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## Two and a Half Ethical Theories: Re-examining the Foundations of the Carnegie Report

Mark F. Kightlinger

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## Two and a Half Ethical Theories: Re-examining the Foundations of the Carnegie Report

MARK F. KIGHTLINGER\*

### ABSTRACT

In the past three years, the American Bar Association, several major state bar associations, the Association of American Law Schools, the *New York Times*, law students, and many legal educators have called for fundamental changes in the way we educate new lawyers. Some critics have suggested that legal education faces a crisis that will be exacerbated by rising tuitions, declining enrollments, and a precipitous drop in the demand for new lawyers. Most of those calling for change have relied on the critical analysis of modern legal education presented in a 2007 report by the Carnegie Foundation for the Advancement of Teaching entitled *Educating Lawyers: Preparation for the Profession of Law*. Despite the central role of the Carnegie Report in current debates about legal-education reform, however, no one has yet made a careful study of the theoretical foundations and, in particular, the ethical grounding of the Report itself. This Article fills that important gap in the literature by critically analyzing the three ethical frameworks that organize and underpin various aspects of the Report's account of modern legal education and its failings. Although a teleological ethical framework with roots in the philosophy of Aristotle provides the Report's backbone, the Report's treatment of that framework is incomplete, somewhat careless, and ultimately unconvincing. Competing with the teleological framework throughout the Report are an emotivist framework with relativist and possibly nihilist implications and a contractarian framework that makes little sense on its own terms and contradicts key assumptions of the core teleological framework. Before we can justify implementing educational reforms based on the Carnegie Report's analysis and recommendations, we must do a great deal of additional scholarly work to resolve a number of basic theoretical problems that threaten to undermine the intellectual foundations of the Report itself.

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Otherwise, efforts to reform legal education may do little more than build glass houses on shifting sands.

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## I. INTRODUCTION

In early 2007, the Carnegie Foundation for the Advancement of Teaching (“Carnegie Foundation”) released a report entitled *Educating Lawyers: Preparation for the Profession of Law* (“Carnegie Report” or “Report”).<sup>1</sup> The Report paints a bleak portrait of the current state of the legal profession.

Many commentators from within law schools have also pointed to troubling declines in public esteem for the profession and attorneys’ apparently growing dissatisfaction with their work, offering empirical evidence that these problems are widespread and serious. According to many observers, the ‘crisis of professionalism’ is manifest in a decline of civility and an increase in adversarialism, a decline in the role of the counselor and in lawyers’ competence, including ethical competence, and a new sense of the law as a business, subject to greater competitive economic pressures and answerable only to the bottom line. Others note a loss of calling or sense of purpose among lawyers.<sup>2</sup>

According to the Report, critics also have accused lawyers and other professionals of “professional self-absorption and irresponsible disconnection from the public.”<sup>3</sup> As the Report argues, “[w]hatever the merits of ‘value-free’ knowledge, they do not transfer well to the idea of ‘value-free’ professionals.”<sup>4</sup>

In response to these serious concerns about the legal profession’s ethical (dis)engagement and loss of purpose, the Report calls for reforming legal education, because “[a] reawakening of professional élan must include

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1. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

2. *Id.* at 136-37.

3. *Id.* at 7.

4. *Id.* at 136-37.

revitalizing legal preparation.”<sup>5</sup> The Report “examines the dramatic way that law schools develop legal understanding and form professional identity.”<sup>6</sup> In particular, the Report focuses on the question “[h]ow effectively does legal education integrate the moral obligations of lawyering with its intellectual and clinical demands?”<sup>7</sup> Summarizing their conclusions, the authors of the Report state:

The dramatic results of the first year of law school’s emphasis on well-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding. If legal education were serious about such a goal, it would require a bolder, more integrated approach that would build on its strengths and address its most serious limitations.<sup>8</sup>

In a 2011 editorial entitled “Legal Education Reform,”<sup>9</sup> the *New York Times* picked up on these themes from the Carnegie Report and sounded an alarm. According to the editorial,

American legal education is in crisis. The economic downturn has left many recent law graduates saddled with crushing student loans and bleak job prospects. The law schools have been targets of lawsuits by students and scrutiny from the United States Senate for alleged false advertising about potential jobs. Yet, at the same time, more and more Americans find that they cannot afford any kind of legal help.

Addressing these issues requires changing legal education and how the profession sees its responsibility to serve the public interest as well as clients.<sup>10</sup>

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5. WILLIAM M. SULLIVAN ET AL., SUMMARY, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (2007) [hereinafter CARNEGIE REPORT SUMMARY], [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf). For a historical analogue to the Carnegie Foundation’s approach, one might go back to “1870 when Christopher Columbus Langdell refounded the Harvard Law School, and in so doing, many would say, refounded the American legal profession.” Robert Stevens, *Aging Mistress: The Law School in America*, 2 CHANGE IN HIGHER EDUC. 32, 34 (1970).

6. CARNEGIE REPORT SUMMARY, *supra* note 5, at 3.

7. *Year in Review 2007*, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, <http://www.carnegiefoundation.org/about-us/year-review/year-review-2007> (last visited Sept. 17, 2012).

8. CARNEGIE REPORT SUMMARY, *supra* note 5, at 4.

9. See Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 26, 2011, [http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html?\\_r=1](http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html?_r=1).

10. *Id.*

If in fact we face a crisis in legal education, then the Carnegie Report's demand that we get "serious" about providing law students with a "solid ethical grounding" takes on new urgency.<sup>11</sup>

The question that this Article raises is whether the Carnegie Report is itself "serious" about matching its analysis of legal education with a "solid ethical grounding" for its criticisms and recommendations. This Article argues that the Carnegie Report lacks and fails to provide such an ethical grounding. We find running through the Report evidence of at least three different ethical theories or frameworks that shore up claims its authors make and criticisms its authors raise. The mere fact that we find evidence of three ethical theories instead of one clearly articulated and defended theory suggests a lack of seriousness. When careful analysis reveals that each of these ethical theories is questionable on its own terms and that the three theories conflict with one another, we cannot help but ask whether the authors of the Carnegie Report are entirely serious about demanding that legal education provide an ethical grounding for law students.

This Article takes as its starting point the Carnegie Report's call for an examination of the ethical grounding that legal education provides to law students.<sup>12</sup> Treating the basic description of legal and ethical education in the Report as a given, the Article asks what sorts of philosophical foundations or premises we must recognize and accept in order to justify the kind of educational experience and ethical grounding for law students that the Report argues we can and must provide.<sup>13</sup> By offering a critical reexamination of the intellectual foundations or premises for the arguments presented in the Report, this Article should serve as a propaedeutic<sup>14</sup> to any further substantive work—whether theoretical or practical—on the ethical grounding of a legal education such as that described in and recommended by the Report. Accordingly, the Article pursues two interrelated propaedeutic objectives. The first is to identify and critically analyze the

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11. CARNEGIE REPORT SUMMARY, *supra* note 5, at 4.

12. *Id.* at 4.

13. *See generally id.* at 6; *see also infra* Part V.

14. I have borrowed the term "propaedeutic" from Immanuel Kant, who referred to his First Critique as a propaedeutic—a preliminary inquiry that would clear the way for a future philosophical system founded on pure reason. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 149 (Paul Guyer & Allen W. Wood eds. and trans., 1998) ("we can regard a science of the mere estimation of pure reason, of its sources and boundaries, as the propaedeutic to the system of pure reason."). My objective in this Article is, of course, much more modest than Kant's in the First Critique. It is to identify some key issues that must be addressed before the project announced and recommended in the Carnegie Report—i.e., providing an ethical grounding for law students through a reformed system of legal education—can be carried forward in an intellectually honest and persuasive manner. In Kant's language, the Article seeks to identify at least some of the "sources and boundaries" of the ethical theory or theories that underpin the Carnegie Report and thereby to provide the necessary foundations for further work. *Id.*

competing ethical theories or frameworks that organize and underpin the Report's account of modern legal education and its failings. Drawing on this critical analysis, the second objective is to outline the key questions that must be addressed before the Report or any future work—either theoretical inquiry or pedagogical practice—based on it can persuasively claim to provide an ethical grounding for legal education and, thus, for law students who receive such education. In later articles, I will offer examples of constructive arguments built on and responsive to the propaedeutic work undertaken here.

Although few will question the importance of ensuring that law students receive some kind of ethical grounding for the practice of law, it is important to note at the outset that the argument in this Article touches at least implicitly on a much larger and, arguably, more important issue. That issue is whether it is possible at the beginning of the twenty-first century to lay an adequate foundation on which to construct a rationally persuasive ethical theory that an intellectually honest and self-critical person could justify teaching to anyone and by which such a person could justify conducting his or her own life. In 1987, Allan Bloom asserted that “[t]here is one thing a professor can be absolutely certain of: almost every student entering the university believes, or says he believes, that truth is relative.”<sup>15</sup> Moreover, the widespread, modern belief in the relativity of truth applies with special force to what once would have been called moral or ethical truth.<sup>16</sup> This Article's search for the ethical foundations of the Carnegie Report's account of legal education poses a potential challenge, or at least a first step in a challenge, to such modern moral relativism. If we could find persuasive grounds for thinking that moral or ethical truth is not relative in the field of legal education, we might have a basis for asserting that moral or ethical truth is not relative at all. This Article does not directly address these broader issues raised by Bloom's assertion about modern relativism.<sup>17</sup> Nevertheless, it is important for the reader to see this Article's discussion of the theoretical foundations for providing “a solid ethical grounding” to law students as part of a wider debate about the theoretical foundations for ethical inquiry and ethical judgments in general. And that wider debate—the intellectual context for this Article—should interest anyone who claims or hopes or even pretends to live and assist others to live a moral or ethical life.

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15. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25 (1987). For more on Bloom's views, see *infra* notes 441, 450, 463, 473, 482 and accompanying text.

16. For a discussion of the belief that moral or ethical judgments are relative and the role that this belief plays in the argument of the Carnegie Report, see *infra* Part IV.A.

17. BLOOM, *supra* note 15, at 25.

Part II of this Article discusses the impact of the Carnegie Report and explains why the Report is significant enough to justify a careful look at the Report's ethical foundations. Part III examines the ethical theory that serves as the backbone of the Report—a teleological theory with roots in the work of Aristotle. My discussion of this theory draws heavily on the writings of Alasdair MacIntyre. Part IV discusses two other ethical theories—namely emotivism and contractarianism—that compete, implicitly or explicitly, throughout the Carnegie Report with the teleological theory. I show that each of these three ethical theories reveals internal flaws and that the three theories conflict on key issues with one another. Drawing on the critical discussions in Parts III and IV, Part V provides a punch list of the major questions that must be addressed and, if possible, resolved before a legal education of the sort outlined in the Carnegie Report can offer an intellectually defensible and persuasive ethical grounding to law students.

## II. BROAD IMPACT OF CARNEGIE REPORT JUSTIFIES CAREFUL STUDY

This Article devotes considerable attention to the foundations of the ethical theories or frameworks operating in the Carnegie Report, but it is reasonable to ask at the outset why one would focus this kind of attention on a report about legal education from the Carnegie Foundation. This might be called the “who cares?” threshold objection. In fact, as discussed in Parts II A and B, there are at least two good reasons to care. First, in the roughly five years since its publication, the Carnegie Report has had a significant impact on practical efforts to reform and improve legal education.<sup>18</sup> Calls for reform of legal education have become increasingly adamant in the wake of widely circulated reports that the costs associated with attending law school are far too high relative to the benefits that most students receive from a legal education.<sup>19</sup> Citing the Carnegie Report, the *New York Times*

18. See *infra* Part II.A.

19. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, [http://www.nytimes.com/2011/01/09/business/09law.html?\\_r=1](http://www.nytimes.com/2011/01/09/business/09law.html?_r=1); David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html>. For a response to David Segal's criticisms, see Richard A. Matasar, *Law School Cost, Educational Outcomes, and a Reformer's Agenda*, N.Y. LAW SCH. (July 19, 2011), [http://www.nyls.edu/news\\_and\\_events/matasars\\_response\\_to\\_nytimes](http://www.nyls.edu/news_and_events/matasars_response_to_nytimes). For a follow-up debate about the current model of legal education, see Opinion, *The Case Against Law School*, N.Y. TIMES, July 21, 2011, <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/>. The U.S. Senate and the ABA also have entered the discussion about whether law schools deliver what they advertise. See Karen Sloan, *ABA Defends Its Oversight of Law Schools to Senator*, LAW.COM (July 25, 2011), <http://www.law.com/jsp/article.jsp?id=1202504855291&hbxlogin=1&slretur n=20120904181424>. For a more aggressive version of the argument that a legal education is not worth what it costs, see Complaint at ¶¶ 2, 4, *Alaburda v. Thomas Jefferson Sch. of Law*, 2011 WL 2109327 (Cal. Super. 2011) (No. 27-2011-00091898-CU-FR-CTL) (demanding damages for, among other things, false advertising and the excessive cost of legal education). See also Alfred S. Konefsky & Barry Sulli-



recently called for reforms in legal education “to help reinvigorate the legal profession and rebuild public confidence in what lawyers can provide.”<sup>20</sup> Thus, efforts to reform legal education will continue and the Carnegie Report will influence, if not guide, these efforts. Second, the Report has spawned a growing secondary literature,<sup>21</sup> none of which appears to have focused on the fundamental philosophical problems that this Article addresses. Continuing academic interest in the Carnegie Report suggests that it would be worthwhile to take a hard look at the Report’s ethical grounding. In sum, it seems fair to say that the Report and work based on it reflect the state of the art in the field of legal education reform, and that the Report will continue to affect developments at the practical and theoretical levels. Thus, we should care whether the ethical foundations of the Report provide adequate support for its analysis and recommendations.

#### *A. The Carnegie Report and Current Efforts to Reform Legal Education*

An anecdote about how I first encountered the Carnegie Report illustrates the work’s impact on reform of legal education. In the spring of 2007, the Executive Associate Dean and the incoming Acting Dean of the University of Kentucky (“UK”) College of Law asked me to take over the chair of the College’s Curriculum Committee. As preparation for the role, they recommended that I read two books. One was the Carnegie Report.<sup>22</sup> The Deans said that they expected the American Bar Association (“ABA”) and the Association of American Law Schools (“AALS”) to rely heavily on the Report in developing new proposals for curriculum reform and revision of law school accreditation standards. As I have learned from that occasionally frustrating experience, the UK College of Law’s approach to curriculum reform is rather conservative, sometimes approaching hidebound. Thus, when the UK College of Law, or at least our Curriculum

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van, *There’s More to the Law Than ‘Practice-Ready’*, THE CHRON., Oct. 23, 2011, <http://chronicle.com/article/Theres-More-to-the-Law-Than/129493/> (identifying as reasons for the recent spate of critical commentary about law schools “the high price of legal education, the failure of many law schools to respond to a serious decline in the demand for lawyers, and lawsuits challenging the ‘sales practices’ used by some law schools to meet the fierce competition for students.”). For a recent, provocative discussion of what is wrong with legal education by a well-respected legal scholar, see BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

20. *Legal Education Reform*, *supra* note 9.

21. *See infra* Part II.B.

22. The other book that they recommended was ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007). That book itself frequently quotes and relies heavily on the Carnegie Report’s account of current practices in legal education. *See, e.g., id.* at 3, 4, 17, 19-20, 61, 62, 99, 100, 134, 183, 237, and 285. Thus, the Carnegie Report is arguably the more important and more foundational of the two works, and it certainly is worthy of separate discussion.

Committee, turns to the Carnegie Report for guidance, that fact alone suggests that other law schools may be turning, or may already have turned, to the Report. Certainly there is no reason to believe that the UK College of Law is eccentric or outside of the mainstream in the area of curriculum development and reform. Thus, my home institution's interest in the Report provides suggestive, albeit anecdotal, evidence of the book's impact on curriculum reform in legal education.

It should come as no surprise that law schools such as mine would review and follow the recommendations of a Carnegie Foundation report on legal education. The Carnegie Foundation began looking at the challenges facing legal education in the United States more than 100 years ago.<sup>23</sup> In 1908, the annual President's Report to the Carnegie Foundation stated that

[w]ith respect to the practice of law, the public interest is dependent . . . on the enforcement of high professional standards . . . . [N]o other profession is so closely related to the development of justice and to the progress of sound public policy. There is no way by which the public can tell whether the practitioner of law will develop into a wise advocate or into a sharp attorney. The only criterion it can impose for its own protection is to require such training for entrance to the profession as will fit the ordinary man for good work in it and will at the same time serve as a means to exclude the unfit.<sup>24</sup>

In 1913, the ABA's Committee on Legal Education and Admissions to the Bar asked the Carnegie Foundation to undertake an "investigation . . . into the conditions under which the work of legal education is carried on in the United States."<sup>25</sup> The Carnegie Foundation issued its first major study of

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23. For a short history of the Carnegie Foundation's work on professional education, see ELLEN CONDLIFFE LAGEMANN, *PRIVATE POWER FOR THE PUBLIC GOOD: A HISTORY OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 60-93 (1983). For a summary of the Foundation's work on legal education, see *id.* at 75-84.

24. Henry Smith Pritchett, *Standards of Professional Education in the United States*, in *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING: THIRD ANNUAL REPORT OF THE PRESIDENT AND TREASURER* 157, 160 (1908).

25. Henry S. Pritchett, *Preface* to ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA* xviii (15th bull. 1921). This call for an investigation of legal education followed an earlier and very influential report by the Carnegie Foundation on medical education. See generally ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (4th bull. 1910). For a discussion of the Flexner Report, see LAGEMANN, *supra* note 23, at 61-72. During this era, the Carnegie Foundation also published studies calling for reform in the fields of teaching and public education as well as engineering. See LAGEMANN, *supra* note 23, at 75-89; WILLIAM S. LEARNED ET AL., *THE PROFESSIONAL*

legal education—*The Common Law and the Case Method in American University Law Schools*—in 1914.<sup>26</sup> In 1921, the Carnegie Foundation issued Alfred Reed’s much more extensive report entitled *Training for the Public Profession of the Law* (“Reed Report”),<sup>27</sup> which focused on the history of legal education in the United States and Canada, and in 1928, the Foundation released a follow-up by Reed entitled *Present-Day Law Schools in the United States and Canada*.<sup>28</sup> Carnegie money also supported a project called the Survey of the Legal Profession that resulted in, among other things, a 1953 study by Albert Harno entitled *Legal Education in the United States*.<sup>29</sup> Another Carnegie entity, the Carnegie Commission on Higher Education, sponsored a 1972 collection of essays entitled *New Directions in Legal Education*.<sup>30</sup>

There is little doubt that the Carnegie Foundation’s work during the twentieth century spurred debate and galvanized the legal profession to take action that altered the standards governing legal education. Ironically, however, the galvanic impact of the Foundation’s work did not necessarily prompt the profession to follow the Foundation’s advice. Discussing the impact of the Reed Report, one scholar has written,

[b]y urging recognition of a diversified bar and by recognizing the night schools that were the viaducts for immigrant entrance to law and politics, the Reed report obtained for the academic lawyers what they had not been able to obtain for themselves: strong ABA endorsement of uniformly high academic standards as a prerequisite for admission to the bar. In other words, the Reed report united the two elites that were represented by the profession’s major organized

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PREPARATION OF TEACHERS FOR AMERICAN PUBLIC SCHOOLS (1920); CHARLES RIBORG MANN, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING: A STUDY OF ENGINEERING EDUCATION (11th bull. 1918).

26. JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR ADVANCEMENT OF TEACHING (1914). For a comparison of the Redlich Report with the Carnegie Report, see generally 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, 1-2 (2007).

27. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA (15th bull. 1921) [hereinafter REED REPORT].

28. ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA (21st bull. 1928).

29. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953). For a discussion of the Survey of the Legal Profession, see generally Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, in ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES vii (1953).

30. HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972).

public lobby, its major national association, against its conclusions.<sup>31</sup>

Thus, although the legal profession and legal educators have not always followed the Carnegie Foundation's recommendations, the Foundation's work has, from the beginning, generated discussion and led to significant changes in the field of legal education.<sup>32</sup> A growing body of evidence suggests that the Carnegie Report will have an impact as significant as that of the 1921 Reed Report, with the important difference that this time around the profession's response to the Carnegie Foundation's recommendations might be more positive.<sup>33</sup>

A comprehensive survey of educational reform efforts at U.S. law schools is well beyond the scope of this Article, but a variety of evidence suggests that the Carnegie Report has affected and continues to affect the ways in which law schools are approaching educational reform.<sup>34</sup> Two scholars have suggested that the Carnegie Report is "perhaps the most influential document in current debates about the future of legal education,"<sup>35</sup> while others have observed that the Report has caused law

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31. LAGEMANN, *supra* note 23, at 81-82. Reed had recommended that the legal profession support rather than oppose the existence of different types of law schools ranging from urban night schools to elite schools such as Harvard and Yale producing different types of lawyers with different professional trajectories and subject to different standards of legal education. *Id.* at 80. In Reed's view, this approach would have assisted people of different classes, including poor people and immigrants, to enter the bar. *Id.* at 80-81. Reed believed a diversified bar was vital to the maintenance of law as a "public" profession in a democratic society. Preble Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review*, in NEW DIRECTIONS IN LEGAL EDUCATION app. II to app. A, at 227, 243 (1972) [hereinafter Stolz, *Training*]. Rejecting Reed's proposal, the "two elites" that united to support a unitary bar and a uniform national standard of legal education were the academic lawyers teaching full-time students and the very small percentage of U.S. lawyers who belonged to the ABA in the early part of the twentieth century. LAGEMANN, *supra* note 23, at 77-78. Jerold Auerbach has suggested that another factor helped to unify law teachers and practitioners around the idea of a uniform standard of education—i.e., the desire to exclude Jews and immigrants from the bar. Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in LAW IN AMERICAN HISTORY 551, 586 (Donald Fleming & Bernard Bailyn eds., 1971). According to Auerbach, "[w]hen the storm [that Reed caused] had subsided, the [ABA and the AALS] stood arm-in-arm against their common enemy: the night law schools and the immigrants who crowded into them." *Id.* at 558. Leaving aside the distasteful causes of the profession's decision to support a unitary bar, Stolz has pointed out that it took roughly fifty years for the profession to move from that decision to the "threshold of achieving a unitary bar." Stolz, *Training*, *supra*, at 249. Ironically, at almost the same time that Stolz announced the advent of a unitary bar (i.e., the early 1970s), Robert Stevens commented that "[a]t long last the idea of a unitary profession is being seriously questioned . . ." Stevens, *supra* note 5, at 41.

32. For further discussion of the complex reception that the Redlich and Reed Reports received at the hands of the bar, see ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 112-23 (1983). For a lengthy discussion of the Reed Report and its impact, see generally Stolz, *Training*, *supra* note 31.

33. See *supra* note 31. See generally CARNegie REPORT, *supra* note 1.

34. See *infra* notes 35-74 and accompanying text.

35. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 70 (2009).

schools to examine their curricula in new ways.<sup>36</sup> The Institute for Law Teaching and Learning (“ILTL”), a joint effort of the Gonzaga University School of Law and the Washburn University School of Law, has published a Chart of Legal Education Reform (“ER Chart”) reflecting the results of a survey on recent curriculum reform activities, a survey to which sixty law schools apparently provided useful responses.<sup>37</sup> Underneath the title, the ER Chart contains a rather cryptic note: “I have marked with an asterisk those relatively older reforms that I think are still relevant, especially in light of the Carnegie and Best Practices (CLEA) reports on legal education.”<sup>38</sup> Although this note is open to interpretation, it suggests that the author of the ER Chart believes that the Carnegie Report provides a baseline against which to measure the significance of recent legal educational reform efforts, including efforts that predate the Report itself. One reform effort mentioned on the ER Chart is the new Daniel Webster Program at the University of New Hampshire School of Law (formerly the Franklin Pierce Law Center).<sup>39</sup> The Daniel Webster Program is based on recommendations from the Carnegie Report.<sup>40</sup> The ER Chart also mentions that William Mitchell is working on reforms that are based on the Carnegie Report.<sup>41</sup> Studies suggest that several other law schools also have instituted reforms in response to the Carnegie Report.<sup>42</sup>

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36. Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 3 (2008) (predicting that the Carnegie Report will continue to cause schools to reevaluate their curricula); Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 165, 166 (2009) (predicting that schools will do more skills training as a result of the Carnegie Report); Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 375 (2009).

37. *Chart of Legal Education Reform*, INST. FOR LAW TEACHING & LEARNING (May 2009), <http://lawteaching.org/publications/ILTLchartoflegaleducationreform200905.pdf>.

38. *Id.* at 1.

39. *Id.* at 2.

40. Paul Maharg, *Simulation Square*, BEST PRACTICES FOR LEGAL EDUC. BLOG (Mar. 18, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/03/18/simulation-squared-2>; see also *Daniel Webster Scholar Honors Program*, U. OF N.H., SCHOOL OF LAW, <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars> (last visited Sept. 21, 2012).

41. *Chart of Legal Education Reform*, *supra* note 37, at 8.

42. See Glenn Cohen, *Harvard Law’s Curricular Reform: 3 Years In*, PRAWFSBLAWG (Dec. 8, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/12/harvard-laws-curricular-reform-3-years-in.html> (Harvard’s new Problem Solving Workshop for 1Ls “is nicely responsive to concerns raised by the Carnegie report”). See generally, e.g., Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum – Process and Product*, 41 U. TOL. L. REV. 327 (2010) (addressing Gonzaga Law School’s curricular reform); Elizabeth Pendo, *A Service Learning Project: Disability, Access, and Health Care*, 38 J.L. MED. & ETHICS 154 (2010) (Carnegie Report motivated the author’s decision to incorporate a public service project into her disability law class); Stephen A. Rosenbaum, *The Juris Doctor Is In: Making Room at Law School for Paraprofessional Partners*, 75 TENN. L. REV. 315 (2008) (addressing University of Tennessee Law School’s curricular reform); Melissa H. Weresh, *An Integrated*

As Dean Minow of Harvard Law School observed in late 2010, the Carnegie Report “has stimulated much discussion about how to better tackle the cognitive, ethical, and practical dimensions of making lawyers.”<sup>43</sup> One commentator has noted that, since the publication of the Carnegie Report,

rethinking the preparation of young lawyers has become a cottage industry. Law school calendars have been littered with forums, seminars, and panel discussions about the future. . . . Paradoxically, it seems that the 200 U.S. law schools accredited by the American Bar Association (ABA) have taken 200 different routes to address the turmoil.<sup>44</sup>

At least one law school advertises that it has long adhered to the standards outlined in the Carnegie Report.<sup>45</sup> The Thomas M. Cooley Law School website states that the Report’s “recommendations, which came about in 2007, are precisely the type of education Cooley has provided since its founding in 1972.”<sup>46</sup> The unstated major premise of Cooley’s “argument,” of course, is that the Carnegie Report provides a valid measure, and perhaps the best measure, for the type of education a law school should provide.<sup>47</sup> Thus, a law school that complies and has always complied with the Report’s recommendations would be a good law school. And Cooley is not alone in declaring that it had complied with the Carnegie Report *avant la lettre*.<sup>48</sup>

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*Approach to Teaching Ethics and Professionalism*, 18 No. 2 PROF. LAW. 25 (2007) (addressing Drake University Law School’s curricular reform).

43. Martha L. Minow, *Making Global Lawyers for the 21st Century: Keynote Address to the FutureEd 2 Conference at Harvard Law School*, HARV. LAW SCHOOL (Oct. 15, 2010), [http://www.law.harvard.edu/programs/plp/pdf/Minow\\_Blue\\_Paper.pdf](http://www.law.harvard.edu/programs/plp/pdf/Minow_Blue_Paper.pdf). Minow also identifies other “long-term trends” that have led to a reevaluation of legal education, including “globalization” and the “digital revolution.” *Id.*

44. Sarah Kellogg, *The Transformation of Legal Education*, DC BAR (May 2011), [http://www.dcbar.org/for\\_lawyers/resources/publications/washington\\_lawyer/may\\_2011/legal\\_education.cfm](http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/may_2011/legal_education.cfm).

45. See *Educating Lawyers*, THOMAS M. COOLEY LAW SCHOOL, [http://www.cooley.edu/rankings/carnegie\\_report.html](http://www.cooley.edu/rankings/carnegie_report.html) (last visited Sept. 21, 2012).

46. *Id.*

47. See Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, 87 MICH. B.J. 20, 21 (2008), available at <http://www.michbar.org/journal/pdf/pdf4article1308.pdf> (discussing the similarities between the Carnegie Report and the curriculum at Cooley).

48. See, e.g., C. Michael Bryce, *Teaching Justice to Law Students: The Legacy of Ignatian Education and Commitment to Justice and Justice Learning in 21st Century Clinical Education*, 43 GONZ. L. REV. 577, 596-97 (2008) (arguing that Jesuit law schools have long been aware of both the importance of ethical training, and the unity of intellectual learning and practice); Lawrence K. Hellman, *Richard E. Coulson: The Indispensable Link Between the Past and the Future of a Developing Law School*, 34 OKLA. CITY U.L. REV. 1, 2 (2009) (addressing Oklahoma City University Law School’s curricular reform).

Emanating from various quarters of the ABA, there is considerable evidence of support for the Carnegie Report's analysis and recommendations.<sup>49</sup> In an October 2010 presentation to the FutureEd 2 conference at Harvard Law School, Professor Henderson and colleagues stated:

[t]he ABA's comprehensive review of accreditation standards, and the comments received through that process, come in the larger context of wide ranging critiques and reassessments of American legal education, particularly informed by the 2007 study by the Carnegie Foundation. Clearly the time has come for serious, collaborative work to develop outcome measures focused on professionalism and understanding of professional identity along with assessment tools for demonstrating whether desired outcomes have been achieved.<sup>50</sup>

As one would suspect from Professor Henderson's comment, an important theme of the Carnegie Report is the need to educate law students to think about professional identity.<sup>51</sup> A range of evidence supports Henderson's claim that organs of the ABA have begun to rely on the account of legal education in the Report.<sup>52</sup> For example, in a July 2008 Report of the Outcome Measures Committee of the ABA's Section of Legal Education and Admission to the Bar, the authors observe that:

[t]he legal education system has lagged behind . . . other fields but has begun to focus on the topic of outcome measures in very recent years. This recent change in direction has been fueled in large part by the publication, in 2007, of two influential reports on legal education . . . .<sup>53</sup>

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49. See generally *Are We Making a Difference? Developing Outcome Measures to Evaluate the Effectiveness of Law School Efforts to Teach Ethics and Develop Professionalism, Future Ed 2*, HARV. LAW SCHOOL, (Oct. 15-16, 2010), [http://www.nyls.edu/user\\_files/1/3/4/30/58/1053/Henderson&Organ&Longan&Berry&Cunningham.pdf](http://www.nyls.edu/user_files/1/3/4/30/58/1053/Henderson&Organ&Longan&Berry&Cunningham.pdf).

50. *Id.*

51. See, e.g., *infra* notes 292-95 and accompanying text.

52. See generally Catherine Carpenter et al., *Report of the Outcome Measures Committee*, AMERICAN BAR ASSOCIATION: SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR 5 (Jul. 27, 2008), <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>.

53. *Id.*

One of those reports is the Carnegie Report.<sup>54</sup> In their proposal to expand the use of learning outcome measures in the law school accreditation process, the authors of the Outcome Measures Committee report repeatedly cite and rely on the Carnegie Report.<sup>55</sup> Other documents emanating from the ABA also rely on the Report.<sup>56</sup> For example, in a 2009 letter to the Chair of the ABA Accreditation Standards Review Committee, the Chair of the ABA Standing Committee on Professionalism wrote “[t]he Committee supports the accreditation review process and remains strongly committed to the principles enunciated in the Carnegie Report.”<sup>57</sup>

Professional organizations in the field of legal education also have indicated support for the Carnegie Report.<sup>58</sup> In a letter to the Chair of the ABA Accreditation Standards Review Committee, Ian Weinstein, the President of the Clinical Legal Education Association (“CLEA”), remarked on the “disconnect between legal education and the legal profession exposed in detail by the Carnegie Foundation and other critics of the standard form of legal education.”<sup>59</sup> According to Weinstein, “[i]n response to the critique, many law schools have redesigned curricula. Numerous conferences and meetings have explored the kinds of changes in legal education that might better prepare students for the profession . . . .”<sup>60</sup> Weinstein singles out one such “Conference on the Future of the Law School Curriculum” that the AALS held in June 2011.<sup>61</sup> In a brochure advertising the conference, the AALS stated that “[w]e are at a pivotal

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54. *Id.* at 5-6 (not surprisingly, the other report on which the authors rely is *Best Practices*). *See generally* STUCKEY, *supra* note 22.

55. *See, e.g.*, Carpenter et al., *supra* note 53, at 6-10, 18, 19.

56. *See generally* Letter from Melvin F. Wright, Jr., Chair, N.C. Chief Justice’s Comm’n on Professionalism, to Donald J. Polden, Chair, ABA Accreditation Standards Review Comm., (Nov. 24, 2009), *available at* <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20character%20and%20fitness%20%20SC%20on%20Professionalism%20November%202009.pdf>.

57. *Id.*

58. *See generally* Letter from Ian Weinstein, President, Clinical Legal Educ. Ass’n, to Donald J. Polden, Dean, Santa Clara Law Sch., 2-3 (Jul. 5, 2011), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standard\\_s\\_review\\_documents/20110705\\_comment\\_outcome\\_measures\\_clea.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standard_s_review_documents/20110705_comment_outcome_measures_clea.authcheckdam.pdf).

59. *Id.*

60. *Id.* at 3.

61. *See id.* *See generally* ASS’N OF AM. LAW SCHS., WORKBOOKLET ON THE CONFERENCE ON THE FUTURE OF THE LAW SCHOOL CURRICULUM (JUNE 11-14, 2011) & CONFERENCE ON CLINICAL LEGAL EDUCATION (2011), *available at* <http://www.aals.org/clinical2011/Clinical&CurriculumWorkbooklet.pdf>.



moment in the history of legal education.”<sup>62</sup> The brochure specifically identifies the Carnegie Report as a source of pressure for curriculum reform:

reformist initiatives fashioned outside the academy, such as the Carnegie Report, are calling on law schools to improve the way they prepare students for professional roles, offering their own distinctive vision of the law school curriculum and pedagogy. Simultaneously, new developments within the academy are generating momentum for curricular change as well. . . . Among the ranks of both established law schools and recently-founded institutions can be found instances of significant innovation in response to these forces.<sup>63</sup>

Thus, both the AALS, which currently includes in its membership 176 law schools,<sup>64</sup> and CLEA, which advocates on behalf of clinical legal educators,<sup>65</sup> recognize the substantial influence that the Carnegie Report continues to exercise on the reform of legal education.

State bar associations also have cited the Carnegie Report with approval and in some instances have taken actions based on the Report.<sup>66</sup> Writing for the Michigan Bar Journal in early 2008, Professor Nelson Miller commented presciently that “[e]very so often, a profession faces an assessment or event that demands a new paradigm. The just-released Carnegie Foundation report . . . , years in the making, may prove to be just such a watershed for legal education.”<sup>67</sup> In a 2009 report “on suggested methods for improving the development of professionalism and professional identities in the law school experience,” the National Organization of Bar Counsel, which represents state bar officials who are responsible for enforcing ethics rules, relied heavily on the framework developed in the Carnegie Report.<sup>68</sup> In 2009, an Ohio State Bar Association (“OSBA”) Task

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62. ASS’N OF AM. LAW SCHS., BROCHURE ON THE CONFERENCE ON THE FUTURE OF THE LAW SCHOOL CURRICULUM 2 (June 11-14, 2011), available at <http://www.aals.org/curriculum2011/CurriculumBrochure2011.pdf>.

63. *Id.*

64. See *What is the AALS?*, ASS’N OF AM. LAW SCHS., <http://www.aals.org/about.php> (last visited Sept. 20, 2012).

65. See *Mission*, CLINICAL LEGAL ED. ASS’N, <http://clea.memberlodge.org/mission> (last visited Sept. 20, 2012).

66. See *Report of the Task Force on Legal Education Reform*, OHIO ST. BAR ASS’N 2 (Dec. 2009), [https://www.ohiobar.org/General%20Resources/pubs/OSBA\\_Legal\\_Education\\_Task\\_Force\\_Report.pdf](https://www.ohiobar.org/General%20Resources/pubs/OSBA_Legal_Education_Task_Force_Report.pdf) [hereinafter *Report of the Task Force*].

67. Miller, *supra* note 47, at 20.

68. See *Law School Professionalism Initiative Report*, NAT’L ORG. OF BAR COUNSEL, at 1, 2, 3, 25-27 (Dec. 2009), <http://www.nobc.org/uploadedFiles/Committees/Law%20School%20Professionalism%20Initiative%20Report%20Final.doc>.

Force on Legal Education Reform that included representatives from all Ohio law schools issued a report later adopted by the OSBA expressly endorsing the recommendations of the Carnegie Report.<sup>69</sup> In April 2010, Howard Miller—then president of the State Bar of California—wrote “[t]he world of legal education is staring in the mirror at its standard model with fading confidence, caused by both academic criticism and client reaction to how legal services are delivered and priced. The academic criticism came most forcefully in the 2007 Carnegie Foundation Report . . . .”<sup>70</sup> Discussing “[t]he effort to understand what lawyers should know and be able to do,” the New York State Bar Association (“NYSBA”) Task Force on the Future of Legal Education declared: “[t]wo recent documents—the ‘Carnegie Report’ and ‘Best Practices’—have transformed the current conversation within law schools.”<sup>71</sup> At its annual meeting in 2011, the ABA adopted a Resolution based directly on the NYSBA’s Task Force report (and therefore on the Carnegie Report) urging law schools to “develop practice-ready lawyers.”<sup>72</sup>

Although the evidence presented in this Part is clearly not comprehensive, it seems to be clear, consistent, and highly suggestive. In the past, the Carnegie Foundation’s studies have exercised considerable influence on the development of legal education in the United States.<sup>73</sup> Based on comments by various educators, law schools, bar associations, and professional organizations, it seems highly likely that the latest Carnegie Report has had and will continue to have an impact on efforts to reform legal education.<sup>74</sup> Indeed, the evidence discussed in this Part shows that the Carnegie Report consistently appears at the forefront of practical discussions about legal education reform.<sup>75</sup> Thus, it seems fair to say that the Carnegie Report and the debate it has provoked reflect the state of the

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69. Report of the Task Force, *supra* note 66, at 3.

70. Howard Miller, *Legal Education for the 21st Century*, CAL. B.J. (Apr. 2010), <http://www.calbarjournal.com/April2010/Opinion/FromthePresident.aspx>.

71. Report of the Task Force on the Future of the Legal Profession, N.Y. ST. BAR ASS’N 43 (April 2, 2011), [http://www.nysba.org/AM/Template.cfm?Section=Task\\_Force\\_on\\_the\\_Future\\_of\\_the\\_Legal\\_Profession\\_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108](http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108).

72. See A.B.A. House of Delegates, *Resolution 10B: Report to the House of Delegates*, A.B.A. 18 (Aug. 8-9, 2011), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_daily\\_journal\\_FINAL.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf). For the New York State Bar Association’s document supporting the ABA Resolution, a document containing several references to the Carnegie Report, see Vincent E. Doyle III, *Report to the House of Delegates*, A.B.A. (Aug. 8-9, 2011), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_10b.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_10b.doc).

73. See Sean C. Goodlett, *The Carnegie Foundation: A Website Review*, 3 CURRENTS: TEACHING & LEARNING 46, 46 (2010).

74. See Miller, *supra* note 47, at 20.

75. See Goodlett, *supra* note 73, at 46.

art in the field. This Article will perform an important service by examining whether and to what extent the Report rests on intellectually sound foundations.

### *B. Academic Discussions of the Carnegie Report*

The Carnegie Report already has given rise to a substantial scholarly literature and this provides further evidence of the Report's state-of-the-art status.<sup>76</sup> The scholarly literature says very little about the ethical foundations of the Carnegie Report and thus a detailed discussion of the literature is beyond the purview of this Article. Nevertheless, a brief summary of the literature will help to convey its scope and underline the importance of the Carnegie Report as a trigger for academic discussions about improving the practice of legal education. Not surprisingly, one group of authors has focused on concerns that the Report raises about the way law schools typically teach legal doctrine and legal reasoning and, in particular, the way law schools use the case dialogue to teach the first-year curriculum.<sup>77</sup> For example, some scholars have agreed with the Report's criticisms of the gap between the teaching of legal theory and the teaching of law's practical or utilitarian side.<sup>78</sup> Others have objected in particular to the fact that the case-dialogue method deemphasizes transactional skills.<sup>79</sup> Still others have used their discussion of the Report as an occasion to argue that the case-dialogue method dehumanizes students or reflects a form of

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76. Jason Dolin recently asserted that "the recommendations of the Carnegie Report have been largely ignored by legal academia." Jason Dolin, *Law Schools: Why Faculties Fight Change*, COLUMBUS BAR LAWYERS Q., 14-15 (Spring 2011). For reasons outlined in this and the previous section, I believe Professor Dolin overstates his point but I would agree with him that law schools and the law faculties who run them may be in no great hurry to change what they do and how they do it in response to the Report's recommendations. Clinging to a comfortable status quo is an all-too-human reaction.

77. For a discussion of the Carnegie Report's analysis of the case dialogue as a method for teaching the novice law student to think like a lawyer, see *infra* Part III.B.2(a).

78. See Sean M. O'Connor, *Teaching IP from an Entrepreneurial Counseling and Transactional Perspective*, 52 ST. LOUIS L.J. 877, 877-78 (2008); see also Kate Nace Day & Russell G. Murphy, "Just Trying To Be Human in This Place:" *Storytelling and Film in the First-Year Law School Classroom*, 39 STETSON L. REV. 247, 254 (2009); Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why are Students Falling Off the Bridge and What are Law Schools Doing to Catch Them?*, 85 U. DET. MERCY L. REV. 429, 439 (2008); Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 338-39 (2010).

79. See Seth Freeman, *Bridging the Gaps: How Cross-Disciplinary Training With MBAs Can Improve Transactional Education, Prepare Students For Private Practice, and Enhance University Life*, 13 FORDHAM J. CORP. & FIN. L. 89, 92 (2008); Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TRANSACTIONS 9, 9-10 (2009) (proposing law schools make up for the deficiencies of the Socratic method by borrowing pedagogical methods from business schools).

gender bias.<sup>80</sup> One scholar has called for replacing the case-dialogue method with an approach that focuses on problems and problem solving.<sup>81</sup> Legal scholars being notoriously fractious, it is not surprising that some also have used the Report as an opportunity to defend the case-dialogue method.<sup>82</sup>

Perhaps the largest body of secondary literature on the Carnegie Report deals with concerns about teaching practical skills to novice lawyers.<sup>83</sup> Numerous scholars agree with the Carnegie Report's view that training in legal skills is important and that law schools do not provide enough of such training.<sup>84</sup> One scholar has argued for more training in legal research<sup>85</sup> and

80. See Peggy Cooper Davis, *Radical Proposals to Reform Legal Pedagogy: Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619, 620 (2008) (gender bias inherent in privileging analytic over linguistic thinking); Michael Hunter Schwartz, *Humanizing Legal Education Symposium: An Introduction to a Symposium Whose Time Came*, 47 WASHBURN L.J. 235, 241-43 (2008) (discussing dehumanizing aspects of law school in general and Socratic method in particular).

81. Shirley Lung, *The Problem Method: No Simple Solution*, 45 WILLIAMETTE L. REV. 723, 723-25 (2009) (contrasting the problem method with the case-dialogue method, and crediting the Carnegie Report with the increasing use of the former).

82. See, e.g., Margaret Moore Jackson, *Confronting "Unwelcomeness" from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 83-85 (2007). See generally Ryan Patrick Alford, *How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations*, 77 U. CIN. L. REV. 1273, 1273-74, 1278 (2009) (arguing that the case-dialogue method has deep roots in Western intellectual history and that it initiates students into a dialectical approach to reasoning that is crucial to the practice of law).

83. For a discussion of the Carnegie Report's account of the way that skills are and should be taught to novices, see *infra* Part III.B.2(b).

84. See, e.g., Leah M. Christensen, *The Power of Skills: An Empirical Study of Lawyering Skills Grades as the Strongest Predictor of Law School Success (or in Other Words, it's Time for Legal Education to Get Serious About Integrating Skills Training Throughout the Law School Curriculum if We Care About How Our Students Learn)*, 83 ST. JOHN'S L. REV. 795, 796-97 (2009) (Carnegie Report that law schools neglect skills training); Kris Franklin, *Sim City: Teaching "Thinking Like a Lawyer" in Simulation-Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861, 862-64 (2008/2009) (relying in part on the Carnegie Report to argue that clinical education should be as fundamental as doctrinal training); Anahid Gharakhanian, *ABA Standard 305's "Guided Reflections": A Perfect Fit For Guided Fieldwork*, 14 CLINICAL L. REV. 61, 72-73 (2007) (discussing the Carnegie Report's judgment that schools do too little practical skills training); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909-10 (2008) (discussing how a law school can review its skills curriculum in light of the Carnegie Report and other studies); Lawrence E. Singer & Megan Bess, *Teaching Health Law: Combining Pedagogy and Practice: Creating a 21st Century Health Law Curriculum*, 37 J.L. MED. & ETHICS 852, 852-53 (2009) (asserting that legal professionals agree with the Carnegie Report's conclusion that law schools do too little practical preparation); Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 J. ASS'N LEGAL WRITING DIRS. 133, 133-34 (2008) (Carnegie Report is having an impact on writing programs in law schools). But see Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1075 (2009) (arguing that the Carnegie Report overlooks the ability of law schools to teach students how to deal with people from diverse backgrounds); Jon Siegal, *Changing Law School*, LAW PROF ON THE LOOSE (Feb. 20, 2007, 8:40 AM), <http://jsiegel.blogspot.com/2007/02/changing-law-school.html> (pointing out that "[a] lawyer has her whole life to learn how to practice," and that the law school offers experiences that practice does not); Gordon Smith, *The Problem of Legal Education: What's the Diagnosis?*, THE CONGLOMERATE (July 20, 2009), <http://www.theconglomerate.org/2009/07/the-problem-of-legal-education-whats-the-diagnosis.html> (remarking that law schools do have a desire to incorporate practical skills into the cur-

another has argued for more legal clinics.<sup>86</sup> Several scholars follow the Carnegie Report in asserting that law schools place insufficient emphasis on legal writing skills.<sup>87</sup> For example, one has recommended that law schools teach first-year law students to draft contracts,<sup>88</sup> another that schools should teach writing in a manner that emphasizes different types of thinking skills,<sup>89</sup> and others that instruction in writing should be part of a “General Practice Skills” course.<sup>90</sup>

A third, somewhat smaller body of literature has taken up the Carnegie Report’s concerns about the teaching of professionalism, professional identity, and ethical lawyering.<sup>91</sup> One group of scholars has supported the Report’s claim that law schools currently give knowing the law priority over ethical lawyering.<sup>92</sup> Other commentators have supported the Report’s call for more discussion in the classroom of issues related to justice.<sup>93</sup> One scholar has argued that law schools should take advantage of social science

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riculum and have met with some success, but asserting that those who criticize law schools for not focusing enough on practical skills often have unrealistic expectations).

85. See, e.g., Brooke J. Bowman, *Researching Across The Curriculum: The Road Must Continue Beyond The First Year*, 61 OKLA. L. REV. 503, 504-05 (2008).

86. See Foxhoven, *supra* note 78, at 335-40.

87. See John A. Lynch Jr., *Teaching Legal Writing After a Thirty-Year Respite: No Country for Old Men?*, 38 CAP. U.L. REV. 1, 11 (2009) (arguing law schools do not take into account the Carnegie Report’s emphasis on practical skills as much as they claim, because legal writing professors do not receive the same treatment as doctrinal professors). Cf. E. Joan Blum & Kathleen Elliott Vinson, *Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms*, 60 MERCER L. REV. 761, 761-62 (2009) (discussing the policy of many law firms to hire legal writing instructors to improve the legal writing skills of junior lawyers).

88. See Deborah A. Schmedemann, *Finding a Happy Medium: Teaching Contract Creation in the First Year*, 5 J. ASS’N LEGAL WRITING DIRS. 177, 180 (2008).

89. See Andrea McArdle, *Writing Across the Curriculum: Professional Communication and the Writing That Supports It*, 15 LEGAL WRITING: J. LEGAL WRITING INST. 241, 246-48 (2009) (writing instruction should emphasize narrative, intuitive, and analytical skills).

90. See Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U.L. REV. 513, 527-32 (2009).

91. For a discussion of the Carnegie Report’s analysis of the way law schools teach professionalism and professional ethics, see *infra* Part III.B.2(c).

92. See Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 SW. L. REV. 1, 31-32 (2008) (supporting the Carnegie Report’s assertion that ethical training is largely overlooked in law schools by pointing out that few student evaluation forms ask about whether ethics receives attention in class); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1333 (2009); David M. Tanovich, *Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students*, 27 WINDSOR Y.B. ACCESS JUST. 75, 77-78 (2009) (exploring legal professionalism issues in Canada).

93. See L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1720-21 (2007); see also Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 207, 217-18 (2007) (agreeing with the Carnegie Report that practical training, such as students receive in clinics, has benefits that extend to the teaching of ethical lawyering). See generally Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33, 42-44 (2009) (discussing the widespread absence of meaningful discussions of justice in law schools).

research on “emotional intelligence,” which he describes as “a set of emotional competencies involving self-awareness of emotions, empathetic awareness of the emotions of others, and the ability to use this awareness to influence the behavior of others.”<sup>94</sup> Such training supposedly would make lawyers both more persuasive and more empathetic.<sup>95</sup> Two other scholars draw on social science literature from the fields of psychology and social work to argue for what they call “Relationship Centered Lawyering” as a way to enhance professionalism.<sup>96</sup>

Not surprisingly, a small number of scholars have used the Carnegie Report as an occasion to call for a wholesale reconstruction of legal education.<sup>97</sup> Some have recommended replacing the current approach to legal education with a model based on the U.S. approach to medical education.<sup>98</sup> Catherine Dunham and Steven Friedland have suggested that we should eliminate the traditional legal classroom entirely and take the show on the road using online technology.<sup>99</sup> Other scholars have put forward the potentially revolutionary suggestion that law school teachers should use empirical techniques to determine whether and how their methods actually work.<sup>100</sup> For example, three scholars used an empirical analysis to show we could improve student performance on final exams by requiring students to take practice exams.<sup>101</sup> This particular insight is, of course, not revolutionary, but one suspects that using empirical techniques to study legal education in practice could lead to much more dramatic insights concerning how law professors teach (or fail to teach) and what law students learn (or fail to learn).

As this brief review shows, the Carnegie Report has generated a substantial body of academic literature in the four years since its

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94. John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 326 (2008).

95. *Id.* at 326, 335-38, 349-50.

96. Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice*, 78 REV. JUR. U.P.R. 23, 24 (2009).

97. See, e.g., Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public and the Legal Profession*, 44 CAL. W. L. REV. 219, 251-56 (2007).

98. *Id.* at 251-52; Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J.L. & EDUC. 705, 708-10 (2009).

99. Catherine Dunham & Steven I. Friedland, *Portable Learning for the 21st Century Law School: Designing a New Pedagogy for the Modern Global Context*, 26 J. MARSHALL J. COMPUTER & INFO L. 371, 372-74 (2009).

100. See Dolin, *supra* note 97, at 251-52.

101. See generally Andrea A. Circio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 271 (2008).

publication.<sup>102</sup> Thus, the Report has become a focus, if not the focus, of discussions about educational reform not only in law schools, professional associations, and bar organizations (as shown in Part II.A), but also in scholarly circles.<sup>103</sup> Indeed, the sheer volume of scholarly work—whatever its merits—supports my contention that the Report and efforts based on it stand at the cutting edge of legal education reform.<sup>104</sup> Thus, a hard look at the ethical grounding of the Carnegie Report itself is not only desirable but, perhaps, overdue.

### III. THE CARNEGIE REPORT'S BACKBONE: A TELEOLOGICAL ETHICAL FRAMEWORK

This Part of the Article and Part IV argue that there are three—or at least two-and-a-half—ethical theoretical frameworks operating in or just below the surface of the Carnegie Report.<sup>105</sup> For reasons that will become clear, I refer to these as the teleological framework,<sup>106</sup> the emotivist framework,<sup>107</sup> and the contractarian framework.<sup>108</sup> This Part of the Article examines the teleological framework in some detail because the teleological framework provides the backbone of the Report and, as discussed in Part V, it should serve as a premise for any future discussions about reforming legal education that claim to be based on the Report. Part III.A carefully examines the difficult and long-debated concept of teleological explanation. Part III.B shows the many ways in which teleological explanation frames, informs, and organizes the analysis of legal education in the Report. Part III.B also identifies internal weaknesses and inconsistencies in the Report's teleological explanation of legal education. Part III.B discusses the Report's analysis and conclusions in considerable detail because, along with Part V, Part III.B is intended to serve as a propaedeutic for future work based on the Report. Part IV.A discusses the emotivist framework that, throughout the Report, seems to shadow and cast doubt on the teleological framework. Part IV.B analyzes the contractarian framework that appears to function in the Report as a somewhat half-hearted defense against key

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102. See, e.g., Lisa T. McElroy, Christine N. Coughlin & Deborah S. Gordon, "Yes, We Carnegie!" *Conference: The Carnegie Report and Legal Writing: Does the Report Go Far Enough?*, 17 LEGAL WRITING 279, 279 (2011).

103. *Id.*

104. See generally, e.g., McElroy, *supra* note 102.

105. I refer to these "theoretical frameworks" as frameworks rather than as theories because they provide structure(s) and organizing principles for the Carnegie Report's analysis and critique of legal education but they do not themselves receive detailed theoretical examination or elaboration in the Report.

106. See *infra* Parts III.A, B.

107. See *infra* Part IV.A.

108. See *infra* Part IV.B.

objections to the teleological framework, including objections posed by the emotivist framework. If the arguments presented here are correct, then the ethical grounding of the Report embodied in the three theoretical frameworks does not provide adequate, internally consistent support for the authors' analytical conclusions or recommendations.

#### A. What Is a Teleological Ethical Theory?

According to the *Oxford Dictionary of Philosophy*, “teleology” means “[t]he study of the ends or purposes of things.”<sup>109</sup> The term comes from the Greek word “*telos*,” meaning “end or goal.”<sup>110</sup> “Teleology” also has been defined as “the philosophical doctrine that all of nature, or at least intentional agents, are goal-directed or functionally organized.”<sup>111</sup> These rather technical and bloodless definitions do not, however, capture the traditional significance of teleological explanation either for human life and activity or for the life and activity of non-human nature. To understand the significance of teleological explanation, we need to place it in historical context. The *telos* is one element of a broader explanatory scheme that received its classical form in Aristotle's account of the Four Causes.<sup>112</sup> As one commentator has written,

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109. *Teleology*, in THE OXFORD DICTIONARY OF PHILOSOPHY 362 (Simon Blackburn ed., 2d ed. 2005).

110. RICHARD SORABJI, NECESSITY, CAUSE, AND BLAME: PERSPECTIVES ON ARISTOTLE'S THEORY 156 (1980). As Professor Moravcsik states, the *telos* “can be described as the *functional factor*. This . . . covers what would be described in modern terms by such different terms as end, aim, goal, and function.” Julius M.E. Moravcsik, *Aristotle on Adequate Explanations*, 28 SYNTHESIS 3, 9 (1974).

111. *Teleology*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 905 (Robert Audi ed., 2d ed. 1999). The definition continues: “Aristotle invested nature itself with goals – *internal teleology*.” *Id.* at 906. “Each kind has its own final cause, and entities are so constructed that they tend to realize this goal.” *Id.*

112. For explanations of Aristotle's account of the Four Causes, see R.J. Hankinson, *Philosophy of Science*, in THE CAMBRIDGE COMPANION TO ARISTOTLE 109, 120-22 (Jonathan Barnes ed., 1995); DAVID ROSS, ARISTOTLE 71-75 (1964); A.E. TAYLOR, ARISTOTLE 44-54 (1955). For an argument that the Greek term usually translated as “cause,” i.e., *aition* or *aitia*, should be translated as “because” or, perhaps, “explanation,” (as in the Four Types of Explanation), see Max Hocutt, *Aristotle's Four Causes*, 49 PHIL. 385, 387 (1974). Professor Hocutt follows Professor Vlastos on this point. See Gregory Vlastos, *Reasons and Causes in the Phaedo*, 78 PHIL. REV. 291, 294 (1969). Professor Moravcsik supports Hocutt's point that we should understand Aristotle's account of the Four Causes as an “account of what constitutes an adequate explanation” or “whatever answers a ‘why’-question.” Moravcsik, *supra* note 110, at 3. Accord SORABJI, *supra* note 110, at 40. But see David Furley, *What Kind of Cause is Aristotle's Final Cause?*, in RATIONALITY IN GREEK THOUGHT 59, 60 (Michael Frede & Gisela Striker eds., 1996) (“I shall avoid the word ‘explanation’ because I believe it normally refers to a proposition or set of propositions – a verbal item – and Aristotle uses *aition* to refer to a fact or a state of affairs or a thing or a person. . . . And I shall avoid talking about ‘because’s’ since I do not understand the distinction people want to make when they use that term instead of ‘causes.’”). For a careful examination of the development of the notion of a “cause” in ancient philosophy, see generally Michael Frede, *The Original Notion of Cause*, in DOUBT AND DOGMATISM: STUDIES IN HELLENISTIC EPISTEMOLOGY 217, 217-21 (Malcolm Schofield et al. eds., 1980).



Aristotle's scheme incorporates the matter, which is . . . the potential bearer of form (and of its privation); the form, or structural organization which is realized in the matter; the agent, or efficient cause, which brings that information about; and (in some cases at least) the goal, or final end [i.e., the *telos*], toward which that process tends.<sup>113</sup>

Thus, the Four Causes are the material, formal, efficient or active, and final, i.e., the *telos*.<sup>114</sup> Under Aristotle's scheme, the potter would be the agent or efficient cause who molds clay—the matter or material cause—into the form of a pot. Raw clay possesses the potential to be a pot and the potter actualizes the potential by forming or informing the clay as a pot. As Aristotle remarked, the form and the *telos* are often the same in an analysis using the Four Causes, meaning that the final end or purpose toward which a process tends often *is* the realization or embodiment of form in matter.<sup>115</sup> To return to the example of the potter, we might say that the *telos* of the pottery process is the form of a pot embodied in clay. Thus, the pot is both formal and final cause. The pot is the final end toward which pottery as a process moves. We could take the analysis a step further and say that the *telos* (purpose or function) of a pot is containing liquid. Thus, we might

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113. Hankinson, *supra* note 112, at 122. See ARISTOTLE, ARISTOTLE'S PHYSICS 28 (Richard Hope trans., 1961). In the standard form for citations to Aristotle, the reference is PHYSICS ii.3 194b25-195a2. *Id.*

114. See SORABJI, *supra* note 110, at 51. After arguing the word usually translated as "cause" should be translated as "explanation," Professor Hocutt's asserts that only Aristotle's efficient or moving cause is a "cause" as the term is used in modern English. Hocutt, *supra* note 112, at 386. Accord Furley, *supra* note 112, at 62 ("we can understand . . . the material, formal, and final causes as being different aspects of the efficient cause, or perhaps different kinds of efficient cause."). Responding to this line of argument, Professor Mure rejects the effort to restrict the term "cause" to Aristotle's efficient cause. G. R. G. Mure, *Cause and Because in Aristotle*, 50 PHIL. 356, 356 (1975). Professor Gotthelf also argues that, for Aristotle, final causes are not reducible to efficient causes. See Allan Gotthelf, *Aristotle's Conception of Final Causality*, in PHILOSOPHICAL ISSUES IN ARISTOTLE'S BIOLOGY 204, 213 (Allan Gotthelf & James G. Lennox eds., 1987) [hereinafter Gotthelf, *Aristotle's Conception*]. For a useful discussion of the links between final and efficient causes in Aristotle, see SARAH BROADIE, *Nature and Craft in Aristotelian Teleology*, in ARISTOTLE AND BEYOND 85 (2007) [hereinafter BROADIE, *Nature and Craft*].

115. See ARISTOTLE, *supra* note 113, at 35 [PHYSICS ii.7 198a25-26]. For discussions of Aristotle's view on this issue, see John M. Cooper, *Aristotle on Natural Teleology*, in LANGUAGE AND LOGOS 197, 200-01 (Malcolm Schofield & Martha Nussbaum eds., 1982); Hankinson, *supra* note 112, at 122; ROSS, *supra* note 112, at 74; TAYLOR, *supra* note 112, at 51-52. See also T.H. Irwin, *The Metaphysical and Psychological Basis of Aristotle's Ethics*, in ESSAYS ON ARISTOTLE'S ETHICS 35, 39-41 (Amélie O. Rorty ed., 1980) (explaining the relationship between form and function in Aristotle). Hocutt suggests that Aristotle's position on this issue may provide a justification for collapsing the final cause into the formal cause as a "constituent" and thus effectively eliminating final causes or *teloi* as a separate type of explanation. Hocutt, *supra* note 112, at 399. Professor Mure rejects Hocutt's attempt to reduce Aristotle's four causes to three, stating bluntly and somewhat hyperbolically that "Aristotle's Nature operates teleologically . . ." Mure, *supra* note 114, at 357.

describe the *telos* of the pottery process as embodying in clay a form that can contain liquid.

It seems unlikely that anyone would seriously dispute the claim that the craft of pottery involves a teleological process in which the goal or purpose in the mind of the potter finds its formal embodiment in the matter of the pot. Aristotle went further, however, and claimed that we can and must use the Four Causes, including the final cause or *telos*, to explain human and non-human *natural* processes, i.e., processes in the world that do not involve the shaping of an artifact to reflect a conscious purpose.<sup>116</sup> Why does Aristotle insist on seeking teleological explanations for non-conscious natural processes? Richard Rubenstein has argued that Aristotle sought teleological explanations because he (Aristotle) believed such explanations render the natural world in which we live meaningful:

[w]e have our reason, which makes it possible for us to think logical, purposive, patterned thoughts, but the universe has its own logic and purposes. If it did not—if the world inside and outside us were not intelligible—our thoughts would disappear into that void like light lost in pure darkness.

Unlike the Jews, Muslims, and Christians who would one day seize on this insight as proof of the existence of a supernatural Creator, Aristotle held that the natural universe, although meaningful, is self-sufficient. And, unlike the secularists, who would one day deny that it has any intrinsic meaning at all, he asserted that it is full of purpose. Everything that exists, he taught, strives to fulfill itself—to realize (or, in his language, to ‘actualize’) its inherent potential. This great law makes nature comprehensible and invites us to fulfill our own destiny by learning to comprehend it.<sup>117</sup>

As Rubenstein points out, however, Aristotle did not make the foolish mistake of claiming that a being such as a plant realizes a *telos* in the sense

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116. As Aristotle says in the *Physics* when introducing his discussion of the Four Causes, “[i]t must clearly, therefore, be our aim in the present inquiry to get knowledge of the first principles to which we may refer *any* problem in our exploration of generation and destruction and of *any* natural transformation.” ARISTOTLE, *supra* note 113, at 28 [PHYSICS II.3, 194b20-24] (emphasis added). For a brief description of the various ways in which Aristotle seeks to explain nature teleologically, see ANDREW WOODFIELD, TELEOLOGY 5-6 (1976).

117. RICHARD E. RUBENSTEIN, ARISTOTLE’S CHILDREN: HOW CHRISTIANS, MUSLIMS, AND JEWS REDISCOVERED ANCIENT WISDOM AND ILLUMINATED THE DARK AGES 42-43 (2003).

that it pursues conscious goals and purposes just as human beings do.<sup>118</sup> A plant's roots draw water and nutrients from soil in order to nourish the plant, but the plant and the roots pursue the *telos* of nourishment and the higher, all-inclusive *telos* of staying alive unconsciously. Indeed, it will turn out to be a crucial element of Aristotle's ethical theory that human beings are similar to plants and to organs in living organisms in the sense that human beings also have a *telos* or *teloi* that they naturally pursue but of which they may not be aware or fully conscious.<sup>119</sup>

For a skeptic steeped in the modern scientific view that the only real causes are efficient causes, Aristotle's notion that we can find real, intrinsic, unconscious *teloi*—goals, ends, purposes—in nature might seem bizarre.<sup>120</sup> To Aristotle, however,

the opposite notion, that the universe is totally unlike us, that it is chaotic matter on which we impose a purely subjective mental order, he would have thought both arrogant (because it locates all meaning in the human mind) and despairing (because it deprives the nonhuman universe of meaning). The lynchpin of his thinking—the idea that connects the meaning inside people with the meaning outside them—is the presence of form in nature. Every natural substance, he declared, whether a tree, a star, or a person, is a compound of matter *and* form. 'Form,' as he uses the word, means shape, but it also means that which makes a substance what it most truly is: the thing's internal structure and its animating force, the factor that realizes or actualizes a thing's potential to be the kind of thing that it is.<sup>121</sup>

By growing into an oak, an acorn actualizes its potential and achieves its true form and inner purpose or end, i.e., its *telos*.<sup>122</sup> For Aristotle, we find meaning in the world by finding the form(s) and end(s) in things—i.e., by developing a teleological explanation of things such as plants and animals as well as of people.<sup>123</sup> As Karl Löwith has written, “[i]t is not by chance

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118. *See id.* at 43. *See also* W. K. C. GUTHRIE, *Aristotle An Encounter*, 6 A HISTORY OF GREEK PHILOSOPHY 107 (1981) (“Aristotle was not a fool, therefore he could not have been guilty of such crude anthropomorphism, or alternatively could not have entertained such an illogical idea as that of unconscious purpose.”).

119. *See infra* notes 146-160 and accompany text discussing the human *telos*.

120. *See supra* note 114.

121. RUBENSTEIN, *supra* note 117, at 43-44.

122. *See* GUTHRIE, *supra* note 118, at 116 (“If the building up of an oak from an acorn were an art practised by man, instead of being achieved by nature unaided, everyone would exclaim at the intelligence, skill and ingenuity involved.”).

123. *See generally supra* note 94; *see also supra* note 95.

that we use the words ‘meaning’ and ‘purpose’ interchangeably, for it is mainly purpose which constitutes meaning for us.”<sup>124</sup>

Before examining Aristotle’s account of teleological explanation and its application to human beings more closely, it is important to underline one point that Rubenstein makes.<sup>125</sup> For Aristotle, teleological explanation is not a method of “impos[ing] . . . a purely subjective mental order” on an otherwise disorderly and meaningless universe.<sup>126</sup> Teleological explanation is not, in other words, a purely heuristic technique with which we analyze the natural world *as if* things in it pursued ends or purposes.<sup>127</sup> Rather, as Professor Moravcsik has argued, the Four Causes “referred to by Aristotle are indeed, elements of reality, or roles played in some context by elements of reality. And thus the relationships introduced are ontological relationships; and not relations between the world and elements of language, or some given state of human understanding.”<sup>128</sup> If Aristotle were to say that the mature, living oak tree is the *telos* or purpose or end of the acorn, he would not be speaking metaphorically or by analogy. He would not be saying we could somehow understand the acorn better by treating it “as if” the oak were its *telos*. Rather, he would be saying that the mature oak really is the form and end toward which the acorn develops and that the acorn is as

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124. KARL LÖWITH, *MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY* 5 (1949). Löwith goes on to suggest that purpose can be found only in things that were created by God or by human beings, but as indicated in the text, Aristotle believed that one can find purposes or ends for many things in nature, things not made by human beings, without presuming that some kind of god created or fashioned those things. *Id.* Indeed, Aristotle rejected the notion of a divine, world-shaping Craftsman defended by his teacher, Plato. See Furley, *supra* note 112, at 65 (Aristotle’s “cosmos certainly has no purposive Craftsman, and is not constructed according to the intention of any Mind.”). *But cf.* GUTHRIE, *supra* note 118, at 108 (“All things considered, we must at least say that if nature for Aristotle was end-directed, that was because it was divinely ordered.”).

125. RUBENSTEIN, *supra* note 117, at 43.

126. See *supra* note 121 and accompanying text.

127. RUBENSTEIN, *supra* note 117, at 43.

128. Moravcsik, *supra* note 110, at 7. Accord David M. Balme, *Teleology and Necessity*, in *PHILOSOPHICAL ISSUES IN ARISTOTLE’S BIOLOGY* 275, 280-81 (Allan Gotthelf & James G. Lennox eds., 1987); Gotthelf, *Aristotle’s Conception*, *supra* note 114, at 228. Although I concur with Moravcsik, Balme, and Gotthelf that for Aristotle teleological explanation has an ontological, real-world basis, it is important to acknowledge that there is a robust debate among Aristotle scholars about the precise status of the Four Causes, and in particular the status of the final cause or *telos*. See Allan Gotthelf, *Understanding Aristotle’s Teleology*, in *FINAL CAUSALITY IN NATURE AND HUMAN AFFAIRS*, 30 *STUDEIS IN PHILOSOPHY AND THE HISTORY OF PHILOSOPHY* 71, 75-79 (Richard F. Hasking ed., 1997) (identifying five main lines of interpretation and two branch lines) [hereinafter Gotthelf, *Understanding Aristotle’s Teleology*]. Professor Gotthelf notes, for example, that as distinguished a scholar as Professor Nussbaum appears (at least in her earlier writings) to favor the view that teleological explanation is primarily of heuristic or “pragmatic” value. See *id.* at 76. See, e.g., MARTHA CRAVEN NUSSBAUM, *Aristotle on Teleological Explanation*, in *ARISTOTLE’S DE MOTU ANIMALIUM* 59, 70, 84-85 (Martha Craven Nussbaum ed. & trans., 1978).

it is and develops as it develops, in Aristotle's phrase, "for the sake of"<sup>129</sup> the mature, living oak.<sup>130</sup> By denying that teleological explanation is merely a heuristic technique, however, Aristotle is certainly not denying that we can and do use teleological explanation heuristically.<sup>131</sup> In fact, teleological explanation helps us to understand and find meaning in the non-human world precisely because, according to Aristotle, things in the world really do act for the sake of and in pursuit of *teloi* or goals and ends.<sup>132</sup> As Professor Gotthelf explains, Aristotle's teleology "identifies the ontological basis of the awareness that the existence and stages of a development can be understood only in terms of its end . . . ."<sup>133</sup>

In a somewhat cryptic comment describing the relationship between the *telos* and the other three causes, Aristotle writes, "there are the ends or the good of the others; for all the others tend toward what is best as toward their end."<sup>134</sup> In this comment, Aristotle appears to identify the *telos* or end with the good or best for that of which it is the end. Thus, we could say that as the *telos* of the acorn, the oak is the good of the acorn or what the acorn is good for. What is an acorn good for? First and foremost, producing an oak. As Professor Cooper says:

Aristotle believed that many (not, of course, all) natural events and facts need to be explained by reference to natural goals. He understands by a goal . . . whether natural or not, something good (from some point of view) that something else causes or makes possible, where this other thing exists or happens (at least in part) because of that good. So in holding that some natural events and facts have to be explained by reference to natural goals, he is holding that some things exist or happen in the course of nature because of some good that they do or make possible.<sup>135</sup>

Elaborating on this point, Professor Furley writes:

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129. ARISTOTLE, *supra* note 113, at 28 [PHYSICS ii.3 194b32-34]. For an analysis of the different senses in which a thing could be "for the sake of" its *telos*, see Wolfgang Kullmann, *Different Concepts of the Final Cause in Aristotle*, in ARISTOTLE ON NATURE AND LIVING THINGS: PHILOSOPHICAL AND HISTORICAL STUDIES 169, 172 (Allan Gotthelf ed., 1985).

130. For a summary of Aristotle's arguments in support of the view that *teloi* or ends and purposes are an intrinsic and irreducible element of the natural world, see Cooper, *supra* note 115, at 207-16.

131. See RUBENSTEIN, *supra* note 117, at 43-44.

132. See Cooper, *supra* note 115, at 214.

133. Gotthelf, *Aristotle's Conception*, *supra* note 114, at 229.

134. ARISTOTLE, *supra* note 113, at 29 [PHYSICS ii.3 195a22-23].

135. Cooper, *supra* note 115, at 197.

What is to count as a goal? Natural processes have many outcomes. . . . Aristotle's answer was that the goal must be recognizably a *good*. . . . The cases that most interested him were the structures and functioning of the parts of animal bodies, and in these cases the good in question is clearly to be identified as the good of the animal itself, and (except in the case of man, whose life involves moral and intellectual goals as well as physical ones) is always related to the animal's capacity for surviving in its environment.<sup>136</sup>

We might say that the natural end or *telos* of the deer's eye is seeing, and seeing allows the deer to move through its environment, to identify food, to avoid predators, and thus to survive. It is, in Furley's phrase, "recognizably a good"<sup>137</sup> for the deer to see, and by seeing, to eat and avoid being eaten.<sup>138</sup> The claim here is not that a previously blind species of deer somehow grew eyes in order to see food and stop blundering into ravenous packs of gray wolves. Rather, Aristotle asserts that one can understand fully what the deer's eye really is and what it means only if one understands what it does and what good(s) it actually serves for the deer.<sup>139</sup> Summing up the conclusions of his monograph analyzing teleological explanation, Professor Woodfield generalizes Aristotle's point:

the different types of teleological explanations are variations on a single theme. This theme is, to put it simply, the idea of a thing's happening *because it is good*. More exactly . . . the [teleological descriptions] I deal with convey the idea that the thing happens or exists because it leads or is believed to lead to something which is good.<sup>140</sup>

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136. Furley, *supra* note 112, at 66.

137. *Id.*

138. See Balme, *supra* note 128, at 281 (final cause "is not directed towards the good of anything other than the individual animal.").

139. Professor Nagel frames the point with reference to the *ergon* (i.e., the specific function or work) of a thing. Thomas Nagel, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS* 7, 8 (Amélie O. Rorty ed., 1980). "The *ergon* of a thing, in general, is what it does that makes it what it is. Not everything has an *ergon*, for there are things to be which is not to do anything. But when something has an *ergon*, that thing's good is specified by it." See *id.* Thus, we could say that the *ergon* of the deer's eye is seeing. *Id.* at 7-8. Seeing is also the good of the eye. *Id.* The measure of the eye's excellence will be how well it performs its *ergon*—in this case, how well it sees. See *id.*

140. WOODFIELD, *supra* note 116, at 205. *But cf.* Gotthelf, *Aristotle's Conception*, *supra* note 114, at 214 n.18 ("Since a naturalistic account can . . . be given of the notion of the good with which Aristotle operates in his biology, it seems to me that the fundamental account of the final cause need not make use of that notion."), 233 ("the goodness of the end is *not* an independent constituent of the analysis, nor what centrally establishes that end as the end.").

Teleological explanation for Aristotle rests, in part, on the claim that every type of being, or at least every species of living being, has a “nature” (in Greek, *physis*).<sup>141</sup> According to Professor Broadie, “[n]ature, in this context, is not Nature in general, or the cosmos, but the specific essential nature of an individual substance, the inner principle of its behaviour and organisation.”<sup>142</sup> As we come to understand the active nature or *physis* of a thing, we also learn to see and specify the thing’s excellence, i.e., what the thing does when it performs its function and does what it is good for doing.<sup>143</sup> In Broadie’s account,

the excellence of a thing [is] the quality whereby it functions well according to its kind or essential nature; but ‘whereby’ is not causal here. The difference between possessing and not possessing the excellence is simply the difference between functioning well and not always so well, whenever an occasion arises for active functioning.<sup>144</sup>

Thus, a living thing such as a thoroughbred horse achieves its specific excellence by functioning well and fulfilling its nature, i.e., actualizing its potential, achieving its *telos*, and thereby doing what it is good for doing, as a thoroughbred horse. We might, for example, say that a thoroughbred horse galloping at the peak of its powers in the Kentucky Derby actively achieves its *telos* and the specific excellence of its nature. The good of the thoroughbred, what the thoroughbred is good for, is running and running well.

Just as a thoroughbred has a specific or essential nature and therefore a characteristic *telos* in a teleological explanation, so also do human beings have a specific or essential nature in Aristotle’s sense and therefore a *telos* that is intrinsic to them as human beings regardless of their particular and individual purposes, intentions, or interests. To show how Aristotle’s notion of a teleological explanation based on a thing’s specific nature applies to human beings, Alasdair MacIntyre outlines the elements of a teleological “moral scheme.”<sup>145</sup>

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141. For a discussion of the roots of Aristotle’s *Physics* in this notion of *physis*, see John Herman Randall, Jr., *Introduction to ARISTOTLE*, *supra* note 113, at v-vii.

142. BROADIE, *Nature and Craft*, *supra* note 114, at 85-86.

143. SARAH BROADIE, *ETHICS WITH ARISTOTLE* 38 (1991).

144. *Id.*

145. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 52 (3d ed. 2007) [hereinafter MACINTYRE, *AFTER VIRTUE*]. For short expositions of Aristotle’s ethical theory, see generally D.S. Hutchinson, *Ethics*, in *THE CAMBRIDGE COMPANION TO ARISTOTLE* 195-32 (Jonathan Barnes ed., 1995); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 124-145 (1988) [hereinafter MACINTYRE, *WHOSE JUSTICE?*]; and Mark F. Kightlinger, *The Gathering Twilight? Information*

Within th[e] teleological scheme there is a fundamental contrast between man-as-he-happens-to-be and man-as-he-could-be-if-he-realized-his-essential-nature. Ethics is the science which is to enable men to understand how they make the transition from the former state to the latter. Ethics therefore in this view presupposes some account of potentiality and act, some account of the essence of man as a rational animal and above all some account of the human *telos*.<sup>146</sup>

Ethics, in other words, is a teleological science because it studies what a human being must do to achieve the human *telos* and thereby realize the human being's essential nature and good as a rational animal.<sup>147</sup> Elaborating on this point, MacIntyre observes:

The precepts which enjoin the various virtues and prohibit the vices which are their counterparts instruct us how to move from potentiality to act, how to realize our true nature and to reach our true end. To defy them will be to be frustrated and incomplete, to fail to achieve that good of rational happiness which it is peculiarly ours as a species to pursue.<sup>148</sup>

Borrowing Broadie's language,<sup>149</sup> we could say that to defy the precepts developed by the science of ethics is to fail to achieve the excellence of our specific or essential nature as human beings, to fail to function as well as possible as human beings. Because a being's essential natural goal or *telos* is a good,<sup>150</sup> achieving the human *telos* is a good—perhaps the overarching good—for human beings. Failing to pursue and achieve the *telos* means failing to pursue and achieve what is good and best for us as human beings.

According to MacIntyre, in a teleological ethical theory,

[w]e . . . have a threefold scheme in which human-nature-as-it-happens-to-be (human nature in its untutored state) is initially discrepant and discordant with the precepts of ethics and needs to

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*Privacy on the Internet in the Post-Enlightenment Era*, 24 J. MARSHALL J. COMPUTER & INFO. L. 353, 357-59 (2006) [Kightlinger, *The Gathering Twilight?*]. Professor Floyd also has noticed the relevance of MacIntyre and the Aristotelian tradition for understanding the Carnegie Report. See Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity*, 28 MISS. C.L. REV. 339, 344 n.12 (2009).

146. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 52.

147. *Id.*

148. *Id.* For an elaboration of the idea that "rational happiness" is the peculiar good or excellence of our species, see *infra* notes 157-159 and accompanying text.

149. See *supra* note 144 and accompanying text.

150. See *supra* notes 134-40 and accompanying text.



be transformed by the instruction of practical reason and experience into human-nature-as-it-could-be-if-it-realized-its-*telos*.<sup>151</sup>

As MacIntyre's references to "untutored human nature" and the "instruction of practical reason and experience" suggest, implicit in a teleological ethical theory is the call for an educational process that will assist a person in making the transition from a raw, untutored, happens-to-be state to the realization and actualization of his or her "essential nature," his or her *telos* or end and purpose as a human being.<sup>152</sup> Moreover, this process is educational in the very strict sense that it educes—i.e., draws out, and develops—potentials that are latent in the raw, untutored, happens-to-be neophyte. Thus, stripped to its essentials, a "teleological framework," as the phrase is used in this Article, is one that explains and supports a process such as producing a (new) lawyer<sup>153</sup> by resolving the process into three interconnected stages. Those stages are (1) the "untutored" or "happens-to-be" state in which we find a person at the beginning of the process; (2) the particular human end state, goal, or *telos* that the person must achieve, actualize, or realize by the end of the process; and (3) the educational activities and other measures needed to move, change, or transform the person from the former state to the latter.<sup>154</sup> As MacIntyre notes, "[e]ach of the three elements of the scheme . . . requires reference to the other two if its status and function are to be intelligible."<sup>155</sup>

At this point in the discussion, I need to introduce a distinction between "grounded" and "ungrounded" teleological ethical theories. A grounded theory, as I use the term, is one that provides a substantial defense of a particular account of the human *telos* in addition to providing an account of the other three elements identified above, i.e., untutored human nature, human nature as it could be if it achieves the human *telos*, and a process for

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151. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 53. For more detailed account of how such teleological moral reasoning operates, see Alasdair MacIntyre, *Practical Rationalities as Forms of Social Structure*, in THE MACINTYRE READER 120, 121-24 (Kelvin Knight ed., 1998) [hereinafter MacIntyre, *Practical Rationalities*]. MacIntyre observes that the teleological

scheme is complicated and added to, but not essentially altered, when it is placed within a framework of theistic beliefs, whether Christian, as with Aquinas, or Jewish with Maimonides, or Islamic with Ibn Roschd. The precepts of ethics now have to be understood not only as teleological injunctions, but also as expressions of divinely ordained law.

MACINTYRE, AFTER VIRTUE, *supra* note 145, at 53.

152. *Id.*

153. For an analysis of how legal education, as described in the Carnegie Report, is constructed on a teleological framework, see *infra* Part III.B.

154. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 53-54.

155. *Id.* at 53.

transforming the former into the latter. Aristotle provides the archetype of what I am calling a grounded teleological ethical theory. For Aristotle, a human being learns how to achieve or realize her human nature and thus to become fully human in part through ethical education.<sup>156</sup> Aristotle's account of ethical education includes an argument in support of what he believes to be the human *telos*, which he labels *eudaimonia*.<sup>157</sup> As MacIntyre observes, this term presents "difficulty in translation: blessedness, happiness, prosperity. It is the state of being well and doing well in being well, of a man's being well-favored himself and in relation to the divine."<sup>158</sup> Elsewhere, MacIntyre appears to translate *eudaimonia* with the phrase "rational happiness."<sup>159</sup> Aristotle's ethical theory is grounded in my sense of the term because it contains a robust defense of his account of the human *telos* toward which the educational process is, or should be, directed.<sup>160</sup> An ungrounded teleological ethical theory, by contrast, is one that omits any substantial defense of the asserted human *telos* or *teloi* toward which the process of ethical education moves. An ungrounded teleological theory, in other words, identifies a *telos* or presumes a *telos* either for human beings in general or for a particular form of human activity but it does not defend and seek to justify that *telos* independently. The *telos*

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156. See *supra* note 148 and accompanying text.

157. See, e.g., ARISTOTLE, NICOMACHEAN ETHICS 7-17 (Terrence Irwin trans., 1985) [NICOMACHEAN ETHICS i.4-i.7 1095a15-1098a20]. For a careful examination of what Aristotle means by *eudaimonia*, see J. L. Ackrill, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS* 15 (Amélie O. Rorty ed., 1980).

158. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 148. See ARISTOTLE, *supra* note 157, at 19 [NICOMACHEAN ETHICS i.8 1098b21-23] ("happy person lives well and does well in action"); see also *id.* at 28 [1101b25-27] ("we never praise happiness, as we praise justice, but count it blessed, as something better and more godlike."). Aristotle elsewhere appears to deny that the best human life is the practical life of action and contends instead that "the metaphysical contemplation of [god] . . . furnishes man with his specific and ultimate *telos* . . ." MACINTYRE, AFTER VIRTUE, *supra* note 145, at 158. See generally ARISTOTLE, *supra* note 157, at 284-91 [NICOMACHEAN ETHICS x.7-x.9 1177a11-1179b33]. For a discussion of the competing arguments within Aristotle's *Nicomachean Ethics* for these two views of the best human life, see Thomas Nagel, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS* 7 (Amélie O. Rorty ed., 1980). For a discussion of the tensions in the *Nicomachean Ethics* between the contemplative life and the practical life and the significance of those tensions, see Ackrill, *supra* note 157, at 29-33.

159. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 52. Hutchinson translates *eudaimonia* as "success" but he acknowledges that the standard translations are "happiness" and "living well and faring well[.]" Hutchinson, *supra* note 145, at 200 n.4, 201. Anthony Kenny appears to accept "happiness" as a translation for *eudaimonia*. Anthony Kenny, *Happiness*, 66 *PROC. ARISTOTELIAN SOC'Y* 93, 99 (1966). Ackrill responds that "[n]early everything Kenny says about happiness goes to show that the word 'happiness' is not a proper translation of the word *eudaimonia*." Ackrill, *supra* note 157, at 24. Sarah Broadie observes that, for Aristotle, "human happiness, the central good of a happy human life, is rational practical excellent activity . . . . The connection between happiness here and excellent activity is as close as the word 'is' can convey." BROADIE, *ETHICS WITH ARISTOTLE*, *supra* note 143, at 41.

160. For a summary of Aristotle's arguments in support of *eudaimonia* as the *telos* or purpose of human life, see Hutchinson, *supra* note 145, at 199-204.

is given as a premise and the theory focuses on how one should describe human nature as it is and, more importantly, how one should educate and transform human nature as it is to achieve or realize the ungrounded *telos* that the theory presumes.<sup>161</sup> One might say that an ungrounded theory focuses on parts one and two of a three-part teleological framework and takes part three—the *telos*—more or less for granted.

As the remainder of this Part shows, the backbone or organizing principle of the Carnegie Report is a recurring pattern—a three-part teleological framework comprising a brief account of the novice law student’s untutored condition, a cursory account of the *telos* or *teloi* that the law student is supposed to achieve or realize by the conclusion of a legal education, and a more detailed account of what must be done to, with, and by the student to move her from the former to the latter. Indeed, as explicated in the Carnegie Report, legal education makes sense, if it makes sense at all, only as a process designed to move the law student from the untutored state to the goal state, while the untutored state and the goal state become fully intelligible only as the starting point and end point of legal education.<sup>162</sup> Unlike Aristotle’s account of the science of ethics, however, the Report presents an ungrounded teleological framework for legal education.<sup>163</sup> The Report does not provide a serious explanation or defense of the *telos* or *teloi* toward which the educational process is expected to move the student.<sup>164</sup> This lacuna in the Report must be addressed if those behind the current push to reform legal education hope to do more than construct sand castles.<sup>165</sup> In the following sections, I first show, in some detail, that the authors<sup>166</sup> rely at various points in their account of legal education on a three-part teleological framework and I also show that they have adopted an ungrounded rather than a grounded teleological standpoint. I then discuss the fundamental problems that their approach raises but does not address or resolve.

### *B. The Carnegie Report Relies Heavily on a Teleological Ethical Framework*

This Part of the Article substantiates the claim that the authors of the Carnegie Report build their account of and recommendations for legal

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161. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 53.

162. *See supra* note 155 and accompanying text.

163. *See supra* note 130 and accompanying text.

164. *See infra* Part III.B.2(e).

165. For a discussion of this assertion, see *infra* Part V.C.1-6.

166. In this Article, whenever I refer to “the authors,” I am of course referring in shorthand to the authors of the Carnegie Report.

education on an ungrounded three-part teleological framework.<sup>167</sup> Teleological frameworks recur throughout the Report, first in the discussion of formation and formative education,<sup>168</sup> and then in the discussions of what the authors call the three apprenticeships.<sup>169</sup> And yet the authors' teleological approach ultimately is not convincing because they rely entirely on an ungrounded teleological framework even though the logic of their own argument demands a grounded teleological framework as the "moral basis"<sup>170</sup> or "ethical grounding"<sup>171</sup> of legal education.

### 1. Formation and Formative Education

For evidence that the authors of the Carnegie Report build their account of legal education on a three-part teleological framework, we should look first at their discussion of "formation" and the formative process.<sup>172</sup> According to the authors, the Report's "unusual angle of vision" is its "focus[] on the daily practices of teaching and learning through which future legal professionals are formed."<sup>173</sup> As the authors observe,

[i]t is common in French, though not in English, to talk about education as 'formation,' as in *la formation medicale* or even *la formation humaine*. However, changing conditions of professional life have begun to give the term some educational currency. The preparation of the clergy has, for its own internal reasons, long been sensitive to the relation of character to professional legitimacy and competence.<sup>174</sup>

If we follow the clue provided by the analogy to "preparation of the clergy," these somewhat cryptic comments imply that the authors see "formation" as a process of bringing a person's character into a proper relation to

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167. See *infra* note 172 and accompanying text.

168. See *infra* Part III.B.1.

169. See *infra* Part III.B.2.

170. For the authors' call for a "moral basis" for legal professionalism, see *infra* note 543 and accompanying text.

171. For the authors' call for "ethical grounding," see *supra* note 8 and accompanying text.

172. For some of the more than twenty references to "formation" or "formative education," see, for example, CARNEGIE REPORT, *supra* note 1, at 2, 3, 12-14, 60, 75, 177-78, 182, 198.

173. *Id.* at 1-2.

174. *Id.* at 84. The authors could make the same point in the German language. The term for "formation" in German is *Bildung*. *Bildung translation English*, German-English Dictionary, REVERSO, <http://dictionary.reverso.net/german-english/bildung> (last visited Dec. 12, 2012). The related verb, *bilden*, means "to form" but also "to cultivate, improve, educate" while the reflexive form of the verb, *sich bilden*, means "to improve one's mind." *Bilden translation English*, German-English Dictionary, REVERSO, <http://dictionary.reverso.net/german-english/bilden> (last visited Dec. 12, 2012). A person is *gebildet* if she is cultivated or educated. *Gebildet translation English*, German-English Dictionary, REVERSO, <http://dictionary.reverso.net/german-english/gebildet> (last visited Dec. 12, 2012).

“professional legitimacy and competence.”<sup>175</sup> Formation thus involves the forming of character. As William Sullivan, the lead author of the Carnegie Report, states in his companion volume *Work and Integrity*,<sup>176</sup> character or “ethos [can be] understood as a cultivated disposition toward good values.”<sup>177</sup> This definition is not quite right because it implies that all character is good character and that a person of bad character has no character at all. It might be more accurate to say that a person of bad character has, in Sullivan’s terms, a “disposition” and perhaps even a “cultivated disposition” to “bad values.”<sup>178</sup> A person’s character thus comprises his or her dispositions and, in particular, the cultivated dispositions toward some set of values or ends.<sup>179</sup> Thus, “formation” of lawyers would involve cultivation of particular dispositions that become part of the character of the person so formed, dispositions determined or at least guided by “values” of competence and professional legitimacy.

The authors of the Carnegie Report elsewhere remark that “all forms of education exert socializing pressures on the students—and faculty—who take part in them. This is the formative dimension of professional education.”<sup>180</sup> In this context, the authors appear to use the term “socialize” to mean “fit or train for a social environment.”<sup>181</sup> Thus, legal education fits or trains the character of the law student, or should fit or train the character, for a social environment.<sup>182</sup> What social environment? The authors do not

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175. CARNEGIE REPORT, *supra* note 1, at 84. The use of the phrase “professional legitimacy” here is not only cryptic but also somewhat ironic because the authors repeatedly suggest that professions in general and the legal profession in particular have been losing “legitimacy” in the eyes of the public. *See, e.g., id.* at 14, 29, 59, 128. Thus, “formation” appears to involve, among other things, bringing the character of the law student into some sort of proper relationship with a rapidly waning professional legitimacy.

176. According to the Carnegie Report, *Work and Integrity* is “an essay on the nature and value of the professions in American life,” and it emerged from the Carnegie Foundation’s Preparation for the Professions Program (PPP), of which the Report is a later product. CARNEGIE REPORT, *supra* note 1, at 15. Describing the significance of *Work and Integrity* for the PPP, Carnegie Foundation President Lee Shulman wrote: “[a]s we envisioned the series of books that will report what we have learned in our ongoing studies of preparation for the professions, we recognized the need for an opening volume, for a book that would set the stage for the set of investigations that would follow.” Lee S. Shulman, *Forward to WILLIAM SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* ix, xii (2d ed. 2005).

177. WILLIAM SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 265 (2d ed. 2005) [hereinafter SULLIVAN, *WORK AND INTEGRITY*].

178. *See id.*

179. *See Character*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 130 (Robert Audi ed., 2d ed. 1999) (character is “the comprehensive set of ethical and intellectual dispositions of a person.”).

180. CARNEGIE REPORT, *supra* note 1, at 85.

181. *Socialize*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/socialize> (last visited Sept. 23, 2012).

182. The reader will notice that I frequently use a formula in this Article such as “according to the Carnegie Report, law professors do or should do X.” This formula is a fair reflection of the approach found in the Report, which is at once descriptive and prescriptive. As the authors state, their work is “an

say, but one presumes the answer would be that of the legal profession and the institutional system within which the profession operates. The authors comment that formation in their sense of the term has received relatively little attention from those who write about professional education.<sup>183</sup> Clearly, however, the authors intend to change that.<sup>184</sup> “We believe if legal education had as its focus forming legal professionals who are both competent and responsible to clients and the public, learning legal analysis

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attempt to interpret what law schools do and do not do, with a sketch of some of the consequences for the legal profession, for higher education, and for American society.” CARNEGIE REPORT, *supra* note 1, at 17. As will become clear, the authors seldom discuss the supposed “consequences” of “what law schools do and do not do” in neutral terms. Thus, by “describing” the negative or positive consequences of a particular educational practice the authors at the same time evaluate the practice. According to the authors, the Carnegie Report “is intended primarily to foster appreciation for what legal education does at its best.” *Id.* at 19. Encouraging “appreciation” of what legal education does “at its best” is at once a descriptive and an evaluative endeavor. In general, efforts to develop lists of “best practices” in legal education combine descriptive and evaluative elements. Somewhat surprisingly, the Stuckey compendium of “best practices,” *see* STUCKEY, *supra* note 22, at 39-283, does not contain a separate discussion of what makes a practice “best” or “better” than an alternative practice. Instead, Professor Stuckey and his co-authors say only that “[t]he principles of best practices described in this document are based on long-recognized principles of sound educational practices as well as recent research and scholarship about teaching and learning. Our conclusions are based on the most up-to-date information available.” *See id.* at 1. One such source of up-to-date information was the Carnegie Report. *See id.* It would have been helpful if the authors of the Carnegie Report or Professor Stuckey and his co-authors had provided a brief theoretical sketch of the kinds of information, research, and scholarship one should examine when determining not only what legal educators actually do but why certain legal educational practices are better or best. Professor Stuckey recently has offered some further thoughts about this issue, asserting that “[t]he superiority of the principles described in *Best Practices for Legal Education* can be demonstrated ‘according to some standard’ and could be objectively verified with different and better metrics.” Roy Stuckey, “*Best Practices*” Or Not, *It Is Time To Re-think Legal Education*, 16 CLINICAL L. REV. 307, 317 (2009). The attempt to combine description and evaluation may seem to violate what many would consider to be a fundamental distinction between descriptive and normative statements, between the “is” and the “ought.” MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 56-57. As Dean Cramton observed, law professors believe that “[c]are should be taken to insure that affirmations of value (our desires concerning what *ought* to be) do not intrude upon thought and knowledge and fact concerning what *is*.” Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 249 (1978). In fact, the Carnegie Report’s tendency to blur or elide the distinction between description and evaluation is itself further evidence that the Report relies heavily on a teleological ethical framework. As MacIntyre has argued, a teleological ethical theory or framework typically will reject any simple distinction between description and prescription or “is” and “ought.” MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 59, 84; *see also* Kightlinger, *The Gathering Twilight?*, *supra* note 145, at 359-60. According to a teleological ethical theory, a claim about the human *telos* or *teloi* is, in principle, a claim about human nature and our essential purpose(s) as human beings. Thus, that claim might be true or false, as might a claim about the actions a person can and should take in particular circumstances to achieve or realize the human *telos* or *teloi*. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 59. *See also* ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY* 134 (1990) [hereinafter MACINTYRE, *THREE RIVAL VERSIONS*] (“Evaluative judgments are a species of factual judgment concerning the final and formal causes of activity of members of a particular species.”). Similarly, a claim about the *telos* or *teloi* of legal education might be true or false just as might be a claim about what legal education does “at its best,” i.e., as it comes closer or closest to its *telos*.

183. *See* CARNEGIE REPORT, *supra* note 1, at 85.

184. *See id.* at 14.

and practical skills would be more fully significant to both the students and faculty.”<sup>185</sup>

When the authors attempt to explain “formative education” with greater clarity, they implicitly build their account around a three-part teleological framework.<sup>186</sup> “[T]he goal of formative education must be more than socialization seen as molding human clay from without. Rather, formative education must enable students to become self-reflective about and self-directing in their own development.”<sup>187</sup> The metaphor that the authors choose here—molding human clay—contains four elements: human clay in an unmolded or raw state, a *telos* or goal toward which human clay is molded, a mold or form, and an intervening process of molding by someone who forms the raw material into the final product.<sup>188</sup> This metaphor plainly invokes Aristotle’s Four Causes.<sup>189</sup> Using Aristotle’s terminology, we can say that the human clay of the raw, untutored novice is the matter that receives and realizes or embodies the form of a legal professional. The formative educational process actualizes the raw novice’s latent potential to embody the form of a legal professional.<sup>190</sup> Moreover, formation is directed toward a *telos*: “to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals.”<sup>191</sup> The *telos*, in other words, is not simply to be a professional but to do what professionals do as professionals.<sup>192</sup> Of course, even a law school graduate is still a beginner in the professional ranks. Thus, it is probably more accurate to say that a formative legal education forms or transforms<sup>193</sup> a novice into a journeyman legal professional who is qualified to act under experienced supervision.<sup>194</sup>

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185. *Id.* For a detailed discussion of this passage, see *infra* notes 365-75 and accompanying text.

186. See *supra* note 172 and accompanying text.

187. CARNEGIE REPORT, *supra* note 1, at 85.

188. See *id.*

189. See *supra* notes 112-115 and accompanying text.

190. See CARNEGIE REPORT, *supra* note 1, at 22.

191. See *id.* Accord STUCKEY ET AL., *supra* note 22, at 19.

192. See CARNEGIE REPORT, *supra* note 1, at 22.

193. The term “transform” is probably more accurate because the novice is not formless human clay prior to receiving the form of the journeyman legal professional. Rather, the novice is human clay in the quite specific form of a student who has matriculated to law school after, among other things, appropriate undergraduate education. See AM. B. ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 502(a) (2011-2012) [hereinafter ABA STANDARDS], available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/chapter\\_5\\_2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_5_2012_2013_aba_standards_and_rules.authcheckdam.pdf). For further discussion of the raw material of the formative educational process, see *infra* Part V.C.4.

194. I have found only one instance of the word “journeyman” in the Carnegie Report. CARNEGIE REPORT, *supra* note 1, at 60. A standard dictionary defines “journeyman” as “a person who has served an apprenticeship at a trade or handicraft and is certified to work at it assisting or under another person.” *Journeyman*, in RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1034-35 (2d ed. 2001). Thus,

At least initially, the efficient or moving cause of a formative legal education is the law professor who (trans)forms the raw human clay into a journeyman.<sup>195</sup> The identity of the efficient cause requires qualification (with the phrase “at least initially”) because the authors of the Carnegie Report contend that a key goal of formative education is to “enable students to become self-reflective about and self-directing in their own development.”<sup>196</sup> Thus, if the early phases of formative education succeed, at some point the student/journeyman will be prepared to take over the formation process and continue to form herself, i.e., to improve and augment the degree to which she realizes or embodies the form of the legal professional and thus the degree to which the form of the legal professional informs her activity.<sup>197</sup> She will take responsibility, in other words, for continuing to achieve the *telos* of the formative process. Molding a novice into a journeyman lawyer is more than and different from molding clay into a pot because the pot cannot and is not expected to continue to mold itself into a better pot after the potter stops molding it. The law student, by contrast, is expected to make further progress toward the *telos* of legal professional and to be able to make such progress at least to some extent on her own.<sup>198</sup> The *telos* is not something external to the journeyman as the form of a pot is external to and imposed on raw clay; rather, the *telos* actualizes a potential of the journeyman and becomes, or should become, internal to her as both her unconscious goal and her intention or plan for herself. Formation realizes the *telos* in her and she realizes it—makes it

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it seems appropriate to designate as a “journeyman” someone who has finished law school and, perhaps, passed a bar examination, thereby obtaining certification to practice law, but is not really ready to practice without the supervision of an experienced attorney. The authors of the Carnegie Report do not explain why they eschewed the term. Perhaps they wished to avoid being forced to replace the apparently masculine “journeyman” with the neuter neologism “journeyperson.” One obvious objection to my use of the term “journeyman” is that technically a law-school graduate who has passed a bar examination may “hang out a shingle” and practice on her own without the supervision of a more experienced attorney. It is difficult to believe, however, that anyone would consider such a newly minted solo practitioner to be a “master” of the craft. As Professor Stolz has observed, “the bar examination no longer even purports to have any value as a device for assuring the competence of fresh graduates to handle real clients.” Preble Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?*, in *CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE* 54, 61 (Edmund W. Kitch ed., 1970). Indeed, according to one recent report, real clients have begun refusing to pay large law firms for supervised work performed by first- and second-year associates because clients do not wish to cover the cost of training a junior associate to practice law. See generally Ashby Jones & Joseph Palazzolo, *What’s A First-Year Lawyer Worth?*, WALL ST. J., Oct. 17, 2011, <http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html>. This suggests that even supervised work by junior lawyers is not worth much to paying clients, raising the question whether calling such junior lawyers journeymen may heap more praise on them than they deserve. *Id.*

195. See *supra* notes 112-115 and accompanying text.

196. See *supra* note 187 and accompanying text.

197. See *supra* note 187 and accompanying text.

198. See CARNEGIE REPORT, *supra* note 1, at 95.



real—in herself as a potential that she always had and now will actualize.<sup>199</sup> Formation thus transforms and reforms the student, making her a new person with new goals or ends as part of a new (for her) community of people, i.e., lawyers who seek to realize those same goals or ends.<sup>200</sup>

## 2. *The Three Apprenticeships*

According to the Carnegie Report, the process through which legal education forms and transforms novices into journeyman legal professionals is “apprenticeship.”<sup>201</sup>

Research suggests that learning happens best when an expert is able to model performance in such a way that the learner can imitate the performance while the expert provides feedback to guide the learner in making the activity his or her own. This describes an expert-apprentice relationship in its simplest form. Expertise, however, is always shared among members of a community who have mastered certain practices. When such communities organize ways of transmitting this expertise to new members, they create apprenticeships.<sup>202</sup>

In this description of apprenticeship, the authors substitute the language of modeling for the language of forming and formation.<sup>203</sup> The expert or

199. *See id.*

200. As sociologist Robert Bellah has observed, traditional views of education relied on this notion of formation as transformation:

[t]raditionally, education was involved in the formation of a new person ideally more perceptive than when he began, one more aware of the whole of existence, including its tragic dimension, and more responsive as a human being. Such education involved not only cognitive skills but a discipline of body, of feeling, of imagination, as well as of mind. Its aim was to eventuate in a morally and religiously transformed person.

Robert N. Bellah, *The New Religious Consciousness and the Secular University*, in DAEDALUS, 1 AMERICAN HIGHER EDUCATION: TOWARD AN UNCERTAIN FUTURE 110, 111 (1974). Needless to say, although the authors do draw an analogy between legal education and “preparation of the clergy,” CARNEGIE REPORT, *supra* note 1, at 84, the Carnegie Report does not claim that legal education will work a religious transformation on law students, *id.* But the analogy to religious transformation does convey something of the potential scope and depth of the formative process in legal education. In addition, Bellah’s remark about religious transformation helps us to see the continuity between the Carnegie Report’s account of modern legal education and descriptions of legal education in the Inns of Court in England during the early period of the common law. *See* Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 706 (1968) (“law was like the priesthood – a way of life as well as a vocation.”).

201. CARNEGIE REPORT, *supra* note 1, at 25.

202. *Id.* at 26.

203. Elsewhere, the authors observe that apprenticeship involves “modeling, habituation, experiment, and reflection.” *Id.* at 14.

“master”—another term that the Carnegie Report tends to avoid<sup>204</sup>—provides a model for the apprentice, a model that the apprentice imitates and after whom she forms herself. Through apprenticeship, in other words, she begins to become and form herself into that which the master models. Thus, one could say that the apprenticeship process is formative insofar as it molds or forms the apprentice into, and according to the model provided by, the master. The master in this account already embodies, or should embody, the relevant form, perhaps not perfectly, but to a far greater extent than the apprentice. The master models the form for and impresses it upon (informs) the apprentice. Prior to her apprenticeship, of course, the novice learner could not have performed the characteristic activities of the master, and could not have demonstrated even the rudimentary attributes of mastery.<sup>205</sup> Viewed from the standpoint of a three-part teleological framework, the novice learner is raw or unformed, an “untutored” person as she “happens-to-be,” in MacIntyre’s language.<sup>206</sup> Through the apprenticeship process, the apprentice “mak[es] the activity [of the master] his or her own.”<sup>207</sup> By appropriating the master’s activity, she achieves or begins to achieve the *telos* and becomes, if not a master, a journeyman on the long path to mastery.

Apprenticeship has a long history as a mode of legal education in the United States.<sup>208</sup> During the colonial era,

[t]he road to the bar, for all lawyers, was through some form of clerkship or apprenticeship. The aspiring lawyer usually entered

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204. According to one dictionary, “master” is defined as, among other things, “a worker qualified to teach apprentices and to carry on a trade independently.” *Master*, in RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1183 (2d ed. 2001). An “apprentice” is “one who works for another in order to learn a trade . . .” *Apprentice*, in RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY, *supra*, at 103. In light of these definitions, it would seem appropriate to refer to the teacher of apprentice lawyers as a “master.” The master also may be an expert, of course, but the term “expert” does not automatically seem to entail a role in or connection to the education of apprentices. The authors acknowledge that to have achieved “expertise” is to “have mastered certain practices,” so they apparently accept that an “expert” in their sense would be deemed a “master” in the traditional language of apprenticeship. CARNegie REPORT, *supra* note 1, at 26.

205. *See id.* at 116-17.

206. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 52, 53.

207. *See* CARNegie REPORT, *supra* note 1, at 26 (alterations added).

208. *See, e.g.*, Gerard W. Gawalt, *Massachusetts Legal Education in Transition, 1766-1840*, 17 AM. J. LEGAL HIST. 27, 29-36 (1973) (arguing that practitioners in colonial Massachusetts insisted on apprenticeship as a method of education in order to restrict growth in the number of lawyers). *See generally* Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124 (1976-77); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L. Q. 597, 603-06 (1982); STEVENS, *supra* note 32, at 3-7; Russell L. Weaver, *Landgell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 522 n.14 (1991).

into a contract with an established lawyer. The student paid a fee; in exchange, the lawyer promised to train him in the law; sometimes, too, the lawyer would provide food and lodging. . . . How much the apprentice learned depended greatly on his master.<sup>209</sup>

Indeed, beginning in the colonial era, some jurisdictions required aspiring lawyers to serve apprenticeships before they could be admitted to the bar.<sup>210</sup> In theory, apprenticeship in a law office might provide a well-rounded legal education,<sup>211</sup> but in practice apprenticeship received as many brickbats as bouquets.<sup>212</sup> Justice Joseph Story, for example, referred with obvious frustration to the “common delusion, that the law may be thoroughly acquired in the immethodical, interrupted and desultory studies of the office of a practicing counse[.]lor.”<sup>213</sup>

Traditionally, scholars have argued that academic legal education more or less replaced law-office apprenticeship during the nineteenth century.<sup>214</sup>

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209. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 97-98 (2d ed., 1985).

210. See McKirdy, *supra* note 208, at 125.

211. See *id.* at 127 (“Ideally, the legal clerkship system placed the student in an environment of law where education was a total and many faceted experience.”). Professor Woodard reminds us that the apprenticeship system “produced some of the most civilized and learned lawyers ever to grace the Bar in both England and this country.” Woodard, *supra* note 200, at 707. The list would include “almost all of the so-called ‘Founding Fathers,’ men who were philosophers of law first and lawyers only second.” *Id.* at 708.

212. See, e.g., Gawalt, *supra* note 208, at 31-33; McKirdy, *supra* note 208, at 128.

213. Gawalt, *supra* note 208, at 42-43 nn. 34-35 and accompanying text (discussing Joseph Story’s review of David Hoffman’s *A Course of Legal Study Respectfully Addressed to the Students of Law in the United States*, 6 NORTH AM. REV. 45, 77 (1818)). But cf. Gawalt, *supra* note 208, at 47-48 (explaining why some students preferred apprenticeship to study in law schools founded in Massachusetts during the early nineteenth century).

214. See, e.g., STEVENS, *supra* note 32, at 7-8 (describing the abolition by states of apprenticeship requirements during the first half of the nineteenth century), 21-28 (describing the growth of law schools in the latter half of the nineteenth century); Stolz, *Clinical Experience*, *supra* note 194, at 56-57 (arguing that Theodore W. Dwight, professor then Dean at Columbia Law School from 1858 to 1891, viewed education in a law school as a replacement for apprenticeship); Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 NOVA L.J. 323, 330 (1980-1981) (arguing Charles W. Eliot, long-time President of Harvard University, consciously set out to replace the traditional apprenticeship system with a newer model of clinical legal education); Gawalt, *supra* note 208, at 42-50 (describing the rise of Harvard Law School and the decline of apprenticeship in Massachusetts). For a general account of the development of professorships of law and of early law schools in the late eighteenth and early nineteenth centuries, see HARNO, *supra* note 29, at 21-53. For a discussion of the role of law schools in legal education during the middle part of the nineteenth century, see WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 42-57 (1978). But cf. George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 163 n.1 (1974) (in the early 1970s “[v]estiges of apprenticeship remain in New Jersey, where a law office clerkship following law school graduation is required; in Pennsylvania, where a preceptor system remains in effect; and in ten other states, where it remains possible to qualify for the Bar through law office training.”). Indeed, seven states still permit a person without a J.D. to take the bar examination after studying law in a law office. See NAT’L CONFERENCE

In 1887, Dean Langdell affirmed that, in reforming the educational program at Harvard Law School, he had sought to replace apprenticeship in a law office with university-based legal education.<sup>215</sup> Challenging this view of the history of legal education, the authors of the Carnegie Report contend that apprenticeship never really died, and that modern academic legal education still consists of three apprenticeships: the cognitive, the practical, and that of identity and purpose.<sup>216</sup> In fact, as the following discussion will suggest, one of the implicit goals of the Carnegie Report is to make legal educators reflect on these modern forms of apprenticeship and their demands.<sup>217</sup> Each of the three apprenticeships, as described by the authors, reflects a three-part teleological framework and the relationship among the three apprenticeships also is in certain respects teleological. Unfortunately, the authors fail to come to grips with the intellectual demands and the implications of their teleological approach.

#### a. The Cognitive Apprenticeship

The authors of the Carnegie Report write that

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OF BAR EXAMINERS AND AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS 2011, at 8-9 (Erica Moeser & Claire Huisman eds., 2011), available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/20110201\\_Comp\\_Guide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/20110201_Comp_Guide.authcheckdam.pdf).

215. See Christopher C. Langdell, Speech to the Harvard Law School Association at the Quarter-Millennial Celebration of Harvard University (Nov. 5, 1887), reprinted in 3 L. Q. REV. 118, 123-24 (1887) ("I have tried to do my part towards making the teaching and the study of law in [Harvard Law School] worthy of a university."). But cf. Rolf Torstendahl, *The Transformation of Professional Education in the Nineteenth Century*, in THE EUROPEAN AND AMERICAN UNIVERSITY SINCE 1800, 109, 138 (Sheldon Rothblatt & Björn Wittrock eds., 1993) ("since the middle ages universities had provided society with . . . lawyers").

216. CARNEGIE REPORT, *supra* note 1, at 28. In a somewhat surprising tribute to the old apprenticeship system, the authors observe that:

In centuries past, learning as an apprentice typically meant exposure to the full dimensions of professional life, not only the intricacies of esoteric knowledge and peculiar skills but also the values and outlook shared by physicians, lawyers, or ministers. By contrast, today's law students encounter this once-unifying experience as three differentiated, largely separate experiences. Students encounter a cognitive or intellectual apprenticeship, a practical apprenticeship of skill, and the apprenticeship of professional identity and purpose, often through different faculty with different relationships to the institution. For many students, neither practical skills nor reflection on professional responsibility figure significantly in their legal education.

*Id.* at 79. As discussed in Part III.B.2(d), the authors argue that the third apprenticeship can and should fuse the other two apprenticeships into a coherent experience, thus perhaps approximating the older unifying apprenticeship.

217. For an earlier call to return to a form of law-school-based apprenticeship, see Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 913 (1933).

[t]he first apprenticeship, which we call intellectual or cognitive, focuses the student on the knowledge and way of thinking of the profession. Of the three, it is the most at home in the university context because it embodies that institution's great investment in quality of analytical reasoning, argument, and research.<sup>218</sup>

During the cognitive apprenticeship, the apprentice learns, or should learn, how to “think like a lawyer.”<sup>219</sup> If thinking like a lawyer is the *telos* of the cognitive apprenticeship, what does it mean to think like a lawyer? According to the authors, “[t]he ability to think like a lawyer emerges as the ability to translate messy situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client's cause before a court or in negotiation.”<sup>220</sup>

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218. CARNEGIE REPORT, *supra* note 1, at 28. The authors say very little about the substantive legal knowledge that an apprentice acquires or should acquire in law school. *Id.* According to Robert Stevens, “[a]s the case method has been appreciated more for its ability to teach method than substance, there is little evidence that law teachers have shown any enthusiasm for new breakthroughs in educational technology . . . which might at least teach the students the elements of substantive law as painlessly and efficiently as possible. Some take the strange view that because there is now so much substantive law, the law schools should seek to teach none at all.” Stevens, *supra* note 5, at 37.

219. See CARNEGIE REPORT, *supra* note 1, at 54. Robert Stevens has shown that this justification for the cognitive apprenticeship—i.e., that it teaches the student to think like a lawyer—emerged at the end of the nineteenth century. STEVENS, *supra* note 32, at 55-56. In a 1906 tribute to Harvard's Dean Langdell and his pedagogical approach, one author said: “The lecturer [i.e., Langdell] was working it out for himself with them [i.e., the students]. Every step of the reasoning was scrutinized and tested and re-examined till proved right or wrong.” Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 441 (1906). By 1907, Harvard's Dean Ames would state:

The object arrived at by us at Cambridge is the power of legal reasoning, and we think we can best get that by putting before students the best models to be found in the history of English and American law, because we believe that men who are trained, by examining the opinions of the greatest judges that the English Common Law System has produced, are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems than they would be by taking up the study of the law of any particular state.

*Discussion of Kale's Paper*, in REPORT OF THE THIRTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 1025 (1907) (comments of James Barr Ames). By contrast, Dean Rubin refers to the claim that students are taught to think like lawyers as a “threadbare rationalization . . . [for] the common law curriculum.” Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 622 (2007). Rubin adds: “[p]erhaps it [the curriculum] does teach students to think like nineteenth century common law lawyers but it does not teach them how to think like lawyers in the contemporary administrative state.” *Id.* Professor Woodard rejects the very notion that there is a type of thinking that is specific to lawyers as the “cult of the ‘legal mind.’” See Woodard, *supra* note 200, at 719.

220. CARNEGIE REPORT, *supra* note 1, at 54.

Particularly in the first year of law school, but also in years two and three, law teachers instruct students to think like lawyers primarily through the “case-dialogue method,”<sup>221</sup> which “constitutes the legal academy’s standardized form of the cognitive apprenticeship.”<sup>222</sup> Perhaps because they view the case dialogue as legal education’s “signature pedagogy,”<sup>223</sup> the authors have little to say about the long tradition within the legal academy

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221. *Id.* at 3. For survey evidence supporting the claim that law professors continue to rely heavily on the case-dialogue or “Socratic” method as a teaching tool, see Dolin, *supra* note 97, at 222 n.7 (2007) (summarizing the results presented in Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 27-31 (1996)). In a 1999 review of contemporary teaching methods at Harvard Law School, Orin Kerr concluded that “the Socratic method is simply one teaching technique among many, and that it has both positive and negative aspects depending on the skill, personality, and purposes of the professor who chooses to use it.” Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 134 (1999). Elizabeth Mertz has remarked that how and to what extent law professors actually use the Socratic, case-dialogue method “is to date largely unstudied.” ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 50 (2007). In this connection, it also is worth recalling Professor Areeda’s reminder that the Socratic method and the case method are not the same thing, although they “are well suited to each other.” Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, Outline of a Lecture given at Puget Sound, in 109 HARV. L. REV. 911, 911 (1996).

222. CARNEGIE REPORT, *supra* note 1, at 50. For discussions of the early history of the case-dialogue method, see STEVENS, *supra* note 32, at 52-57; Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. L. HIST. 329, 342-43 (1979) (arguing that the case-dialogue method owes its origins to Harvard Law School Dean Langdell and to Harvard University President Charles W. Eliot). Chase suggests that “the notion that teaching a student to think like a lawyer should play a central role in legal education had a significant, even if elliptical, connection to Continental pedagogy,” and in particular to the educational theories of Johann Heinrich Pestalozzi. *Id.* at 343. Josef Redlich, by contrast, declared that the case method

is an entirely original creation of the American mind in the realm of law, and must be comprehended and appraised as such. It is indeed particularly noteworthy that this new creation of instruction in the common law sprang from the thought and individual characteristics of a single man, Christopher C. Langdell . . . .

REDLICH, *supra* note 26, at 9. For a discussion of Langdell’s role in making the study of law more “scientific,” see Woodard, *supra* note 200, at 699-703. Langdell himself suggested that his purpose in creating the case-dialogue method was to establish the study of law as a science that would deserve a place in the university. See Langdell, *supra* note 215, at 123-24. For a fascinating attempt to reconstruct actual case dialogues that occurred in Langdell’s classroom at Harvard, see Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They are Not to Take as Law”: *The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57, 96-98, 102-08, 112-23 (1999). Weaver has shown that learning to “think like a lawyer” is one of several justifications that have been offered for using the case-dialogue method to teach lawyers. See Weaver, *supra* note 208, at 545-61. Robert Stevens has argued that Dean Ames at Harvard Law School originated the idea that the case-dialogue method teaches students how to think in a certain way. See Robert Stevens, *Legal Education: The Challenge of the Past*, 30 N.Y.L. SCH. L. REV. 475, 479 (1985) [hereinafter Stevens, *Challenge*]. For a comment by Ames himself on the case-dialogue method, see *Discussion of Kale’s Paper*, *supra* note 219, at 1025.

223. CARNEGIE REPORT, *supra* note 1, at 54. A signature pedagogy “serve[s] as primary means of instruction and socialization for neophytes in a field . . . .” *Id.* at 23.

of criticizing the case-dialogue method.<sup>224</sup> As they point out, in a case-dialogue class,

[f]or most of the hour, the professor of law is facing the students, interacting with them one by one through exchange of question and answer, using the board or other visual displays to support the verbal exchanges. . . . Again and again in our observations, at the end of the hour we would be struck by the single-minded focus on the close reading of texts, analytical reasoning, and a discourse of rapid exchanges and responses . . . .<sup>225</sup>

In the case dialogue,

the relentless stress is on learning the boundaries that keep extraneous detail out of the legal landscape. This enables students to practice a disposition to think in a specific way, to value and aim at both precision and generality in the application of categories to persons and situations. This is an important distinguishing feature of legal thought and of the guild of legal professionals.<sup>226</sup>

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224. For a summary of the critical literature on the Carnegie Report's handling of the case-dialogue method, see *supra* notes 77-82 and accompanying text. As early as 1892, Professor Tiedeman raised objections to over-reliance on cases as a teaching tool. See Edward J. Phelps, William A. Keener, Christopher G. Tiedeman & J. C. Gray, *Methods of Legal Education*, 1 YALE L. J. 150, 152-57 (1892). In 1914, the Redlich Report discussed concerns about the case-dialogue's failure to give students a more systematic and general understanding of law. REDLICH, *supra* note 26, at 41-47. In 1916, John Wigmore offered incisive comments about the strengths and weaknesses of the case-dialogue method for teaching the various mental processes that law students must master. See generally John H. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812 (1917). In 1933, Jerome Frank attacked law schools for relying so heavily on the case method, arguing that the method reflects Langdell's own limited, library-focused experience as a practitioner. See Frank, *Why Not a Clinical Lawyer-School?*, *supra* note 217, at 908. Frank later observed that the case-dialogue method is a relatively effective way to train lawyers for appellate-court practice but not well-suited to training for trial-court practice. See Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 22 (1951) [hereinafter Frank, *Both Ends Against the Middle*]. Professor Woodard has argued that "new theories or schools of thought: 'legal pragmatism,' 'sociological jurisprudence,' 'legal realism,' or 'functionalism' . . . were begun by legal scholars, not practitioners, in protest against a form of legal education [i.e., the case method] that had lost touch with reality." Woodard, *supra* note 200, at 717. For more recent highly critical discussions of the case dialogue as a pedagogical method, see Rubin, *supra* note 219, at 612 (describing the case-dialogue method as "a pedagogic fossil, marvelously preserved from a vanished era by the adamant rock of a licensed monopoly."); Weaver, *supra* note 208, at 561-80. For a summary of the arguments for and against the case dialogue as a teaching method, see MERTZ, *supra* note 221, at 26-28.

225. CARNEGIE REPORT, *supra* note 1, at 50.

226. *Id.* at 54-55. Dean Ames provided a surprisingly similar account of case-dialogue pedagogy in a 1901 address at the University of Pennsylvania:

If it be the professor's object that his students shall be able to discriminate between the relevant and the irrelevant facts of a case, to draw just distinctions between things apparently

By learning through the case dialogue to see and think about messy real-life situations in precise, general legal categories, the law student develops a disposition to detach or distance herself from innumerable details that are “extraneous” to lawyers, if not to the people caught up in those messy real-life situations.<sup>227</sup> This disposition of detachment becomes, or should become, part of the student’s lawyerly character.<sup>228</sup> A bakery owner, for example, might see his business collapsing, his livelihood failing, his family threatened, and his long-time employees applying for unemployment insurance or welfare because a welshing supplier on whom the baker had relied for years refused to deliver any more flour to the bakery unless the baker would pay thirty-five percent more than originally agreed. The flour supplier might respond that the baker’s sob story reflects a misunderstanding of the deal and that he (the supplier) will be forced out of the flour market completely—ruining his business and the bakery owner’s—if he cannot raise his prices to reflect market conditions. The apprentice lawyer is taught that she can and must fit this messy, real-world situation into categories from the field of contract law such as offer and acceptance, consideration, performance or breach, mitigation, and damages.<sup>229</sup> Facts that do not assist her in applying these categories are not relevant to her as a lawyer.<sup>230</sup> They are extraneous.

As Professor Areeda observed, a key goal of the case dialogue is to teach novices to “appreciat[e] which of the many facts stated by the court

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similar, and to discover true analogies between things apparently dissimilar, in a word, that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases.

JAMES BARR AMES, *The Vocation of the Law Professor*, in LECTURES ON LEGAL HISTORY 354, 364 (1913).

227. Several scholars who have commented on the Carnegie Report have criticized the case-dialogue method for teaching students to treat clients as abstractions with no extra-legal needs. See, e.g., Maria O’Brien Hylton, *Creeping Impoverization: Material Conditions, Income Inequality, and ERISA Pedagogy Early in the 21st Century*, 34 FORDHAM URB. L.J. 1355, 1361 (2007); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 264 (2010); Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding “Thinking Like a Lawyer” into “Thinking Like a Leader,”* 40 U. TOL. L. REV. 411, 411-12 (2009).

228. For a discussion of the concept of “character” as used here, see *supra* notes 177-79 and accompanying text.

229. See MERTZ, *supra* note 221, at 56.

230. Based on classroom observations, Mertz has provided a description of the way that a law professor encourages or, perhaps, forces students to see a case that appears to be about a botched nose job as a case that is really about the grounds for appellate review of lower court decisions. See MERTZ, *supra* note 221, at 53-54. As Mertz summarizes her results, “stories of human conflict, complete with their social contexts and moral overtones, are inexorably supplanted by new readings focused on layers of textual and legal authority.” *Id.* at 56.



are most relevant to the legal dispute and which arguments were most critical to the result.<sup>231</sup> The Carnegie Report's authors worry, however, that the result may be a "temporary moral lobotomy" because the apprentice learns to concentrate on abstract legal analysis to the exclusion of other concerns.<sup>232</sup> According to the authors, "[t]his focus is justified on pedagogical grounds, with an implied assumption that law school can flip off the switch of ethical and human concern, teach legal analysis, and later, when students have mastered the central intellectual skill of thinking like a lawyer, flip the switch back on."<sup>233</sup> By teaching all novice lawyers to think in essentially the same amoral and abstract way, "the case-dialogue classes work to enforce homogeneity of viewpoint and reasoning, molding diverse beginners into a corps of legal apprentices . . . ."<sup>234</sup> Through the case dialogue, "students are . . . taught not only how to think but also, from a legal point of view, what is worth thinking about."<sup>235</sup> Their thinking, one might say, is formed and directed toward certain ends or purposes that define legal professionals and give them a shared standpoint.

Although the authors do not appear to recognize that they rely heavily on a three-part teleological framework, they clearly construct the Carnegie Report's account of the cognitive apprenticeship around such a framework. The authors say very little about the untutored novice, the person as she happens-to-be before entering law school, but they apparently believe that she thinks in a certain unlawyerly, but all-too-human way.<sup>236</sup> She attends to "extraneous detail."<sup>237</sup> Her thinking lacks "precision,"<sup>238</sup> meaning apparently that her ideas about situations are inexact and ill-defined. Because she gets bogged down in extraneous human details, she does not and cannot automatically or routinely generalize or abstract from a specific, messy, complex situation to a set of legal categories encompassing that and

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231. Areeda, *supra* note 221, at 915.

232. CARNEGIE REPORT, *supra* note 1, at 78.

233. *Id.* at 141.

234. *Id.* at 40. Grant Gilmore made a similar point in a much less laudatory way: "[a]t least in Langdell's version, [case-method teaching] had nothing whatever to do with getting students to think for themselves; it was, on the contrary, a method of indoctrination through brainwashing." GRANT GILMORE, *THE DEATH OF CONTRACT* 13 (1974).

235. CARNEGIE REPORT, *supra* note 1, at 53.

236. The authors' failure to discuss the novice as-she-happens-to-be is an important gap in the Carnegie Report's argument. One presumes that an adequate teleological account of legal education would provide a well-founded account of the novice as-she-happens-to-be in order to explain why a particular type of educational process will serve to move her towards the *telos*. Lurking just below the surface is a hornet's nest of related issues concerning the criteria by which law schools select (or should select) novices with some raw characteristics rather than others in light of the educational process and the *telos* or *teloi* to be achieved. I return to these issues in Part V.C.4.

237. See *supra* note 226 and accompanying text.

238. See *supra* note 226 and accompanying text.

analogous situations.<sup>239</sup> Indeed, the novice apparently does not even value generalization and precise thinking with well-defined categories, or at least not in the way that a lawyer values these activities.<sup>240</sup> The authors do not explain what the untutored novice values or why, but, based on their comments, we might surmise that she values and enjoys perceiving and experiencing real-world situations in all of their rich detail and complexity.<sup>241</sup> Moreover, she may be moved by legally extraneous but very human concerns for the people involved in the complex, messy situations she perceives. Clearly, however, she lacks the ability and disposition to think like a lawyer.<sup>242</sup>

Through the educational process of the case dialogue, the law professor seeks to form the novice's untutored mind by modeling for her a lawyerly way of thinking.<sup>243</sup> The case dialogue thus functions as the all-important middle part or element of the three-part teleological framework.

In a sense, the dialogue of the case-dialogue method is an offshoot of the apprentice system, with a master artisan guiding a roomful of novices through the early stages of learning a craft. As in a craftsman's studio, the apprentices watch the master artisan's actions and attempt to emulate them. But in this cognitive apprenticeship, the fundamental skills are related to memory, knowledge, comprehension, and interpretation and are impossible to observe. Only through question and answer can instructors make their thought processes explicit, observable, and available for imitation by [the student].<sup>244</sup>

Thus, through case-dialogue Q&A about the legally salient aspects of disputes between litigants such as Messrs. Hawkins and McGee, as well as innumerable others, the apprentice realizes how to think with and for the master and in the process begins to embrace and value a new (for her) and distinctively legal and lawyerly way of thinking.<sup>245</sup> She develops the

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239. See CARNEGIE REPORT, *supra* note 1, at 54-55.

240. See *id.*

241. See *id.* at 54.

242. She apparently has the disposition to learn to think like a lawyer or she would not have decided to attend or remain in law school. See *id.*

243. See *id.* at 60-61.

244. CARNEGIE REPORT, *supra* note 1, at 62-63.

245. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929). *Hawkins* is the subject of the famous case-dialogue exchange between James Hart and Professor Kingsfield at the fictional Harvard Law School in the opening scenes of *The Paper Chase*. *THE PAPER CHASE* (Twentieth Century Fox Film Corporation 1973). *Hawkins* appears in many Contract Law casebooks and thus remains part of the common experience of many apprentice lawyers. See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 63-66 (4th ed. 2008); JOHN P. DAWSON, WILLIAM BURNET HARVEY, STANLEY D. HENDERSON &

disposition to think like a lawyer as the legal way of thinking becomes her way of thinking, her way of analyzing disputes and, eventually, her way of arguing for or against particular outcomes in the world.<sup>246</sup> As Professor Areeda observed,

[t]he student sees that [s]he *could* have asked [her]self those questions before class; that the kinds of questions the instructor asked can be self-posed after class. The internalization of that questioning process is not an illusion. It is the essence of legal reasoning and the prize of the [Socratic Method].<sup>247</sup>

Moreover, the apprentice comes to value this legal, lawyerly way of thinking as a path to success in the law school classroom and she soon seeks to improve her own capacity to think in this way.<sup>248</sup> Thus, the process by which law professors form her way of thinking gradually gives rise to a process of self-formation.<sup>249</sup> Through the cognitive apprenticeship, law professors prepare the apprentice and she learns to prepare herself for eventual entry into the “guild of legal professionals.”<sup>250</sup> The case dialogue, therefore, serves as the middle part or element in a three-part teleological process that transforms the apprentice lawyer from a novice to a journeyman. According to the fictional Professor Kingsfield of Harvard Law School, the apprentice “come[s] in here with a skull full of mush.”<sup>251</sup> She leaves as a journeyman legal professional who has begun to think like a lawyer and value thinking in a lawyerly way. She thus has realized or at least begun to realize and actualize within herself the *telos* of the cognitive apprenticeship—the third part of the three-part teleological framework.<sup>252</sup>

#### b. The Practical Apprenticeship

According to the Carnegie Report, the second of legal education’s three apprenticeships is practical, and the authors’ account of this apprenticeship

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DOUGLAS G. BAIRD, *CONTRACTS: CASES AND COMMENT* 2-6 (9th ed. 2008); DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, *CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS* 713-16 (3d ed. 2011). For a discussion of how law professors teach *Hawkins* in a typical first-year class and of how their teaching approach affects untutored novices, see *CARNEGIE REPORT*, *supra* note 1, at 48-49, 52-54.

246. See generally *Hawkins*, 146 A. 641.

247. Areeda, *supra* note 221, at 922 (emphasis added).

248. *CARNEGIE REPORT*, *supra* note 1, at 56 (discussing the way in which “competitive zeal” motivates students to develop their cognitive abilities in the case-dialogue Q&A).

249. See *supra* note 187 and accompanying text.

250. *CARNEGIE REPORT*, *supra* note 1, at 55.

251. *THE PAPER CHASE*, *supra* note 254.

252. See *CARNEGIE REPORT*, *supra* note 1, at 27-28.

also clearly relies on a three-part teleological framework.<sup>253</sup> “The students’ second apprenticeship is to the forms of expert practice shared by competent practitioners. . . . In this second apprenticeship, students learn by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients.”<sup>254</sup> As the authors observe, “[t]he prime learning task of the novice in the law is to achieve a basic acquaintance with the common techniques of the lawyer’s craft.”<sup>255</sup> For example, in a clinical setting, “novices can begin to learn the rudiments of litigation, or client counseling, or negotiation by attending to the core elements of the procedural and conceptual models exemplified in expert practice.”<sup>256</sup> More generally and perhaps more importantly, however, the authors understand the practical apprenticeship as an educational process aimed at forming professional judgment: “[l]aw schools, we believe, need to give the teaching of practice a valued place in the legal curriculum so that formation of the students’ professional judgment is not abandoned to chance.”<sup>257</sup> Indeed, the authors view legal practice itself as “judgment in action.”<sup>258</sup> Thus, the

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253. See *supra* note 216 and accompanying text.

254. CARNEGIE REPORT, *supra* note 1, at 28. For an earlier discussion of the legal clinic as a modern form of apprenticeship, see Frank, *Both Ends Against the Middle*, *supra* note 224, at 29. Professor Grossman observed that during the 1960s, supporters of law school clinics generally defended them as a means of providing low-cost legal services to the poor and not as a way to educate law students to practice law. See Grossman, *supra* note 214, at 174. For a discussion of long-standing complaints that law schools have never provided adequate practical training for law students, see generally William T. Vukowich, *The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change*, 23 CASE W. RES. L. REV. 140 (1971).

255. CARNEGIE REPORT, *supra* note 1, at 117. A 1992 report to the ABA by Robert MacCrate and others “delineates in some detail the fundamental lawyering skills that characterize the day-to-day practice of law: problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, client counseling, negotiation, litigation and dispute resolution, and organization and management of legal work . . . .” *Id.* at 174. See AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138-141 (1992) [hereinafter MACCRATE REPORT]. The ABA’s accreditation standards for law schools identify a similar list of lawyering skills that should be taught: “[t]rial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting . . . .” ABA STANDARDS, *supra* note 193, Interpretation 302-2. For many years, proposals to teach practice skills in law school, through clinical programs or otherwise, provoked heated debate and opposition. For example, Judge Clark, who served as Dean of Yale Law School from 1919 to 1939 before being appointed to the Second Circuit, argued that if law schools heed recommendations to provide practical training, they “may be led to waste their substance in doing what they cannot do effectively and what if they could would not be pedagogically worth while [sic].” Charles E. Clark, “Practical” Legal Training An Illusion, 3 J. LEGAL EDUC. 423, 423 (1951). See Grossman, *supra* note 214, at 187-91 (summarizing the arguments against teaching skills in law school).

256. CARNEGIE REPORT, *supra* note 1, at 10-11. For a history of the development of clinical legal education, see generally Grossman, *supra* note 214.

257. CARNEGIE REPORT, *supra* note 1, at 115. For a discussion of the teleological structure of what the authors call “formation,” see *supra* Part III.B.1.

258. CARNEGIE REPORT, *supra* note 1, at 9.

practical apprenticeship aims, or should aim, not just at instilling particular skills or techniques in the apprentice but at forming professional judgment.

What is professional judgment? According to the authors, it is “the ability to size up a situation well, discerning the salient features relevant not just to the law but to legal practice, and, most of all, knowing what general knowledge, principles, and commitments to call on in deciding on a course of action.”<sup>259</sup> Thus, exercising professional judgment means grasping a messy, complex factual situation as a whole of a general type (*e.g.*, a breach of contract or a defamation sounding in tort), recognizing which rules and skills to apply, and then taking action as appropriate in the situation here and now (or then and there). “The new capacity—what the competent person has that the novice does not—is the ability to judge that when a situation shows a certain pattern of elements, it is time to draw a particular conclusion, that one should act in a certain way to achieve the selected goal.”<sup>260</sup> Professional judgment, as the authors define it, apparently is equivalent to expertise—“the ability to achieve goals dependably without either working through complex problem solving or devising explicit plans.”<sup>261</sup>

As William Sullivan has acknowledged, the authors adapted this account of professional judgment (or expertise) from Aristotle’s discussion of the virtue of *phronêsis*, which can be translated as “prudence” or “practical wisdom.”<sup>262</sup> In the following passage from Aristotle’s *Nicomachean Ethics*, Terrence Irwin translates *phronêsis* as “intelligence”:

Intelligence . . . is about human concerns, about what is open to deliberation. For we say that deliberating well is the function of the intelligent person more than anyone else . . . . The unconditionally good deliberator is the one whose aim expresses rational calculation in pursuit of the best good for a human being that is achievable in action.

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259. *Id.* at 115.

260. *Id.* at 117. Here the authors use the term “competent person” in much the same way that I use “journeyman” throughout this Article. For a discussion of my use of the term “journeyman,” see *supra* note 194.

261. CARNEGIE REPORT, *supra* note 1, at 115.

262. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 104-05, 254. For a summary of Aristotle’s account of *phronêsis* and its role in practical reason, see MACINTYRE, AFTER VIRTUE, *supra* note 145, at 154; MACINTYRE, WHOSE JUSTICE?, *supra* note 145, at 124-45.

Nor is intelligence about universals only. It must also come to know particulars, since it is concerned with action and action is about particulars.<sup>263</sup>

As Roger Crisp argues, for Aristotle “practical wisdom involves the virtuous person’s commanding himself to perform what is called for in the circumstances.”<sup>264</sup> According to MacIntyre,

First, [*phronêsis*] enables its possessor to bring sets of particulars under universal concepts in such a way as to characterize those particulars in relevant relationship to the good at which the agent is aiming. So it is a virtue of right characterization as well as of right action. Secondly, such characterization, like right action, is not achieved by mere rule-following. The application of rules may indeed be and perhaps always is involved in right characterization as in right action, but knowing which rule to apply in which situation and being able to apply that rule relevantly are not themselves rule-governed abilities. Knowing how, when, where, and in what way to apply rules is one central aspect of *phronêsis/prudentia*.<sup>265</sup>

For the authors of the Carnegie Report, professional judgment consists in this same capacity that Aristotle described to size up a situation, identify and apply the correct rules, and act in the correct manner to achieve one’s goals then and there in the particular circumstances.<sup>266</sup> Thus, the capacity that Aristotle viewed as a virtue of all “practically wise” or “unqualifiedly good” people,<sup>267</sup> the authors view as a virtue proper and necessary to professionals such as lawyers.<sup>268</sup> According to MacIntyre, “virtues are dispositions not only to act in particular ways, but also to feel in particular ways.”<sup>269</sup> Thus, training in professional or expert judgment will inculcate the disposition to act in a particular way in particular circumstances as well as a feeling that it is proper to act in that particular way in those particular circumstances. To learn professional judgment is to acquire the disposition

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263. ARISTOTLE, *supra* note 157, at 158 [NICOMACHEAN ETHICS vi. 1141b9-17].

264. Roger Crisp, *Introduction* to ARISTOTLE, NICOMACHEAN ETHICS xxv (Roger Crisp ed. & trans., 2000).

265. ALASDAIR MACINTYRE, *First Principles, Final Ends, and Contemporary Philosophical Issues*, in THE TASKS OF PHILOSOPHY, 164 (2006) [hereinafter MACINTYRE, *First Principles*].

266. See CARNEGIE REPORT, *supra* note 1, at 115.

267. See *supra* note 263 and accompanying text.

268. For a discussion of the weaknesses in the Carnegie Report’s account of lawyerly virtues, see *infra* Part V.C.3.

269. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 149.

to act from professional judgment and to value so acting. The authors acknowledge, of course, that a novice cannot acquire the virtue of professional (or expert) judgment overnight or even in three years of law school.<sup>270</sup> Rather, law school should provide students with a “solid foundation and, as they begin their careers in law, useful guidance on what they need to continue to develop . . . .”<sup>271</sup>

There appears to be no explanation in the Carnegie Report of the precise relationship between the two dimensions of the practical apprenticeship, i.e., learning the “common techniques of the lawyer’s craft”<sup>272</sup> and acquiring the foundations of the virtue of professional judgment. On first glance, it would seem that a law student could learn a great deal about, for example, specific drafting, negotiating, and counseling techniques or skills without learning how to size up a messy, real-world situation, identify the rules and skills appropriate to that situation, and take proper action to achieve a goal then and there. Perhaps the authors would respond that learning the techniques of negotiation or client counseling is the same thing as learning how to use a particular lawyering skill here and now to achieve an identifiable goal. Learning to negotiate involves learning when to say a particular thing (or not) here and now and learning how to respond (or not) here and now to what one’s interlocutor says.<sup>273</sup> This capacity to deploy lawyering skills and techniques to take action here and now to achieve an objective in a particular situation seems to capture an important aspect of what the authors mean by practical judgment or expertise. Thus, practical judgment might be understood as the general capacity to do what one learns to do with much greater specificity when studying the “common techniques of the lawyer’s craft” during the practical apprenticeship.<sup>274</sup> The relationship between lawyering skills or techniques and practical judgment would then be a relationship between particular and general as well as, perhaps, a relationship between part and whole. If this explanation is correct, then it makes sense to conjoin learning common lawyering techniques with learning professional judgment in the practical apprenticeship because as one learns and practices the former, one also begins to develop the foundations of the latter.

As in the cognitive apprenticeship, much of the formation of students in the practical apprenticeship occurs through modeling by teachers who demonstrate a particular practice and then analyze and explain what they

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270. CARNEGIE REPORT, *supra* note 1, at 142.

271. *Id.* at 115.

272. *See supra* note 255 and accompanying text.

273. *See* CARNEGIE REPORT, *supra* note 1, at 115.

274. *See id.* at 117.

have demonstrated.<sup>275</sup> For example, “as trial lawyers . . . have long known, arguments can be written down, then rehearsed, analyzed, criticized, and, in the process, improved. . . . Feedback from more accomplished performers directs the learner’s attention toward improved attempts to reach a goal.”<sup>276</sup> According to the authors, “[f]eatures of expert performance . . . can thereby be made explicit for learners in the form of rules, procedures, protocols, and organizing metaphors for approaching situations or problems. Cued by these devices, students can then be coached through imitation and appropriation of various aspects of expert performance.”<sup>277</sup> Thus, in the practical apprenticeship, teachers and other “more accomplished performers” model good practice for students to imitate and appropriate (make their own) while requiring students to analyze, repeat, and improve performance.<sup>278</sup> As teachers model good practice or expert performance, they model aspects of professional judgment (assuming the discussion above described accurately the relationship between practice skills and professional judgment). Teachers thereby form their novice students into practitioners—or at least into journeymen—who have not only the kernels of the key skills comprised in expert legal performance but also the foundation of the broader capacity to size up a complex situation, identify the appropriate rules and skills, and take proper action here and now (or then and there) to achieve a specified goal.

The practical apprenticeship fits comfortably into the account offered above of a three-part teleological framework.<sup>279</sup> The untutored novice entering the practical apprenticeship is the same one who enters the cognitive apprenticeship—the new law student.<sup>280</sup> Thus, like the cognitive apprenticeship, the practical apprenticeship presumes that a raw, untutored novice will tend to get bogged down in the “extraneous detail” of messy, complex real-life situations and that her thinking will lack “precision” and “generality.”<sup>281</sup> The novice does not and perhaps cannot see a situation “as a whole” and as a particular type of legal situation; thus, she will have difficulty identifying and applying the right rules and selecting the right course of action to achieve a desired goal.<sup>282</sup> Confronted with a complex,

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275. See *supra* note 202 and accompanying text.

276. CARNEGIE REPORT, *supra* note 1, at 98. The Carnegie Report characterizes the process as “iterative” because it involves repeating and reworking a performance or skill in order to make incremental improvements. *Id.*

277. *Id.* at 99.

278. See *id.* at 98.

279. See *supra* notes 145-57 and accompanying text.

280. See *supra* note 202 and accompanying text.

281. See *supra* note 226 and accompanying text.

282. See CARNEGIE REPORT, *supra* note 1, at 115-17.



real-life legal problem, she would not have an inkling of what to do here and now, what to do next, and so forth. Even if she did know what to do, she would lack the skills to do it. Indeed, she likely would lack a disposition to act in a professional manner and she might not even value professional judgment or its fruits. At best, she might have a free-floating, inchoate desire to “help” or to do the “right thing,” whatever that might be. This is the novice law student’s nature as-she-happens-to-be, i.e., the first part of the three-part teleological framework.<sup>283</sup> Where the *telos* of the cognitive apprenticeship was “thinking like a lawyer,” the *telos* of the practical apprenticeship is practicing or beginning to practice the virtue of professional judgment, i.e., the capacity and disposition to size up a situation, identify the relevant rules and skills, and skillfully adopt a proper course of action here and now to achieve a goal.<sup>284</sup> This is the third part of the teleological framework.

The practical apprenticeship itself provides the second part of the framework: the middle stage or phase during which masters who model lawyering techniques and practical judgment form, or should form, the untutored novice into a journeyman with at least a rudimentary capacity and disposition to practice those techniques and that type of judgment. If we treat the practical apprenticeship as a process of formation or formative education, we could say that practical judgment is the form impressed upon and the potential realized in the human clay of the novice. Moreover, insofar as the practical apprenticeship is a formative process, the apprentice acquires, or is expected to acquire, not only the foundation of professional skill and judgment but also the desire and the ability to improve her own professional skill and judgment through further experience as a legal professional.<sup>285</sup> Formation of skill and judgment thus evolves, or should evolve, into self-formation and the disposition to self-formation. As the Carnegie Report states, “the essential goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity and motivation to pursue genuine expertise.”<sup>286</sup>

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283. See *supra* note 146 and accompanying text.

284. See CARNEGIE REPORT, *supra* note 1, at 115.

285. See *supra* note 187 and accompanying text.

286. CARNEGIE REPORT, *supra* note 1, at 173. For an argument that law schools currently fail to equip students to continue to form themselves through practical experience, see Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S. C. L. REV. 105, 109 (2010).

## c. The Apprenticeship of Identity and Purpose

According to the Carnegie Report, the third apprenticeship is that of “identity and purpose.”<sup>287</sup>

The third apprenticeship . . . introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible. . . . The essential goal . . . is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.<sup>288</sup>

Elsewhere, the authors state that the third apprenticeship places “theoretical and practical emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.”<sup>289</sup> By inculcating the purposes, attitudes, dispositions, ethical standards, social roles, and responsibilities of the legal profession, the third apprenticeship helps the apprentice to realize, i.e., to understand and to make real in herself, what it means to be a lawyer.<sup>290</sup> As the authors observe, “[t]he values that lie at the heart of the apprenticeship of professionalism and purpose also include conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession.”<sup>291</sup> More importantly perhaps, the third apprenticeship helps the apprentice to begin to discover what it means *for her* to be a lawyer. She begins, in other words, to formulate and understand her own “professional identity.”

Professional identity is, in essence, the individual’s answer to questions 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? and What place do ethical-social values have in my core sense of professional identity?<sup>292</sup>

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287. CARNEGIE REPORT, *supra* note 1, at 28.

288. *Id.* The reference in the quoted passage to teaching “inclinations” underlines again the fact that, for the authors, formation through the apprenticeship process includes modifying the dispositions of the apprentice so that she will come to esteem and pursue goals and practices that she did not previously esteem and pursue. *Id.*

289. *Id.* at 194.

290. *See id.* at 28.

291. CARNEGIE REPORT, *supra* note 1, at 132.

292. *Id.* at 135.

This, then, is why the authors refer to the third apprenticeship as the apprenticeship of “identity and purpose”:<sup>293</sup> the apprentice studies, or should study, the purposes, attitude, dispositions, standards, roles, and responsibilities of the legal profession and in the process she should start to discover and develop her own dispositions and attitudes, her own account of who she is as a lawyer, and thus her own professional identity.

The Carnegie Report frequently refers to the apprenticeship of identity and purpose as the “ethical-social” apprenticeship.<sup>294</sup> According to the Report, the “apprenticeship of professional identity should encompass issues of both individual and social justice, and it includes the virtues of integrity, consideration, civility, and other aspects of professionalism.”<sup>295</sup> Unfortunately, the authors do not elaborate on these brief remarks about virtue. They clearly believe the third apprenticeship should inculcate virtues such as integrity, consideration, and civility that, according to the authors, are associated with professionalism. They do not, however, identify any virtues that are particular to lawyers as distinct from the virtues lawyers have in common with other professionals such as doctors and members of the clergy. Indeed, the authors do not explain in what sense the virtues that they mention are virtues, of professionalism or otherwise.<sup>296</sup> And they also make no effort to defend a particular catalogue of virtues.<sup>297</sup> I return to these important questions—what are the lawyerly virtues and why—in Part V.C.3.

According to the authors, in “[m]ost law schools,” the ethical-social apprenticeship occurs in a legal ethics course.<sup>298</sup> There, students typically learn and analyze the Model Rules of Professional Conduct.<sup>299</sup> Although it clearly is important for apprentice lawyers to study the Model Rules,

[w]hen legal ethics courses focus exclusively on the law of lawyering, they can convey a sense that attorneys’ behavior is bounded only by sanctions . . . and . . . that most practicing lawyers

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293. At various points in the Carnegie Report, the authors refer to the third apprenticeship as the apprenticeship of “professional identity” or “professional identity and purpose.” See, e.g., *id.* at 79, 126 (title of Chapter IV), 128, 151.

294. See, e.g., *id.* at 130, 132, 158, 160, 191.

295. *Id.* at 132.

296. The Carnegie Report sometimes uses the term “virtue” rather loosely. For example, it refers to “freedom with equity” as “virtues” and “values.” CARNEGIE REPORT, *supra* note 1, at 202. The reader reasonably might ask what the authors believe is the relationship between a value and a virtue. We might value the virtues, or at least some of them, but does the catalogue of virtues include all so-called values?

297. For a discussion of competing accounts of the nature of virtue and competing catalogues of virtues, see MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 181-87.

298. CARNEGIE REPORT, *supra* note 1, at 148.

299. *Id.* See generally MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter MODEL RULES].

are motivated primarily by self-interest and will refrain from unethical behavior only when it is in their immediate self-interest to do so.<sup>300</sup>

Instead of resting their case on this rather facile criticism<sup>301</sup> of courses that focus on the law of lawyering, however, the authors offer a more subtle objection to such courses rooted in the idea that a formative educational process forms, or should form, the student's character.<sup>302</sup>

Such a narrow focus [on the law of lawyering] misses an important dimension of ethical development—the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice. This capacity is critical because ethical challenges cannot be addressed unless they are noticed and taken seriously.<sup>303</sup>

By focusing on the claim that ethics courses fail to inculcate in apprentices the inclination to spot ethical problems, the authors arguably understate the divergence between rules-based ethics courses and formative ethical education. If Aristotle is correct (as the Carnegie Report's reliance on him suggests he may be), then the problem with teaching legal ethics through rules of conduct is not that such teaching appeals only to self-interest or somehow fails to activate a student's equipment for detecting moral dilemmas. Rather, the fundamental problem with focusing legal ethics courses on rules of conduct is that a general rule articulated in advance normally cannot provide adequate guidance for action in a particular real-world situation.<sup>304</sup> As Sarah Broadie writes, for Aristotle “not even the wisest moralist can firmly lay down general rules for good or right action, since only the agent in each case can know then and there what is best. There is no recipe for ‘functioning well.’”<sup>305</sup> To put Broadie's point in a

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300. CARNEGIE REPORT, *supra* note 1, at 149.

301. The authors fail to state or defend the questionable major premise of this argument, i.e., that we study rules only to avoid the sanctions attendant on violating those rules. They also fail to defend the premise that we ordinarily avoid violating rules and incurring sanctions only out of “immediate self-interest.” These premises and the authors' critical conclusions about legal ethics courses merit further examination.

302. *See* CARNEGIE REPORT, *supra* note 1, at 149.

303. *Id.*

304. *See* BROADIE, ETHICS WITH ARISTOTLE, *supra* note 143, at 60.

305. *See id.* This criticism of rule-based ethics does not require us to reject a system of ethics rooted in human rationality. Rather, for Aristotle, functioning well “is functioning in accordance with right reason or the *orthos logos*, but no one can say in advance what the *orthos logos* for a particular situation would be.” *See id.* Broadie adds: “Aristotle's whole point is that there can be a rational finding that lacks the generality of a rule or what would nowadays be called a ‘principle.’” *See id.* at 118.

more positive form, the challenge facing formative education in legal ethics is to give the student the ability, or at least the rudiments of the ability, to function well, i.e., the disposition and deliberative capacity to identify and do what is best then and there in the situation in which she finds herself.<sup>306</sup> An education in general rules alone will not suffice to inculcate or strengthen this disposition and capacity.

After arguing that rules-based legal ethics courses do not provide an adequate setting for the ethical-social apprenticeship, the authors strongly suggest that the apprenticeship ideally should occur in “context-based education.”<sup>307</sup> The proper context(s) for such education may “range from bringing ethical reflection and the concerns of professionalism to bear in the simulation pedagogy of lawyering courses, to engagement with actual cases and clients in supervised externships and, most important, in clinical-legal education.”<sup>308</sup> The authors conclude that

a special value of the pedagogies of the ethical-social apprenticeship lies in their emphasis on ethical engagement, particularly responsibility to clients for justice. Through ever-closer approximations to actual practice, in a range of settings, students can be helped to develop insight into the full dimensions of the identity and purposes proper to a lawyer.<sup>309</sup>

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This rational finding would, however, provide guidance to action in a particular, concrete situation here and now (or then and there). For Aristotle’s discussion of this issue, see ARISTOTLE, *supra* note 157, at 35 [NICOMACHEAN ETHICS ii.2 1103b26-1104a11] (where the translator renders *orthos logos* as “correct reason”).

306. This disposition and deliberative capacity may be equivalent to or at least an aspect of what the authors describe as professional judgment and Aristotle described as *phronêsis*. See *supra* notes 257-71 and accompanying text. We may, therefore, have to recast the authors’ account of the second and third apprenticeships to reflect the fact that professional judgment plays an important and quite similar role in each of them.

307. CARNEGIE REPORT, *supra* note 1, at 158.

308. *Id.* The authors give somewhat short shrift to what may be the most obvious context for the ethical-social apprenticeship, i.e., the dozens of ordinary doctrinal courses that students take in three years of law school. They note that “the faculty is influential in conveying . . . what qualities are important for a member of [the] profession.” *Id.* at 156. They also draw attention to calls for faculty members to act as “role models for law students’ perceptions of lawyering.” *Id.* at 157. The authors offer no substantive discussion of such ethical role modeling or of the virtues that law faculty might model, except to suggest that professors can provide models of “how to use power and authority.” *Id.* These cursory comments beg for more subtle analysis. For a short discussion of faculty members as ethical role models, see Thomas D. Morgan, *Law Faculty as Role Models*, in TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 37 (1997). *But cf.* Cramton, *supra* note 182, at 259 (questioning whether faculty who “have forsaken the profession that the law student plans to enter” can serve as role models); Newton, *supra* note 286, at 147-48 (questioning whether a faculty that “notwithstanding its scholarly prowess, does not itself possess even the basic skills required to practice the type of law about which it teaches and writes” can function as a role model for students).

309. CARNEGIE REPORT, *supra* note 1, at 160.

Thus, apprentices learn, or should learn, professional purposes, ideals, and ethics that are “proper to a lawyer” while they approximate and, in a sense, practice the practice of law by assuming responsibility to and for clients or simulated clients. The authors do not explain which identity or purposes are “proper to a lawyer” or in what sense that identity and those purposes are “proper.” The authors also do not explain why they believe that assuming responsibility to clients entails assuming responsibility to clients “for justice.” As will be discussed in Part IV, *infra*, some would argue that one person’s justice is another person’s raw deal, i.e., that justice is in the eye of the beholder. Moreover, unless one is prepared to take the implausible position that the client’s interests always will be consonant with justice (however defined), then it would seem the apprentice might learn (gradually) to take responsibility for clients, and she might learn that she has some responsibility as a lawyer to promote “justice.” But she inevitably also will learn that these two missions sometimes will lead in different or even opposite directions. The lawyer who gets her client, the rapist and murderer, off on a “technicality” has taken responsibility for her client, but whether she has promoted justice is at least an open question.<sup>310</sup>

The third apprenticeship resembles the other two in its three-part teleological structure.<sup>311</sup> As the first part of the teleological structure, the third apprenticeship assumes a raw, untutored novice with, as Professor Kingsfield suggested, a “skull full of mush”—a person who has little or no knowledge of what it means to be a lawyer either in general or for her in particular.<sup>312</sup> She also apparently lacks the dispositions and virtues of a lawyer, at least in their developed forms.<sup>313</sup> The third part of the teleological structure, the goal or *telos* of the apprenticeship, is a person possessing at least a basic understanding of and disposition or commitment to the purposes, ideals, ethics, and responsibilities of the legal profession and of her role as a professional.<sup>314</sup> At the end of the third apprenticeship, the journeyman lawyer should have a foundation for her professional identity and an incipient insight into what it will mean for her to be a lawyer. How does the third apprenticeship form the raw, untutored student? In other words, what is the second or formative part of the three-part teleological scheme? The authors admit that there is “no research”

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310. The authors recognize this potential conflict in the lawyer’s purposes but provide a less than adequate response to it. For further discussion of this issue, see *infra* notes 662-68 and accompanying text.

311. See *supra* notes 145-57 and accompanying text.

312. See *supra* note 251 and accompanying text.

313. See *supra* note 146 and accompanying text.

314. See *supra* note 146 and accompanying text.

concerning the formative influence that law school might have on a student's professional identity.<sup>315</sup>

Based on our research, however, we do know that for students to incorporate the profession's ethical-social values into their own, they need to encounter appealing representations of professional ideals, connect in a powerful way with engaging models of ethical commitment within the profession, and reflect on their emerging professional identity in relation to those ideals and models.<sup>316</sup>

The authors do not explain who or what would be an "appealing representation[]" of professional ideals" or an "engaging model[]" of ethical commitment."<sup>317</sup> One could perhaps ask students to watch Gregory Peck play Atticus Finch in *To Kill a Mockingbird*<sup>318</sup> or Sidney Poitier play Thurgood Marshall in *Separate But Equal*,<sup>319</sup> or, in a less heroic but perhaps more realistic vein, Jimmy Stewart play the cagey Paul Biegler in *Anatomy of a Murder*.<sup>320</sup>

According to the authors, one way to encounter an appealing model of professionalism is through pro bono legal work.<sup>321</sup> "[F]ree legal work for clients who cannot afford legal services is a vivid enactment of law's professional identity."<sup>322</sup> The authors do not explain why or how pro bono

315. CARNEGIE REPORT, *supra* note 1, at 135.

316. *Id.*; see also *id.* at 146 ("when students form relationships with professionals who inspire them, they can internalize new images of what they want to be like more deeply and vividly than they are likely to do through reading."). If the third apprenticeship relies in part on "appealing representations of professional ideals," it seems to follow that there must be a quality of openness and receptivity in the raw, untutored novice to which these appealing representations can and will appeal. Novices must have the capacity to be inspired by "professionals who inspire them." Although the authors say nothing about this topic, such openness, receptivity, or capacity appears to be a key premise of the argument that the third apprenticeship can form or transform the character of a law student and redirect her toward the *telos* or *teloi* of the legal profession. I will say more about this in Part V.C.4.

317. CARNEGIE REPORT, *supra* note 1, at 135.

318. *TO KILL A MOCKINGBIRD* (Universal International Pictures 1962). For a discussion of the pros and cons of treating Atticus Finch as a role model, see Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1339 (1998-1999).

319. *Separate But Equal*, TV GUIDE, <http://movies.tvguide.com/separate-but-equal/cast/137142> (last visited Sept. 20, 2012).

320. *Anatomy of a Murder*, TV GUIDE, <http://movies.tvguide.com/anatomy-of-a-murder/cast/113464> (last visited Sept. 20, 2012). Paul Biegler is entertaining and therefore "appealing" but whether he is a good role model is less clear.

321. CARNEGIE REPORT, *supra* note 1, at 138.

322. *Id.* The authors observe that "recent graduates ranked pro bono work at the bottom of law school experiences they found useful in their transition to practice." *Id.* at 139. A 2011 report by NALP appears to confirm this observation. NALP, *2010 Survey of Law School Experiential Learning Opportunities and Benefits*, 26-27 (2011), <http://www.nalp.org/uploads/2010ExperientialLearningStudy.pdf>. The authors assert that students' negative reaction to pro bono work reflects "how supportive the school's overall culture is of" such

work enacts professional identity, but one presumes that observing and participating in pro bono work conveys to the apprentice the principle that real lawyering requires taking responsibility for a client who needs help regardless of the lawyer's opportunity for remuneration.<sup>323</sup> One also presumes, however, that apprentices eventually must adapt that principle to the world of remunerated lawyering, since lawyers who survive to tell the tale generally do not engage fulltime in pro bono work.<sup>324</sup> Unfortunately, the Carnegie Report says nothing about how pro bono work as an appealing model for ethical lawyering relates to the daily grind of remunerative legal work in the real world.<sup>325</sup> It seems obvious that apprentices would benefit from appealing models of how to balance pro bono practice with remunerative work. Apprentices also would benefit from appealing models of ethical remunerative lawyering, but the authors do not even

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work. CARNEGIE REPORT, *supra* note 1, at 139. The authors suggest that law faculty should convey their support for pro bono work by making such work a requirement for graduation. *Id.* at 184. Why making pro bono work mandatory will make it seem more useful to students is not clear.

323. *Id.* at 138-44. The authors elsewhere claim that “[c]ompassion and concern about injustice become much more intense when students develop personal connections with those who have experienced hardship or injustice.” *Id.* at 146. If we assume that many people receiving pro bono services would have experienced some form of hardship, if not injustice, then we could infer that pro bono work may increase the apprentice’s “compassion and concern” for “those who have experienced hardship.” *See id.* The idea that clinical work might help students to “learn . . . responsibility” and “develop . . . compassion for the poor” dates back at least to the early 1970s. *See* Grossman, *supra* note 214, at 223. In 1971, however, a curriculum study commissioned by the AALS cast doubt on the “correlation between [clinical work] and concern for social justice . . .” *The Carrington Report, reprinted in* HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* app. A, at 134 (1972).

324. Recent statistics suggest that sixty-seven percent of attorneys earn their living in private practice while another eight percent work for businesses and twenty-two percent work for the government or in a public defender setting. Ronit Dinovitzer, Bryant G. Garth, Richard Sander, Joyce Sterling & Gita Z. Wilder, *After the JD: First Results of a National Study of Legal Careers*, 27 (2004), available at <http://www.nalpfoundation.org/uploads/50-AJD1.pdf>. Many attorneys in these settings engage in some pro bono work, but clearly most attorneys most of the time support themselves by collecting payment from someone for their services. *Id.* at 37. Deborah Rhode discusses similar statistics from a more critical perspective.

[T]he best available research finds that American lawyers average less than half an hour of work per week and under half a dollar per day in support of pro bono legal assistance. Public service programs involving the profession’s most affluent members reflect a particularly dispiriting distance between the bar’s idealized image and actual practices. . . . [O]nly 18 of the nation’s 100 most financially successful firms meet the Model Rules’ standard of 50 hours per year of pro bono service. The approximately 50,000 lawyers at these firms averaged less than 10 minutes per day on pro bono activities. At many of these firms, the vast majority of charitable assistance comes from associates . . . .

DEBORAH RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* 20 (2005).

325. *See* CARNEGIE REPORT, *supra* note 1, at 138-39.



acknowledge, let alone discuss, that possibility.<sup>326</sup> In any event, it seems narrow-minded and short-sighted to design the third apprenticeship to treat remunerative work as inherently dirty or degrading or as an activity driven solely by self-interest chafing at the limits imposed by ethical rules.<sup>327</sup> Remunerative work appears, after all, to be the primary professional activity of most lawyers most of the time.<sup>328</sup>

As in the first and second apprenticeships, the master teaching apprentices in the third apprenticeship does not simply impose a form on the apprentice from without, molding the apprentice the way a potter might mold a pot. Rather, the master who models and inculcates professionalism should encourage apprentices to “reflect on their emerging professional identity”<sup>329</sup> by discussing and encouraging apprentices to talk about “ethical-social values” and “ethical commitment.”<sup>330</sup> As apprentices become reflective about professional identity, they gradually should become responsible for molding or forming themselves as professionals. Formative education in the third apprenticeship gradually will or should become self-formative education, just as it did or should do in the cognitive and practical apprenticeships.<sup>331</sup> Thus, the apprenticeship of identity and purpose shows the same three-part teleological structure as the other apprenticeships: a master practitioner forms a raw, untutored novice into a reflective journeyman with the ability to continue to mold herself further.<sup>332</sup> Moreover, the master accomplishes this objective at least in part by acting as a model and presenting appealing representations for the apprentice of the already-formed legal professional, i.e., the lawyer who already substantially embodies the form and has achieved or made substantial progress toward the *telos*.<sup>333</sup>

After this analysis of the third apprenticeship, it is possible to state and answer a potentially important objection to my argument that the Carnegie

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326. *See id.* (not discussing the possibility). Looking at the three films about lawyers mentioned above, see *supra* notes 318-20 and accompanying text, Atticus Finch apparently defended his client pro bono at the request of a local judge, see Lubet, *supra* note 318, at 1339. Thurgood Marshall received his paycheck from the National Association for the Advancement of Colored People, see *Separate But Equal*, *supra* note 319, and Paul Biegler got cheated out of his fee when his client skipped town without paying after acquittal, see *Anatomy of a Murder*, *supra* note 320. It is not clear what message(s) these films convey about the ethical dimension of lawyering for pay.

327. The Carnegie Report’s views on lawyering for pay underline the accuracy of a comment made over thirty years ago by Dean Cramton: a law professor’s “attitude toward practitioners is often touched with an air of superiority and disdain.” Cramton, *supra* note 182, at 259.

328. *See* Dinovitzer et al., *supra* note 324, at 27.

329. CARNEGIE REPORT, *supra* note 1, at 135.

330. *Id.*

331. *See supra* notes 187, 249, 285 and accompanying text.

332. *See supra* note 187-206.

333. *See supra* note 194 and accompanying text.

Report relies heavily on teleological explanation and rests on a teleological framework.<sup>334</sup> According to this objection, a key element of a teleological explanation for a process such as legal education is the claim that the process helps the student to actualize her potential and realize her essential human nature.<sup>335</sup> But, according to this objection, legal education as described in the Carnegie Report makes only incidental or superficial changes in the law student and does not affect the student's essential nature or even rely on a claim that student has an essential nature.<sup>336</sup> Learning to be a lawyer is like learning to play a role. We would not say that Tom Hanks became a different person when he learned how to play Forrest Gump.<sup>337</sup> We also would not say a potter essentially transforms a pot by coloring it blue rather than red or by giving it two small handles instead of one large one. These changes in coloring and configuration might affect the uses to which one can put the pot just as legal education might affect the uses to which one might put a person or the functions that a person can perform. According to the Carnegie Report, legal education bestows on the law student various new attributes and useful skills.<sup>338</sup> But the Report makes no assertions about human nature, let alone essential human nature, and consequently no claim that legal education somehow actualizes or realizes human nature in the law student. Ergo, the Report does not rely or rest on a teleological framework.

In response to this objection, I concede that the Carnegie Report does not expressly discuss human nature or essential human nature.<sup>339</sup> By the same token, however, the Report does not suggest that we treat legal education as the equivalent of learning to play a role in a film.<sup>340</sup> Rather, as Part III.B.1 shows, the Report relies heavily on the claim that legal

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334. See *infra* Part III.B.

335. See *supra* note 146 and accompanying text.

336. Compare CARNEGIE REPORT, *supra* note 1, with MACINTYRE, AFTER VIRTUE, *supra* note 145, at 32. MacIntyre has argued that modern sociology and several strands of modern philosophy, including the Existentialism of Jean-Paul Sartre, find common ground in the claim that the human self has no essence or essential nature. See MACINTYRE, AFTER VIRTUE, *supra* note 145, at 32 (the “democratized self which has no necessary social content and no necessary social identity can . . . be anything, can assume any role or take any point of view, because it *is* in and for itself nothing.”).

337. See FORREST GUMP (Paramount Pictures 1994).

338. See *supra* note 84 and accompanying text.

339. See generally CARNEGIE REPORT, *supra* note 1.

340. See *infra* Part V.C.6(a) (further discussion of whether we should view lawyering as role-playing or acting a part) The Carnegie Report does, of course, recognize that lawyers and other professionals play various roles in our society, see, e.g., *supra* note 292 and accompanying text, but to my knowledge the Report nowhere suggests that becoming a lawyer is equivalent to learning to perform a role or part in a film or play, see *infra* Part V.C.6(a). Moreover, as suggested in the text, the Report provides various reasons for concluding that legal education is not the equivalent of learning to play Forrest Gump. See *infra* Part V.C.6(a).

education is formative.<sup>341</sup> The Report explains formative education by invoking Aristotle's Four Causes and implying repeatedly that legal education, done correctly, will transform the law student's character in fundamental ways.<sup>342</sup> According to the Report, the first apprenticeship, done correctly, will transform the way the neophyte law student thinks<sup>343</sup> and the second apprenticeship will develop her judgment, thereby modifying or attempting to modify where, when, and how she responds to events in the world.<sup>344</sup> The third apprenticeship will encourage her to recognize and reflect on her new identity as a lawyer and legal professional.<sup>345</sup> Indeed, the Report argues that legal education, done correctly, will invite her to consider and adopt new answers to the question "who am I?"<sup>346</sup> Thus, it is clearly incorrect to say that legal education, as analyzed in the Carnegie Report, does no more than teach a law student to play a new role by making incidental and superficial changes in the student. Rather, legal education, done correctly, aims at making a fundamental change in the character and identity of the law student by transforming her into a journeyman lawyer and legal professional.<sup>347</sup>

The critic of my position might concede that the Carnegie Report strongly suggests legal education will make a fundamental transformation in the identity and character of the law student but deny that the transformation somehow realizes or actualizes some kind of essential human nature. Even if we recognize that legal education gives or tries to give the law student a new identity and character as a journeyman lawyer, we have no reason to believe this new identity and character will bring her any closer to a *telos* rooted in human nature than would a new identity and character as a doctor or an architect or a plumber or a night watchman. The law student's new identity as a journeyman lawyer is just an arbitrary endpoint to a particular educational process, an endpoint that may allow the journeyman to get a good job and perform the functions of a lawyer in our legal system. But we should not glorify this endpoint by declaring it a *telos* rooted in essential human nature and then describe the process by which a student reaches this endpoint as teleological in some lofty Aristotelian sense of the term.

At this stage of the debate with my hypothetical critic, I would suggest that we have reached a kind of uneasy agreement. The critic concedes that,

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341. See *supra* Part III.B.1.

342. See *supra* notes 187-92 and accompanying text.

343. See *supra* Part III.B.2(a).

344. See *supra* Part III.B.2(b).

345. See *supra* Part III.B.2(c).

346. See *supra* note 292.

347. See *supra* note 194.

according to the Carnegie Report, legal education is a process aimed at altering the character and identity of the law student and that the endpoint of the process will be a journeyman lawyer and legal professional.<sup>348</sup> Whether we call that endpoint a *telos* is ultimately a semantic question but I would suggest there is no reason not to speak of it as a *telos* as that word is ordinarily understood.<sup>349</sup> Leaving aside the semantic quarrel, my critic and I seem to agree that the Report presents a classic three-part teleological scheme involving the neophyte law student as-she-happens-to-be, an endpoint or *telos*, and an educational process to take her from the former to the latter.<sup>350</sup> What the Report lacks, according to my critic, is an argument tying the endpoint or *telos* to an account of essential human nature, an argument that would allow us to assert that in learning to be a lawyer the law student actualizes her potential or some part of her potential as a human being.<sup>351</sup> And here, surprisingly, my critic and I also agree. Indeed, I would make the point more strongly. The Report does not provide any kind of argument in defense of the *telos* of the legal educational process, let alone an argument that builds on the Report's Aristotelian account of formative education and ties the purported *telos* to an account of essential human nature.<sup>352</sup> In other words, using terminology that I introduce in Part III.A, the Report provides an ungrounded teleological framework for legal education rather than a grounded framework.<sup>353</sup> Moreover, as I show in Parts III.B.2(d) and (e) *infra*, the Report itself seems to demand a clear account of the *telos* of legal education, a clear account of what it means for a person to be a lawyer and to do what lawyers do, as well as a clear justification for that *telos*, but the Report fails to provide any such account or justification.<sup>354</sup> Indeed, as I show in Part IV.A, despite the Report's own intentions, it appears to offer reasons to believe that justifying the *telos* of legal education is not possible.<sup>355</sup> Thus, *pace* my critic, I argue that the Carnegie Report does rely and build on a teleological framework but that it develops the framework in an incomplete, careless, and ultimately unpersuasive way.

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348. *See supra* note 197.

349. *See supra* note 110 and accompanying text.

350. *See supra* notes 151-57 and accompanying text.

351. *See generally* CARNEGIE REPORT, *supra* note 1.

352. *See generally id.*; *see also supra* Part III.A.

353. *See supra* Part III.A.

354. *See infra* Part (d) and Part (e). *See generally* CARNEGIE REPORT, *supra* note 1.

355. *See supra* Part IV.A.

d. The Third Apprenticeship Provides a Purpose for the First and Second

In addition to resembling the cognitive and practical apprenticeships in teleological structure, the apprenticeship of identity and purpose provides, or should provide, the resolution to a potential conflict between those two apprenticeships.<sup>356</sup> In the cognitive apprenticeship, “the case dialogue inculcates a narrow and highly abstract range of vision. This, in turn, can have a corrosive effect on the development of the full range of understanding necessary for a competent and responsible legal professional.”<sup>357</sup> As explained above, the cognitive apprenticeship typically uses the case-dialogue method to teach law students to abstract from the messy details of particular, real-life situations and to think “like a lawyer” in general, well-defined legal categories about such situations.<sup>358</sup> By contrast, the practical apprenticeship is supposed to provide students with the foundations of professional judgment, the capacity to size up a complex, messy situation, identify the relevant rule and skills, and adopt a course of action here and now using a range of lawyering skills to achieve a concrete objective.<sup>359</sup>

The practice of law is, ultimately, a matter of engaged expertise. Like the experienced physician, the legal professional must move between the detached stance of theoretical reasoning and a highly contextual understanding of client, case, and situation. The habit of moving back and forth between these two different modes of cognition is learned primarily through experience, especially the intimate relationships of apprenticeship . . . .<sup>360</sup>

The basic problem, however, is that before attending law school, students typically do not acquire and could not have acquired this professional “habit of moving back and forth.” And once they reach law school, the cognitive and practical apprenticeships tug them in two different, arguably conflicting, directions between a “detached stance” and a “highly contextualized understanding.”<sup>361</sup> One apprenticeship pulls the student out of context while the other pulls the student in; one emphasizes detachment and disengagement, the other involvement and engagement.

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356. CARNEGIE REPORT, *supra* note 1, at 14.

357. *Id.* at 77.

358. *See supra* notes 222-26 and accompanying text.

359. *See supra* notes 259-71 and accompanying text.

360. CARNEGIE REPORT, *supra* note 1, at 115.

361. *See id.*

In addition to tugging the apprentice back and forth between the cognitive and the practical, law school tends to favor the cognitive apprenticeship:

The strengths of academic training lie in its efficiency in the systematic transmission of ideas and information, along with at least some guarantee that the knowledge communicated to students will be reputable and up-to-date. Its weaknesses lie in its relative abstraction from the actual application of knowledge to practice, along with its general avoidance of the embedded knowledge of practice itself.<sup>362</sup>

Thus, the *telos* of the cognitive apprenticeship—thinking like a lawyer—not only appears to operate at cross purposes with, but (at least in the academic environment) to take priority over, the *telos* of the practical apprenticeship—practical skill and professional judgment.<sup>363</sup> By the authors' own account, therefore, legal education seems to pursue fundamentally conflicting cognitive and practical objectives and to give priority to the cognitive over the practical.<sup>364</sup>

According to the authors, a key function of the apprenticeship of identity and purpose is to resolve and overcome this conflict or tension between the cognitive and practical apprenticeships:

[t]he third element of the framework—professional identity—joins the first two elements [i.e., legal analysis and practical skill] and is, we believe, the catalyst for an integrated legal education. The third element of our framework . . . draws to the foreground the purposes of the profession and the formation of the identity of lawyers guided by those purposes. We believe if legal education had as its focus forming legal professionals who are both competent and responsible to clients and the public, learning legal analysis and practical skills would be more fully significant to both the students and faculty.<sup>365</sup>

How does the third apprenticeship “join[] the first two” and make them “more fully significant”?<sup>366</sup> This is a key question that the authors do not

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362. *Id.* at 95. See Vukowich, *supra* note 254, at 141 (“the law schools’ main emphasis is on theoretical studies.”).

363. See CARNEGIE REPORT, *supra* note 1, at 95.

364. See *supra* note 362 and accompanying text.

365. CARNEGIE REPORT, *supra* note 1, at 14.

366. See *id.*

answer.<sup>367</sup> I believe it is possible, however, to construct an answer based on various comments that the authors make about the third apprenticeship. Thus, in what follows, I argue that the third apprenticeship joins, or should join, the first two and makes, or should make, them more fully significant by providing an intelligible context and unifying rationale for them.

According to the authors, “the intentions embodied in the apprenticeship of professional identity and purpose have to precede and interpenetrate the learning of formal analytical knowledge in the first apprenticeship and the development of skilled practice in the second.”<sup>368</sup> The intentions of the third apprenticeship do not “precede and interpenetrate” the first two apprenticeships in the sense that we expect, or should expect, apprentices to study legal ethics and professionalism before studying contracts, torts, or legal writing. Nor, apparently, are apprentices expected to study “contract ethics” as part of contracts and “tort ethics” as part of torts, although the authors suggest that such a “pervasive” approach to legal ethics has value for legal education.<sup>369</sup> Rather, the third apprenticeship’s intentions precede and interpenetrate, or should precede and interpenetrate, in the sense that any tolerably complete and adequate account of the purposes, dispositions, ideals, ethics, and responsibilities of the legal profession—inculcation of which is the *telos* of the third apprenticeship—should include or at least provide the basis for an explanation and justification of the way(s) that law schools educate and form new members of the profession. In other words, if legal education is coherent and does not pursue conflicting aims, then it should be possible to articulate a rationale rooted in the purposes of the legal profession (as taught in the third apprenticeship) for studying, and studying in a particular way, contracts, torts, legal writing, oral argument, and the other subjects and skills comprised in the cognitive and practical apprenticeships. Thus, the intentions of the third apprenticeship should “precede and interpenetrate” the first two apprenticeships in the sense that, before the master/law professor in one of the first two apprenticeships steps into the classroom,

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367. *See id.* This is a “key” question not according to some independent measure but according to the authors’ own argument. The third apprenticeship is supposed to solve a fundamental problem in legal education that the authors themselves have identified, namely the problem posed by the apparent conflict between the goals of the first and second apprenticeships. *See supra* note 216. If the third apprenticeship does not and cannot solve this problem in an intelligible and persuasive manner, then legal education will remain incoherent, tugging the student in conflicting directions without an overarching, unifying rationale.

368. CARNEGIE REPORT, *supra* note 1, at 160. For the same point in almost identical words, see SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 253-54.

369. *See* CARNEGIE REPORT, *supra* note 1, at 151-52. *See* Grossman, *supra* note 214, at 172 (pervasive approach to legal ethics dates from early to mid-1960s). For a short discussion of the Carnegie Report’s comments on ethical education, *see supra* notes 298-99 and accompanying text.

she ought to be able to identify and, ideally, articulate a rationale for what and how she teaches. Moreover, that rationale should be rooted in the broader purposes and ideals of the legal profession and should explain how the information and skills the apprentice will learn in the classroom contribute to the apprentice's formation as a journeyman legal professional who shares or ultimately will share the profession's purposes and ideals. A master who cannot offer such a rationale, if challenged to do so, would have no good reason—i.e., no reason rooted in the purposes of the legal profession—for teaching the theoretical/analytical or practical materials that she teaches.<sup>370</sup>

The authors shed further light on the role of the third apprenticeship in unifying the first two when they describe what a legal education would look like without the third apprenticeship:

[t]o neglect formation in the larger public purposes for which the profession stands and their meaning for individual practitioners is to risk educating mere legal technicians for hire in the place of genuine professionals. Therefore, the goal of professional education cannot be analytical knowledge alone or, perhaps, even predominantly. Neither can it be analytical knowledge plus merely skillful performance.<sup>371</sup>

Instead, analytical knowledge and skillful performance find, or should find, their intellectual context and rationale—their significance—in the “defining purposes” of the legal profession.<sup>372</sup> If and to the extent that analytical

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370. To my knowledge, the authors do not offer any explanation of how the intentions of the third apprenticeship precede and interpenetrate the first and second apprenticeships, but the explanation offered here seems to be implicit in their account of the third apprenticeship. *See supra* Part III.B.2(c). The authors do comment that “[i]f the final aim of legal education is to foster the development of legal expertise and sound professional judgment, then educators’ awareness of the basic contours of the path from novice to expert, along with appropriate steps along this way, are very important.” *CARNEGIE REPORT, supra* note 1, at 116. This comment suggests that one of the objectives of the Carnegie Report is to make legal educators conscious of what they do and, at least to some degree, why they do it. *Id.* A unifying explanation of why legal educators do what they do is, I argue, one thing that the third apprenticeship should bestow on the first two.

371. *CARNEGIE REPORT, supra* note 1, at 160. Dean Cramton has pointed out that legal educators convey two common descriptions of the lawyer's role—the “hired gun” and the “social engineer.” Cramton, *supra* note 182, at 251. Both descriptions essentially treat lawyers as “legal technicians for hire,” while varying the identity of who does the hiring. Ironically, Professor Woodard argues that since the 1930s legal scholars themselves have become technicians and applied scientists, partly in reaction to the perceived abstractness of legal science as taught by the case method. *See* Woodard, *supra* note 200, at 718. If Woodard is correct, we may face the problem of scholar-technicians trying to train apprentice lawyers to be something other than lawyer-technicians. Woodard himself seems to support the evolution in our understanding of “the lawyer from a quasi-priestly figure into a social engineer.” *See* Woodward, *supra* note 200, at 733.

372. *CARNEGIE REPORT, supra* note 1, at 160.



knowledge and practical skill serve a unified, coherent, and defining set of professional purposes, the apprenticeships in which a student begins to acquire such knowledge and skill would not need to work at cross-purposes, legal education would not be incoherent, and the resulting journeyman lawyer would not be relegated to the role of technician-for-hire.<sup>373</sup> Thus, the third apprenticeship, which teaches the defining purposes of the profession, should, in doing so, provide a rationale for, and resolve the tensions and conflicts between, the first and second apprenticeships.<sup>374</sup> Or to put the same point in different terms, the third apprenticeship should explain, or at least provide the resources to explain, the place or role of the other two apprenticeships in the larger project of becoming a legal professional. In this way, the third apprenticeship “joins the first two apprenticeships” and makes them “more fully significant” to students and faculty, apprentices and masters.<sup>375</sup>

Before turning to a basic problem raised by this account of the relationship between the third apprenticeship and the first two, it is important to note that the account is, again, fundamentally teleological.<sup>376</sup> Each of the first two apprenticeships has a *telos*: “thinking like a lawyer” in the case of the cognitive apprenticeship; practical skill and professional judgment in the case of the practical apprenticeship.<sup>377</sup> These *teloi* could lead the apprentice who pursues both in different and potentially conflicting directions. The third apprenticeship, which inculcates the purposes of lawyering and the legal profession, should provide a kind of master or overarching *telos*, a *telos* that the other *teloi* can and should subserve. Thus, if the question were “to what end should I think like a lawyer?” or “what is the purpose of thinking like a lawyer?” the answer would be “the end or purpose of thinking like a lawyer is to perform the functions or services of a legal professional and thereby to pursue the defining purposes of the legal profession, which are . . . .” As the authors assert,

[t]his kind of teaching, which is sensitive to the breadth of substantive concerns and the precision of procedural thinking, keeps reminding students of the broader purpose and mission of the law. Without this grounding in the larger purpose of what they are

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373. *See id.*

374. *See, e.g., id.* at 14, 28.

375. *See supra* note 365 and accompanying text.

376. *See supra* Part III.A.

377. *See supra* Part III.B.2(a), III.B.2(b).

studying, the sheer challenge and satisfaction of achieving intellectual mastery can become a kind of end in itself.<sup>378</sup>

Thus, the *teloi* of legal education form a hierarchy in which the ends of the first two apprenticeships serve the end(s) of the third apprenticeship. As MacIntyre has observed, “[o]n the [Aristotelian] view human action, because it is to be explained teleologically, not only can, but must be, characterized with reference to the hierarchy of goods which provide the ends of human action.”<sup>379</sup> In the Carnegie Report, the hierarchy of goods places the goods or ends of the apprenticeship of identity and purpose above, and logically or conceptually prior to, the goods or ends of the cognitive and practical apprenticeships, which thus derive their place or role and their meaning in the larger project of legal education from the third apprenticeship. In this way, the *telos* of the third apprenticeship should “precede and interpenetrate” the *teloi* of the first two apprenticeships.<sup>380</sup> Indeed, one could argue that the Carnegie Report itself plays, or could play, a role in the third apprenticeship because the Report takes a first cut at articulating the rationales for the first two apprenticeships in light of the defining purposes of the legal profession.<sup>381</sup>

#### e. The Lacuna: No Purpose for Legal Profession

Unfortunately, at precisely this crucial point in the argument there is an important lacuna in the Carnegie Report. The authors fail to explain why they believe the legal profession has or, indeed, could have defining purposes.<sup>382</sup> And setting aside this thorny question, they also fail to explain

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378. CARNEGIE REPORT, *supra* note 1, at 144.

379. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 84. For a discussion of the significance of the hierarchy of goods for Aristotle, see BROADIE, ETHICS WITH ARISTOTLE, *supra* note 143, at 11-12.

380. CARNEGIE REPORT, *supra* note 1, at 160.

381. To my knowledge, the authors do not attempt to articulate the potentially important role or function of works such as the Carnegie Report itself in the third apprenticeship.

382. The authors’ reference to the “defining purposes” of the legal profession, *id.*, appears to rely on another teleological analysis or argument drawn from the Aristotelian tradition. Sarah Broadie outlines Aristotle’s account of how a craft or practice such as law can have its own purpose or aim:

[t]he *aiming* which is the central notion of the argument is not intending, seeking, or purposing in a psychological sense. Only human individuals can ‘aim’ in that sense, and the aim may vary depending on the motive. But Aristotle’s argument attaches aims and ends to those abstract entities crafts, activities, practices, projects. *They* cannot have motives, and the ‘aim of’ each is defined by the end whose achievement is the mark of *success* for that kind of craft, activity, etc. The status of health as the end of medicine is the same whatever one’s motive for engaging in the practice of medicine.

BROADIE, ETHICS WITH ARISTOTLE, *supra* note 143, at 16. Clearly, if one rejects the view that the legal profession or legal education can have an aim or a purpose above and beyond the aims and purposes of

what they believe the defining purposes of the legal profession are and why.<sup>383</sup> They do identify several services that the profession provides.<sup>384</sup> For example, they state that the “important service[]” that law provides is “to regulate social transactions and secure justice.”<sup>385</sup> They do not, however, explain how or in what sense lawyers regulate “social transactions” or what “justice” means and how lawyers might “secure” it.<sup>386</sup> In a related vein, the authors remark that the “apprenticeship of professional identity should encompass issues of both individual and social justice, and it includes the virtues of integrity, consideration, civility, and other aspects of professionalism.”<sup>387</sup> The authors do not explain, however, what they mean by “individual and social justice” or how those notions may be related to one another.<sup>388</sup> Also, as previously observed, the authors do not tell us why or how the particular virtues they identify should be considered “aspects of professionalism,” legal professionalism, or otherwise.<sup>389</sup>

Elsewhere in the Carnegie Report, the authors seem to offer a somewhat different account of the defining purpose(s) of the legal profession:

for a profession such as law, which is pledged to public service, a more encompassing center may be essential. That center is the development of responsibility, both for individual clients and for

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individual lawyers or teachers, then Aristotle’s position and that adopted by the authors will make little sense. *See id.* I expect to pursue this issue in a subsequent article.

383. *See* Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 *RUTGERS L. REV.* 1011, 1021 (2009) (“Despite its engagement with values and professional ethics, the *Carnegie Report* did not analyze the values or professional ethics of the profession itself.”). Leonard Long also has argued that the Carnegie Report fails to identify the purpose of law school. Leonard J. Long, *Resisting Anti-Intellectualism and Promoting Legal Literacy*, 34 *S. ILL. U. L. J.* 1, 13-16 (2009).

384. *See* *CARNEGIE REPORT*, *supra* note 1, at 21.

385. *Id.* It is not at all clear that an “important service” of the law is the same thing as a “defining purpose” of the legal profession.

386. *Id.* As will become clear in the following paragraphs of the text, I am not arguing that the authors have identified the wrong purposes for the legal profession but that they have catalogued altogether too many purposes and provided no arguments in support of the purposes that they identify. Thus, the difficult intellectual work remains to be done.

387. *Id.* at 132.

388. *See id.* The AALS has adopted a similar view, also without providing further explanation:

[t]he fact that a law professor’s income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced *obligation to pursue individual and social justice*.

ASSOC. OF AMERICAN LAW SCHOOLS, 2008 HANDBOOK 97 (2008) (emphasis added). This statement implies that “economic pressure” may inhibit a law professor’s students from pursuing individual and social justice when they represent “private clients,” a view that seems to reflect some ambivalence toward the for-pay lawyering that most law students will do after law school. *See id.*

389. *See supra* notes 295-97 and accompanying text.

the law and its values. This is the subject of the pedagogies of the apprenticeship of professional identity . . . .<sup>390</sup>

The authors do not explain, however, what “responsibility” for individual clients, the law, and the law’s values might mean. Nor do they explain what the law’s “values” might be, although for reasons discussed below,<sup>391</sup> their decision to refer to the law’s values as “values” may be revealing. Elaborating on a passage quoted above, perhaps they would contend that the law’s values are regulating social transactions and securing individual and social justice.<sup>392</sup> But without further explanation and argument, this clarification clarifies very little. Indeed, this clarification may point to a more fundamental problem. What should the lawyer do when her responsibility for her client conflicts with her responsibility for the law and for “securing justice”? The authors recognize the “apparent conflict”<sup>393</sup> or “tension”<sup>394</sup> between the role of “lawyer as zealous advocate for clients”<sup>395</sup> and lawyer as “social regulator[]” with “obligations to see to the proper functioning of the institutions of the law.”<sup>396</sup> They do not explain, however, whether or how this “conflict” or “tension” can be resolved.<sup>397</sup>

In what appears to be a third, unrelated attempt to state the “defining purposes” of the legal profession, the authors declare that

[l]awyer professionalism is still importantly defined with reference to ideals first announced by leaders of the bar in the early part of the twentieth century—ideals of independent service to the public, requiring and supporting counsel to clients that would also be independent of possible benefit to the attorney or law firm.<sup>398</sup>

It will come as no surprise that the authors fail to explain what they mean by “independent service to the public.”<sup>399</sup> Would a lawyer who serves on the local zoning board be performing independent service to the public? And does it matter *what* the lawyer does while serving on the Board—what positions she takes? Pro-development? Pro-historic conservation? Pro-

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390. CARNEGIE REPORT, *supra* note 1, at 125.

391. *See infra* notes 462-65 and accompanying text.

392. *See supra* note 385 and accompanying text.

393. CARNEGIE REPORT, *supra* note 1, at 82.

394. *Id.* at 83.

395. *Id.* at 82.

396. *Id.*

397. For further discussion of the significance of this tension between the roles of lawyer as zealous advocate and lawyer as social regulator, see *infra* notes 661-68 and accompanying text.

398. CARNEGIE REPORT, *supra* note 1, at 127.

399. *Id.*

affordable housing? Pro-homeowner autonomy? The notion of “independent public service” is compatible with a wide variety of substantive positions. Similarly, if independent service to the public means supporting clients without regard to possible benefits to attorney or firm, then a lawyer could serve the public by defending the Nazi Party’s desire to march in Skokie, Illinois, and by defending the efforts of some of Skokie’s citizens to stop the Nazi march.<sup>400</sup> The call for “independent” service to the public without benefit to self or firm also may reflect the authors’ belief that pro bono work provides a “vivid enactment of law’s professional identity.”<sup>401</sup> As discussed above, however, the authors do not explain why or how pro bono work performs such a lofty function.<sup>402</sup>

When the authors refer to “ideals first announced . . . in the early part of the twentieth century,” they may be pointing to a phenomenon they call civic professionalism.<sup>403</sup> As the authors state,

[t]hat is the challenge of professional preparation for the law: linking the interests of educators with the needs of practitioners and the members of the public the profession is pledged to serve—in other words, participating in civic professionalism. How well the challenge of linking these interests and needs is met is, in large part, determined by how clearly civic professionalism is understood[.]. The aim of this book is to contribute to that understanding.<sup>404</sup>

Unfortunately, the Carnegie Report does not contribute very much to an understanding of civic professionalism, and as a result, civic professionalism does not contribute very much to our understanding of the purpose(s) of the legal profession that should be taught to law students during the third apprenticeship. The authors clearly believe that “civic professionalism” has something to do with public service or service in the public interest.<sup>405</sup> In his earlier Carnegie Foundation study, *Work and Integrity*, which is cited without discussion in the passage quoted above, Sullivan describes civic professionalism as “the ideal of social

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400. For a very brief account of this legal battle, see *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

401. CARNEGIE REPORT, *supra* note 1, at 138; *see supra* note 322 and accompanying text.

402. *See supra* notes 323-29 and accompanying text.

403. CARNEGIE REPORT, *supra* note 1, at 127.

404. *Id.* at 4.

405. *Id.* at 196 (suggesting students need to be prepared for “active roles as civic professionals, contributing to the public direction of their areas of the law.”). Talcott Parsons observed that “the ideology of service . . . long distinguished the professions from the market-oriented business groups . . .” Talcott Parsons, *Professions*, 12 INT’L ENCYC. OF THE SOC. SCI. 536, 541 (David L. Sills ed., 1968).

reciprocity.”<sup>406</sup> “Social reciprocity” appears to mean reciprocity between a profession and the public. “The professions are publicly chartered to make it their primary concern to sustain . . . public goods. They are therefore in an important sense public occupations even when they work outside government or publicly supported institutions.”<sup>407</sup> According to Sullivan, the “tradition of civic professionalism . . . views the professional enterprise as humanly engaged practices [*sic*] generating values of great significance for a modern society.”<sup>408</sup> But exactly what public goods or values of great significance is it the purpose of the legal profession to generate? This is the hard question that neither Sullivan nor his co-authors answer with any clarity. Sullivan suggests that the legal profession is responsible for “such values as a functional legal system . . . .”<sup>409</sup> He also declares that “[p]rofessionalism became one of the pillars of the Progressive movement by positing, in the professional career, a design for living that promised to give individual occupational achievement moral meaning through responsible participation in a civic life.”<sup>410</sup> Unfortunately, Sullivan’s general statements about the good or value of a functional legal system and responsible participation in civic life contain no useful details and thus they provide no content with which to answer our question about the defining purpose(s) of the legal profession.

Sullivan seems to regard Louis D. Brandeis as a model of the civic professional.<sup>411</sup> According to Sullivan,

[i]n his celebration of the kind of practical judgment he saw as the lawyer’s best skill, Brandeis was echoing a venerable tradition that ultimately reached back to Cicero and Aristotle. . . . In Brandeis’s rendering, the aim of legal education and practice was to develop professionals expert in this capacity for practical judgment. Such professionals could be trusted to educate their clients and the public at large to see the ethical and civic dimensions of even routine legal matters.<sup>412</sup>

In Sullivan’s view, Brandeis believed that the lawyer must serve as a counselor, and “[a]s counselor, the lawyer was to inject the larger

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406. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 5.

407. *Id.*

408. *Id.* at 64-65.

409. *Id.* at 5.

410. *Id.* at 100.

411. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 101-05.

412. *Id.* at 105.

perspective of the public interest as it bore on the matter at hand.”<sup>413</sup> This description of Brandeis’s civic professionalism, assuming it is accurate,<sup>414</sup> boils down to a recommendation that lawyers incorporate an ethical, civic, and/or public-interest element into their legal advice and practice.<sup>415</sup> Assuming for argument’s sake that this is a wise and useful recommendation, it provides no insight into the content or substance of the ethical, civic, or public-interest element. Thus, Sullivan’s discussion of Brandeis’s civic professionalism provides little help in answering our basic question about the legal profession’s defining purposes.<sup>416</sup>

The authors offer what may be a final candidate for the *telos* of lawyering and the legal profession in the last paragraph of the Carnegie Report:

[t]he calling of legal educators is a high one: to prepare future professionals with enough understanding, skill, and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens’ loyalty; that is, to uphold the vital values of freedom with equity and extend these values into situations as yet unknown but continuous with the best aspirations of our past.<sup>417</sup>

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413. *Id.* at 104.

414. John Frank, who examined several difficult episodes in Justice Brandeis’s career that came up during his confirmation process, seems to depict a lawyer who worked hard to separate his private representations from his advocacy of public positions and not a lawyer who sought to push private clients toward results that supposedly were in the public interest. See generally John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 683-85, 702 (1965) [hereinafter Frank, *Brandeis*]. For Brandeis’s own views on lawyering in the public interest, which he vigorously supported, see generally LOUIS D. BRANDEIS, *The Opportunity in the Law, in BUSINESS – A PROFESSION* 313 (1914).

415. I intend no disrespect to Justice Brandeis or his remarkable legal career. I mean to suggest only that if Justice Brandeis’s career and views are to help us identify and justify the defining purposes of the legal profession, we will have to examine that career and those views more thoroughly than Sullivan does in *Work and Integrity*. In particular, we would need to reconsider Sullivan’s assertion that Brandeis believed an attorney should function not just as a lawyer for a private interest but a “lawyer for [a] situation.” SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 104. Brandeis apparently did once make a comment to that effect, a comment that John Frank—Sullivan’s source—referred to as “one of the most unfortunate phrases that [Brandeis] ever casually uttered.” Frank, *Brandeis*, *supra* note 414, at 702. As Frank observes, “[l]awyers are not retained by situations, and the adversary system assumes that they faithfully represent one interest at a time.” *Id.* For a defense of acting as a “lawyer for the situation,” see generally David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717-18 (1988). Luban contends that Brandeis advocated a “distinctively liberal public philosophy,” *id.* at 724, which Luban labels “progressive professionalism,” *id.* at 725. This suggests that Sullivan’s and Luban’s support for a Brandeis-style civic professionalism may reflect—or, perhaps, disguise—a liberal, progressive political agenda. *Id.*

416. I will return to the notion of civic professionalism in the discussion of the contractarian ethical framework in Part IV.B.

417. CARNEGIE REPORT, *supra* note 1, at 202.

Here the authors seem to suggest that the *telos* of lawyering and the legal profession is to “sustain the United States as a free society worthy of its citizens’ loyalty . . . .”<sup>418</sup> Needless to say, the authors do not tell us what they mean by a “free society,” or what characteristics might make some, but apparently not all, free societies worthy of a citizen’s loyalty. They also do not tell us how a system of law might “sustain” such a society, or how lawyers can or should “support” that system of law. They imply that sustaining a free society worthy of loyalty means “uphold[ing] the vital values of freedom with equity.”<sup>419</sup> It seems to follow that the free societies worthy of loyalty might be those that uphold equity along with freedom. Thus, the job of the lawyer apparently would be to support a legal system that sustains freedom and equity or equality in a manner consistent with U.S. traditions, or at least “the best aspirations of our past.”<sup>420</sup> Whatever might be the substantive merits of this suggested *telos* for lawyering and the legal profession, the authors make no effort to explain and defend it, and no effort to link it to the preceding 200-page critical discussion of legal education.

My point, of course, is not that there is anything wrong with civic professionalism or pro bono work or the various other purposes and virtues of the legal profession that the Carnegie Report and Professor Sullivan catalog. My point is simply that the Carnegie Report provides no explanation of how or why civic professionalism, pro bono work, independent public service, responsibility for clients and the law, regulating social transactions and securing justice, maintaining a functional legal system, or supporting the United States as a free society serve as defining purposes for the legal profession. And the Report provides no explanation of how these various purposes might relate to one another. The authors’ silence on these key points is important because they argue that the defining purposes of the legal profession should provide both the core of what is taught and learned during the third apprenticeship and the unifying rationale for the first two apprenticeships.<sup>421</sup> If the legal profession has a coherent set of defining purposes, legal education in pursuit of those purposes ultimately is, or at least could be, coherent. If, however, we lack a coherent, persuasive account of the defining purposes of the legal profession, then we will not have a coherent subject matter for the third apprenticeship and we will not have a unifying rationale or, perhaps, any rationale at all aside from rank pragmatism or self-interest for the first two apprenticeships. We will

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418. *Id.*

419. *Id.*

420. *Id.*

421. *See supra* Part III.B.2(d).



be forced back on the model of lawyer as technician—a hired gun for some kind of client.<sup>422</sup>

This point can be restated using the terminology of ungrounded and grounded teleological frameworks. As described by the authors, the cognitive and practical apprenticeships both appear to be built upon ungrounded teleological frameworks.<sup>423</sup> Their *teloi* are simply given.<sup>424</sup> Unfortunately, their *teloi* appear to be in conflict. The third apprenticeship is supposed to provide the coherent, unifying rationale for the first two, in effect converting their teleological frameworks from ungrounded to grounded by providing the underlying justification for their *teloi*.<sup>425</sup> But it turns out that the third apprenticeship itself relies on an ungrounded teleological framework, because the authors ultimately fail to provide any justification, any rationale or validation, for the various purposes or *teloi* that they seem to identify as defining purposes of the legal profession. Insofar as the teleological framework of the third apprenticeship remains ungrounded, the frameworks of the first two also must remain ungrounded and, by the authors' own account, incoherent. As discussed in Part IV, the second ethical framework in the Carnegie Report takes this line of argument a step further by providing grounds for arguing that the teleological framework of the third apprenticeship must remain ungrounded.<sup>426</sup> If true, this means that the legal profession does not and cannot have a coherent set of rationally defensible, non-arbitrary defining purposes that provide a rationale for the way we educate lawyers.

It is important to acknowledge at this stage of the argument that the problems associated with providing a justification for the *telos* of the third apprenticeship—the problems associated with converting the teleological framework from ungrounded to grounded—are not unique to the field of legal education.<sup>427</sup> As MacIntyre has pointed out, teleological explanatory schemes have been under assault for several centuries.<sup>428</sup> In 1623, Francis Bacon wrote “[i]nquiry into final causes is sterile, and, like a virgin consecrated to God, produces nothing.”<sup>429</sup> In 1651, Thomas Hobbes announced, albeit somewhat less colorfully, that “there is no such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest Good,) as is spoken

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422. See *supra* note 371 and accompanying text.

423. See *supra* Parts III.B.2(a), (b).

424. See *supra* Parts III.B.2(a), (b).

425. See *supra* Parts III.B.2(a), (b).

426. See *infra* Part IV.

427. See MACINTYRE, AFTER VIRTUE, *supra* note 145, at 53-55.

428. *Id.*

429. WOODFIELD, *supra* note 116, at 3 (quoting Francis Bacon's 1623 work *De Augmentis Scientiarum*).

of in the Books of the old Morall Philosophers.”<sup>430</sup> Living at roughly the same time as Hobbes,

it is [Blaise] Pascal who recognizes that . . . [r]eason does not comprehend essences or transitions from potentiality to act; these concepts belong to the despised conceptual scheme of scholasticism. Hence anti-Aristotelian science sets strict boundaries to the powers of reason. Reason is calculative; it can assess truths of fact and mathematical relations but nothing more. In the realm of practice therefore it can speak only of means. About ends it must be silent. . . .

Pascal’s striking anticipations of Hume . . . point to the way in which this concept of reason retained its power. Even Kant retains its negative characteristics; reason for him, as much as for Hume, discerns no essential natures and no teleological features in the objective universe available for study by physics. Thus their disagreements on human nature coexist with striking and important agreements and what is true of them is true also of Diderot, of Smith and of Kierkegaard.<sup>431</sup>

MacIntyre summarizes the result: “the joint effect of the secular rejection of both Protestant and Catholic theology and the scientific and philosophical rejection of Aristotelianism was to eliminate any notion of man-as-he-could-be-if-he-realized-his-*telos*.”<sup>432</sup> The breadth and thoroughness of these early modern and subsequent assaults on teleological explanation suggest

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430. THOMAS HOBBS, *LEVIATHAN* 160 (C. B. MacPherson ed., 1968). In case there is any doubt that Hobbes rejected Aristotelian thought, one also might cite the following: “And I beleieve that scarce any thing can be more absurdly said in naturall Philosophy, than that which now is called *Aristotles Metaphysiques*; nor more repugnant to Government, than much of that hee hath said in his *Politiques*; nor more ignorantly, than a great part of his *Ethiques*.” *Id.* at 687.

431. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 54. In the same era as Pascal (1623-1662), René Descartes (1596-1650) and Baruch Spinoza (1632-1647) also rejected teleological explanation. See ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* 124, 156, 188 (1964). According to Lovejoy, Descartes was “the most influential philosopher of the age” immediately prior to the Enlightenment. *Id.* at 123. For a careful summary of Immanuel Kant’s expulsion of teleological explanation from the realms of scientific and metaphysical explanation, see S. KÖRNER, *KANT* 196-211 (1955). See also RICHARD WOLIN, *HEIDEGGER’S CHILDREN: HANNAH ARENDT, KARL LÖWITH, HANS JONAS & HERBERT MARCUSE* 111-13 (2001) (describing the intellectual movement from Descartes to Darwin by which teleological explanations disappeared from science).

432. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 54. MacIntyre himself, at least in his earlier work, rejects as unsupportable one premise of Aristotle’s teleological framework, a premise MacIntyre calls “Aristotle’s metaphysical biology.” *Id.* at 163. Andrew Woodfield proposes a relatively benign explanation for the disappearance from natural science of Aristotle’s teleological approach: “The main reason why Aristotle’s doctrine faded out is simply that the new men of science stopped asking teleological questions. To them, final causes were scientifically irrelevant.” WOODFIELD, *supra* note 116, at 8.

quite strongly that the authors of the Carnegie Report walked or stumbled into a much larger debate when they placed a teleological framework at the core of their account of legal education.<sup>433</sup> If human beings have no essential ends or *teloi*, it is not clear how human beings as lawyers could have such essential ends or *teloi*. It would be clear, however, why the authors might avoid attempting to identify and defend such *teloi* for human beings or for the subset of human beings who are lawyers: it is hard to identify and defend something that does not exist. And, as discussed in Part V.C.2, *infra*, any search for an adequate account of and justification for the *telos* or *teloi* of legal education—any attempt to convert an ungrounded teleological framework into a grounded one—will require us to engage in a more fundamental philosophical discussion of the purposes of human conduct and human life and the subordinate purposes of lawyering and the legal profession.<sup>434</sup>

#### IV. TWO COMPETING ETHICAL FRAMEWORKS: EMOTIVISM AND CONTRACTARIANISM

This Part of the Article carries the argument two steps further. Through a close reading of key passages in the Carnegie Report, the first section shows that there is a second, emotivist ethical framework operating at cross-purposes with the teleological framework that, as shown in Part III, forms the core of the authors' account of legal education. If the emotivist account of ethical life is correct, then we must reject the teleological framework and the account of legal education built on that framework. The second section of this Part teases out and elaborates a third, contractarian framework that also seems to lurk in the margins of the Carnegie Report. This contractarian framework is interesting and potentially important because it appears to reflect the authors' somewhat half-hearted attempt to provide an ethical grounding, basis, or purpose for the legal profession, a grounding, basis, or purpose required but not provided by the teleological framework.

##### A. *The Shadow Ethical Framework: Emotivism*

The authors of the Carnegie Report at various points discuss a so-called “shadow” pedagogy.<sup>435</sup> They describe a shadow pedagogy as one that “is

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433. For a discussion of several recent objections to teleological forms of explanation, see SORABJI, *supra* note 110, at 163-66, 168-74.

434. *See infra* Part V.C.2.

435. CARNEGIE REPORT, *supra* note 1, at 24, 56-59.

not, or is only weakly engaged.”<sup>436</sup> A shadow pedagogy is communicated without explicit discussion along with the primary pedagogies, such as the case dialogue, that dominate legal education.<sup>437</sup> All but unrecognized in the Carnegie Report, and certainly only weakly engaged, is a shadow ethical theory or framework that seems to haunt the teleological framework discussed in Part III and, perhaps, to explain why the teleological framework remains and must remain ungrounded. I will refer to this shadow ethical framework as “emotivist.” Alasdair MacIntyre defines “emotivism” as “the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.”<sup>438</sup> As MacIntyre elaborates the point, “what emotivism asserts is in central part that there are and can be *no* valid rational justification[s] for any claims that objective and impersonal moral standards exist and hence that there are no such standards.”<sup>439</sup> According to the emotivist,

[f]actual judgments are true or false; and in the realm of fact there are rational criteria by means of which we may secure agreement as to what is true and what is false. But moral judgments, being expressions of attitude or feeling, are neither true nor false; and agreement in moral judgment is not to be secured by any rational method, for there are none. It is to be secured, if at all, by producing certain non-rational effects on the emotions or attitudes of those who disagree with one.<sup>440</sup>

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436. *Id.* at 24. The authors do not explain whether the shadow pedagogy lurks in the shadows of the primary pedagogy or whether the shadow pedagogy shadows the primary pedagogy in the sense of following it around, or both. *Id.*

437. *See id.* 56-59. According to the authors, two unspoken lessons shadow the case-dialogue pedagogy as it teaches a student to think like a lawyer. CARNEGIE REPORT, *supra* note 1, at 24, 56-59. The first is that thinking like a lawyer can be learned in a classroom and therefore does not require the presence of actual clients. *Id.* at 57. Thus, the case dialogue tacitly teaches students to view lawyers as “distanced planners or observers [rather] than as interacting participants in legal actions.” *Id.* The second unspoken lesson is that thinking like a lawyer requires students to disregard “their sense of justice and fairness,” *id.*, because “matters of justice are secondary to formal correctness,” *id.* at 58.

438. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 11-12. For further discussion of emotivism, see Mark F. Kightlinger, *Nihilism with a Happy Ending? The Interstate Commerce Commission and the Emergence of the Post-Enlightenment Paradigm*, 113 PENN. ST. L. REV. 113, 120-23 (2008) [hereinafter Kightlinger, *Nihilism with a Happy Ending?*]. For a classic statement of the emotivist position, see ALFRED JULES AYER, LANGUAGE, TRUTH & LOGIC 102-20 (Dover 1952).

439. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 19.

440. *Id.* at 12.

As Allan Bloom has noted, this position entails a form of nihilism, assuming nihilism has more than one form.<sup>441</sup> According to Bloom, the heart of this position is the claim that

[v]alues are not discovered by reason, and it is fruitless to seek them, to find the truth or the good life. . . . This alleged fact was announced by Nietzsche just over a century ago when he said, ‘God is dead.’ Good and evil now for the first time appeared as values, of which there have been a thousand and one, none rationally or objectively preferable to any other.<sup>442</sup>

Thus, one might say that for the emotivist, all values are created equal and they are created by the preferences, attitudes, and feelings of individuals. Moreover, for the emotivist, any effort to construct a critique of someone’s values will provoke suspicion and resistance because values are understood to be personal, subjective, relative, and, therefore, not open to rational criticism.<sup>443</sup>

Precisely this emotivist position seems to shadow the central teleological framework of the Carnegie Report. I will not try to present all of the copious evidence for this claim, but I will discuss some key passages and patterns in the text. In one such passage, the authors state:

[t]he values that lie at the heart of the apprenticeship of professionalism and purpose . . . include conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession. However, in legal education today, most aspects of the ethical-social apprenticeship are . . . contested as to their value and appropriateness.<sup>444</sup>

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441. See BLOOM, *supra* note 15, at 143.

442. See *id.* For Nietzsche’s famous discussion of the death of God, see FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 103, 124 (Walter Kaufmann ed. & trans., 1968) [hereinafter NIETZSCHE, ZARATHUSTRA]. See also FRIEDRICH NIETZSCHE, THE GAY SCIENCE 181 (Walter Kaufmann ed. & trans., 1974) (“God is dead. God remains dead. And we have killed him.”). As MacIntyre says, “it was Nietzsche’s historic achievement to understand more clearly than any other philosopher . . . not only that what purported to be appeals to objectivity were in fact expressions of subjective will, but also the nature of the problems that this posed for moral philosophy.” MACINTYRE, AFTER VIRTUE, *supra* note 145, at 113. For MacIntyre’s views on the significance of Nietzsche, see, e.g., *id.* at 113-20. As MacIntyre suggests, Nietzsche found the sources of moral judgment in acts of will while the emotivist finds the sources of moral judgment in preferences, attitudes, and feelings. See *id.* For the purposes of this Article, however, the key point is that Nietzsche and the emotivists agree on the purely personal, subjective, and non-rational roots of moral judgments.

443. See Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 122.

444. CARNEGIE REPORT, *supra* note 1, at 132.

If one restates this point in the active voice, the authors apparently wish to remind us that some legal educators contest the value of “most aspects” of the third apprenticeship and doubt its appropriateness. The authors of the Carnegie Report have one set of values; those who contest “aspects” of the third apprenticeship have other values, or value other things. The question that shadows the Carnegie Report’s argument—unstated and unanswered—is: can this sort of conflict between or among values be resolved or adjudicated rationally and objectively in a way that somehow would oblige a person to accept as correct what the authors of the Carnegie Report value over what unnamed others in legal education incorrectly happen to value? If values are “contested,” can one side win the contest through rational argument? Or does “once contested” mean “always and irremediably contested”?

The authors recognize that for many people in the legal academy today, the answer to this last fundamental question would be “yes”: “in the minds of many faculty, ethical and social values are subjective and indeterminate,” and thus endlessly contestable.<sup>445</sup> This means that “many faculty”—i.e., many of the masters who train apprentice lawyers—are, in effect, emotivists in MacIntyre’s sense.<sup>446</sup> As emotivists, they would reject the view that there are objective, rationally defensible and justifiable moral truths.<sup>447</sup> They, therefore, would reject the suggestion that the values reflected or advocated, albeit somewhat half-heartedly, in the Carnegie Report, or any other set of values that one could characterize as “professional,” are or could be intrinsically preferable to any other set of values. And *a fortiori*, these emotivist faculty members would—or at least should, if they wish to be intellectually consistent—deny that any set of “professional” values can or should be taught to law students as objective truths. One could of course

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445. *Id.* at 132-33. It is perhaps worth noting that values could be subjective without being indeterminate. In my experience, people who assert that values are subjective often have very determinate values. For such a person, her values might be indeterminate only in the limited sense that no one else could validly determine that her values are somehow false or wrong. In such a situation, indeterminacy of values would function as a shield against criticism but not as a source of uncertainty or self-doubt. Robert Summers referred to this as “[t]he possessory theory of truth—‘my values are right because I hold them.’” Cramton, *supra* note 182, at 254 n.20 and accompanying text (quoting R. S. Summers, *Mimeographed Materials on Jurisprudence and the Legal Process* 4-5 (Cornell Law School (1977))).

446. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 22. Many of these faculty members may not be prepared to admit that they are emotivists. As MacIntyre observes, “to a large degree people now think, talk and act *as if* emotivism were true, no matter what their avowed theoretical standpoint may be. Emotivism has become embodied in our culture.” *Id.*

447. Dean Cramton has characterized this rejection of objective moral truth as part of the “ordinary religion” that law teachers convey to students in the classroom. See Cramton, *supra* note 182, at 249-50 (“Since it is apparent that people differ in the values they hold and that there is no rational way to resolve these differences, a practical person will not waste time worrying about unanswerable questions.”).

teach values as values—one set of values among many. But to teach one set of allegedly professional values as somehow true or valid cannot be justified, at least on emotivist grounds.<sup>448</sup>

As the authors recognize, some emotivists carry the critique one step further by questioning the motives of those who wish to teach one or another set of values to law students: “[m]any faculty who doubt the value of education for professional responsibility in law schools equate efforts to support students’ ethical development with inculcation, which they see as illegitimate and ineffective. This is further complicated by their belief that some of their colleagues are pushing ideological agendas.”<sup>449</sup> In other words, many emotivists would argue that anyone who pretends to teach ethics is actually teaching her own values, i.e., her subjective preferences, attitudes, and feelings. Therefore, anyone who teaches ethics must have a personal agenda, perhaps political or religious, that she wishes to impose on her students.<sup>450</sup> Indeed, according to the authors, “[t]h[e] perception that it is indoctrination even to ask students to articulate their own normative positions was surprisingly prevalent on the campuses we visited.”<sup>451</sup> The authors do not explain why they find the prevalence of this “perception” surprising.<sup>452</sup> It is, after all, an obvious corollary of the view that questioning and criticizing another person’s values is illegitimate because all values ultimately reflect personal preferences. Indeed, it would be surprising if many self-conscious and self-consistent emotivist law professors were not somewhat reticent to question a law student about her values, since such professors probably believe there can be no rational, impersonal, non-subjective basis for calling a student’s values into question and many such professors apparently also believe that any efforts to teach values likely stem from questionable ulterior motives.

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448. One could, of course, justify teaching a particular set of professional values on purely instrumental grounds: espouse and act according to these values or you will lose your license and, perhaps, go to jail. This sounds, however, suspiciously like the sort of instrumental, self-interested approach to rule-based legal ethics that the authors wish to reject. See *supra* notes 298-305 and accompanying text. For further discussion of the close links between emotivism and instrumentalism, see *infra* Part V.C.6.

449. CARNEGIE REPORT, *supra* note 1, at 135. See Cramton, *supra* note 182, at 256 (“The law teacher typically avoids explicit discussion of values in order to avoid ‘preaching’ or ‘indoctrination.’”).

450. As Allan Bloom has argued, “[s]ince values are not rational and not grounded in the natures of those subject to them, they must be imposed. They must defeat opposing values. Rational persuasion cannot make them believed, so struggle is necessary.” BLOOM, *supra* note 15, at 201. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 12 (agreement on moral questions can be achieved, “if at all, by producing certain non-rational effects on the emotions or attitudes of those who disagree with one.”).

451. CARNEGIE REPORT, *supra* note 1, at 136.

452. *Id.* The authors’ rhetorical choice of the term “perception” seems subtly to denigrate the emotivist position. At the same time, however, it seems to adopt or at least to presuppose the fundamental emotivist contention that evaluative judgments are merely matters of subjective, personal perception rather than objective, impersonal, rationally ascertainable truth.

Perhaps in order to deflect attention from the fundamental challenge posed by the emotivist framework, the authors try to shift the discussion from the question of whether it is *proper* to teach values to the question of whether it is *possible* to teach values:

[i]n contrast to this kind of skepticism on the part of some faculty and students about the effectiveness and legitimacy of efforts to foster ethical development in law school, the legal profession, as represented by the American Bar Association, has acknowledged both the potential of law schools to contribute to professional responsibility and ethics and the importance of these educational goals.<sup>453</sup>

By invoking the authority of the ABA to dispel or disparage the concerns raised by the emotivists about the propriety of teaching values, the authors tacitly seem to concede that they do not have a rationally persuasive response to those concerns.<sup>454</sup> Instead, they focus on whether in fact law schools have the “potential” to “contribute to professional responsibility and ethics,” i.e., whether law schools can in fact teach values.<sup>455</sup>

A key factor mediating the relationship between individuals’ ideals and their actual conduct is their sense of moral identity—the moral values, goals, and feelings that are central to their sense of who they are. Like moral judgment, moral identity is not established once and for all in childhood. It can be transformed quite dramatically in adulthood when individuals encounter conditions that are conducive to further growth. A number of studies have shown that moral identity and ethical commitment can change quite dramatically well into adulthood . . . .<sup>456</sup>

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453. *Id.* The authors clearly are correct about the general position of the ABA. See, e.g., MACCRATE REPORT, *supra* note 255, at 140-41. Whether the legal profession actually is “represented” by the ABA is, perhaps, an open question.

454. See CARNEGIE REPORT, *supra* note 1, at 136. The authors’ “argument” here is similar to the one that a child’s mother might make when the child asks why she should do what her father told her to do. *Id.* The mother might reply “because he’s your father.” It is worth noting that by wielding the authority of the ABA to stave off criticism instead of offering a rationally persuasive argument to support their position, the authors seem to illustrate the forensic approach that Bloom and MacIntyre ascribe to the emotivist, i.e., the authors attempt to override the values and views of people who may disagree with them and impose their own values and views by invoking the power or dominant position of the ABA. See *supra* note 450.

455. See CARNEGIE REPORT, *supra* note 1, at 136.

456. *Id.* at 134-35. It is noteworthy that in the final two sentences of this quotation, the authors appear to equate “change” of “moral identity and ethical commitment” with moral or ethical “growth.” The emotivist could, of course, concede that a person’s ethical commitments may change without con-



If “moral identity and ethical commitment can change,” then surely it must be possible for law school to cause or promote such change.<sup>457</sup> And the evidence appears to support this conclusion:

Overall, . . . the research makes quite clear that higher education can promote the development of more mature moral thinking, that specially designed courses in professional responsibility and legal ethics do support that development, but that unless they make an explicit effort to do so, law schools do not contribute to greater sophistication in the moral judgment of most students.<sup>458</sup>

The problem with this argument should be obvious: it begs the key question raised by emotivism. The emotivist can and probably would concede that a person’s values can change over time and that outside influences, including professional training, can change those values. Indeed, many emotivist law professors would not be so concerned about “indoctrination” if they did not already believe that a law professor could alter a law student’s values through the educational process. The hard question posed by the emotivist—the question that shadows the entire discussion of professional purposes or values and thus shadows the third apprenticeship—is whether in fact there is or could be any justification for teaching a particular set of values, given that—by hypothesis—all values ultimately reflect no more than the personal preferences, attitudes, and feelings of their holders.

The authors of the Carnegie Report often describe their own views in terms that appear to reflect the emotivist framework. According to the authors, individuals have a “sense of moral identity—the moral values, goals, and feelings that are central to their sense of who they are.”<sup>459</sup> The authors appear to emphasize *the individual’s* values, *the individual’s* goals and *the individual’s* feelings, or at least that subset of those feelings that *the individual* would characterize as “moral,” perhaps in contradistinction to her aesthetic values, goals, and feelings. This emphasis on *the individual’s*

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ceding that such change reflects some kind of “growth” to a demonstrably superior ethical stance or outlook.

457. *See id.*

458. *Id.* at 134. Again, the authors appear to equate change with growth or improvement by smuggling in the assertion that the student’s newly adopted—or imposed—values and ethical outlook are or may be more “mature” or “sophisticated” than the values and outlook that the student held before ethical education. As previously noted, see *supra* note 456, this suggestion that change, or some form of change, reflects improvement—maturation and greater sophistication—ignores the fundamental challenge posed by the emotivist claim that all values are created equal. The claim that some value judgments are more mature or sophisticated than others is itself value laden. The consistent emotivist could acknowledge only that the student’s new values and outlook are different, but not that they are more mature, sophisticated, or in any sense better.

459. CARNEGIE REPORT, *supra* note 1, at 134.

moral values, goals, and feelings appears to reflect, or at least jibe with, the emotivist view that “all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling,” because preferences, attitudes, and feelings are subjective states of individuals.<sup>460</sup> As if to underline the point that individual subjectivity is what counts in their moral analysis, the authors focus not on a person’s moral identity per se but on a person’s “sense of moral identity.”<sup>461</sup> My identity in fact might be that of a Thomist or a Kantian or a Hedonist, based on what I say and do. But my “sense” of my identity seems to be entirely subjective, emphasizing my impressions or feelings about my Thomism, my Kantianism, or my Hedonism. Indeed, my “sense” of my moral identity could vary dramatically from my actual moral identity. I could feel that I am a Kantian but in fact (i.e., in word and deed) be a Thomist or a Hedonist. An emotivist should welcome the authors’ emphasis on the individual’s subjective “sense of moral identity” because that emphasis allows the authors to avoid a potential dispute with emotivism over whether the moral judgments and beliefs comprising the individual’s actual moral identity could and should be objectively valid and true rather than silly, false, or even pernicious.

If we look closely at the moral vocabulary of the Carnegie Report, we see that the authors repeatedly use the terms “value” and “values” to characterize moral or ethical beliefs or positions.<sup>462</sup> Allan Bloom has argued that this use of the terms “value” and “values” emerged when Friedrich Nietzsche, Max Weber, and others rejected the view that reason could resolve disputes about moral judgments and beliefs.<sup>463</sup> “The term ‘value,’” observes Bloom, “mean[s] the radical subjectivity of all belief about good and evil . . . .”<sup>464</sup> One could say that the reduction of moral truths to personal values is a central tenet of emotivism. As if illustrating Bloom’s point, the authors of the Carnegie Report suggest that students, as part of the third apprenticeship, should have “experience with people who exemplify distasteful values.”<sup>465</sup> This statement implies that, for the

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460. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12; *see supra* note 438 and accompanying text.

461. CARNEGIE REPORT, *supra* note 1, at 134.

462. *See id.* at 7, 24, 28, 81, 132, 134, 194, 196.

463. BLOOM, *supra* note 15, at 194-217. Weber famously declared that “ultimate” problems of value lie beyond the “limits of science.” *See* MAX WEBER, *Science As A Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 151 (H. H. Gerth & C. Wright Mills eds. and trans., 1946). For a discussion of Weber’s indebtedness to Nietzsche, *see* Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 126.

464. BLOOM, *supra* note 15, at 142.

465. CARNEGIE REPORT, *supra* note 1, at 157.

authors, some values are tasteful and others distasteful, but all judgments about values ultimately must be matters of taste. And of course, *de gustibus non est disputandum*, there is no disputing about taste.<sup>466</sup> Had the authors instead observed that students should have experience with people who exemplify false, invalid, or even unacceptable moral beliefs, the authors at least implicitly would have placed themselves at odds with emotivism.

The authors might respond that their repeated use of the terms “value” and “values” is not intended to prejudge the outcome of a debate about whether one can weigh moral or ethical beliefs through a process of objective, rational debate and find such beliefs adequate or inadequate, valid or invalid, rationally justified or not. Rather, their use of the terms “value” and “values” reflects the undeniable fact that different people have different moral beliefs.<sup>467</sup> One person thinks abortion is a form of murder and thus immoral. Another does not. One person thinks that the death penalty is murder and thus immoral. Another does not. The terms “value” and “values” give us a language in which to describe these moral disagreements. We could say that one person “values” the life of the person on death row as highly as the life of a person walking down the street and thus believes that any intentional taking of that life would be murder. Another person might not value the life of a person on death row in the same way. This person’s values differ from that person’s values. The authors themselves at one point contrast “individualistic values” such as financial success with other values such as “social significance” or “social purpose and meaning.”<sup>468</sup> By referring to these competing moral positions as “values,” the authors might say, they do not intend to prejudge the question of whether one position might be true, valid, or rationally defensible and the other not. They simply describe a disagreement.

This response has merit. The authors do not commit themselves irrevocably to an emotivist position simply by using the terms “value” and “values” to characterize moral and ethical positions or beliefs. Nevertheless, the emotivist understanding of the terms “value” and “values” does apparently underlie the views of the “many faculty” who, according to the authors themselves, believe that “ethical and social values are subjective and indeterminate . . . .”<sup>469</sup> Moreover, if the authors concede—or insist—that their use of the terms “value” and “values” is purely descriptive, then they also must admit that the statement “X values A” describes a state of affairs about X but it does not in and of itself give Y a reason to value A.

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466. *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434, 1438 (S.D.N.Y. 1985).

467. *CARNEGIE REPORT*, *supra* note 1, at 150.

468. *Id.*

469. *Id.* at 133.

Before Y will value A, Y needs either a reason to value what X values or an independent reason to value A. If the authors want the reader to value what the authors value in the field of legal education, the authors owe the reader a reasoned argument for adopting the particular values that the authors prefer. The authors do not provide such a reasoned argument or an account of how one might provide such an argument.<sup>470</sup> And again, it should be noted that according to the authors, “many faculty”—the emotivists—apparently contend that such a reasoned argument is not possible precisely because values are subjective and indeterminate.<sup>471</sup> Thus, the authors may be able to parry my suggestion that their repeated use of the terms “value” and “values” betrays a closet emotivism, but they can do so only at the cost of recognizing that their account of values is purely descriptive and therefore of no persuasive force to someone who seeks a sufficient reason, or even a good reason, to adopt the authors’ values.<sup>472</sup> As Bloom noted, words such as “values,” whether used by the emotivists or the authors, “are not reasons, nor were they intended to be reasons. All to the contrary, they were meant to show that our deep human need to know what we are doing and to be good cannot be satisfied.”<sup>473</sup>

This discussion of emotivism has potentially dire implications for the central teleological framework of the Carnegie Report. If the emotivist is correct that all moral judgments reflect nothing more than personal preferences, attitudes, and feelings, then any set of professional values and purposes taught to law students during the third apprenticeship also ultimately will reflect nothing but someone’s personal preferences, attitudes, and feelings.<sup>474</sup> As I observed in an earlier discussion of emotivism,

[o]nce one rejects the view that there is a telos or end that we all share qua human beings, a telos or end about which we can make factual claims potentially subject to rational public debate and resolution, it appears to follow that all accounts of the human end are actually accounts of private ends and desires pursued by particular human beings or groups.<sup>475</sup>

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470. *See generally id.*

471. *Id.* at 133.

472. *See supra* notes 448-501 and accompanying text for use of the word value and the description given.

473. BLOOM, *supra* note 15, at 238.

474. *See supra* notes 438-43 and accompanying text.

475. Kightlinger, *The Gathering Twilight?*, *supra* note 145, at 359.

This could explain why the authors become so vague when they allude to *the* purpose(s) of the legal profession that should form the core of what is taught in the third, ethical-social apprenticeship.<sup>476</sup> For an emotivist, any claim about *the* purpose(s) of the profession will conceal or camouflage an assertion of the preferences, attitudes, and feelings of a particular person or group. The third apprenticeship cannot have a moral or ethical core because morality and ethics are matters of subjective personal preference. There simply is no moral or ethical core to be had—for legal education, for the legal profession, or for any other area of life. Moreover, all teleological ethical accounts of legal education must ultimately be ungrounded teleological accounts because there can be no persuasive justification for the *telos* or *teloi* for human activities such as legal education. Any such *telos* or alleged *telos* will reflect nothing more than some person's or group's non-rational preferences, feelings, and attitudes. Thus, emotivism appears to provide both an account of moral judgments and an account of where and why other accounts such as the teleological framework should fail. To avoid emotivism in the context of legal education, one would need a rationally persuasive account of the foundation or basis for asserting that there is a coherent, unifying purpose or *telos* for the legal profession, a purpose or *telos* that can be taught to law students.<sup>477</sup> As discussed in Part IV.B, *infra*, the authors provide hints about such a foundation or basis in the notion of a contract between society and the legal profession.<sup>478</sup>

Before turning to the authors' discussion of social contracts, however, it is important to point out that the emotivist framework is not above criticism. As Alasdair MacIntyre has shown, emotivism in its endemic modern form arose from the failure of moral theories developed during and after the Enlightenment to offer an adequate explanation of why human beings should obey moral precepts.<sup>479</sup> A wide range of very clever people—*e.g.*, Denis Diderot, David Hume, Immanuel Kant, Adam Smith, Jeremy Bentham, and John Stuart Mill—attempted but failed to solve this fundamental problem.<sup>480</sup> Emotivism emerged from this failure in part because emotivism purports to explain why the problem cannot be solved. There is no rational justification for obeying moral precepts or judgments because moral precepts and judgments reflect nothing more than personal preference, attitude, and feeling. There is, in other words, no further or

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476. See *supra* notes 383-402 and accompanying text.

477. For further discussion of this point, see *infra* Part V.C.6(a).

478. See *infra* note 489 and accompanying text.

479. See Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 119-21.

480. MACINTYRE, *AFTER VIRTUE*, *supra* note 145 at 40-50 (reviewing the work of Diderot, Hume, Kant, and Smith), 62-64 (appraising Bentham and Mill).

additional theoretical justification that philosophers might discover for obeying moral judgments and precepts.

As noted above, Friedrich Nietzsche was perhaps the first thinker to recognize and come to grips with the emotivist implications of the failure of Enlightenment moral theories.<sup>481</sup> Allan Bloom observed that “[f]or Nietzsche this was an unparalleled catastrophe; it meant the decomposition of culture and the loss of human aspiration. . . . In short, Nietzsche with the utmost gravity told modern man that he was free-falling in the abyss of nihilism.”<sup>482</sup> If, as Nietzsche teaches, nihilism means or entails that “everything is permitted,” then emotivism implies a moral anarchy in which the judgments of Mother Theresa, Mohandas Gandhi, and Nelson Mandela have no more weight or validity than those of the mythical Procrustes and the very non-mythical Joseph Stalin, Adolph Hitler, and Pol Pot.<sup>483</sup> Many of us will find troubling a moral theory that cannot provide us with good reasons to reject the view that it is okay to exterminate Kulaks, Jews, and/or recalcitrant Cambodians.<sup>484</sup> Unfortunately, by showing that emotivism places the moral judgments and beliefs of Nelson Mandela on the same level or footing as those of Adolph Hitler, we do not disprove emotivism or stave off the nihilism about which Nietzsche warned. The emotivist would say that we succeed only in showing that some of us find some of emotivism’s implications (to use the authors’ term) “distasteful.”<sup>485</sup> As discussed in Part V.C.6, it will be necessary to develop a more robust response to emotivism if we wish to provide the Carnegie Report’s analysis and recommendations with a secure intellectual grounding.<sup>486</sup>

### *B. A Half-Hearted Response? The Contractarian Framework*

If the teleological framework provides the primary organizing structure for the account of legal education in the Carnegie Report, and the emotivist framework is the teleological framework’s shadow, then the third framework, which I call contractarian, appears only in the form of a trace or

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481. See *supra* note 442 and accompanying text.

482. BLOOM, *supra* note 15, at 143.

483. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 150 (Walter Kaufman trans., 1969).

484. The emotivist might retort that emotivism teaches us that there is no justification other than mere personal preference for the moral judgments of Messrs. Stalin, Hitler, and Pot. Thus, although emotivism cannot provide a basis other than personal preference for condemning their judgments, it also provides no rational basis whatsoever for supporting those judgments. If one finds some solace in the thought that Hitler’s moral judgments about exterminating European Jewry are no more persuasive than one’s own, then one no doubt would be satisfied with this emotivist response.

485. CARNEGIE REPORT, *supra* note 1, at 157.

486. See *infra* Part V.C.6.

perhaps a palimpsest.<sup>487</sup> According to the contractarian framework, the legal profession must serve certain purposes and perform certain functions because of a contract between the profession and society.<sup>488</sup> As the authors state this point:

[p]rofessions operate within an explicit contract with society as a whole. In exchange for privileges such as monopoly on the ability to practice in specific fields, professions agree to provide certain important services. In exchange for the privilege of setting standards for admission and authorizing practice, professions are legally obliged to discipline their own ranks for the public welfare. The basis of these contracts is a set of common goals shared by the public for which different professions take responsibility. For example, medicine, nursing, and public health are chartered for the maintenance and improvement of society's health, just as education exists to promote the goal of an educated citizenry, law to regulate social transactions and secure justice, and engineering to develop technologies for the improvement of life. These are public values, and the core of professional privilege is based on the professions' willingness to commit to them.<sup>489</sup>

This ethical framework is contractarian because it rests on a claim that there is a contract of some sort between the legal profession and society.<sup>490</sup> This contractarian framework is ethical because it rests on a claim that the contract in question obligates the legal profession to take responsibility for certain "common goals" or "public values," and in particular that the profession's task is "to regulate social transactions and secure justice."<sup>491</sup> The authors referred to this same task in their brief comments on the purposes of the legal profession that students should learn during the third apprenticeship.<sup>492</sup> This verbal link between the authors' account of the contractarian framework and their comments about the purposes of the legal profession is not accidental.<sup>493</sup> As I show in the following discussion, the contract between the profession and society serves, or purports to serve, as a "moral basis" or ground for the *telos* or *teloi* of the profession found in and

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487. See SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 54.

488. See CARNEGIE REPORT, *supra* note 1, at 21.

489. *Id.*

490. *See id.*

491. *Id.* at 133.

492. *See supra* note 385 and accompanying text.

493. See CARNEGIE REPORT, *supra* note 1, at 54, 132-33.

required by the teleological framework.<sup>494</sup> The contractarian framework thus converts, or purports to convert, the Carnegie Report's ungrounded teleological framework into a grounded teleological framework and provides, or purports to provide, a moral basis or ground for the *teloi* taught during the third apprenticeship.<sup>495</sup> As previously explained, those *teloi* in turn are supposed to supply the unifying, coherent rationale for the first and second apprenticeships.<sup>496</sup>

I refer to the contractarian framework as a trace or palimpsest because the authors say very little about it in the Carnegie Report.<sup>497</sup> The only other comment about the contractarian framework that I have found provides some indication of what they mean when they claim that the legal profession has a contract with society that somehow obligates the profession (as one would expect from a contract) to perform certain services or functions in exchange for certain privileges. According to the authors,

the social contract between the profession and society [is] embodied in the terms of licensing and the code of ethics by which the profession declares its intent to regulate its own life in order to maintain the trust and cooperation of the public. But codes and contracts, as every lawyer knows, rely, in the end, on the good faith of the parties.<sup>498</sup>

Thus, when the authors refer to the "social contract," they seem to be alluding to our state-imposed system of licenses to practice law as well as to ethical requirements for practitioners drawn up by lawyers and administered by lawyers on behalf of and at the behest of the state.<sup>499</sup> I am licensed to practice law in the District of Columbia and I am subject to the District's rules of legal ethics as well as to the requirements imposed on lawyers by any state in which I might happen to practice. The authors apparently would describe as contractual my relationship(s) and the relationship(s) of other lawyers with our respective state bars and with society as a whole.<sup>500</sup>

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494. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 54. For further discussion of Sullivan's use of the phrase "moral basis," see *infra* note 543 and accompanying text.

495. See CARNEGIE REPORT, *supra* note 1, at 28-30.

496. See *supra* notes 365-75 and accompanying text.

497. See generally CARNEGIE REPORT, *supra* note 1.

498. CARNEGIE REPORT, *supra* note 1, at 30. As discussed *infra* at notes 559-63, every lawyer also knows that contracts generally rely on the presence of a legal regime for their enforcement, a legal regime that is conspicuously absent in the case of the alleged social contract between the legal profession and society.

499. Compare SULLIVAN, WORK AND INTEGRITY, *supra* note 181, at 54.

500. See *id.* at 63.



It is tempting to react to this contractarian argument the way Justice Holmes reacted to an argument proposed by the plaintiffs in error in a 1915 case, saying “it [i]s hard to believe that the proposition was seriously made.”<sup>501</sup> Despite the paucity of references in the Carnegie Report to the supposed social contract between the legal profession and society, however, there is persuasive evidence from another source that the authors take the contractarian argument seriously. In *Work and Integrity*, the companion volume to the Carnegie Report,<sup>502</sup> William Sullivan explicitly refers to and comments on the alleged social contract or social compact at least fourteen times.<sup>503</sup> It is, of course, impossible to be certain why Sullivan discusses the social contract so frequently in the Carnegie Foundation study that he wrote alone and so infrequently in the related study that he co-authored. Perhaps it is because his co-authors in the Carnegie Report found arguments based on the alleged social contract unpersuasive. After all, one of the co-authors of the Report, Judith Welch Wegner, is an attorney and law professor who undoubtedly would have some familiarity with contract law and contract arguments.<sup>504</sup> Perhaps she found that arguments based on a social contract were not credible. On the other hand, the Carnegie Report does expressly mention the contractarian argument at least twice.<sup>505</sup> Perhaps the co-authors of the Report believed that Sullivan had dealt sufficiently with the topic in *Work and Integrity*—the first of the Carnegie Foundation’s “series of reports on professional education”<sup>506</sup>—and, therefore, the co-authors chose not to rehash the points that Sullivan already had made. The latter view seems the more persuasive because it takes seriously the references to a social contract in the Report instead of treating them as editing or proofreading mistakes. Thus, it makes sense to consider whether Sullivan’s comments in *Work and Integrity* about the social contract clarify and, perhaps, substantiate the brief remarks found in the Carnegie Report.<sup>507</sup>

As an initial point, it seems clear that the basic account of the social contract in *Work and Integrity* is the same as that found in the Carnegie Report. In the former, Sullivan writes:

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501. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

502. For a discussion of the relationship between the Carnegie Report and *Work and Integrity*, see *supra* note 176.

503. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 2, 3, 23, 29, 37, 39, 40, 54, 63, 68, 96, 196, 279, 289.

504. See *CARNEGIE REPORT*, *supra* note 1, at ix-x. Professor Wegner’s legal specialties are land use, property law, legislation, and local government. *Judith Welch Wegner*, UNIV. OF N.C. SCHOOL OF LAW, <http://www.law.unc.edu/faculty/directory/wegnerjudithwelch/> (last visited September 15, 2012).

505. *CARNEGIE REPORT*, *supra* note 1, at 21, 30.

506. *Id.* at 15.

507. See generally *CARNEGIE REPORT*, *supra* note 1, at 21, 30; SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 2, 3, 23, 29, 37, 39, 40, 54, 63, 68, 96, 196, 279, 289.

[I]aw and medicine, in particular, have long been prestigious occupations, and lawyers and doctors have long served as community leaders as well as experts in their specialized domains. But they have held such positions of honor on the basis of a social contract with the public they serve.

This contract is at the core of professionalism. Not only medicine and law but fields such as engineering, architecture, accounting, the clergy, nursing, and teaching operate within explicit legal regulation. In exchange, professions have received authority to control entry into their domains and key aspects of how they do their work.<sup>508</sup>

Under the supposed social contract, therefore, members of the profession suffer the *quid* of “explicit legal regulation” in exchange for the *quo* of prestige, honor, and control over entry into and practice of the profession.<sup>509</sup> Legal professionals “are legally obliged to maintain standards, even to discipline their own ranks, for the public welfare.”<sup>510</sup> According to Sullivan, “[p]rofessions are collegial organizations that carry a grant of public privilege and responsibility in exchange for accountability to the public.”<sup>511</sup> Although one might quarrel with Sullivan’s characterization of this arrangement as a “contract,”<sup>512</sup> social or otherwise, his basic description of the factual situation seems uncontroversial—lawyers do enjoy a certain social status and power in U.S. society<sup>513</sup> and lawyers are subject to various ethical and professional obligations.<sup>514</sup>

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508. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 2.

509. *Id.* Sullivan also indicates at one point that the social contract reflects or incorporates not only statutory obligations imposed on the profession but also terms or obligations imposed by “custom.” *Id.* at 4, 23. Sullivan makes nothing of this potentially important point, which I expect to discuss in a later publication.

510. *Id.* at 4.

511. *Id.* at 63. In a review of the literature on legal professionalism between 1925 and 1960, Solomon observes that some have described the privileges the bar enjoys “as a bargain between the bar and the state in which the bar is granted professional autonomy in exchange for dissociating itself from the commercial market and from partisan politics.” Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144, 153 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992). This seems to be a rather different social contract from the one described by Sullivan, who does not mention the public’s alleged interest in dissociating the bar from partisan politics. See SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 98. Indeed, Sullivan’s comments in support of civic professionalism appear to advocate a more partisan, “progressive” political stance for the bar. See *infra* note 528 and accompanying text.

512. For comments on this issue, see *infra* note 547.

513. It is not entirely clear how one would substantiate such an obvious point. If we assume that wages are a proxy for status and power, we could show that, in May 2010, the mean wage for all occupa-

Sullivan's argument becomes tendentious, however, when he seeks to expand the scope of the *quid* that lawyers allegedly exchange for the *quo* of prestige and self-regulation beyond the well-established ethical and professional obligations imposed on lawyers by state bars:

[t]he core of professionalism is that by functioning as lawyer, engineer, doctor, accountant, architect, teacher, or nurse, an individual carries on a public undertaking and affirms public values. With this identity comes a certain public status and authority, as is granted by custom and the profession's social contract; but professionalism also means duties to the public. Chief among these duties is the demand that a professional work in such a way that the

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tions in the United States—\$45,676—was only about forty percent of the mean wage for lawyers—\$112,110. U.S. Bureau of Labor Statistics, *Full-Time Civilian Workers: Mean and Median Hourly, Weekly, and Annual Earnings and Mean Weekly and Annual Hours*, in NATIONAL COMPENSATION SURVEY: OCCUPATIONAL EARNINGS IN THE UNITED STATES, 2010 3-1 tbl.3 (May 2011), available at <http://www.bls.gov/ncs/ncswage2010.pdf>. If we assume that political office is a proxy for status and power, we can point out that, at the time this was written, the U.S. President, Vice President, and Secretary of State are lawyers. *President Barack Obama*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/president-obama> (last visited October 8, 2012) (President Obama was the first African-American president of the *Harvard Law Review*); *Vice President Joe Biden*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/vice-president-biden> (last visited October 8, 2012) (Vice President Biden attended Syracuse Law School); *Hillary Rodham Clinton*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/first-ladies/hillaryclinton> (last visited October 8, 2012) (Secretary of State Clinton attended Yale Law School). Indeed, more than half of U.S. Presidents have been lawyers. See Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother*, 86 DENV. U. L. REV. 865, 875 (2009). In addition, the current Majority and Minority Leaders of the U.S. Senate are lawyers. *About Harry Reid*, *Biography*, SENATOR HARRY REID, <http://www.reid.senate.gov/about/index.cfm> (last visited October 8, 2012) (Senate Majority Leader Reid attended George Washington University School of Law); *Mitch McConnell: Biography*, U.S. SENATE REPUBLICAN LEADER MITCH MCCONNELL, <http://www.mccconnell.senate.gov/public/index.cfm?p=Biography> (last visited October 8, 2012) (Senate Minority Leader McConnell attended University of Kentucky College of Law). Closer to my home, the Governor of Kentucky and two of the last three mayors of Lexington, Kentucky, were or are lawyers. *About Governor Steve Beshear*, OFFICE OF KENTUCKY GOVERNOR STEVE BESHEAR, <http://governor.ky.gov/about/Pages/default.aspx> (last visited October 8, 2012) (Kentucky Governor Beshear attended University of Kentucky College of Law); *Jim Newberry, attorney, former Lexington mayor, joins GC as General Counsel and Special Assistant to the President*, GEORGETOWN COLLEGE (May 24, 2012), <http://www.georgetowncollege.edu/news/2012/05/jim-newberry-attorney-former-lexington-mayor-joins-gc-as-general-counsel-and-special-assistant-to-the-president/> (Lexington Mayor Newberry attended University of Kentucky College of Law); Katherine Yeakel, *Leading Lexington*, PENNSYLVANIA UNIVERSITY MAGAZINE, 12, 13, Spring 2003, available at <http://www.transy.edu/magazine/pdf/spring03.pdf> (Lexington Mayor Isaac attended University of Kentucky College of Law). The relatively high status of lawyers in U.S. society is not new. As far back as 1831, Alexis de Tocqueville famously observed that in the United States, "lawyers . . . form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that . . . it occupies the judicial bench and the bar." ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 288 (1960).

514. See, e.g., MODEL RULES, *supra* note 299, Preamble ¶ 9.

outcome of the work contributes to the public value for which the profession stands.<sup>515</sup>

Here, Sullivan seems to be suggesting that the social contract obligates the lawyer not only to develop and comply with standards of professional responsibility that protect the public from misbehavior by lawyers but also to pursue a “public undertaking” in which the lawyer affirms “public values” and, in particular, “the public value for which the profession stands.”<sup>516</sup> In a similar vein, Sullivan elsewhere describes the “social compact [as] one requiring that, in exchange for their elevated status and a regulated market for their services that ensures a good livelihood, professionals demonstrate civic responsibility and even community leadership.”<sup>517</sup> Sullivan’s position is consistent with the statement quoted above from the Carnegie Report that the legal profession agrees by contract to pursue one of society’s “common goals,” namely “to regulate social transactions and secure justice.”<sup>518</sup> Indeed, in *Work and Integrity* Sullivan identifies “civil regulation and social justice” as among the “key public values” for which “[t]he professions have become responsible.”<sup>519</sup> He does not specifically assert that lawyers are responsible for civil regulation and social justice but it seems likely that that was his point. Under a contract with society, lawyers pursue civil regulation and social justice while doctors pursue health and teachers pursue education.

By adding responsibility for civil regulation and social justice to the list of *quids* that lawyers allegedly exchange for the *quo* of social status and self-regulatory power, Sullivan raises important and difficult questions that he and his co-authors do not attempt to address. As remarked above, no one would deny that lawyers are subject to rules of legal ethics and professional responsibility.<sup>520</sup> One only need point to the various codes of professional responsibility<sup>521</sup> and the many disciplinary cases<sup>522</sup> applying those codes to

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515. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 23.

516. *See id.*

517. *Id.* at 68. Rayman Solomon has provided a somewhat less tendentious description of the *quid* that lawyers offer: “the bar provides competence and access to legal services to the public, but refrains from partisan politics, and avoids the excesses of the market.” Solomon, *supra* note 511, at 171. Providing competence and access to legal services appear to be much less ambitious commitments than assuming responsibility for civil regulation and social justice. *See id.*

518. *See supra* note 489 and accompanying text.

519. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 4.

520. CARNEGIE REPORT, *supra* note 1, at 30; *see, e.g.*, MODEL RULES, *supra* note 299, Preamble ¶ 9.

521. *See, e.g.*, D.C. RULES OF PROF’L CONDUCT (2006), *available at* [http://www.dcbarr.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_conduct/amended\\_rules/index.cfm](http://www.dcbarr.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/index.cfm).

support this claim. To my knowledge, however, there are no equivalent codes or cases that require attorneys to assume responsibility for civil regulation and social justice.<sup>523</sup> Many attorneys do, of course, assume responsibility for civil regulation by, for example, drafting contracts, wills, and deeds, creating partnerships and corporations, and filing civil litigation. And many attorneys also pursue, or say they pursue, some version of social justice.<sup>524</sup> But Sullivan and his co-authors cite no evidence that attorneys perform these many functions and services because they are or believe themselves to be obligated to do so by a social contract—the key claim of the contractarian framework.<sup>525</sup>

Sullivan's own account of professionalism betrays his uncertainty about the claim that lawyers today have in fact assumed some kind of contractual obligation to take responsibility for social justice or any other public value.<sup>526</sup> As he remarks, the view that membership in a profession may entail "public responsibility" emerged within the last 120 years or so.<sup>527</sup> Sullivan links professionalism and public responsibility under the rubric of civic professionalism, an idea or ideal that developed during the Progressive era.<sup>528</sup> Sullivan observes that the 1890s were "professionalism's heroic age, when it came forward as a *new* American moral ideal."<sup>529</sup> Sullivan also appears, however, to agree with the results of a study by Steven Brint who found, among other things, that "there has been a long-term movement away from an earlier conception of professionalism as 'social trusteeship,'" i.e., away from the conception of civic professionalism that Sullivan

522. See, e.g., *Opinions of the D.C. Bar Legal Ethics Committee*, D.C. BAR, [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions.cfm) (last visited September 15, 2012).

523. The Preamble to the Model Rules states that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES, *supra* note 299, Preamble ¶ 9. It is noteworthy, however, that this descriptive language occurs in the Preamble and not among the operative provisions of the Model Rules as a requirement. See *generally id.*

524. Michael S. Greco, President-Elect, A.B.A. Remarks to the Fellows of the Alabama Law Foundation Annual Dinner at Capital City Club, Montgomery, Ala. (Jan. 28, 2005), in 66 ALA. LAW. 183, 183 (2005) ("The ideal of true social justice is one that lawyers strive for each day.").

525. See *generally* CARNEGIE REPORT, *supra* note 1, at 21, 30.

526. See SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 3-4.

527. *Id.* at 3.

528. *Id.* at 98 ("Professionals and their aspirations would be central to Progressivism. In the ensuing debates and struggles, some influential members of the new professional class would develop a conception of professionalism . . . designed to complement and strengthen a new civic politics. We will call this development civic professionalism."). According to one student of the period, "the Progressive movement . . . extended from about 1900 to 1914 . . ." RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F. D. R. 3 (1955). For a discussion of "civic professionalism" as a source of professional purposes, see *supra* notes 404-15 and accompanying text.

529. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 85 (emphasis added). Solomon described "the last quarter of the nineteenth century, as . . . the 'take-off' period of professionalization in the United States." Solomon, *supra* note 511, at 150.

supports.<sup>530</sup> Thus, by Sullivan's own account, the 1890s and early 1900s represented the high point of civic professionalism, which went downhill from then on.<sup>531</sup>

Sullivan does not even discuss evidence suggesting that many lawyers did not share the civic professional ideal by the first decade of the twentieth century, i.e., immediately after "professionalism's heroic age."<sup>532</sup> For example, in a 1906 address to the Legal Education Section of the ABA, William Draper Lewis, the first full-time Dean at the University of Pennsylvania Law School, stated that,

our failure as a profession to perform what I have designated our public duties is due principally, not to external conditions, but to a total absence of any idea that there exists any obligation on the part of the Bar toward the community. As a profession we lack any idea of responsibility which cannot be classified as a duty toward a court, a client, or a fellow-lawyer. Lawyers have as a rule a real sense of a duty toward clients, but little or no sense whatever of any duty toward the community as a whole for the better administration of justice.<sup>533</sup>

If Lewis described his era correctly, then in the final years of professionalism's allegedly heroic age, most lawyers had no inkling that the bar might bear any civic duties or responsibilities.<sup>534</sup> To summarize, then, the contractarian view of the legal professional's obligation to pursue civic or public values is a bit over 120 years old and it has been in steep decline

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530. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 9. Rayman Solomon seems to confirm Brint's conclusion that there has been a long-term movement away from some earlier professional ideals. In a review of writings and speeches by bar leaders from 1925 to 1960, he found that "bar elites enunciated the extreme urgency of reestablishing conformance with the norms of professionalism to justify their privileges." Solomon, *supra* note 511, at 171-72. It would not have been necessary to "reestablish[] conformance" if the profession had continued to adhere to the earlier norms. *See id.* This leaves open the question whether the profession ever actually adhered to the earlier norms and whether those earlier norms were ever anything more than the mindset of a particular group of lawyers at a particular point in history.

531. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 85.

532. *See id.*

533. William Draper Lewis, *Legal Education and the Failure of the Bar to Perform Its Duties*, 54 AM. L. REG. 629, 636 (1906). As should be clear from the passage quoted, Lewis was calling for a new emphasis on the lawyer's public duties and responsibilities. *See id.* But in so doing, he expressly acknowledged that the profession of his time did not generally recognize such duties and responsibilities. *See id.* (noting "the almost total absence of any conception that we have any duties of this character. . . ."). Foreshadowing the argument found one hundred years later in the Carnegie Report, Lewis ascribes the profession's failure to recognize its supposed public duties to "defects in our legal education." *Id.*

534. *See* Auerbach, *supra* note 31, at 601. Auerbach has shown that the bar's understanding of itself—or lack of understanding of itself—as a public profession did not change significantly by the early 1920s. *See id.* ("Lawyers still belonged to a profession in search of itself.")

for much, if not all, of that time. One might be forgiven for asking how long and significant the period was during which the contractarian view and the related ideal of civic professionalism actually flourished.

Sullivan appears to recognize that today the contractarian framework is, if not dead, then moribund and in need of resurrection or resuscitation:

At a moment when the unregulated cash nexus of the market threatens to implode upon the social order it should serve, the reinvigoration and institutionalization of the ideals of integrity of function and public responsibility that professionalism represents would fill an essential need.

We need a new professionalism adequate to the changed circumstances of American life. The first step toward this reinvention of professionalism, however, requires that professionalism be understood as a public good, a social value, and not the ideology of some special interest.<sup>535</sup>

As if to underline the point that he is calling for a “reinvention” of professionalism and for something “new,” Sullivan repeatedly refers to his account of the link between professionalism and public goods as an “ideal.”<sup>536</sup> For example, he observes that

[t]hrough its inherent logic, civic professionalism proposes an ideal of self that complements today’s social imperative to achieve a positive outcome to interdependence. . . . Positive interdependence demands of the individual a high degree of self-awareness and a major effort to developing one’s powers. But it then demands more. The goal of self-actualization itself must be transcended (or perhaps better, reoriented) by integrating individual goals with those of the larger community. The logical fulfillment of this process is a kind of character for whom what happens to these

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535. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 159-60. Sullivan’s attack on the “unregulated cash nexus of the market” suggests the same discomfort with, if not disdain for, the legal marketplace that we saw in the discussion of pro bono work as a “vivid enactment of law’s professional identity.” *See id.*; *see also supra* note 322 and accompanying text. Again, it must be observed that a proposal for reforming legal education is unlikely to succeed if it stems from disdain for the kind of remunerative work that most lawyers do most of the time.

536. *See, e.g.,* SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 11, 18 (professionalism as an “ideal of living”), 51, 159.

larger commitments is as important as what happens to the self, or more so.<sup>537</sup>

Thus, civic professionalism is not only an ideal but an ideal involving the transformation of human character and, apparently, the transcendence (or reorientation) of self-interest.<sup>538</sup> By placing civic professionalism in the realm of the ideal, if not the realm of fantasy, Sullivan implicitly recognizes that a lawyer does not have a real obligation—contractual or otherwise—to take responsibility here and now for such public goods as civil regulation and social justice. Ideally, a lawyer might assume responsibility for such “larger commitments” but nothing obligates her to do so. Thus, even if there were a brief shining moment during which the legal profession entered a social contract exchanging a commitment to ethical conduct for social status and self-regulatory power, that social contract either no longer imposes or never did impose the “ideal” requirement that lawyers pursue a higher civic purpose or commitment such as social justice.<sup>539</sup> Perhaps in the ideal world of the “new professionalism,” lawyers would be obligated to pursue a higher civic purpose, but as Sullivan acknowledges, lawyers do not live in an ideal world but rather in the market-oriented “cash nexus” of the old professionalism.<sup>540</sup> Consequently, it is not surprising that, near the end of *Work and Integrity*, Sullivan calls on “professional communities . . . to recharter their professional social contract.”<sup>541</sup> Sullivan and his co-authors might wish there were a social contract under which the legal profession promises to take responsibility for civic goods, but they are forced to recognize that any such contract would have to be drafted or redrafted and, one assumes, offered (again?) to members of the profession for their assent or rejection.

In light of the questions that Sullivan himself seems to raise or suggest about the Carnegie Report’s contractarian ethical framework, it may seem like beating a dead horse to mention other significant criticisms. It is, however, important to recall the reason why the contractarian ethical framework matters to the larger argument of the Carnegie Report and thus to the analysis presented in this Article. The contractarian framework apparently is supposed to provide the foundation or basis for claims about the purpose(s) of the legal profession, the purpose(s) that masters should

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537. *Id.* at 289-90.

538. *Id.*

539. *See id.* (describing the idea of civic professionalism as an “ideal”).

540. *Id.* at 159.

541. *Id.* at 279.



inculcate into apprentice lawyers during the third apprenticeship.<sup>542</sup> As Sullivan observes, “in the United States the professions had to struggle for status in a distinctly American way. They bargained for honor, guaranteed by legally enforced privileges, in exchange for service and community trusteeship. This social contract became the moral basis of professionalism in America, giving American professions a civic orientation.”<sup>543</sup>

The social contract, therefore, provides the “moral basis” that the legal profession needs to sustain and justify its existence.<sup>544</sup> The profession must teach that moral basis to the next generation of professionals and rely on that moral basis to provide the objective, impersonal rationale or justification for a coherent, unified program of legal education. If there is no such social contract, then apparently there is no moral or ethical basis for legal professionalism, or at least there is no basis to be found in the Carnegie Report and its sister text, *Work and Integrity*.<sup>545</sup> It would follow that there is no unified, coherent content for the third apprenticeship to teach and no objective, impersonal rationale for a coherent program of legal education. In light of the central role that the contractarian framework apparently plays in the Carnegie Report, it is important to identify, at least briefly, other salient questions that that framework raises but does not answer.<sup>546</sup>

The first question that the contractarian framework raises but fails to answer is obvious. Assuming there were a social contract, what would be its terms? No one is likely to disagree that attorneys obligate themselves to abide by rules of professional conduct—ethical rules—when they become members of a bar.<sup>547</sup> Beyond that set of requirements, however, what obligations does the social contract impose? The apparent answer in the Carnegie Report is that attorneys bear some important responsibility for civil regulation and social justice.<sup>548</sup> Accepting that answer for the sake of

542. CARNEGIE REPORT, *supra* note 1, at 28.

543. SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 54.

544. *Id.*

545. See CARNEGIE REPORT, *supra* note 1. See generally SULLIVAN, WORK AND INTEGRITY, *supra* note 177.

546. See generally CARNEGIE REPORT, *supra* note 1.

547. See generally MODEL RULES, *supra* note 299. It is, of course, open to question whether the rules of legal ethics to which one becomes subject upon joining the bar reflect *contractual* obligations. One might equally well view those ethical rules as conditions on a license to practice law or simply as legal requirements imposed on bar members by the state. One ordinarily would not refer to speed-limit laws or laws against driving while intoxicated as contractual obligations to which one assents when obtaining or renewing a driver’s license. Despite these concerns, I assume *arguendo* in the text that one can describe a lawyer’s obligation to obey the rules of professional ethics as contractual.

548. See *supra* note 519 and accompanying text. I say this answer is “apparent” because Sullivan and his co-authors provide a grab bag of possible purposes—including civil regulation and social justice—for the legal profession in the Carnegie Report. See *supra* notes 385-402 and accompanying text.

argument, the obvious next question is what the authors mean by “civil regulation” and “social justice.”<sup>549</sup> The authors do not tell us.<sup>550</sup> A contract that imposes broad, vague obligations of this sort is one with which it is likely to be either too easy or too hard to comply—too easy because one can always claim that one has taken some degree of responsibility for civil regulation and social justice and too hard because one will always be vulnerable to the charge that one has not done enough or that one somehow has failed to meet one’s responsibilities. According to standard contract-law doctrine, the terms of a contract generally mean what “a reasonable person in the position of the other party” would take them to mean.<sup>551</sup> So what would a reasonable person in the position of a lawyer agreeing to the social contract mean by “civil regulation” and “social justice”?<sup>552</sup> Needless to say, the authors remain silent on this crucial point.<sup>553</sup> They thus fail to provide or attempt to provide any content for the obligations that the social contract allegedly imposes on the legal profession. The contractarian framework remains an empty bottle into which the authors and the reader may pour whatever wine they may wish.<sup>554</sup> Moreover, as a leading treatise on contract law states, “even if the parties intend to contract, if the content of their agreement is unduly uncertain no contract is formed. . . . The traditional rule is that if the agreement is not *reasonably* certain as to its *material* terms there is a fatal indefiniteness and the agreement is void.”<sup>555</sup>

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One finds, however, no contractarian arguments supporting these other alleged purposes in the Carnegie Report or *Work and Integrity*. And the mere fact that the authors themselves cannot seem to decide what purposes the social contract obligates the legal profession to pursue suggests that the terms of the supposed contract are hopelessly uncertain.

549. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 4.

550. See CARNEGIE REPORT, *supra* note 1. See generally SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177.

551. See JOSEPH M. PERILLO, *CALAMARI & PERILLO ON CONTRACTS* 24 (6th ed. 2009) (“objective manifestations of intent of the party should generally be viewed from the vantage point of a reasonable person in the position of the other party.”).

552. SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 4.

553. See CARNEGIE REPORT, *supra* note 1. See generally SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177.

554. See CARNEGIE REPORT, *supra* note 1, at 21. The emotivist might interject that a lawyer is free to interpolate her personal values or preferences—if any—regarding social justice into the social contract. See Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438 at 12-23; see also AYER, *supra* note 438, at 103-20 (for further discussion of emotivism). Thus the social contract would obligate the lawyer to do whatever she believes or feels to be just. If the authors truly mean to say that the social contract obligates a lawyer to follow her own personal values and preferences, then it would seem that something has gone badly wrong with the contractarian argument. The authors probably would be wise not to call on the emotivists for assistance here.

555. See PERILLO, *supra* note 551, at 43-44 (citation omitted).

By this traditional standard, the alleged social contract described by the authors probably would be void as a matter of law.<sup>556</sup>

A second fundamental problem with the contractarian framework is one that tends to infect many forms of contractarian theory. The authors of the Carnegie Report are hardly the first thinkers to claim that some kind of social contract establishes a set of rights and obligations for persons subject to that contract.<sup>557</sup> Among the most famous early exponents of social-contract theories were John Locke and Jean-Jacques Rousseau.<sup>558</sup> Each of their theories is subject to a potentially damaging objection. As Seyla Benhabib has observed, “[s]ince the publication of C.B. Macpherson’s *The Political Theory of Possessive Individualism*, it has been a familiar argument that the models of political obligation and authority put forward by contractarian thinkers presuppose the institutions of a liberal market society.”<sup>559</sup> To oversimplify the point somewhat, if there is no pre-existing social and legal system, then there is no binding contract because a contract binds only if a social and legal system says it binds.<sup>560</sup> It seems to follow that a social contract cannot create, or explain the genesis, of a social and legal system. The contractarian framework in the Carnegie Report is not subject to this specific objection because that framework does not purport to provide the foundation and explanation for political society as a whole.<sup>561</sup> The contractarian framework is, however, subject to a related objection: if we assume there is a social contract between the legal profession and society, what law renders that contract binding? Again, no one ordinarily would deny that state law makes the rules of professional conduct binding on attorneys, although some might deny that the relevant state law is the law of contract.<sup>562</sup> But what law makes binding the contract that allegedly gives the legal profession special responsibility for civil regulation and social justice? If there is a binding contract, it should be possible to identify a

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556. See *id.*; see also CARNEGIE REPORT, *supra* note 1; SULLIVAN, WORK AND INTEGRITY, *supra* note 177.

557. See generally Ernest Barker, *Introduction to SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* vii (1960).

558. See John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in SOCIAL CONTRACT 1, 56-57 (1960) (1690); Jean-Jacques Rousseau, *The Social Contract*, in SOCIAL CONTRACT 167, 179-82 (1960) (1762).

559. Seyla Benhabib, *Obligation, Contract and Exchange: On the Significance of Hegel’s Abstract Right*, in THE STATE AND CIVIL SOCIETY 159, 159 (Z. A. Pelczynski ed., 1984).

560. See *id.* As the authors of a leading casebook on international law observe, “[a] contract is valid and enforceable because some national legal system says so.” BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 637 (6th ed. 2011). See also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291-307 (1986) (rules of contract law presuppose a theory of entitlements and, in particular, a theory of alienable rights to property).

561. See CARNEGIE REPORT, *supra* note 1.

562. See *supra* note 547.

body of law that makes that contract binding. Otherwise, the contract—if it exists at all—would be nothing more than a non-binding, unenforceable promise or exchange of promises. No law, no contract.<sup>563</sup>

Finally, assuming that there is a contract, that we can identify its terms with some specificity, and that it is binding under some recognizable body of law, there remains at least one more significant problem. Sullivan and (I assume) his co-authors wish to claim that the social contract provides the “moral basis” for legal professionalism and this claim is crucial to the overall argument of the Carnegie Report.<sup>564</sup> Compliance with a legally binding contract is, however, a legal obligation, not a moral obligation.<sup>565</sup> As one standard introductory text on contract law states,

[t]he most common basis for enforcing promises in the United States involves the concept of consideration. There is consideration for a promise if that promise was made for something as a part of a bargain or deal. . . . The underlying principle is that the promise is being enforced because the promisee paid a price for that promise.

. . . [c]ourts in the United States will enforce a promise if it is made as a part of a bargained exchange for another promise or for the performance or forbearance of an act.<sup>566</sup>

The authors of the Carnegie Report claim that the legal profession promised to assume certain responsibilities in exchange for status and self-regulatory authority.<sup>567</sup> That was the bargain and the bargain is, by hypothesis, enforceable. It is enforceable, however, because by hypothesis some body of law says certain bargains are enforceable and not because the parties are morally bound to or by the terms of those bargains. In theory, the contractarian framework might provide a legal and contractual basis for the

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563. The authors could, of course, claim that the social contract is binding under some kind of “higher law,” divine, natural, or perhaps dictated by reason itself. Although I am personally sympathetic to such claims, I suspect that the authors will not persuade most people to recognize the alleged social contract by invoking a higher law that renders the contract binding. It is generally unwise to support a questionable claim with an even more questionable claim.

564. See *supra* note 543 and accompanying text.

565. For a similar argument, see Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 172-73.

566. CLAUDE D. ROHWER & ANTHONY M. SKROCKI, *CONTRACTS IN A NUTSHELL* 5 (7th ed. 2010); see also E. ALLAN FARNSWORTH, *CONTRACTS* 3 (4th ed. 2004) (“the law of contracts is confined to promises that the law will enforce. It is therefore concerned primarily with *exchanges* because . . . courts have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it.”).

567. See CARNEGIE REPORT, *supra* note 1, at 21; see also SULLIVAN, *WORK AND INTEGRITY*, *supra* note 177, at 4.

legal profession's supposed obligation to assume responsibility for civil regulation and social justice but the contractarian framework does not and cannot provide a "moral" basis.<sup>568</sup> The contractarian framework cannot account for the "moralness" of the alleged moral basis. One might say that the contractarian ethical framework, insofar as it relies upon an actual contract, cannot be ethical.<sup>569</sup>

One can make the same point in a different way by appealing to basic contract-law doctrine.<sup>570</sup> According to Professor Perillo, when assessing the validity of a contract,

[a]s a general rule the courts do not review the adequacy of the consideration. The parties make their own bargains. . . . Courts . . . have believed that it would be an unwarranted interference with freedom of contract if they were to relieve an adult party from a bad exchange.<sup>571</sup>

Courts generally do not, in other words, consider whether what X agrees in the contract to do for Y is an adequate price to pay for what Y agrees to do for X.<sup>572</sup> Courts generally allow a party to decide what the other party's goods and services are worth and whether a deal would be worthwhile.<sup>573</sup> Thus, assuming there were a contract between the legal profession and society, the contract would reflect a deal in which society apparently thought it made sense to grant certain privileges in exchange for a commitment by lawyers to take responsibility for civil regulation and social justice. At the same time, lawyers thought it made sense to take the privileges in exchange for the commitment. In other words, society thinks the value of the commitment is equal to or greater than the value of the privileges or society would not have made the bargain exchanging the latter for the former. By contrast, the lawyers—with stereotypical mercenary zeal—placed a higher value on the privileges they would receive than on the commitment they would assume.<sup>574</sup> That would be the reason—the *only*

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568. According to the Restatement, "[a] contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). A contract creates a legal duty, not a moral duty, and breach of a contract creates a legal remedy. *See id.*

569. *See* CARNEGIE REPORT, *supra* note 1 at 21.

570. PERILLO, *supra* note 551, at 154.

571. *Id.*

572. *Id.*

573. *Id.*

574. Although the authors do not seem to notice, their argument entails that the exchange value or market value of civil regulation and social justice is roughly equivalent to that of social status and power plus self-regulation. One would have thought civil regulation and social justice might hold a higher value.

reason—they were prepared to exchange the latter for the former. The legal profession’s supposed commitment to assume responsibility for civil regulation and social justice would simply be a fact about a deal. The commitment would not acquire or generate any intrinsic moral value just because it resulted from a deal with society or with anyone else. If the authors of the Carnegie Report wish to claim that the supposed commitment to civil regulation and social justice has an intrinsic value or moral worth and that the commitment provides a moral basis for legal professionalism, the authors must look outside the realm of contract law and enforceable bargains to defend that claim.<sup>575</sup> As Professor Perillo indicated, the law does not ask or take into account what the lawyers’ supposed commitment is *really* worth independent of the bargain in which the lawyers exchanged the commitment.<sup>576</sup> From a legal perspective, the commitment is worth what was paid for it. Moreover, if the authors could discover the intrinsic value or moral worth of taking responsibility for civil regulation and social justice, it seems quite possible that the alleged contractual basis for taking such responsibility would become superfluous to the argument. One could simply skip over the contractarian theory entirely and rely on the intrinsic value or moral worth of the legal profession’s supposed responsibilities.

As anyone who has taught or studied contract law knows, or should know, there are certain categories of cases in which a U.S. court will enforce a contract that did not result from a bargained exchange of consideration.<sup>577</sup> For example, courts sometimes will enforce a contract or quasi-contract based on a theory of reliance<sup>578</sup> or a theory of unjust enrichment.<sup>579</sup> There are even a small number of cases that scholars generally group together under the heading of “moral consideration.”<sup>580</sup> It

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575. Charles Fried famously has argued that obligation to keep promises provides “the moral basis of contract law.” CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981). If we assume for the sake of argument that Fried is correct, then it appears that the authors of the Carnegie Report could skip over the social contract argument and jump straight to a claim that lawyers have a moral obligation to keep their supposed promise to pursue civil regulation and social justice. We would not need a contractual obligation to support the alleged moral obligation if we can identify a moral obligation as the basis for the contractual obligation.

576. See PERILLO, *supra* note 551, at 154.

577. See *id.* at 206-07. Students of contract law will also recall that the courts will sometimes refuse to enforce a contract for reasons of public policy. See FARNSWORTH, *supra* note 566, at 312. In some cases, such policies are “grounded on moral values, as are the policies against impairment of family relationships and against gambling.” *Id.* at 318. Clearly, the fact that courts may refuse to enforce a small category of immoral contracts does not imply that all other types of contract give rise to moral obligations.

578. For a short introduction to the notion of reliance and the related legal concept of promissory estoppel, see PERILLO, *supra* note 551, at 218-22.

579. For a short discussion of unjust enrichment and the available remedies, see *id.* at 541-47.

580. For short discussions of the law concerning enforcement of promises on the basis of moral obligation, see *id.* at 207-208; FARNSWORTH, *supra* note 566, at 57-63.

is beyond the scope of this Article to try to reconstruct the Carnegie Report's contractarian framework based on one of the many intellectual byways in the law of contracts. Suffice it to say that these alternative bases for contractual obligation do not transform a legal obligation into a moral obligation.<sup>581</sup> They simply provide a basis other than bargained consideration for imposing a legal obligation on one of the parties to the alleged contract.<sup>582</sup> In the Carnegie Report, the authors appear to be trying to do precisely the opposite.<sup>583</sup> They seek to transform an allegedly bargained contractual obligation—an exchange of valuable consideration between parties—into a morally binding obligation or at least an obligation with moral significance.<sup>584</sup> The authors owe us an explanation of the theoretical basis for that transformation.

The preceding argument could be reformulated as an emotivist criticism of the contractarian framework.<sup>585</sup> An emotivist can concede that people enter into contracts to pursue their own preferences and values.<sup>586</sup> An emotivist also can and presumably must concede the empirical point that legal systems enforce many such contracts under various theories.<sup>587</sup> The emotivist should deny, however, that there is any objective “moral” obligation to abide by a contract. For the emotivist, moral judgments reflect personal preferences, attitudes, and feelings.<sup>588</sup> Some people may have a personal preference for keeping promises and fulfilling bargains. For those people, abiding by a contract—social or otherwise—might plausibly be described as morally correct.<sup>589</sup> For people who do not hold such preferences, alleged values such as keeping promises, fulfilling bargains, and abiding by contracts may have no force. For the emotivist, it is not accurate to say that it would be morally right for such people to comply with a contract.<sup>590</sup> Compliance could well be legally obligatory, but it would not be morally obligatory.<sup>591</sup> The emotivist might abide by the contract because the emotivist's preferences impel her to avoid the negative

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581. See PERILLO, *supra* note 551, at 207-208, 218-22, 541-47.

582. See *id.*

583. See *supra* note 543 and accompanying text.

584. See SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 54.

585. See Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 120-23; see also AYER, *supra* note 438, at 102-20 (for further discussion of emotivism).

586. See *supra* notes 438-40 and accompanying text (defining emotivism as “the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.”).

587. See *supra* notes 438-40 and accompanying text.

588. See *supra* note 443 and accompanying text.

589. See *supra* note 446-47 and accompanying text.

590. See *supra* note 438-47 and accompanying text.

591. See Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 172-73.

consequences she might suffer if she breaches the contract.<sup>592</sup> Thus, viewed from the emotivist perspective as well, the authors of the Carnegie Report have failed to provide a moral basis for legal professionalism, even if we assume they have succeeded in providing a legal basis. Indeed, if the emotivist is correct that moral judgment reflects nothing more than personal preference, the emotivist can offer a plausible account of why the contractarian argument must fail to provide a distinctively moral basis for legal professionalism. The authors have tried to use contract law, or at least contract jargon, to elevate a legally enforceable bargain based solely on the preferences of the parties to the status of an obligation that is somehow more than legal and more than a matter of preference.<sup>593</sup> But as the emotivist (allegedly) has shown, such obligations do not exist.<sup>594</sup>

In addition to butting heads with emotivism, the contractarian framework also seems to contradict the Carnegie Report's teleological framework on a crucial point.<sup>595</sup> The teleological framework depends upon a claim that human beings have an essential nature, a purpose or *telos*, that defines and distinguishes them from other species as human beings.<sup>596</sup> Under a teleological framework, human ends or goods such as civil regulation and social justice would derive their meaning or significance at least in part from their intelligible relationship to this highest, defining human purpose or good.<sup>597</sup> If the teleological framework is correct, the human *telos* or purpose is a given, a fact or state of affairs that we can discover and about which we can make true or false statements.<sup>598</sup> The *telos* is not chosen, created, or somehow constructed by human beings.<sup>599</sup> For the contractarian framework, by contrast, the defining purposes of the legal profession (*e.g.*, civil regulation and social justice) are just a choice and a construct, the result of an alleged bargain between society and the legal

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592. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145 at 11-12. As Oliver Wendell Holmes Jr. famously wrote, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). The emotivist will keep the contract if she prefers performing to paying in the particular circumstances. See *id.*; see also MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12. For a discussion of what Holmes may have meant by his famous remark and how it has been interpreted or misinterpreted, see Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085 (2000).

593. See generally CARNEGIE REPORT, *supra* note 1.

594. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145 at 11-12; see also AYER, *supra* note 438, at 102-20; Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 120-23.

595. See *supra* Part III.B (discussing the Carnegie Report's teleological framework).

596. See *supra* notes 145-151 and accompanying text.

597. See *supra* notes 379-81 and accompanying text. For further discussion of the hierarchy of goods, see *infra* notes 671-72 and accompanying text.

598. See *supra* note 182 and accompanying text.

599. See *supra* note 182.



profession.<sup>600</sup> Thus, even if the contractarian framework otherwise provided an airtight rationale for the alleged purposes or *teloi* of the legal profession, that rationale arguably would undercut the very teleological framework that lies at the core of the Carnegie Report's account of legal education. To the extent that the "moral basis" of legal professionalism is contractarian, it cannot be teleological in any meaningful and traditional sense.

If I am correct that the contractarian ethical framework fails to provide a "moral basis" for legal professionalism, then the consequences for the central argument of the Carnegie Report are dire.<sup>601</sup> The authors needed a moral basis for a particular account of legal professionalism in order to fill an important gap in their argument. Specifically, they needed an objective, impersonal rationale or justification for teaching a particular set of professional purposes to apprentices during the third apprenticeship. If there is no such objective, impersonal justification or rationale, then teaching any particular set of professional purposes will be an intellectually arbitrary act, an imposition by non-rational means of new "professional" values on students who may hold different values. Moreover, if there is no objective moral basis for the professional purposes that masters teach to apprentices, then there is no objective moral basis for the third apprenticeship's supposedly overarching and unifying account of the purposes or *teloi* of the first and second apprenticeships. But the *teloi* of the first and second apprenticeships appear to be in conflict with one another and apparently will remain in conflict without an overarching set of purposes that can somehow mediate and overcome the conflict.<sup>602</sup> Thus, without the "moral basis" that the contractarian framework supposedly provides, the system of legal education described and advocated by the Carnegie Report remains fundamentally incoherent—an undertaking without a consistent, objective justification or rationale that literally operates at cross-purposes with itself. The authors still need what they would call a moral basis for legal professionalism and what I would call an adequate justification for the *telos* or *teloi* of the third apprenticeship—a *telos* or set of *teloi* that must, in turn, allow us to articulate an overarching and unifying account of the *teloi* of the first and second apprenticeship.<sup>603</sup>

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600. CARNEGIE REPORT, *supra* note 1, at 21.

601. See *supra* note 543 and accompanying text.

602. See *supra* notes 356-75 and accompanying text.

603. See SULLIVAN, WORK AND INTEGRITY, *supra* note 177, at 54.

## V. GETTING SERIOUS ABOUT THE TELEOLOGICAL FRAMEWORK

As I remarked at the beginning of this Article, the Carnegie Report questions whether legal education today is “serious” about the goal of providing law students with a combination of analytical ability, practical skill, and “solid ethical grounding.”<sup>604</sup> Parts III and IV examined the arguments offered in the Carnegie Report and showed that the authors themselves have been less than entirely serious about providing a “solid ethical grounding” for their own account of legal education and the recommendations that they make. Part III showed that the authors build the Carnegie Report around an ungrounded teleological ethical framework when, by the logic of their own argument, what they require is a grounded teleological framework. Moreover, as Part IV showed, the authors appear to acknowledge, and in certain respects to presume or rely upon, two other non-teleological ethical frameworks that are not compatible with one another or with the teleological framework. The authors do not appear to recognize, however, that the “ethical grounding” of their own position is not only not solid but arguably not even coherent.<sup>605</sup> Perhaps the moral of this story is that people who live in ethical glass houses should be careful about throwing around accusations that others are not serious about ethics.

The question, then, is where to go from here. This Part of the Article provides recommendations on the steps that must be taken if we wish to pursue the approach and the objectives of the Carnegie Report. Part V.A addresses the threshold question why we should build on the Carnegie Report at all. Why not just jettison the authors’ work and start from scratch to develop a new theoretical framework for reforming legal education? Part V.B briefly discusses a second, more fundamental threshold issue, namely why we should be concerned about providing a theoretical grounding at all for legal education reform. Can we not just get on with legal education and reform as law schools obviously did before the Carnegie Foundation offered the Report to an eager public? Why engage in navel-gazing when what we need, apparently, is action? Part V.C provides a “propaedeutic punch list” of foundational issues and questions that must be addressed in order to carry forward the work of the Carnegie Report within the teleological framework on which the Report relies.

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604. See *supra* note 8 and accompanying text.

605. See CARNEGIE REPORT SUMMARY, *supra* note 5, at 4.

*A. Why Build on the Carnegie Report?*

One way of assessing Parts III and IV of this Article is to conclude that they have made mincemeat of the case presented in the Carnegie Report and thus have provided us with more than adequate grounds to pitch that work in the recycling bin (because all ideas for reforming legal education must be recycled every few decades) and start over. For at least three reasons, however, starting over would be a mistake. First, as shown in Part II, by triggering widespread, serious academic debate as well as action by law schools, the ABA, the AALS, and major state bar associations, the Carnegie Report has exercised and continues to exercise a significant influence on practical and theoretical work on legal educational reform.<sup>606</sup> Indeed, as I concluded in Part II, it probably is fair to say that the Report and the work it has provoked are the state of the art in the field just as the reports on legal education issued previously by the Carnegie Foundation represented the state of the art in their respective eras.<sup>607</sup> It is, of course, possible that legal academics, the ABA and the rest have foolishly wasted their time attempting to build on the Carnegie Report. Perhaps the Report is no more than a passing fad or fashion, the scholarly equivalent of a Hula-Hoop or poodle skirt. Intellectual humility urges, however, that we treat the attention paid to the Report with respect.<sup>608</sup> At a minimum, we should place the burden on those who would jettison the Report to come up with a better alternative or at least to provide a conclusive argument that the Report itself is wrong not just on matters of detail but on the fundamental questions it addresses.

If we shift the burden of proof to those who favor jettisoning the Carnegie Report, then for the time being any serious discussion of legal education and its challenges should continue to build on the Report. Indeed, given the current state of debate about reforming legal education, a person who refuses to begin with the Report effectively will place herself on the

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606. See *supra* Part II (noting there the broad impact of the Carnegie Report and how it justifies careful study).

607. See *supra* notes 23-32 and accompanying text. The other leading publication that might share “state of the art” honors with the Carnegie Report is *Best Practices*, which itself relies heavily on the Carnegie Report. See *supra* note 22.

608. Humility is, of course, a virtue in the Christian tradition but, as MacIntyre has observed, it is not a virtue that all ethical traditions endorse. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 177 (arguing Aristotle probably would have viewed humility as a vice rather than a virtue). Humility does not seem to be a cardinal virtue of lawyers, academic or otherwise, and humility is conspicuously absent from the lists of lawyerly virtues provided by the Carnegie Report and other interested parties. See *infra* note 683. Humility also may not be a virtue of the self-conscious emotivist, since she believes that her preferences determine what is good. See *id.* For the emotivist, each person seems to be the hero of her own moral narrative.

margins of the debate or, perhaps, outside the debate entirely.<sup>609</sup> But starting with the Report does not mean accepting it as gospel. As this Article has shown, the Report has many important flaws.<sup>610</sup> Thus, starting with the Report will mean building on it by, among other things, identifying the problems that the authors have failed to solve—particularly the foundational problems—and attempting to solve them. If solution proves impossible, the next step would be to recast the argument of the Report in a way that somehow avoids the problems that cannot be solved. Thus, the approach that I favor would treat the Report respectfully as the latest important development in an ongoing tradition of debate about the nature of legal education extending at least as far back as the founding of the first U.S. law school in Litchfield, Connecticut, by Tapping Reeve,<sup>611</sup> through the innovations of Langdell at Harvard,<sup>612</sup> to the Carnegie Foundation reports in the early part of the twentieth century, to the MacCrate Report in 1992.<sup>613</sup> Because this tradition of debate is ongoing, however, we know already that the Carnegie Report will be a way station and not a terminus.<sup>614</sup> We know that the Report eventually will be superseded in some manner by the results of the very debate it has provoked. Superseding the Report will and does, however, require participating in that debate and thus treating the Report as a starting point or focal point rather than starting afresh.<sup>615</sup>

Someone might object to this first reason for building on the Carnegie Report that it is really just a disguised argument from authority, in this instance the authority of other academics, the ABA, and assorted groups who have adopted the Report as their starting point for legal educational reform.<sup>616</sup> Since I accused the authors of relying on an argument from authority in the Report itself,<sup>617</sup> it would be hypocritical of me—as well as fallacious—to rely here on an appeal to authority. I am not, however, relying on authority to support the accuracy of the Report as a whole or the truth of any particular proposition(s) in the Report. Rather, I am using a generalization about what people in the field of legal educational reform are discussing, i.e., the Report, as a rationale for joining in that discussion

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609. See *supra* notes 35-73 and accompanying text (describing the current state of debate).

610. See, e.g., *supra* Parts III.B, IV.A, IV.B.

611. See Karen S. Beck, *One Step At a Time: The Research Value of Law Student Notebooks*, 91 LAW LIBR. J. 29, 33 (1999) (describing the first U.S. law school); see also STEVENS, *supra* note 32, at 1.

612. For references on Langdell, see *supra* note 222.

613. See *supra* note 255 (for reference to this debate).

614. See *supra* note 255.

615. I will show in a subsequent article that this respectful approach to the tradition of debate about legal education, including to the Carnegie Report as the latest iteration of that tradition, is also consistent with the teleological framework on which the authors constructed the Report.

616. See *supra* notes 23-75 and accompanying text.

617. See *supra* notes 453-56 and accompanying text.

instead of seeking to start a new, separate discussion.<sup>618</sup> Moreover, this rationale for joining the discussion does not foreclose the possibility that we ultimately might prove mistaken the very people—including me—who thought it useful to start with and build on the Report. We could prove them wrong if, for example, we could show that the arguments in the Report pose fundamental problems that we cannot solve. Indeed, if we cannot solve the fundamental intellectual problems posed by the Report, we may well have met the burden of proof mentioned above and thus justified a decision not to erect any future discussions of legal educational reform on the foundations laid by the Report.

Although I do not wish to rely on the authority of those who have focused on the Carnegie Report as support for the accuracy of any propositions in that work, I also do not mean to suggest that I believe the key propositions in the Report might be false.<sup>619</sup> On the contrary, I believe that a second reason not to jettison the Report and start afresh is that it provides a fundamentally accurate description and explanation of modern legal education and the issues currently facing legal educators.<sup>620</sup> By jettisoning the Report, we would be throwing a very large baby out with the bathwater. What baby? A few snapshots of the infant will suffice to convey her appearance. It is difficult to believe that anyone currently involved in legal education would challenge the Carnegie Report's basic claims that (1) legal education has at least three important components: cognitive, practical, and ethical;<sup>621</sup> (2) the educational process has not integrated those components very successfully;<sup>622</sup> and (3) the cognitive component tends to receive the greatest attention in law school.<sup>623</sup> It also is

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618. See *supra* note 255.

619. See *supra* notes 34-72 and accompanying text.

620. The Carnegie Report's analysis of legal education is based in part upon empirical observations that the authors gathered over two years at sixteen law schools across North America. See CARNEGIE REPORT, *supra* note 1, at 15-16. I see no good reason to reject the authors' observations and the resulting description.

621. See *id.* at 13-14. The Carnegie Report's account of the three components of legal education dovetails very well with Talcott Parsons's classic account of the three sociological "criteria" that distinguish a profession from other types of occupational roles or groups: (1) "formal technical training" that "lead[s] to . . . mastery of a generalized cultural tradition"; (2) "skills" in the use of the tradition; and (3) "institutional means of making sure that such competence will be put to socially responsible uses." Parsons, *supra* note 405, at 536. According to the Carnegie Report, law school provides or should provide apprentices with a formative education that combines cognitive discipline and substantive knowledge, skills training, and an overarching ethical framework. Through this formative education, apprentices should become qualified to serve as journeyman members of a profession that satisfies the three sociological criteria that Parsons specified. The fact that the Carnegie Report's account of legal education fits so neatly into Parsons's discussion of professions lends credibility to the Report's account.

622. See CARNEGIE REPORT, *supra* note 1, at 13-14.

623. See *id.* at 60-63. I do not mean to suggest that it is impossible to challenge the details of the authors' description of legal education. For example, as discussed above, some of the secondary litera-

difficult to believe that anyone would seriously dispute the Carnegie Report's claim that legal education plays a formative role in the lives of future lawyers by altering, or at least attempting to alter: the way they think and what they think about, the way they make practical judgments, and the standards and objectives by which they guide and assess their own actions as well as the actions of others.<sup>624</sup> In addition, I suspect that there may not be very much disagreement with the Carnegie Report's proposal that we view the formative work of legal education as a kind of apprenticeship, a process in which masters of a sort transform novices into apprentices and then into journeymen.<sup>625</sup> At a minimum, we clearly should test and explore the hypothesis that legal education consists of and should be treated as a set of interlocking apprenticeships.<sup>626</sup>

Recognizing, of course, that some people might disagree, I propose that we take these basic elements—formation, apprenticeship, and the three components of legal education—at least provisionally<sup>627</sup> as givens or facts requiring investigation and further explanation. Along with the authors, I believe that these givens, these *explananda*, support and perhaps demand a teleological explanation—an account based on a teleological framework.<sup>628</sup> In other words, the teleological framework discussed in Part III appears to be woven into the givens, the facts on the ground, of legal education. When we look closely, the facts appear to us *as* facts about a teleological process. In the words of Professor Moravcsik, the *telos* is an “element[] of reality”

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ture on the Carnegie Report has criticized the authors' single-minded focus on the case dialogue as a pedagogical method. *See supra* notes 77-82 and accompanying text. One could correct the details of the Carnegie Report's description and explanation of the case dialogue and its significance without jettisoning the Report as a whole. Indeed, correcting the details of the Carnegie Report would seem to be a core function of a vibrant scholarly process. *See supra* notes 77-82 and accompanying text.

624. *See* CARNEGIE REPORT, *supra* note 1, at 2-4. I do not wish to exclude the possibility of debate about whether and how legal education should form future lawyers. I suggest only that any dispassionate observer would acknowledge the formative potential and impact of legal education. Indeed, even those emotivists who object to efforts to (re)form the values of future lawyers recognize that professional education may have a formative effect on students. *See supra* notes 449-58 and accompanying text.

625. *See* CARNEGIE REPORT, *supra* note 1, at 25-27.

626. *See id.*

627. I add the qualifier “at least provisionally” because I recognize that we might have to return to and reconsider the Carnegie Report's basic observations about legal education if we discover that we cannot offer a coherent account of those observations. In other words, if a teleological account cannot be made to work, we may have to return to the things themselves—i.e., to the actual world of legal education—to determine whether the givens that seemed to demand a teleological account may not have been given at all. As MacIntyre observes, “[w]hat each observer takes himself or herself to perceive is identified and has to be identified by theory-laden concepts.” MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 79. If we ultimately decide to reject concepts that are laden with a teleological theory, then what we take ourselves to perceive when we reexamine the world of legal education may “look” quite different. *See id.*

628. *See supra* Part III.

and the relationships described in the teleological explanation are “ontological.”<sup>629</sup> This means that once we acknowledge even provisionally the accuracy of the Report’s description of legal education, we inevitably will have to wrestle with the problems presented by the teleological framework through which the authors present that description and its implications.<sup>630</sup> The teleological framework is not an arbitrary, heuristic construction imposed on a neutral set of facts, but rather a central element of a more or less coherent whole—a state-of-affairs-revealed-from-a-theoretical-perspective—that the Carnegie Report attempts to present or exhibit and explain.<sup>631</sup> If we wish to understand that coherent whole, it makes sense to work within the parameters of the Carnegie Report to attempt to solve the problems that the Report poses before concluding that we must start again from scratch. We may eventually have to jettison the Carnegie Report, but we have not yet reached a stage where doing so would make sense.

A third reason to build on the Carnegie Report instead of beginning anew may be the paucity of good alternatives. The question what makes an intellectual account of anything a good or better account is not easy to answer.<sup>632</sup> At a minimum, we can assume that a good alternative to the Carnegie Report would have to display all or most of the virtues of the Report as a descriptive and analytical work while avoiding the pitfalls of theory into which the Report may have fallen. I do not have any grounds for denying that such an alternative account is possible. Indeed, I briefly discuss two possible alternative accounts in Parts V.B and V.C.6 and argue that they do not provide us with adequate grounds to desert the Carnegie Report. I do contend, however, that until someone comes forward with a sufficiently robust alternative, the Report will remain the only serious game in town. At this moment in the tradition of debate about legal education to which I alluded above,<sup>633</sup> the Carnegie Report is the focal point.<sup>634</sup> And the

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629. See Moravcsik, *supra* note 110, at 7-10; *supra* note 128 and accompanying text.

630. See *supra* notes 167-86.

631. See *id.*

632. MacIntyre has devoted considerable attention to this issue. See MACINTYRE, THREE RIVAL VERSIONS, *supra* note 182, at 116-26. Building on the insights of Thomas Kuhn and others, he has attempted to show how Thomas Aquinas could seek to reconcile the ethical positions of Aristotle and St. Augustine and at the same time claim that his (Aquinas’s) reconciliation was rationally superior to either of those earlier positions. See, e.g., *id.* For MacIntyre’s views on Kuhn and Kuhn’s interlocutors, see ALASDAIR MACINTYRE, *Epistemological Crises, Dramatic Narrative, and the Philosophy of Science*, in THE TASKS OF PHILOSOPHY 3, 15-23 (2006).

633. See *supra* notes 611-13 and accompanying text.

634. There is much more to be said about the relationship within a teleological framework between a tradition of debate and a practice such as legal education or lawyering in general. I plan to discuss this topic in a future article.

Report's status as a focal point is both a cause and an effect of the decision that academics, the ABA, the AALS, and state bar organizations have made to focus attention on it.<sup>635</sup> There simply are no other recent accounts of legal education that show the same breadth and depth of analysis.<sup>636</sup> The Carnegie Report is, therefore, the best available starting point, despite the questions raised about it in Parts III and IV.<sup>637</sup>

*B. Why Provide Any Type of Ethical Grounding?*

Section A presents a plausible explanation of why we should start with and focus on the Carnegie Report as the best currently available theoretical or intellectual basis for reforming legal education. Section A fails, however, to address a more fundamental question: why do we need an theoretical or intellectual basis at all? Why not just move forward with the effort to reform legal education and stop wasting time with Sudoku puzzles about teleological ethical frameworks and pretentious palaver about the emotivists and contractarians? Why not simply get on with it? If we ask “get on with what, precisely?” the answer might be “get on with what works.” This argument sounds suspiciously like something a very naïve pragmatist might say, and it would be facile to point out that Pragmatism is itself a complex theoretical position, not a safe haven for people who wish to eschew theory in favor of action.<sup>638</sup> If we try to take the anti-theoretical position seriously on its own terms, we must ask what is meant by the proposal to “get on with what works.” It would seem that in order to develop an approach to legal education that works, one needs to know what end(s) one seeks to achieve. A screw driver works well if one seeks to drive a screw, but the same screw driver will not work well if one uses it to take a cat's temperature or clean a baby's ear. Thus, before we can discuss or do what works in the field of legal education, we need to reach some conclusions—at least tentative conclusions—about what we want to accomplish. We need, in other words, to determine at least provisionally the *telos* or *teloi* of legal education. Thus, the anti-theoretical, “do what works” approach also seems to presuppose something like a teleological framework of the sort found in the Carnegie Report.<sup>639</sup> At a minimum, the people who urge us to “do what works” owe us an explanation—

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635. For a discussion about using the Report as a focal point, see *supra* note 35-73 and accompanying text.

636. See *supra* note 35-73 and accompanying text.

637. See *supra* Parts III, IV.

638. For a brief critical account of Pragmatism as a philosophical position, see H. S. Thayer, *Pragmatism*, in *A CRITICAL HISTORY OF WESTERN PHILOSOPHY* 437 (Daniel J. O'Connor ed., 1967).

639. See *supra* notes 167-86.



teleological or otherwise—of what ends they plan to accomplish and why they plan to accomplish those particular ends. Everyone agrees, I hope, that we should adopt an approach to legal education that works rather than one that does not work. But until we figure out what we want legal education to work *for*, what ends we want it to *achieve* or *realize*, it makes little sense to focus exclusively on what works and what does not work.

There is a second problem with the seductive suggestion that we should stop navel-gazing and get on with reforming legal education. If the proposal to “get on with it” really is meant to support action in the absence of any substantial theoretical or intellectual basis for such action, then the proposal is anti-intellectual in the worst sense.<sup>640</sup> The proposal apparently would have us abandon the attempt to provide a persuasive account of why we do what we do when educating lawyers and fall back on an unaccountable activism. Thus, when a parent who pays law school tuition or a legislator who appropriates funds for a state law school asks why we are changing the curriculum or the pedagogical process in a particular way or why we are not changing the curriculum or the pedagogical process, we would have no substantial account to offer of our actions. We also would have no account to offer when a law student asks why we do things this way rather than that way, or why we are changing the way we do things. Indeed, under the “do what works” approach, we legal educators would do what we do or change what we do even though we know that we have no substantial account of the “why” and we believe that we would be wasting our time with navel-gazing by attempting to develop such an account. It would not be surprising if parents, legislators, and students found this sort of unaccountable legal education and educational reform very unsatisfying. Such unaccountable action would not “work” for them. Although parents, legislators, and students might not support endless navel-gazing in place of action, they certainly will, and should, insist that legal academics who expect payment for their intellectual labor engage in the intellectual labor of developing a persuasive theoretical account of what law school seeks to accomplish as a prelude to doing what works.<sup>641</sup> We must, therefore, resist

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640. It is, perhaps, not surprising that in a study of American anti-intellectualism, Richard Hofstadter devotes a highly critical chapter to John Dewey’s pragmatic philosophy of education and its practical impact. See RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 359-90 (1963). Proposals to act pragmatically often seem to accompany anti-intellectual views or skepticism about the value of intellectual activity. See *id.*

641. Dean Smith has shown that legal scholars depend far more than academics in other disciplines on student tuition payments to fund their scholarly activities. Steven R. Smith, *Gresham’s Law in Legal Education*, 17 J. CONTEMP. LEGAL ISSUES 171, 206 (2008). It would be ironic if legal scholars concluded that there is no need to use some of the student tuition money that funds faculty scholarship to develop a persuasive scholarly account of how and why we educate law students in a particular way.

the seductive suggestion that we can or should avoid theoretical work of the sort that the Carnegie Report undertakes and inspires.

A final, more subtle version of the “get on with it” argument might concede that we need some kind of theoretical ground for legal education and education reform but deny that we need to locate the ground in an ethical theory. Why not simply avoid notoriously sticky questions about ethics and ethical theory (or what some call meta-ethical theory) by providing some sort of non-ethical theoretical grounding? The best answer to this argument is that legal education clearly is a moral and ethical enterprise in several senses.<sup>642</sup> First, and most obviously, it includes an explicit ethical component in the form of required training in legal ethics.<sup>643</sup> Second, legal education clearly involves teaching the apprentice to think and act differently and to see herself as a different person with a new and different calling.<sup>644</sup> It is not clear how we could offer a justification for re-forming another person and reorienting her life that did not involve a large dose of theorizing about why it is good and better for a person to think this way rather than that way, to behave this way rather than that, and to pursue these ends rather than those. Such theorizing inevitably will involve fundamental ethical questions and thus will be ethical theorizing. Finally, as the Carnegie Report observes, the word “ethics” “comes from the Greek *ethos*, meaning ‘custom,’ which is the same meaning of the Latin *mos*, *mores*, which is the root of ‘morals.’”<sup>645</sup> The Report adds: “[b]oth words refer to the daily habits and behaviors through which the spirit of a particular community is expressed and lived out. In this broad sense, professional education is ‘ethical’ through and through.”<sup>646</sup> Thus, any theory that seeks to provide a ground for the professional education that lawyers receive will be at least in part an ethical theory.

### C. Propaedeutic Punch List

Drawing on the arguments in Parts III and IV, this Part of the Article identifies and briefly discusses the most significant foundational problems

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642. See ABA STANDARDS, *supra* note 193, Standard 302(a)(5).

643. See *id.* (“A law school shall require that each student receive substantial instruction in . . . (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”); *id.*, Interpretation 302-9 (“The substantial instruction . . . required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”).

644. *Think Like a Lawyer: The Socratic Method Makes Better Lawyers*, UNIV. OF LAVERNE, COLLEGE OF LAW, <http://law.laverne.edu/prospective-students/in-brief/think-like-a-lawyer-the-socratic-method-makes-better-lawyers/> (last visited October 1, 2012).

645. CARNEGIE REPORT, *supra* note 1, at 30.

646. *Id.* at 30-31.

that the teleological framework of the Carnegie Report raises but does not resolve.<sup>647</sup> I refer to these foundational issues as propaedeutic because an adequate resolution of them is a necessary preliminary to and condition of real substantive progress in the debate about legal educational reform that the Carnegie Report has provoked.<sup>648</sup> To leave these issues unexamined and unaddressed is to risk constructing a castle—or perhaps a shiny new law school—on sand. A strong intellectual rain could wash away the foundation of legal education leaving nothing but the rickety, unaccountable practices, if any, built on that foundation. I refer to this list of outstanding foundational issues as a “punch list” because it identifies work that needs to be done, not work that I pretend to do in this Article. This list will have served its purpose if it ensures that I, and perhaps others, get—to borrow again the language of the Carnegie Report—“serious” about these foundational issues.<sup>649</sup>

### 1. *What Is the Telos of the Legal Profession?*

At the risk of restating the obvious, a teleological account of anything requires at least a provisional account of the relevant *telos*.<sup>650</sup> Thus, an account of legal education built on a teleological framework must include a persuasive account of the *telos* or *teloi* of legal education. If we assume, as seems reasonable, that the purpose or *telos* of legal education is, as the Carnegie Report’s title suggests, educating lawyers, then we should ask what we educate someone to be and do when we educate someone to be a lawyer.<sup>651</sup> The question then becomes what is the *telos* of the lawyer or of

647. For a discussion of the Carnegie Report’s teleological framework, see *supra* Part III.

648. See *supra* note 14 (describing the use of “propaedeutic”); see also *supra* notes 35-73 for a discussion of the debate about legal educational reform provoked by the Carnegie Report.

649. See *supra* note 8 and accompanying text.

650. The account of the *telos* may be provisional in the sense that the account could and likely would evolve as we reflect further on the *telos* and the processes by which we expect to achieve it. As MacIntyre has observed, “when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose.” MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 222. Thus, identifying a *telos* that serves as the “point and purpose” of the legal profession will not exclude further debate within the profession about the *telos*. See *id.*

651. According to the Carnegie Report, “[a]mid the useful varieties of mission and emphasis among American law schools, the formation of competent and committed professionals deserves and needs to be the common, unifying purpose.” CARNEGIE REPORT, *supra* note 1, at 13. *But cf.* Peter W. Martin, “Of Law and the River,” and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 26 (1985) (*Letter from Professor Owen M. Fiss to Dean Paul D. Carrington* states as follows: “Law professors are not paid to train lawyers, but to study law and to teach their students what they happen to discover.”). Writing in 1970, Robert Stevens described legal education as “a profession whose literature (or its absence) suggests that law professors are either remarkably vague or largely inarticulate about the skills which law schools currently purport to develop, and, indeed, about the purposes for which such schools exist.” Stevens, *supra* note 5, at 37. Although we may have made some progress since 1970 on

lawyering and the legal profession? Without an account of the *telos* of lawyering and the legal profession, we may be unable to specify what it means to be a lawyer, i.e., what a lawyer is and what a lawyer does as a lawyer. If we cannot specify what it means to be a lawyer and to engage in lawyering, then according to the Carnegie Report, we will not have a content for the ethical apprenticeship.<sup>652</sup> We can teach apprentice lawyers the ethical rules that they must not break, but we cannot tell them what it means for them and for us to be lawyers, or what the purpose(s), aim(s), and end(s) of lawyering are. We leave our apprentices with no coherent account of the calling that we invite and encourage them to adopt or the life that we expect them to lead in that calling. Indeed, we may convey as our shadow pedagogy that there is no such coherent account of their calling or their future lives in it.

If a persuasive account of the *telos* or *teloi* of lawyering and the legal profession is a necessary condition for the third apprenticeship, then such an account also is a necessary condition for the first and second apprenticeships, at least insofar as those apprenticeships work to achieve a common and coherent objective.<sup>653</sup> The cognitive apprenticeship teaches the apprentice to think like a lawyer by distancing herself from the messy human details of a situation in order to analyze and organize it in abstract legal categories.<sup>654</sup> The practical apprenticeship, by contrast, teaches the apprentice to intervene here and now (or then and there) in a specific, messy human situation and deploy specific legal skills to achieve a specific result.<sup>655</sup> The capacity to intervene in a specific situation to achieve a desirable result the authors call practical or professional judgment.<sup>656</sup> Unfortunately, learning to think like a lawyer and learning to exercise practical judgment may pull the apprentice in two quite different directions. To ensure that these two types of learning, these two apprenticeships, pull the apprentice in a single direction toward a single objective, we require a coherent account of that objective, an account that seeks to unify the cognitive and practical dimensions of lawyering.<sup>657</sup> We need, in other words, an account of the overarching objective(s) of legal education rooted in an account of the *telos* or *teloi* of lawyering and the legal profession.

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identifying the skills that law schools purport to develop, see *supra* note 255, we still seem to have trouble articulating the purpose of legal education.

652. CARNEGIE REPORT, *supra* note 1, at 144-45.

653. For a discussion of this issue, see *supra* Part III.B.2(d); see also CARNEGIE REPORT, *supra* note 1, at 27-33.

654. See *supra* notes 218-20 and accompanying text.

655. See *supra* notes 254-56 and accompanying text.

656. For a discussion of professional judgment, see *supra* notes 257-71 and accompanying text.

657. See *supra* notes 218-20, 254-56 and accompanying text.

This means that an account of the *telos* or *teloi* of lawyering and the legal profession is a necessary preliminary to and condition of an account of legal education such as the one found in the Carnegie Report that recognizes and seeks to enhance the three apprenticeships while fitting them together into a coherent whole.<sup>658</sup>

The Carnegie Report never directly addresses or acknowledges the importance of the question what is the *telos* of lawyering and the legal profession. The Report identifies various services or functions that the legal profession performs and various goals the profession apparently seeks to achieve such as regulating social transactions and securing individual and social justice.<sup>659</sup> The Report's suggestions in this area may prove useful. Indeed, it would be surprising if any of the professional goals and services that the Report identifies were to prove inconsistent with the *telos* of lawyering and the legal profession. The problem, in other words, is not that the Carnegie Report offers false clues about the *telos*. Rather, the problem is that the Carnegie Report does not provide a coherent and reasonably thorough (provisional) account of the *telos* (or *teloi*). Intellectual humility suggests that we should begin with the clues in the Carnegie Report and, perhaps, *Work and Integrity* about the various functions of the legal profession and, if possible, use them to construct a coherent account of the *telos* or *teloi* of the profession. We should begin, in other words, with the premise that the authors of the Carnegie Report have seen or held the trunk, the tail, and the leg, but they have not beheld the entire living elephant. This approach would build on the Carnegie Report and follow the path that it marks out to a destination that it does not reach.

In addition to offering clues and off-hand remarks about the legal profession's functions and services, the Carnegie Report imposes at least one important demand or requirement that any adequate account of the *telos* of lawyering and the legal profession will have to meet in order to remain within the Report's framework. An adequate account of the *telos* will have to provide the basis for a coherent account of legal education as the formative process by which a novice becomes a lawyer and a member of the profession. In particular, an account of the *telos* will have to provide the basis for an explanation of the purpose(s) of the cognitive apprenticeship and the purpose(s) of the practical apprenticeship. Moreover, the explanation of those various purposes will have to demonstrate that they cohere with one another, thus allowing us to show that the first and second apprenticeships do not impose fundamentally conflicting demands or goals

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658. See *supra* note 182.

659. See *supra* notes 385-415 and accompanying text.

on students. Indeed, an adequate account of the *telos* of lawyering and the legal profession should allow us to demonstrate that the cognitive and practical apprenticeships push and pull the apprentice toward a unitary objective animated by a coherent purpose or set of purposes. If we follow the reasoning of the Carnegie Report, we must reject as inadequate any account of the *telos* of lawyering and the legal profession that does not provide a *telos* for legal education and thereby supply a unifying account of and for the first two and, indeed, all three apprenticeships.<sup>660</sup> Of course, an adequate account of the *telos* of lawyering and the legal profession must do more than guide legal education, but from the standpoint of people working on legal education reform, it is clear that an adequate account of the *telos* of lawyering and the legal profession must *at the very least* provide the requisite guidance for legal education (as demanded by the Carnegie Report).

Although the Carnegie Report is less explicit about the point, there appears to be at least one other task that an adequate account of the *telos* of lawyering and the legal profession will have to be able to perform. As I observed above,<sup>661</sup> the authors see an “apparent conflict”<sup>662</sup> or “tension”<sup>663</sup> between the role of “the lawyer as zealous advocate for clients”<sup>664</sup> and the lawyer as “social regulator[.]” with “obligations to see to the proper functioning of the institutions of the law.”<sup>665</sup> They do not take a position on whether the conflict or tension is real or apparent.<sup>666</sup> Indeed, they comment that

there is a . . . controversial issue within the broad scope of the apprenticeship of professionalism and purpose: Does the responsibility to pursue substantive justice in individual cases and to consider the broader impact of one’s actions conflict with advocacy on behalf of one’s client? This is a matter of considerable debate. In the view of many attorneys and law school faculty, the only justice that can be known with certainty is procedural justice, and the adversary system ensures the greatest possible justice in the

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660. *See supra* Part III.B.2(d).

661. *See supra* notes 393-96 and accompanying text.

662. CARNEGIE REPORT, *supra* note 1, at 82.

663. *Id.* at 83.

664. *Id.* at 82.

665. *Id.*

666. *Id.* at 82-83.

long run if lawyers on each side promote their clients' interests in the narrow sense. Others disagree.<sup>667</sup>

Instead of attempting to resolve this controversy, however, the authors state that “[s]tudents at least need to be made aware, not only of the various sorts of lawyer they might become but also of the various kinds of approaches they can take toward lawyering itself.”<sup>668</sup> In other words, the authors seem to recommend that we punt this basic dispute over the nature and purpose of lawyering to the apprentice and let her handle it—or fumble it—on her own. On the contrary, I would suggest that any adequate account of the *telos* of the legal profession cannot evade this controversy about whether there is a real tension or merely an apparent tension between the model of lawyer as zealous advocate for a particular client and the model of lawyer as social regulator and/or civic professional. If these two models of lawyering are both valid and the conflict or tension between them is real rather than apparent, then it may be impossible to develop a single, coherent account of the *telos* or *teloi* of lawyering and the legal profession that can serve as the subject matter of the third apprenticeship and the unifying theme of the first and second apprenticeships. No coherent *telos* or *teloi* may mean no teleological framework; no teleological framework would mean, as I have suggested, no plausible account of legal education and educational reform based on the Carnegie Report.

## 2. How Can We Ground the *Telos* After Jettisoning the Contractarian Argument?

Although it is difficult to imagine anyone objecting in principle to the more-or-less tautological assertion that an adequate teleological account of legal education (or anything else) requires and presupposes an adequate (provisional) account of the relevant *telos*, any claim of the sort “X is the *telos* of the legal profession” likely will meet an objection that we can summarize in two words: “prove it.” Anyone can purport to identify a *telos* for lawyering and the legal profession, but how can one show that any particular *telos* so identified is the proper *telos*? How might one show that a particular account of the *telos* of lawyering and the legal profession somehow binds and is valid for all members of the profession, including in particular those members of the profession who might disagree with that account of the *telos*? To borrow an example from the previous section, how

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667. CARNEGIE REPORT, *supra* note 1, at 131. For a critical discussion of David Luban’s account of “client counseling,” which leans heavily toward the view that a lawyer should pursue substantive justice rather than the client’s interests, see *infra* notes 772-75 and accompanying text.

668. CARNEGIE REPORT, *supra* note 1, at 132.

might one show that pursuing substantive justice is the true *telos* of a lawyer (assuming it is) to a person who believes (allegedly incorrectly) that the *telos* of lawyering and the legal profession is pursuing the client's interests as the client understands them? How might someone demonstrate to me that a purported *telos* is my *telos* as a lawyer even if I do not particularly like that *telos* or wish to pursue and achieve it? Is such a showing possible or must we concede in advance that any account of the *telos* of lawyering and the legal profession can never be more than an account of a purported *telos*, i.e., an account of what one or some people believe may be the *telos* but not an account of what we plausibly can claim is the proper *telos* binding on and valid for all lawyers as lawyers? Indeed, is the Carnegie Report's own failure to identify the *telos* of lawyering and the legal profession not a symptom of a deeper problem, namely that either there is no *telos* or, if there is a *telos*, we cannot demonstrate to everyone's, or perhaps anyone's, satisfaction what it might be?

Part IV.B argued that the contractarian framework serves as the Carnegie Report's rather half-hearted attempt to provide a moral basis or ground for lawyering and the legal profession. Thus, the contractarian framework appears to be the Report's response to the challenge to "prove" that a particular *telos* might bind members of the legal profession whether they like it or not. The contractarian framework attempts to explain the obligation that lawyers supposedly have as lawyers and professionals to pursue certain goods or *teloi* by showing that the obligation results from a social contract between the profession and society.<sup>669</sup> The Carnegie Report's invocation of the contractarian framework, half-hearted or not, registers the fact that the authors of the Report recognize they have to provide a persuasive account not only of what the proper *telos* of the legal profession is but of why the asserted *telos* is the proper *telos* and therefore is binding on, and valid for, all members of the profession, including, one presumes, those who would contest the Report's vague account of the *telos*. Because Part IV.B shows at considerable length that the contractarian framework, at least as presented by Sullivan and his co-authors, does not withstand serious scrutiny, we continue to need an argument that will do the work that the authors apparently intended the contractarian framework to do.<sup>670</sup> We need, in other words, a persuasive justification for the statement "X is the *telos* of the legal profession" that will respond to a skeptic's or unbeliever's challenge to "prove it." Consequently, the propaedeutic punch

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669. See *supra* note 489 and accompanying text.

670. See *supra* Part IV.B.



list must include a demand for an argument that replaces the contractarian framework.

I plan to discuss this issue at length in a subsequent article, so I do not wish to pull a half-baked loaf out of the intellectual oven here. Nevertheless, it may be helpful for some readers to see possible paths that the argument could take. As discussed above, a teleological account of human action typically includes an account of a hierarchy of goods or ends.<sup>671</sup> One might begin with an account of the highest good or end for human beings as such and then proceed with accounts of relevant subordinate goods or ends. The accounts of the subordinate goods or ends would show, at least in part, how the subordinate goods or ends help human beings to realize or achieve their highest good or end as human beings. Under such a framework, therefore, an account of the good(s) or purpose(s) of the legal profession would presuppose and rely upon an account of the highest good or purpose of human beings and, perhaps, upon accounts of other intermediate goods and purposes in the hierarchy. For example, to understand the good(s) or purpose(s) of the legal profession we might require an account of the good(s) or purpose(s) of law and the legal system. That account may presuppose an account of the good(s) or purpose(s) of our political community and, possibly, of political community *per se*. That account may derive in turn from our account of the highest good or end of human beings, our account of the essential human *telos*. Any argument or justification for such an account of a hierarchy of goods for human beings rooted in the highest good or *telos* likely would start with the work of Aristotle and his examination of *eudaimonia*.<sup>672</sup> From there, one might proceed as MacIntyre does through the work of Thomas Aquinas.<sup>673</sup> Alternatively, one might attempt to move through a different channel of the Aristotelian tradition by way of Hegel and his commentators or even, perhaps, by way of Martin Heidegger, avoiding of course the latter's intellectual swan dive into the empty pool of Nazism.

Someone might object to this second item on the punch list that it would require us to do the impossible as a precondition for proceeding with debate about the reform of legal education based on the Carnegie Report and thus it would effectively block all further such debate.<sup>674</sup> What is the impossible precondition for further debate? The requirement that we develop a

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671. *See supra* notes 379-81 and accompanying text.

672. *See supra* notes 157-159 and accompanying text.

673. For an example of MacIntyre's Thomist approach, see MACINTYRE, THREE RIVAL VERSIONS, *supra* note 182, at 196-215 (offering a Thomist response to the genealogical arguments of Nietzsche and Foucault).

674. *See supra* notes 428-33 and accompanying text for discussion of this debate.

persuasive justification for our account of the *telos* of lawyering and the legal profession, an account rooted (perhaps) in a persuasive justification for an account of the human *telos*. If more than 2000 years of debate about teleological explanation and the human *telos* has shown anything, it has shown that we cannot expect anyone now or in the near term to develop an argument in support of a particular *telos* for lawyering and the legal profession that somehow will be binding on and valid for all lawyers, including those who reject the *telos* and/or the argument for it. In other words, we cannot expect to develop on demand a grounded teleological account that will suffice as a substitute for the patently inadequate contractarian framework discussed in Part IV.B.<sup>675</sup> But if we cannot develop the relevant kind of grounded teleological account, then we apparently cannot proceed with the debate about legal education reform based on the Carnegie Report. Or if we do proceed with the debate, we lay ourselves open to the objections leveled in Part V.B against those who recommended that we drop the theorizing and “get on with it.”<sup>676</sup>

I agree that it would be absurd to argue that debate about legal educational reform based on the Carnegie Report should await the result of what might be a very long debate about how to justify an account of the *telos* of lawyering and the legal profession, let alone a never-ending debate about whether we have succeeded in justifying an account of the highest human good or *telos*. As a non-absurd alternative, I would propose that we take advantage of the division of academic labor. A small number of scholars should wrestle with the problem of grounding the teleological account or framework for legal education while another likely larger group of scholars can continue to work on issues related to educational reform. People in the former group should keep apprised of the results presented by people in the latter group to ensure that work on the grounding problem does not lead to a grounded framework or account that is badly out of synch with the best current thinking on the specifics of legal education and educational reform. More importantly, people in the latter group—those who focus on the specifics of legal education and educational reform—should keep apprised of the results presented by people in the former group, for at least two reasons. First, without those results, all proposals for and conclusions about legal education and its reform must remain ungrounded, therefore tentative and hypothetical. Second, the results of work on grounding the teleological framework ultimately will form an important part

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675. See *supra* Part IV.B (for a discussion on the inadequate contractarian framework of the Carnegie Report).

676. See *supra* Part V.B.

of the content of the third apprenticeship, which at the very least should provide students with the best available thinking about the rationale for the *telos* or *teloi* of lawyering and the legal profession.<sup>677</sup>

Unfortunately, we might have to live for a considerable period of time with a situation in which several competing accounts of the *telos* or *teloi* of lawyering and the legal profession grounded in several competing, more-or-less persuasive justifications support (or fail to support) various competing concrete proposals for legal educational reform. We also may have to learn how to get on with the business of forming journeyman lawyers along the lines recommended by the Carnegie Report in an intellectual environment that contains competing accounts of, and justifications for, the *telos* or *teloi* of lawyering and the legal profession.<sup>678</sup> A critic might observe that a situation comprising potentially endless theoretical debate plus getting on with our practical business would hardly be novel. Indeed, that situation would look suspiciously like the status quo. What would be novel, perhaps, is a clearer understanding of our situation and our ongoing debate about the *telos* or *teloi* of lawyering and the legal profession as part of a larger intellectual project defined at least in part by the teleological framework outlined in the Carnegie Report. Perhaps the debate would not prove to be endless if it were conducted in the light of this larger intellectual purpose.<sup>679</sup>

### 3. Formation and Character—What Are the Lawyerly Virtues?

At a few points in the Carnegie Report, the authors identify various virtues that, they claim, are the virtues of lawyers or, perhaps, of professionals in general.<sup>680</sup> One such virtue is professional judgment—the *telos* of the second apprenticeship.<sup>681</sup> Other virtues that the authors list include integrity, consideration, and civility.<sup>682</sup> At no point in the text do

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677. See CARNEGIE REPORT, *supra* note 1, at 28.

678. See *supra* Part III.B.2.

679. This suggestion that academic and professional debate about the *telos* of lawyering and the legal profession might itself reflect and seek to realize certain defining purposes or achieve certain goods (such as strengthening the foundations of the Carnegie Report) presupposes a teleological understanding of academic and professional debate. Within a teleological framework, the goods we achieve through academic and professional debate, goods such as truth, rational consensus or, perhaps, self-understanding, would find their place in a hierarchy of goods just as would the goods of lawyering and the legal profession. MACINTYRE, *First Principles*, *supra* note 265, at 169-78. It is beyond the scope of this Article to outline and defend a teleological account of academic and professional debate. For some initial reflections on the topic, see *id.* For a short discussion of the questions that the Carnegie Report implicitly raises about the role of scholarship in the broader mission of the law professor, see *infra* notes 738-48 and accompanying text.

680. See *supra* notes 257-71 (virtue of professional judgment), 295 (virtues of integrity, consideration, and civility).

681. For a discussion of professional judgment, see *supra* notes 257-71 and accompanying text.

682. See *supra* note 295 and accompanying text.

the authors draw together their seemingly off-hand comments about virtue(s) into a general discussion covering, among other things, what the lawyerly virtues are,<sup>683</sup> how we know those virtues are the lawyerly virtues, and what steps (if any) we do, can, and/or should take to inculcate those virtues in apprentice lawyers during the formative process. The absence of such a general discussion is significant because, as MacIntyre contends, an account of the virtues is generally a key element of a teleological ethical theory in the Aristotelian tradition:

For what constitutes the good for man is a complete human life lived at its best, and the exercise of the virtues is a necessary and central part of such a life, not a mere preparatory exercise to secure such a life. We thus cannot characterize the good for man adequately without already having made reference to the virtues. And within an Aristotelian framework the suggestion therefore that there might be some means to achieve the good for man without the exercise of the virtues makes no sense.<sup>684</sup>

The Greek work generally translated as “virtue” is *aretê*, which also bears the more general meaning “excellence.”<sup>685</sup> Thus, as MacIntyre suggests, within the Aristotelian tradition, to live a good life and achieve or realize the human good or *telos* is, at least in part, to exercise and realize the various excellences or virtues that make a human being a true human being.<sup>686</sup> An account of the human *telos* will be, at least in part, an account of the actively virtuous or excellent human life.<sup>687</sup> Moreover, as MacIntyre observes, in the science of ethics, “[t]he precepts which enjoin the various

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683. Professor Stolz, for example, suggested that “there has emerged an ethic of the profession, by no means universally honored, but nonetheless a widely-shared tradition of independence, courage and honesty.” Stolz, *Clinical Experience*, *supra* note 194, at 76. Not to be outdone, the MacCrate Report declares that “[i]n his or her actions on behalf of a client, a lawyer should embrace ‘those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, throughout the centuries, been compendiously described as ‘moral character.’” MACCRATE REPORT, *supra* note 255, at 213-14 (quoting *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring)). No doubt it would be gratifying if independence, courage, honesty or truth-speaking, honor, granite discretion, and fiduciary responsibility were among the professional virtues of lawyers, but until we have a persuasive account of lawyerly virtue, we cannot know what virtues will find a place in the catalog. For a recent discussion of lawyerly virtue, see Robert F. Blomquist, *The Pragmatically Virtuous Lawyer*, 15 WIDENER L. REV. 93, 108-57 (2009) (proposing a catalogue of “ten pragmatic lawyerly virtues”). Unfortunately, Professor Blomquist does not discuss the Carnegie Report or the central role of the virtues in a formative legal education. *See id.*

684. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 149.

685. *See Virtue*, in ARISTOTLE, *NICOMACHEAN ETHICS* 385, glossary at 430-31 (Terrence Irwin trans., 1985).

686. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 149.

687. *Id.*

virtues and prohibit the vices which are their counterparts instruct us how to move from potentiality to act, how to realize our true nature and to reach our true end.”<sup>688</sup> The precepts of ethics, in other words, teach us how to actualize our potential to be virtuous or excellent, how to realize in action the virtues or excellences of a human being, and thus how to behave and live virtuously and excellently. As MacIntyre suggests, a teleological ethical theory without a discussion of the virtues and their realization “makes no sense.”<sup>689</sup>

The Carnegie Report does not, of course, purport to provide a full-blown ethical theory, Aristotelian or otherwise, so one would not expect it to contain a complete account of the role of the virtues in a good and truly human life. Nevertheless, the absence of any substantial discussion of lawyerly virtue(s) in the Report is troubling. If we assume that MacIntyre’s analysis of the role of the virtues in a teleological ethical theory is essentially correct, then a complete account of the human *telos*, the good human life, must include an account of the virtues or excellences intrinsic to that life.<sup>690</sup> Acting virtuously is, or at least is part of, living the good and truly human life and achieving the human *telos*.<sup>691</sup> By analogy, an account of the *telos* or *teloi* of lawyering and the legal profession almost certainly should include an account of the virtues or excellences of lawyering and legal professionalism, whatever those virtues or excellences may be.<sup>692</sup> Lawyering virtuously or excellently almost certainly is, or at least is part of, achieving the *telos* or *teloi* of lawyering and the legal profession. Thus, just as the punch list includes a demand for an account of the *telos* or *teloi* of lawyering and the legal profession, so the punch list also includes a demand for an account of the virtues of lawyering. Indeed, meeting the first demand arguably requires meeting the second demand.

It is worth remarking that there also is a very practical reason for insisting on an account of the lawyerly virtues as a precondition for further progress on reforming legal education along the lines laid out in the Carnegie Report. According to the Report itself, a fundamental purpose or

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688. *Id.* at 52. For further discussion of this passage, see *supra* note 148 and accompanying text.

689. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 148-49.

690. *See id.*

691. For a discussion of the role of acting or behaving excellently or virtuously in a teleological framework, see *supra* notes 144-149 and accompanying text.

692. I add the qualifier “almost certainly” because until we have an account of the *telos* or *teloi* of lawyering and the legal profession and an account of the virtues of lawyering, we really cannot specify with certainty what the relationship is between the *telos* or *teloi* and the virtues. In light of the relationship that Aristotle discovered between the human *telos* and the human virtues, however, it seems reasonable to proceed on the assumption that the relationship between the *telos* or *teloi* of lawyering and the virtues of lawyering will be the same or at least analogous.

*telos* of the second and third apprenticeships is inculcating virtues in novice and apprentice lawyers.<sup>693</sup> The second apprenticeship inculcates the virtue of practical or professional judgment.<sup>694</sup> The third apprenticeship apparently inculcates other professional and lawyerly virtues.<sup>695</sup> But how can we use these apprenticeships today or modify these apprenticeships in the future to inculcate specific virtues in apprentice lawyers if we do not know what virtues we wish to inculcate? Attempting to inculcate virtues without first developing a catalog of virtues is tantamount to attempting to teach children about the Revolutionary War without first learning something about the Boston Tea Party, the Continental Congress, and the winter at Valley Forge. One could make the same point using the terminology of formation and formative education. How can we form the characters of apprentice lawyers if we do not have a reasonably complete<sup>696</sup> list of the virtues with which we hope to inform those characters? The virtues are key elements of the form to be realized in the law student through a formative education. This means that a reasonably complete list of the virtues is not just an intellectual or theoretical requirement for a plausible teleological account of legal education but also a basic practical requirement for the educational process.

#### 4. *What Is the Raw, Unformed Character of the Novice Lawyer?*

The first three items on the punch list relate to the *telos* or *teloi* of legal education and the foundation for that *telos* or those *teloi*. They deal, in other words, with what, according to the Carnegie Report, we want the novice or apprentice lawyer to become or achieve and why. If we turn, however, to the other end of the teleological continuum, we find another significant gap in the Report. As MacIntyre observes, a teleological account or framework involves three elements: an account of the *telos*, an account of the process for achieving the *telos*, and an account of the person as-he-or-she-happens-to-be prior to embarking on the formative educational process to achieve the *telos*.<sup>697</sup> The Carnegie Report is all but silent on the subject

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693. CARNEGIE REPORT, *supra* note 1, at 28.

694. *See supra* Part III.B.2(b).

695. *See supra* Part III.B.2(c).

696. I suggest the list of virtues should be “reasonably complete” because I do not believe we need to insist on a final or exclusive list of virtues as a precondition to formative education. Clearly, the list of virtues could evolve as part of the debate about the *telos* of lawyering and the legal profession. If, however, the formative educational process tolerates a list of lawyerly virtues that we know is grossly incomplete, then formative education will proceed with full knowledge of the fact that we lack an adequate grasp of the form that we seek to inculcate. In such circumstances, if we happen to form lawyers who show lawyerly virtue or excellence it would be by accident rather than by design. Indeed, we may be fortunate to form lawyers at all.

697. *See supra* notes 145-155 and accompanying text.

of the novice law student as-she-happens-to-be when entering law school. In Part III, I constructed a somewhat imprecise account of the novice as-she-happens-to-be at the outset of the three apprenticeships by reasoning negatively, i.e., by subtracting from the apprentice and the journeyman those characteristics that the apprenticeship process supposedly inculcates in them. Using this approach, we found the novice to be a not-yet-fully-mature person who cannot and will not abstract from messy concrete situations, cannot exercise lawyering skills or practical judgment, and does not know or even appreciate what it means to be a lawyer let alone how to be a good or excellent lawyer.<sup>698</sup>

There is, however, an obvious difference between reasoning backwards from the *telos* of legal education to an account of what the novice is presumed to be and actually studying the novice herself to figure out what she is. The former deals in presumptions while the latter seeks to deal in observable facts. Following the Carnegie Report, if we are to understand legal education as a formative process, then we need to know not only the *telos*, which is a key element of the form itself, but we also need to know something about the raw matter on to which we plan to impress and in which we plan to realize the form. If nothing else, we need to know what characteristics the novice—the raw matter—already possesses and what characteristics the novice lacks in order to know in what respects and to what extent the novice requires formation. We also need to know whether and to what extent the raw matter of the novice may limit our ability to form her. It is one thing to form a screw driver out of tempered steel. It is quite another thing to form a screw driver out of whipped cream or latex. A whipped cream screw driver might be an interesting object for a cook, but it probably will not help a carpenter to drive a screw. To carry the analogy one step further, we cannot know whether the novice lawyer is steel or whipped cream unless we study her as-she-happens-to-be and develop an account of her as the matter of a formative process, an account that is not entirely derivative of our account of the *telos* that we hope she eventually will achieve.

The need for an account of the novice as-she-happens-to-be opens up a range of potentially difficult problems, two of which I will mention here. First, the novice lawyer—the new law student—is not simply a random blob of raw material that wanders into a law school off the street. Rather, the typical novice law student is the product of a careful selection process, a process that imposes very strict limits on the sorts of raw material that can enter law school. But this obvious fact raises an important question: are the

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698. See, e.g., *supra* notes 226, 237-51 and accompanying text.

criteria by which we select the novice the correct criteria for identifying the kind of raw material best suited to go through the teleological process of legal education and achieve the *telos* or *teloi*? To answer this question, we would have to identify the *telos* or *teloi* of legal education, including the virtues of lawyering and legal professionalism, and then we would have to look back at the process by which we select law students to determine whether we are choosing the right raw material to undertake the formative process leading to that *telos* or those *teloi*. It may, of course, be the case that the current selection criteria, which typically focus on such issues as the novice's grade point average in college and her performance on the Law School Aptitude Test, are appropriate.<sup>699</sup> But it could equally well be the case that those criteria are not appropriate when viewed in the light of the teleological framework outlined in the Carnegie Report.<sup>700</sup> For example, it might be the case that the current selection criteria are appropriate for selecting a person who will excel in the first apprenticeship but not a person who might excel in the second and third apprenticeships. The authors of the Carnegie Report did not mention or address these questions about what the raw material of the legal educational process actually is and what it could or should be, but we must consider and at least provisionally resolve these questions before we can claim that we have founded legal education on an intellectually defensible teleological framework.<sup>701</sup>

Someone might respond to this argument that we do not need to worry about the selection criteria for law students because the teleological formative process will and should work on anyone who meets the basic intellectual requirements for admission to law school. The problem with

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699. In an online document advising potential law students about how to choose an appropriate law school, the Law School Admissions Council (LSAC) states: "Most schools publish a grid that indicates the number of applicants with LSAT scores and GPAs like yours who were admitted in the most recent admission year. This gives you a general sense of your competitiveness at that school." *Assess Yourself Realistically*, LSAC, <http://www.lsac.org/JD/Choose/assess-yourself-realistically.asp> (last visited Sept. 14, 2012).

700. See *supra* Part III.B (discussing the Carnegie Report's teleological framework).

701. Once one acknowledges that the novice as-she-happens-to-be presents important unresolved questions, a new problem comes into focus. The novice herself is the result of a long educational process. If law schools were to adopt reforms that modify the ways in which they choose the raw material admitted into their formative process, law schools inevitably would convey—whether intentionally or not—information about those reforms to undergraduate educational institutions that “feed” students into legal education. In turn, those undergraduate institutions may change the way they form the raw material for law schools. Thus, efforts to change the selection criteria for the raw material admitted to legal education may create a feedback loop that leads to corresponding changes in the *telos* or *teloi* of undergraduate education and related changes in the raw material available to law schools. Law professors have been complaining for decades about the quality of education students receive before coming to law school. See, e.g., Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 659 (1935). As Llewellyn wrote in 1935, “the more we see of that, the less we like it. They come unprepared. We know it. But about it, we do nothing.” *Id.*



this response is clear: in advance of any data, we have no reason to believe it is true. Moreover, we have reasons derived from the Carnegie Report and Aristotle to suspect it might be false. As noted above, the authors of the Report appear to assume that the novice law student—the raw material—will arrive at law school with a character, a set of dispositions, that responds appropriately to what the authors consider to be positive or appropriate models of lawyering.<sup>702</sup> This assumption underlies the authors’ statement that “for students to incorporate the profession’s ethical-social values into their own, they need to encounter appealing representations of professional ideals . . . .”<sup>703</sup> But what if the “appealing representations” do not appeal to all potential law students? What if some potential law students find the “appealing representations” unappealing? Should a law school reject those law students because the relevant appealing representations do not appeal to them? A person who is immune or impervious to the appeal of an appealing representation of professional ideals might respond badly or not at all to the second apprenticeship’s efforts to inculcate the rudiments of professional judgment. She also might resist the third apprenticeship’s efforts to (re)form her character and (re)orient her to pursue new (for her) professional purposes and values. If the authors cannot assure us that the appealing representations of lawyering will appeal to any potential law student, then the authors must acknowledge that there is a legitimate question whether we should configure the law school admissions process, if possible, to admit only students who find “appealing representations” appealing, i.e., students who have the proper untutored dispositions and character to embark on and benefit from a formative legal education designed to mold their characters to pursue the purposes of the legal profession as embodied in appealing representations.

This argument that formative education presupposes a particular character or set of dispositions in the learner has deep roots in Aristotle’s own teleological ethical theory.<sup>704</sup> As Aristotle wrote,

we need to have been brought up in fine habits if we are to be adequate students of what is fine and just, and of political questions generally. For the origin we begin from is the belief that something is true, and if this is apparent enough to us, we will not, at this stage, need the reason why it is true in addition; but if we have this

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702. See *supra* note 316 and accompanying text.

703. CARNEGIE REPORT, *supra* note 1, at 135.

704. See ARISTOTLE, *supra* note 157, at 6 [NICOMACHEAN ETHICS i:5 1095 b 4-9].

good upbringing, we have the origins to begin from, or can easily acquire them.<sup>705</sup>

Analyzing this passage, Broadie comments that for Aristotle, “we do need . . . to have been brought up in good ways of feeling and acting . . . . We must have sound values, because our actual values afford the only possible ethical starting points, and unless they are sound the starting points will be false.”<sup>706</sup> MacIntyre elaborates this point:

The vicious argue unsoundly from false premises about the good . . . . Only the virtuous are able to argue soundly to those conclusions which are their actions . . . . In their initial training it was the acquisition of virtuous habits which enable the virtuous to perform those actions in reflection upon which they first formulated, even if initially in skeletal form, those principles of action which define human excellence, the various virtues and indeed the good and the best itself. Moreover, in so doing they became able to engage in theoretical enquiry about practice, as well as in practical enquiries, deliberations . . . which they, lacking the virtues, would not be able to engage in.<sup>707</sup>

Thus, it seems clear that for Aristotle, ethical deliberation and ethical training presuppose a student with a good upbringing and proper dispositions—virtuous habits or, in Broadie’s terms, “sound values.”<sup>708</sup> A person without such habits or values likely will reason from and act upon false ethical premises in pursuit of vicious, i.e., non-virtuous, ends. By analogy, a novice law student who lacks virtuous habits and proper dispositions or values instilled by a proper upbringing likely would respond badly or fail to respond at all to a formative ethical education of the sort found in the third apprenticeship. Appealing representations of lawyerly virtue might not appeal to such a person—not because of a defect in the representations but because of a lack in her. I have discussed this point at length not to argue that Aristotle is correct but to underline the need for a more serious examination of the character of the raw material—the novice

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705. *Id.*

706. BROADIE, *ETHICS WITH ARISTOTLE*, *supra* note 143, at 22. The fact that ethical education and reasoning must begin from and build on the well-raised student’s dispositions does not mean those dispositions are beyond criticism or correction. As Broadie observes, “[t]he value data of ethics, like the perceptual data from which natural science starts, can be modified and corrected, but only against *each other* and in the light of deductions for which some of *them* must serve as premisses.” *Id.* (emphasis in original).

707. MACINTYRE, *WHOSE JUSTICE?*, *supra* note 145, at 136.

708. BROADIE, *ETHICS WITH ARISTOTLE*, *supra* note 143, at 22.

law student as-she-happens-to-be—and a concomitant examination of the process by which we select the novices whom we admit to law school. Without an examination of the character of the novice as-she-happens-to-be and of the process by which we admit her to law school, we will have an inadequate understanding of the starting point of the formative educational process that the Carnegie Report describes and advocates.

A closely related issue that the authors of the Carnegie Report ignore concerns not the characteristics of the novice as-she-happens-to-be but the formative process through which legal educators seek to realize the *telos* in her.<sup>709</sup> Once we have identified the *telos* or *teloi* of legal education and we have an adequate, evidence-based account of the novice as-she-happens-to-be, we can inquire what kind of formative process is adequate or proper or best to move the novice from the raw starting point to the *telos* or *teloi*. Moreover, if our account of the novice as-she-happens-to-be varies (as it probably will) with our choice of the criteria by which we select novices for legal education, then our account of the adequate, proper, and/or best formative process for moving the novice to her *telos* or *teloi* could well vary along with our account of the novice. It only makes sense that the process by which one forms raw material will vary according to the material one has selected. Building a roof out of asphalt shingles will require a very different process from building a roof out of wood shingles or clay tiles. Building a lawyer out of one kind of novice may require a different process from building a lawyer out of another kind of novice. Of course, it may turn out that roughly the same kind of formative process will work on all types of novices (assuming the novices have the necessary intellectual abilities and habits of character), but we have no reason to assume in advance that that will be the case and no reason for neglecting to gather and analyze evidence about the adequacy of various possible kinds of formative processes in transforming various kinds of novices.

##### 5. *What Are the Virtues or Excellences of the Law Professor?*

The Carnegie Report argues at considerable length that we should view the formative process of legal education as an apprenticeship or set of apprenticeships.<sup>710</sup> If we accept this view as a basis for future progress on educational reform, then we not only have to examine in greater detail the key elements of the apprenticeship process—as argued in Parts V.C.1 through 4—but we also have to recognize that, at least conceptually, the

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709. See generally CARNEGIE REPORT, *supra* note 1.

710. See *id.* at 25-27; see also *supra* Part III.B.2 (discussing the concept of apprenticeship in detail).

apprentice is part of a dyad with a master whose function or *telos* is to guide and form the apprentice. The Carnegie Report itself avoids using the term “master,” but as argued above, the very statement that the law student is an apprentice seems to entail the conclusion that the person who teaches the student, typically the law professor, is or should be a master.<sup>711</sup> This conclusion raises a host of questions that I have sought to summarize for purposes of this punch list as “what are the virtues or excellences of the law professor?” To put the same question in slightly different terms, what sorts of characteristics or excellences must a law professor have in order to serve, and, if possible, serve well, as a master in a formative apprenticeship process of the sort outlined in the Report?<sup>712</sup> The Report does not raise or attempt to answer this question, and thus, the account of apprenticeship that it offers remains incomplete.<sup>713</sup>

The Carnegie Report’s authors may have assumed that the masters in the apprenticeship process are and should be exactly the people or kind(s) of people who currently serve as members of law faculties. Clearly, if we can describe the current process of legal education as an apprenticeship (however deficient it may be in practice), then it must be the case that, in the absence of any alternatives, today’s law professors serve as the masters.<sup>714</sup> But whether these law professors have the proper characteristics—the proper virtues or excellences—to serve as masters is simply not clear. Dean Langdell himself argued that his new case-dialogue method demanded a particular and novel kind of mastery in an educator.<sup>715</sup> In 1887, he declared that “[w]hat qualifies a person . . . to teach law, is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law . . . .”<sup>716</sup> Nearly ninety years later, Professor Grossman observed that “Dean Langdell’s emphasis on ‘learning law’ as opposed to ‘using law’ has left traditional law teachers ill-equipped to design or supervise clinical programs. With Langdell’s ideas, teachers with practice experience have been shunned by law schools.”<sup>717</sup> By the 1970s, in other words, the typical law professor may not have been qualified to serve as a master in the Carnegie Report’s second apprenticeship, or

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711. See *supra* note 204 and accompanying text.

712. See *supra* note 204 and accompanying text.

713. See *supra* note 204 and accompanying text.

714. The list of masters also would have to include adjunct faculty who, in my experience, often are practitioners invited to teach a single course. The list also might have to include people who direct externship programs outside the law school.

715. See Langdell, *supra* note 215, at 124.

716. *Id.*

717. Grossman, *supra* note 214, at 182.

perhaps, the third.<sup>718</sup> The Report seems to reflect this same concern about the qualifications of the professoriate in the twenty-first century. The authors observe that

[i]ntellectual mastery alone is, indeed, always a possible pathology of schooling—one that can subtly subvert the best efforts of professional schools by displacing the goal of learning the profession with a more self-contained academic aim of technical virtuosity, detached from attention to the ends of legal training. This danger is intensified by the fact that students who go on to become the next generation of law school faculty are drawn from the subset of students who achieve the very highest levels of technical, intellectual mastery.<sup>719</sup>

The implication of this observation, an implication the authors do not draw or explore, is that the widespread, Langdellian approach to selecting law professors from those who achieve “the very highest levels of technical, intellectual mastery” in law school may be pathological or may at least nourish a pathology that threatens professional education. Aside from these isolated and somewhat cryptic remarks about law professors, however, the Carnegie Report provides no basis for assuming, let alone concluding, that today’s professoriate does or does not have the proper characteristics to serve as masters, because the Report does not delve into the question of what characteristics a master must have to perform the functions assigned to her by the teleological formative process.<sup>720</sup> The Report simply avoids the issue.

One can, of course, speculate about why the Carnegie Report fails to delve into obvious questions about the virtues or excellences of mastery in the field of legal education. No doubt the authors could have ensured that many of today’s legal educators would either ignore or lambaste the Report if the authors had claimed that such educators lack the proper characteristics to serve as masters. The authors also may have concluded that, as a tactical matter, it makes more sense to focus attention on questions about the educational process—the mission of the Carnegie Foundation—than to take

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718. As Dean Cramton observes, law professors “have forsaken the profession that the law student plans to enter; and their attitude toward practitioners is often touched with an air of superiority and disdain.” Cramton, *supra* note 182, at 259. If law professors have forsaken the profession (an “if” that requires careful examination), then it would be at least odd if not clearly inappropriate for those same professors to model and form the apprentice lawyer’s identity as a member of the profession.

719. CARNEGIE REPORT, *supra* note 1, at 144. For further discussion of the narrow criteria that law schools use to select new doctrinal faculty members, see Newton, *supra* note 286, at 126-39.

720. See generally CARNEGIE REPORT, *supra* note 1.

on the vested interests of the legal professoriate in continuing to get paid to do what they already do.<sup>721</sup> No doubt the authors also realized that even readers without a vested interest in the status quo might wonder about the merits of a study of legal education that concluded the typical law professor is not qualified to do her job, a job she and (as Professor Grossman suggests) people like her have been doing in much the same way since Langdell revolutionized Harvard Law School in 1870.<sup>722</sup> Even if we agree that legal education needs reforming, a reform proposal that includes cashiering the current professoriate would have seemed far too extreme to serve as the basis for a serious debate.

While recognizing the interests and concerns that discussion of the professoriate's qualifications will provoke, I suggest that some such discussion is a requirement for further progress in elaborating and, perhaps, implementing the educational program that the Carnegie Report outlines.<sup>723</sup> Law students cannot serve as apprentices unless their professors can serve as masters. Professors can serve as masters only if they are qualified to do so. Thus, as a condition of further progress along the Carnegie Report's path, it will be necessary to look into the characteristics—the virtues or excellences—that equip a person to serve and serve well as a master of apprentice lawyers.<sup>724</sup> More specifically, if we accept the framework of the three apprenticeships, it will be necessary to ask what might be the virtues or excellences of someone who teaches apprentices to think like lawyers, of someone who teaches apprentices the skills of lawyering and the related virtue of practical judgment, and of someone who guides apprentices to understand and adopt the social and ethical purpose(s) and identity of the lawyer.<sup>725</sup> We know that, according to the Carnegie Report's authors, the master typically will model skills and capabilities for the apprentice as part of the effort to form and transform her.<sup>726</sup> Thus, we can ask what sort or sorts of person is best suited to model the form(s) that the apprentice must realize or achieve during each of the three apprenticeships.

Following this line of inquiry, one question that may have to be answered anew (as Grossman implies)<sup>727</sup> is whether we should insist that a

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721. Robert Stevens observed that “the law professor has developed vested interests which sometimes savor of the eighteenth century’s ‘parson’s freehold.’” Stevens, *supra* note 5, at 42.

722. See Grossman, *supra* note 214, at 163.

723. For a provocative discussion of the professoriate's qualifications that takes the Carnegie Report as a starting point, see generally Newton, *supra* note 286.

724. MacIntyre has provided a short but potentially helpful general discussion of the virtues of mastery and professorship. See MACINTYRE, *AFTERVIRTUE*, *supra* note 145, at 191-92.

725. See *CARNEGIE REPORT*, *supra* note 1, at 25-29 for the framework of the three apprenticeships.

726. See, e.g., *supra* note 202 and accompanying text.

727. Grossman, *supra* note 214, at 171-72.

master who teaches apprentice lawyers will have practiced law herself.<sup>728</sup> A related question is how long she should have practiced law. These questions date back at least to the era of James Barr Ames, a professor and later Dean at Harvard Law School from 1873—when Langdell hired him—to 1910.<sup>729</sup> As Robert Stevens observes,

Ames was the first non-practitioner teacher, yet for someone who had little experience with practice, Ames became the role model for the teacher at the elite law school. . . . Members of this new breed of law teachers were normally young, at least when appointed, and increasingly equipped with judicial clerking experience but rarely with more than a couple of years experience in practice.<sup>730</sup>

A recent study by Brent Newton supports Stevens's point. According to Newton, "[t]he data showed that the typical non-experiential, tenure-track professor had only 3 years of practical legal experience before being hired as a full-time faculty member."<sup>731</sup> Entry-level tenure-track professors at top-tier law schools had much less practical experience, and over 45 percent had no practical experience at all.<sup>732</sup> In my own institution, the University of Kentucky College of Law, we have faculty members, both junior and senior, with practice experience ranging from none whatsoever, to a year or two in a judicial clerkship, to anywhere from two or three to ten or more years at a major law firm.<sup>733</sup> The question is whether it is defensible to continue to hire and promote law professors with little or no lawyering

728. For a recent discussion of this issue, see generally Newton, *supra* note 286.

729. For Ames's biography, see generally Samuel Williston, *James Barr Ames (1846-1910)*, 51 PROC. AM. ACAD. ARTS & SCI. 845 (1916).

730. Stevens, *Challenge*, *supra* note 219, at 482. Unlike his protégé Ames, Langdell himself practiced law in New York City for 16 years, apparently in relative obscurity, before assuming the Dane professorship at Harvard in 1870. See Batchelder, *supra* note 219, at 439. Writing in 1912, Columbia's Dean Stone—who later served as an Associate Justice and then as Chief Justice of the U.S. Supreme Court—suggested that after Langdell introduced the case-dialogue method at Harvard, law schools began to hire as faculty members recent law-school graduates with little or no practice experience because only recent graduates had actual experience with the case-dialogue method and could be expected to use it properly. See Harlan F. Stone, *The Importance of Actual Experience at the Bar as a Preparation for Teaching Law*, 3 AM. L. SCH. REV. 205, 205 (1912). Thus, Langdell may have taken the then-extraordinary step of hiring Ames because, one assumes, Ames had excelled in Langdell's classroom and thereby demonstrated the ability to use Langdell's brand new method to teach other law students. Of course, this rationale for hiring law school graduates with minimal practice experience no longer holds water because almost everyone practicing law today has experienced the case-dialogue method of education in some form. There is, however, considerable debate about whether the case dialogue is the best way to educate lawyers. See *supra* notes 77-82, 221-24 and accompanying text.

731. Newton, *supra* note 286, at 129-30.

732. *Id.* at 130.

733. *Faculty Directory*, UNIV. OF KY. COLLEGE OF LAW, <http://www.law.uky.edu/index.php?pid=80> (last visited on Sept. 20, 2012).

experience if we accept the proposition that the law professor is a master in an apprenticeship process designed to form the novice law student into a journeyman lawyer. Dean Langdell, who hired Ames to teach at Harvard, believed that learning law was the only experience relevant to teaching law.<sup>734</sup> But this suggests that Langdell's ideal teacher would be a master of learning law,<sup>735</sup> a master student or perhaps a first-rate journeyman, and not necessarily a master of the practice of law or a master of teaching law.<sup>736</sup> I do not propose to enter further into the debate about whether and how long a law professor should have practiced law before escaping to academe. I simply suggest that we will have to address this potentially controversial issue in any reasonably complete account of the virtues or excellences of a person who can serve as a master law professor in the apprenticeship process that the Carnegie Report outlines.<sup>737</sup>

Any adequate account of the virtues or excellences of the Carnegie Report's master law professor will have to address a second issue that is at least as controversial as the question whether and how long a law professor should have practiced law. In a rather biting attack on proposals to teach practical skills in law school, Judge Clark—who had served as Dean of Yale Law School from 1929 to 1939—made a provocative observation:

[I]t is this very independence, this attempt to follow the intellectual life, to be true to matters of the mind, which in my view is the foundation for the success the [law] schools have attained and for

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734. See *supra* note 716 and accompanying text.

735. As Preble Stolz remarked, “[p]rofessors tend to teach to and grade on the talents that made them successful law students.” Stolz, *Clinical Experience*, *supra* note 194, at 74 n.67. If he is correct, then each generation of law professors may reinforce, perhaps inadvertently, the tendency to pack the professoriate with people who have the characteristics of a highly successful law student. The question, which sounds almost paradoxical, is whether a highly successful law student is the best sort of person to form novices into practicing lawyers.

736. In addition to asking whether a master in the apprenticeship process outlined by the Carnegie Report should have experience practicing law, it would be appropriate to ask whether a master should have some kind of experience or training as a teacher. It seems counterintuitive that the masters in the legal apprenticeship process would have neither experience as lawyers nor experience as teachers and yet they would claim to be master teachers of law. It may, of course, be possible to argue that law teaching is itself a kind of apprenticeship in which junior faculty members serve as apprentices and someone—perhaps a more senior faculty member—serves as the master. The apprentice teacher would gain the requisite teaching experience as a junior faculty member during a formative process that should result in mastery. This line of argument would open up a range of new questions about the nature of the law teaching apprenticeship, its purpose or *telos*, and whether its current structure adequately serves that purpose or *telos*.

737. See CARNEGIE REPORT, *supra* note 1, at 27-29. The issue is potentially controversial because it reflects directly on the qualifications of everyone who currently teaches law. In my experience, the issue arises in some form whenever a law faculty considers hiring a new junior faculty member. The discussion surrounding a faculty candidate's practice experience and its relevance is almost always lively and often quite personal.



the high regard in which they are actually held by thinking members of our profession. I suggest that here are values too important to be sacrificed or damaged and that the more undesirable feature of the pressure for practicality is that it is aimed fundamentally at the intellectual life of the school. Raw vocationalism cannot be practiced without sacrifice of things of the spirit, and the price of requiring it is altogether too high for any possible gain.<sup>738</sup>

Judge Clark here juxtaposes vocationalism to the intellectual and spiritual life of the law school, thus reminding us that law professors typically do not simply teach apprentices to practice law.<sup>739</sup> At most law schools, professors also do research on and write about law.<sup>740</sup> If Judge Clark is correct, the law school as an institution has an intellectual life, and that life concentrates not only on training lawyers but on law as a subject of intellectual discussion, analysis, and criticism.<sup>741</sup> One assumes that in Judge Clark's account, law students participate in the school's intellectual life with their professors, perhaps by studying and discussing the law for its own sake and not "just" learning the law as a vocation. According to Judge Clark, the more we emphasize vocationalism and focus on what the Carnegie Report might call the apprenticeship aspect of law school, the less we will emphasize and support the intellectual life of law school, the life of scholarship, and intellectual inquiry about law.<sup>742</sup> In the process, we may risk "killing the spirit" of the law school.<sup>743</sup>

It is beyond the scope of this Article to take a position on Judge Clark's argument, but it is important for purposes of this propaedeutic punch list to acknowledge that he implicitly raises at least three fundamental questions about the function or *telos* of the law professor and her professional identity and thus about the virtues or excellences we should demand in her.<sup>744</sup> These questions are: (1) to what extent is the scholarly or spiritual/intellectual orientation to law an intrinsic part of the law professor's function/*telos* and professional identity?<sup>745</sup> (2) assuming we adopt an account of the law

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738. Clark, *supra* note 255, at 428.

739. *See id.*

740. As Professor Stolz observes, "[i]t is an article of faith in the law teaching profession that good teaching and scholarship go together." Stolz, *Clinical Experience*, *supra* note 194, at 67.

741. *See* Clark, *supra* note 255, at 428.

742. *Id.*

743. I have borrowed the phrase "killing the spirit" from the title of a book by Page Smith criticizing modern higher education. *See* PAGE SMITH, *KILLING THE SPIRIT* (1991).

744. *See generally* Clark, *supra* note 255.

745. *See id.* at 428. Chief Justice Roberts recently set the legal professoriate atwitter with a biting criticism of modern, impractical legal scholarship.

professor's function/*telos* and professional identity that incorporates a scholarly and spiritual/intellectual orientation, how does that account square with the Carnegie Report's account of the law professor as master in an apprenticeship process?<sup>746</sup> and (3) assuming we can incorporate the account of law-professor-as-scholar into the account of law-professor-as-master-of-apprentice-lawyers, what virtues or excellences will this complex account of the law professor demand?<sup>747</sup> The Carnegie Report offers nothing useful on

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"Pick up a copy of any law review that you see," Roberts said, "and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."

Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, THE VOLOKH CONSPIRACY (July 23, 2011, 11:07 AM), <http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship/>. The Chief Justice's comment suggests that he would approve of scholarship that provides "help to the bar," i.e., practice-oriented scholarship. For a sample of the responses that the Chief Justice provoked, see Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, COMMENTS, A.B.A. JOURNAL (July 7, 2011, 5:29 AM), [http://www.abajournal.com/mobile/comments/law\\_prof\\_responds\\_after\\_chief\\_justice\\_roberts\\_disses\\_legal\\_scholarship/](http://www.abajournal.com/mobile/comments/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/).

<sup>746</sup> See CARNEGIE REPORT, *supra* note 1, at 23-29. Many commentators see a tension between these two accounts of the law professor. As Dean Rubin observed,

virtually all the material rewards that tenured faculty members receive, other than basic job security, depend on their research production. The quality of their research, as measured largely by the attention that it attracts from other academics, determines their salary raises, their summer grants, their supplementary expense funding, and their access to funds for organizing conferences . . . .

Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 141-42 (2008). As Brent Newton has argued,

neither the Carnegie Report nor Best Practices appears to acknowledge the enormous obstacle standing in the way of their proposed reforms: law schools' increasing practice of primarily hiring impractical professors whose chief mission is to produce theoretical legal scholarship and who not only lack practical skills, but also feel indifference toward (or in some cases outright disdain for) both practicing attorneys and practical components of the law school faculty such as clinicians.

Newton, *supra* note 286, at 113. The Carnegie Report comments that "the career and reward structures of the legal academy . . . have increasingly emphasized theory over practice, scholarship over teaching, cognitive over ethical engagement." CARNEGIE REPORT, *supra* note 1, at 114. Indeed, this Article has taken so long to prepare that I have received some not-so-subtle indications that I am failing to live up to my College's expectations for scholarly productivity.

<sup>747</sup> See Clark, *supra* note 255, at 428. There appears to be very little evidence suggesting that prolific scholars make better law teachers. See Newton, *supra* note 286, at 138. Thus, there is no reason to assume in advance of the evidence that the scholarly virtues are also the virtues of the master in any of the three apprenticeships. Brian Tamanaha recently suggested that "it is by no means a safe assumption that the bulk of law professors would have thrived in the practice of law." TAMANAHA, *supra* note 19, at 47. It is not intuitively obvious that people who would not have succeeded in legal practice are the ideal group to teach the next generation of practitioners.

any of these questions about the function/*telos* and professional identity of law professors,<sup>748</sup> but we will need to address them as and when we attempt to develop a formative, teleological approach to legal education based on the Report.<sup>749</sup>

#### 6. *What Is the Proper Response to Emotivism in the Law Faculty and Law Students?*

As discussed in Part IV.A, the emotivist framework shadows the Carnegie Report's teleological account of formative legal education. Emotivism holds that a person's moral beliefs and precepts reflect nothing more than the person's preferences, attitudes, and feelings.<sup>750</sup> According to the emotivist, there is and can be no impersonal, objective, rational basis for adopting a particular set of moral beliefs and precepts or preferring one set of moral beliefs and precepts over another.<sup>751</sup> Emotivism thus implicitly raises the fundamental question whether the ethical precepts and purposes of lawyering and the legal profession to be taught in the third apprenticeship will reflect nothing more than someone's preferences, attitudes, and feelings.<sup>752</sup> The preferences, attitudes, and feelings may be those of the person doing the teaching or they may be those of some other person or group, perhaps an "expert" on the subject of legal ethics or perhaps the ABA and some of its members. The authors imply that emotivist views

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748. See CARNEGIE REPORT, *supra* note 1, at 188. The Carnegie Report does suggest somewhat obliquely that there may be a tension between the roles of lawyer as scholar and lawyer as practitioner, thus pointing us to questions about whether and how any master could model both roles in the formative process. See *id.* (omitting practical training from law school will "prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, thus conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients."). The Report does not discuss whether and how law professors who are themselves scholars and, often, competitive scholars can or should be expected to teach an apprentice attorney to deal with clients or, more generally, to practice law.

749. For an argument that the Progressive movement played a central role in forming the professional identity of law professors, see Auerbach, *supra* note 31, at 553-56. In contrast with Judge Clark, Auerbach sees the tension in the professional identity of law professors not as a struggle between the intellectual life and vocationalism but as a struggle between two conflicting objectives of legal education: "mak[ing] the law into a responsive social institution" and "train[ing] practitioners." *Id.* at 568. The conceptual link between Clark's view and Auerbach's may lie in the law professor's tendency to treat making law more socially "responsive" (Auerbach) as a, if not the, *telos* of the law professor's and the law school's scholarly and spiritual/intellectual life (Clark). According to this synthesis of Clark and Auerbach, "true" scholarship and spiritual/intellectual activity apparently would be Progressive in its focus on making law more responsive to supposed social needs. The affinities between this view of legal scholarship and the Brandeis model of civic professionalism, itself a product of the Progressive era, see *supra* notes 404-15 and accompanying text, are obvious.

750. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

751. *Id.* at 12.

752. See *supra* note 438 and accompanying text.

may be widespread among members of the legal professoriate.<sup>753</sup> But at no point do the authors discuss the implications of emotivism and its presence in the professoriate—or the student body—for the formative teleological educational process that they describe and recommend.<sup>754</sup> Indeed, the authors appear to dismiss the emotivist challenge by appealing to the power or authority of the ABA,<sup>755</sup> a tactic that should not satisfy anyone who tries to take the ethical foundations of the Carnegie Report seriously. If, as I argue in Part IV.A, emotivism poses a fundamental challenge to the teleological framework that supports the formative educational process, then we need to develop an intellectually persuasive response, or perhaps a set of responses, to emotivism as a condition for real progress in the direction that the Report attempts to guide us. We do not, of course, need to cease work on all other issues pending a resolution of this one, but we need to work on this issue because it threatens to undermine the foundations for progress on many, if not most, other issues related to legal education that emerge from the Carnegie Report. In the following sections, I briefly outline two strategies for dealing with the emotivist threat to the teleological framework, strategies I have labeled “refutation” and “incorporation.”

#### a. Refutation

From an intellectual standpoint, clearly the most satisfying way to dispose of emotivism would be to refute it decisively. Otherwise, it may continue to spring up like a mushroom in an otherwise attractive lawn. Unfortunately, refuting emotivism through argument alone may prove difficult precisely because emotivism in its modern form seems to have emerged as a default or fallback position when attempts to construct arguments in support of one or another ethical framework or theory failed.<sup>756</sup> In other words, emotivism is the mushroom that springs up on a dying or dead moral theory, feasting on rotting, failed arguments. Since emotivism is a product not of good arguments but of the absence of good arguments, decisively refuting it probably would require constructing a persuasive, valid argument for a moral theory or framework, an argument that does not shrivel under pressure from the intellectual environment and thereby provide decaying matter on which emotivism may feast. In other words, refuting emotivism requires, at least in part, making out an

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753. See *supra* notes 445-52 and accompanying text.

754. See *supra* notes 445-52 and accompanying text.

755. See *supra* note 453 and accompanying text (the authors do not suggest or imply that the power or authority of the ABA is the power or authority of the superior rational argument).

756. See *supra* notes 479-80 and accompanying text.

affirmative case for a moral or ethical position such as the teleological framework derived from Aristotle and put forward by the Carnegie Report.<sup>757</sup> This is essentially the point that MacIntyre makes in somewhat pithier form when he titles the final chapter of his most famous book “After Virtue: Nietzsche *or* Aristotle, Trotsky *and* St. Benedict.”<sup>758</sup> As MacIntyre observes, “Nietzschean man, the *Übermensch*, the man who transcends, finds his good nowhere in the social world to date, but only in that in himself which dictates his own new law and his own new table of the virtues.”<sup>759</sup> Nietzsche here represents emotivism and its nihilist implications.<sup>760</sup> Nietzsche’s position will be persuasive to the extent that competing positions such as Aristotle’s fail under careful scrutiny. Nietzschean nihilism is the default.<sup>761</sup> As MacIntyre summarizes the point, “the Nietzschean would at least have the consolation of being unpopularly in the right—unless, that is, the rejection of the Aristotelian tradition turned out to have been mistaken.”<sup>762</sup> Thus, for someone who wishes to build on the Carnegie Report, the best and perhaps only way to refute emotivism (and Nietzsche) is to construct a persuasive argument in favor of the teleological ethical framework, i.e., to pursue the first two tasks on my propaedeutic punch list.<sup>763</sup>

Short of constructing a full-scale defense of the teleological framework, it may be possible to offer some reasons for rejecting emotivism that should appeal to educators such as law professors, if not to everyone who participates in the field of moral debate. These reasons would take the form “if you are committed to X, Y, and Z as a law professor, particularly a law professor who teaches ethics, then you must reject emotivism.” Of course, such reasons are persuasive only if the law professor is committed to X, Y,

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757. See generally BROADIE, ETHICS WITH ARISTOTLE, *supra* note 143; CARNEGIE REPORT, *supra* note 1. I do not mean to suggest that a teleological framework is the only possible theory one might defend in order to avoid emotivism. Clearly, a latter day Kantian or Utilitarian might attempt to defend a very different type of moral theory in an effort to stave off emotivism. Such a theory would, however, probably fit very poorly into the formative educational process described in the Carnegie Report, which appears to rely upon an Aristotelian teleological framework. See *supra* Part III.B (discussing the teleological framework underlying the Carnegie Report).

758. MACINTYRE, AFTER VIRTUE, *supra* note 145, at 256. MacIntyre says very little about the significance of Trotsky and St. Benedict, but as I have suggested at various points in this Article, he has a great deal to say about Aristotle’s teleological ethics and about Nietzsche. See *id.*

759. *Id.* at 257. For Nietzsche’s own comments about the *Übermensch*, usually translated as “superman” or “overman,” see, e.g., NIETZSCHE, ZARATHUSTRA, *supra* note 442, at 124-31. See also WALTER KAUFMANN, NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST 307-16 (4th ed. 1974) (examining the many passages in Nietzsche’s work that discuss the *Übermensch*).

760. For Nietzsche’s relationship to emotivism, see *supra* note 442.

761. See MACINTYRE, AFTER VIRTUE, *supra* note 145, at 257.

762. *Id.* (emphasis omitted).

763. See *supra* Part V.C.1.

and Z and is not prepared to give up those commitments. A law professor could continue to adhere to and defend emotivism if she is prepared to accept the wages of her position. I will describe briefly four lines of attack that one might pursue against emotivism. It is beyond the scope of this Article to develop these lines of attack and I do not want to rule out the possibility that emotivism may be able to mount a reasonably successful defense against one or more of them. This discussion is intended to be merely suggestive and I expect to pursue it in a later publication.

First, some law professors might reject emotivism because emotivism seems to reduce the third apprenticeship to an exercise in manipulative instrumentalism, an exercise that I assume many law professors would be committed to reject. Emotivism appears to require professors to teach students that ethical virtues and principles are nothing more than means to an end, an end that itself reflects nothing more than preferences, attitudes, and feelings.<sup>764</sup> If an emotivist found herself teaching legal ethics (perhaps at the insistence of her Dean),<sup>765</sup> how would she respond to a query from a student about why lawyers should obey the rules of ethics? She should not say “because it is right and good for everyone (or at least every lawyer) to do so.” Emotivism teaches that any such judgment reflects a personal preference, attitude, or feeling that the student might not share. Indeed, the judgment might reflect a personal preference that the professor herself does not share. As an emotivist, she would be forced to say instead that the student should follow the rules insofar as it is consistent with the student’s values to do so. If the student values physical liberty and/or economic stability, for example, the student should follow the rules of ethics because doing so will help to keep her out of jail while allowing her to remain in the relatively lucrative legal profession. If the student happens to value following rules per se, she should follow the rules of ethics as a means of adhering to her personal rule-following preference. If she values the admiration of family and friends that she might receive by obeying the rules, she should follow the rules as a means to obtaining such admiration.

All of the emotivist law professor’s justifications for following the rules of legal ethics have in common the assertion that the student should follow the rules as a means to achieving or realizing her own values and purposes,

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764. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

765. The argument in the text does not depend for its persuasiveness on the plausibility of a scenario in which an emotivist teaches legal ethics. I have used that scenario to highlight the issue of how emotivism must deal with questions about the foundations of legal ethics. Ethical questions—and debates about the foundations of ethical practice—might arise in any course in a law school from Antitrust to Business Associations to Tax. An emotivist teaching any of those courses might have to confront the same difficulties confronted by the emotivist who focuses on legal ethics.

whatever those may be. The student's values and purposes are givens and the rules of legal ethics function only as instruments or means for achieving those given values and purposes, a position that I refer to here as "instrumentalist." Reasoning about legal ethics should focus solely on the means to achieve the student's values, purposes, and ends because, from an intellectual standpoint that rejects teleological argument, "[r]eason is calculative . . . . In the realm of practice therefore it can speak only of means. About ends it must be silent."<sup>766</sup> For the emotivist, legal education cannot seek to reform and improve the student's character as an ethical professional by inculcating a new and better set of values, purposes, or ends because no set of values, purposes or ends is objectively better than any other set.<sup>767</sup> Moreover, emotivism should treat the *teloi* of the first and second apprenticeships as means to or instruments for achieving the student's (or someone's) values and preferences. In other words, for the emotivist, thinking like a lawyer, practicing skillfully, exercising professional judgment, and following ethical rules can be nothing more than instruments for achieving the student's (or someone's) ends, ends rooted solely in the student's (or someone's) preferences, attitudes, and feelings, all of which lie beyond rational debate and criticism.<sup>768</sup> Instrumentalist arguments will thus provide the "ethical" justification for every phase and element of legal education. Nothing the student learns in legal ethics can or will serve an end higher than the student's (or someone's) own preferences, attitudes, and feelings, because there are no higher ends.<sup>769</sup> There are only instruments or means for achieving the student's (or someone's) ends.

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766. *Id.* at 54. MacIntyre's comment about calculative reason clearly relies on Max Weber's well-known discussion of "instrumentally rational (*zweckrational*)" social action, i.e., action "determined by expectations as to the behavior of objects in the environment and of other human beings; these expectations are used as 'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends . . . ." MAX WEBER, *ECONOMY AND SOCIETY* 24 (Guenther Roth & Claus Wittich eds., 1978). For Weber's own examination of this notion, see *id.* at 26.

767. See BLOOM, *supra* note 15, at 143.

768. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12. Dean Cramton makes a related point when he observes that one of the "[m]odern dogmas [that] entangle legal education . . . [is] a pragmatism tending toward an amoral instrumentalism." Cramton, *supra* note 182, at 262. In particular, Cramton worries that law students have become "technicians who are trained in the dispassionate use of legal skills for the instrumental purposes of those they serve." *Id.* at 251. Thus, what begins as "amoral instrumentalism" in the service of one's own values becomes "amoral instrumentalism" in the service of the client's values. See *id.* at 251, 262.

769. Robert Bellah makes a related point about the place of instrumental reason in university education. See Bellah, *supra* note 200, at 111. As he observes, according to a widely held modern view, "the university is composed of atomized, individualistic students with certain fixed impermeable goals. The university's only purpose is to help students attain their goals by communicating to them certain discrete skills and certain discrete bodies of fact about the external world which they can then 'use.'" *Id.* The emotivist would say that those "fixed impermeable goals" can be called values, and they are "im-

In the most extreme form of emotivist instrumentalism, teaching ethical virtues and precepts to the apprentice might entail training her to recognize, parrot, and obey a new but to her foreign set of precepts and virtues and to mimic when necessary the related preferences, attitudes, and feelings. She would be taught to engage in this ethical performance for the purely instrumental reason that she must learn to speak and act the way a lawyer supposedly speaks and acts in order to obtain some benefit of lawyering—perhaps a high salary or prestige—that she values. In this form of ethical education, the virtues and precepts of legal ethics would not reflect the apprentice’s own preferences, attitudes, and feelings. Rather, the virtues and precepts would become tools that she uses or, perhaps, an aspect of the role that she plays when she walks on stage as a lawyer. She—the actress—does not share the lawyerly virtues and precepts or the underlying preferences, attitudes, and feelings any more than Laurence Olivier shared the virtues, precepts, preferences, attitudes, and feelings of Hamlet;<sup>770</sup> but she performs the part of a person who has these virtues, precepts, preferences, attitudes, and feelings because that is the person whom her professors and the bar apparently prefer her to play and with whom a client apparently prefers to deal. In this extreme form, emotivism reduces virtues, precepts, preferences, attitudes, and feelings to an instrumentalist simulacrum, a theatrical performance that allows the student to achieve her goals by paying lip service to certain principles and mimicking someone else’s preferences, attitudes, and feelings. Emotivism thus introduces a pervasive instrumentalism into teaching, learning, and following the principles of legal ethics that, I suggest, should make emotivism unappealing to law professors committed to the view that ethical principles and precepts are not mere means to arbitrary, subjectively defined ends.

As an example of the ease with which ethical education can descend into a kind of cynical instrumentalism, it is helpful to look at a suggestion that Professor Luban made.<sup>771</sup> According to Luban, we should teach lawyers to engage in what he calls “client counseling,” which “is an abbreviation for a morally activist vision of lawyering in which lawyers take it upon themselves to judge and shape client projects.”<sup>772</sup> It emerges, however, that “client counseling” may involve a radically instrumentalist

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permeable” because they are rooted in the student’s preferences, attitudes, and feelings, which lie beyond rational disputation. *See id.*

770. For a cinematic record of Olivier’s performance, see *HAMLET* (Two Cities 1948).

771. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *VAND. L. REV.* 717, 738 (1988).

772. *Id.* at 738.



and entirely situational approach to clients and traditional principles of legal ethics:

Client counseling may mean kindling the clients' consciences, but more often it will mean inventing alternative ways for clients to satisfy their interests. Sometimes it means persuading clients that the course of action they propose will harm them even when that is not necessarily so. In other instances, client counseling will require threatening to withdraw from a representation or refusing to follow a client's instructions. In extreme cases, it means telling the client that if he does not back away from a course of action, the lawyer will blow the whistle on him.<sup>773</sup>

In other words, "client counseling" may include lying to clients, abandoning them, defying them, or extorting their compliance with threats to rat them out, all "in order to divert clients away from projects that harm the common good."<sup>774</sup> The client, one presumes, would not have retained a lawyer who did not at least pretend to possess the ethical virtues of honesty, loyalty, and fiduciary responsibility and to espouse the related ethical principles. Thus, to recruit a new client, the lawyer likely would act the part of an honest and loyal counselor whom the client can entrust with her projects. According to Luban, the lawyer should then feel free to disregard (or perhaps redefine?) those ethical virtues and principles when necessary to achieve the "common good."<sup>775</sup> If we follow the emotivist, however, we must assume that the common good as Luban sees it will differ from the common good or, indeed, the good per se as the client sees it.<sup>776</sup> It then becomes clear that what Luban calls "client counseling" others would consider a radical form

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773. *Id.* at 737-38.

774. *Id.* at 737.

775. *See id.* at 737-38. Professor Luban might respond that this discussion presumes the lawyer would pretend to be honest, loyal, and trustworthy while courting a new client. Luban, *supra* note 771, at 737-38. Perhaps Luban would recommend instead that a lawyer disclose to potential clients that she may lie to them, bully them, or betray them in pursuit of the "common good." Such full disclosure clearly would allow the lawyer to avoid acting the traditional part of an ethical attorney and thereby make instrumental, situational use of ethical virtues and precepts. Such full disclosure also would give the client a good reason not to retain the lawyer in the first place. A lawyer who wishes to eat almost certainly will have to pretend to be ethical in the traditional sense (i.e., honest, loyal, and trustworthy) if she hopes to have the opportunity to engage in the kind of manipulative client counseling that Professor Luban recommends. *See id.*

776. The client may believe that the "common good"—assuming the notion is meaningful at all—is not the appropriate good to pursue. She might believe the proper good to pursue is her personal good or the good of her family or friends or neighbors or stockholders. In other words, she might disagree with Luban and, perhaps, her own attorney about the nature of the good and the hierarchy of goods worthy of pursuit. For a discussion on the hierarchy of goods, see *supra* note 379 and accompanying text.

of instrumentalism or situational manipulation of ethical precepts to achieve the lawyer's personal ends, i.e., the common good as she sees it. Indeed, Luban appears to recommend employing almost any means necessary to achieve a vision of the good rooted in the lawyer's personal preferences, attitudes, and feelings.<sup>777</sup> I do not mean to suggest that Professor Luban himself is an emotivist. His laudatory comments about "progressive professionalism"<sup>778</sup> suggest that he may believe he has gotten his hands on some moral truths that are more than just personal preferences, truths that apparently would justify lying to clients or bullying them into serving purposes that the lawyer has identified. But his comments in support of "client counseling" do seem to epitomize—perhaps unintentionally—the radically instrumentalist, if not nihilistic, approach to basic ethical principles and virtues that emotivism entails.

Some law professors who teach ethics might reject emotivism for a second reason. Emotivism seems to offer an unsatisfying, if not demoralizing, account of what occurs when the professor attempts to inculcate legal ethical principles and patterns of ethical reasoning in her students. I assume that many law professors are committed to the view that what goes on in the law school classroom is, at least in part, a process of reasoned discussion and debate.<sup>779</sup> For the emotivist, however, moral beliefs and precepts are not open to reasoned debate because they reflect nothing more than personal preferences, attitudes, and feelings.<sup>780</sup> As Allan Bloom suggested, the only way to inculcate new values in a person is to impose them, and a fortiori the same would hold for inculcating new preferences, attitudes, and feelings.<sup>781</sup> If the emotivist law professor acknowledges that the only way she can change a student's values, preferences, attitudes, and feelings is by imposing—i.e., forcing—a new set of values on the student, it should be clear why at least some emotivist law professors say they hesitate to teach "ethical and social values" in the

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777. *See id.*; *see also* MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12 (for reference to personal preferences, attitudes, and feelings). I say "almost any means necessary" because Luban does not recommend, for example, that the lawyer threaten his client with a gun or exploit the client's lust by dangling the lawyer's irresistible sexual favors. *See* Luban, *supra* note 771, at 737-38. Rather, Luban more insidiously seems to recommend that the lawyer use the client's vulnerability and dependency within the attorney-client relationship to manipulate the client to achieve the lawyer's ends. *See id.* In this way, Luban would treat the client, the attorney-client relationship, and lawyering itself as instruments to be manipulated for the "common good," however defined. *See id.*

778. *See, e.g., id.* at 736, 739.

779. It is important to emphasize again that I am not suggesting all law professors are committed to this view. I am suggesting only that law professors who are committed to this view will have considerable difficulty squaring it with the emotivist moral framework.

780. *See* MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

781. *See supra* note 450.

classroom.<sup>782</sup> By hypothesis, the emotivist law professor acknowledges that there is no rational basis for asserting that her values, or whatever values she might teach the student, are somehow superior to the values that the student already holds. Thus, inculcating values would mean making the student adopt new values by whatever non-rational means might be necessary, including such obvious “pedagogical” techniques as social or peer pressure (repeatedly telling students what “we” believe to be ethical), threats (of low grades or failure), mockery (in front of the student’s peers), and bullying (through the case-dialogue method). Moreover, the self-conscious emotivist professor would engage in such non-rational pedagogical techniques in full knowledge that the values, preferences, attitudes, and feelings that she inculcates are no better, no more rationally defensible, than the preexisting values, preferences, attitudes, and feelings that the professor seeks to override and replace.<sup>783</sup> It follows that a law professor must either reject emotivism or surrender her commitment to the view that what occurs during ethical education in the classroom is, at least in part, a process of reasoned discussion and debate. The law professor who holds on to the emotivist position must also accept the demoralizing corollary that a key part of her job is to impose values, preferences, attitudes, and beliefs on her students through non-rational means.

Of course, it is only fair to acknowledge that in a dark corner of the academic bestiary, we almost certainly will find some emotivist law professors who delight in imposing values, preferences, attitudes, and/or feelings on students because those professors value imposing values, preferences, attitudes, and feelings. I take it most law professors and, indeed, most decent people would find troubling the prospect of a professor bullying his students into accepting a new set of values, particularly a set of values that the professor knows is no better or more defensible than the set of values the student already holds. But from an emotivist perspective, there can be no objective, rational basis for arguing that it is “wrong” to impose a new set of values on students.<sup>784</sup> Indeed, preventing a professor who delights in imposing values from imposing values on students would seem to require either imposing a set of values on the professor that she does not herself accept or thwarting the professor’s efforts to express her values because those values conflict with other equally irrational but more student-friendly values. Thus, either the professor imposes her values on students with no outside interference or someone imposes values on the

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782. See *supra* notes 449-51 and accompanying text.

783. See BLOOM, *supra* note 15, at 201.

784. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

professor. As Bloom argued, emotivism inevitably seems to lead to someone imposing values on someone.<sup>785</sup> Emotivism clearly does not require respect for or tolerance of differing views and values. Tolerance and respect are just two more subjective preferences, two more values, that some people have and others do not.

The third reason that a law professor might reject emotivism is a corollary of the second reason. If a law professor remains committed to the belief that what goes on in the classroom is, at least in part, a process of reasoned discussion and debate, then her account of what occurs in the classroom may require her to reject emotivism's account of the basis of moral judgments and beliefs. Assume that examination of ethical issues in a law classroom typically involves, at least in part, reasoned discussion about competing beliefs and precepts.<sup>786</sup> The student remains free to stew over the results of the reasoned discussion and, in the process, reach her own conclusions. In some instances, those conclusions may lead her to adopt new (to her) ethical beliefs and precepts. If, along with the emotivist, we assume that moral beliefs and precepts find their roots in preferences, attitudes, and feelings, then we would expect the student to develop new or modified preferences, attitudes, and feelings that will serve as the basis for her new ethical beliefs and precepts. Indeed, I would suggest that moral education often follows this pattern. From my experience observing parents with small children, it seems clear that parents often very deliberately seek to inculcate particular preferences, attitudes, and feelings by communicating precepts such as "be nice to your sister," "wash your hands before dinner," or "pick up your toys" in appropriate circumstances. By communicating the appropriate precept in the appropriate circumstances, the parent seeks to convey and inculcate positive preferences, attitudes, and feelings about niceness, cleanliness, and tidiness, as well as negative preferences, attitudes, and feelings about their contraries—meanness, dirtiness, and clutter. The precept, in other words, is a tool or a means that the parent uses to instill the relevant preference. In my experience, law professors adopt a similar approach to ethical education but they place much greater emphasis on discussion and argumentation than would the typical parent. I believe it would be quite unusual for a law professor to attack a student's preferences, attitudes, and beliefs directly and explicitly. Thus, in law school as in the parent-child relationship, discussion of ethical principles and precepts often and perhaps ordinarily precedes any relevant changes in preferences,

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785. See BLOOM, *supra* note 15, at 201.

786. How law professors teach ethics and/or examine ethical issues in practice is, of course, an empirical question worthy of study for its own sake.

attitudes, and feelings. If a law professor believes that in many, if not most, instances precept precedes or forms preference, and preference evolves to reflect precept, then the law professor should reject as incomplete or inaccurate the emotivist view that precept merely reflects preference.<sup>787</sup> The law professor who remains committed to the view that ethical education occurs to a significant extent at the level of reasoned discussion and debate should think hard before adopting the emotivist ethical framework.

A fourth reason for law professors to reject emotivism as an adequate framework for ethical education is that emotivism runs into difficulty when addressing the kinds of complicated ethical dilemmas that law professors tackle with their students. Take, for example, the kind of situation identified by Professor Luban in which a client wishes to accomplish an objective that her lawyer firmly believes is contrary to the common good.<sup>788</sup> Should the lawyer follow her own preferences and sacrifice the client's objective, as Luban seems to suggest?<sup>789</sup> Should the lawyer instead ignore her preferences and pursue the client's objective, as the virtue and principle of loyalty apparently would demand? And how is the law professor to "teach" this dilemma to students whose preferences may line up on either side of the debate or students who are of "two minds" and have preferences running in both directions? How does the emotivist account for a situation in which principle might conflict with preference or in which two or more preferences and two or more principles may conflict? The view that principles reflect nothing more than preferences does not provide any assistance when the problem is a conflict between preferences reflected in a conflict between principles. I would suggest that the problems a professor teaching legal ethics most typically confronts are those in which pre-existing preferences either provide no adequate guidance or may actually mislead. In those circumstances, emotivism will provide little help in explaining or describing the problem and no help in solving it.<sup>790</sup>

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787. The emotivist might respond that when a student develops new values or modifies existing values, this merely reflects her emerging or growing awareness of a pre-existing preference that she had not previously recognized or appreciated. It is beyond the scope of this Article to pursue the debate about whether precept can precede preference except to note that if emotivism attempts to rely on unconscious or inchoate preferences, emotivism might become unfalsifiable and therefore disconnected from any form of reasoned debate based on evidence.

788. Luban, *supra* note 771, at 724-25.

789. See *supra* notes 772-78 and accompanying text.

790. The emotivist might respond either by denying that a person can suffer from conflicting preferences, a view that seems patently incorrect, or by admitting that conflicting preferences may occur but that when they do there is no way to resolve the conflict. Any resolution would require either following one of the conflicting preferences because it is somehow stronger or following some new preference that overrides the two conflicting preferences. It is beyond the scope of the Article to pursue this debate but I would suggest that the law professor is unlikely to find any of these emotivist responses

This argument against emotivism can, I believe, be pressed a step further. As every adult who has spent time with a tiny infant knows, such an infant's preferences, attitudes, and feelings are vehement but relatively circumscribed. There is a large gap between the very restricted preferences, attitudes, and feelings of a ten-day-old infant and those of a two-year-old who has begun to deploy the word "no," or an eight-year-old who has clear convictions about what she wants to do this afternoon, or a teenager who adamantly believes that most of the adults in the world are stupid and narrow-minded. Yet these varying and increasingly complex preferences, attitudes, and feelings may reside in and animate the same person as she grows from a newborn to a young adult. Moreover, parents, grandparents, older siblings, school teachers, clergymen, and other authority figures seek, sometimes successfully, to inculcate preferences, attitudes, and feelings (among other things) in the growing child.<sup>791</sup> The emotivist can and, I assume, would have to concede that a person's preferences, attitudes, and feelings may have changed over time and that the person may have acquired many of her preferences, attitudes, and feelings from or through the influence of other people. Indeed, many emotivist law professors apparently object even to questioning a law student about her values because those professors recognize that a person in a position of authority can influence and perhaps alter another person's values, presumably by modifying her preferences, attitudes, and feelings.<sup>792</sup>

As we construct a defense of the Carnegie Report against the emotivist challenge, we should ask whether it is possible, within the emotivist framework, to make productive use of the concession that a person's current preferences, attitudes, and feelings represent the perhaps temporary result of an intergenerational process of inculcation. It is no exaggeration to say that a law professor typically earns her living in the classroom by questioning arguments, assumptions, and conclusions, and by teaching students to

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useful as she tries to address an ethical dilemma by reasoning with her students to an answer that may be correct but at the same time inconsistent with at least some of their and perhaps her personal preferences.

791. The emotivist could offer a scorched-earth argument to the effect that inculcating preferences, attitudes, and feelings in infants and children (to the extent that it occurs) is per se improper and that in an ideal world no such inculcating would occur. According to this line of argument, we should allow children to develop preferences, attitudes, and feelings entirely on their own, without inculcation or modeling by adults. A discussion of this radical child-rearing proposal is beyond the scope of the Article. It may be worth observing, however, that a child in whom adults inculcated and for whom adults modeled no preferences, attitudes, and feelings might well resemble the feral boys or young men depicted in Francois Truffaut's *L'Enfant Sauvage* (Les Artistes Associés 1970) or Werner Herzog's *Jeder für sich und Gott gegen alle* a/k/a *The Enigma of Kaspar Hauser* (Filmverlag der Autoren 1974). One assumes that a feral young adult would not make an acceptable law student and that, therefore, an acceptable law student would be someone in whom adults have inculcated and for whom adults have modeled at least some "civilized" preferences, attitudes, and feelings.

792. See *supra* notes 449-51 and accompanying text.

distance themselves intellectually from their own first responses or gut reactions to a problem or case.<sup>793</sup> It seems incongruous, then, for the law professor to concede that her own values, preferences, attitudes, and feelings reflect a long, intergenerational process of inculcation, and yet to deny that she can adopt a genuinely critical attitude toward those values, preferences, attitudes, and feelings. Indeed, recognizing that many of her own values, preferences, attitudes, and feelings resulted from an inculcation process would seem to be a key step in adopting a critical attitude because it involves stepping away from and transcending the results of that inculcation process by subjecting those results to reasoned scrutiny. Subjecting preexisting values to reasoned, critical scrutiny is the hallmark of the law school classroom, but it is a process that emotivism cannot acknowledge, let alone explain. For emotivism, values, preferences, attitudes, and feelings are surds.<sup>794</sup> They simply are. And they are all that we have. We cannot escape them or transcend them in order to criticize them. They provide the sole measure for our moral beliefs and judgments. Thus, we must return to them and rely on them in the very act of transcending them—even as we recognize that they themselves emerged from an intergenerational process of inculcation. If a law professor remains committed to the view that teaching legal ethics involves questioning, criticizing, and ultimately transcending preferences, attitudes, and feelings, she should reject emotivism.

As I hope this discussion makes clear, emotivism as a moral theory or framework raises important questions and leads to awkward conclusions that may make it unattractive to educators such as law professors who accept or even sympathize with the Carnegie Report's contention that the third apprenticeship or something like it is an important element of a formative legal education. I do not mean to suggest that an emotivist could not construct a response to some of the issues that I have raised. My purpose here is entirely propaedeutic—raising questions about emotivism for further exploration by those who seek to defend the teleological framework at the core of the Carnegie Report.<sup>795</sup> I have devoted more attention to this entry on the propaedeutic punch list only because I believe that emotivism, which has become a kind of casual, unspoken background

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793. As the Carnegie Report explains, learning to distance or detach oneself from immediate concerns and reactions in favor of more abstract legal analysis is a key component of learning to think like a lawyer. See *supra* notes 227-30 and accompanying text. If the emotivist is correct, however, it is not clear how one could adopt a distanced, critical attitude toward one's own preferences.

794. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

795. See *supra* Part III.B (discussing the teleological framework of the Carnegie Report).

assumption for day-to-day moral debate in our culture, represents the most serious threat to the intellectual foundations of the Carnegie Report.<sup>796</sup>

b. Incorporation

Emotivism has proven hard to defeat at least in part because it is based, I believe, on a partial and obvious truth, namely that a person's preferences, attitudes, and feelings in fact do provide motives for her actions and should be recognized as doing so by any adequate ethical theory or framework.<sup>797</sup> A theory or framework that is more adequate than emotivism would, among other things, incorporate the truths of emotivism while avoiding its mistakes.<sup>798</sup> Using this criterion, it should be possible to show that the teleological theory or framework is more adequate than emotivism, if in fact the teleological framework is more adequate. At a minimum, this criterion provides a useful test for the adequacy of the teleological framework. Although it is beyond the scope of this Article to spell out the argument here, the following is an outline of some key points.

A teleological ethical theory or framework contains three parts: the person as-she-happen-to-be, the person as-she-would-be-if-she-realized-her-*telos*, and a formative educational process designed to move her from the former to the latter.<sup>799</sup> As MacIntyre explains, "[w]e thus have a threefold scheme in which human-nature-as-it-happens-to-be (human nature in its untutored state) is initially discrepant and discordant with the precepts of ethics and needs to be transformed by the instruction of practical reason and experience into human-nature-as-it-could-be-if-it-realized-its-*telos*."<sup>800</sup> In a brief account of the history of moral argument, MacIntyre has shown that the teleological moral framework withered during the era between the mid-sixteenth and the early nineteenth centuries when the notion of the human *telos* ceased to be credible,<sup>801</sup> thereby undermining and ultimately obliterating the old notion of the person as-she-could-be-if-she-achieved-her-*telos*.<sup>802</sup>

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796. See *supra* note 446. In previous articles, I have argued that emotivism is a key element of the post-Enlightenment paradigm through which we ordinarily organize and explain our experience. See, e.g., Kightlinger, *Nihilism with a Happy Ending?*, *supra* note 438, at 117-30 (describing the post-Enlightenment paradigm).

797. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12 (explaining emotivism).

798. For a more detailed discussion of how one tradition or framework of inquiry can both incorporate and surpass or transcend another rival tradition or framework, see MACINTYRE, *THREE RIVAL VERSIONS*, *supra* note 182, at 116-26.

799. See *supra* notes 145-151 and accompanying text.

800. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 53.

801. For a short description of this assault on teleological thinking, see *supra* notes 428-33 and accompanying text.

802. MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 54-55.



[T]he elimination of any notion of essential human nature and with it the abandonment of any notion of a *telos* leaves behind a moral scheme composed of two remaining elements whose relationship becomes quite unclear. There is on the one hand a certain content for morality: a set of injunctions deprived of their teleological context. There is on the other hand a certain view of untutored-human-nature-as-it-is.<sup>803</sup>

By exposing the original teleological roots and rationale of our moral injunctions, MacIntyre shows why Enlightenment moral philosophy failed and had to fail in its attempt to connect or reconnect untutored-human-nature-as-it-is to moral injunctions originally intended to censure and transform untutored human nature.<sup>804</sup> At the end of this story, emotivism emerged as the only plausible explanation for our moral beliefs and judgments.

We should, however, take a step back along this historical account, a step that, to my knowledge, MacIntyre himself does not take. One appeal of emotivism as a theory or framework is that it proposes to trace our moral judgments and beliefs to a source that seems to be real, namely our preferences, attitudes, and feelings, rather than to a source that seems to be imaginary, namely an account of the human *telos*.<sup>805</sup> Emotivism, I would suggest, attempts to reconnect the two surviving elements of the three-part teleological framework by adjusting the account of human nature as-it-happens-to-be to fit a revised account of the moral precepts we should follow. As a consequence, the moral precepts come to reflect what is left of the notion of human nature as-it-happens-to-be, i.e., the individual's personal, subjective preferences, attitudes, and feelings. From the standpoint of the teleological framework, emotivism contains an important kernel of truth: the assertion that human nature as-it-happens-to-be, including our preferences, attitudes, and feelings, can and will influence our

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803. *Id.* at 55.

804. *Id.* As he explains,

the eighteenth-century moral philosophers engaged in what was an inevitably unsuccessful project; for they did indeed attempt to find a rational basis for their moral beliefs in a particular understanding of human nature, while inheriting a set of moral injunctions on the one hand and a conception of human nature on the other which had been expressly designed to be discrepant with each other.

*Id.*

805. *See id.* at 11-12.

actions and our moral lives.<sup>806</sup> Emotivism's mistake, again seen from the perspective of the teleological framework, is the claim that our given, pre-existing preferences, attitudes, and feelings alone provide a complete and adequate basis for and explanation of our moral beliefs and precepts. From the perspective of the teleological framework, our preferences, attitudes, and feelings provide the grist for our moral beliefs and precepts, but the grist must be ground by a teleological formative education to produce, among other things, properly amended, reformed and/or transformed preferences, attitudes, and feelings.<sup>807</sup> As MacIntyre says in another context,

[v]irtues are dispositions not only to act in particular ways, but also to feel in particular ways. To act virtuously is not, as Kant was later to think, to act against inclination; it is to act from inclination formed by the cultivation of the virtues. Moral education is an 'éducation sentimentale'.<sup>808</sup>

Moral education is sentimental education because it involves, among other things, educating the sentiments—the preferences, attitudes, and feelings—to respond properly in particular circumstances.<sup>809</sup> Emotivism correctly recognizes the importance of the role of the feelings—as well as the preferences and attitudes—but emotivism mistakenly views those feelings as surds that are given once and for all rather than formed and achieved.<sup>810</sup> Thus, the teleological framework not only can explain the genesis of emotivism from the breakdown of a more complete account of ethical life, but it also can acknowledge, preserve, and correct the insights of emotivism

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806. This is one of the reasons why, for Aristotle, it is so important that a person embarking on ethical education begin with virtuous habits inculcated by a proper upbringing. See *supra* notes 705-07 and accompanying text. A person with vicious habits built on bad preferences, attitudes, and feelings will reason from bad maxims or premises to bad acts.

807. Another key element that teleological formative education should add is the ability to exercise practical reason. For a short explanation of Aristotle's account of practical reason and its relationship to a person's preferences and feelings, see MacIntyre, *AFTER VIRTUE*, *supra* note 145, at 161-62.

808. *Id.* at 149. For a discussion of the Aristotelian roots of the connection between virtue and a "settled disposition" to act in a particular way in particular circumstances, see BROADIE, *ETHICS WITH ARISTOTLE*, *supra* note 143, at 58. See also Bernard Williams, *Morality, the Peculiar Institution*, in *VIRTUE ETHICS* 45, 55 (Roger Crisp & Michael Slote eds., 1997) ("One way in which ethical life serves [important social ends] is by encouraging certain motivations, and *one* form of this is to instill a disposition to give the relevant considerations a high deliberative priority . . .").

809. The Carnegie Report's account of the third apprenticeship recognizes that ethical education is sentimental education. *CARNEGIE REPORT*, *supra* note 1, at 28. As the authors state, "[t]he essential goal . . . is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional." *Id.* Clearly, teaching "inclinations" is a form of sentimental education. See also *id.* at 194 (third apprenticeship inculcates "dispositions").

810. See MACINTYRE, *AFTER VIRTUE*, *supra* note 145, at 11-12.

by placing them in the context of a broader theory where they can play an appropriately circumscribed role.

As I already indicated, this attempt to show how the teleological framework can incorporate the insights of emotivism is intended as a sketch of a longer argument. To show how the teleological framework can incorporate the truths of emotivism, it would be necessary to look in greater detail at the emotivist position and also to spell out with greater precision the role of preferences, attitudes, and feelings in the teleological framework itself. Both of these undertakings lie beyond the scope of this Article. It is worth noting, however, that even the short sketch I have offered of how the teleological framework might incorporate the truths of emotivism shows also how the teleological framework might attempt to deal with some of the problems internal to the emotivist position that I identified in Part V.C.6(a). For example, the teleological framework would have no difficulty explaining how a change in a person's moral beliefs and precepts might help to trigger a change in a person's preferences, attitudes, and feelings leading to new preferences that support the new beliefs and precepts. The teleological framework allows us to distinguish between a person's preferences, attitudes, and feelings as-they-happen-to-be at any particular time and the amended and transformed preferences, attitudes, and feelings that will result from a teleological formative education that pulls and pushes the person toward the human *telos*. The teleological framework would acknowledge that people can and must acquire preferences, but also would contend that those preferences can and must undergo further formation and amendment through, among other things, reasoned discussion and debate about moral beliefs and precepts. Thus, from the standpoint of the teleological framework, it is quite clear that preferences can and, indeed, must change over time. Moreover, it is clear that one's preferences always must be revisited and revised in light of the human *telos*, which one may come to understand better over time. One's preferences, attitudes, and feelings do not provide the only measure for and guide to revising one's preferences, attitudes, and feelings. The human *telos* provides the measure, and ethical education, including the sort of ethical education that law professors offer, will help to form preferences, attitudes, and feelings in accordance with the measure.