LEADERSHIP IN LAW SYMPOSIUM

Santa Clara University
School of Law

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ETHICAL PROFESSIONAL (TRANS)FORMATION: THEMES FROM INTERVIEWS ABOUT PROFESSIONALISM WITH EXEMPLARY LAWYERS

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Five Ideas to Take Home

1. Ethical professional formation is a priority for legal education (ABA & Carnegie), despite skepticism about lifespan adult ethical development (i.e., formation)

2. The critics' assumption that character is formed primarily by upbringing is *not* supported by empirical research – it is a lifespan process, also influenced by the social milieu

3. Transformational professionalism among peer-honored exemplary lawyers is associated with ethical leadership in the profession

4. Legal education can foster and assess ethical professional formation (development) with effective instructional methods

5. Educational engagements must take into account that students are at different stages of development.

Need for a Paradigm Shift

Student Learning Outcomes Subcommittee – ABA's Section of Legal Education requires that the learning outcomes for each accredited law school shall include competency as an entry-level practitioner in the following areas

1. "The professional skills of … (ii) the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas;" and

2. "knowledge and understanding of … the values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity, and respect for the rule of law."

Need for a Paradigm Shift

- Carnegie Foundation for the Advancement of Teaching completed 5 in-depth studies of education in the professions over a 10-year period. They concluded:

- "In every field we studied, we concluded that the most overlooked aspect of professional preparation was the formation of a professional identity with a moral core of service and responsibility around which the habits of mind and practice could be organized."

- "[Educating for an ethical professional identity] has to be holistic to advance students toward genuine expertise as practitioners who can enact the profession's highest levels of skill in the service of its defining purposes…"

Skepticism About the Goal

1. Posner: "as for the task of instilling ethics in law students … I can think of few things more futile than teaching people to be good."

2. Law faculty "often argue that by the time students enter law school it is too late to affect their ethical commitment and professional responsibility."

3. "Can it really be taught when ethical issues are a matter of right and wrong?"

Neil Hamilton, and Monson, Verna, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)* **(March 13, 2011).** *The Professional Lawyer, Vol. 20, No. 4,* **2011; U of St. Thomas Legal Studies Research Paper No. 11-05. Available at SSRN: http://ssrn.com/abstract=1791216**

Defining Professionalism

Hamilton (2008) developed a definition based on synthesis of

- literature from social sciences (e.g., Friedson)

- Carnegie Foundation's *Educating Lawyers*

- major ABA reports

- the Conference of Chief Justices National Action Plan and the

- Preamble to the Model Rules of Professional Conduct

Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity***, 5 U. St. Thomas L.J. 470, (2008).**
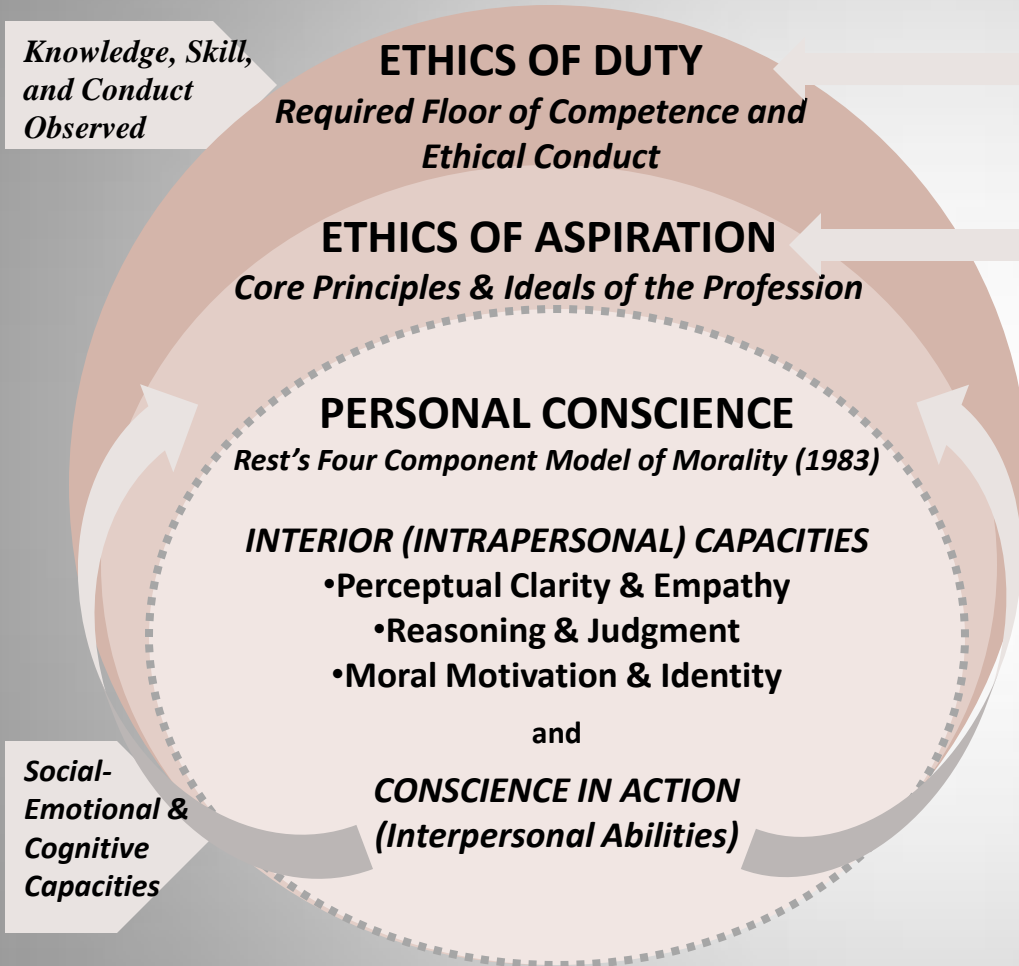
Defining Professionalism

1. **Personal Conscience** – one's moral center
2. **The Ethics of Duty** – required content in the law school curriculum, including "instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct" (represents the minimum floor of competence and ethical conduct)
3. **The Ethics of Aspiration** – The core principles and ideals that guide the profession and its members

EMPIRICAL PROFESSIONAL ETHICS:
A DEVELOPMENTAL MODEL OF PROFESSIONALISM*

The development and integration of personal and professional ethics over a career represent the highest level of professionalism.

Knowledge, Skill, and Conduct Observed

ETHICS OF DUTY
Required Floor of Competence and Ethical Conduct

ETHICS OF ASPIRATION
Core Principles & Ideals of the Profession

PERSONAL CONSCIENCE
Rest's Four Component Model of Morality (1983)

INTERIOR (INTRAPERSONAL) CAPACITIES
- Perceptual Clarity & Empathy
- Reasoning & Judgment
- Moral Motivation & Identity

and

*CONSCIENCE IN ACTION
(Interpersonal Abilities)*

Social-Emotional & Cognitive Capacities

MEETING MINIMUM STANDARDS of the Rules of Professional Conduct & Avoiding Malpractice

INTERNALIZING EXCELLENCE at Technical Skills, and the Core Principles and Ideals (displayed below):
- Zealous Advocacy
- Loyalty to Client
- Confidentiality
- Public Service
- Respect for the Legal System
- Independence of Professional Judgment
- Peer Review
- Integrity
- Honesty
- Fairness
- Self Restraint in Seeking Sustainable Profits

*Adapted from Hamilton (2008); Rest (1983); and Boyatzis's (1982) model of developing managerial competencies, this graphic (1) shows most observable skills and behavior as the outer layer, as well as the inner social-emotional and cognitive capacities of morality, and (2) suggests a dynamic process among the three dimensions of professionalism.

Present Study of Exemplary Lawyers

Statement of Purpose:

Legal education and the profession need more clarity about the specific elements of an ethical professional identity that define the educational goal. With a clear definition of these elements, educators can design learning models, educational programs and curriculum, and assessment to foster students' and practicing professionals' ethical formation.

Research Questions

How do peer-honored, exemplary lawyers define the meaning of professionalism?

How do they explain the origins of their understanding?

Has their understanding changed throughout their years in practice? If so, how has it changed?

Methods

In-depth, semi-structured interview based on a holistic model of lifespan development of identity (i.e., methodological paradigm suggested by the Carnegie Foundation, past moral exemplar studies)

Sample of 12 attorneys drawn from 10 years of bar-sponsored professionalism awards in Minnesota; random, but maximizing diversity

Diverse by gender (6 men, 6 women), age (mid-40s to mid-80s), ethnicity, practice areas (large and medium size firms, government, legal aid and non-profit)

Major criteria for inclusion: Currently practicing law, not a present or former colleague of co-principal investigators, nor a present employee of the University of St Thomas

Exemplary Attorneys Define Professionalism
(12 attorneys, in-depth interview)

- Continuous dynamic growth in understanding and internalizing the meaning of professionalism.

- Reflection and learning from mistakes as an important element of professionalism.

- Professionalism's foundation is the moral compass or core values of the lawyer.

- Professionalism as a deep sense of commitment and responsibility toward others including clients, colleagues, the firm, the profession, the justice system, and society

- Professionalism includes counseling the client, giving the lawyer's independent judgment (taking into account also the lawyer's moral compass) and candid and honest advice.

- Professionalism includes the importance of firm or department culture and mentoring junior lawyers.

- Other themes: Trustworthiness, honesty, truthfulness, truth telling, moral courage, kindness, humility, internalized standard of excellence at the technical skills of lawyering.

How professionalism is understood. . .

. . . depends on one's predominant stage of identity development

Lifespan identity development theory (Kegan, 1994); Rule & Bebeau, 2004

The Instrumental Professional (level 2)

- View self and others
    - as independent operators, with **own agendas and interests**
    - through **lens of individual interest**
- Success measured by **concrete attainments**
- Role expectations are **fixed, concrete, black & white**
- Motivation to meet standards: **Desire to be correct and effective**

The Socialized Professional (Stage 3)

- View self and others in terms
  - **shared interconnections**
  - **shared values**, **mutual expectations**, and
  - **identification with institutional ideals and principles**
- Can take **multiple perspectives simultaneously**
- Are idealistic and **internally self-reflective**
- See professionalism as **meeting the expectations of those who are more knowledgeable**, more legitimate, and more professional

The Self-Authored Professional (Stage 4)

- Forging a **personal system of values** and internal processes for evaluating those shared identities

- Possess an **internal compass** for negotiating and resolving tensions among multiple, shared expectations

- Identity no longer embedded within the professional role

- Can **"think outside the box"** – become change agents for the profession

- Expanded ability to shift perspectives, roles

The Self Transforming Professional (Stage 5)

- Can step back and assess one's primary self-chosen system (from level 4), and realize its limitations

- Cognizance of the interdependence of systems, and of personal ideologies or philosophical viewpoints

- Can evaluate multiple systems of meaning, and choose a personal system or shift between different systems

Lifespan identity development theory (Kegan, 1994)

Ethical Professional Identity Studies in Legal Education and Law

Percent at Kegan Stages (2010-11)
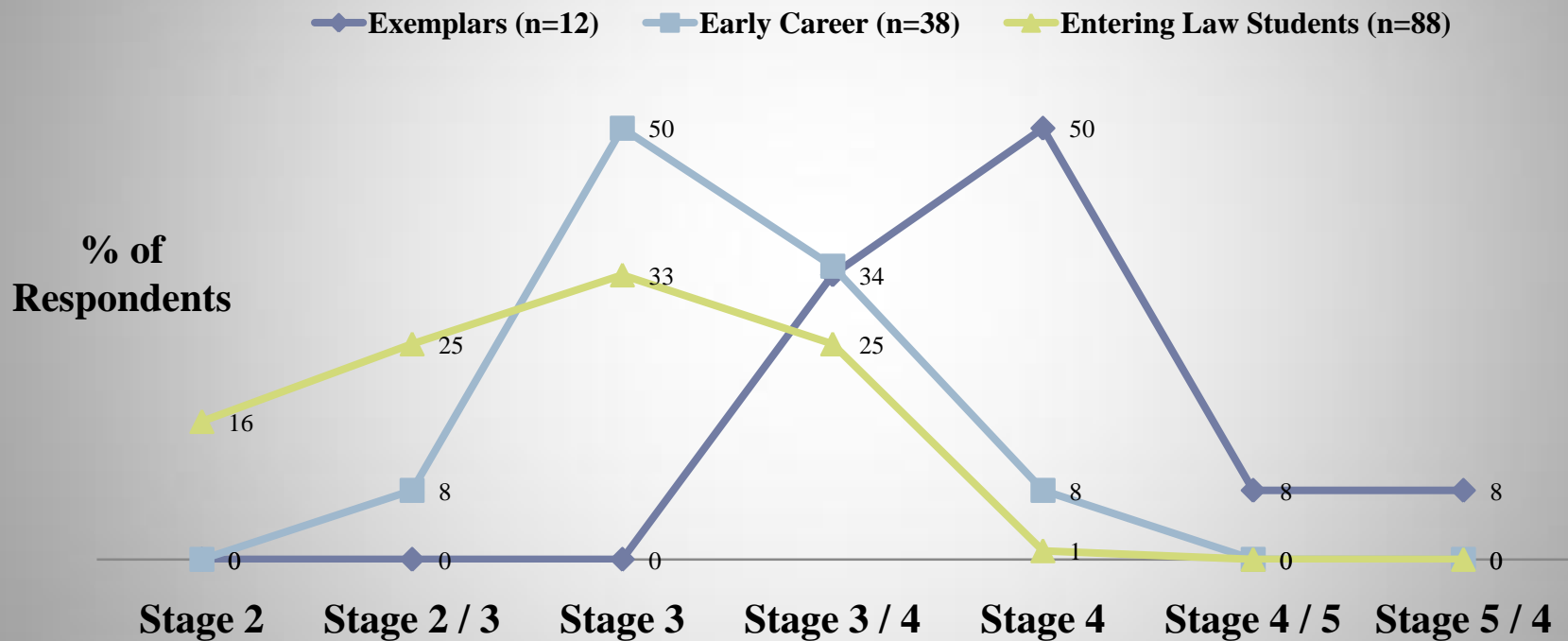
Hamilton & Monson 2011; Monson & Hamilton, 2010, 2011

EMPIRICAL PROFESSIONAL ETHICS:
A DEVELOPMENTAL MODEL OF SERVANT LEADERSHIP IN THE PROFESSIONS*

The development and integration of personal and professional ethics over a career represent the highest level of professionalism.

Knowledge, Skill, and Conduct Observed

UNIQUE SKILLS OF A SERVANT LEADER

VIRTUES AND QUALITIES OF A SERVANT LEADER

LISTENING, CONCEPTUALIZATION OF POSSIBILITIES, PERSUASION, COMMUNITY BUILDING, COUNSELING, AND REFLECTION AND SOLICITATION OF FEEDBACK

PERSONAL CONSCIENCE
Rest's Four Component Model of Morality (1983)

STEWARDSHIP, EMPATHY, COMMITMENT TO HOLISTIC GROWTH OF OTHERS

INTERIOR (INTRAPERSONAL) CAPACITIES
- **Perceptual Clarity & Empathy**
- **Judgment & Reasoning**
- **Moral Motivation & Identity**

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SERVANT LEADERSHIP: SKILLS AND VIRTUES

ETHICS OF DUTY

ETHICS OF ASPIRATION

PERSONAL CONSCIENCE
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Discussion

- Peer-honored lawyers validated elements of professionalism from theoretical definitions but most framed it as an ongoing process of internalization

- With lawyers who had achieved Stage 4 and 5, there was a convergence with leadership ability, and contributions to advancing change in the firms or the profession

- Transformational change is associated with *enduring commitment to core values* – not a superficial approximation that results from "skills training"

Future Research & Application

- This study will be replicated in New York, other market areas – question: are there regional differences?

- Development of instructional materials for law school faculty, counselors, and mentors to use in coaching for developmental change

- Ongoing validation studies – adapting the Subject-Object interview to essay questions

- Writing a book synthesizing all three identity studies

- Longitudinal studies of moral judgment are in process

Implications

1. Ethical professional formation (development) can be fostered and assessed in legal education with effective instructional methods

2. Imposing additional "tests" of character or personality (related to professional ethical identity) is reductionistic, misses opportunities for formative assessment, coaching, and countering a social milieu based on competition

3. Ethical professional formation assessment can integrate with the doctrinal and skills curricula or with mentoring / counseling programs

Conditions for growth and development

Foster a climate of "optimal conflict" (Kegan & Lahey, 2009, p.54)

- "The **persistent** experience of some frustration, dilemma, life puzzle, quandary, or personal problem that is . . .

- Perfectly designed to cause us to **feel the limits** of our current way of knowing. . .

- In some sphere of our living that we **care about**, with . . .

- **Sufficient supports** so that we are neither overwhelmed by the conflict nor able to escape or diffuse it."

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