

THE DEVELOPMENTAL PATH OF THE LAWYER

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I. INTRODUCTION

*My mother does not drive, and I own a towel that I cannot use—these are my reasons for studying law.*¹

*I am an integrated tapestry of elation and disappointment, risk and reward, ambiguity and conviction . . . I discovered [through adversity] that transitional challenges were not permanent impediments to my progress, but were instead emboldening catalysts to my personal evolution and professional development.*²

These two stories come from admissions essays submitted by members of Georgetown University Law Center's class of 2014, recently published in the Law Center's alumni magazine.³ The published essays provide fascinating views into the personal experiences and deep reflection that lead people to pursue legal studies.⁴

Both of the quoted students experienced tragedy at the hands of the legal system. The first young man's mother does not drive after a court

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* Associate Professor of Legal Research and Writing, Georgetown University Law Center. I acknowledge with appreciation Georgetown's generous support of this project. Many colleagues at Georgetown and beyond have generously shared their time and perspectives on these matters, including Jane Aiken, Frances C. DeLaurentis, Diana R. Donahoe, Alyssa Dragnich, Sarah Laubach, Lisa McElroy, Jill J. Ramsfield, Ruth Anne Robbins, Anne Taranto, Karen Thornton, and Kristen K. Tiscione. I am particularly grateful to Professor Jeffrey Shulman. I also acknowledge the love and support of my wife, Luci V. Cedrone and my children, Timothy M. Cedrone and Elizabeth L.R. Cedrone, who teach me new lessons every day. This paper is dedicated to the memory of Associate Dean Carol Q. O'Neil.

¹ Ethan J. Bercot, *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 21, 21.

² Tarik Ajani-Kehinde Barrett, *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 20, 27.

³ *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 18.

⁴ *Id.* at 18. ("No student arrives without a story. And the stories of these 1Ls are especially riveting. They prove that Georgetown Law students have much more than good grades and high LSAT scores. They have perseverance, passion for their cause—and a lot of moxie.").

summarily and perhaps unfairly judged her responsible for a car accident that injured a pedestrian.⁵ His mother's treatment by the justice system and the motto of his small Christian college, "Be great—serve," motivate his career in law.⁶ The writer aspires to "'be great,' . . . [by] serv[ing] those like [his] mother, who, while serving others, need to be served themselves."⁷ The second man's essay probes his relationship with his incarcerated brother and concludes that he and his brother are not fundamentally all that different.⁸ He, too, wants to use a legal education to achieve his life goals.⁹

The stories continue. An officer in the Montgomery County Police Department envisions a broader role for herself in criminal court.¹⁰ A District of Columbia teacher of students with special needs blows the whistle on administrators and colleagues for cheating on standardized tests; she concludes that "[a] few teachers who are willing to leave the classroom and enter courtrooms would greatly improve both fields."¹¹ A project manager at an international development consulting firm travels to Afghanistan and Pakistan and learns, in "places where law is most fragile," that "the rule of law is the linchpin of a more prosperous, safe and just world," and vows to support this goal through a legal career.¹² For a legal educator, these essays are deeply satisfying and enjoyable reading. Bright and accomplished young adults at a moment of transition reflect on the meaning and purpose of their lives. Formed by past experiences, they articulate their deepest goals, hopes, and reasons for pursuing legal education.¹³ In these essays, the authors begin to construct their

⁵ Bercot, *supra* note 1, at 21.

⁶ *Id.* at 21, 27–28. The motto, which is embroidered on the towel the writer cannot use, refers to the Gospel account of Jesus washing the feet of his disciples and commanding them to follow his example of service to others. *Id.* See also *John* 13:1–17.

⁷ Bercot, *supra* note 1, at 28.

⁸ Barrett, *supra* note 2, at 20, 27.

⁹ See *id.*

¹⁰ Alexa Andrade Briscoe, *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 22, 28.

¹¹ Mia Carre Long, *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 23, 23.

¹² Steven Seigel, *Student Stories*, RES IPSA LOQUITUR, Spring/Summer 2012, at 25, 29.

¹³ Put differently, experiences lead these individuals to create meaning and purpose for their lives. This process exemplifies the central tenet of constructivism, a psychological theory that posits that reality is created by the human person's interaction with environmental factors. See ROBERT KEGAN, *THE EVOLVING SELF* 7–13 (1982) (discussing
(continued)

professional identities as lawyers. These students are under no illusions that the legal system is perfect or that it can solve every problem. Rather, they are motivated by deeply personal goals and commitments, and they want to use law to advance those goals, changing the law along the way if necessary.

It is unfortunate that the law school curriculum provides so few opportunities for students to engage in sustained reflection on their emerging professional identities and goals. Opportunities for this kind of reflection abound in the legal curriculum. The law is riddled with enticing characters in morally ambiguous situations: the injured tort plaintiff; the contracting party who must breach covenants; the landowner facing the state's powers of eminent domain; criminal defendants facing the death penalty; medical professionals seeking to comply with myriad safety, financial, and privacy regulations; winners and losers under the tax code; and so many others. Each of these archetypes, if examined in the rich context of human experience, presents fertile ground for reflection on the client's needs, the law's limits, and the lawyer's role; alas, this ground is often left untilled.¹⁴

Important recent examinations of the law school curriculum have called attention to shortcomings in educating about the lawyer's professional role.¹⁵ In 2007, the Carnegie Foundation issued the seminal report *Educating Lawyers: Preparation for the Profession of Law*. As is now widely known, Carnegie posits three facets of legal education: a cognitive apprenticeship, which teaches the knowledge or "way of thinking" in law; an apprenticeship of practical skill, which requires students to use and apply knowledge in the context of simulated or actual practice; and an ethical apprenticeship, which considers the ethical

constructivism generally); SHARAN B. MERRIAM ET AL., *LEARNING IN ADULTHOOD* 291–94 (3d ed. 2007) (describing the constructivist orientation as applied to learning). This theory will figure prominently in the discussion that follows. See discussion *infra* Part IV.A–B.

¹⁴ See, e.g., Jane Harris Aiken, *Clients as Teachers*, 16 WASH. U. J.L. & POL'Y 81, 84 (2004) ("The case method . . . permits, perhaps requires, the student to be detached from the people involved . . . It is rare to see a shocked response by the class to an instance of physical injury, or to a human tragedy of a person who has lost his liberty unjustly.").

¹⁵ See, e.g., ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (Clinical Legal Educ. Ass'n ed., 2007); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*]; Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867 (2009).

principles and public roles and responsibilities of lawyers.¹⁶ The report views this trinity of apprenticeships as the essential elements of a legal education.¹⁷

The Carnegie Report persuasively demonstrates that law schools are very good at teaching legal doctrine and analysis.¹⁸ Carnegie recognizes deficiencies in law schools' attempts to teach legal skills in practical contexts but acknowledges that progress has been made in this area, largely through the rise of writing programs and clinical legal education.¹⁹ In Carnegie's estimation, education for each student's journey of professional identity is the most seriously shortchanged.²⁰

Research beyond Carnegie is necessary to appreciate the developmental complexity of law students' paths into professional life. Achieving a mature professionalism requires that students reshape their fundamental ways of thinking and making meaning about the world.²¹ A career in law requires wrestling with the ethical demands of the profession and with conflicts between personal values, the values of clients, and values of the legal system. Law students must recognize the multiple pressures on lawyers as agents in the legal system. These challenges are developmental. Entering the legal profession requires individuals to develop new ways of understanding the world.

This Article focuses on the ways in which law-learning is fundamentally a process of human development that must embrace the relationships and tensions between self, client, legal system, and society. Though not fully considered by the Carnegie authors, this developmental

¹⁶ CARNEGIE REPORT, *supra* note 15, at 27–29.

¹⁷ *Id.* at 29.

¹⁸ *Id.* at 74–75 (noting that the case-dialogue method is “well suited to train students in the analytical thinking,” which will lead to success in law school and in practice).

¹⁹ *Id.* at 89 (“[W]e [must] consider the question of what could be done to move education for practice into the more central position it deserves to hold within the legal academy.”).

²⁰ *See id.* at 132 (“[I]n legal education today, most aspects of the ethical-social apprenticeship are subordinate to academic training in case-dialogue method and contested as to their value and appropriateness.”). In perhaps the most memorable turn of phrase in the report, the Carnegie authors suggest that the first year of law school and its immersion in the case-dialogue method requires a “temporary moral lobotomy.” *Id.* at 78.

²¹ When viewed through a developmental lens, psychological growth may be thought of as “successively more complex principles for organizing experience.” ROBERT KEGAN, IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE 29 (1994). *See also infra* notes 125, 127–131 and accompanying text.

view militates in favor of Carnegie's central recommendation that students should be asked to apply cognitive knowledge of legal doctrine in practical contexts accompanied by mature reflection on ethics and professional purpose. Such experiences can result in developmental changes. Knowing the process by which this developmental change takes place will assist law schools in designing a curriculum that supports these changes. A developmental approach to the law curriculum requires a new paradigm that exceeds the Carnegie recommendations. In such a revised curriculum, students would be expected to discover and create knowledge by being both individually and collaboratively responsible for investigation of law and facts. Students would also write more, so that they capture their new ways of understanding and analyzing problems. These modifications to the curriculum would ensure that experience and reflection on experience have a more intentional and central role in students' formation.

This Article proceeds in four parts. Part II lays out the experience of a group of 1L students responding to a problem-based exercise in a torts casebook. Although the casebook problem presents a complex and rich fact pattern, it shortchanges important questions about the lawyer's relationship with her clients and the law, and thereby misses opportunities for essential professional and personal development. Part III examines the Carnegie Report and contemporary trends in legal education, noting shortfalls that result from the lack of a developmental perspective. Part IV.A examines social constructivism, a theory which posits that learning the law is a process of socialization and concludes that the social view does not leave adequate room for individuals' developmental capacities. Part IV.B then sets out cognitive-developmental stages of adult development in some detail with the goal of understanding the developmental demands imposed by the professional life. Part V advocates a more developmentally-appropriate law curriculum and suggests what some prominent features of that curriculum might be. The central goal of these suggestions is to educate law students to author their own experiences and to better understand lawyers' roles within and apart from the legal system. This developmental view of legal education aspires to form lawyers who are more fulfilled and satisfied in their life's work, ultimately empowered to pursue their deepest goals.

II. AN EXAMPLE

Because law-learning and law practice are deeply embedded in human experience, a real-life example best illustrates the strengths and shortcomings of the present legal education system. This example is drawn from my own experience as a first-year student (some thirteen years

ago) in a thirty-person, small-group torts class. Within the first month of school, my classmates and I were assigned to consider the following problem, drawn from a popular torts casebook:²²

A potential client, Alice Trudlow, is a thirty-two-year-old single mother of a fifteen-year-old daughter named Samantha. Some months previously, Alice came home unexpectedly early one evening to discover Samantha having sex with an eighteen-year-old named William Jennings. That evening, Samantha locked herself in her room, and mother and daughter have never spoken about the incident. Samantha became pregnant, but the pregnancy was tubal and had to be surgically terminated. Alice is concerned that Samantha would not discuss the issue with her, and she worries that Samantha will follow in her own footsteps as a teenaged parent. Consequently, she asks whether prosecutors could be encouraged to pursue a statutory rape charge against Jennings; failing that, she wants to know whether Jennings is liable for the tort of battery. The lawyers have interviewed Samantha and learned that the sex was in fact consensual—a fact which Alice does not know and which Samantha begs them to keep confidential.²³

For governing law on the battery issue, the casebook provides an excerpt from the brief opinion in *Barton v. Bee Line, Inc.*²⁴ This 1933 New York decision held that “a female under the age of eighteen has no cause of action [in tort] against a male with whom she willingly consorts, if she knows the nature and quality of her act.”²⁵ To hold otherwise, said the court, would reward “such female . . . for her indiscretion.”²⁶ The court refused to “unwarily put it in the power of the female sex to become seducers in their turn.”²⁷ Only after five pages of commentary do the casebook authors report the obvious: this rule is “the distinct minority view

²² See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 39–47 (5th ed. 1999).

²³ *Id.* at 39–41.

²⁴ *Id.* at 41–42 (excerpting *Barton v. Bee Line, Inc.*, 265 N.Y.S. 284 (N.Y. App. Div. 1933)).

²⁵ *Barton*, 265 N.Y.S. at 285.

²⁶ *Id.*

²⁷ *Id.* (quoting *Smith v. Richards*, 29 Conn. 232, 240 (Conn. 1860)).

regarding the effect of statutory rape statutes in battery cases.”²⁸ Armed with these facts and this case law, the first-year law student is asked to advise Alice about the feasibility of criminal or civil action against Jennings.²⁹

The professor for my first-year torts class decided to conduct an in-class simulation of this client meeting with Alice. Two male students were assigned to roles as lawyers, and a visitor to the class played Alice. The simulated client meeting was awkward and uncomfortable. The student-lawyers dealt cavalierly with the confidentiality issue. Within minutes, they revealed to Alice that Samantha had consented to the sex with Jennings. The student-lawyers then argued normatively in favor of the position found in *Barton*, stating that because Samantha consented to the sex, she was not wronged and should not recover. The client seemed taken aback by her lawyers’ views.

In responding to their client, these student-lawyers constructed a simple world where the legal framework of *Barton* was all that mattered. In their view, *Barton* was the law and was not to be questioned in any way; any contrary views, including those of the client, were to be ignored or opposed. The students thus avoided the hard questions of law and ambiguities within *Barton*, the views of their own client and her conflict with the law, and the deeply problematic social mores of *Barton*. They did not see any room for their own personal agency within the legal system. Mature and effective lawyering requires a more complex and nuanced way of understanding the legal system and human experience. This in turn requires more advanced developmental tools than these students had available to them at that time. Developing these tools must become part of legal education.

Achieving a more mature developmental state requires aspiring lawyers to mediate tensions in the client relationship and tensions in the lawyer’s own relationship to the law. The Trudlow problem casts both of these tensions in relief.

First, the problem requires the student to struggle with the nature of a lawyer’s relationship with a client. At the heart of this problem is the question whether the lawyer should tell Alice that Samantha characterized

²⁸ HENDERSON, *supra* note 22, at 47. Indeed, the seventh edition of the Henderson casebook sharpens this point, noting parenthetically that “at the time *Barton* was decided it was contrary to the contemporaneous weight of authority in New York and in other jurisdictions and that only one case in New York has since been determined on *Barton*’s authority.” JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 48 (7th ed. 2007).

²⁹ *Id.* at 40–41.

the sex with Jennings as consensual.³⁰ Jennings will likely argue that the sex was consensual; if Samantha corroborates this argument, the battery claim could be fatally undermined. Of course, the lawyer must first face the legal question whether she may reveal Samantha's confidences to Alice. However, this legal issue is only the beginning. She must also decide how to take account of nonlegal considerations such as the state of the parent-child relationship or the needs of a fifteen-year-old child.³¹ Moreover, even law students must be expected to appreciate that different lawyers will view these considerations differently.

Second, the problem presents difficult issues of law. *Barton* is a long-abandoned minority view for good reason. The rule and reasoning of *Barton* would probably surprise most nonlawyers, as it did the actress who

³⁰ The casebook includes notes on a number of legal issues related to this question, including the issue of Samantha's right to confidentiality, Samantha's status as a potential minor plaintiff in a tort suit, and the effect of the criminal statute on consent. HENDERSON, *supra* note 22, at 42–47. However, by casting these issues as purely legal questions, the book missed an opportunity to prod students to think about how these legal rules should apply to the human clients in front of them.

³¹ The casebook's treatment of this issue is unsatisfactory. The initial material following the problem and *Barton* case admits that "the nonlegal aspects may actually be more difficult to resolve than the purely legal," but the surrounding discussion suggests that the lawyer may well avoid taking the case because it "will not be a pleasant one to handle," and glibly reports, "[t]he reaction of many lawyers to cases of this sort is, 'I should have gone to business school.'" HENDERSON, *supra* note 22, at 42. The business school response strikes me as the gendered reaction of three male casebook authors. I doubt that most of my classmates responded to a story about a single mother concerned about the possible teenage pregnancy of her daughter by thinking about business school. I certainly did not.

Continuing on the assumption that law students would want to avoid this case, the casebook then quotes the Model Code of Professional Responsibility to the effect that "a lawyer should not lightly decline proffered employment" and must sometimes "accept[] . . . his share of tendered employment which may be unattractive both to him and the bar generally." *Id.* at 43 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 2-26 (1980)). It might have been more useful to point students towards the conception of a lawyer articulated in Model Rule of Professional Conduct 2.1: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2012). Rather than dismissing the family conflicts at the heart of this case as "unpleasant" or tolerating them as an "unattractive" part of the professional's job as a lawyer, the Model Rule allows the lawyer to assist the clients in nonlegal matters—perhaps best accomplished in this matter by pointing Alice and Samantha towards a skilled family therapist. *Id.* at R. 2.1 cmt. 4.

played Alice in our class exercise. Most people understand that the crime of statutory rape views consent as irrelevant.³² However, for the civil claim, *Barton* rejects this familiar legal principle and puts consent squarely at issue.³³ The reasoning in *Barton* is even worse. The language of the opinion embraces a thoroughly patronizing and outdated view of women. Must a lawyer in a jurisdiction where *Barton* is the law accept its result and reasoning uncritically? Can the lawyer avoid the rule of *Barton* without challenging it? Or is it desirable to challenge the rule directly and perhaps change the law? If change is not possible or advisable from the client's perspective, how can a lawyer function within a legal system that contains such a rule?

Mindful of the complexity of this task, Carnegie defines well the goal of legal education: sophisticated legal practice demands that lawyers engage in careful legal analysis of the client's positions, formulate and communicate ideas clearly in speech and writing, and simultaneously uphold the ethical standards of the profession while not shrinking from the human dimensions of practice.³⁴ This call to integrate the teaching of these three areas is a powerful, even transformational, suggestion for legal pedagogy. Alas, the call has largely gone unheeded.³⁵

Moreover, Carnegie does not fully recognize the developmental gains that are necessary to achieve a mature professionalism. To advise Alice and Samantha well and with integrity, law students must take on the developmental position of a mature, adult, and professional lawyer. The intricate legal and human dynamics of the Trudlow problem require students to reflect on how lawyers think, negotiate the diversity of legal

³² SHARON G. ELSTEIN & NOY DAVIS, AM. BAR ASS'N, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 17–20 (1997).

³³ See *Barton v. Bee Line, Inc.*, 265 N.Y.S. 284, 285 (N.Y. App. Div. 1933).

³⁴ See CARNEGIE REPORT, *supra* note 15, at 191–92.

³⁵ See *id.* There are notable exceptions. For an excellent guide for how to design and teach a law school class, I generally recommend MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN (2009). The book contains useful advice rooted in sound educational theory. Chapter 3, entitled “Designing the Course,” addresses the process of curriculum design at the course level, arguing that the first step is to set goals for the course in terms of what the students should get out of it. *Id.* at 38–40. Law schools would do well to absorb and reflect upon the authors' advice as they begin identifying and defining their outcome goals.

thought, and understand that legal solutions are but one tool for addressing the human problems of Alice and Samantha.³⁶

As a prelude to designing a stronger curriculum, legal educators must examine the research conducted by cognitive and developmental psychologists about adult learning and lifespan development. Present examinations of the law school curriculum have only begun to assimilate this body of knowledge.³⁷ This literature broadly supports a reformed model of legal education that would help lawyers understand their roles vis-à-vis clients and the legal system. A developmental approach to legal education would shift the priority from training people to “think like lawyers” to empowering individuals to use their full developmental capacities to generate creative legal ideas in complex human situations. Importantly, a developmental approach would also develop law students’ critical consciousness about the law as they seek to mediate the demands of the applicable law, clients, the legal profession, the social good, and their own personal commitments. In sum, law students would be empowered to author their own experiences as agents and actors in the legal system.

III. THE LIMITS OF THE CARNEGIE CRITIQUE OF LEGAL EDUCATION

Much current commentary about curriculum reform builds on the seminal 2007 Carnegie Foundation report as its foundation.³⁸ Carnegie

³⁶ Of course, at its best, clinical legal education can teach these lessons. Indeed, there is a robust literature arguing that experiential education generally and clinical education in particular is essential to preparing law students to enter practice. See, e.g., Jane H. Aiken, *Provocateurs for Justice*, 7 *CLINICAL L. REV.* 287, 287 (2001) (“Clinical legal education offers students direct experience as lawyers working for social justice.”); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1935 (2002) (arguing that law school clinic is the primary place in law school where students can learn about the actual functioning of the legal system, and that the clinic experience instills in them the value and duty of public service). However, the law school experience for most students—even those lucky enough to have access to good clinical education—is still dominated by Socratic paradigms, and so I begin my examination here in a torts class.

³⁷ One education scholar has said that the relationship between student development and the process of inquiry in different disciplines is “unexplored terrain.” JANET DONALD, *LEARNING TO THINK*, at xi (2002).

³⁸ Part of Carnegie’s promise lies in the respected history of the Carnegie Foundation’s interventions in American higher education. A 1910 study of medical education by Abraham Flexner provided the blueprints for the modern system of academic and clinical medical training that endures to this day in this country. See ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION* (continued)

posits three apprenticeships or “facets of professional expertise” which would-be practitioners must master.³⁹ The first apprenticeship is “intellectual or cognitive”; it teaches the “knowledge [or the] way of thinking of the profession.”⁴⁰ This lesson is pursued through the case-dialogue method, which the report terms “the legal academy’s standardized form of the cognitive apprenticeship.”⁴¹ The second apprenticeship gives students experience in “the forms of expert practice shared by competent practitioners” through “simulated practice situations . . . or in actual clinical experience with real clients.”⁴² The report observes a “wide range” of courses geared towards this apprenticeship, including first-year legal research and writing, trial advocacy classes, externships, and legal clinics.⁴³ The report also recognizes that many law schools communicate to students that these courses are of “secondary intellectual value and importance” by marking faculty who teach them with “lower academic status.”⁴⁴ Finally, an apprenticeship of “identity and purpose” attempts to

FOR THE ADVANCEMENT OF TEACHING (1910); DAVID THOMSON, *LAW SCHOOL 2.0*, at 60 (2009) (discussing the impact of the Flexner report).

Carnegie has examined legal education many times over the past 100 years. See JAMES R. MAXEINER, *EDUCATING LAWYERS NOW AND THEN: AN ESSAY COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION*, at vii–viii (2007); JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN LAW SCHOOLS* (1914); THOMSON, *supra*, at 60–62. The 2007 Carnegie Report is the product of a respected former law school dean, a philosopher, two psychologists, and an education scholar, drawing together practical and theoretical knowledge from a number of places within the academy. See *CARNEGIE REPORT*, *supra* note 15, at ix–x. See *id.* for background on each of the Carnegie Report’s co-authors.

³⁹ See *CARNEGIE REPORT*, *supra* note 15, at 27–28. As the report itself recognizes, the present graduate/academic model of legal education replaced an earlier apprenticeship model. *Id.* at 25. See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 463–68 (3d ed. 2005). The Carnegie Report suggests that the transition to academic legal education has resulted in “a legacy of crossed purposes and even distrust between practitioners and academics, as well as between the academy and the public, which still besets the preparation of professionals.” *CARNEGIE REPORT*, *supra* note 15, at 25. In this context, Carnegie’s decision to reclaim and reconceptualize the term “apprenticeship” may be viewed as an effort to restore benefits lost to the hegemony of the academic model of education. *Id.* at 26.

⁴⁰ *Id.* at 28 (discussed in detail in Chapter 2).

⁴¹ *Id.* at 50.

⁴² *Id.* at 28 (discussed in detail in Chapter 3).

⁴³ *Id.*

⁴⁴ *Id.* at 87–88.

form students' professional identity in line with the ethical values as well as public roles and responsibilities of lawyers.⁴⁵ The report views the apprenticeship of professional identity as neglected by law schools.⁴⁶

For law, as for other professions, Carnegie identifies the “signature pedagogy” that defines training in the discipline.⁴⁷ “[A] signature pedagogy is a key educational practice by which a given field creates a common frame through which it can induct new members.”⁴⁸ Noting that the “bottom line” of professional education is not what students know, but “what they can do,” Carnegie asserts that “the most distinctive of the signature pedagogies . . . are pedagogical attempts to build bridges between thought and action”⁴⁹ Examples include: bedside teaching in medicine, the design and performance studios in architecture and engineering, the preaching practicum in seminaries, and the case dialogue method (popularly known as the Socratic method) in law.⁵⁰

The central Carnegie thesis is that law schools overemphasize the cognitive apprenticeship through practice of the case-dialogue method while neglecting the apprenticeships of practice and professionalism.⁵¹ According to Carnegie, the case-dialogue method prizes “procedural and formal qualities of legal thinking,” while shortchanging “the moral and social dimensions” of legal problems and neglecting “fuller contexts of

⁴⁵ *Id.* at 28.

⁴⁶ *Id.* at 128.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 23–24, 50.

⁴⁹ *Id.* at 23. Unfortunately, the very next sentence somewhat obscures the definition: “These are pedagogies invented to prepare the mind for practice.” *Id.* By using the words “prepare the mind,” the text suggests, at least in theory, that a signature pedagogy might function adequately even if limited solely to the cognitive realm. However, none of the examples cited—medical training at bedside, the engineering or architecture studio, preaching class in seminaries, and supervised practice in teaching and social work—operates by separating the knowledge base and theoretical frames of the profession from its work in action.

⁵⁰ *Id.* Commentators, including the present writer, have struggled to find language to describe the present doctrinal classroom. Carnegie employs the term “case-dialogue method” to refer to what goes on in American law classrooms today. *Id.* at 2–3. Professor Mertz, in her linguistic study, similarly distinguishes “prototypical” Socratic instruction from a “modified” method. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL* 44, 241 n.3 (2007). Both choices seem attempt to recognize that what goes on in American law classrooms today is related to but must be differentiated from the archetypical Socratic method.

⁵¹ CARNEGIE REPORT, *supra* note 15, at 29.

actual legal practice.”⁵² These characteristics of the case-dialogue method result in “two major limitations of legal education”: its “causal attention . . . to teaching students how to use legal thinking in the complexity of actual law practice” and its inadequate “support for developing the ethical and social dimensions of the profession.”⁵³

The result is a law school experience that does not adequately support students’ move into the professional community. Carnegie recognizes that sustained focus on the case-dialogue method over three years of legal education results in “diminishing returns.”⁵⁴ Indeed, Carnegie views “the relative marginality of clinical training in law schools” as “striking.”⁵⁵ However, this marginality is not surprising but rather is a predictable outgrowth of a signature pedagogy that operates in the cognitive domain and largely eschews responsibility for building the bridge from thought to practice.⁵⁶

From Carnegie’s ambitious thesis and searching critique, one might expect proposals that substantially revise the law school experience. To be sure, the report proffers initial thoughts on how to structure an integrated curriculum—one that sets the cognitive analytical study of law in practical contexts rich with questions of ethics and professional role.⁵⁷ Concurring with *Best Practices for Legal Education*, the Carnegie authors assert that

⁵² *Id.* at 145.

⁵³ *Id.* at 187–88. For an interesting take on other ways to educate lawyers about their ethical responsibilities, see Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479 (2009) (advocating a pitfalls pedagogy, or a legal curriculum that incorporates the perils of the legal profession as an approach to professional responsibility to better prepare law students for the situations they will encounter in practice).

⁵⁴ CARNEGIE REPORT, *supra* note 15, at 76–77.

⁵⁵ *Id.* at 24.

⁵⁶ Carnegie even seems to recognize this problem, identifying the “shadow structure,” that is, “the absent pedagogy that is not engaged” as involving two “missing complements to the case-dialogue method.” *Id.* at 51, 56. These missing components are “experience with clients” and lack of “ethical substance,” loosely tracking the apprenticeships of practice and professional identity. *Id.* at 56–57.

⁵⁷ *Id.* at 194–202. This message pervades the document. To take just one example, in Chapter 4, entitled “Professional Identity and Purpose,” the report asserts that achieving a better balance among the cognitive, practical and ethical/professional apprenticeships requires more than “shuffl[ing] the existing pieces.” *Id.* at 147. Instead, legal educators will have to engage in “careful rethinking of both the existing curriculum and the pedagogies that law schools employ to produce a more coherent and integrated initiation into a life in the law.” *Id.*

“lawyering should always be taught in conscious relationship to the students’ growing understanding of particular features and areas of legal doctrine.”⁵⁸ However, Carnegie’s proffered practical solution seems modest compared to its goal of a “reconfigured” third year experience, and “probably some reconfiguration of the second year as well.”⁵⁹ It is unfortunate that Carnegie misses an opportunity to advocate for a redefined signature pedagogy that better prepares students for the challenges they will face as lawyers.

Indeed, Carnegie seems to reflect the incremental—and ineffective—change that is currently taking place in legal education. The case-dialogue method continues to exert “considerable influence” over modern practice.⁶⁰

⁵⁸ *Id.* at 195. See also STUCKEY ET AL., *supra* note 15, at 143 (explaining that the opportunity to engage in problem-solving exercises alone is insufficient; law schools should give students the opportunity to engage in “context-based” learning in both hypothetical and real-life situations).

⁵⁹ *Id.* at 77. To be sure, the Carnegie prescriptions are ambitious in the staid world of legal education. Even Carnegie observes that reform movements in legal education typically result in additions to the curriculum—discrete courses or series of courses aimed at remedying particular deficits. *Id.* at 76 (“[T]oday’s trend is to supplement rather than replace the inherited reliance on this venerable case-dialogue teaching in the first phase of doctrinal instruction . . . either by including other techniques, such as close reading drills, or by the direct incorporation of legal writing into the class itself, or by changing the pedagogical form altogether . . .”). Indeed, the concluding chapter of the report notes that “all law schools teach lawyering skills and professionalism, and the offerings at many are very rich.” *Id.* at 191. However, the present model of skills and ethics instruction in most American law schools reflects just the kind of ‘reform by addition’ that Carnegie criticizes. This is not the kind of solution Carnegie offers; it would be a defeat if the dominant law school response was to add a Carnegie-flavored item to the present curricular smorgasbord. See Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1085 (1986) (employing the smorgasbord metaphor).

⁶⁰ MERTZ, *supra* note 50, at 144. See also Laurel Currie Oates, *Did Harvard Get It Right?*, 59 MERCER L. REV. 675 (2008). For general commentary about the Socratic classroom, see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); Brook K. Baker, *Language Acculturation Processes and Resistance to In “doctrine”ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz’s Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131 (2000); James Eager, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389 (1996–97); Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105 (1998); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000); Jennifer L. Rosato, *The Socratic Method* (continued)

The modern law classroom bears surface resemblance to its pedagogical forebears: classes are still large, and the professor's voice, through questions and often answers, tends to dominate. However, present pedagogical practices depart from archetypical models of the Socratic classroom⁶¹ in a variety of ways. The goals of the archetype—the ability to think on one's feet and to quickly perceive the intricacies and implications of legal argument—are not fully realized chiefly because the pressure to perform has been abated.⁶² Although newer techniques are

and Women Law Students: Humanize, Don't Feminize, 7 S. CAL. REV. L. & WOMEN'S STUD. 37 (1997).

Many writers particularly critique the Socratic classroom's focus on appellate cases, as so much modern law is statutory. A number of law schools, notably Harvard, have introduced legislation-regulation courses in the first year, and a number of textbooks are now available for these courses. *E.g.*, LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE* (2006); JOHN F. MANNING & MATTHEW STEPHENSON, *LEGISLATION AND REGULATION* (2010).

⁶¹ See Philip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound 1/31/90)*, 109 HARV. L. REV. 911, 915 (1996) (noting that the Socratic method asks the student to engage in the kind of analysis lawyers in practice do, to "sit under the apple tree himself—that is, to examine directly relevant and the arguably analogous legal materials and to reason through to a solution of the unsettled problem"); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 122–24 (1999) (describing "traditionalist" Socratic professors at Harvard Law School).

⁶² Many professors have dropped the practice of "blind calls" and now indicate ahead of time which students will or may be called on for a particular class. Scholars are correct to observe that students are most successful when they participate as active learners; in the traditional Socratic classroom, students are expected to learn either by answering the professor's questions aloud or vicariously. *E.g.*, Areeda, *supra* note 61, at 916 ("What you [the instructor] try to do, therefore, is to induce the students you haven't called on to participate vicariously . . ."); Kerr, *supra* note 61, at 117; Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 351 (2001). However, announcing in advance which students are going to be on call for a particular class robs the Socratic method of its immediacy and impact. Students prepare very well when they are on call and are less motivated at other times. Without reading the cases before class, students have much more difficulty following the Socratic dialogue and formulating their own internal answers to the questions. Thus, the purported active learning of the archetypical Socratic classroom has given way to passive listening in the neo-Socratic classroom. This passive listening is further exacerbated by common practices that occur when the Socratic method is poorly executed. See Areeda, *supra* note 61, at 911–13 (describing the following poor questioning techniques: "antiphonal recitation," "opinion survey," "non-followed-up vague or big picture rambler," and "token mid-lecture pause"). Perhaps these passive classrooms

(continued)

now sometimes used in Socratic classrooms, the goals suggested by these techniques have not been fully understood, theorized, and articulated, much less realized.⁶³ These attempts to build bridges into practice are quite tentative.

Newer course offerings pursue a similar path, ornamenting the Socratic melody rather than fundamentally changing law schools' tune. Writing courses, clinics, policy seminars, and legal philosophy courses now appear

lead to the worrisome disengagement that characterizes the second and third years of law school. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: IN CLASS AND BEYOND, 2010 ANNUAL SURVEY RESULTS 14 (2011) (citations omitted), http://lssse.iub.edu/pdf/2010/2010_LSSSE_Annual_Survey_Results.pdf (“Criticisms of the traditional model highlight diminishing academic engagement in the third year, and research confirms that academic engagement declines over the course of students’ three-year tenure in law school.”). The Law School Survey of Student Engagement (LSSSE) findings from 2009 indicate that 26% of 3Ls go to class without having done the assigned reading, and only 54% of 3Ls spend at least twenty hours a week reading and preparing for class. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: ENHANCING STUDENT LEARNING, 2009 ANNUAL SURVEY RESULTS 7–8 (2010), http://lssse.iub.edu/pdf/LSSSE_Annual_Report_2009_forWeb.pdf. Further, 2Ls and 3Ls are much less likely than their 1L counterparts to prepare multiple drafts of a writing assignment, with the percentage of students reporting doing this very often dropping from up to 39% (occurring at schools ranging in size from 500 to 900 students) to only 26% of 3Ls at those same schools doing the same. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT 2009, STUDENT RESPONSES, ACADEMIC MOTIVATION, http://lssse.iub.edu/pdf/2009sturesp_academicmotivation.pdf. Forty-seven percent of 1Ls at schools larger than 900 students reported never coming to class unprepared to 32% of 2Ls and only 20% of 3Ls claimed the same. *Id.*

⁶³ There is evidence that professors have begun to incorporate other techniques such as lecture, role-playing, and problem-based approaches to their classes. Mertz recognizes that in the eight contracts classes she studied, “[t]here was a wide variation among the eight classes in the degree to which professors used lecture, focused Socratic dialogue, and more diffuse styles of discursive interaction with the class.” MERTZ, *supra* note 50, at 85. Nonetheless, she finds an “underlying similarity: . . . the same fundamental approach to text, reading, and authority that is so clearly delineated in Socratic teaching.” *Id.* See also Eager, *supra* note 60, at 398. While these additions can be effective, they are not yet supported by careful reflection on the goals and outcomes that they might support. Too often, the voice of the professor still dominates in the classroom, and individual students have little room for meaningful spoken or written participation. With few opportunities for feedback and no evaluation or examination of the skills practiced through these classroom techniques, there is little reason to think students will master the new skills they could support.

as course offerings and, in some cases, requirements.⁶⁴ More recently-recognized trends and modifications include “(1) specialization; (2) experiential learning; (3) globalization; (4) integration of skills-based and doctrinal learning; (5) greater training in professionalism; and (6) enhanced feedback.”⁶⁵ While each of these areas of innovation is potentially useful and worthy of deep study, none has resulted in a comprehensive reform of the law curriculum on the order of the reforms first implemented by Charles Langdell in the 1870s.⁶⁶ Instead, in the modern era, the law curriculum has advanced in piecemeal fashion, eluding “transformative change” of the sort suggested by the broadest readings of Carnegie.⁶⁷

Moreover, critiques of the Socratic method have emerged which question whether it appropriately trains students to critique the law from a moral and personal perspective.⁶⁸ Pierre Schlag’s arresting essay, *The Anxiety of the Law Student at the Socratic Impasse*, highlights what Schlag terms the “narrowing effects” of law school.⁶⁹ In Schlag’s analysis, study of judicial opinions leads one down a “trajectory” that is “designed not to edify or illuminate, but to shut things down.”⁷⁰ In Schlag’s (admittedly pessimistic) view, law school leads the law student to ask:

⁶⁴ Byse, *supra* note 59, at 1085 (“[T]he smorgasbord of courses—both practical and theoretical—is far richer now than before.”). No less an authority than Justice Elena Kagan in 2007, as Dean of Harvard Law School, noted that she “was struck by the extent to which Professor Byse anticipated the evolution of legal education at Harvard Law School and elsewhere over the next two decades.” Elena Kagan, *In Memoriam: Clark Byse*, 121 HARV. L. REV. 454, 455 (2007).

⁶⁵ Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L. J. 717, 728 (2009).

⁶⁶ See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277 (2004).

⁶⁷ CARNEGIE REPORT, *supra* note 15, at 191; Fine, *supra* note 65, at 723. Many reasons for resistance to change in the legal academy have been well documented. *E.g.*, MAXEINER, *supra* note 38 (discussing the lack of reform in legal education over the last century); Fine, *supra* note 65, at 728–32; Wegner, *supra* note 15, at 870–77 (describing reasons the legal academy is disinclined to engage with “wicked problems,” which are problems that cannot be “definitively described or understood”).

⁶⁸ *E.g.*, Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse—An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575, 582–83 (2007).

⁶⁹ *Id.* at 575.

⁷⁰ *Id.* at 583. Of course, Schlag’s views may be empirically wrong or unduly pessimistic. I sidestep this debate and use Schlag only as an illustration of the kinds of mental demands Schlag believes law school should involve.

- “Is this case correctly decided?” when she should be asking back, “Correctly decided by reference to what?”
- “Does this rule work?” when she should be asking back, “Work for whom?”
- “Is this consistent with . . . ?” when she should be asking back, “What’s consistency got to do with it?”
- “Which aspect or factor is predominant, primary, or more important here?” when she should be asking back, “How could I tell? How could you tell? How could anyone tell?”⁷¹

Schlag’s preferred questions require students to recognize the value judgments that underlie the legal community’s choices of legally significant facts and bring their own experience to bear on legal analysis. Learning to mediate the balance between their own values and those of the legal system will serve students throughout their careers in law and will give them the power to be successful lawyers whose thinking transforms the legal system by exploring the boundaries of law and by examining the functioning of the legal system in the face of contemporary problems. Training students to do this requires a move beyond the case-dialogue method as signature pedagogy. It is unfortunate that the Carnegie Report did not push its conclusions this far.

To truly create a more effective educational experience, law schools must engage students’ developmental capacity to integrate the cognitive, practical, and ethical dimensions of lawyering, and to cast a critical eye over the system of law they are learning. Engaging the critical and moral imagination of law students is the key to developing professional capacity, ethics, and conscience. To get to this goal, a deeper understanding of cognitive and developmental psychology is necessary. This deeper understanding and the reforms it suggests will result in a broader, more robust curriculum and pedagogy in law schools.

IV. PEDAGOGY AND PHILOSOPHY ROOTED IN PSYCHOLOGY

Legal education since Langdell, if not before, has been thought of as a process of socialization.⁷² Social constructivism “focus[es] on the social

⁷¹ *Id.*

⁷² Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI. KENT L. REV. 429, 449–50 (1981).

setting in which learning occurs” and encompasses the idea that individuals learn by “engag[ing] socially in talk and activity about shared problems or tasks.”⁷³ According to the social constructivist model, education should teach people to participate in the discourse of their field of study.⁷⁴ Much of legal modern education pursues this goal. Part IV.A examines the work of social constructivist theorists as they consider adult development and adult learning and applies these theories to legal education.⁷⁵ On examination, a criticism emerges; in elevating the discourse of the community, social constructivism does not fully credit individuals’ developmental capacity to contribute to and ultimately change the discourse. Recent defenses of the social view have recognized this critique and responded by suggesting different ways to conceive of an individual’s role within the discourse community.⁷⁶ However, these defenses of the social view do not fully appreciate the importance of research in human development nor do they recognize the full developmental capabilities of mature professionalism in individuals.

Part IV.B examines the literature of adult development and adult learning to assess the developmental capabilities of law students.⁷⁷ The work of cognitive developmental psychologists sheds light on developmental processes that are at play during graduate and professional training and that continue throughout adults’ lives. Adult students come to their studies at diverse developmental stages. What psychologists term the “self-authoring view” is the hallmark of mature professionalism and should serve as a developmental goal for law students. Pursuing this goal will lead educators to follow Carnegie’s prescription by integrating instruction in legal doctrine, legal skills, and professional ethics and identity. Following this path, students will view law more critically and learn to mediate the complex human contexts in which law is but one tool for solving problems.

⁷³ MERRIAM ET AL., *supra* note 13, at 291, 297.

⁷⁴ *See, e.g., id.* at 292 (“[The] constructivism [model] understand[s] learning to be an active rather than passive endeavor. Consequently, learning occurs through dialogue, collaborative learning, and cooperative learning.”). *See infra* notes 78–108 and accompanying text.

⁷⁵ *See infra* notes 78–108 and accompanying text. In this discussion, I use the terms “social constructivism” and “the social view” interchangeably.

⁷⁶ *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 MERCER L. REV. 705, 736–45 (2009).

⁷⁷ *See infra* notes 109–208 and accompanying text.

A. The Social Constructivist Baseline in Legal Education

Social constructivism traces its origins to the great Russian psychologist L.S. Vygotsky, who “proposed that learning is socially mediated through a culture’s symbols and language, which are constructed in interaction with others in the culture.”⁷⁸ On this view, learning is primarily a process of enculturation; from this central insight flows both an epistemology and a pedagogy.⁷⁹ As to epistemology, social constructivists hold that “knowledge is ‘constructed when individuals engage socially in talk and activity about shared problems or tasks.’”⁸⁰ Because “[m]aking meaning is . . . a dialogic process involving persons-in-conversation, . . . learning is seen as the process by which individuals are introduced to a culture by more skilled members.”⁸¹ For proponents of social constructivism, instruction in these “culturally shared ways of understanding and talking about the world and reality” is at the heart of the teaching-learning process.⁸²

Constructivism became “the leading metaphor of human learning” in the 1980s and 1990s, displacing behaviorist and information-processing perspectives.⁸³ The impact of constructivism on classrooms at all levels cannot be understated. The prior behaviorist focus on education as a process of providing information to the student led to “passive perception, memori[z]ation, and all the mechanical learning methods in traditional didactic lecturing.”⁸⁴ Over time, behaviorism has been augmented and

⁷⁸ MERRIAM ET AL., *supra* note 13, at 292. *But see* Charlotte Hua Liu & Robert Matthews, *Vygotsky’s Philosophy: Constructivism and Its Critics Examined*, 6 INT’L EDUC. J. 386, 387–88, 391–92 (2005) (recognizing that the social constructivist view is often said to be derived from Vygotsky’s work, but re-examining Vygotsky’s views of the individual’s interactions with social contexts). *See generally* L.S. VYGOTSKY, *MIND IN SOCIETY* (Michael Cole et al. eds., 1978).

⁷⁹ *See* Liu & Matthews, *supra* note 78, at 388.

⁸⁰ MERRIAM ET AL., *supra* note 13, at 291–92 (quoting Rosalind Driver et al., *Constructing Scientific Knowledge in the Classroom*, 23 EDUC. RESEARCHER 5, 7 (1994)).

⁸¹ *Id.*

⁸² *Id.* at 292.

⁸³ Liu & Matthews, *supra* note 78, at 387. This is a bit of an oversimplification. There have been other philosophical and psychological orientations to learning, including humanist, cognitivist, and social cognitivist perspectives. *See* MERRIAM ET AL., *supra* note 13, at 281–91, 294–97. That said, Liu and Matthews are correct to identify “oscillating emphases” between behaviorist and constructivist poles of influence across these varied orientations. Liu & Matthews, *supra* note 78, at 387.

⁸⁴ Liu & Matthews, *supra* note 78, at 389.

sometimes replaced by a variety of techniques that seek to create experiences through which the learner creates meaning, including self-directed learning, transformational learning, experiential learning, situated cognition, and reflective practice.⁸⁵ Each of these educational emphases reflects aspects of constructivism.⁸⁶

Turning to legal education specifically, many commentators have found deeply social qualities in the traditional Langdellian epistemology. Professor Kerr captures a social constructivist view of epistemology when he observes that “students who learn the law via Socratic dialogue are likely to appreciate the social construction of law.”⁸⁷ In the doctrinal classroom, the professor and students often pursue the precise content of legal rules, the nuanced contours of legal doctrine, and lawyerly application of law to indeterminate facts. Legal doctrine and its application is thus constructed—and knowledge of “the law” is thus created—in the social dialogues that take place in the classroom, at least in the ideal form.

Legal writing faculty have also wrestled with social constructivist notions of education.⁸⁸ Writing faculty working from a social view “acknowledge the social contexts within which writing takes place and, thus, . . . acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts.”⁸⁹ The professor guides his or her students to enter written dialogue with the legal audience by modeling or making transparent well-defined features of the legal discourse community such as its unarticulated assumptions, highly technical vocabulary, and selective emphasis on particular facts. The aim is to “focus[] people’s attention so that their conversation”—or written

⁸⁵ MERRIAM ET AL., *supra* note 13, at 297. Merriam’s book includes material detailing self-directed learning (chapter 5), transformational learning (chapter 5), experience and learning (including situated cognition; chapter 5), and reflective judgment (chapter 13). See also Kitchener et al., *Development of Reflective Judgment in Adulthood*, in HANDBOOK OF ADULT DEVELOPMENT AND LEARNING 73 (Carol Hoare ed., 2006); Kathleen Taylor, *Autonomy and Self-Directed Learning: A Developmental Journey*, in HANDBOOK OF ADULT DEVELOPMENT AND LEARNING 196 (Carol Hoare ed., 2006).

⁸⁶ MERRIAM ET AL., *supra* note 13, at 297.

⁸⁷ See Kerr, *supra* note 61, at 118.

⁸⁸ See, e.g., J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994).

⁸⁹ *Id.* at 57. See also Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 25–27 (1991) (describing the problems with work of the “socialized writer”).

work—“increasingly occurs in the language of the community they want to join.”⁹⁰

Legal epistemology in its social dimensions—both in the classroom and in law practice—has come under increasingly close scrutiny because the academy has begun to explicitly focus on the process by which law students and lawyers construct knowledge. In her linguistic study, Professor Mertz identifies a “strong resonance or linguistic fit” between the “canonical Socratic method and legal thinking” in practice.⁹¹ According to Mertz, the language of law school and of law practice reflects “a core [legal] approach to the world and to human conflict” that focuses on “form, authority, and legal-linguistic contexts.”⁹² Through deeply social means, this worldview is imparted in the law classroom, resulting in a “reorientation” of the student view to a legally-filtered analysis of conflicting claims of right and claims of moral value.⁹³

As a result, the stakes in the law classroom are high. If one agrees with the notion that legal language “is highly technical but nevertheless necessary and appropriate to express a specific legal relation,”⁹⁴ then the

⁹⁰ KEGAN, *supra* note 21, at 288. The social view of legal epistemology has important implications for pedagogy. Social constructivist oriented law teachers view novices in the legal community as being neither poor thinkers and writers generally; rather, they are “pre-socialized,” or not yet fully aware of the community’s discourse conventions. Williams, *supra* note 89, at 24–25 (documenting many characteristics of pre-socialized writers). See also MERTZ, *supra* note 50, at 43–83 (documenting many features of the legal discourse community). Thus, for example, a 1L memo that (typically) quotes the law excessively and fails to analyze relevant facts from the assigned pattern does not reveal a generalized weakness in analytical ability. Rather, as Williams puts it, the novice writer unfamiliar with the community’s expectations for legal analysis tends focus on the concreteness of what courts have said at the expense of deep legal analysis of the client’s facts. Williams, *supra* note 89, at 19–20. Pre-socialized novices develop through the “socialized” and “post-socialized” stages. *Id.* at 25–30. People who are socialized can comfortably use the community’s discourse conventions to communicate effectively with other members of the community. In effect, they become lawyers who can talk to other lawyers. People who are post-socialized can “retranslate” the complex ideas embodied in the conventions of the discourse community into terms that a nonlegally-trained person can understand. *Id.* at 28.

⁹¹ MERTZ, *supra* note 50, at 28.

⁹² *Id.* at 4.

⁹³ *Id.* at 4–6. Mertz concludes that legal education and the law reinforce a dominant “capitalist epistemology” without adequate attention to “hidden exclusions that are created by subtle cultural invisibility and cultural dominance.” *Id.* at 208.

⁹⁴ Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 712 (1998). Professor Litowitz rejects both excessive legalese and entirely plain
(continued)

law classroom gives people the keys to the (legal) kingdom—that is, the ability to use legal language and manipulate the layers of authority and legal categories. Mertz’s work suggests that the way students are taught to identify, analyze, and solve problems in the law classroom can deeply influence their approach to problems as lawyers.⁹⁵ This has powerful implications; Mertz’s call for law schools to attend better to invisible and excluded populations as well as for law students to retain their moral imaginations and ethical sensibilities even during legal training may well lead to future rethinking of the law’s most fundamental approaches to problems.⁹⁶ While not necessarily determinative, the law school experience is formative for many lawyers and thus, is capable of shaping the profession’s approach to clients and their problems.

It is not convincing, however, that a richer, more critical legal discourse can be achieved if the orientation towards legal education remains primarily social. The social-constructivist stance can lead to its own kind of rigidity that can rob the learner of intellectual autonomy through several inherent risks and shortcomings. First, a focus on the discourse of the target community neglects to consider that the discourse itself, particularly near its boundaries, is not static and easily definable.⁹⁷ One need look no further than the recent controversy over the Patient Protection and Affordable Care Act to see that arguments once considered frivolous can quickly become widely accepted or even the law.⁹⁸ Second,

English as appropriate modes of legal communication. *See id.* at 711. However, his paper also acknowledges that the specialized, technical discourse he envisions presents dangers to society at large. *Id.*

⁹⁵ *See* MERTZ, *supra* note 50, at 12–13.

⁹⁶ *See id.* at 4, 218–19, 223.

⁹⁷ *See id.* at 115 (“[A] legal reading has room for almost any facet of social context or identity—but at the margins.”); Schlag, *supra* note 68, at 575 (“Law school teaching has a pervasive centralizing, homogenizing tendency . . . I will call it centrism Centrism celebrates moderation, reasonableness, good judgment, avoidance of extremes, following the norm, judicial minimalism, the passive virtues, balancing, and the middle of the bell curve.”).

⁹⁸ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (Roberts, C.J.) (holding that the individual mandate provision of the Patient Protection and Affordable Care Act exceeds Congress’s powers under the Commerce Clause, forming a majority by being in accordance with the four justices who filed the joint dissent); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1825–27 (2011) (explaining that most legislators and scholars had “good reason” to be confident of the individual mandate’s constitutionality under the Commerce Clause at the time the legislation was passed).

the journey into the target community and experiences in that community may differ markedly for persons of different backgrounds, particularly women, racial minorities, and people of diverse sexual orientations.⁹⁹ As the legal community becomes less homogenous, it is more difficult to identify features of the discourse that are shared by its diverse members or that reflect the dreams and aspirations of those members. Finally, even newcomers to the legal community have the power to make contributions that fundamentally change the discourse.¹⁰⁰

Professors Rideout and Ramsfield recognize the power of these critiques and attribute shortcomings in the social view to flaws in the “professor’s stance.”¹⁰¹ If a social view is used “as a tool for indoctrination only, for acculturation only, or for a thinly guised return to formalism,” the professors posit, “the subtleties and strengths of the view are lost,” and “professors may have let community trump critical thinking, discourse drum out dialogue, and context coerce creativity.”¹⁰²

To remedy this situation, Rideout and Ramsfield extend their social view to cover aspects of identity that they consider most salient to learning to write like a lawyer.¹⁰³ Drawing primarily on the work of “new literacy” researcher Roz Ivanic,¹⁰⁴ they suggest that legal writing teachers focus on the “discoursal self,” which is “that part of a legal writer’s identity

⁹⁹ See generally MERTZ, *supra* note 50. As usual, Mertz is sensitive to the results of the legal community’s tendency to discount the effects of differences such as gender, race, or sexual orientation. She characterizes legal language as taught in U.S. classrooms as having a “double edge.” *Id.* at 133. Legal readings of conflicts which ignore or marginalize social, cultural, and contextual differences can offer a “liberating” egalitarian quality to conflict resolution, but at the same time these readings can also “conceal the ways that law participates in and supports unjust aspects of capitalist societies.” *Id.* at 133–34. She explains: “As Matoesian[] has noted, domination is well concealed and indeed naturalized through metalinguistic ideology and structure in legal settings, and the law school classroom offers a prism through which to see this process in action.” *Id.* at 134 (citing GREGORY M. MATOESAN, *LAW AND THE LANGUAGE OF IDENTITY* 37–68 (2001)).

¹⁰⁰ See KEGAN, *supra* note 21, at 287–92 (arguing that the social constructivist view of education can underestimate the psychological and developmental independence of individual learners); *id.* at 303 (noting that a goal of education should be that the students will see themselves “as the co-creators of the culture” as opposed to culture merely shaping them).

¹⁰¹ Rideout & Ramsfield, *supra* note 76, at 711.

¹⁰² *Id.* at 711, 714.

¹⁰³ *Id.* at 744.

¹⁰⁴ See *id.* at 723–24, 728–36.

‘constructed’ by legal writing itself.”¹⁰⁵ Constructing this identity, for Rideout and Ramsfield, is “much more than simply taking on a role. It is taking on a different identity, one inscribed with ways of understanding the world that are constrained by the positions and possibilities available within the discourse of the law . . . [it is] changing as a person.”¹⁰⁶

To be sure, Rideout and Ramsfield reject the view that the legal community creates “discoursal identity” in law students in a deterministic manner, and they recognize that entering the community can create conflict for individuals who resist its norms or conventions.¹⁰⁷ However, the role of community is still paramount in their view. Because their view valorizes social contributions to the formation of a discoursal identity, they view the matter of change in the legal discourse as “difficult.”¹⁰⁸ Rideout and Ramsfield’s contribution illuminates the multidimensional processes by which law students become socialized legal writers. Nonetheless, a richer view that would also credit their individual cognitive development is needed.

B. Beyond the Social: Appreciating the Complexity of Individual Development

Only recently have scholars begun to understand that the deep connections between learning and development that characterize childhood are also at work in the lives of adults.¹⁰⁹ Indeed, both adult development and adult learning are relatively young fields of study.¹¹⁰ Prior to 1978, the term “adult development” was not used as a subject heading in *Psychological Abstracts*, the most important print source collecting research in the field of psychology.¹¹¹ Likewise, only in 1968 did Malcolm Knowles publish his theory of andragogy, which differentiated learning in adulthood from learning in childhood and used basic assumptions about how adults learn to propose practices that guided adult education for a

¹⁰⁵ *Id.* at 737. The discoursal identity is distinguished from other aspects of identity, most importantly the “autobiographical self,” i.e., the “self” that most people think about when they refer to themselves. *Id.* at 735–36.

¹⁰⁶ *Id.* at 737.

¹⁰⁷ *See id.* at 742.

¹⁰⁸ *Id.* at 741–42.

¹⁰⁹ Carol Hoare, *Growing a Discipline at the Borders of Thought*, in *HANDBOOK OF ADULT DEVELOPMENT AND LEARNING* 3, 3 (Carol Hoare ed., 2006).

¹¹⁰ *Id.* at 3–4.

¹¹¹ *Id.* at 3. *Psychological Abstracts* ceased print publication in 2006; the online resource PsycINFO is presently the most useful digest of psychological scholarship.

generation.¹¹² One of the reasons that connections between adult learning and development have not been probed more deeply is that they reside in two different and non-integrated subfields: adult learning is studied as part of the discipline of educational psychology and adult education, while adult development is located within psychological theory and research.¹¹³ Integrating the accumulated knowledge about adult development and learning is key to rebuilding the professional curriculum.

Much of the most useful knowledge about human development takes as its starting point Jean Piaget's model of cognitive development in children.¹¹⁴ Piaget's work has been expanded and extended into adulthood by Professor Robert Kegan of the Harvard Graduate School of Education.¹¹⁵ As we look for connections between development and learning, the cognitive-developmental perspective of Kegan and his followers offers a rich and flexible model that can help legal educators better understand the cognitive, moral, and personal journey that characterizes entry into the legal community.

There are two primary reasons that the cognitive-developmental model is helpful. First, Kegan, like many contemporary psychologists, believes that developmental growth and change processes continue throughout adulthood.¹¹⁶ For Piaget, mature adult thought emerges in late adolescence, and this manner of thinking remains static throughout adulthood.¹¹⁷ Kegan sees distinct stages of development in the lives of

¹¹² MERRIAM ET AL., *supra* note 13, at 84–87.

¹¹³ *Id.*

¹¹⁴ KEGAN, *supra* note 13, at 26 (“We begin the journey toward a new understanding of the development of the person with Piaget . . . because in Piaget I believe we discover a genius who exceeded himself and found more than he was looking for.”).

¹¹⁵ See generally KEGAN, *supra* note 21; KEGAN, *supra* note 13. I am aware of the raging debates in the psychology literature regarding the matters I write about. For instance, scholars find support for a variety of views about whether development in adulthood proceeds in cumulative, hierarchical stages, or whether development occurs consistently across domains (e.g., cognitive, moral, interpersonal, and intrapersonal). See Charles N. Alexander et al., *Introduction: Major Issues in the Exploration of Adult Growth*, in HIGHER STAGES OF HUMAN DEVELOPMENT 3 (Charles N. Alexander & Ellen J. Langer eds., 1990). However, the purpose of the present paper is not to attempt to resolve, or even to survey the literature, of these debates. Instead, I have selected the developmental model that seems to provide the most fruitful path for legal educators at this stage in our reflection on our students' experiences.

¹¹⁶ See *infra* notes 136–138 and accompanying text.

¹¹⁷ MERRIAM ET AL., *supra* note 13, at 326.

adults as people balance and rebalance increasing demands of work, family, and community.¹¹⁸ Second, Kegan expands the developmental focus beyond the cognitive domain and into moral, social, and intrapersonal realms.¹¹⁹ As a result, Kegan's perspective is particularly helpful for understanding how to equip lawyers with the knowledge and skill they need while forming mature professional identity and a critical sensibility that allows them to mediate tensions between legal and nonlegal concerns.

1. The Constructive-Developmental Perspective: Essential to Understanding the Lives of Lawyers and Law Students

The constructive-developmental model merges two perspectives from the psychology literature.¹²⁰ First, it draws on the constructivist notion that "people actively construct, or make sense of, their experiences (that is, reality)."¹²¹ Second, it appreciates the significance of developmentalism, "which proposes that the ways in which people make meaning (that is, their constructions of reality) can develop over time according to regular principles of stability and change."¹²²

As previously noted, constructive-developmental perspectives on adulthood grow out of the work of the renowned Swiss philosopher and psychologist Jean Piaget.¹²³ Piaget's research centered on the study of development in children; nonetheless, his work "has provided the foundation for work with adults."¹²⁴

Piaget's model is built around four stages of development. Each stage represents a "qualitatively different way[] of making sense, understanding, and constructing a knowledge of the world."¹²⁵ A "qualitatively" different way of constructing knowledge contrasts with a quantitative increase in knowledge. A quantitative change in knowledge refers to the accumulation of more knowledge (data) in an individual.¹²⁶ Qualitative

¹¹⁸ KEGAN, *supra* note 21, at 179–81.

¹¹⁹ *See infra* note 140 and accompanying text.

¹²⁰ KEGAN, *supra* note 13, at 8–13.

¹²¹ ELEANOR DRAGO-SEVERSON, *BECOMING ADULT LEARNERS: PRINCIPLES AND PRACTICES FOR EFFECTIVE DEVELOPMENT* 20 (2004) (citing KEGAN, *supra* note 13, at 8).

¹²² *Id.* (citing KEGAN, *supra* note 13, at 8).

¹²³ KEGAN, *supra* note 13, at 4.

¹²⁴ MERRIAM ET AL., *supra* note 13, at 326.

¹²⁵ *Id.* *See also* Alexander et al., *supra* note 115, at 4.

¹²⁶ *See* Hoare, *supra* note 109, at 9.

difference, on the other hand, refers to alterations in epistemology.¹²⁷ Stated differently, qualitative changes result in new and more complex abilities to contextualize and understand knowledge and experience, that is, new mental containers or structures for knowledge.¹²⁸ Writing in a Piagetian vein about adult development, one writer described qualitative change as resulting from “alterations in human functioning and in ways of seeing and interpreting oneself in the world.”¹²⁹ Of course, individual adults vary widely along their path of development based on internal and external factors, including “contexts, experiences, intentional choices, and inclinations.”¹³⁰

Piaget’s stages proceed through childhood and adolescence in lockstep fashion; the final stage, “formal operational,” is reached between ages fifteen and twenty.¹³¹ Formal operational thought is characterized by the “capacity to think hypothetically about the ‘possible[,]’ that is, to think in abstract terms.”¹³² This way of thinking is the basis of logical, scientific thought and permits a person to understand abstract principles such as justice, ethics, and moral philosophy, which are part of the social order.¹³³ Piaget’s theory does not extend beyond formal operations. For him, formal operations represent “the apex of mature adult thought.”¹³⁴ While individuals may learn to reason abstractly in a more competent way and may accumulate more knowledge to apply these abstract reasoning powers across a broader spectrum,¹³⁵ Piaget’s theory does not allow for a more complex way of making meaning in the world.

¹²⁷ See MARK TENNANT, *PSYCHOLOGY AND ADULT LEARNING* 59–60 (2006); Hoare, *supra* note 109, at 9; Sharan B. Merriam & M. Carolyn Clark, *Learning and Development: The Connection in Adulthood*, in *HANDBOOK OF ADULT DEVELOPMENT AND LEARNING* 27, 32 (Carol Hoare ed., 2006).

¹²⁸ See MERRIAM ET AL., *supra* note 13, at 326.

¹²⁹ Hoare, *supra* note 109, at 8–9.

¹³⁰ *Id.* at 9. Kegan refers to a “zone of mediation where meaning is made,” which is the space between an event and an individual’s reaction to it, where the event is “privately composed, [and] made sense of.” KEGAN, *supra* note 13, at 2.

¹³¹ MERRIAM ET AL., *supra* note 13, at 326. See also KEGAN, *supra* note 13, at 37.

¹³² TENNANT, *supra* note 127, at 61. See also KEGAN, *supra* note 13, at 38.

¹³³ TENNANT, *supra* note 127, at 61.

¹³⁴ MERRIAM ET AL., *supra* note 13, at 326.

¹³⁵ See Alexander et al., *supra* note 115, at 4–5.

Like many other developmental psychologists, Kegan expands Piaget beyond the formal operational stage.¹³⁶ In the classical Piagetian framework, most students arrive at law school in the same stage of development as when they were in approximately eleventh grade.¹³⁷ Unlike Piaget, Kegan views development as continuing beyond childhood and adolescence and into adulthood.¹³⁸ This permits Kegan to see subtle differences as people grow into adult, career-oriented professionals.

Law teachers will likely find that Kegan's model explains what they intuitively know to be true. Many professors of first-year law students work to distinguish the mental tasks of law school from the mental tasks of undergraduate education.¹³⁹ They rightly expect elevated levels of competence and professionalism from first-year law students. It may be less obvious that these expectations require most students to effect a developmental change in the way they categorize, interpret, understand, and reason. Along with a new field of study comes a new way of thinking, a new path, and a new stage of development.

Kegan develops and expands Piaget's approach in a second way by applying it "beyond thinking to affective, interpersonal, and intrapersonal realms."¹⁴⁰ While Piaget concerned himself with the processes of logical

¹³⁶ MERRIAM ET AL., *supra* note 13, at 329–40 (summarizing the adult development theories of William Perry, King, and Kitchener (the Reflective Judgment Model), Belenky et al. (Women's Ways of Knowing study), and Marcia Baxter Magolda (the Epistemological Reflection Model)); Alexander et al., *supra* note 115, at 28 tbl.1.3 (charting stages of adult development beyond formal operations proposed by theorists including Carol Gilligan, Kurt Fischer, Kegan, and Lawrence Kohlberg, among others); Taylor, *supra* note 85, at 202 (comparing the models of Perry, Kegan, and Belenky et al.). See, e.g., LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* 170–71 (1984) (describing moral development throughout adulthood); Kurt W. Fischer & Thomas R. Bidell, *Dynamic Development of Psychological Structures in Action and Thought*, in 1 *HANDBOOK OF CHILD PSYCHOLOGY* 467, 539 (5th ed. 1998); Howard Gardner et al., *The Roots of Adult Creativity in Children's Symbolic Products*, in *HIGHER STAGES OF HUMAN DEVELOPMENT* 79, 93 (Charles N. Alexander & Ellen J. Langer eds., 1990) (describing preconventional, conventional, and post conventional 'stages' of creative development).

¹³⁷ See MERRIAM ET AL., *supra* note 13, at 326.

¹³⁸ KEGAN, *supra* note 13, at 86–87, 108; KEGAN, *supra* note 21, at 29. See also DRAGO-SEVERSON, *supra* note 121, at 20–21 ("The first premise [of constructive-developmental theory] is that growth and development are lifelong processes; they do not end in late adolescence, but continue throughout our lives.").

¹³⁹ See generally Schlag, *supra* note 68.

¹⁴⁰ DRAGO-SEVERSON, *supra* note 121, at 20 ("Constructive-developmental theory attends to the ways in which people make sense of their experiences with respect to
(continued)

reasoning,¹⁴¹ Kegan also explores the development of an individual in relation to herself and to those around her.¹⁴²

This expansion is also useful to law professors; the practice of law surely includes cognitive reasoning, but also it includes interpersonal, intrapersonal, and affective or emotional dimensions. For instance, a lawyer functions in the interpersonal realm upon interacting with clients, other lawyers, and judges, then formulating a position after considering what the others have said or are likely to say. Further, a lawyer also mediates an intrapersonal and affective discourse between her own view of a case and the view she will take on as a lawyer, an advocate, an agent of her principal, the client. At times, a lawyer's view of a client's legal position or prior experience in litigating another case will conflict with a lawyer's sense of justice. This conflict requires the lawyer to resolve complex questions of role and responsibility that can significantly impact one's feelings and emotions.

Constructive-developmentalists observe these powerful and increasingly complex demands modern life makes of adults: the workplace

cognitive, intrapersonal (the self's relationship to itself), and interpersonal lines of development.”); KEGAN, *supra* note 21, at 29. While Kegan's approach is uniquely beneficial to law teachers, he is not alone in looking to expand Piagetian approaches to development beyond the cognitive domain. Howard Gardner may be the most popularly known example. Gardner famously found “increasing evidence to suggest that intellect is better thought of as composed of a variety of domains, including not only logical-mathematical thought and linguistic knowledge, but also such relatively unstructured forms as visual-spatial thinking, bodily-kinesthetic activity, musical knowledge, and even various forms of social understanding.” Gardner et al., *supra* note 136, at 81. Gardner has articulated these thoughts in various forms as the Theory of Multiple Intelligences. In my view, this theory is of most value when applied to education of younger students.

For law professors, models which focus on moral reasoning and judgment have a particular salience. For this reason, a number of legal scholars have focused on the Reflective Judgment Model (RJM) articulated by Karen Kitchener and Patricia King. *See, e.g.,* Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623, 624 (2003) (presenting a “synthesized model of the process through which clinical students bring together the necessary components to build reflective judgment”); Wegner, *supra* note 15, at 902–03 (“The ‘reflective judgment’ model . . . is of particular relevance . . .”). It is noteworthy to me that Kitchener and King themselves consider there to be “value [in] situating the RJM within an integrated approach to development,” and choose to situate the RJM within the cognitive-developmental work of Professor Kegan. Kitchener et al., *supra* note 84, at 93–94.

¹⁴¹ *See* MERRIAM ET AL., *supra* note 13, at 326.

¹⁴² Kitchener et al., *supra* note 84, at 93.

requires more complex skills and self-directed approaches to problems, expectations surrounding family relationships have changed, and factors such as increasing diversity in neighborhood, school, and workplace communities require increased understanding of culturally different ideas and practices.¹⁴³ To meet what Kegan terms “[t]he [m]ental [d]emands of [m]odern [l]ife,”¹⁴⁴ he posits five orders of consciousness, or ways of constructing reality.¹⁴⁵ They may be stated as follows:

¹⁴³ Taylor, *supra* note 85, at 201–03 (noting demands of contemporary society and terming them “demonstrably more complex than those faced by most in our parents’ and grandparents’ generations”). While I see kernels of truth in that statement, I have not seen sufficient evidence to be totally convinced by it. It seems to me that the major conflicts of generations past: World War II, the Vietnam War, and the Civil Rights Movement placed powerful demands on adults at those times. I am as yet unwilling to say that the present changes in culture and society exceed the demands on prior generations, although they clearly implicate different issues and occur in a quite different and less stable economic context. For a catalogue of the demands placed on individuals by modern roles as parents, intimate partners, workers, and citizens, see KEGAN, *supra* note 21, at 302–03.

¹⁴⁴ KEGAN, *supra* note 21 (subtitle of the work).

¹⁴⁵ KEGAN, *supra* note 13, at 86–87 (charting six stages, including Stage 0, a position of infancy).

While not central to my thesis, a few words about the mechanism of change between these “orders of consciousness” might be helpful. Kegan’s description of these stages grows out of Piaget’s concept of “equilibrium,” in which an individual’s cognitive system seeks an “active state of balance” with the demands of her environment. See Alexander et al., *supra* note 115, at 6. In the Piagetian frame, the individual “actively incorporates features of the external world” into existing structures through the process of “assimilation.” *Id.* When conflict between an individual’s existing structures and her environment becomes too great, the structures themselves change to “accommodate” to the environment, and a new cognitive equilibrium is reached. *Id.* See also KEGAN, *supra* note 21, at 39, 43–44.

Kegan conceives of changes between the orders of consciousness in terms of the subject-object balance. DRAGO-SEVERSON, *supra* note 121, at 17, 21. To simplify a complex point, the individual is “subject to” epistemologies that she is “embedded in” or “identified with.” *Id.* at 21. These epistemologies are “invisible” to the person; they cannot be held apart and subjected to critical examination. Taylor, *supra* note 85, at 203. Only when these ways of knowing are differentiated from the individual do they become “object,” which can be “examined, controlled, manipulated, or in some way acted upon.” DRAGO-SEVERSON, *supra* note 121, at 21. This process of differentiation and integration permits individuals to formulate increasingly complex ways of making meaning in the world. KEGAN, *supra* note 13, at 77; KEGAN, *supra* note 21, at 326.

- First order: impulsive
- Second order: instrumental
- Third order: socializing
- Fourth order: self-authoring
- Fifth order: self-transforming¹⁴⁶

The first order of consciousness, termed “impulsive,” is a position of childhood, and the final stage, termed “interindividual” or “self-transforming” is mostly theoretical and ordinarily reached only after midlife, if at all.¹⁴⁷

For law professors, the second, third, and fourth orders of consciousness have the greatest power and promise to help understand students’ journeys. The paragraphs following describe the principal features of the second, third, and fourth orders of consciousness and describe important features of learners within each order. The orders of consciousness, like the phenomena they attempt to describe, are subtle, complex, and nuanced. While this account hopefully does justice to the research and thinking that supports the orders, its purpose is to better understand the developmental path of lawyers-in-training. Accordingly, the view of the orders described in this Article is not complete. At each stage, this discussion emphasizes features of development and related characteristics of learning that have implications for legal education, and the discussion omits other characteristics that seem to have less clear application.

I am also mindful of the old axiom that “the eye cannot see itself.”¹⁴⁸ Psychologists have observed “that stages of development beyond one’s

¹⁴⁶ Taylor, *supra* note 85, at 203 (describing Kegan’s five orders of consciousness). See also KEGAN, *supra* note 13, at 86–87; KEGAN, *supra* note 21, at 314–15.

¹⁴⁷ DRAGO-SEVERSON, *supra* note 121, at 23; Taylor, *supra* note 85, at 203. In focusing attention on the second, third, and fourth orders, I am following a path well-traveled by these scholars. Further, Kegan reports results of thirteen empirical studies involving 320 discrete subjects ranging in age from twenty-five to sixty-six years old which find no individual subject functioning fully at the fifth order of consciousness and only some 6.7% of subjects transitioning from fourth to fifth order. KEGAN, *supra* note 21, at 192–95.

¹⁴⁸ The classical Greek philosopher Socrates once coined this phrase to describe by analogy the difficulty of knowing oneself. MARK J. LUTZ, SOCRATES’ EDUCATION TO VIRTUE 124 (1998).

own are difficult to fully comprehend and describe.”¹⁴⁹ Indeed, upon deep reflection, I can identify characteristics of the second, third, and fourth orders of consciousness as I make sense of my own sometimes-conflicting roles as lawyer, professor, husband, son, and father. At times, my own developmental characteristics may impede my ability to write clearly about these epistemologies. However, I believe that the privileged position of law teacher requires me to confront and resist limitations that come from within as I explore the paths we have set for our students.

2. *The Second Order of Consciousness: The Instrumental Way of Knowing*

The second order of consciousness emerges in childhood and has mostly been transformed into the third order by age twenty.¹⁵⁰ Nonetheless, studies have shown that just over 10% of adults (including adults of graduate student age) remain in the second order or are in the process of transforming from second to third order.¹⁵¹ Although most incoming law students have passed beyond second order thinking, at least some law students will begin their studies at this order of consciousness, and law teachers see this stage in a minority of students in the classroom.

The main cognitive characteristic of the second order of consciousness is the ability to see a reality beyond one’s own perception or vantage point.¹⁵² To take a very concrete example, a person functioning at the second order who is flying on an airplane might observe that buildings look very small from that vantage point, but this person realizes that the buildings are not actually small.¹⁵³ Because of this ability, individuals at the second order can construct narratives of events, understand cause and effect, and create fixed mental categories and classes in which things and people can be placed.¹⁵⁴

Parents of children have likely experienced one of the hallmarks of second order reasoning: when asked what a story or movie is about, the

¹⁴⁹ *Preface* to HIGHER STAGES OF HUMAN DEVELOPMENT, at v (Charles N. Alexander & Ellen J. Langer eds., 1990).

¹⁵⁰ KEGAN, *supra* note 21, at 30–31, 37.

¹⁵¹ *See id.* at 192–95. As the following discussion will demonstrate, aspects of second order thinking may be more common than this statistic would suggest. *See infra* notes 163–164 and accompanying text.

¹⁵² DRAGO-SEVERSON, *supra* note 121, at 23; KEGAN, *supra* note 21, at 30.

¹⁵³ DRAGO-SEVERSON, *supra* note 121, at 23.

¹⁵⁴ KEGAN, *supra* note 21, at 30.

child launches into a detailed marathon retelling of the plot.¹⁵⁵ Individuals at the second order are not yet capable of abstracting a theme, such as “it’s a coming of age story” or “it’s about the struggle to do the right thing.” Instead, the individual at the second order stays rooted in the concrete chain of events that make up the plot.

In the realm of interpersonal and intrapersonal understandings, individuals at the second order can control their impulses and needs.¹⁵⁶ Consequently, second-order individuals have a more fixed concept of “self,” marked largely by concrete attributes and behaviors such as “one’s physical characteristics, one’s concrete likes and dislikes, the kind of job one has, the kind of car one drives.”¹⁵⁷ On this view, others have desires, beliefs, and feelings, but others are primarily viewed as “pathways or obstacles to getting one’s concrete needs met.”¹⁵⁸

Learners at the second order of consciousness have what might be termed an “instrumental” way of knowing.¹⁵⁹ Knowledge (or an advanced degree or certificate) is approached in a “utilitarian” way as something to be obtained for its results, such as a raise or a promotion.¹⁶⁰ At the second order, individuals look to external authorities—whether professors or texts—as sources of knowledge, are “intently focused on doing things ‘right[,]’ and expect to be told with great specificity what that entails.”¹⁶¹ This approach to knowledge and authority is more common than one might imagine. In fact, one study suggests that 68% of students enter university study “in a stage of absolute knowing, considering knowledge to be certain or absolute and conceiving their role as learners to be limited to obtaining knowledge from the instructor.”¹⁶²

Although few adult students function fully within the second order of consciousness, I can generate examples of second-order-type thinking in

¹⁵⁵ KEGAN, *supra* note 21, at 33 (introducing this example).

¹⁵⁶ KEGAN, *supra* note 13, at 89.

¹⁵⁷ DRAGO-SEVERSON, *supra* note 121, at 24 (citing ROBERT KEGAN ET AL., NAT’L CTR. FOR THE STUDY OF ADULT LEARNING & LITERACY, TOWARD A NEW PLURALISM IN ABE/ESOL CLASSROOMS: TEACHING TO MULTIPLE “CULTURES OF MIND” 55 (2001), available at <http://www.ncsall.net/index.php?id=29.html>).

¹⁵⁸ *Id.* See also Taylor, *supra* note 85, at 204.

¹⁵⁹ See DRAGO-SEVERSON, *supra* note 121, at 23.

¹⁶⁰ Taylor, *supra* note 85, at 203.

¹⁶¹ *Id.* at 203, 208.

¹⁶² DONALD, *supra* note 37, at 3 (citing MARCIA B. BAXTER MAGOLDA, KNOWING AND REASONING IN COLLEGE: GENDER-RELATED PATTERNS IN STUDENTS’ INTELLECTUAL DEVELOPMENT 70 (1992)).

my own history and in the thinking of my law students. In fact, I recall a time in my adult life when I viewed learning in almost exclusively instrumental terms. Prior to attending law school, while in my twenties, I was a public school teacher. I obtained some thirty graduate credits beyond a master's degree largely because of the increases in salary that came with greater levels of training. I selected several courses purely because they were inexpensive and not burdensome. My purpose was to earn credits each year so that I would get the "lane change" raises that were a feature of our compensation scheme at that time. I wanted to do what I had to do to get the raise and precious little more.¹⁶³

As a law teacher, I have seen second-order-type thinking in a few of my students. In my legal research and writing class, I prod my students to reflect on challenges that come with the lawyer's role as they arise. One spring, I asked my students to draft an appellate brief in a case involving issues of constitutional criminal procedure. I assigned students to the role of either prosecutor or defense attorney, giving them no choice over which side they would represent. Later in the semester, I asked them to consider whether the role and responsibilities I had assigned conflicted with their sense of what a just outcome would be in the criminal case. Many students distinguished the defendant's substantive guilt or innocence from his procedural rights and further distinguished their responsibilities to their client from their personal beliefs. Others reflected more broadly on their aspirations as lawyers and considered how a career in criminal law might serve those aspirations. One student raised his hand and said, "Look, I'm here because I want a job. I was a literature major and couldn't find employment that paid well. So I'm here. I don't particularly want to save the world or pursue an agenda." That student articulated well the instrumental view of education found at the second order—education as a means of entry to a career. Indeed, part of our role as legal educators is professional training—law school, after all, is the gateway for entrance into practice, and we must support our students in this goal. However, the demands of modern law practice and the moral conflicts they engender are more complex, and we must also support our students in their efforts to face these more complicated demands.

¹⁶³ In fact, I remember experiencing cognitive dissonance in talking to an older, wiser colleague who reported that she did not care whether she got a raise, but was only interested in taking courses that would benefit her teaching.

3. *The Third Order of Consciousness: The Socializing Way of Knowing*

The third order of consciousness, growing from Piaget's concept of "formal operations," has been termed "cross-categorical knowing" or the "socializing way of knowing."¹⁶⁴ This stage emerges in late adolescence or early adulthood for most people.¹⁶⁵ Research has shown that most adults in Western societies exhibit at least some features of third order epistemology.¹⁶⁶

In the cognitive realm, third-order thinkers generally move from interacting with the concrete world around them to being more comfortable with abstractions.¹⁶⁷ This kind of thinking will be familiar to law teachers: a thinker at the third order "can start right in at the theoretical."¹⁶⁸ She can "ponder about situations contrary to fact; accept assumptions for the sake of argument; make hypotheses that can be expressed in terms of propositions and tested; . . . invent imaginary systems; . . . and reflect on her thinking in order to provide logical justifications."¹⁶⁹

These mental capacities are required by the law curriculum. As students learn the legal system, they ponder contrary-to-fact hypotheticals, accept unstated assumptions, use technical language to analyze human experience, and learn to selectively focus on facts the legal system deems to be significant. Further, students may make use of assumptions and contrary-to-fact reasoning to understand how to analyze or argue a given issue. In addition, students learn to reflect on the reasoning they read in legal opinions, and hopefully, to reflect on the quality of their own reasoning to strengthen it.

The cognitive capacities that emerge in the third order allow social identity to move to the fore. Kegan characterizes the third order as "cross-categorical"; the self is no longer the only "set or category" (as in the more concrete second order), but a person can instead "experience the self in relation to a . . . set or category."¹⁷⁰ In relating to other people, an individual at the third order can internalize both the individual's own

¹⁶⁴ KEGAN, *supra* note 21, at 29–31, 37 (third order emerges between the ages of twelve and twenty in most cases); DRAGO-SEVERSON, *supra* note 121, at 25.

¹⁶⁵ KEGAN, *supra* note 21, at 29–31, 37.

¹⁶⁶ See Taylor, *supra* note 84, at 204.

¹⁶⁷ *Id.*

¹⁶⁸ KEGAN, *supra* note 13, at 38.

¹⁶⁹ *Id.*

¹⁷⁰ KEGAN, *supra* note 21, at 27.

viewpoint and that of another person, and can make self-reflective decisions based on the interaction of these viewpoints.¹⁷¹ As a result, people at the third order can “subordinate their needs and desires to the needs and desires of other people.”¹⁷² Relatedly, a student functioning at the third order can learn the “values, opinions, hypotheses, inferences, [and] generalizations” of a group of people or of a discipline; she may even be able to “bring[] [her] own values, opinions, and inferences[] into conversation with those” of the discipline.¹⁷³ The net result of these transformations in epistemology at the third order is that the self becomes “identified with, or made up by, its relationship to other people (family, important friends, supervisors, or colleagues) or ideas (religious, political, or philosophical ideologies).”¹⁷⁴ At the third order, membership in and identification as part of the group is a primary motivator.¹⁷⁵

As learners, individuals at the third order value acceptance and approval; education is pursued to “meet the goals and expectations of external authorities . . . and/or valued others.”¹⁷⁶ Knowledge, on this view, is still the property of authorities.¹⁷⁷ As a result, individuals at the third order sometimes conclude that the thoughts and feelings they *should* have are the thoughts and feelings they do indeed have.¹⁷⁸ Because of this tendency, individuals at the third order are “vulnerable” to the critiques of

¹⁷¹ *Id.* at 28, 30–31. Understanding the third order of consciousness can help understand behavior that departs from societal norms. As an example, Kegan notes that adolescents who engage in high-risk behavior are often not merely exhibiting poor “impulse control.” *Id.* at 27. Rather, they have not yet reached the third order of consciousness. Instead, they can only see “the short-term, immediate present—a present lacking a live relation to the longer-term future.” *Id.* at 28. That is, they are unable to subordinate their own present sensations to the values of others (such as their parents, teachers, or culture) or to their own longer-term aspirations. *Id.*

¹⁷² DRAGO-SEVERSON, *supra* note 121, at 25. This ability leads to the emergence of empathy. Taylor, *supra* note 85, at 204.

¹⁷³ KEGAN, *supra* note 21, at 286.

¹⁷⁴ DRAGO-SEVERSON, *supra* note 121, at 25.

¹⁷⁵ At my college graduation, the president of the university captured well the achievement of the third order when he used the ancient formulation of welcoming us newly-minted college graduates “to the company of educated men and women.”

¹⁷⁶ DRAGO-SEVERSON, *supra* note 121, at 33; Taylor, *supra* note 85, at 204.

¹⁷⁷ See DRAGO-SEVERSON, *supra* note 121, at 33.

¹⁷⁸ Caroline L. Bassett, *Laughing at Gilded Butterflies: Integrating Wisdom, Development, and Learning*, in HANDBOOK OF ADULT DEVELOPMENT AND LEARNING 281, 301 (Carol Hoare ed., 2006) (citing KEGAN, *supra* note 21, at 275).

their teachers.¹⁷⁹ Critical feedback can be perceived as commentary on a student's "essential worthiness" as a member of the group rather than as suggestion for improvement.¹⁸⁰

Law teachers likely recognize the third order in their midst. At the third order, law students and lawyers integrate the legal system's values with their own, but they cannot yet take perspective on these values or deploy them volitionally and selectively. These are the first-year law students who apply legal reasoning in all areas of their life. They ask pointed and lawyerly questions about course assignments and requirements, and they test the patience of their families and loved ones by engaging in lawyerly analysis of personal decisions.

In the view of Kegan and others, the mastery of a discipline enabled by the third order is not adequate to meet the "hidden curriculum" of modern life which places demands on students both in and out of school and on adults in both the public and private spheres of their lives.¹⁸¹ At the third order, one cannot "see that the discipline is itself a method, procedure, or system of interpretation for reflecting on hypotheses, evaluating values, [or] validating knowledge."¹⁸² Stated differently, the individual has "no internal procedure for subjecting [the] inferences [of the discipline being studied] to systematic evaluation or critique, [and] can[not] . . . organize its

¹⁷⁹ Taylor, *supra* note 85, at 204.

¹⁸⁰ *Id.*

¹⁸¹ See KEGAN, *supra* note 21, at 5 ("It remains for us to look at the curriculum of modern life in relation to the capacities of the adult mind."); MERRIAM ET AL., *supra* note 13, at 329–40 (examining theories of William Perry, Pat King, and Karen Kitchener (Reflective Judgment Model), Mary Belenky (Women's Development Theory), and Marcia Baxter-Magolda (Epistemological Reflection Model)). With important differences, each of these theories moves beyond a view of learning and meaning making as learning the rules of a discipline. The advanced stages of each of these theories share important characteristics: an increased tolerance for uncertainty, development of judgment based on evidence, and personal authorship (construction) of knowledge. See also SHEELAGH O'DONOVAN-POLTEN, *THE SCALES OF SUCCESS: CONSTRUCTIONS OF LIFE-CAREER SUCCESS OF EMINENT MEN AND WOMEN LAWYERS* 89–167 (2001) (examining themes emerging from research on successful Canadian attorneys and relating those themes to Kegan's developmental theories, and according to this study, successful lawyers demonstrate many features of third, fourth, and even fifth order consciousness).

¹⁸² KEGAN, *supra* note 21, at 286. Professor Kegan develops an extended critique of social constructivism, summarized here, which charges that it fails to facilitate student's development of this higher order analytical competence. *Id.* at 287–93.

inferences into a more complex whole (a *formulation*) or create a complex whole that will itself generate inferences.”¹⁸³

This limitation of the third order epistemology leads Professor Kegan to a critique of social constructivism and its implications for higher education.¹⁸⁴ Understanding Kegan’s views refines the criticism offered earlier in Part IV.A of this Article that the social-constructivist model valorizes the role of the community at the expense of individual cognitive development.¹⁸⁵

Professor Kegan charges that social constructivism “romanticizes” the community and does not leave the student better equipped to critically examine the community’s values, practices, and beliefs.¹⁸⁶ Indeed, Kegan draws an example from the law to illustrate his point; he observes that most United States citizens are “socialized . . . into the language of the constitutional ‘discourse community.’”¹⁸⁷ However, when queried about their personal beliefs, they would deny many individual protections of the Bill of Rights to members of society.¹⁸⁸ While citizens speak the language of our Constitution and consider constitutionalism an important part of their civic identity, they cannot experience or examine the tension and dissonance that arises from disagreement with particular tenets and values of the Constitution itself.

Most significantly for teachers of law, this kind of education as socialization leaves students with “no greater capacity to resist induction in the future into communities of discourse less benign than the ones social constructivists imagine—totalitarian ‘discourse communities,’ for example.”¹⁸⁹ Examples from history abound: slavery, fascism, and racism have at various times and in various places been supported by robust legal apparatus.¹⁹⁰ Excessive emphasis on the social view in education does not

¹⁸³ *Id.* at 286.

¹⁸⁴ *Id.* at 287–93.

¹⁸⁵ See discussion *supra* notes 108 and accompanying text.

¹⁸⁶ KEGAN, *supra* note 21, at 289.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See, e.g., U.S. CONST. art. I, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV and XVI (commonly known as the “three-fifths rule”); *Loving v. Virginia*, 388 U.S. 1, 4 (1967) (describing statutes aimed at prohibiting interracial marriages); Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417, 456 (1993) (discussing how early American slave law was derived from the constitutional law of the British Empire); Martti Koskenniemi, *‘By Their Acts You Shall Know Them . . .’* (continued)

necessarily equip individuals to perceive limits in the dominant paradigms of the day or to perceive conflict between those paradigms and more fundamental values. Membership in these communities does not include an ability to stand apart from the community and appreciate that membership in a community can sometimes involve blindness to the community's evils. To be sure, Kegan recognizes that social constructivist academics often examine the ways in which their disciplines are incomplete, inconsistent, and flawed in their search for meaning and truth, but he concludes that this message presented to students in the context of an educational system that does not support this kind of reflective thinking "may be pitched to a range that is out of the hearing of most . . . students."¹⁹¹

These reflections on the philosophy of education permit us now to return to basic principles. The concept of learning to "think like a lawyer" and the signature Socratic pedagogy of law school share fundamental flaws. First, the implied epistemology assumes a shared pattern of lawyerly thought, failing to recognize the great diversity of modern approaches to legal problems. Second, this epistemology does not empower students with a capacity to reflect on how lawyers think—in sum, to move beyond the socializing values of the third order of consciousness. In seeking integration of cognitive achievement, practical skill, and ethical reflection, the Carnegie Report pushes beyond the limits of the social constructivist view and the third order epistemology.

4. *The Fourth Order of Consciousness: The Self-Authoring Way of Knowing*

Fourth order consciousness has been termed the "self-author[ing]" way of making meaning.¹⁹² It typically emerges in adulthood, although not all adults reach this balance. Kegan's empirical work suggests that "[a]t any given moment, around one-half to two-thirds of the adult population appear not to have fully reached the fourth order of consciousness."¹⁹³ Despite this reality, the self-authoring value of the fourth order has been deemed to "match the expectations of the professional workplace," and

(*And Not by Their Legal Theories*), 15 EUR. J. INT'L L. 839, 843 (2004) (explaining that Nazi legal doctrines were borrowed from multiple sources).

¹⁹¹ KEGAN, *supra* note 21, at 292.

¹⁹² See Garrett McAuliffe, *The Evolution of Professional Competence*, in HANDBOOK OF ADULT DEVELOPMENT AND LEARNING 476, 478 (Carol Hoare ed., 2006).

¹⁹³ KEGAN, *supra* note 21, at 188–91.

stimulating thought pattern has been posited as a task of graduate and professional training.¹⁹⁴

Major concerns at the fourth order include autonomy and self-determination.¹⁹⁵ Kegan devotes a full six chapters of *In Over Our Heads* to exploring ways in which modern life demands a self-authoring psychological stance.¹⁹⁶ A complete summary of all the characteristics of fourth order epistemology exceeds the scope of this Article. However, understanding the process of legal education requires a richer view of fourth order epistemology in the interpersonal or social and educational domains.

In the interpersonal realm, the individual at the fourth order is no longer defined by social context but instead can reflect on and examine that context.¹⁹⁷ Identity has permanence despite the demands of social context; in Kegan's terms, the self can "maintain[] a coherence across a shared psychological space," whether that space is shared by others in intimate relationships, in professional affiliations, in religious commitment, or in civic bonds.¹⁹⁸ Because of this coherence, individuals at the fourth order can take perspective and reflect on their roles within social contexts and systems.¹⁹⁹ This means that lawyers and law students who function at the fourth order have the capacity to critically reflect on the legal system as a whole and on their own interaction with and role in the system.

Underlying this autonomy is a self-authoring epistemology. At the fourth order, knowledge is no longer the property of external authorities or experts; instead, it is constructed "through experience, reflection, [and] analysis," informed by thoughtful use of "teacher, texts, [and] authorities."²⁰⁰ In educational settings, the individual is what experts have termed a "self-directed learner."²⁰¹ As a result, she is not threatened by feedback but sees it as an opportunity for personal growth and change.²⁰²

¹⁹⁴ McAuliffe, *supra* note 192, at 485.

¹⁹⁵ *Id.* (citing numerous studies).

¹⁹⁶ KEGAN, *supra* note 21, at 302–03 (summarizing the main claims for fourth order consciousness in the domains of parenting, partnering, work, citizenship, therapy, and schooling).

¹⁹⁷ See DRAGO-SEVERSON, *supra* note 121, at 27.

¹⁹⁸ KEGAN, *supra* note 21, at 100.

¹⁹⁹ DRAGO-SEVERSON, *supra* note 121, at 27.

²⁰⁰ Taylor, *supra* note 85, at 208 tbl.9.4.

²⁰¹ *Id.* at 205. See also DRAGO-SEVERSON, *supra* note 121, at 27 (also often referred to as a "self-authoring knower"); McAuliffe, *supra* note 192, at 485.

²⁰² See DRAGO-SEVERSON, *supra* note 121, at 28; Taylor, *supra* note 85, at 204–05.

At the fourth order, law students and lawyers are not wed to the legal view of the world. They can make systematic critiques of the law by observing both how numerous aspects of the legal system interact with each other and from observing the moral reasoning that takes place as the values of the legal system interact with their own personal values.²⁰³

This fourth order capability provides insight into the “difficult” question of change in legal discourse identified by Rideout and Ramsfield.²⁰⁴ Changes are introduced in the discourse as individuals author new paths that are both critical of the legal system of thought—of the discourse-project itself—and that mediate legal and nonlegal concerns. For example, fourth order consciousness supports the ability to examine how lawyers and courts select legally significant facts upon which to base legal analysis. As scholars have noted, the business of selecting legally significant facts is laden with unexamined assumptions. Professor Mertz has noted that a lawyer’s approach to facts is intrinsically decontextualized.²⁰⁵ In her view, this decontextualized approach demands that facts be placed “within the framework of the relevant precedential legal categories instead of focusing on morality or narrative structure.”²⁰⁶ A lawyer who functions within the third order of consciousness may discuss and debate which facts are or should be legally significant. A lawyer moves towards fourth order consciousness as she examines whether she *should* place facts within appropriate precedential frames or whether she should bring narrative or moral reasoning techniques to bear on traditional legal discourse.²⁰⁷ In balancing these concerns, the lawyer becomes conscious and aware of her ability (or lack of ability) to contribute to the discourse, and ultimately, to change it.

²⁰³ I note here that a fourth order way of knowing underlies the questions Professor Schlag believes law school should be teaching students to ask. *See supra* notes 68–70 and accompanying text.

²⁰⁴ *See supra* note 107–108 and accompanying text.

²⁰⁵ *See* MERTZ, *supra* note 50, at 92.

²⁰⁶ Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, J. MARSHALL L. REV. 91, 102 (2000).

²⁰⁷ For a consideration of the role of storytelling in legal writing, see Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 J. LEGAL WRITING INST. 163 (2010). For a collection of recent contributions to the storytelling/narrative topic in recent legal scholarship, see *Preface* to 7 J. ASS’N LEGAL WRITING DIRECTORS, at viii–ix (2010), <http://www.alwd.org/LC&R/CurrentIssues/2010/pdfs/preface.pdf>.

Increasingly, students must not only understand the legal system and analyze issues on the legal system's own terms, but they must also have a fourth order capacity for autonomous reflection on the legal system. Success in the legal profession often requires that they construct meaning through experience, reflection, and analysis rather than seeking answers from outside experts such as law professors, judges, or even the law itself.²⁰⁸ Students must learn to recognize the value judgments that underlie law and must bring their own experience to bear on legal analysis. They must hone their critical sense and develop judgment so they can understand when to challenge the law's apparent requirements and when to turn to nonlegal solutions. The aim of legal education should be to produce lawyers with the wisdom, experience, and courage to operate within and beyond the legal view of the world.

V. A DEVELOPMENTAL VIEW OF LEGAL EDUCATION

The task before legal educators is to facilitate learning in ways that give range to students' fullest developmental capacities. Academic environments must do justice both to the social view of legal education and to robust notions of individual development. Law schools must remain conscious of the enormously complex cognitive tasks of lawyering, even while locating those tasks in real world contexts and instigating mature ethical reflection on the professional role. A one-size-fits-all approach to these challenges will not do; each school must look closely at where their graduates will practice to design a curriculum that prepares students for the unique challenges they will face.

Generally, law schools should support the move to what Kegan terms "personal psychological authority," that is, the fourth order of consciousness.²⁰⁹ The self-authoring way of knowing best permits lawyers to function within the legal community without being consumed by it.²¹⁰ A

²⁰⁸ At this point, I must add a crucial aside. Kegan observes that university faculty are well versed in these kinds of fourth order critiques and have in some ways begun to move past the fourth order's embeddedness in a complex, personal ideology to consider more ultimate issues. KEGAN, *supra* note 21, at 292 (describing the fifth order of consciousness). He notes, however, that asking faculty to "support a move to just the order or consciousness they themselves are currently happy to be leaving behind" (i.e., the fourth order) may be a "especially unappealing assignment, since there is no order of consciousness that holds less charm for us than the one we have only recently moved beyond." *Id.* at 292.

²⁰⁹ KEGAN, *supra* note 21, at 292.

²¹⁰ See O'DONOVAN-POLTEN, *supra* note 181, at 171–204; McAuliffe, *supra* note 192, at 485.

self-authoring view also best enables students to apply the cognitive legal processes that law schools now teach so well to the contexts presented by practice in a professional and ethical manner. Formed in this way, lawyers at the bar should be able to both effectively deploy legal skill on behalf of clients and stand aside from the legal system to pursue nonlegal solutions or change in law when they are in the interests of clients or society. To better understand this vision, let us return to my first-year classmates who struggled to advise Alice Trudlow, the fictional client described at greater length in Part II of this Article.

Alice wanted to pursue a civil claim against eighteen-year-old William Jennings for having sex with her fifteen-year-old daughter, Samantha, who suffered a tubal pregnancy. Unfortunately, this claim appears to lack merit under the rule of *Barton v. Bee Line, Inc.*²¹¹ *Barton* declared consent a defense to a civil claim for battery arising from a statutory rape.²¹² The student-lawyers know—but Alice does not know—that Samantha would testify that she consented to the intercourse.

In this posture, my first-year classmates struggled to explain to Alice Trudlow that her claim likely lacked merit. By narrowing their presentation to a robust defense of the *Barton* rule, my classmates acted in accordance with second or perhaps third order principles. For them, the law was a strong external authority—they had no agency in the situation, either to advise a course that would challenge the law, or to advise ways to maneuver within the legal system that would avoid the *Barton* rule.

While drawing conclusions about the developmental state of others must be done cautiously, it is nonetheless fair to say that the behaviors my classmates exhibited in advising Alice Trudlow had clearest parallels with the second order, the instrumental way of knowing. They viewed the law as a static, fixed authority embodied solely in the *Barton* case. Further, this legal authority had great control—not only did it guide the outcome on a particular legal claim for these students, but it dictated a normative or moral stance that they seemed to feel obligated to take vis-à-vis their client. My classmates seemed genuinely perplexed by Alice's bewilderment at their suggestion that Samantha was uninjured. They struggled to hold multiple perspectives at once: they could not, in the moment, accommodate Alice's views and the rule of *Barton*, and they could not conceive their own role as something other than apologist for the

²¹¹ 265 N.Y.S. 284 (N.Y. App. Div. 1933).

²¹² *Id.* at 285.

legal system. These behaviors are characteristic of the second order of consciousness.

Many might attribute the shortcomings in the students' advice to Alice to a poorly constructed hypothetical or to inadequate education about the governing law. Through the developmental lens, this critique would point towards better socialization as lawyers—Kegan's third order of development.²¹³ Surely, my classmates would have advised Alice better had they considered the possible criminal charge against Jennings or if they had a better appreciation of the ethical issues involved. They had no idea at the time whether they were obligated to maintain Samantha's confidence.²¹⁴ One can imagine a curriculum—even a curriculum in the current Socratic pedagogy—that would lead to a better view of how the legal system works, including: better readings, a guided discussion to prepare students to arrive at some working answers to the legal issues involved, and perhaps a writing assignment asking them to plan the advice they intend to give Ms. Trudlow. All of this would lead to a more effective use of the legal system—a worthy third order goal rightly pursued in many parts of the academy.

However, the deepest tensions in Alice Trudlow's case—and in the lives of lawyers more broadly—are only mediated through the self-authoring view of the fourth order. Students should be asked to confront the limits of the law—both its internal flaws and inconsistencies and its inability to address deep, intractable, and ultimately human problems. Students should also be asked to recognize that the role of a lawyer involves more than mechanical application of the law and provision of legal advice.

To achieve these ends, the developmental view requires that legal education be reconceptualized. The developmental view posits that education is not merely the collection of “cumulative bits of knowledge or even heightened understanding of complex concepts.”²¹⁵ Instead, education should prompt a “change[] in general worldview.”²¹⁶ This kind of education (1) sets learners on a “growth trajectory” and guides them to make “progress to more advanced knowledge levels”; (2) includes learning

²¹³ See discussion *infra* Part IV.B.3.

²¹⁴ I realize one might argue that this was a class in torts, not criminal law or professional ethics, but client problems do not come neatly packaged, and even the casebook makes a brief, if totally inadequate, excursion into these allied issues.

²¹⁵ McAuliffe, *supra* note 192, at 479.

²¹⁶ *Id.* See also MERRIAM ET AL., *supra* note 13, at 130–44 (describing various theories of transformational learning).

experiences which produce “fundamental restructuring,” i.e., “qualitative shifts in knowledge reorganization”; and (3) builds support for “self-scaffolding,” by which learners become able to construct “more advanced knowledge” independently.²¹⁷ Self-scaffolding becomes the basis for lifelong learning.

Applied to law schools, these principles suggest three directions for reform. First and most importantly, the philosophical stance of legal educators with respect to knowledge creation must shift. Knowledge should not be simply transferred from teacher to students in the classroom, nor should it be “drawn out” of students by professor-sages. Instead, students should be expected to create knowledge by learning from each other and from experiences with peers and professors. This shift is fundamental to instigating a self-authoring view.

Second, law schools must require students to write more. Legal education presently expects law students to listen and speak more than to write. It is simply harder for students to create legal thought and knowledge if they are not capturing their ideas in writing. It is also much harder for them to see the transformations that are taking place in their ways of knowing without examining the evidence that written assignments can provide. Opportunities to write and receive feedback on writing can give students the range and appropriate support to claim their full place in the legal community.

Finally, law school must become richer in experiences and opportunities to reflect on those experiences. Only through experience can students gain detached perspective both on the legal system and on the transformations of knowledge that are taking place within themselves.

Fully applied, these reforms would require fundamental changes in the way law schools are organized and financed and in the way legal education is delivered. I add my voice to the chorus of people demanding such changes. However, meaningful improvements to the present situation should not be sacrificed to the uncertainty of revolution.

A. A New Paradigm for Knowledge Creation

Legal education should follow a new paradigm for knowledge creation. The present Langdellian paradigm posits education as either a

²¹⁷ DRAGO-SEVERSON, *supra* note 121, at 18; Nira Granott, *We Learn, Therefore We Develop: Learning Versus Development—or Developing Learning?*, in *ADULT LEARNING AND DEVELOPMENT* 15, 18 (M. Cecil Smith & Thomas Pourchot eds., 1998); McAuliffe, *supra* note 192, at 479.

process of knowledge transfer from professor to students or as a process of the professor-expert drawing insight out of students.²¹⁸ While this model may equip law students with information that will be helpful in their career endeavors, it is a remarkably inefficient way of helping them become creative and independent lawyers. Upon entering practice, lawyers are increasingly expected to think critically and creatively about difficult problems.²¹⁹ Lawyers are expected to think carefully through client needs and apply both legal and nonlegal tools in dynamic and ever-changing contexts to achieve satisfactory and ethical resolutions. To be prepared to do this, law students must learn that lawyers themselves generate knowledge in their field.²²⁰ Stated differently, lawyers generate law, they do not merely research and repeat it.

The educational model must mirror this reality by becoming a place where knowledge arises from the students—where students investigate law and facts, learning with and from each other with the guidance of the professor as an available and valuable resource. This environment supports the emergence of Kegan’s fourth order of consciousness.²²¹ As previously noted, as individuals transition from third to fourth order consciousness, knowledge becomes less a commodity to be received from experts and more a product to be constructed based on one’s experiences

²¹⁸ See Kimball, *supra* note 66, at 279 (“Langdell introduced the inductive and Socratic case method of teaching [at Harvard] and practiced it assiduously.”); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1930–31 (2002) (noting Langdell’s use of the Socratic method as “the interrogation of students by the professor” to elicit the legally important facts, issues, and holdings from the readings).

²¹⁹ See STUCKEY ET AL., *supra* note 15, at 16–27 (arguing that the goals of law school must expand to better prepare graduates to enter practice); Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 *SEATTLE U. L. REV.* 51, 51–53 (2010) (positing that “‘transfer of learning’ is at the very essence of what lawyers do every day,” and arguing that the law curriculum must impart “a greater understanding about how to translate knowledge and skills to other courses and, eventually, to practice”).

²²⁰ See Aiken, *supra* note 36, at 294 (“The critical thinker must recognize herself as a legitimate source of knowledge along with authorities, such as the teacher or case law and statute.”).

²²¹ Kegan himself posits schools as “holding environments” that facilitate transformative change in their students through an appropriate balance of demands and supports. See DRAGO-SEVERSON, *supra* note 121, at 35.

and information gleaned from a variety of sources; and the student must be prepared to judge whether the source is reliable.²²²

To accomplish this kind of environment, law teachers must be prepared to let the student voice dominate in the classroom. Students must be expected to ask their own questions, to search for the answers, and to evaluate the choices they make in that process. Both inside and outside the classroom, students must act in ways that they will as lawyers—exploring the vagaries of facts, law, and legal strategy. Through preparation for class, classroom experiences, and—most importantly—assessment activities, students should be expected to own the processes of thought that are essential for the practice of law.

Returning to the case of Alice Trudlow, imagine that the law had been presented in a less absolute way. Imagine that we had been asked not only to read *Barton* but also to research tort and ethics rules in specific jurisdictions. Not only might students see for themselves that different jurisdictions treat civil liability for statutory rape differently, they might also develop some sense of the complex legal, political, and cultural reasons why this is so. Perhaps with a broader legal perspective, my classmates would have been less captive to the harsh rule of *Barton* in advising Ms. Trudlow and more creative in their approach to resolving the situation. A more creative approach might exemplify a better third order understanding of the law and its possibilities, which could also push towards a mature fourth order view that sees shortcomings of the dominant legal approaches to the problem and looks for solutions beyond the legal realm.

Consider the results if the torts casebook did not declare (as the current edition still does) that the case would prompt many law students to believe they should have gone to business school instead.²²³ In the alternative, students might be prompted to confront the challenges of the situation and asked directly which challenges are most difficult. Undoubtedly, many students would focus on the legal uncertainty, particularly around the ethical rules; but the questions whether to maintain Samantha's confidence and whether to encourage or discourage Ms. Trudlow from suing or instigating criminal prosecution of William Jennings are not only legal. At least some students might reflect more deeply on the proper role of a

²²² See discussion *supra* notes 162, 165, 180–182, and accompanying text. Indeed, as these sources demonstrate, most stage theories of development regard a less absolute approach to knowledge as characteristic of higher and more complex stages.

²²³ HENDERSON, *supra* note 28, at 43; HENDERSON, *supra* note 22, at 42.

lawyer in the face of client's strong wishes. This type of exercise might indeed help students appreciate the lawyer's role or even understand what area of legal practice suits them. At the least, the Trudlow problem should introduce students to the fourth order tensions that they will mediate in the course of their legal careers.

Changing expectations of students also involves changing the professor's role in the educational process. Inside the classroom, professors must cede center-stage. Robust research among adult learners focuses on the benefits of creating learning cohorts and using collaborative learning techniques.²²⁴ Learners at different points on the developmental spectrum can each glean benefits from collaborative learning or group work techniques: at the second order, learners use groups to help discover the "right" answers; at the third order, learners absorb the values and practices of the group; and at the fourth order, learners balance varying points of view and learn to see value in the process of understanding and (at times) reconciling areas of commonality and difference.²²⁵ Researchers have demonstrated benefits flowing from these types of educational techniques in the academic, emotional, and cognitive realms.²²⁶

For law students, the benefits of cooperative or collaborative learning include a deeper understanding of legal substance as well as inspiration and support for the sometimes-difficult intellectual and emotional tasks of lawyering.²²⁷ In groups, students can help each other see nuances in legal doctrine and niceties of how that doctrine applies to real or simulated client situations.²²⁸ In groups, students find support for making decisions about how to handle legal problems and for taking the sometimes brave steps that lawyers must take, whether those steps involve facing an unfriendly judge at oral argument, pursuing answers relentlessly in the examination of a hostile witness, or presenting a singularly unwelcome demand (to the client or to an opposing party) in a negotiation.²²⁹

When students approach problems in groups, the teacher becomes a "facilitator and enabler of meaningful, enjoyable, challenging learning."²³⁰ Students must be put in positions of authority, positions where they are

²²⁴ DRAGO-SEVERSON, *supra* note 121, at 72–102.

²²⁵ *Id.* at 99–102 (presenting results of an empirical study done in the context of Adult Basic Education/English as a Second Language courses for adult employees at Polaroid).

²²⁶ *Id.* at 156.

²²⁷ GERALD F. HESS ET AL., *TECHNIQUES FOR TEACHING LAW 2*, at 127 (2011).

²²⁸ *Id.* at 128.

²²⁹ *Id.*

²³⁰ McAuliffe, *supra* note 192, at 480.

responsible to each other, and positions where they must provide reasonable feedback to each other about the content and process of what they are learning.²³¹ The teacher supports the process, serving as resource and advisor to the students as necessary.²³²

In the Trudlow case, two of my classmates were asked to collaboratively advise the client. However, the shortcomings of their interview were not a failure of the collaborative process; a better process and a greater awareness of the developmental task at hand would have led to much stronger results. My classmates and I were not adequately prepared by the materials in the casebook to advise Ms. Trudlow. We needed a better education about tort and ethics laws that applied to the situation. Also, having never previously counseled a client, my classmates needed to rehearse in advance their advice to Ms. Trudlow—perhaps with one of them playing the role of Alice Trudlow and imagining her likely reaction to their advice. After the advice session with the actress playing Trudlow, my classmates needed a more substantial debriefing—they needed to hear the actress-client's reactions to the advice she was given and the professor's guidance on how to handle sometimes-delicate client meetings. A professor who is aware of the developmental trajectory of lawyers might be more attuned to my classmates' distressing failure to differentiate themselves as lawyers from the substantive moral commitments of the *Barton* case.

There are many opportunities in law classrooms to make students responsible for finding, evaluating, and analyzing information. However, engaging these principles at a deeper level which more readily prompts mastery of complex law and appreciation of professional role requires breaking down some of the walls that divide our present curriculum. For example, torts class could use teams of student lawyers to investigate, research, and report on a series of case studies. Civil procedure could be taught in the context of legal research and writing so that students build understanding of how procedural context influences legal argument.

²³¹ See *id.* at 481. Former Dean Paul Brest of Stanford Law School observes that traditional legal education implies a pedagogy that is solitary, noting that “[m]ost [law school] class assignments, exams, and papers are individual endeavors.” Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBLEMS 5, 15 (1995). The view articulated here attempts to respond to this isolation.

²³² For a variety of thoughtful and thought-provoking ideas about how to integrate collaborative, cooperative, and team learning techniques into law classes, see HESS ET AL., *supra* note 227, at 127–52.

Criminal law or procedure could be taught in ways that integrate principles of professional ethics for prosecutors and defense attorneys. All of these courses can spend time focusing on the role of a lawyer who practices in that area. The goal of creating self-authoring lawyers who can integrate subject area knowledge with legal skill in collaborative professional contexts should drive further revisions to the law curriculum.

B. Writing as Vehicle for Learning

Lawyers recognize the central importance of writing,²³³ but often provide only lip service in the form of vague rumblings of discontent about the writing skills of new law graduates. Perceptions about legal writing among the public at large are similarly negative.²³⁴ A renewed focus on writing should logically flow from the fact that “most law students will become professional writers: that is, they will make their living from writing.”²³⁵ In a real sense, “[l]earning to write as a lawyer writes means, in a very real sense, becoming a lawyer.”²³⁶

A developmental curriculum empowers students to grow through writing.²³⁷ Writing sparks gains in the cognitive, practical, and ethical arenas, the areas of concern to the Carnegie authors. To write, students must understand the legal and factual materials at hand deeply and thoroughly. They discover that the devil is so often in the details: subtle factual arguments, intricate points of law, and creative legal analogies only emerge in a thorough written examination of legal problems. Writing, in

²³³ Rideout & Ramsfield, *supra* note 88, at 37.

²³⁴ *See id.* at 37–39.

²³⁵ *Id.* at 39.

²³⁶ *Id.* at 58. This view is echoed by Henry Perritt, former dean of Chicago-Kent College of Law at the Illinois Institute of Technology, who observes that “the ability to communicate ties together an increasingly diverse legal profession.” Henry H. Perritt, Jr., *Taking Legal Communication Seriously*, 33 U. TOL. L. REV. 137, 137 (2001). Perritt calls for “a fundamental rethinking of how legal education teaches the skills of legal communication” through making better use of English composition theory, emphasizing oral communication, and integrating legal writing with other parts of the law curriculum, among other ideas. *Id.* at 138–41.

²³⁷ Although many commentators have written on this topic, I find refreshing Erwin Chemerinsky’s frank recognition that the present model of classroom instruction, in which students write only a final exam and receive only a grade and little other feedback (indeed, almost no personalized feedback), is “impossible to justify from a pedagogical perspective.” Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 597 (2008).

this sense, becomes a vehicle for understanding professional abilities in the law; that is, understanding how to control the law and harness its power towards preferred ends.

In addition, writing demands that the student attend to context—to the audience(s) and purpose(s) of their communications. There are often multiple audiences for a legal document including the lawyer's client, opposing or negotiating parties, decision-makers or neutrals, and sometimes even the public at large. Students must learn how to communicate legal analyses and arguments effectively to both legal and nonlegal audiences. Purposes may be simple and direct, e.g., to get a motion allowed; or subtle and multivalent, e.g., to present a convincing legal position that postures the matter for a negotiated resolution on favorable terms. Navigating these waters requires a mature concept of the lawyer's professional role.

In addition, writing can facilitate the kind of cognitive developmental growth that undergirds mature professional identity. The current Socratic flavor of legal pedagogy can result in a "dissonance between . . . oral prowess and . . . written performance."²³⁸ Students are not given authority and power to reflect in writing on the legal decisions they have read; they are infrequently asked to explore their ideas and theories through written form. Writing can prompt students to embrace third and fourth order lessons by helping them learn to act as lawyers in the face of uncertainty and recognize instances when the legal solution to a problem is inadequate. Further, writing can require students to confront and regulate the conflict of competing interests that come to the fore in written documents and in the writer herself. These conflicts range from the quotidian clash of competing legal interests to the existential dilemmas posed by legal arguments that implicate moral questions.

The case of Alice Trudlow demonstrates that writing assignments can effectively teach the legal principles and prompt developmental gains. Students might be asked to draft a letter to the client containing their advice about whether a lawsuit in tort is likely to be successful, making an objective prediction about the effect of *Barton* on such a suit, but also wrestling with the state of the evidence: Can they tell Alice that Samantha consented to sex with Jennings? They might be asked to draft a complaint

²³⁸ Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 521 (2002). The principal problem with the Socratic law classroom is that students have woefully insufficient opportunity to practice the very skills professors expect them to learn. *Id.* at 521–22.

for such a lawsuit, this time marshalling facts and law in a persuasive form. If some students were asked to do the former task while others were asked to do the latter, even richer education about the law and ethics of the problem would be possible. Students could greatly profit from deciding what to include in each document. Students writing the complaint might also learn that their duty of candor to the tribunal would not allow them to leave out facts harmful to their case.²³⁹ Either assignment would require deeper engagement both with the law and with the lawyer's role than a brief class discussion or role-play exercise can provide.

Beyond these two assignment ideas, students might be asked to write a bench memoranda or a law reform piece debating whether the rule of *Barton* should be overturned. While one could easily imagine the arguments against *Barton*'s antiquated reasoning and worldview, asking students to defend the case might also prompt cognitive and developmental gains, as well as insights into the role of lawyer as agent of the client and the limits of what one will do in such a role. Writing on difficult topics such as these can be an essential ingredient to focus a lawyer's critical sensibility.

Again, the professor's role is dramatically altered. No longer primarily a Socratic interlocutor, the professor becomes a mentor and coach while guiding students through deliberately chosen rhetorical situations. Through deeper and more thoughtful interactions with professors, students will have more opportunities to construct the web of knowledge and experience that leads them to self-author their pathway as lawyers. The professor's job is to construct increasingly complex and demanding situations that require more sophisticated approaches to the law, to have dialogue with partners in the legal community, and to consider professional identity and roles. A curriculum that is more closely aligned to the cognitive development of its students and to the requirements of the legal profession would include far more opportunities for students to write, to receive feedback on their writing, and to revise.²⁴⁰

²³⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012).

²⁴⁰ See Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997) for a collection of ideas about how to integrate writing into law school classes. However, Parker does not fully explore the ramifications of integrating writing into all law school courses. She notes that writing opportunities "should not be overlooked" in doctrinal classes, noting that "[e]ncouraging students to engage in 'two-way conversations' with their texts complements Socratic-style and discussion classes by offering students a medium for expression and reflection, for creative and critical thinking." *Id.* at 579–80. At least this much is true. In fact, my thesis
(continued)

Unfortunately, too often writing is pejoratively labeled a “legal skill” and its potential to prompt cognitive developmental growth is devalued and marginalized.²⁴¹ Although Carnegie recognizes some of the importance of writing as a vehicle for deep learning,²⁴² the academy has not yet fully embraced this lesson. It is time to give up the norm under which the only writing required and read in many, if not most, law courses occurs during the final exam. Assignments and feedback can take varied forms and need not be limited to the briefs and memos commonly taught in legal writing classes. Faculty should experiment with assigning other legal documents, including contracts, mediation statements, or settlement agreements, as well as letters, e-mails, and the types of informal communications that are increasingly populating the world of practice.²⁴³ Further, documents unique to the academic environment such as reflection papers or critical essays may also have a role to play in forming the professional identity of young lawyers. Teaching more writing skills will not only serve the goal of producing better writers, worthy as that goal is, but also it will produce better lawyers who have more fully embraced their developmental capabilities.

C. Experience as Foreground of Law School Education

In considering the relationship between experience and learning, John Dewey hypothesized that “all genuine education comes about through experience.”²⁴⁴ This insight, which seems obvious on its face, suggests that educational outcomes can be predicted based on the kinds of experiences in the program of study. Until quite recently, classroom teaching has been the norm at American law schools, even considering the

is that full integration of writing which engenders more creative and critical thinking will create a new post-Socratic curriculum.

²⁴¹ See Kristen Konrad Robbins-Tiscione, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS’N LEGAL WRITING DIRECTORS 108, 108–09 (2006).

²⁴² See CARNEGIE REPORT, *supra* note 15, at 38–43. But see Lisa T. McElroy et al., *The Carnegie Report and Legal Writing: Does the Report Go Far Enough?*, 17 J. LEGAL WRITING INST. 279, 280–81 (2011).

²⁴³ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. (2012) (discussing protocol for situations involving exchange of electronic communication).

²⁴⁴ JOHN DEWEY, EXPERIENCE AND EDUCATION 25 (1938).

considerable progress that has been made by legal writing professors, clinicians, and others.²⁴⁵

The role of experiential learning, which is coming into vogue in the legal academy, has been studied through multiple theoretical lenses.²⁴⁶ The constructivist theoretical perspective elevates reflection on experience as a means of learning—knowledge is constructed through experience, and students’ ways of making meaning are transformed as they reflect on those experiences.²⁴⁷ Because students capture their progress in writing, reflection on experience is key to the transformative process that becoming a lawyer entails.

Scholars have also posited other perspectives on experience. The situative theory of learning elevates communities of practice and examines ways in which “knowing is intertwined with doing.”²⁴⁸ This understanding of experience parallels the views of social constructivists. Unlike constructivists generally, social constructivists locate learning in the community rather than in the head of the student.²⁴⁹ On this view, experiential learning causes the community to “refine its practices” slowly over time.²⁵⁰ The proper response to the social-constructivist norm in legal education is calling for greater attention to pathways of individual development.²⁵¹

There is little doubt that the law school model is evolving in the direction of greater “experience.” Simulations like the Alice Trudlow problem can be extremely important forms of experience early in the educational process. That said, they are just a beginning. Clinical

²⁴⁵ The Carnegie Report emphasizes that law schools tend to elevate “cognitive training in the classroom setting.” CARNEGIE REPORT, *supra* note 15, at 81.

²⁴⁶ MERRIAM ET AL., *supra* note 13, at 160.

²⁴⁷ *Id.* at 160 (citing TARA J. FENWICK, LEARNING THROUGH EXPERIENCE 21 (2003)).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Other scholars studying experiential education have taken the psychoanalytic view, examining how unconscious desires and fears may reinforce or limit students’ trajectories; have embraced cultural critical perspectives, examining limits of dominant norms of experience in society; or have focused on the aptly-named complexity theory, which looks at experience as part of relationship, a complex interplay of “consciousness, identity, action and interaction, objects and structured dynamics.” MERRIAM ET AL., *supra* note 13, at 160. While these perspectives are useful in various settings, often for explaining individual students or educators, they are not as useful as the constructivist or situative theories for understanding legal education, so I do not treat them in my text.

offerings have increased and externships, simulations, and problem-based courses are also finding places in the curriculum.²⁵² I have heard my colleagues at Georgetown and elsewhere refer to these offerings as comprising a “spectrum” of experiential opportunities; this language is quite helpful in planning a legal curriculum. Not every experience offers the same opportunities as live client interaction in clinic coupled with expert guidance of clinical faculty. However, each type of experience, from simulation to externship to live client representation, contributes to the habits of mind and course of development of our students.

What matters is that the ethos of experience becomes pervasive. It is not enough to insert add-ons, Carnegie-flavored courses, or single-course requirements into the curriculum. Instead, all courses must be rethought and evaluated for the kind and quality of experience they offer students.

VI. CONCLUSION

Admittedly, there is reason to approach the developmental view with caution. Understanding and prompting developmental change in others is not an easy task, and most legal educators have no specialized training in this area.²⁵³ More advanced and complex stages of development are not necessarily better stages for all individuals.²⁵⁴ Moreover, the transition between stages of development and the emergence of later stages can bring to the fore conflicts between the individual and environment that were not salient in the prior stage. In making the transition, some individuals experience unsettling anxiety and even psychological pain.²⁵⁵ Some commentators have questioned whether it is appropriate for educators of adults to “tamper with the worldview” of their students, noting that pursuit of developmental goals can be “invasive.”²⁵⁶

This consideration is legitimate and cautionary; however, it should not cause educators to avoid the developmental view. When a student appears to be in distress or to be experiencing some crisis arising from tensions between professional and personal commitments, educators should respond by referring the student to appropriate professionals. A large body of

²⁵² For examples and commentary, see Roger J. Dennis, *Building a New Law School: A Story from the Trenches*, 61 RUTGERS L. REV. 1079, 1083–89 (2008); Fine, *supra* note 65, at 728, 738–46; Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 62–67 (2001).

²⁵³ See discussion *supra* Part II.

²⁵⁴ DRAGO-SEVERSON, *supra* note 121, at 22.

²⁵⁵ See *supra* note 143 and accompanying text.

²⁵⁶ See MERRIAM, *supra* note 13, at 154.

theoretical and empirical scholarship supports the idea that the professional workplace requires fourth order consciousness,²⁵⁷ therefore, educators should support the transformation to a self-authoring way of knowing.

Of course, not all law students will arrive at school at uniform stages of development. Kegan and his followers have referred to the developmental diversity of adult learners as creating a “new pluralism” in the classroom,²⁵⁸ and the data suggests that this diversity is also present in law classrooms.²⁵⁹ Therefore, not all students will respond in equally productive ways to the same pedagogical approaches.²⁶⁰ As a result, scholars call for a “correspondingly diverse collection of pedagogical approaches and an awareness that these ways of knowing can evolve given the appropriate challenges and supports.”²⁶¹ Stated differently, the course of study must allow students to enter at different levels while still facilitating the development of all.

At a time when lawyers face increasing complexity in the professional workplace, adequate preparation for practice demands that law students be given the tools they will need to succeed. Students must consequently be prepared to deal with the role of a lawyer perpetuated in the model rules: a lawyer, “[i]n rendering advice, . . . may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”²⁶²

²⁵⁷ See O’DONOVAN-POLTEN, *supra* note 181, at 171–204; McAuliffe, *supra* note 192, at 477, 485.

²⁵⁸ DRAGO-SEVERSON, *supra* note 121, at 154.

²⁵⁹ *Id.*

²⁶⁰ For a particularly compelling example, see Taylor, *supra* note 85, at 206–08 (describing how a learning contract might be extremely effective for a self-authoring learner, but not used to its maximum benefit by a learner with a socializing epistemology). See also KEGAN, *supra* note 21, at 286 (describing the disjuncture between a student with third order epistemology who faces fourth order demands).

²⁶¹ DRAGO-SEVERSON, *supra* note 121, at 154.

²⁶² MODEL RULES OF PROF’L CONDUCT R. 2.1 (2012).