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# The “New Normal” For Educating Lawyers

*Nicola A. Boothe-Perry\**

## I. PREFACE

*“[P]ray will you concern yourself with anything else than how we citizens can be made as good as possible?”<sup>1</sup>*

When Socrates posed this question to “statesmen” who “embarked upon a public career,” he answered the query indicating that the improvement (“as good as possible”) of those under the statesman’s supervision should be the ultimate goal. For the law professor or “statesperson,” the question is instructive.

The law professor’s role has been defined in tripartite fashion: as 1) a scholar, 2) a teacher, and 3) a colleague.<sup>2</sup> Additional roles of “lawyer for clients” (an advocate for legal reform)<sup>3</sup> “transmitter of information” and “keeper of the hierarchy” have also been articulated.<sup>4</sup> Yet,

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1. PLATO, THE COLLECTED DIALOGUES, INCLUDING THE LETTERS 296 (Edith Hamilton & Huntington Cairns eds., 1961).

2. Law professors have various roles in and outside the law school community. This article will, however, focus on the law professor’s role within the law school community, extending to the outside community only as it specifically relates to the narrowly defined legal profession. See generally Jason Ostrom, *The Competing Roles of Law Professors*, 42 S. TEX. L. REV. 539 (2001) (noting the various roles of law professors); Amy Gajda, *The Law Professor as Legal Commentator*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 209 (2004) (discussing law professors’ involvement with legal media).

3. See Richard H. Fallon, Jr., *Scholars Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 247 (2012) (delineating roles of a law professor towards a goal of identifying the moral and ethical constraints that bear specifically on their participation in scholars’ briefs).

4. See, e.g., Maria L. Ciampi, *The I and the Thou: A New Dialogue for the Law*, 58 U. CIN. L. REV. 881, 897 (1990) (As the “keeper of the hierarchy,” the author states that the law professor “‘slaps’ the student into the cold reality of the practice of law, communicates that the student must prove that the student deserves to be a member of this profession, and teaches the student that a ‘hierarchy’ exists in the law which the student must mind and revere.”).

when a group of faculty members from a law school were asked the question: “[w]ho do we need to be for our students?” there was no particularized uniformity of the roles that define our vocation.<sup>5</sup> The only time provided to think about the question was the time between individual faculty members’ responses. Without much opportunity for forethought, the responses were indicative of each individual’s honest belief of his or her obligations as a law professor. The interesting responses varied from the positive (which were the majority of responses) (e.g. enabling the students to “be positive contributions to the community”; “think critically”; “be intellectually curious”), to an interesting response of “conflicted.”<sup>6</sup> These responses provided pause for thought, especially as those responses related to not just who faculty members *wanted* to be, but who they *should* be as law professors.

By definition, a “professor” is one who “teaches or professes special knowledge of an art, sport, or occupation requiring skill.”<sup>7</sup> One of the most renowned Jewish existentialist philosophers of the twentieth century, Martin Buber, believed that teaching is the most important profession for human society.<sup>8</sup> For those who teach laws and legal principles, Socrates’ rhetorical question suggests that the primary goal is the improvement (the “betterment”) of those being taught. But what does “teaching” mean to the law professor? Although it is imperative to teach “the law”—the substance, the analysis, and the synthesis—does the obligation as “teacher” go beyond such traditional “teaching” of the substance of the law? Are there obligations to teach other tangible and non-tangible skills that have an impact on students and society? Are there other obligations to the profession as a whole? Are there other aspirational values that should be included in the obligatory duties of a law professor? Are these obligations as a professor heightened/increased at a school that specifically targets and attracts students from historically underrepresented segments of society? And how do these obligations adapt to the “new normal” standards in the legal community and society as a whole?

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5. The question was posed to the faculty of Florida A&M University College of Law during a faculty retreat, which the author attended in April 2013.

6. *Id.*

7. *Professor Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/professor> (last visited Oct. 13, 2016).

8. AUBREY HODES, *MARTIN BUBER: AN INTIMATE PORTRAIT* 124 (1971) (quoting Buber); *see also* Ciampi, *supra* note 4, at 881 (discussing the dialogical relationship in education).

## II. INTRODUCTION

The term “new normal” has been minted as a shorthand phrase to express our “economic instability, societal changes, and business models in flux.”<sup>9</sup> This new normal has many implications for law schools and the legal profession as schools cope with decreased enrollment numbers,<sup>10</sup> law school graduates find the job market slim, law firms cope with budgetary restraints, and legal academia battles with issues such as tuition and tenure.<sup>11</sup> In the midst of these critical changes, law schools have to adjust or suffer negative consequences of failing to do so.<sup>12</sup>

As the law profession and legal academia hasten to adjust to this new normal, there is a need for legal academia to address the new normal by clearly identifying the law professor’s role in this adjustment. In forming that identification, it is critical that law professors remain aware of the roles they serve to students as mentor, inspiration, and counselor, to name a few.<sup>13</sup> Similarly, important in the formation of this identity is the need to recognize there are obligations, ethically and morally, to students both inside and outside the classroom (including how we comport ourselves as faculty members—governance, policy implications, collegiality, etc.). In addition, occupying a unique position “between the academy and the legal profession,”<sup>14</sup> as law

9. Jan Bisset & Margi Heinen, *Facing the New Normal*, MICH. B.J., Oct. 2013 (Magazine), at 52.

10. For an in-depth discussions regarding the new demographic of law students and the impact on law schools, see Courtney G. Lee, *Changing Gears to Meet the “New Normal” in Legal Education*, 53 DUQ. L. REV. 39 (2015).

11. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (arguing that law schools cost more than they should resulting in many law students graduating with huge debts); see also Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013) (exploring new challenges to legal education, including lack of consensus regarding the problem itself, and financial, structural, curricular, and value issues); Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177 (2012) (examining the reasons for and consequences of the increased cost of legal education in the U.S.).

12. See generally Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html> (quoting the dean of Hastings College of the Law at the University of California in San Francisco, Frank Wu: “Law schools will be crushed if they don’t remake themselves . . . [t]his is Detroit in the 1970s: change or die.”).

13. See Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPS; or, Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 301, 328–29 (2001) (noting that law professors have “a strong impulse—and perhaps even a responsibility—to serve as mentors for students.”).

14. Fallon, Jr., *supra* note 3, at 246 (noting that a law professor is “poised between the

professors, it is important to evaluate and define what role is served in the greater legal community.

This article will undertake to clearly identify and define the roles of a law professor in the “new normal” of legal academia in an effort to enhance effectiveness and impact on students, colleagues and the legal profession as a whole. Part III of the article will discuss “ethics vs. morality” as a starting point recognizing that the execution of roles as law professors begins with an identity of self. Part IV will explore obligations to the “new normal” students with Section A discussing competence in teaching, Section B acknowledging the importance of trustworthiness in teaching, Section C discussing the roles of mentor and counselor, and Section D noting the role in student formation of professional identities. Part V will address the obligation to the “new normal” legal profession as a whole. Part VI will focus on the obligation to the “new normal” law school institution, highlighting the necessity to provide institutional leadership in Section A and the importance of collegiality in Section B. Part VII provides a conclusion acknowledging the importance of meeting all students’ needs (pedagogically, institutionally and professionally) and suggests a normative Code of Conduct as an end to such means.

### III. ETHICS VS. MORALITY—A NECESSARY DISTINCTION FOR A LAW PROFESSOR’S IDENTITY

As a starting point to define the role of a law professor it is important to recognize that identity in a given profession is in great part formed by one’s identity of self. It is generally accepted that a student’s moral being can be directly affected by legal education.<sup>15</sup> Therefore, the morals and ethics of those individuals who provide this influential education must necessarily include an examination of the intersection of morality, ethics, and professionalism within the context of forming a communal identity. Since the focus of this article is on the identity of law professors specifically, the intersection of morality and ethics must be explored within that context as the values emanating from law

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academy and the legal profession.”).

15. See Jonathan M. Freiman, *Steps Toward a Pedagogy of Improvisation in Legal Ethics*, 31 J. MARSHALL L. REV. 1279, 1284 (1988) (stating that “[l]egal education directly affects some individuals’ moral beings.”).

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professors will be embraced by—and have a direct impact on—law students.<sup>16</sup>

Typically, the terms “moral” and “ethics” are used synonymously in ordinary discourse.<sup>17</sup> Philosophers have also used the terms interchangeably, with many philosophers distinguishing between the two.<sup>18</sup> Ethics has been defined as “a set of concepts and principles that guide us in determining what behavior helps or harms sentient creatures.”<sup>19</sup> Also called “moral philosophy,”<sup>20</sup> it has nevertheless been distinguished from “morality,” which defines one’s personal character through a “set of duties to others (not necessarily just other people) that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct.”<sup>21</sup> In general terms, “morals” are the “good” and “ethics” are the rules that guide us to that “good.”<sup>22</sup> For example, an individual’s moral belief may be that murder is “bad” or “immoral.” However, if that individual is a lawyer who is bound to defend a person charged with murder, the lawyer would, despite any moral beliefs, have an ethical obligation to zealously advocate for his client.<sup>23</sup> In that sense, morality refers to the “domain of what we owe to each other” whereas ethics “refers to the

16. This article does not purport to philosophize or expand on the definitions and meanings of “ethics” and “morality.” Rather, the terms as defined in verified literature are used simply for the purpose of providing a backdrop to address the individual’s “identity” as it impacts the role as a law professor.

17. See, e.g., *Ethics Synonyms*, MERRIAM-WEBSTER THESAURUS, <http://www.merriam-webster.com/thesaurus/ethics> (last visited Sept. 24, 2016) (listing “morals” as a synonym for “ethics”). See also Fallon, Jr., *supra* note 3, at 245 (noting that “[i]n ordinary parlance, the terms ‘moral’ and ‘ethical’ are typically used interchangeably.”).

18. *Ethics Definition*, THE CAMBRIDGE DICTIONARY OF PHILOSOPHY (Robert Audi ed., 2d ed. 1999) (“[‘Ethics’] is also commonly used interchangeably with ‘morality’ . . .”).

19. RICHARD PAUL & LINDA ELDER, *THE THINKER’S GUIDE TO ETHICAL REASONING* 2 (2013).

20. See, e.g., Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 322 (1986–1987) (noting that ethics trace to Immanuel Kant and Enlightenment moral philosophy). See also BARBARA MACKINNON, *ETHICS: THEORY AND CONTEMPORARY ISSUES* 2 (7th ed. 2012) (stating that “ethics” is a “branch of moral philosophy.”); *Moral Philosophy Definition*, MORALPHILOSOPHY.INFO, <http://moralphilosophy.info/> (last visited Sept. 8, 2016) (stating that “[m]oral philosophy is the area of philosophy concerned with theories of ethics . . .”).

21. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1988) (stating that morality is “about what we owe, rather than what we are owed, except insofar as a sense of entitlement (to happiness, self-fulfillment, an interesting life, the opportunity to exercise our talents, or the opportunity to realize ourselves) might generate a duty on the part of others to help us get what we are entitled to.”).

22. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1716 (1976) (noting the view that there is a “viable distinction to be made between the ‘right’ (law) and the ‘good’ (morals).”).

23. See MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. (Am. Bar Ass’n 2013).

domain of standards bearing on how we ought to live in order to lead good or worthy lives.”<sup>24</sup> In their book, *Ethics for Dummies*, Christopher Panza & Adam Potthast simplify ethics and morality as the “simple concept that can be expressed using the words *should* and *ought*.”<sup>25</sup> As Panza & Potthast explain, “[g]ood’ or ‘right’ actions are actions that you *ought* to do,” while “[b]ad’ character traits are ones you *should* try not to develop,” and “[e]vil’ traits are those you should *re-ally* try to avoid.”<sup>26</sup>

Another main difference in the terms “ethics” and “morals” can be traced to word origin. The word “ethics” is derived from the Greek word “ethos” meaning “moral character, nature, disposition, habit, custom.”<sup>27</sup> “Moral” is derived from the Latin word “moralis,” meaning “proper behavior of a person in society,”<sup>28</sup> with further roots in the Latin word “mos” meaning “one’s habit, custom or manner.”<sup>29</sup> Philosophers have further distinguished various ethical theories such as “virtue ethics” (as described by Socrates and Aristotle),<sup>30</sup> utilitarianism (grounded in the “greatest happiness principle” as coined by Jeremy Bentham and John Stewart Mills),<sup>31</sup> and consequentialism,<sup>32</sup> to name a few. These philosophic terms include variations of altruism and egoism in assessing an individual’s moral and ethical behavior.<sup>33</sup>

Each law professor enters academia with an established set of his

24. See Fallon, Jr., *supra* note 3, at 245 (citing RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 13–15 (2011)).

25. CHRISTOPHER PANZA & ADAM POTTHAST, ETHICS FOR DUMMIES 10 (2010) (Italics added).

26. *Id.* (emphasis in original).

27. *Ethos Definition*, DICTIONARY.COM, <http://www.dictionary.com/browse/ethos> (last visited Oct. 15, 2016).

28. *Moral Definition*, DICTIONARY.COM, <http://www.dictionary.com/browse/moral> (last visited Oct. 15, 2016).

29. *Mos Definition*, THE LATIN DICTIONARY, <http://latindictionary.wiki-dot.com/noun:mos> (last visited Oct. 15, 2016).

30. MACKINNON, *supra* note 20, at 125–27.

31. *Id.* at 53–55. In utilitarian reasoning, a comparison is made between the benefits and costs of each action. To do this, the actor must take into account the totality of consequences; as opposed to Egoism—what is best for me; or Altruism—what is best for others. To determine the totality of consequences, the actor would consider the pleasure impact—measuring the intensity, duration, fruitfulness, and likelihood of pleasure that will result from an act or policy.

32. A term coined by G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 12 (1958) (explaining that one must “estimate the badness in the light of the consequences you expect” and coining the term “consequentialism.”).

33. For example, the notion of “altruism” was coined in the 19<sup>th</sup> century by philosopher, Auguste Comte and is considered a traditional virtue in most societies. See *Altruism Definition*, OXFORD ENGLISH DICTIONARY (3d ed. 2012).

or her own moral values and ethical beliefs: a “moral identity.”<sup>34</sup> The exercise of one’s moral identity dictates and affects interpersonal relationships. In a professional learning environment, this moral identity must necessarily conform to certain ethical standards of the general law school community. Oftentimes, the conformance (or lack thereof) is directly reflected in the level of professionalism exhibited.<sup>35</sup> Empirical evidence indicates that the issue of professionalism is inexplicably “linked to a lawyer’s moral core or moral compass, and includes a deep commitment to clients, colleagues, the firm, and broader society.”<sup>36</sup> The lawyer professor should recognize that the foundation of this moral core is “trustworthiness, which serves to ‘hold together’ the day-to-day functions . . . , and serves as an important marker in both establishing and maintaining a lawyer’s credibility and reputation.”<sup>37</sup> As the researchers noted in their conclusion: “[a] major part of this foundation of trustworthiness is honesty, with self and others. Honesty serves also as an internal mechanism that is part of an ongoing practice of self-reflection and growth.”<sup>38</sup>

Law professors should be aware of individual moral identity and its impact on the effectiveness within legal academia. The key to such awareness, as noted by Professors Hamilton and Monson, is honesty with self and others driven by a commitment to self-reflection and growth. The intersection of moral identity, ethical standards, and professionalism illustrate the formation of an identity of law professor and provide a foundation for discussing the obligations to students, the teaching institution, and the legal profession as a whole.

#### IV. LAW PROFESSOR’S OBLIGATION TO STUDENTS

The most recognizable aspect of a law professor’s identity is the role of teacher. In that capacity, the law professor has an undisputed responsibility to her students to create and disseminate information. This responsibility to transmit knowledge<sup>39</sup> necessarily requires a high

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34. “Moral Identity” has been “used to describe a holistic combination of motivational, social, emotional, and cognitive capacities that shape our decisions and behavior.” See Neil Hamilton & Verna Monson, *Ethical Professional (Trans)Formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921, 933 (2012) [hereinafter Hamilton & Monson].

35. *Id.* at 957.

36. *Id.*

37. *Id.*

38. *Id.*

39. See generally Ciampi, *supra* note 4, at 897 (noting one of the roles of law professor as



level of competence, an accomplished level of teaching, and a commitment and dedication to the enhancement of knowledge.

### A. *Competence in Teaching*

A solid level of competence is key in providing an effective teaching methodology. To teach the law is to equip the next generation of lawyers with the necessary tools for success. This can be a complex endeavor. Yet, it may be a law school's most "important programmatic product."<sup>40</sup> In order to achieve a high level of competence, law professors must be fully versed in the substance of the subjects they teach and possess a commitment and dedication to continued enhancement of knowledge in a given field on a global level. Because of the significant time and monetary investment made by students in the pursuit of a law degree,<sup>41</sup> law schools have an obligation to provide competent faculty capable of imparting the requisite skills to prepare students for their professional lives beyond law school. As one scholar noted, to do otherwise would be "a species of consumer fraud."<sup>42</sup> Teaching, therefore, is paramount to the law professor's identity. Neither the law professor's institutional status<sup>43</sup> nor the mantra of academic freedom, in which many a law professor take great pride, should cloak unfulfilled obligations to be an effective teacher, taking into account current social and societal norms.<sup>44</sup>

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"transmitter of information").

40. See Bradley Toben, *What Should Our Students Justifiably Expect of Us as Teachers?*, 33 U. TOL. L. REV. 221, 231 (2001) ("A law school relies upon each of its faculty members to deliver to its students its most important programmatic product—teaching—in a fashion that recognizes and reflects the worth of the enterprise.").

41. The American Bar Association reported that the average cost of law school in 2012 was \$23,214 for a public law school and \$40,634 for a private law school. *Law School Tuition 1985–2012*, ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR REPORT, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/lstuition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lstuition.authcheckdam.pdf) (last visited Sept. 8, 2016).

42. Lawrence Rosenthal, *Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us About Who Should be Teaching Law*, 80 MISS. L.J. 1563, 1632 (2011).

43. See Toben, *supra* note 40, at 226 ("Tenure cannot be a shield for poor performance and lack of engagement in the teaching enterprise.").

44. See generally Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. ST. THOMAS L.J. 366, 369 (2008) (discussing studies that suggest generational shifts in perceptions of self-importance and individual priorities that present challenges for educators concerned with instilling in students a sense of responsibility toward others).

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Teaching generally involves a commitment to ongoing improvement<sup>45</sup> and development of teaching skills.<sup>46</sup> Because law professors are also lawyers, there is an ongoing obligation to keep current with updates in the law in order to ensure mastery in the doctrines and theories of the subject matters they teach. In the current “new normal” climate, specialized knowledge and its application must be communicated in such a way to ensure that students absorb the substance and understand the significance of laws and their operation. The law professor should remain aware that each student learns differently—be they abstract or concrete thinkers; visual or auditory learners. Law professors should also be reasonably prolific in the varying types of learning theories such as independent learning theory,<sup>47</sup> self-directed learning theory,<sup>48</sup> schema theory,<sup>49</sup> heuristic learning theory,<sup>50</sup> and mastery learning theory.<sup>51</sup> As one author noted, “if we understand how law students learn

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45. Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 HOW. L.J. 447, 455 (2013) (noting that “law professors and law schools always can, and should, do more to improve their teaching and student learning . . .”).

46. For scholarly articles regarding teaching suggestions and insights for law school professors, see generally Paul T. Wangerin, *Teaching and Learning in Law School: An “Alternative” Bookshelf for Law School Teachers*, 29 GONZ. L. REV. 49, 50 (1994) (suggesting that teachers develop an alternate bookshelf that contains materials on teaching and learning and offers several works); GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (1999); HOWARD E. KATZ & KEVIN FRANCIS O’NEIL, *STRATEGIES AND TECHNIQUES OF LAW SCHOOL TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS* (2009); MADELEINE SCHACHTER, *THE LAW PROFESSOR’S HANDBOOK: A PRACTICAL GUIDE FOR TEACHING LAW* (2004); MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 169–87 (2009).

47. Independent learning theory subscribes to the idea that students should be trained to become independent from teachers. See generally Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985) (discussing individualized learning); Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55, 58 (1989).

48. Self-directed learning theory encourages the adult student learner to take increased responsibility for learning—and thereby move away from a passive recipient mode. See generally Stephen Brookfield, *Self-Directed Learning: A Critical Review of Research*, in *SELF-DIRECTED LEARNING: FROM THEORY TO PRACTICE, NEW DIRECTIONS FOR CONTINUING EDUCATION* 5, 11 (Stephen Brookfield ed., 1985).

49. Schema theory argues true understanding occurs when incoming information is broken down and patterned into a structure or a schema. See generally John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275 (1989).

50. Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 682–85 (1994) (discussing the various forms of learning theory).

51. Mastery Learning Theory is a concept of achievable, widespread excellence. The theory is that “with little more investment of time and resources than we now make, we can create

we can teach to their learning styles and produce better students.”<sup>52</sup> Current technological advances should therefore be taken into account, recognizing the impact of those advances on different student learning styles, and the ability of students to gain the necessary knowledge and skills to be effective members of the legal community.

For many “new normal” law students, “the only world they have ever known has been digital.”<sup>53</sup> As one scholar aptly noted, these students “have always had cable, have never really thought of ‘cookies’ and ‘spam’ as just food items, have never ‘dialed’ a telephone, have never had to use a bottle of ‘White Out’—much less had to retype an entire page—before handing in a paper,” “have always used ‘Google’ as a verb, have probably never ‘rolled down’ a car window, [and] have never thought that ‘off the hook’ had anything to do with a telephone . . . .”<sup>54</sup> These “digital natives”<sup>55</sup> think and process information “fundamentally differently from their predecessors.”<sup>56</sup> Many of them show deficiencies in basic critical reading, thinking, analysis, and writing skills.<sup>57</sup> It is imperative that law professors understand how these students learn and keep abreast of technology used by students and technology available for use in the classrooms. Law professors should remain amenable to incorporating “new and varied approaches to the traditional lecture in order to engage students.”<sup>58</sup> Student engagement is a critical adaptation to the learning style of the current generation

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an instructional environment in which virtually all students can and will learn well most of what we have to teach them.” Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 896 (1985).

52. Roach, *supra* note 50, at 682.

53. Samantha A. Moppett, *Control-Alt-Incomplete? Using Technology to Assess “Digital Natives,”* 12 CHI.-KENT J. INTELL. PROP. 77, 79 (2013).

54. Camille Broussard, *Teaching with Technology: Is the Pedagogical Fulcrum Shifting?*, 53 N.Y. L. SCH. L. REV. 903, 913 (2009).

55. The term “digital natives” has been used to describe those that were “born after 1980, when social digital technologies, such as Usenet and bulletin board systems, came online.” JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 1 (2008).

56. Moppett, *supra* note 53, at 79 (citing FRANCES JACOBSEN HARRIS, *I FOUND IT ON THE INTERNET: COMING OF AGE ONLINE* viii (2005)). See also Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 19 (2002) (“Students entering law school today differ from their predecessors of twenty years ago because they are very technology savvy.”).

57. Nancy B. Rappaport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN. ST. L. REV. 1119, 1143–44 (2012).

58. Broussard, *supra* note 54, at 913–14 (stating that “law professors need to be prepared to incorporate new and varied approaches to the traditional lecture in order to engage their students” because “[d]efending traditional pedagogical approaches will become increasingly difficult”).

of digital natives. In 2012, the American Bar Association (“ABA”) Section on Legal Education and Admissions to the Bar Standards Review Committee proposed revisions to the Standards for Approval for Law Schools (“Accreditation Standards”) to shift from traditional input measures and instead emphasize outcome measures.<sup>59</sup> With the focus on outcome measures, the law professor’s role is not simply to transfer information to the students.<sup>60</sup> Rather, the focus is on what the students have learned from the educational experience.<sup>61</sup> These outcome measures will therefore depend on the ability of the law professor to address her student’s learning styles and abilities, and adjust teaching methods accordingly.

### *B. Trustworthiness In Teaching*

As with any effective teaching, there must also be a necessary element of trustworthiness.<sup>62</sup> As one scholar noted, “[a]lthough there are many ways to teach well, successful teaching of any kind requires trust. . . . [Trust that is deserved by] tak[ing] personal responsibility for the accuracy or sincerity”<sup>63</sup> in interactions with students. This element of trustworthiness develops in the classroom. A good teacher will therefore foster a classroom environment conducive to learning. Studies suggest that creating a learning environment<sup>64</sup> is so critical to the success of learners that no other technique we use as educators will be effective without first addressing this.<sup>65</sup>

Scholarly research and articles have delved into the impact of the classroom atmosphere on child-student learning.<sup>66</sup> Research suggests,

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59. See ABA SEC. LEG. EDUC. & ADMIS. TO B., STANDARDS REVIEW COMMITTEE, STANDARDS REVIEW DOCUMENTS CHAPTERS 1–7 (2011). See also Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 608 (2010).

60. Moppett, *supra* note 53, at n. 31 (citing Robert B. Barr & John Tagg, *From Teaching to Learning*, CHANGE, Nov.-Dec. 1995, at 13, 16, 19–20).

61. See BARBARA E. WALVOORD, ASSESSMENT CLEAR AND SIMPLE 3 (2004).

62. Fallon, Jr., *supra* note 3, at 247.

63. *Id.*

64. A “learning environment” has been defined as “all of the physical surroundings, psychological or emotional conditions, and social or cultural influences affecting the growth and development of an adult engaged in an educational enterprise.” Roger Hiemstra, *Aspects of Effective Learning Environments*, in CREATING ENVIRONMENTS FOR EFFECTIVE ADULT LEARNING 5, 8 (Roger Hiemstra ed., 1991).

65. See generally D.W. TILESTON, TEN BEST TEACHING PRACTICES (2000).

66. See, e.g., Xinyi Wu, *Intrinsic Motivation and Young Language Learners: The Impact of the Classroom Environment*, 31 SYSTEM 501 (2003); Letty J. Rayneri, Brian L. Gerber, &

however, that although adult learners are different from children in many respects, they have many characteristics that are not dissimilar from children.<sup>67</sup> When a student (child or adult) has a lot on his or her mind, such as problems causing anxiety, little space is left for learning activities, and the usual result is ineffective learning.<sup>68</sup> By its nature, law school creates an atmosphere that can foster anxiety. As one scholar put it, “the stresses of attending law school are legendary.”<sup>69</sup> Large amounts of reading, a heavy workload, grades, and competition for class placement create “major stressors.”<sup>70</sup> When additional stressors are unnecessarily encountered in the learning environment, the consequences can prove devastating, resulting in a significant decline in a student’s well-being, including anxiety, panic attacks, depression, substance abuse, and suicide.<sup>71</sup> The gravity of these effects underscores the importance for creation of a classroom environment conducive to learning. One study conducted to determine categories most influential on learning environments<sup>72</sup> revealed that among the most influential categories, many involved social and emotional elements in learning (e.g. student-teacher social interactions, classroom climate, peer

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Larry P. Wiley, *The Relationship Between Classroom Environment and the Learning Style Preferences Of Gifted Middle School Students and the Impact On Levels Of Performance*, 50 GIFTED CHILD Q. 104 (2006); James E. Tarr, et al. *The Impact Of Middle-Grades Mathematics Curricula and the Classroom Learning Environment On Student Achievement*, 39 J. FOR RES. MATHEMATICS EDUC. 247 (2008); Yin Cheong Cheng, *Classroom Environment and Student Affective Performance: An Effective Profile*, 62 J. EXPERIMENTAL EDUC. 221 (1994); Barry C. Dart, et al. *Students’ Conceptions of Learning, the Classroom Environment, and Approaches to Learning*, 93 J. OF EDUC. RES. 262 (2000).

67. See generally MALCOLM S. KNOWLES, ELWOOD F. HOLTON & RICHARD A. SWANSON, *THE ADULT LEARNER: THE DEFINITIVE CLASSIC IN ADULT EDUCATION AND HUMAN RESOURCE DEVELOPMENT* (6th ed. 2005) (discussing the classical theory of andragogy theory in adult learning and recognizing the difference and similarities between adult and child learning).

68. KATHERINE A. GREENBERG, *THE COGNITIVE ENRICHMENT ADVANTAGE TEACHER HANDBOOK* 69 (2000).

69. Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die From Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOYOLA L. REV. 791, 794 (2014).

70. REBECCA NERISON, *LAWYERS, ANGER & ANXIETY: DEALING WITH THE STRESSES OF THE LEGAL PROFESSION* 68 (2010).

71. NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* 6–8 (2010); DOUGLAS LITOWITZ, *THE DESTRUCTION OF YOUNG LAWYERS BEYOND ONE L* 16–26 (2006); NERISON, *supra* note 70, at 15–39; Corie Rosen, *The Method and the Message*, 12 NEV. L.J. 160, 161 (2011).

72. Margaret C. Wang, Geneva D. Haertel, & Herbert J. Walberg, *What Influences Learning? A Content Analysis of Review Literature*, 2 J. OF EDUC. RES. 91 (1997).

group).<sup>73</sup> Classroom management and climate, and student-teacher interactions directly correlated to effective instruction.<sup>74</sup> As an instructor, facilitating learning and the content of what is offered cannot be separated from the social environment in which it is offered. The research supports that a good “teacher,” therefore, must necessarily also create and provide a conducive learning environment. As the AAUP Statement of Ethics states:

As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student’s true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them.<sup>75</sup>

To create or foster a classroom environment with social or emotional stressors is unnecessary to the practice of law and could do a grave disservice to students, hindering their ability to do what they attend law school to do: learn the law. The mantra of “academic freedom” cannot be used to cloak behavior that is detrimental to the advancement of students. Certainly law professors should, as one author notes, “honor academic freedom as a great and indispensable value because it serves the values of understanding, knowledge, and truth that are greater still.”<sup>76</sup> However, the “freedom” granted through academic freedom cannot be boundless. Particularly where any lack of boundaries will serve as an instrument to permit abuse and belittling of students and generate an unhealthy learning climate. Creating an environment conducive to learning will encompass the necessary obligation of trustworthiness.

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73. *Id.* at 94.

74. *Id.*

75. AAUP, *Statement of Professional Ethics*, <http://www.aaup.org/report/statement-professional-ethics> (last accessed Sept. 9, 2016) (emphasis added). The Statement was originally adopted in 1966. Revisions were made and approved by the Association’s Council in 1987 and 2009.

76. Robert George, *Why Academic Freedom Matters (Now More Than Ever)*, INTERCOLLEGIATE R. (May 19, 2014), <http://www.intercollegiatereview.com/index.php/2014/05/19/why-academic-freedom-matters-now-more-than-ever/>.

*C. Teacher as Mentor and Counselor*

Trustworthiness is also foundationally critical as it pertains to two interrelated roles of a law professor: that of 1) mentor and 2) counselor.<sup>77</sup> These roles become particularly highlighted where the law professor is a member of a historically underrepresented category of professors, or teaches in an institution where the mission, in whole or in part, is committed to racial and ethnic diversity in the legal profession as it relates to the students, the institution, and the profession of law as a whole.<sup>78</sup>

Although institutions of higher learning in the United States have become increasingly diverse over the past few decades,<sup>79</sup> as one renowned scholar points out, there is still a “long way to go.”<sup>80</sup> Empirical evidence indicates that the demographic makeup of law faculties compared to the larger pools of lawyers and the general public has increased in recent years.<sup>81</sup>

However, of the over 9,000 law professors<sup>82</sup> in the United States, the percentages of those who would consider themselves members of an underrepresented class defined by gender or race are small. For example, a 2013 survey indicated that about 38.6% of all full-time law

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77. Fallon, Jr., *supra* note 3, at 247 (noting that “[t]he role of teacher carries especially enhanced obligations of trustworthiness in counseling students about what to do or believe”).

78. This article only generally addresses the law professor’s role where diversity in legal academia and in law schools is an issue.

79. The Department of Education’s, National Center for Education Statistics reported a 55.78% increase between 1997 and 2013 in the number of racial minorities who held faculty positions at colleges and universities. U.S. DEPARTMENT OF EDUCATION, INSTITUTE OF EDUCATION SCIENCES, NATIONAL CENTER FOR EDUCATION STATISTICS, *Digest of Education Statistics*, <http://nces.ed.gov/programs/digest> (last visited November 14, 2016) (the DOE Table 230 reported that 27,723 of full-time faculty were minorities in 2007. In 2013, the number reportedly rose to 43,188 (Table 315.20)). See also Angela Onwuachi-Wilig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH U. L. REV. 763, 770 (2010) (noting statistics that “between 1993 and 2003, the percentage of underrepresented minority faculty at “four-year institutions grew only 2% nationally, from approximately 6% to 8%.”).

80. *Id.*

81. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 128 (2016) (in examining which racial, gender, religious, and political groups were the most under- and overrepresented in 1997 and in 2013 compared to persons of similar ages in larger pools, the author determines that over the years of the study, minority groups moved from being underrepresented to being overrepresented in law teaching compared to the legal profession.).

82. *About*, AMERICAN ASSOCIATION OF LAW SCHOOLS, <http://www.aals.org/about.php> (last visited Sept. 24, 2016) (The AALS is a non-profit educational association of 176 law schools representing over 9,000 law faculty in the United States).

faculty (male and female) and 36.6% of all tenured faculty were minorities, with African-American professors making up the largest minority group (19.7%).<sup>83</sup> Statistics further reveal that by 2013, women comprised only 33.8% of all full-time law faculty in the United States.<sup>84</sup> Only 16.3% of all tenured law professors were women.<sup>85</sup>

Students belonging to similarly underrepresented classes statistically have lower Law School Admission Test scores and other low indicators of ability to succeed.<sup>86</sup> Oftentimes these students do not come from families or communities with any firsthand knowledge of the rigors and demands of a law school curriculum, and, without a fully-aware support system, the students have a more difficult time adjusting to law school than their majority counterparts.<sup>87</sup> Empirical evidence indicates that students of color and other non-traditional students are more likely than their white counterparts to suffer from isolation during their law school tenure, contributing to low academic performance, low self-esteem, low motivation, and increased psychological ramifications.<sup>88</sup> For these students, the role of mentor and counselor becomes particularly important—not just for those professors who share the same identifiable characteristics of the students, but for all professors who have the opportunity to teach any of these students. Critics may argue that all law students should be provided the same level of support from faculty and that saying there is a higher responsibility to underrepresented groups of students has the appearance of

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83. Elizabeth Mertz, et. al., *After Tenure: Post-Tenure Law Professors in the United States*, AM. BAR FOUND. 36 (2011), available at [http://www.americanbarfoundation.org/uploads/cms/documents/after\\_tenure\\_report\\_final\\_abf\\_4.1.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report_final_abf_4.1.pdf). (last visited November 14, 2016). See also AMERICAN BAR ASSOCIATION, *Law School Staff by Gender and Ethnicity*, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_school\\_staff\\_gender\\_ethnicity.xlsx](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_school_staff_gender_ethnicity.xlsx) (last visited November 14, 2016).

84. *Id.*

85. *Id.*

86. See generally David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Score for Equitable Law School Admissions*, 12 BERKELEY LA RAZA L.J. 399, 401–05 (2001) (discussing, generally, the LSAT “score gap” between minority and non-minority law applicants and citing statistics that indicate that the LSAT produces a discriminatory impact significantly greater than can be accounted for on the basis of prior academic achievement).

87. See generally Ostrom, *supra* note 2, at 540 (noting that “[f]or many law students, their first encounter with a member of the legal profession occurs at law school,” and that even though we “come across lawyers and judges in our everyday lives . . . for first-year law students who have taken the initial step in pursuing a legal career, often the law professor is the first person with legal authority they personally encounter”).

88. Roach, *supra* note 50, at 675–77.



unequal treatment or unfair bias. Acknowledging the strength and equity of the “equal opportunity” argument, the simple reality is that provision of support via mentoring and counseling is merely a tool creating an “equal” base for those underrepresented students. This is not to suggest that a law professor must actively seek out students to provide mentoring/counseling or that a law professor should engage in a system of spoon-feeding or handholding. Rather, it is a simple acknowledgement of the responsibility of the law professor to provide such mentoring/counseling as necessary and when solicited, at the very least.

#### *D. Role in Student Formation of Professional Identity*

As a mentor/counselor to all students, a law professor plays a critical role in helping students form their own moral identities: a concept used to describe “a holistic combination of motivational, social, emotional, and cognitive capacities that shape our decisions and behavior.”<sup>89</sup> The majority of students attending law school are adults with pre-conceived notions of the law, habitual behavior traits, and established moral beliefs and virtues.<sup>90</sup> In fact, scholars who have studied ethical identity and formation in law students have observed that “some law students arrive with a clear sense of purpose—of professionalism as living one’s ethics and values through the practice of law; and others arrive with more pragmatic motivations—of a lucrative career accompanied by some authority and autonomy.”<sup>91</sup> Yet, despite any established beliefs and identity, evidence supports that an individual’s identity—call it ethical, moral, or virtuous—can be enhanced and improved throughout one’s life. “[M]oral development was a matter of learning the norms of one’s culture, of accepting them and internalizing them, and of behaving in conformity to them.”<sup>92</sup> Research indicates

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89. Hamilton & Monson, *supra* note 34, at 933.

90. Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer’s Professional Identity*, 28 MISS. C. L. REV. 339, 347 (2009) (noting that many believe that law students are adults whose ethics and values are fully formed and relatively immutable once they come to law school).

91. Verna Monson & Neil Hamilton, *Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385, 391 (2011).

92. JAMES R. REST & DARCIA NARVÁEZ, *MORAL DEVELOPMENT IN THE PROFESSIONS: PSYCHOLOGY AND APPLIED ETHICS* 2 (1994).

that despite this foundational morality, adults can, in fact, change ethically.<sup>93</sup> Other research and analysis has shown that educational programs that are “continually refined . . . can foster an identity that is grounded in the public purposes, core values and ideals of a profession.”<sup>94</sup>

In 2007, a study on legal education by the Carnegie Foundation for the Advancement of Teaching reported that although law schools shape “the minds and hearts of their graduates,”<sup>95</sup> law schools are “especially salient in the development of professional purpose and identity.”<sup>96</sup> The Carnegie report further noted,

Although some people believe that law school cannot affect students’ values or ethical perspectives, in our view law school cannot *help* but affect them. For better or worse, the law school years constitute a powerful moral apprenticeship, whether or not this is intentional. Law schools play an important role in shaping students’ values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyers and the criteria by which they define and evaluate professional success.<sup>97</sup>

In part due to the Carnegie Report, more scholars have sounded the call to law professors to recognize their vocation as a “unique opportunity and . . . obligation to show students the direction to humanity and to responsibility,”<sup>98</sup> and noted that the “focus on professional identity and integrity must be intentional, it must be pervasive, and it must start in the first year.”<sup>99</sup> The American Bar Association (“ABA”) has also recognized the importance of this particular aspect of a law

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93. See Lawrence Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 J. PHIL., Oct. 25, 1973, at 630–31 (outlining the six stages of moral judgment indicating that logic and morality develop through constructive stages); see also Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 482 (2008) (Professor Hamilton’s model of professionalism indicates that ethical identity can be developed across one’s lifespan); see generally JAMES REST, *MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY* (1986).

94. Bebeau, *supra* note 44, at 367.

95. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 129 (2007).

96. *Id.*

97. *Id.* at 139 (emphasis omitted).

98. Ciampi, *supra* note 4, at 883 (charging American law schools to teach law students that lawyers “can and must answer their call to humanity in the profession and to responsibility in the community”).

99. Floyd, *supra* note 90, at 348 (providing a detailed example of one school’s efforts to cultivate professional identity).

professor's role.<sup>100</sup> In July 2011, the ABA's Section of Legal Education proposed changes regarding professionalism to Accreditation Standard 302 on Learning Outcomes.<sup>101</sup> The proposed changes require the learning outcomes for each accredited law school to include competency as an entry-level practitioner as stated in the following areas:

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] knowledge and understanding of the following values: . . . (ii) *the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law . . .*<sup>102</sup>

These proposed changes evidence the profession's recognition of the need for law schools to play a more active role in fostering each student's "ethical professional identity."<sup>103</sup> The recognition of the need for law professors to do more to "foster each student's ethical professional identity"<sup>104</sup> has resulted in a proposed paradigm shift in legal education.<sup>105</sup> Using empirical evidence, Professors Neil Hamilton and Verna Monson supported the proposal of a:

. . . shift from a static definition of professionalism and ethical professional identity, focused on ethics education about the Rules of Professional Conduct, to a constructive developmental definition that emphasizes also fostering each student's moral core of responsibility to others, trustworthiness and honesty, independent counsel to clients, and habits of seeking feedback, reflection, and self-assessment.<sup>106</sup>

The law professor's important role in this process of developing a moral core is critical to the development of the student-lawyer—both

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100. See *Draft for July Meeting, Program of Legal Education*, A.B.A. (July 9, 2011), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july2011meeting/20110621\\_ch\\_3\\_program\\_of\\_legal\\_education\\_redlined\\_to\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_redlined_to_standards.authcheckdam.pdf); *Draft for April Meeting, Program of Legal Education*, A.B.A. (April 2-3, 2011), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/april\\_2011\\_meeting/report\\_of\\_subcommittee\\_on\\_student\\_learning\\_outcomes\\_redline\\_to\\_january\\_2011\\_draft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/april_2011_meeting/report_of_subcommittee_on_student_learning_outcomes_redline_to_january_2011_draft.authcheckdam.pdf).

101. *Id.*

102. *Id.* at 2–3 (emphasis added).

103. See Hamilton & Monson, *supra* note 34 at 924–26.

104. *Id.* at 923.

105. *Id.*

106. *Id.* at 963.

as a professional and as a humane member of society.<sup>107</sup>

## V. OBLIGATIONS TO LEGAL PROFESSION

With a substantial amount of time and energy dedicated to fulfilling the obligations to students and law schools, law professors may hold the belief that they are ensconced in institutional cocoons: isolated and separated from the practicing bar and greater legal community. Certainly there is a percentage of law professors who have never practiced law<sup>108</sup> and another slightly higher percentage whose tenure in the practice was brief, and who do not maintain active licenses as members of a state bar.<sup>109</sup> Nevertheless, as the molders and teachers of future lawyers, law professors are inescapably an intricate part of the legal profession. Those law professors who are also members of a state bar are subject to the ethical rules that govern the relevant jurisdiction. Law professors who are not bar members should nevertheless adhere to the ethical rules, in addition to maintaining compliance with applicable professional standards. It is unfortunate when “[l]egal educators and practicing lawyers [view] themselves as being separated by a ‘gap’” instead of recognizing that “they are engaged in a common enterprise—the education and professional development of the members of a great profession.”<sup>110</sup> Beyond the duties of teaching our students, furthering scholarly pursuits, and ensuring the substantive competence of tomorrow’s lawyers, law professors have a broader obligation in this

107. Ciampi, *supra* note 4, at 896 (noting that the “effective selection of the profession the law professor presents to the student, and how the professor guides the student into the world of law, are critical to the professional and humane development of the student-lawyer”).

108. See James M. Dente, *Need For More Professors Who Have Practiced Law*, 18 CLEV. ST. L. REV. 252 (1969) (noting that many law schools hired as new professors “only those whom they consider to be legal scholars [who] are inexperienced recent graduates with good academic records and who had published law review articles”). See also Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 126–30 (discussing the limited practice experience of many law professors).

109. See Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 144 (2001) (noting that “[t]he practice experience of many law professors at many prominent law schools will have been brief, and the life and concerns of practice soon seem far removed from current intellectual interests, even in the case of those who practiced for substantial periods”).

110. See ROBERT MACCRATE ET. AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 3 (A.B.A. Sec. Legal Educ. & Admissions to the Bar ed., 1992) (also known as the “MacCrate Report”), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report%29.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf).

“common enterprise”<sup>111</sup> to ensure that the attributes and qualities displayed by new lawyers will serve to uphold and enhance the standards of the legal profession. Intellectual pursuit cannot be the sole charge of the law professor. This obligation to the legal profession is, in a sense, inextricably woven with a law professor’s obligation to her students. Learning how to respect and relate to others within the practice of law should therefore be a part of the mission of legal education<sup>112</sup> and an integral component of the law professor’s role.

As the law professor fulfills the role in assisting students to form an ethical identity discussed previously, it is imperative that the law professor acknowledges and addresses challenges articulated by the legal profession. Law is a profession that takes pride in its “professional status.”<sup>113</sup> Yet, over the years one of the most frequently articulated concerns has related to the state of professionalism exhibited by members of the legal profession, and the perception of the lack of professionalism held by the general public.<sup>114</sup> Unprofessional behavior exhibited by some members of the legal profession has led to the conclusion that attorneys are “fail[ing] to absorb the significance of practicing professionalism.”<sup>115</sup> This lack of professionalism has been aptly noted as a “crisis.”<sup>116</sup> Research evidences that law schools can, in

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111. *Id.*

112. William J. Rich, *Measuring Judicial Success: Interpersonal Intelligence and Commitment to Enduring Values*, 47 WASHBURN L.J. 35, 37 (2007) (discussing characteristics of interpersonal intelligence and self-assurance to determine if law professors should model the characteristics of successful judges).

113. See Nicola A. Boothe-Perry, *Professionalism’s Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOYOLA L. REV. 517, 520 (2009) (noting that law is a profession that “takes pride in ‘professional status’ and is hypersensitive about its image”).

114. See CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 17 (1999), <http://ccj.nsc.org/~media/microsites/files/ccj/web%20documents/national-action-plan-full.ashx> (noting how the unethical and unprofessional conduct of a small portion of lawyers has tainted the image of the legal community and diminished public confidence in legal and judicial institutions). See also Richard Abel, *Book Review of Marc Galanter, Lowering the Bar: Lawyer Jokes and Legal Culture*, 57 J. LEGAL EDUC. 130 (March 2007); Sullivan & Podgor, *supra* note 109, at 150 (noting that “[t]he lack of public confidence in the value of the legal profession and in the work that lawyers do, together with the apparent lack of self-confidence within the profession, are festering problems today.”).

115. See Nicola A. Boothe-Perry, *Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 635 (2011).

116. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 136–37 (2007) (This “crisis” also includes a decline in the role of the counselor and in lawyers’ competence, including ethical competence, and a new “sense of the law as a business, subject to greater competitive economic pressures and answerable only to the bottom line.”).

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fact, promote the development of mature moral thinking in its students, which inevitably will result in increased ethical conduct and professional behavior.<sup>117</sup>

Competence and effectiveness are consistently elicited in defining “good” lawyers.<sup>118</sup> In addition, empirical data indicates that a lawyer’s success and effectiveness is inextricably linked to the lawyer’s professionalism.<sup>119</sup> The ABA has long recognized the importance of “teaching” professionalism, and the law school and law professor’s role towards that end.<sup>120</sup> In July 1992, the ABA’s Section on Legal Education and Admissions to the Bar, chaired by Robert MacCrate, issued “An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap” (“MacCrate Report”).<sup>121</sup> The central mission of the MacCrate Report Task Force was twofold.<sup>122</sup> First, the Task Force sought to identify the necessary skills and values for lawyers to describe what law schools and the practicing bar were doing to advance the professional development of lawyers.<sup>123</sup> Second, the group was tasked to formulate recommendations on how the legal education community and the practicing bar can join together to fulfill their respective responsibilities to the profession and the consuming public.<sup>124</sup> The Task Force concluded in part that it is the responsibility of law schools and the practicing bar to make a collected effort in order

117. *Id.* at 133, 135 (noting that “[l]aw school experiences, if they are powerfully engaging, have the potential to influence the place of moral values such as integrity and social contribution in students’ sense of self.”).

118. The Preamble to the Model Rules of Professional Conduct states directly that “[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” MODEL RULES OF PROF’L CONDUCT, Preamble 7 (AM. BAR ASS’N 2013). In addition, the Model Rules’ Preamble specifically requires a lawyer to observe the Model Rules. *Id.* at Preamble (7), (12), (14). Rule 8.4(a) states that it is professional misconduct to violate the Rules, which includes Rule 1.1 on competence and Rule 1.3 on diligence. MODEL RULES OF PROF’L CONDUCT r. 8.3 (AM. BAR ASS’N 2013).

119. *See generally* Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 139 (2011).

120. *See* ROBERT MACCRATE, *supra* note 110.

121. *Id.*

122. *Id.* at 8 (“To identify those skills and values, to describe what law schools and the practicing bar are now doing to advance the professional development of lawyers, and to recommend how the legal education community and the practicing bar can join together to fulfill their respective responsibilities to the profession and the consuming public has been the central mission of this Task Force.”)

123. *Id.*

124. *Id.*

to assist students and lawyers in “developing the skills and values required” of them to fulfill the responsibilities to the profession and the public.<sup>125</sup> The Report recommended “enhancing professional development during the law school years.”<sup>126</sup> The Report further analyzed “professional values” and noted that “training in professional responsibility” should involve more than “just the specifics of the Code of Professional Responsibility and the Model Rules of Professional Conduct”; it should encompass “the values of the profession,” including “the obligations and accountability of a professional dealing with the lives and affairs of clients.”<sup>127</sup>

A key element of the law professor’s role should involve a commitment to instruct and “train” our students in the principles and standards of the legal profession.

## VI. OBLIGATIONS TO INSTITUTION

The law professor’s individual conscience and commitment to academic and holistic growth of law students is a primary role. In addition, faculty members and administrators of law schools should have a “legitimate interest in the maintenance of proper standards of faculty responsibility on the part of all members of the academic community.”<sup>128</sup> The unique mission of higher education (that of creation of knowledge and the teaching of the “discipline of dissent”) is the basic justification for academic freedom<sup>129</sup> and also shared governance.<sup>130</sup> Although most administrative duties are fulfilled by administrators in law schools (many of whom are law professors themselves), the faculty

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125. *Id.* at 8.

126. *Id.* at 327, 330.

127. *Id.* at 135–36 (quoting Robert B. McKay, *What Law Schools Can and Should Do (and Sometimes Do)*, 30 N.Y.L. SCH. L. REV. 491, 509–10 (1985)).

128. Neil Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 243–44 (2001) (quoting American Association of University Professors, *Academic Responsibility: Comments by Members of Committee A Incident to Consideration of the Koch Case*, 49 AAUP BULL. 40, 40 (1963)).

129. *Id.* at 233 (describing “academic freedom” as a “tradition where college and university employers, acknowledging higher education’s unique mission of creating knowledge and teaching the discipline of dissent, have granted exceptional vocational freedom of speech to professors in research, teaching, and extramural utterance.”).

130. *Id.* at 232 (quoting Eric Ashby, *A HIPPOCRATIC OATH FOR THE ACADEMIC PROFESSION*, 7 *Minerva* 64, 65 (1968–1969)).

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as a whole retains substantial collective responsibility to provide institutional leadership.<sup>131</sup> This leadership can only be accomplished effectively in the face of collegial behavior.

#### A. Provision of Institutional Leadership

The American Association of University Professors (“AAUP”) Statement of Professional Ethics reinforces the importance of this aspect of a law professor’s role. The AAUP’s stated mission is to “advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education’s contribution to the common good.”<sup>132</sup> In its “Statement of Professional Ethics,” the AAUP states that professors must “accept their share of faculty responsibilities for the governance of their institution.”<sup>133</sup> This necessitates that the law professor partic-

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131. *American Association of Law Schools Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, <http://www.aals.org/members/other-member-services/aals-statements/ethics/> (membership log-in needed). See also *AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*, WASHBURN UNIV. SCHOOL OF LAW (Nov. 17, 1989), <http://washburnlaw.edu/facultystaff/otherpolicies/aalsgoodpractices.html> (stating that “[l]aw professors have a responsibility to participate in the governance of their university and particularly the law school itself. Although many duties within modern universities are assumed by professional administrators, the faculty retains substantial collective responsibility to provide institutional leadership. Individual professors have a responsibility to assume a fair share of that leadership, including the duty to serve on faculty committees and to participate in faculty deliberations.”). See also Gene A. Marsh, *ETHICAL RESPONSIBILITIES IN TEACHING CONSUMER PROTECTION LAW*, 60 CONSUMER FIN. L.Q. REP. 11, 16 (2006).

132. *Mission*, AAUP, <http://www.aaup.org/about/mission-description> (last visited Sept. 24, 2016).

133. *Statement on Professional Ethics*, AAUP (1966), <http://www.aaup.org/report/statement-professional-ethics>. (This statement was originally adopted in 1966 and later adopted by the AAUP’s Council in 1987.).

The Statement [reads]:

1. Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibility to their subject is to seek and to state the truth as they see it. To this end, professors devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although professors may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.
2. As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their



ipates in the governance of both the law school and the parent university by serving on faculty committees and participating in faculty deliberations. This encompasses both matters of academic concern and any other issues of institutional policy.<sup>134</sup> Some law school faculty and committee meetings might oftentimes want for social or intellectual stimulation, or elicit a sense of *déjà vu*.<sup>135</sup> Nevertheless, consistent and active participation in these endeavors is an inescapable obligation of the law professor. Law professors should be able to contribute to the

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proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them. They protect their academic freedom.

3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from their own. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.
4. As members of an academic institution, professors seek above all to be effective teachers and scholars. Although professors observe the stated regulations of the institution, provided the regulations do not contravene academic freedom, they maintain their right to criticize and seek revision. Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of work done outside it. When considering the interruption or termination of their service, professors recognize the effect of their decision upon the program of the institution and give due notice of their intentions.
5. As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

134. See *Bylaws*, ASSOCIATION OF AMERICAN LAW SCHOOLS, <http://www.aals.org/about/handbook/bylaws/> (last visited Sept. 24, 2016) (Section 6-5(a) states that "a member school shall vest in the faculty primary responsibility for determining academic policy."). See generally Susan P. Liemer, *Hierarchy Of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351, 365 (2004) [hereinafter Liemer] (noting that the AALS does not limit faculty to academic matters when it requires that member schools vest faculty with primary responsibility for institutional policy).

135. Liemer, *supra* at 134 at 351 (The author states that "[f]or anyone who has been teaching at an American law school for a few years, the agenda for any given faculty meeting may elicit a sense of *déjà vu*. From time to time the grading system or the honor system will be revisited, committees focusing on topics from admissions to graduation will give reports, and the dreaded curriculum reform or self-study will resurface.").

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dialogue in a productive and efficient manner, refraining from filibuster discourse. Even though we “maintain the right to criticize and seek revision,”<sup>136</sup> that right should not be exercised to the detriment of colleagues or the institution. It is also imperative to recognize that committees and faculty meetings are not vehicles to promote self-interested pursuits. Rather, these meetings provide an opportunity for collective engagement towards a goal of advancement of the institution.

### B. Collegiality

As the Statement of Professional Ethics notes, “[professors should] respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from their own.”<sup>137</sup> This “respect” for “associates” is key to the law professor’s role both inside and outside the law school community.<sup>138</sup>

The AAUP notes that “[a]s colleagues, professors have obligations that derive from common membership in the community of scholars . . . [and] do not discriminate against or harass colleagues.”<sup>139</sup> The need for reinforcement of this dictate of collegiality has sparked little scholarly interest over the years,<sup>140</sup> despite the fact that it is a recurring topic of conversation among law school faculty members. Despite research and discourse on the topic, the fully-collegial law school faculty

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136. *Statement on Professional Ethics*, *supra* note 133.

137. *Id.*

138. *Id.*

139. *Id.*

140. Michael L. Seigel, *On Collegiality*, 54 J. LEGAL EDUC. 406, 407 (2004) (Professor Siegel notes that “though much talked about in academic circles, collegiality has received scant attention in academic writing.”). See Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609 (2001); Gregory M. Heiser, “*Because the Stakes are so Small*”: *Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. KAN. L. REV. 385 (2004) (analyzing the issue of collegiality from a sociological perspective).

The literature does evidence articles of collegiality as it deals specifically with its use as a factor for the tenure and promotion process. For in-depth literature on that tangential topic regarding collegiality as a factor to be considered in the tenure and promotion process, see generally Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J. C. & U. L. 833 (2001) (presenting an analysis of the policy arguments for and against consideration of collegiality in higher education tenure, promotion, and termination decisions and a review of the relevant case law that discusses and analyzes the issue); Edgar Dyer, *Collegiality as a Factor in Faculty Employment Decisions at Public Colleges and Universities: A Selective Review of the Caselaw*, 152 EDUC. L. REP. 455 (2001); Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 EDUC. L. REP. 1053 (1983).

seems to be more of an anomaly than a normalcy in many of our nation's law schools. Uncollegial behavior remains an invidious evil in law school faculty.

In 2006, Professors Michael L. Seigel and Kami Miner-Rubino published preliminary findings of an empirical study of collegiality among law professors.<sup>141</sup> Of the 8,029 law faculty members solicited, 1,256 submitted at least a partially completed survey on collegiality.<sup>142</sup> Respondents reported generally positive, but far from ideal, conditions at their respective institutions.<sup>143</sup> The findings suggested that a minimum level of collegiality is more or less the norm.<sup>144</sup> However, the data revealed that what “[l]urk[ed] behind the norm” was “a moderate degree of affirmatively uncollegial conduct” occurring on a regular basis at most law schools.<sup>145</sup> Conduct such as being “[p]ut down” or having “been condescending to” was reported by 53.3% of faculty members.<sup>146</sup> A full 36.5% of respondents reported that a colleague had made “insulting or disrespectful remarks” to them at least once during the prior year; and a substantial majority (55.5%) claimed that a colleague had “interrupted or spoke[n] over” them at least once, with 43.3% contending that this had happened on more than one occasion.<sup>147</sup> A number of survey-takers (38.8%) claimed to be the victims of “the silent treatment” by a colleague one or more times during the previous twelve months.<sup>148</sup> What might have been more disturbing was the empirical data indicating that lying is a common behavior on law school faculties.<sup>149</sup> More than a third of the respondents reported to having been the direct victim of dishonesty at least once in the previous year.<sup>150</sup> More rampant was dishonesty in the form of attempting to

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141. Michael L. Seigel & Kathi Miner-Rubino, *Some Preliminary Statistical, Qualitative, and Anecdotal Findings of an Empirical Study of Collegiality Among Law Professors*, 13 WIDENER L. REV. 1 (2006).

142. *Id.* at 7.

143. *Id.* at 10–11.

144. *Id.*

145. *Id.* at 11.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* (31.5% of respondents reported having been the direct victim of dishonesty at least once in the last year).

influence faculty governance or policy “in an underhanded or dishonest way.”<sup>151</sup> “Bad faith”<sup>152</sup> lobbying for an institutional resource allocation (e.g., chair, money, faculty appointment) was noted by an even greater percentage of respondents.<sup>153</sup> Another trend of uncollegiality was noted from the 72.2% of survey respondents who claimed to witness a colleague “[s]hirking committee or other governmental responsibilities.”<sup>154</sup>

Although 24% of respondents declared their institutions as a “fun, collegial place to work,”<sup>155</sup> the uncollegial reports remained glaring, with suggested reasons such as the power differential commonly found at law schools between the tenured and tenure-track faculty,<sup>156</sup> the few “bad apples” on the faculty who perpetuate the uncollegial behavior,<sup>157</sup> and an “ineffective (or worse) dean or administration.”<sup>158</sup> Smaller percentages of comments pointed to uncollegiality stemming from issues of discrimination (e.g. sexism,<sup>159</sup> racism,<sup>160</sup> and “discrimination against white males and/or conservatists;”<sup>161</sup>); generational divides;<sup>162</sup> division between “scholars” and “teachers”;<sup>163</sup> and “inter-school competition for students.”<sup>164</sup>

Whatever the root causes, these disturbing statistics indicate that the oft-touted and sought-after collegiality in law schools is lacking.<sup>165</sup>

151. *Id.* (41.4% of respondents reported instances of dishonest influences on faculty governance or policy).

152. *Id.* (defining “bad faith” as conduct performed “for selfish motives as opposed to an honest belief in the best interests of the institution”).

153. *Id.* (citing the percentage as 42.4%).

154. *Id.* at 12.

155. *Id.* at 13.

156. *Id.* at 17.

157. *Id.* at 19–20 (noting that the statistics support an underlying assumption in his previous scholarship that most of the problems law schools face in the collegiality arena stem from the conduct of a very small minority of extremely difficult faculty members).

158. *Id.* at 23.

159. *Id.* at 21 (commenting that the law school is “sexist, either overtly or unconsciously”).

160. *Id.* at 28–29.

161. *Id.* at 26.

162. *Id.* at 28.

163. *Id.* at 29.

164. *Id.* at 30.

165. A precise definition of “collegiality” has provided fodder for scholars. In *Mayberry v. Dees*, the court weighed in on the issue, defining collegiality as “the capacity to relate well and constructively to the comparatively small bank of scholars on whom the fate of the university rests.” 663 F.2d 502, 514 (4th Cir.1981), *cert. denied*, 459 U.S. 830 (1982). As Professor Michael Seigel notes however, this definition raises more questions than it answers. Questions such as “[d]o colleagues truly need to ‘relate well’ to each other? Or was the court suggesting something more Machiavellian—that a faculty member needs to get along with his institution’s power-

Law faculties are subject to the regulations of the institutions at which they teach.<sup>166</sup> Some institutions include within their teaching or service components a requirement that professors contribute as collegial members<sup>167</sup> or demonstrate “professional collegiality.”<sup>168</sup> Others use collegiality as a factor to be considered in the tenure and promotion process.<sup>169</sup> The court in *Mayberry v. Dees* recognized the importance of collegiality even in the presence of Constitutional rights, stating that to the extent that professor’s remarks may tend to diminish collegiality of the department, “one may, without offending the Constitution, base decision not to recommend tenure on content of remarks, although they enjoy First Amendment protection.”<sup>170</sup>

Whether or not an institution has specific regulations for faculty collegiality,<sup>171</sup> law professors must realize that conduct and behavior within the institution reflects not only on them as individuals, but more importantly on the status and perception of the institution itself. If law

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wielding insiders or risk endangering his career?” See Michael L. Seigel, *supra* note 130, at 410.

166. Marsh, *supra* note 131, at 15.

167. Auburn University requires that a candidate for tenure demonstrate that he or she “contributes as a productive and collegial member of the academic unit in all relevant areas” addressing issues such as whether “the candidate’s professional abilities and relationships with colleagues [are] compatible with the departmental mission and with its long-term goals? Has the candidate exhibited an ability and willingness to engage in shared academic and administrative tasks that a departmental group must often perform and to participate with some measure of reason and knowledge in discussions germane to departmental policies and programs? Does the candidate maintain high standards of professional integrity?” *Chapter 3: Faculty Personnel Policies and Procedures*, AUBURN UNIVERSITY, [http://www.auburn.edu/academic/provost/facultyHandbook/chapter%203-personnel\\_policies.html#tenurecriteria](http://www.auburn.edu/academic/provost/facultyHandbook/chapter%203-personnel_policies.html#tenurecriteria) (last visited Oct. 4, 2016).

168. Virginia State University’s *Criteria for the Award of Tenure to Collegiate/Instructional Faculty* requires the candidate to demonstrate “professional collegiality.” VIRGINIA STATE UNIVERSITY, TENURE CRITERIA, SECTION 2.5, <http://www.vsu.edu/files/docs/faculty-staff/Tenure.pdf> (last visited Oct. 4, 2016).

169. See generally Connell & Savage, *supra* note 140 (presenting an analysis of the policy arguments for and against consideration of collegiality in higher education tenure, promotion, and termination decisions and a review of the relevant case law that discusses and analyzes the issue); Dyer, *supra* note 140; Zirkel, *supra* note 140.

170. *Mayberry v. Dees*, 663 F.2d at 516.

171. Seigel & Miner-Rubino, *supra* note 141, at 12 (In response to queries regarding institutional responses to uncollegiality, only 25.8% of respondents reported that their institution has “leaders who take quick action to stop even subtle negative comments” while 34.8% reported that their law school did not have leaders of this ilk. 40.2% of respondents claimed that their law school leaders do not make “strong public statements about the seriousness of uncollegiality.”).

professors are not able (or willing) to display “affirmative collegiality”<sup>172</sup> or, in other words, to be a “model colleague[];”<sup>173</sup> at the very least, the behavior must comport with a baseline collegiality as defined by Professor Siegel: i.e. “conducting oneself in a manner that does not impinge upon the ability of one’s colleagues to do their jobs or on the capacity of one’s institution to fulfill its mission.”<sup>174</sup>

One role of the law professor involves a commitment to create an atmosphere conducive to academic freedom that allows for free discourse among professors and with students.<sup>175</sup> This would necessitate acknowledgement of a common goal towards collaborative and constructive cooperation and a commitment to providing honest judgment of a given subject matter, particularly as it relates to issues of faculty governance and institutional advancement. Voicing criticism and convictions through conscientious, reflective behavior would adhere to goals of furthering this governance and advancement of the institution. This behavior would encompass the varied definitions of collegiality. As Professor Siegel points out, lack of collegiality is not to be confused with “good faith criticism and pressure for change.”<sup>176</sup> The description of “good faith” is tantamount, however, to avoid destructive or self-serving behavior which in turn can undermine the progression and mission of the institution.

A commitment to a collegial atmosphere in the institution will foster behavior by law faculty to highlight institutional accomplishments and promote the institution. The law professor’s commitment to a scholarly agenda and dedication to service within and beyond the law school community will also enhance the institution’s external standing.

## VII. CONCLUSION

The ABA’s Commission on Professionalism stated that “the law

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172. Siegel, *On Collegiality*, *supra* note 140, at 414 (defining “affirmatively collegial” faculty as those who “typically go beyond the call of duty in some aspect(s) of their job . . . display enthusiasm, dedication, and a constructive attitude, and . . . work hard to foster harmony among their peers and to further the mission of their institution.”).

173. *Id.* at 411.

174. *Id.* (emphasis omitted) (providing a one sentence definition for “baseline collegiality”).

175. Hamilton, *supra* note 128, at 240 (noting that the “essential requirement for progress in the discovery of knowledge in a university setting is free discourse among academic professionals within the ethical and competency constraints of a discipline as defined by peers[.]”).

176. Siegel, *supra* note 140, at 415 (noting that there is a distinction between “legitimate activism” and “destructive behavior.”).

school experience provides the student's first exposure to the profession, and . . . professors inevitably serve as important role models for students."<sup>177</sup> The roles that define law professors will directly define the behavior that the "new normal" student and the future lawyers of America will model.

As law professors and members of the legal profession, one of the primary obligations of the law professor is to ensure that actions inside and outside the law school classroom exemplify the standards of the profession and exhibit a high degree of professionalism. Perhaps a uniform Code of Law Professor Conduct will provide foundational support to establish such standards.<sup>178</sup> To be a role model dictates modeling a particular role that one will emulate. Law professors must have a clear understanding of the multi-faceted roles in which they are cloaked: roles defined by responsibilities to students, institutions, and the legal profession, particularly in this current "new normal" climate. The attitudes and attributes that society needs and demands from the next generation of lawyers must be modeled by those who teach the law.

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177. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 12 (1986).

178. As a starting point, the author proposes, but will not in this article outline, such a proposed Code of Conduct.