide instruction or pedagogical strategies used in higher education. The following describes the core ideas, the ways of knowing that are tradition (i.e., epistemologies), and major theorists that are associated with these paradigms. Note that some theorists contributed to more than one paradigm. In practice, instructors draw upon two or more paradigms.

**CONSTRUCTIVISM (also constructive-developmentalism, cited in Carnegie studies)**

- **Core ideas:** Learning is enhanced through experiential activities that facilitate the learner's active construction of knowledge and build upon prior knowledge to form more complex or complete conceptual structures. Constructivist theory states that cognitive disequilibrium, or the process of encountering new or conflicting ideas or information, is necessary for development to occur. Learning is a social activity. Students naturally observe and teach each other. Learning and development are described not as "filling up" the learner with facts or information but as fostering transformational growth that proceeds in a sequence of stages. Constructive-developmental theory is applied to cognition (Piaget), moral development (Piaget, Kohlberg, Rest), and more holistically to cognitive emotional and social development (Rest's Four Component Model, Kegan). Theories of lifespan development (Dewey, Rest, Kegan, Knowles) and adult education/self-directed learning (Knowles) fall into this paradigm. Social learning theory and social cognition contains elements of constructivism and cognitivism (Bandura).
- **Ways of knowing:** The constructivist paradigm focuses on the learner's construction of knowledge. Researchers use in-depth interviews with learners to gain meaningful insights into how they make sense of self and develop conceptions of the professional role. The objective is to understand how individuals make sense of their world and how patterns can be seen in samples or groups (e.g., lawyers compared with physicians).
- **What critics say:** Critics say there is insufficient empirical evidence to support the validity of constructivist pedagogies and that learners benefit more from direct instruction. Despite this criticism, construc-

tivist pedagogies are pervasive throughout professional education and adult education because learning that is contextualized (i.e., resembling practice settings) more readily transfers to other settings. Examples in professional education include simulations, role-plays, or clinics.

- **Major theorists:** John Dewey, Jean Piaget, Jerome Bruner, Lev Vygotsky, Lawrence Kohlberg, James Rest, Robert Kegan, Albert Bandura, Malcolm Knowles.

## COGNITIVISM

- **Core ideas:** People are not passive in learning and cannot be “programmed” to learn complex skills like language acquisition through reinforcements or punishments. Instead, people possess innate mental capacities for learning. Cognitive processes of memory and thought are types of information processing. The role of the instructor is to structure or sequence information to build on the learner’s past knowledge and experiences, and assist learners in the process of encoding information into memory. Learning is seen as an individual process. Instructors should take into account that adult learners have different cognitive styles and learning styles. Instructional design utilizes principles of cognitive learning theory in sequencing and grouping information for learners, as well as helping them by providing memory devices as part of instruction. Promoting different forms of cognition for adult learners, such as meta-cognition and reflective thought, overlaps with constructive-developmental theories.
- **Ways of knowing:** Experiments, observation, case studies. The objective is to identify principles of learning and cognition that generalize broadly.
- **What critics say:** Critics say cognitivism does not attend to the social and cultural context in which learning takes place.
- **Major theorists:** Jean Piaget, Jerome Bruner, Noam Chomsky, Jack Mezirow.

## BEHAVIORISM

- **Core ideas:** All learning is a response to external stimuli. Learning and behavior can be shaped through processes of reinforcement (e.g., gold stars or praise) or punishment (e.g., academic probation). The inner mental state of the student is not important. The role of the instructor is to determine specific goals in learning or shaping behavior and how best to reinforce learning or behavior change. Elements of the behaviorist paradigm are found throughout schools, business, and society in the use of reinforcers of behavior (e.g., pay

for performance compensation systems) and in the maintenance of social order through punishment (e.g., removing driving privileges for drivers convicted of driving under the influence of drugs or alcohol).

- **Ways of knowing:** Behaviorists rely instead on observations, protocols for data collection, and experimental research designs, with a focus on identifying laws or principles that operate similarly in learners.
- **What critics say:** Critics of behaviorism point to research that with learners who are intrinsically motivated (i.e., love of learning for the sake of learning), external reinforcement can reduce motivation. In the 1960s, Noam Chomsky led a major paradigm shift to cognitivism in education in an essay that critiqued Skinner's claim that behaviorism could explain even the infant's acquisition of language, noting that infants are born with an innate ability to learn language through imitation.
- **Major theorists:** B.F. Skinner, Ivan Pavlov, Edward Thorndike, John Watson.

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For a review of the Carnegie Foundation studies in relation to pedagogies of fostering professional formation, see Hamilton, *Lessons from Carnegie*, *supra* note 14, at 12.

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JACK MEZIRROW, *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON THEORY IN PROGRESS* (2000).

## APPENDIX D

**Guidelines for Giving Developmentally Appropriate Feedback**<sup>273</sup>

Feedback is an important component of learning. This section is concerned with the development of comments and questions that, in addition to being constructive, take into account how the student sees the self in relation to others. Individuals at different stages of identity have different concerns. Thus questions that may make sense to a Stage 3 learner may not be understood by a Stage 2 learner and may be less likely to challenge further thinking.

Below are listed some prototypic questions to promote further thinking about what the student has written. To identify what kind of probe questions to include, ask yourself: Is this an essay that reflects:

1. Individual competence or role enactment? (Primarily a Stage 2 Identity)
2. Team player orientation or sense of social obligation? (Primarily a Stage 3 Identity)
3. Values orientation or professionalism? (Primarily a Stage 4 Identity)

If the essay reflects some of various stages, then the individual may be in the transition. Select questions from each level will direct attention to the missing dimension.

**FOR STAGE 2 IDENTITY**

*What is the student grappling with?*

**Concrete individualistic performance**

*How does he/she see the world?*

**Concrete and dualistic****PROBE QUESTIONS**

*Strategy:* When the student sees things in dualistic terms: good and bad, right and wrong, black and white.

*Ask:* Does everyone see it the way you do? How did the other person think about what you did or said? Is there any evidence to support your view? Some people think there are situations which are not clearly right or wrong. Can you think of such examples?

*Strategy:* When the student sees only his/her interest in the situation, encourage perspective taking.

*Ask:* What does (name other party) care about? How does the profession think about that? How would you feel if you were on the receiving end

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273. Bebeau & Lewis, *supra* note 132, at 111–13.



of that action? How would your friend (or family) feel? Do you actually know what your friend (parent, superior, or subordinate) thought about what you did? Did you ask? It is helpful to ask and to collect evidence on how others see things.

*Strategy:* Take other's perspective with respect to their intent or experience.

*Ask:* Do you think the other person perceived what you did as helpful, disrespectful, dishonest, etc.

*Strategy:* Try to elicit an internal focus.

*Ask:* Would you feel guilty if you did that? If so, why would you feel guilt or shame?

*Ask:* What emotion would your parents or friends experience if you failed (cheated, lied, harmed someone, failed a course, or failed the bar exam)? How would their reaction make you feel? What if you succeeded (earned good grades or received an offer from a top firm)? Maybe we can find some words that capture those feelings (self-confident, shameful, compassionate, remorseful). What sort of qualities would you like to strengthen in yourself?

*Strategy:* Try to elicit the student's experience of being regarded by others?

*Ask:* What do you want your friends (superiors, subordinates, or parents) to say about you? What kind of person would you like to become? How do you feel when your friends are worried about you (proud of you or upset with you)? How do you feel when your family members or instructors are worried (proud or upset or angry) with you?

*Strategy:* Develop a perspective on failure. Help them see that failures can be opportunities for learning.

*Ask:* What can you learn from that experience? What would be the worst thing that would happen to you if you failed? What circumstances might lead you to repeat this failure?

### **FOR STAGE 3 IDENTITY**

*What is the student grappling with?*

#### **Being a team member or team player**

#### **Concern for societal role, professional ideals**

*How does he/she see the world and the self?*

#### **Reflective and idealistic**

### **PROBE QUESTIONS**

*Strategy:* Take the student's perspective on what they accepted as a shared value.

*Ask:* How do you know that is true? What is your source of authority for that? Do different authorities disagree about that? What reasons do they use to come to their conclusions?

*Strategy:* Raise consciousness about likely conflicts between interpersonal allegiances and one's ideals.

Try to do two things:

1) Raise consciousness that conflict.

*Ask:* What if you marry someone who wants you to stay home rather than have a career? What if your friend asks you to keep secret about something that harms someone else? What if a senior associate or partner asks you to lie in order to help a client? What if your client asks you to overlook an ethically questionable policy in an employee contract negotiation?

2) Raise consciousness as to whether one's ideals can be met.

*Example:* Sometimes students get very frustrated when they know they should live up to some ideal standard but don't see how to do it.

*Ask:* Have you worked out a way to really do what is right?

*Strategy:* Develop a perspective on failure. Help them see that failures can be opportunities for learning.

*Ask:* What can you learn from that experience? What would be the worst thing that would happen to you if you failed? What circumstances might lead you to repeat this failure?

**FOR AN EMERGING STAGE 4 IDENTITY** (someone in Stage 3 to Stage 4 transition)

*What is the student grappling with?*

**Constructing a discerning principled identity**

**Staying centered and responsibly attuned to and tolerant of complexity**

*How does he/she see the world and the self?*

**Developing and changing**

**Contextual and constructed**

**Ambiguous and paradoxical**

**PROBE QUESTIONS:**

*Strategy:* Because students are grappling with a number of issues and are already rather discerning, they may need help in finding mentors for their problems.

*Ask:* Who can you talk to about this issue? How do you know if you are seeing this issue clearly? What set of criteria do you use to judge whether your views on this matter are defensible? How do you deal with people who do not know where you are coming from? Is there another whole way of looking at this situation? How do you hold on to your core values in this sort of situation? What about this situation caused you to lose your focus?

*Strategy:* Locate decision criteria within the self.

*Ask:* How do you go about deciding what to trust when you get conflicting guidance from others? How do you resist falling back into accepting the status quo or standard solution when pressured to do so?

## APPENDIX E

**DEVELOPING ABILITIES USING CASES<sup>274</sup>**

Michael Zigmond, University of Pittsburgh

Muriel Bebeau, University of Minnesota

Presented here are a set of circumstances to show how stimulus materials can be used to elicit the development of each of the ethical decision making abilities reflected in Rest's Four Component Model of Morality. The basics of the situation are these: A female postdoc (Michele Tyler) has just published an article in which she reports on a genetically engineered mouse that she has produced as a result of several years of hard work. She is about to move to her first job at a research university when she receives a phone call from a senior scientist (Max Myer), who heads up a large research group. Dr. Meyer asks her to send a dozen mice from her colony.

**Ethical Sensitivity**

The objective is to present clues to a problem for the protagonist without actually signaling what the problem is. The task of the trainee is to identify the issues and relate them to professional norms. In this instance, a dialog format is used that could be audio or videotaped, or simply presented as a script that can be acted out by the participants.

**The Michele Tyler Case**

Meyer: (In his office, sitting at a large desk.) Hello, is this Dr. Tyler?

Tyler: (Standing in the lab, one hand holding a sample she was processing.) Yes?

M: This is Professor Maxwell Meyer from the Institute of Psychiatry at the State University. You probably know my work.

T: Oh yes, I have read many of your papers.

M: Well, I just read your very excellent paper in the recent issue of *Research*. You have done some very, very clever work for such a young scientist. You must be very proud.

T: (Hesitating) Thank you very much. I guess, yes, I think it was a good paper.

M: What are your plans for the future? I am sure you had many job offers.

T: Well, I didn't get that many offers. But in the end, I did get a nice position at City University.

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274. Zigmond & Bebeau, *supra* note 129.

M: City University! Great. That is an excellent place. And they are lucky too that you will be joining them.

T: (silence)

M: . . . Yes, very lucky. You probably already have met my good friend, Professor Jones, then.

T: No, I haven't.

M: Oh, you really must. I will immediately write you a letter of introduction. When will you be going there?

T: Actually I leave next month.

M: Wonderful. And that way you will get there before the snow starts.

T: Oh, I think it is already snowing.

M: I see . . . Well, I know you will really like it there. By the way, we are interested in replicating some of your excellent work. Replication is really important for a young person just starting out, you know. I'd like to have you send us a dozen or so of those wonderful mice of yours.

Take on the role of Dr. Tyler. What would you say to Dr. Meyer at this point? Speak directly to him.

## **Ethical Reasoning**

### **The Michele Tyler Case**

Michele Tyler is happy. She has just completed three years of hard work as a postdoc and has a great deal to show for it: she's developed a "knockout" mouse (a mouse lacking a particular gene) that seems to be a model for schizophrenia, published a paper on that mouse in the highly prestigious journal *Research*, and secured an assistant professorship at City University. She knows that the new mouse and the paper were critical in getting her the job, and she's ready to show the search committee that they did the right thing—she will set up her new lab and begin to reap the benefits of her hard work by exploring the neurobiology of this mouse. However, no sooner had she arrived at City University, she received an e-mail message from Dr. Max Meyer asking her to provide a dozen mice from her knockout colony. It is clear from the e-mail that Dr. Meyer understands the potential of the mouse line and will have no trouble figuring out and completing the very experiments that Dr. Tyler had plans to pursue.

Should Dr. Tyler provide the mice?

Take a tentative position, yes or no, and tell why. List as many reasons as you can to support your position.

### Moral Motivation and Commitment

Using either formulation of the case, ask the learner to think about their future as a scientist. Ask the following:

What are the conflicts in the case about?

What do you, personally, plan to do when such conflicts arise?

What role models have you observed?

What do you think someone that you admire as a role model, might do?

If you have read the story of Irwin Mandel,<sup>275</sup> what do you think he would do?

What did you learn from reading his personal story that might apply?

What have you learned from observing what other researchers, whom you admire, do about this kind of problem?

### Moral Character and Competence

Here the concern is with execution of an action plan that honestly and fairly balances competing interest. Equally important to a good action plan is the ability to apply principles of effective communication and negotiation as one role plays an interaction with Dr. Meyer. To provide practice in problem solving and social interaction, either of the situations presented above could be used as a stimulus for problem solving, but the question following the case will change. Instead of asking the student to defend one of two choices, provide the mice or don't provide the mice, the emphasis now is on brainstorming different courses of action that do not compromise conflicting interests or obligations, that would attend to the interests of affected parties and would minimize negative consequences. Students would offer several courses of action and then try to decide which is most defensible, given the norms and values that govern such decisions. Once a defensible course of action is proposed, students either role play or write out what is consistent with the rules and regulations. What one might ask here is to develop an action plan for dealing with the Tyler case and work out a dialog as to what to say. This could be role played or scripted for evaluation.

Using either version of the Michele Tyler Case, presented above, ask the following:

*What courses of action are open to Dr. Tyler?*

Most students will feel that Dr. Tyler has only two choices—to share or not to share. The cynical might add that she could say she would share and then stall. Press them. In a problem solving exercise, effort is made to

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275. See James T. Rule & Muriel J. Bebeau, *Integrity and Mentoring in Research: The Story of Irwin D. Mandel*, 32 *QUINTESSENCE INT'L* 61 (2001).

find a solution that compromises none of the protagonist's obligations or interests. The experienced researcher will be able to help students consider collaboration, as well as to help students examine the variety of ways that such a conflict might be managed. Following the development of a defensible action plan, students can explore the wide range of agreements that have been worked out between collaborators. Yet having a defensible plan does not assure that the plan will be carried out effectively. Good intentions are often undermined with ineffectual communication skills. At this point, students can be encouraged to:

*Develop an action plan. Create a dialog to respond to Dr. Meyer.*

Students and their facilitator can critique a role play exercise for effective interpersonal interaction. One resource that is often useful for developing and critiquing negotiation and interpersonal skills is Roger Fisher and William L. Ury's *Getting to Yes: Negotiating Agreement Without Giving In* (1981).