

# Nurturing the Law Student's Soul: Why Law Schools Are Still Struggling to Teach Professionalism and How to Do Better in an Age of Consumerism

Elizabeth Adamo Usman

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# **NURTURING THE LAW STUDENT’S SOUL: WHY LAW SCHOOLS ARE STILL STRUGGLING TO TEACH PROFESSIONALISM AND HOW TO DO BETTER IN AN AGE OF CONSUMERISM**

ELIZABETH ADAMO USMAN

*The pronounced increase over the past few decades of the role of consumerism in higher education in general and in law schools specifically, in which schools and students view themselves, respectively, as consumers and sellers of an educational product, has only been accelerated in recent years with the competition over the declining number of potential entering law students. With no end to this trend in site, consumerism appears to have become a part of the reality of legal education.*

*This Article explores the intersection of consumerism and professionalism in the law school setting with a specific focus on the “Millennial” law student. This Article first explores the contours of what constitutes “professionalism,” concluding that at essence it involves aspirational values of the legal profession. The Article also delineates the unique characteristics of law students from the Millennial generation, focusing on Millennials’ penchant for service and desire for greater meaning through work.*

*With this background in mind, the Article argues that although, as of yet, Millennial students’ self-conception of themselves as consumers has hindered rather than helped law schools in fulfilling their duty to inculcate legal professionalism, law schools have the ability to change this. By drawing upon the unique characteristics of the Millennial student, law schools can harness the power of consumerism to give the Millennial student-consumer the greater meaning that she seeks while at the same time inculcating students with the aspirational values of our profession.*

*To bring about this change, law schools will have to embrace the Humanizing Legal Education Movement and focus on the movement’s central tenant of nurturing not just the mind but also the “soul” of the law student. With the Humanizing Legal Education Movement as the skeletal structure, specific educational mechanisms, namely Mindset Theory,*

*metacognition, and self-regulated learning, can provide the flesh on the bones that brings this goal to fruition.*

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## I. INTRODUCTION

In the fall of 2014, the number of first-year law students enrolled at American Bar Association (ABA) accredited law schools reached the lowest level since 1973.<sup>1</sup> There has been a stunning and precipitous decline, 27.7%, in the number of first-year law students entering ABA accredited law schools from the historic high only four years earlier in 2010.<sup>2</sup> The jarring nature of this decline becomes even more apparent when one considers that there were only 151 ABA-accredited law schools in 1973, fifty-three less than in 2014,<sup>3</sup> and the population of the

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1. *ABA Section of Legal Education Reports 2014 Law School Enrollment Data*, A.B.A. (Dec. 16, 2014), [http://www.americanbar.org/news/abanews/aba-news-archives/2014/12/aba\\_section\\_of\\_legal.html](http://www.americanbar.org/news/abanews/aba-news-archives/2014/12/aba_section_of_legal.html) [https://perma.cc/7N8E-JMTT].

2. *Id.*

3. *Id.*

United States was approximately 211 million people,<sup>4</sup> roughly two-thirds of today's population of 320 million people.<sup>5</sup> As significant as the decline in the number of enrolling students has been, the decline in the number of Law School Admission Test (LSAT) test takers has been even more substantial with approximately 40% fewer LSATs administered in the 2014–2015 cycle than in the 2009–2010 cycle.<sup>6</sup> The higher percentage of decline in LSAT test takers than law school enrollees has resulted, not surprisingly, in significant declines in the average objective admission metrics of admitted students.<sup>7</sup> It is not clear that a bottom has as of yet been reached in terms of decreasing incoming class sizes,<sup>8</sup> nor is there any clear sign of a significant recovery in the number of students entering law school on the horizon.<sup>9</sup>

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4. *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU, <https://www.census.gov/population/estimates/nation/popclockest.txt> [<https://perma.cc/8AJZ-KPXC>] (last revised June 28, 2000).

5. *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2015: 2014 Population Estimates*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/X985-8FW5>] (last updated Dec. 2015).

6. *Total LSATs Administered—Counts & Percent Increases by Admin & Year*, LSAC, <http://www.lsac.org/lsacresources/data/lsats-administered> [<https://perma.cc/F7UN-FG92>] (last visited May 29, 2016) [hereinafter *Total LSATs Administered*]. In 2009–2010, 171,514 LSAT exams were administered, while only 101,689 were administered in 2014–2015. *Id.* The latter constituting 59.29% of the total exams administered only five years earlier. *Id.*

7. See, e.g., Natalie Kitroeff, *Getting into Law School Is Easier Than It Used to Be, and That's Not Good*, BLOOMBERG BUS. (Jan. 6, 2015, 4:45 AM), <http://www.bloomberg.com/news/articles/2015-01-06/getting-into-law-school-is-easier-than-it-used-to-be-and-thats-not-good#r=hpt-ls> [<https://perma.cc/S6V5-D9GV>] (stating that 95% of ABA accredited law schools have lowered their admission standards for students in the bottom 25% of the class since 2010); see also David Frakt, *Parsing the Bloomberg Businessweek Article on Law School Admissions*, FAC. LOUNGE (Jan. 8, 2015, 8:10 AM), <http://www.thefacultylounge.org/2015/01/parsing-the-bloomberg-businessweek-article-and-the-ncbe-report.html> [<https://perma.cc/8TL9-7Y2S>] (arguing and explaining his conclusion that LSAT declines are even more significant and substantial than they may initially appear); Erica Moeser, *President's Page*, B. EXAMINER, Dec. 2014, at 4, 7–11 (providing a chart that sets forth four years of declining LSAT scores at the bottom twenty-fifth percentile reporting mark for ABA accredited law schools).

8. The number of LSATs administered declined from 105,532 in 2013–2014 to 101,689 in 2014–2015—a decline of 3.64%. *Total LSATs Administered*, *supra* note 6.

9. See, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013) (asserting that there has been a structural shift in the legal profession that is permanent not cyclical in nature that will relatedly impact law schools); Dorothy A. Brown, *Law Schools Are in a Death Spiral. Maybe Now They'll Finally Change*, WASH. POST (Mar. 9, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/03/09/law-schools-are-in-a-death-spiral-maybe-now-theyll-finally-change/> [<https://perma.cc/29LH-WRRQ>] (arguing that reduced application numbers are the “new normal” and represent a seismic and permanent change);

In this era of unprecedented declining law school admissions, law schools' efforts to recruit and retain students is more in the forefront than perhaps ever before in the history of legal education.<sup>10</sup> Even high-ranking law schools are not immune from this competition.<sup>11</sup> This competition lends itself to re-enforcing the consumer-driven model of law school education in which the students are the consumers of the product sold by schools.<sup>12</sup> Because keeping the student-consumer

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Debra Cassens Weiss, *Moody's Warns That Stand-Alone Law Schools Are Most at Risk, Notes Downside to Tuition Cuts*, A.B.A. J. (May 9, 2014, 10:59 AM), [http://www.abajournal.com/mobile/article/moodys\\_warns\\_that\\_stand-alone\\_law\\_schools\\_are\\_most\\_at\\_risk\\_notes\\_downside](http://www.abajournal.com/mobile/article/moodys_warns_that_stand-alone_law_schools_are_most_at_risk_notes_downside) [<https://perma.cc/A8D8-4ZGV>] (noting that Moody's Investor Service has concluded that the downturn in law school applications is part of a "fundamental shift in the legal field, rather than the typical cyclical rise and fall in demand").

10. Luanne Rife, *Virginia's Law Schools Address Declining Enrollment*, ROANOKE TIMES (Feb. 2, 2015, 4:21 PM), [http://www.roanoke.com/news/education/higher\\_education/virginia-s-law-schools-address-declining-enrollment/article\\_aa15254f-5056-587c-8088-3c7fbd66bf-d9.html](http://www.roanoke.com/news/education/higher_education/virginia-s-law-schools-address-declining-enrollment/article_aa15254f-5056-587c-8088-3c7fbd66bf-d9.html) [<https://perma.cc/6EK5-W5FJ>] ("The downward trend is putting pressure on law school administrators to step up recruitment and scholarship awards . . ."); Ry Rivard, *Lowering the Bar*, INSIDE HIGHER ED (Jan. 16, 2015), <https://www.insidehighered.com/news/2015/01/16/law-schools-compete-students-many-may-not-have-admitted-past> [<https://perma.cc/X9F8-89WL>] (addressing the fierce and new competition that now exists over students with LSAT scores in the low to mid 140s); J.K. Wall, *'No Relief' for Law School Enrollment Slump*, I.B.J.COM (Feb. 7, 2015), <http://www.ibj.com/articles/print/51685-no-relief-for-law-school-enrollment-slump> [<https://perma.cc/AA2F-BHY7>] (noting that in response to declining law school applications "Indiana's law schools are . . . spending more on recruiting, creating programs for non-attorney types of legal education, and experimenting with an educational approach that responds to what many see as permanent shifts in demand for legal services"); Debra Cassens Weiss, *Law Prof Blasts 'Downright Predatory' Poaching of His School's Students; Top Transfer Schools Named*, A.B.A. J. (Jan. 15, 2015, 5:45 AM), [http://www.abajournal.com/news/article/law\\_prof\\_criticizes\\_downright\\_predatory\\_poaching\\_of\\_his\\_schools\\_students\\_to](http://www.abajournal.com/news/article/law_prof_criticizes_downright_predatory_poaching_of_his_schools_students_to) [<https://perma.cc/TN6C-Y6BC>].

11. See, e.g., Elizabeth Olson, *Law School Is Buyers' Market, With Top Students in Demand*, N.Y. TIMES, Dec. 2, 2014, at B5, [http://dealbook.nytimes.com/2014/12/01/law-school-becomes-buyers-market-as-competition-for-best-students-increases/?\\_r=0](http://dealbook.nytimes.com/2014/12/01/law-school-becomes-buyers-market-as-competition-for-best-students-increases/?_r=0) [<https://perma.cc/5HJ3-JN5Q>] (quoting Dean Daniel B. Rodriguez of the Northwestern University School of Law saying, "We're in hand-to-hand combat with other schools."); Ry Rivard, *Poaching Law Students*, INSIDE HIGHER ED (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/law-school-transfer-market-heats-getting-some-deans-hot-under-collar> [<https://perma.cc/QV8A-SRJ9>] (addressing higher-ranking law schools acceptance of a significant number of transfer students from lower-rankings counterparts).

12. See, e.g., Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools That Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 97, 102 (2012) ("[M]ost law schools rely heavily upon marketing and recruiting practices to enroll prospective students. In many ways, law schools are more like for-profit businesses, competing over customers (law students) to sell a product . . ." (footnote omitted)).

satisfied is a goal in a consumer-driven model,<sup>13</sup> this approach to law school has the potential to affect not just admissions practices but also the nature of legal education itself.<sup>14</sup>

One under-explored area of potential impact is how a consumer-driven model<sup>15</sup> of law school impacts the teaching of professionalism to law school students. This Article explores the intersection between consumerism and professionalism in legal education. Although pinning down the exact contours of what constitutes “professionalism” has been an issue of some debate,<sup>16</sup> there is little question about the importance of instilling professionalism in attorneys<sup>17</sup> as well as law schools’ central

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13. See, e.g., CAROLYN ORANGE, 44 SMART STRATEGIES FOR AVOIDING CLASSROOM MISTAKES 86 (2005) (“[T]he new consumer model of delivering education . . . assumes . . . the customer is always right, much like its source of inspiration, the business consumer model.”).

14. See Ann Marie Cavazos, *Next Phase Pedagogy Reform for the Twenty-First Century Legal Education: Delivering Competent Lawyers for a Consumer-Driven Market*, 45 CONN. L. REV. 1113, 1118–19, 1127 (2013) (discussing law school as a product and the impact of consumer-driven model on clinical legal education); Ralf Michaels, “*Law as the Study of Norms*”—*Foundational Subjects and Interdisciplinarity in Germany and the United States*, VERFASSUNGSBLOG ON MATTERS CONST. (Feb. 19, 2014), <http://www.verfassungsblog.de/en/law-as-the-study-of-norms-foundational-subjects-and-interdisciplinarity-in-germany-and-the-united-states/> [<https://perma.cc/2XZC-L9KU>] (addressing the effect of increased competition in a consumer-driven model of legal education on scholarship and the type of curriculum offered by law schools).

15. See ORANGE, *supra* note 13, at 86; JAMES STANYER, MODERN POLITICAL COMMUNICATION: MEDIATED POLITICS IN UNCERTAIN TERMS 96 (2007).

16. See VT. R. CLE § 3 history (noting that the Vermont Mandatory Continuing Legal Education Board and continuing legal education providers “have had problems agreeing on a workable definition of ‘professionalism’”); AM. BAR ASS’N COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) [hereinafter STANLEY REPORT] (“‘Professionalism’ is an elastic concept the meaning and application of which are hard to pin down.”); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 415 (2005) (“[T]he term ‘professionalism’ itself has proven abstruse. . . . It has proven notoriously difficult to define what professionalism offers beyond the minimums of legal ethics, and most scholars and bar officials have abandoned efforts at a specific definition.”); Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism.”* 41 EMORY L.J. 403, 408 (1992); Melissa H. Weresh, *The Chicken or the Egg? Public Service Orientation and Lawyer Well-Being*, 36 U. ARK. LITTLE ROCK L. REV. 463, 473 (2014) (“[M]any scholars have acknowledged that the term [professionalism] is difficult to define. Some authors [even] reject the possibility of an adequate definition . . . .” (footnote omitted)).

17. STANLEY REPORT, *supra* note 16, at 10; Edmund M. Brady, Jr., “*An Honor to Himself, an Honor to His Kind*,” 76 MICH. B.J. 1040, 1040 (1997) (“An integral part of the campaign to improve the public’s perceptions of lawyers is for lawyers to practice professionalism and civility.”); Joseph B. Bluemel, *Professionalism A Ten-Dollar Word or A Way of Life?*, WYO. LAW., Aug. 2013, at 36, 37 (“The concept of professionalism, although difficult to describe, is critical for Wyoming lawyers and for our profession.”); Michael A.

role in at least beginning this process.<sup>18</sup> Unfortunately, there is a broad consensus they are failing to adequately meet this challenge.<sup>19</sup> Although the consumer-driven model of legal education has the potential to profoundly hinder law schools' ability to fulfill this mandate, more surprisingly, the consumer-driven model also has the potential to be part of the solution to the professionalism deficiencies in legal education.

In delineating the problem and endeavoring to offer a solution, this Article begins in Part II by attempting to arrive at a working understanding of what constitutes professionalism. The Article next, in Part III, discusses the rise of the consumer-driven model of education and touches upon surprising benefits derived by law schools and law students therefrom. Part IV addresses the challenge posed by consumerism to law schools instilling professionalism, the responsibility of law schools to inculcate professionalism, and law schools' underperformance in this role. Part V of the Article will suggest that, at least for Millennials, consumerism can be harnessed as a conduit for advancing professionalism and that if law schools seize upon this opportunity, the Humanizing Legal Education Movement<sup>20</sup> provides a means to significantly advance their aim of instilling professionalism in law students. Part V will also argue that utilization of Mindset Theory, metacognition, and self-regulated learning<sup>21</sup> offer the best route to implementing the Humanizing Legal Education Movement's more abstract vision.

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Bush, Note, *From the Great Depression to the Great Recession: (Non-)Lawyers Practicing Deregulated Law*, 115 W. VA. L. REV. 1185, 1217–18 (2013) (“The rule of law, critical to the American society, rests upon the loyalty and professionalism to which each licensed lawyer is bound.”).

18. 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, 132 (2001) (“[L]aw schools necessarily have a central role to play in transmitting values of professionalism and in encouraging the development of attitudes and dispositions appropriate to professionalism.”); R. Brad Morgan, *Lessons for the Journey Profession and Participants Benefit from Mentoring*, TENN. B.J., Feb. 2015, at 14, 17–18 (addressing the critical role law schools play in maintaining a legal culture dedicated to professionalism). See generally Douglas S. Lang, *The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism*, 42 S. TEX. L. REV. 509 (2001).

19. See Lang, *supra* note 18, at 510–11.

20. The Humanizing Legal Education Movement is explained in detail in *infra* Part V.B.

21. Mindset Theory, metacognition, and self-regulated learning are explained in detail in *infra* Part V.C.

## II. TOWARDS A WORKING DEFINITION OF “PROFESSIONALISM”

As observed by philosopher Jacques Derrida, words gain meaning through contrast,<sup>22</sup> an observation that has resonance in attempting to understand professionalism. In seeking to grasp this surprisingly complex concept, it is imperative to first appreciate what constitutes a profession. The most ready definition of a “profession” is an oft repeated<sup>23</sup> contrast-driven assertion that “[a] profession is not a business.”<sup>24</sup> Approaches to understanding what separates a profession from other areas of endeavor often define a profession as involving three primary characteristics:

- (1) members of the community have acquired a distinctive skill set;
- (2) members regulate entry into and conduct within the community;
- and (3) members enjoy and are bound by a relationship of trust with the public based upon the commitment by professional members to elevate the public good over self-interest.<sup>25</sup>

In relation to this third aspect of public trust, this relationship differs from a business’s relationship to the public, insofar as professionals are bound by

a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of

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22. David Weitzner, *Writing and Difference*, in 2 ENCYCLOPEDIA OF CASE STUDY RESEARCH 973, 973 (Albert J. Mills et al. eds., 2010).

23. Defining a profession in contrast with business is an approach utilized by professionals within a wide variety of fields. Joseph D. Bryant, *The Saying and the Doing*, 6 J. MED. SOC’Y NEW JERSEY 300, 302 (1909) (distinguishing the medical profession from a business); H.W. Forbes, *Are We and Are We to Be an Ethical Profession*, 9 J. AM. OSTEOPATHIC ASS’N 152, 153 (1910); Samuel Osherson & Lorna AmaraSingham, *The Machine Metaphor in Medicine*, in SOCIAL CONTEXTS OF HEALTH, ILLNESS, AND PATIENT CARE 218, 247 n.38 (Elliot G. Mishler et al. eds., 1981) (quoting Stephen J. Kunitz, *Professionalism and Social Control in the Progressive Era: The Case of the Flexner Report*, 22 SOC. PROBS. 16, 18 (1974)) (noting the observation from Johns Hopkins Economics Professor Richard T. Ely asserting that city planners and city managers are not a business but instead professionals); Charlotte Boardman Rogers, *The European Bookseller*, 34 BOOKSELLER, NEWSDEALER, & STATIONER 45, 45–46 (1911) (noting that European booksellers, as distinct from their American counterparts, do not regard themselves as running a business but instead as being engaged in a profession).

24. *In re Estate of Freeman*, 311 N.E.2d 480, 483 (N.Y. 1974).

25. Melissa H. Weresh, *I’ll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 342 (2009).



ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in nonprofessional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.<sup>26</sup>

This conception of a profession is in line with Max Weber's description of a profession as incorporating "the idea of duty in one's calling" and involving "the highest spiritual and cultural values."<sup>27</sup>

Although the definition of "profession" itself is relatively settled, an exact definition of "professionalism" as it pertains to the legal profession is a matter of some debate.<sup>28</sup> The suffix "ism" conveys "a belief, attitude, style, etc., that is referred to by a word that ends in the suffix *-ism*."<sup>29</sup> In other words, adding the suffix "ism" to a noun denotes "a state or quality" of the noun.<sup>30</sup> Professionalism in the legal context, therefore, is the "state or quality" of being a legal professional or the "belief" associated with being a legal professional.<sup>31</sup> Thus, professionalism has been described as an "attitude or approach to work" in that it involves both "the way work is conducted and the underlying values and traditions associated with the profession that shape the professional's approach to work."<sup>32</sup> Or, as has been well phrased by Professor Melissa H. Weresh, "professionalism" is the "embodiment of the [lawyer's] identity" as a member of her profession.<sup>33</sup>

There has been much debate in trying to pin down what this "attitude" or "embodiment of identity" consists of or should consist of.<sup>34</sup> Legal professionalism scholar, Robert Atkinson, has analogized

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26. *Estate of Freeman*, 311 N.E.2d at 483.

27. Sullivan & Podgor, *supra* note 18, at 122 (quoting MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 182 (Anthony Giddens ed. & Talcott Parsons trans., Charles Scribner's Sons 1976) (1921)).

28. Weresh, *supra* note 25, at 342-43.

29. *ism*, MERRIAM-WEBSTER ONLINE DICTIONARY [hereinafter MERRIAM-WEBSTER ONLINE DICTIONARY], <http://www.merriam-webster.com/dictionary/ism> [https://perma.cc/9T6Y-AXCJ] (last visited May 31, 2016).

30. *-ism*, OXFORD DICTIONARIES [hereinafter OXFORD DICTIONARIES], [http://www.oxforddictionaries.com/us/definition/american\\_english/-ism](http://www.oxforddictionaries.com/us/definition/american_english/-ism) [https://perma.cc/Z2A8-LR46] (last visited May 31, 2016).

31. See MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 29; OXFORD DICTIONARIES, *supra* note 30.

32. John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 330 (2008).

33. Weresh, *supra* note 25, at 342.

34. *Id.* at 342-43.

professionalism in the law to religion insofar as like religion professionalism is concerned with fundamental commitments: “[T]he mode of professional life to which we as lawyers commit ourselves is analogous to, if not indistinguishable from, a religious commitment.”<sup>35</sup> Relatedly, Atkinson challenges the “implicit assumption” that there is “one true professional faith.”<sup>36</sup>

Continuing with the analogy, as in many religions, the exact contours of the tenets of faith have been, and perhaps should be, a matter of some debate:

Some scholars have denied the existence of an adequate definition, concluding that lawyer professionalism is “like pornography, hard to define, but easy to recognize.” Others point out that the difficulty in defining professionalism relates to its fluidity, arguing that the concept of “legal professionalism is . . . a moving target.” One scholar argues that “[t]he professionalism debate to date has been shallow because we have talked only about how we see ourselves. We have limited the contours of the discussion to how we relate to each other and how we can better serve paying clients.”<sup>37</sup>

In general, the attempts to define professionalism have been too sectarian and polarized, reflecting “two extreme views”:

One reduces professionalism to the level of professional etiquette—pleasantness, returning telephone calls, and the like—so that it appears to lack any real moral content at all. The other vehemently gives professionalism moral content, but reduces it to a single, politically biased value—helping the poor. Although both these approaches contain a kernel of truth, they are far too limited to be the basis for a sustained analysis of our professional heritage.<sup>38</sup>

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35. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 269 (1995).

36. *Id.* at 263 (emphasis added).

37. Weresh, *supra* note 25, at 342–43 (alteration in original) (footnotes omitted) (quoting Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*, 7 GEO. J. LEGAL ETHICS 987, 997 (1994) (book review); Terrell & Wildman, *supra* note 16, at 408; Richard C. Baldwin, “Rethinking Professionalism”—*And Then Living It!*, 41 EMORY L.J. 433, 433 (1992)).

38. Terrell & Wildman, *supra* note 16, at 419.

Interestingly this critique, too, reflects the idea that professionalism involves fundamental commitments and, therefore, necessarily should include some “real moral content,” while continuing the debate about exactly what that moral content should consist of.

It is not necessary for purposes of this Article to precisely define the exact contours of legal professionalism—the exact tenets of our “professional faith”; rather, for purposes here, broader strokes are all that is needed. The very idea that there *is* a “professional faith” to which members of our profession should be penitents, and that our “professional faith” broadly involves social responsibility, both to our clients and to the profession as a whole, beyond that due in the marketplace, is sufficient. As the then-Chief Justice of the New York Court of Appeals Benjamin Cardozo stated, “[m]embership in the bar is a privilege burdened with conditions.’ [An attorney is] received into that ancient fellowship for something more than private gain. [He or she becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.”<sup>39</sup> Thus, the working definition of professionalism for purposes of this Article is a belief, and practice in accordance with that belief, that entrance into the legal profession is a privilege burdened with conditions and, moreover, that those conditions include a dedication to “voluntary compliance with aspirational standards,”<sup>40</sup> many of which relate to the public-trust aspect of the legal profession.

### III. CONSUMERISM IN HIGHER EDUCATION

While professionalism is interwoven with what it means to be an attorney, law students, especially Millennials, increasingly have a self-conception of themselves as consumers purchasing a product, and law schools increasingly see themselves as purveyors of a product.<sup>41</sup> Over the last few decades, there has been a pronounced increase in the role of consumerism in education in general and law schools specifically.<sup>42</sup> This

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39. *People ex rel. Karlin v. Culin*, 162 N.E. 487, 489 (N.Y. 1928) (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

40. Atkinson, *supra* note 35, at 276.

41. *See infra* Part III.B.

42. *See, e.g.*, Nannerl O. Keohane, *The American Campus: From Colonial Seminary to Global Multiversity*, in *THE IDEA OF A UNIVERSITY* 48, 57 (David Smith & Anne Karin Langslow eds., 1999); John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 *J. LEGAL EDUC.* 528, 528–29 (2002).

is a trend that has only accelerated with the competition increasing over potential students and the vast majority of students entering law schools being Millennials.<sup>43</sup> The rise in consumerism has not been entirely negative for the quality of legal education; quite to the contrary, the rising influence of consumerism has resulted, and is resulting, in some extremely positive changes in legal education.<sup>44</sup> However, with regard to professionalism, the consumer-driven model to legal education as currently approached has offered no assistance and, instead, has further exacerbated the struggles that law schools have with inculcating the aspirational nature of professionalism within their students.<sup>45</sup>

*A. American Higher-Education Before the Rise of Consumerism*

Before delving into the impact of the consumer-driven model, it is helpful to consider what existed before. Though higher education in an era before consumerism has certain distinct advantages, the pre-consumerist approach to education can be falsely romanticized. It was not so much better, in fact in some ways it was worse, as much as it was different than what higher education has become in an age of consumerism. The primary goals and objectives of higher education in the United States have not remained constant, but at least some remnant of each of the historic strands continue to resonate in some way or in some sector of American higher education.

Colleges began in the United States with a religious mission of aspirational formation of religious and societal leaders to preserve civil order and advance knowledge in matter consistent with divine will.<sup>46</sup>

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43. See, e.g., CRAIG BRANDON, *THE FIVE-YEAR PARTY: HOW COLLEGES HAVE GIVEN UP ON EDUCATING YOUR CHILD AND WHAT YOU CAN DO ABOUT IT* (2010); JEFFREY J. SELINGO, *COLLEGE (UN)BOUND: THE FUTURE OF HIGHER EDUCATION AND WHAT IT MEANS FOR STUDENTS 19–35* (2013).

44. See *infra* Part III.C.

45. See *infra* Part IV.

46. Before the American Revolution, the colonies had already produced nine colleges. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 3 (1962). A 1643 promotional pamphlet seeking donations for America's first college, Harvard, which was then in its seventh year of existence, described the purpose of this institution of higher-education as follows:

After God had carried us safe to *New England*, and wee had builded our houses, provided necessaries for our liveli-hood, rear'd convenient places for Gods worship, and settled the civil government: One of the next things we longed for, and looked after was to advance *Learning* and perpetuate it to Posterity; dreading to leave an illiterate Ministry to the churches, when our present ministers shall lie in the dust.

Even before the American Revolution, colleges joined the pre-existing goal of formation of virtuous persons with an objective of providing practical education for future occupational endeavors.<sup>47</sup> After the American Revolution, both the practical and virtue-formation objectives of higher education came to be viewed through democratic and nationalistic lenses.<sup>48</sup> Practical skills would strengthen the nation's economy and raise her non-elites to a self-sustaining economic level, which was viewed as vital to the performance of the role of a citizen in a republic.<sup>49</sup> The virtue-formation would train future leaders for their

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NEW ENGLANDS FIRST FRUITS (1643), *reprinted in* SAMUEL ELIOT MORISON, THE FOUNDING OF HARVARD COLLEGE app. D, at 419, 432 (1935); *see also* FRANKLIN E. COURT, THE SCOTTISH CONNECTION: THE RISE OF ENGLISH LITERARY STUDY IN EARLY AMERICA 59 (2001) (noting that Harvard College which would later become Harvard University was the first college founded in all of North America); BEN MEZRICH, THE ACCIDENTAL BILLIONAIRES: THE FOUNDING OF FACEBOOK 124 (2009) (indicating that “the statue of the three lies” on Harvard’s campus famously lists the University has John Harvard as founding the University in 1638 when it was actually founded two years earlier in 1636, and the figure in the statute is not actually based on an image of John Harvard nor is he the founder of Harvard).

From the beginning, the education afforded by Harvard, however, was not limited to ministers but extended to laymen, drawing much from scholastic education traditions as modified by Christian Humanists and an early scientific influence. LOUIS B. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES 116–17 (1957). With Harvard, there existed a commitment to “a learned clergy and a lettered people.” MORISON, *supra*, at 45. Harvard “would train the schoolmasters, the divines, the rulers, the cultured ornaments of society—the men who would spell the difference between civilization and barbarism.” RUDOLPH, *supra*, at 6. Though not exact, the same general purposes drove the formation of the other eight colleges that adorned the American colonial landscape. *Id.* at 7.

47. Another purpose of higher education, practical job-skills-focused education, also started to emerge in the mid-1700s in part through the promotion of this end by the irrepressible Benjamin Franklin in his formation of the University of Pennsylvania. *See* Steven Morgan Friedman, *A Brief History of the University of Pennsylvania*, PENN U. ARCHIVES & RECORDS CTR., <http://www.archives.upenn.edu/histy/genlhistory/brief.html> [<https://perma.cc/YTY6-WWZ6>] (last visited Mar. 8, 2016). Franklin advocated for a then “innovative concept of higher education, one which simultaneously taught both the ornamental knowledge of the arts and the practical skills necessary for making a living.” *Id.* A nascent focus on such a purpose started to appear in colonial colleges prior to the American Revolution and would expand in the 1800s. *See* STEPHEN E. ATKINS, THE ACADEMIC LIBRARY IN THE AMERICAN UNIVERSITY 3 (1991).

48. *See* Michael Schwarz, *Virtue, Happiness, and Balance: What Jefferson Can Still Teach Us About Higher Education*, in THE RELEVANCE OF HIGHER EDUCATION: EXPLORING A CONTESTED NOTION 53, 59 (Timothy L. Simpson ed., 2013).

49. Jefferson integrated Franklin’s concept of practical focused education into the ideology of republicanism. As one his three collegiate schools for the University of Virginia, Thomas Jefferson endeavored to create a functioning school of “Technical Philosophy.” *Id.* at 61. This department of Jefferson’s prized University of Virginia would all be a place to attend for a “mariner, carpenter, clock-maker, machinist, optician, metallurgist, druggist,

responsibilities and assist citizens to better assess the actions of those leaders.<sup>50</sup>

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brewer, distiller, painter, soapmaker, and any others who might hope ‘to learn as much’ of science ‘as shall be necessary to pursue their art understandingly.’” *Id.* (quoting Letter from Thomas Jefferson to Peter Carr (Sept. 7, 1814), in THOMAS JEFFERSON: WRITINGS 1346, 1351 (Lib. of Am. 1984)). For Jefferson Universities should provide a location “where every branch of science, deemed useful in this day and in our country, should be taught in the highest degree.” John K. Whitaker, *Early Flowering in the Old Dominion: Political Economy at the College of William and Mary and the University of Virginia*, in ECONOMISTS & HIGHER LEARNING IN THE NINETEENTH CENTURY 15, 23 (William J. Barber ed., 1993) (quoting Letter from Thomas Jefferson to Peter Carr (Sept. 7, 1814), in ROY J. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON app. E, at 222 (1931)). His purposes in creating such a practical skills focused program were nationalistic and tied with his republican ideologically:

Jefferson hoped to protect American independence through the discovery and dissemination of useful knowledge necessary for the development of commerce and manufacturing. He also believed that scientific instruction promised to elevate the masses beyond mere subsistence. Jefferson noted that individuals who applied science to their labors benefited both themselves and the public. Therefore, science promised to reconcile self-interest and public interest so as to maintain the republic’s virtue. “Science,” Jefferson wrote[,] “is indispensably necessary for the support of a Republican government.” . . .

Jefferson’s optimistic view resulted from his observation that scientific inventions continually elevated the human physical condition, allowing people the leisure to cultivate their moral faculties.

DAN R. FROST, THINKING CONFEDERATES: ACADEMIA AND THE IDEA OF PROGRESS IN THE NEW SOUTH 3–4 (2000) (quoting Letter from Thomas Jefferson to Josiah Meigs (May 20, 1803), in WM. M. MEIGS, LIFE OF JOSIAH MEIGS app. D, at 125 (1887)).

50. As observed by founder Benjamin Rush, “The business of education has acquired a new complexion by the independence of our country . . . . The form of government we have assumed . . . has created a new class of duties to every American.” DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 23 (1987) (quoting BENJAMIN RUSH, THOUGHTS UPON THE MODE OF EDUCATION PROPER IN A REPUBLIC, reprinted in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 9, 9 (Frederick Rudolph ed., 1965)). See generally ALYN BRODSKY, BENJAMIN RUSH: PATRIOT AND PHYSICIAN (2004). There was a sense that the establishment of common schools for the education of the entire community was of greater importance to the American experiment than universities. See, e.g., M. SCOTT NORTON, COMPETENCY-BASED LEADERSHIP: A GUIDE FOR HIGH PERFORMANCE IN THE ROLE OF THE SCHOOL PRINCIPAL 2 (2013) (addressing the view of a number of the founding fathers with regard to the importance of general public education). As stated by Jefferson, “[w]ere it necessary to give up either the Primaries or the University, I would rather abandon the last, because it is safer to have a whole people respectably enlightened than a few in a high state of science and the many in ignorance.” HENRY J. PERKINSON, TWO HUNDRED YEARS OF AMERICAN EDUCATIONAL THOUGHT 47 (1976) (quoting Letter from Thomas Jefferson to Joseph Cabell (Jan. 13, 1823)). That did not mean that higher-education did not have a critical role to play in democratic self-governance. With the University of Virginia, Jefferson aimed for the university to educate citizens in the art and science of government in preparing them in practical affairs and public service. THOMAS E. BOUDREAU, UNIVERSITAS: THE SOCIAL RESTRUCTURING OF AMERICAN

Responding to the perceived inferiority of American higher education to German universities, the latter half of the nineteenth century witnessed American higher education shifting towards staking its reason for existence upon expanding knowledge, but instead of the divine purposes of the colonial era, knowledge was pursued for knowledge's sake, and the means were through departmental units organized around subject areas.<sup>51</sup> With the Cold War, universities continued to emphasize pursuit of knowledge but as part of an arsenal of democracy; pursuit of knowledge would be the strengthener of the leaders of society and preserver of core American values.<sup>52</sup> This time

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UNDERGRADUATE EDUCATION 187 (1998). In his eighth and final annual address to Congress, in calling for the formation of national university, Washington indicated that “a primary object of such a national institution should be the education of our youth in the science of *government*.” George Washington, President: Eighth Annual Address (Dec. 7, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 199, 202 (1896). Washington asked the rhetorical question, “In a republic what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country?” *Id.*

51. The German model of education, starting in 1860s, would significantly reorient American Universities. Based upon the existence predominant German understanding:

[A] university implies a *Zweck*, an object of study, and two *Bedingungen*, or conditions. The object is *Wissenschaft*; the conditions are *Lehrfreiheit* and *Lernfreiheit*. By *Wissenschaft* the Germans mean knowledge in the most exalted sense of that term, namely, the ardent, methodical, independent search after truth in any and all of its forms, but wholly irrespective of utilitarian application.

WAYNE BIVENS-TATUM, LIBRARIES AND THE ENLIGHTENMENT 70 (2012) (quoting JAMES MORGAN HART, GERMAN UNIVERSITIES: A NARRATIVE OF PERSONAL EXPERIENCE (1874), reprinted in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 569, 571 (Richard Hofstadter & Wilson Smith eds., 1961)). America's leading universities, which became trend setters, embraced to a significant extent, though not fully, the German model. *Id.* at 70–71. America's universities also reorganized in the 1890s based on departmental academic disciplines, which provided the base of knowledge to be conveyed and sought to advance disciplinary knowledge via research and graduate education within their respective fields. Roger L. Geiger, *The Ivy League*, in STRUCTURING MASS HIGHER EDUCATION: THE ROLE OF ELITE INSTITUTIONS 281, 284 (David Palfreyman & Ted Tapper eds., 2009). Institutions of higher-education viewed themselves as having as a central mission advancing research within the various university fields. Craig Calhoun, *The Changing Character of College: Institutional Transformation in American Higher Education*, in THE SOCIAL WORLDS OF HIGHER EDUCATION: HANDBOOK FOR TEACHING IN A NEW CENTURY 9, 12 (Bernice A. Pescosolido & Ronald Aminzade eds., 1999).

52. Albert Jacobs's inaugural address as the Chancellor of the University of Denver in 1949 is emblematic of the Cold War era understanding of the role of universities:

America's New Frontiers are our great centers of learning—their opportunity and responsibility to impart to our citizens this essential knowledge and understanding.

period would mark the last in higher education that was largely untouched by consumerism.

In seeking to fulfill these various missions of higher education, the academy developed what Professor Steve O. Michael has termed the “professorialism model.”<sup>53</sup> Under the professorialism or professorial model, Michael notes, “[T]he faculty or professors determine what to offer, how to offer, and when to offer. The professors decide the kind of services to provide and what constitutes quality service.”<sup>54</sup> Before the rise of consumerism in higher education, universities and colleges for the most part educated a small wealthy elite in a fairly intimate environment, in which faculty commanded and students complied.<sup>55</sup>

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Again I say—truth is what we seek—the whole truth—truth about our way of life and alien ideologies. To help our people to see more clearly and to live more fully the ideal of American democracy requires courageous pioneering, clarity of vision and strength of purpose on the frontiers of higher education.

Why is the opportunity of our universities so great and the responsibility so heavy? Because the continuance of our free society depends on the capacity of our people to make wise decisions on policy and to discharge effectively their responsibilities. Never has the need been greater for citizens of intelligence, of wisdom and of courage. Our universities must equip our people to recognize the truth, to appreciate the heritage that is ours.

....

The primary function of a university is the advancement of knowledge, the discovery of new truth and the readjustment of what has been regarded as truth already discovered. A university passes on to coming generations the accumulated knowledge of the ages, giving youth an understanding of how our institutions, freedom of speech, freedom of religion, ownership of property and equality before the law, evolved and developed. When our youth realize that what we have is due to free enterprise, appreciate fully the priceless value of our heritage and understand completely “What Price Freedom”, the fear of internal collapse will vanish.

DOUGLAS E. CLARK, *EISENHOWER IN COMMAND AT COLUMBIA* 57–58 (2013). President Harry S. Truman provided leadership in expanding governmental funding to support students attending institutions of higher education with the dual purposes of providing an educational defense against the growing threat posed by communism and also to allow individual Americans from all economic backgrounds a better opportunity to reach their full potential. MAURICE R. BERUBE, *AMERICAN PRESIDENTS AND EDUCATION* 38 (1991); ANTHONY J. KUZNIEWSKI, *THY HONORED NAME: A HISTORY OF THE COLLEGE OF THE HOLY CROSS, 1843–1994*, at 313 (1999).

53. See generally Steve O. Michael, *American Higher Education System: Consumerism Versus Professorialism*, 11 INT’L J. EDUC. MGMT. 117 (1997).

54. *Id.* at 126.

55. See, e.g., Howard Gardner, *Beyond Markets and Individuals: A Focus on Educational Goals*, in *DECLINING BY DEGREES: HIGHER EDUCATION AT RISK* 97, 105 (Richard H. Hersh & John Merrow eds., 2005).



Specialization of education within department structures increased faculty control, and the hegemony of faculty over determining what constituted appropriate academic expectations and content was largely unchecked either inside or outside of colleges and universities.<sup>56</sup> This approach stands as the antithesis of a consumer-oriented model of education; thus, not surprisingly, institutions of higher education were characterized by a “lack of responsiveness” to students.<sup>57</sup> Within this professorial model, there is a lurking danger that traditional educational “rhetoric may cover institutional or professional interests rather than a genuine love for the search for truth, disinterested research and other traditional ideals of the university.”<sup>58</sup> In other words, while the pre-consumerist models in theory serve the greater good of the society and the student, there was a grave danger that faculty could conflate their own self-interest with that of the student and the broader society.

### *B. The Rise of Consumerism in the Educational Setting*

There is wide consensus that the professorial model has been significantly impacted by a rise of consumerism in higher education,<sup>59</sup> and law schools are not an exception to that trend.<sup>60</sup> The contemporary consumer-driven model did not appear in its present form in higher education via a single transformative moment but instead has emerged through a process that dates back more than half a century.<sup>61</sup> The origins of this transformation can be dated to the Servicemen’s

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56. Michael S. Harris, *The Escalation of Consumerism in Higher Education*, in 3 THE BUSINESS OF HIGHER EDUCATION: MARKETING AND CONSUMER INTERESTS 89, 95 (John C. Knapp & David J. Siegel eds., 2009).

57. Gardner, *supra* note 55, at 105.

58. Marek Kwiek, *Emergent European Educational Policies Under Scrutiny: The Bologna Process from a Central European Perspective*, in 12 HIGHER EDUCATION DYNAMICS: CREATING THE EUROPEAN AREA OF HIGHER EDUCATION 87, 110 (Voldemar Tomusk ed., 2006).

59. *See generally* DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2003); ROGER L. GEIGER, KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE (2004); ERIC GOULD, THE UNIVERSITY IN A CORPORATE CULTURE (2003); DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION (2003); SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2004); JENNIFER WASHBURN, UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF AMERICAN HIGHER EDUCATION (2005).

60. *See* Cavazos, *supra* note 14, at 1127; Michaels, *supra* note 14.

61. Michael S. Harris, *Out Out, Damned Spot: General Education in a Market-Driven Institution*, 55 J. GEN. EDUC. 186, 186–87 (2006).

Readjustment Act of 1944, better known as the G.I. Bill of Rights.<sup>62</sup> The G.I. Bill of Rights provided funding for returning soldiers to attend college, and they seized this opportunity in extraordinary numbers.<sup>63</sup> In the first decade of the program, millions of soldiers attended colleges and universities, resulting in, between 1946 and 1948, the majority of students in American higher education institutions being returning soldiers.<sup>64</sup>

Old-guard university presidents initially expressed concern. University of Chicago President Robert Hutchins expressed wariness that Roosevelt's program was simply moving the problems of the economic struggles of soldiers re-entering society to college campuses, which would be become "hobo jungles."<sup>65</sup> Harvard President James Conant feared that the intellectual quality of higher education would be watered down.<sup>66</sup>

Neither concern proved well founded. Quite to the contrary, "veterans possessed greater maturity and motivation than the average college student. Veterans earned higher grades and were less likely to fail than their counterparts."<sup>67</sup> Sophomoric student traditions, paddling freshman, and mud-fights were replaced by early morning to late evening classes and studying.<sup>68</sup> By 1949, Harvard President Conant

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62. Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284. President Franklin D. Roosevelt, who recalled the difficult financial position and transition back into society in returning from war for veterans of World War I, was determined, as were the members of the American Legion, that returning soldiers "must not be demobilized into . . . a place on a bread line or on a corner selling apples." *The Servicemen's Readjustment Act, Public Law 346 (The G.I. Bill of Rights), 1944* [hereinafter *The Servicemen's Readjustment Act*], in AMERICAN HIGHER EDUCATION TRANSFORMED, 1940–2005: DOCUMENTING THE NATIONAL DISCOURSE 394, 394 (Wilson Smith & Thomas Bender eds., 2008) [hereinafter AMERICAN HIGHER EDUCATION TRANSFORMED] (alteration in original) (quoting Franklin D. Roosevelt, President, Fireside Chat on the Progress of the War and Plans for Peace (July 28, 1943), in 1943 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D ROOSEVELT 326, 333 (Samuel I. Rosenman ed., 1950)). Public relations persons with the American Legion came up with the term G.I. Bills of Rights, which had its origins in the designation of an enlisted person in the Army, "Government Issue," and also to galvanized iron in military equipment of the era. *Id.*

63. *The Servicemen's Readjustment Act*, *supra* note 62, at 394.

64. KUZNIEWSKI, *supra* note 52, at 312–13.

65. *The Servicemen's Readjustment Act*, *supra* note 62, at 394; *see also* BERUBE, *supra* note 52, at 37.

66. BERUBE, *supra* note 52, at 37; *The Servicemen's Readjustment Act*, *supra* note 62, at 394.

67. BERUBE, *supra* note 52, at 37.

68. DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945–1980, at 14 (1983).

would retract his early criticism of the G.I. Bill of Rights, concluding that the Harvard Class of 1949 was “the most mature and promising students Harvard has ever had.”<sup>69</sup> Similarly, *Fortune* magazine stated that the students graduating that year were “the best class the country has ever produced . . . the most mature . . . the most responsible . . . the most self-disciplined group the colleges have ever had.”<sup>70</sup> The soldiers returning from World War II were also “more focused on vocational preparation, and more willing to question the authority of professors.”<sup>71</sup> Rather than embracing a methodical traditional academic pace, these career-oriented former soldiers “did not have time to waste.”<sup>72</sup> Their relative position vis-à-vis students before them, older, more mature, and having experienced war, also pushed universities to bend some long-existent regulations to accommodate these students.<sup>73</sup> With federal funds available, universities also started to attempt to recruit such students.<sup>74</sup>

Activist students of the 1960s would also pose a challenge to professorial hegemony. These “student activists changed the relationship between students and the administration by leveraging their power as tuition-payers to force universities to live up to ideals of fairness, equality and justice.”<sup>75</sup> Student activists also advanced their own more immediate self-interest in pushing for independent studies and pass-fail grading.<sup>76</sup>

By the 1980s, education had “lost much of its intrinsic value; it was discussed more and more in terms of the market, as an individual investment in human capital. Increasingly higher education was treated as a private good, a product to be purchased for personal benefit.”<sup>77</sup>

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69. *Id.* (quoting Keith W. Olson, *The G.I. Bill and Higher Education: Success and Surprise*, 25 AM. Q. 596, 604 (1973)).

70. *Id.* (alterations in original) (quoting *Class of '49*, FORTUNE, June 1949, at 84, 84).

71. Julie Margetta Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL'Y 531, 544 (2009).

72. Michael Bisesi, Book Review, 59 PEABODY J. EDUC. 66, 66–67 (1981).

73. KUZNIEWSKI, *supra* note 52, at 312–13.

74. See BERUBE, *supra* note 52, at 37; *The Servicemen's Readjustment Act*, *supra* note 62, at 394.

75. Morgan, *supra* note 71, at 544–45.

76. Bisesi, *supra* note 72, at 67.

77. Wilson Smith & Thomas Bender, *Introduction to AMERICAN HIGHER EDUCATION TRANSFORMED*, *supra* note 62, at 1, 9.

The negative result has been “the student as consumer, too often more interested in certification than in inquiry.”<sup>78</sup>

The arrival of Millennials on campuses has further pushed the consumer-driven model of education. The majority of today’s law students<sup>79</sup> are part of “Generation Y,” also known as Millennials, born from 1981 to 1995,<sup>80</sup> a generation that has been described as “born consumers.”<sup>81</sup> Professor Melissa Weresh describes the attributes that make a consumerist understanding so engrained with Millennials:

This was a generation of children who were told that their opinions (on just about everything) mattered. Thus, they are accustomed to voicing those opinions and believe that their contributions should be valued, irrespective of their relative lack of experience. The authoritative figures that influenced their development were publicly disparaged . . . . One generational scholar notes that Millennials have a “sense of entitlement” and are not deferential, assuming an equality with more seasoned peers irrespective of experience.<sup>82</sup>

Perhaps as a result of the changed public discourse on education to a consumer-driven model, and perhaps in part because of generational characteristics, undergraduate students of the Millennial generation have shown an increased willingness to bring suits against universities as consumers:

Today, students demand more choice and flexibility from universities, and institutions are willing to acquiesce. When their expectations are not met, students and parents do not hesitate to seek recourse outside the university by appealing to the court system. . . . Courts have reinforced this consumer mentality by inferring a contractual relationship between the student and

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78. *Id.*

79. Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 273–74 (2011) (“Most law students today are members of the generational group known as Millennials, who were born between 1981 and the mid-2000s and differ significantly from previous generations.”).

80. Weresh, *supra* note 25, at 360–61.

81. Jan M. Baker, *Teaching Legal Writing in the 17th Grade: Tips for Teaching Career Students Who Fly Nonstop from First Grade to First Year*, 16 PERSP. 19, 19–20 (2007).

82. Weresh, *supra* note 25, at 368 (footnotes omitted) (quoting JEAN M. TWENGE, GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE 29 (2006)).

college, using the academic handbook as the terms of the agreement.<sup>83</sup>

Examples of such lawsuits include suits based on tuition price disputes,<sup>84</sup> misleading job placement or earned qualification claims, program accreditation, and grade disputes.<sup>85</sup> There have likewise been multiple suits brought by law students claiming damages as consumers.<sup>86</sup> Although the suits have not been successful,<sup>87</sup> the public discussion surrounding the suits has reinforced the model of law students as consumers.

The effects of consumerism on higher education have varied from the somewhat frivolous but not terribly significant in-and-of-themselves to outright disturbing and fundamentally challenging to the purposes of higher education. On the former side, schools' competition to attract students with the latest amenities has transformed colleges into resort-like environments with features and services that range from the ubiquitous—for example, rock climbing walls—to the unique—for example, High Point University's ice cream truck that travels the campus delivering free ice cream.<sup>88</sup> On the more disturbing side, there is a dramatic increase in incivility among students<sup>89</sup> and, even more problematic, a capitulation in terms of academic expectations from far too many university administrators and faculty members.<sup>90</sup> The net result of capitulation by faculty members, who are seeking to avoid negative evaluations from students, and administrators, who are looking to recruit and retain students, is grade inflation and a decrease in

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83. Morgan, *supra* note 71, at 545–46 (footnote omitted).

84. *Id.* at 546.

85. Robert E. Toone & Catherine C. Deneke, *Student-Consumers: The Application of Chapter 93A to Higher Education in Massachusetts*, BOS. B.J., Fall 2013, at 16, 16.

86. *Id.*; see also Christopher Polchin, *Raising the "Bar" on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 209–10 (2012).

87. Toone & Deneke, *supra* note 85, at 16 & n.1.

88. WILLIAM J. BENNETT & DAVID WILEZOL, *IS COLLEGE WORTH IT?: A FORMER UNITED STATES SECRETARY OF EDUCATION AND A LIBERAL ARTS GRADUATE EXPOSE THE BROKEN PROMISE OF HIGHER EDUCATION* 66–69 (2013); Michael S. Harris, *The Escalation of Consumerism in Higher Education*, in 3 *THE BUSINESS OF HIGHER EDUCATION* 89, 94 (John C. Knapp & David J. Siegel eds., 2009).

89. See, e.g., S. Pascale Vergereau-Dewey, *Back to School, 2006*, in *BREAKTHROUGH: ESSAYS AND VIGNETTES IN HONOR OF JOHN A. RASSIAS* 37, 39 (Mel B. Yoken ed., 2007) (noting that there exists a “declining decorum in classrooms. Students’ incivilities . . . include [for example] coming late and leaving early, eating, conversing and talking on cell phones.”).

90. JAMES E. CÔTÉ & ANTON L. ALLAHAR, *IVORY TOWER BLUES: A UNIVERSITY SYSTEM IN CRISIS* 116 (2007).

academic rigor.<sup>91</sup> Professors James E. Côté and Anton L. Allahar have asserted that

grade inflation . . . has progressed to the point where, regardless of ability, almost everyone who enters university today is virtually guaranteed to graduate with a degree if they simply pay tuition, show up for class periodically, and half-heartedly sit for the tests and hand in the half-baked assignments in their courses. And this brings us back to the state of affairs where universities have become large business enterprises with customers demanding of satisfaction and their money's worth. For the disengaged student, satisfaction translates to high grades for little effort.<sup>92</sup>

The reduction in academic rigor is not without consequence or effect, which include students' lack of adequate preparation for entering into and succeeding in the employment sphere resulting from colleges' failure to train students to think critically, write effectively, or to meet general workplace expectations, such as timeliness.<sup>93</sup> Stake-holders such as legislators, business leaders, parents, and students who are accumulating debt with diminished job prospects are starting to push back, but the tide still favors reducing rather than increasing academic rigor.<sup>94</sup> That result follows because for the consumers—the current and prospective students—the most important part of college is not the knowledge gained, the training for their future employment, or being better prepared for their role as a citizen but instead “getting the degree in the end and the fun they have along the way, the friends they make, and the things they learn about themselves in peer relationships.”<sup>95</sup> Thus, classes and academic requirements are perceived as not the essence of college but something that interferes with the college

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91. *Id.*

92. *Id.*

93. See, e.g., RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 1–3 (2011); Eric Pianin, *The Surprising Reason College Grads Can't Get a Job*, FISCAL TIMES (Jan. 19, 2014), <http://www.thefiscaltimes.com/Articles/2014/01/29/Surprising-Reason-College-Grads-Can-t-Get-Job> [https://perma.cc/5CWF-WAS5]; Martha C. White, *The Real Reason New College Grads Can't Get Hired*, TIME (Nov. 10, 2013), <http://business.time.com/2013/11/10/the-real-reason-new-college-grads-cant-get-hired/>.

94. See generally ARUM & ROKSA, *supra* note 93; BRANDON, *supra* note 43; SELINGO, *supra* note 43, at 19–35.

95. MARY GRIGSBY, *COLLEGE LIFE THROUGH THE EYES OF STUDENTS* 116 (2009).

experience.<sup>96</sup> There is a danger in the consumer-driven model that universities will entertain instead of educate, affirm instead of challenge, comfort instead of strengthen.<sup>97</sup>

### C. *The Positive Impact of Consumerism in Legal Education*

In comparison with undergraduate programs of study, consumerism in the law school setting has not been nearly as negative and, in fact, has helped advance some much-needed reform. That result follows because law student consumerism is more closely aligned with the traditional educational goals of faculty than are the objectives of undergraduate students and undergraduate faculty. While mass higher education in the United States began with high expectation soldiers returning from war who wanted to be trained to succeed in their future vocations,<sup>98</sup> “[a]nthropologists studying contemporary college students note that fun is why many young adults go to college.”<sup>99</sup> Law students go to law school for a different reason. As has been well noted by the acidic,<sup>100</sup> informative,<sup>101</sup> and at times scandalous<sup>102</sup> editors of *Above the Law*, “[m]ost people attend law school to obtain jobs as lawyers.”<sup>103</sup> To accomplish the aim of obtaining employment or preparing to hang-out their own shingle, “law students want professors’ teaching geared

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96. *See id.*

97. *See* ALFRED P. ROVAL, *THE INTERNET AND HIGHER EDUCATION: ACHIEVING GLOBAL REACH* 63–64 (2009).

98. *See* BRANDON, *supra* note 43; JAMES J. FARRELL, *THE NATURE OF COLLEGE: HOW A NEW UNDERSTANDING OF CAMPUS LIFE CAN CHANGE THE WORLD* 158 (2010).

99. FARRELL, *supra* note 98, at 158.

100. *See* Jordan Weissmann, *Now Is a Great Time to Apply to Law School: We Aren't Joking—Promise*, SLATE: MONEYBOX (June 30, 2014, 11:39 AM), [http://www.slate.com/articles/business/moneybox/2014/06/why\\_now\\_is\\_a\\_great\\_time\\_to\\_go\\_to\\_law\\_school\\_part\\_2.html](http://www.slate.com/articles/business/moneybox/2014/06/why_now_is_a_great_time_to_go_to_law_school_part_2.html) [<https://perma.cc/C5SK-VDC2>] (characterizing the writers of *Above the Law* as “delightfully acidic folks”).

101. *See* Joshua Landau & Kate Willcox, *Within the Law: Dealing with Non-Confidential Sensitive Information in the Age of Online Legal Tabloids*, 23 GEO. J. LEGAL ETHICS 667, 681–82 (2010) (“Legal blogs, and *Above the Law* in particular, are popular sources of information in the legal community.”).

102. Brian Leiter, *Is the “National Enquirer” Blog for Law About to Fold?*, BRIAN LEITER’S L. SCH. REP. (Dec. 20, 2013), <http://leiterlawschool.typepad.com/leiter/2013/12/is-the-national-enquirer-blog-for-law-about-to-fold.html> [<https://perma.cc/3ADG-MCSD>] (describing *Above the Law* as “notorious gossip cyber-rag”).

103. *Law School Rankings: Most People Attend Law School to Obtain Jobs as Lawyers*, ABOVE L., <http://abovethelaw.com/careers/2015-law-school-rankings/> [<https://perma.cc/4DZQ-PV4H>] (last visited Mar. 8, 2016).

toward the realities of practice.”<sup>104</sup> The legal academy long resisted such reforms, viewing practical skills training as the “grubby”<sup>105</sup> stuff of “trade schools,”<sup>106</sup> rather than the more rarified theoretical air of graduate education.<sup>107</sup> “In the 1980s and ‘90s . . . ‘most law schools could promise their applicants excellent job prospects even if they did not have programs in place to impart practical skills’” because of the inadequate supply of new law school graduates to meet the legal employers’ needs.<sup>108</sup> Thus, there could be a detente between students and resistant faculty because jobs were readily available despite educational deficiencies, which were then remedied by employers.<sup>109</sup>

An antagonistic view towards inclusion of practical skills from then to now has come to appear as dated as stove-pipe hats, pocket-watches, and monocles. Of the movement towards practical skills legal education, Dean Luke Bierman offered a brief but telling synopsis: “Everybody’s doing it.”<sup>110</sup> It has not escaped schools’ attention that

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104. Martin H. Pritikin, *The Experiential Sabbatical*, 64 J. LEGAL EDUC. 33, 36 n.18 (2014) (noting that surveys suggest “practicing attorneys regret they did not get better training in these areas while in law school”).

105. Christopher G. Wren & Jill Robinson Wren, *The Teaching of Legal Research*, 80 LAW LIBR. J. 7, 24–25 (1988) (“Proponents of a graduate school model advocate a curriculum concentrating almost exclusively on the theoretical and policy underpinnings of legal doctrines and generally disdain courses intended to develop ‘grubby’ skills considered useful only in practicing law. A trade school model, on the other hand, presumes that a law school exists to train students principally to practice law . . .”).

106. Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 268 (1992) (“Historically, most law school educators rejected the idea that a law school education ought to include broad-based instruction in skills and values and in the art of lawyering. The traditional approach to legal education essentially borrowed a liberal arts methodology and applied it to professional education. . . . It also assumed that a law school connected to a university ought to teach research-based theory and theoretical skills and not the practical skills and values associated with trade schools.” (footnotes omitted)).

107. Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 246–48 (1996) (“The ‘grudging’ attitude toward legal skills training has resulted in part from the tension between the ‘trade school’ and ‘graduate academy’ views of American schools.”).

108. Joshua L. Plager, *All Things Equal: Unintended Consequences and Allegedly Misrepresented Statistics*, 67 U. MIAMI L. REV. 681, 690–91 (2013) (quoting Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL ED. 598, 602 (2010)).

109. See *id.* at 690–91 (quoting Thies, *supra* note 108, at 602).

110. Don J. DeBenedictis, *Practical Skills in Vogue in Law School Classrooms*, DAILY J. (Sept. 17, 2013), <http://www.dailyjournal.com/public/Pubmain.cfm?seloption=The%20New%20Lawyer&pubdate=2013-05-21&shNewsType=Supplement&NewsId=965&sdivId=&screenHt=680&eid=931174> [https://perma.cc/EQ83-W8RM].



“[s]pecial practice courses, skills courses, and clinics also become effective recruiting programs when law schools look for new admittees.”<sup>111</sup> The legal academy has largely accepted that “[w]hat law students want and deserve is a true professional education that includes instruction in the craft of the law, not just legal theory and doctrine.”<sup>112</sup> The second component of that formulation, law faculties’ expanded view of what students deserve, has been greatly aided by the simultaneous lauding and shaming of the legal academy that occurred with the highly influential 2007 report from the Carnegie Foundation on Higher Education, *Educating Lawyers: Preparation for the Profession of Law*.<sup>113</sup> Therein, law schools were praised for their ability to quickly and effectively teach students to think like a lawyer<sup>114</sup> but strongly criticized for their failure to assist students further in developing practical skills.<sup>115</sup> The movement to end the war between theory and practice was also greatly assisted by the reminder from the Carnegie Report that theory and practice can be integrated to bring the student to a fuller and richer understanding of both.<sup>116</sup> As was well observed by Professor Linda Edwards:

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111. Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449, 452 (2012).

112. Roy Stuckey, *Foreword*, 38 WM. MITCHELL L. REV. 900, 903 (2012).

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

114. *Id.* at 186 (“From this comparative perspective [comparing with other professional schools], law schools are impressive educational institutions. In a relatively short period of time, they are able to impart a distinctive habit of thinking that forms the basis for their students’ development as legal professionals. In our visits to over a dozen schools of different types and geographical locations, our research team found unmistakable evidence of the pedagogical power of the first phase of legal education. Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules. Despite a wide variety of social backgrounds and undergraduate experiences, they were learning, in the parlance of legal education, to ‘think like a lawyer.’ This is an accomplishment of the first order that deserves serious consideration from educators of aspirants to other professional fields.”).

115. *Id.* at 188.

116. See, e.g., Sherri Lee Keene, *One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Law School Curriculum*, 65 MERCER L. REV. 467, 472 (2014) (“[T]he Carnegie Report speaks not only of increased skills training in legal education, but also calls for law students to have more opportunities to integrate theory and practice.”); Pritikin, *supra* note 104, at 36 (“[T]he reform literature resoundingly rejects the divide between theory, practice and professionalism in legal education.”).

Instead of merely adding more skills faculty, who will teach more skills courses, the report advocates the integration of skills components into existing courses. Because this integration will bring existing case-dialogue faculty into the teaching of skills, it can be expected to prompt “deep engagement with the knowledge, skills, and defining loyalties of the profession.” The goal is to overrun traditional boundaries. This integrative approach would help legal education “re-integrate the severed components of the educational experience.”<sup>117</sup>

The consumer-driven demands pushing upon an environment in which faculty have become more willing to accept and embrace change are significantly shifting the legal academy’s approach to integration of practical skills into legal education.

Another positive change a consumer model of legal education has engendered is increased transparency in law schools’ reporting of consumer information such as enrollment and employment statistics.<sup>118</sup> ABA Standard for Approval of Law Schools 509 requires that law schools make public certain information that, among other things, is of interest to the student-consumer deciding whether to attend an institution.<sup>119</sup> For instance, law schools are required to publish information about “employment outcomes.”<sup>120</sup> Punishment for failure to comply with these standards includes losing ABA accreditation.<sup>121</sup> However, many law schools regularly manipulated the statistics in various ways for their own benefit.<sup>122</sup> For instance, law schools had developed a practice of hiring their own graduates for short stints in order to increase their post-graduation employment numbers.<sup>123</sup> When the legal market was relatively robust, these manipulations went unchecked, but as the legal market faltered, students who expected but did not receive gainful employment after graduation took notice and

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117. Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 215 (2014) (footnotes omitted) (quoting CARNEGIE REPORT, *supra* note 113, at 84–85).

118. Polchin, *supra* note 86, at 210.

119. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015 § 509 (AM. BAR ASS’N 2014).

120. *Id.* § 509(b)(7).

121. *Id.* § 509(a).

122. Paul Campos, *Served*, NEW REPUBLIC (Apr. 24, 2011), <http://www.newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown> [<https://perma.cc/M69K-W6HB>].

123. *Id.*

several lawsuits were brought by graduates against their alma maters in which students alleged damages as consumers.<sup>124</sup> Although the lawsuits were not successful, in part in response to the public criticism related to the student lawsuits, between 2011 and 2013 the ABA made changes to the information that law schools must provide, requiring more detailed information that is less susceptible to manipulation in order to better inform the student-consumer.<sup>125</sup>

#### IV. LAW SCHOOLS' ROLE IN INSTILLING PROFESSIONALISM IN AN AGE OF CONSUMERISM

Unlike practical skills training and increased transparency in reporting, in which consumer demands are helping to push much needed reform, consumerism has thus far presented a challenge for law schools in teaching professionalism. A lack of professionalism is unfortunately tied with, and more naturally exhibited by, those approaching legal education from a consumerist perspective.<sup>126</sup> Employers report that Millennials in particular have difficulty with some of the soft skills<sup>127</sup> of professionalism.<sup>128</sup> More fundamentally problematic with regard to instilling professionalism, consumerism is a mind-set of rights and privileges, not responsibilities and duties,<sup>129</sup> and is thus, in many ways, the antithesis of professionalism.<sup>130</sup> Unlike practical skills, students have a tendency to approach professionalism issues with a lack of passion or even interest.<sup>131</sup> Professionalism, in the view of many students, is

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124. Andrew S. Murphy, *Redeeming A Lost Generation: "The Year of Law School Litigation" and the Future of the Law School Transparency Movement*, 88 IND. L.J. 773, 775 (2013) ("[A]lumni of at least fifteen law schools have even filed purported class-action lawsuits seeking tens of millions of dollars in damages for those alleged injuries."); Polchin, *supra* note 86, at 207–10.

125. Polchin, *supra* note 86, at 209–10.

126. Kristen Konrad Tiscione, *A Writing Revolution: Using Legal Writing's "Hobble" to Solve Legal Education's Problem*, 42 CAP. U. L. REV. 143, 157 (2014).

127. Defined in contrast to "hard skills" which are more technical in nature, soft skills "cover multifarious abilities such as communication and interpersonal skills, emotional intelligence, team skills, negotiations skills, social grace, time management skills, business etiquettes, etc. Soft skills are becoming essential for professional success." RAJ KUMAR, BASIC BUSINESS COMMUNICATION: CONCEPTS, APPLICATIONS AND SKILLS 249 (2010).

128. *See id.*; JEFF WOLF, SEVEN DISCIPLINES OF A LEADER 263 (2015).

129. ANTHONY SELDON, TRUST: HOW WE LOST IT AND HOW TO GET IT BACK 37–39 (2009).

130. *See supra* Part II for a discussion of what constitutes professionalism.

131. *See* Sabrina C. Narain, *A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School's Duty to Better Prepare Lawyers for Real Life Practice*, 41 W. ST.

transmogrified into a shriveled incomplete form of itself—limited solely to what one needs to know to pass the Multi-State Professional Responsibility Exam (MPRE) and a professional responsibility course as well as not to get disbarred, suspended, or censured.<sup>132</sup> Students generally do not view issues of professionalism as warranting sustained focus or attention.<sup>133</sup> In fact, as noted by Professional Responsibility Professor Michelle Harner,

not many students consider the “profession” part of the “legal profession” prior to attending law school. Rather . . . they view law school as a means to an end . . . . They probably give little thought to the fact that they are preparing to join a “profession.”<sup>134</sup>

Law schools have an unfortunate tendency to reinforce, though inadvertently, the message that professionalism is less important than theory or doctrine that students are learning in classic casebook courses.<sup>135</sup>

Consumerism is a pursuit of self-interest<sup>136</sup> and students’ working understanding, not an inaccurate one, is that professionalism requires sacrifice of self-interest.<sup>137</sup> While lawyers acting in accordance with the dictates of professionalism benefits the profession as a whole<sup>138</sup> and the public,<sup>139</sup> “few [lawyers] have direct economic incentives to be ‘more

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U. L. REV. 411, 415 (2014) (quoting Sarah Galer, *New Ethics Class Gives Law Students More Realistic Dilemmas*, RECORD (Fall 2009), <http://www.law.uchicago.edu/alumni/magazine/fall09/ethics> [<https://perma.cc/W2UF-D563>]).

132. *See id.*

133. *See* W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 575 (2001).

134. Michelle Harner, *Teaching Professionalism*, CONCURRING OPINIONS (Jan. 20, 2011), <http://concurringopinions.com/archives/2011/01/teaching-professionalism.html> [<https://perma.cc/M4P5-P47P>].

135. *See* Timothy P. Chinari, *We Are Who We Admit: The Need to Harmonize Law School Admission and Professionalism Processes with Bar Admission Standards*, 31 MISS. C. L. REV. 43, 64 & n.92 (2012).

136. JOHAN J. GRAAFLAND, *ECONOMICS, ETHICS AND THE MARKET: INTRODUCTION AND APPLICATIONS* 86 (2007).

137. George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 275 (1998).

138. *See, e.g.*, Alison L. Asti, *Strengthening MSBA as a Legal Resource*, MD. B.J., Nov./Dec. 2007, at 44, 47; J. Nick Badgerow, *Brave Lawyers’ Work: The Pillars of Professionalism*, J. KAN. B. ASS’N, Oct. 2012, at 22.

139. *See* *Middlebrook v. Sch. Dist.*, 805 F. Supp. 534, 536 n.3 (E.D. Tenn. 1991) (emphasizing the importance of professionalism in the administration of justice); Michael T.

professional.”<sup>140</sup> To the contrary, “lack of professionalism does not necessarily equate with ‘bad lawyering.’ Failure to devote time to improving the justice system, lack of civility, and overly aggressive tactics may not be ethical violations, professional malpractice, or detrimental to a client’s interests.”<sup>141</sup> Students perceive that professionalism does not relate to being an “effective lawyer” and wonder whether professionalism beyond that demanded to avoid discipline will help them to have a more successful career.<sup>142</sup> They have not as of yet grasped and certainly not internalized, something difficult for a consumer mindset student to do, that “[a] person who deploys his or her doctrinal skill without concern for the public interest is merely a good legal technician—not a good lawyer.”<sup>143</sup> In other words, for a student who is seeking to become an effective and successful attorney, professionalism beyond adhering to minimum requirements, has a tendency to seem like pious murmurs. This is not particularly conducive to law schools instilling the faith of professionalism in law students, which is problematic because law schools have a clear duty to do precisely that.

At least four ABA Standards for law school accreditation impose some measure of duty upon a law school to instill professionalism in law school students. ABA Standard 301 provides that “[a] law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation.”<sup>144</sup> ABA Standard 302(c) provides that “[a] law school shall establish learning outcomes that shall, at a minimum, include competency in [among others areas] (c) Exercise of proper professional and ethical responsibilities to clients and the legal system . . . .”<sup>145</sup> ABA Standard 303(a) requires that “[a] law school shall

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Colatrella Jr., *Learning “the True, the Good and the Beautiful” in Law School: Educating the Twenty-First Century Litigator*, 33 REV. LITIG. 741, 776 (2014).

140. Montgomery, *supra* note 32, at 333.

141. *Id.*

142. See 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).

143. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 66 (1992).

144. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015 § 301(a) (AM. BAR ASS’N 2014).

145. *Id.* § 302(c). Standard 302(d) requires law schools to develop a program of study that “shall establish learning outcomes that shall, at a minimum, include competency

offer a curriculum that requires each student to satisfactorily complete at least . . . (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members.”<sup>146</sup> Additionally, ABA Standard 303(b)(2) mandates that “[a] law school shall provide substantial opportunities to students for: . . . (2) student participation in pro bono legal services, including law-related public service activities.”<sup>147</sup> As a practical matter, however, a law school can satisfy all of these requirements through a two-credit professional responsibility class and a program that offers students the opportunity to voluntarily participate in an externship program that includes public service or pro bono opportunities.<sup>148</sup>

As was well described by Professor A. Benjamin Spencer, “[t]he ABA Standards impose a requirement of giving students some legal ethics or professionalism training.”<sup>149</sup> Legal Professionalism expert Tim Chinaris has similarly noted while these requirements “provide a basic foundation for ethics and professionalism education” that law schools themselves, as well as the ABA and state supreme courts, may need to consider more demanding requirements.<sup>150</sup>

So if not the ABA, from where does the duty for law schools to teach professionalism arise? In considering this question it is important to remember that law schools taught professionalism long before the ABA required them to do so. From 1921, when the ABA first promulgated its *Standards for Legal Education* and provided its first list of law schools that met those standards,<sup>151</sup> until the involvement of

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in . . . (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.” *Id.* § 302(d). ABA Interpretation 302-1 provides a gloss to the ABA Standard that seems to move the focus of 302(d) from aspirational professionalism to skills based effectiveness: “For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.” *Id.* § 302 cmt.

146. *Id.* § 303(a)(1).

147. *Id.* § 303(b)(2).

148. Chinaris, *supra* note 135, at 82–83.

149. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2021 n.301 (2012).

150. Chinaris, *supra* note 135, at 46.

151. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015, at vii (AM. BAR ASS’N 2014).

multiple lawyers in the Watergate scandal prompted reform in 1973,<sup>152</sup> the ABA's *Standards for Legal Education* did not require law schools to instruct future lawyers on legal ethics or professional responsibility.<sup>153</sup> Nevertheless, law schools have been offering professional responsibility instruction since as early as the 1930s.<sup>154</sup> Though not required by the ABA nor sought by their customers, the simple reason is that teaching professionalism is an aspect of the professional duty and responsibilities of lawyer members of law faculties to the profession.<sup>155</sup>

Law schools, unfortunately, have not been succeeding particularly well in meeting this responsibility, which is not a new problem. In 1986, the American Bar Association Commission on Professionalism considered how to revitalize professionalism and issued a report based upon their findings,<sup>156</sup> which would become known as the Stanley Report.<sup>157</sup> Therein, the ABA Commission on Professionalism expressed optimism about the role that law schools could play in inspiring professionalism but also a wariness of law schools' existing approaches to doing so.<sup>158</sup> The Stanley Report recommended that professionalism should be addressed in different courses as it arises therein and not simply in terms of minimum requirements of the rules but more expansively in terms of expectations, mores, and values of the

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152. The appearance of the first ABA requirements for law schools to teach professional responsibility emerged out of the Watergate scandal and the involvement of so many lawyers therein. Narain, *supra* note 131, at 414–15 (“In the early 1970s and shortly after the *Watergate* scandal came to light, the ABA required all accredited law schools to teach courses regarding the ‘duties, values, and responsibilities of the legal profession.’ The ABA believed that a basic ethics course would have had an impact on those involved in Watergate.” (footnotes omitted)).

153. Miriam R. Albert & Jennifer A. Gundlach, *Bridging the Gap: How Introducing Ethical Skills Exercises Will Enrich Learning in First-Year Courses*, 5 DREXEL L. REV. 165, 172 n.13 (2012); see also Laurel S. Terry, *A Survey of Legal Ethics Education in Law Schools*, in ETHICS IN ACADEMIA 61, 65–66 (S.K. Majumdar et al. eds., 2000).

154. Albert & Gundlach, *supra* note 153, at 172 n.13.

155. See, e.g., Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 36–37 (2012); Chinaris, *supra* note 135, at 63 (noting the disturbing tendency of some faculty members to regard instilling professionalism as not being the responsibility of law schools); Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 PROF. LAW., no. 1, 2010, at 1, 11.

156. STANLEY REPORT, *supra* note 16.

157. Marjorie Meeks, Note, *Alter(ing) People's Perceptions: The Challenge Facing Advocates of Ancillary Business Practices*, 66 IND. L.J. 1031, 1031 n.5 (1991).

158. STANLEY REPORT, *supra* note 16, at 16–19.

profession.<sup>159</sup> In 1986, through the vehicle of the Stanley Report, law schools were presented with a thoughtful well-reasoned suggestion to “give attention to teaching of ethics and include discussions of professionalism and ethics throughout curriculum.”<sup>160</sup> In 1989, the ABA Section of Legal Education and Admissions to the Bar created a task force that as part of its mission was to consider issues of professionalism in legal education; the task force produced in 1992 the MacCrate Report.<sup>161</sup> Like its predecessor the Stanley Report, the MacCrate Report concluded that the law schools and the bar have a shared “responsibility for ensuring the proper professional development of members of the legal profession . . . .”<sup>162</sup> The MacCrate Report called for a renewed emphasis on ethics and professionalism in law schools, admonishing law schools for “not giving adequate attention to teaching students professionalism.”<sup>163</sup> Like its predecessor, the Stanley Report, the MacCrate Report tried to plant “the seeds for professionalism education beyond the application of the rules of ethics. The professional values identified as essential were: (1) strive to provide competent representation; (2) strive to promote justice; (3) strive to improve the profession; and (4) strive to develop a sense of professional identity.”<sup>164</sup>

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159. *Id.*

160. Eleanor W. Myers, “Simple Truths” About Moral Education, 45 AM. U. L. REV. 823, 824 n.3 (1996).

161. Cecilia Bryant, *The Fork in the Road: The Bifurcated Purposes of Legal Education*, FLA. B.J., May 1997, at 48, 50 (quoting Robert MacCrate, “The Lost Lawyer” Regained: *The Abiding Values of the Legal Profession*, 100 DICK. L. REV. 587, 614 (1996)) (“In 1987, Justice Rosalie Wahl [of the Minnesota Supreme Court], then chair of the ABA Section of Legal Education and Admissions to the Bar, asked, ‘What skills, what attitudes, what character traits, and what qualities of mind are required of lawyers in a time of great change in the legal profession to sustain and preserve the profession as a respected, client-serving, problem-solving, public calling?’ In 1989, the section created the Task Force on Law Schools and the Profession: Narrowing the Gap to answer Justice’s Wahl’s questions. The task force, chaired by Robert MacCrate, retired senior partner of Sullivan & Cromwell in New York City and former president of the ABA, submitted its report in 1992, *Legal Education and Professional Development—An Educational Continuum* (MacCrate Report).” (footnote omitted)).

162. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: Perspectives on Curriculum Reform, Mercer Law School’s Woodruff Curriculum, and . . . “Perspectives,”* 63 MERCER L. REV. 975, 1003 n.84 (2012).

163. Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching After the Carnegie Foundation’s Educating Lawyers*, 31 W. NEW ENG. L. REV. 97, 113 n.71 (2009).

164. Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 63–64



Some of the findings of the MacCrate Report provoked a follow-up investigation by the ABA which created a committee that was composed of members the ABA's Commission on Professional Responsibility.<sup>165</sup> This committee was to specifically focus on "the role of law schools in instituting a sense of professionalism in law students during their law school study."<sup>166</sup> Issuing their report *Teaching and Learning Professionalism* in 1996,<sup>167</sup> Committee Chair William Reece Smith has described the report's findings and the immediate response thereto as follows:

The recommendations of the "Teaching and Learning Professionalism" report are extensive. But consistent with the committee's basic assignment, the initial focus was on law school instruction in professionalism. The report contains two paramount recommendations in that regard.

The law school survey responses indicated that most law schools offer a single two- or three-hour course on professional responsibility in which the minimum disciplinary standards contained in the Model Rules of Professional Conduct and the Model Code of Professional Responsibility are primarily stressed. There was little indication of professionalism instruction otherwise. The committee found this state of affairs unsatisfactory and recommended that, to the extent practical, ethics and professionalism be taught pervasively throughout the law school curriculum.

Perhaps more importantly, the committee noted that law school faculty often serve as a student's first role model of the professional lawyer. Faculty members were urged, therefore, to be aware of this role and to conduct themselves accordingly. The committee also recommended that only faculty with significant practice experience should be selected to teach professional

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(2012).

165. Wm. Reece Smith, Jr., *Professionalism? What's That?*, FLA. B.J., May 1998, at 28, 28, 30-31.

166. *Id.* at 31.

167. David S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. TOL. L. REV. 421, 424 (2009) ("[T]he ABA's Professionalism Committee issued another report in 1996, entitled *Teaching and Learning Professionalism*. Its focus was 'on the professional values segment' of the MacCrate Commission Report, and its approach was 'to look at the purposes of the profession, the character of the practitioner, and supportive characteristics of professionalism.'" (footnotes omitted) (quoting PROFESSIONALISM COMM., AM. BAR ASS'N, *TEACHING AND LEARNING PROFESSIONALISM* 1 n.2, 5 (1996))).

responsibility and legal ethics courses and that faculty should be recruited with this requirement in mind. This recommendation predictably provoked criticism from law school circles as being inconsistent with the current employment practices of many law schools.<sup>168</sup>

Despite initial encouragement and subsequent scolding from the ABA, prior to 2007 and the issuance of the Carnegie Report, “little had been done to *increase* meaningful professionalism education in American law schools.”<sup>169</sup> Not surprisingly, “[t]here is widespread dissatisfaction within academia about the role of professional responsibility in the law school curriculum.”<sup>170</sup> More importantly, there is a serious professionalism problem, what some have termed a professionalism crisis, that has dangers of deepening.<sup>171</sup> The 2007 Carnegie Report, addressed above in terms of its discussion of practical skills recommendations for law schools, tapped into this problem, concluding “that American law schools have failed to teach professionalism effectively.”<sup>172</sup> The Carnegie Report expressly notes that

[c]ontinuing and growing lawyer discipline problems suggest that law schools can and should address professionalism and character . . . . As a matter of notice and common sense, law practice cannot be the first time that a lawyer takes to heart the duty toward maintaining the integrity of the profession.<sup>173</sup>

Ultimately, the Carnegie Report encourages “law schools to ‘offer an integrated curriculum’ that ‘joins “lawyering,” professionalism and legal analysis from the start.’”<sup>174</sup> Something that builds upon but that is similar to what the Stanley Report, the MacCrate Report, and the

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168. Smith, *supra* note 165, at 31–32.

169. Kehner & Robinson, *supra* note 164, at 65 & n.35 (emphasis added).

170. Alfred R. Light, *Civil Procedure Parables in the First Year: Applying the Bible to Think Like a Lawyer*, 37 GONZ. L. REV. 283, 284 (2001–2002).

171. See Myers, *supra* note 160, at 827–29.

172. John L. Gedid, *The Importance of Professionalism*, WIDENER L., Fall 2008, at 10, 11.

173. Timmer & Berry, *supra* note 155, at 11.

174. Nantiya Ruan, *Student, Esquire?: The Practice of Law in the Collaborative Classroom*, 20 CLINICAL L. REV. 429, 437 (2014) (quoting WILLIAM M. SULLIVAN ET AL., SUMMARY OF EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8–9 (2007), [http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary\\_pdf\\_632.pdf](http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf) [<https://perm.a.cc/W2MN-TR7G>]).

Teaching and Learning Professionalism Report have been encouraging laws schools to do over the course of more than two decades.

#### V. TOWARD A SOLUTION

With decades of efforts toward the teaching of professionalism failing to achieve their intended purpose, there are two conclusions to draw. One line of reasoning would question law schools' ability to truly impact students' professionalism, suggesting the best course is to include the minimum required in terms of addressing professionalism in the curriculum. Professor Deborah Rhode describes this skepticism about the efficacy of teaching professionalism:

To many faculty, postgraduate ethics instruction promises too little too late. A common assumption is that moral conduct is primarily a matter of moral character. Students either have it or they don't. . . . [L]egal ethics "like politeness on subways . . . and fidelity in marriage" cannot be acquired through classroom moralizing. A related concern is that even if legal education can have some effect on students' attitudes, it will have little impact on their later practice. Moral conduct is highly situational, and critics argue that contextual pressures are likely to dwarf the effects of law school coverage.<sup>175</sup>

In other words, to those who agree within this line of reasoning, while the desired result of lawyers who embody the values of professionalism is a valuable goal, the strategy of achieving that goal through the law school curriculum is fundamentally flawed and therefore should be abandoned.

The second line of reasoning suggests not a retreat but a fundamental change of strategy. If decades of dedication to teaching professionalism is still not producing the desired result,<sup>176</sup> perhaps a

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175. Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 28 (1999) (footnote omitted) (quoting Eric Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 205 (1978)).

176. There has certainly been more sound and fury among law schools in response to the Carnegie Report than earlier iterations, but the question remains of what will that amount to in terms of advancing legal education with regard to professionalism. Most of the focus has been on practical skills, where student-consumers and faculty are in concurrence that something needs to be done, and meaningful progress is being made in that vein; however, there a significant amount of stirring with regard to professionalism. Professors Alison Donahue Kehner and Mary Ann Robinson in an extraordinarily informative tour-de-force journey, which provides a wonderful contribution to the literature in the area professionalism education in law schools, explore the various responses of schools. Kehner & Robinson,

wholesale rethinking of the approach to professionalism is required. What has been termed the “Humanizing Legal Education Movement”<sup>177</sup> provides a promising avenue for rethinking how to instill professionalism in law students. The key tenet of the Humanizing Legal Education Movement is that by rethinking law school curriculum in order to foster internal rather than external motivations and “psychological maturity” in our students, the end result will be students that are both more professionally satisfied and more willing and able to uphold the ideals of professionalism.<sup>178</sup> In this way, the Humanizing Legal Education Movement focuses not on teaching professionalism in and of itself but instead on the approach to teaching in law school generally. Returning to the analogy of professionalism as a “faith,” one may say that the Humanizing Legal Education Movement calls for law schools to focus not just on the students’ minds but also on their professional “souls.” Moreover, the Humanizing Legal Education Movement is unique in that it has the potential to appeal to the Millennial generation that makes up the majority of law students.

First, in Part V.A, closer attention will be paid to the characteristics of Millennials in order to lay a foundation for how and why this generation may find appeal in the Humanizing Legal Education Movement. Second, in Part V.B, the Humanizing Legal Education Movement and its relationship to instilling professionalism in students will be examined in depth. Finally, Part V.C will suggest that with the Humanizing Legal Education Movement as the skeletal structure,

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*supra* note 164, at 71–99. Posing the question of reform with regard to finding the right approach to teaching professionalism in terms of whether this mission is impossible, accomplished, or simply underway, they conclude that the latter designation—“mission underway”—is an appropriate characterization of the response. *Id.* at 99. Some others have been more skeptical of law schools’ reform efforts with regard to professionalism. Professor David H. Getches suspects that many of the measures that have been and will be taken are only “skin deep.” David H. Getches, *What’s New in Legal Education—Experiential Learning*, COLO. LAW., April 2009, at 13, 13. Similarly, Professor Nora V. Demleitner sees restraint in terms of deep reforms by institutions. Nora V. Demleitner, *Curricular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?*, 44 SETON HALL L. REV. 1014, 1017–18 (2014). While tending to concur with Kehner and Robinson that progress is being made and that schools have come up with some creative approaches that offer progress, the ultimate problem is at more foundational level and needs to be addressed at that level to instill professionalism, especially given the challenges posed by the consumer student in whom in this professional faith must be instilled.

177. Weresh, *supra* note 25, at 374–76.

178. Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 428 (2005).

Mindset Theory, metacognition, and self-regulated learning provide a way to successfully implement the central tenets of the Humanizing Legal Education Movement.

#### A. Millennials

The onrushing wave of consumerism threatens to erode professionalism further, but there are attributes of Millennials, their values and beliefs, goals and objectives, that may allow for diverting the water so as to harness its energy rather than to be battered by its force. While Millennials, as a group,<sup>179</sup> may be born consumers and consumerism is fundamentally about satisfying what the consumer wants, what Millennials want, or at least part of what they want, presents a gateway into the aspirational faith of professionalism. Though every generation has its foibles, and Millennials certainly have theirs, Millennials have “a desire and belief in their ability to improve their own communities.”<sup>180</sup> As a generation that was raised with community service requirements and the concept of service learning,<sup>181</sup> Millennials are more likely to volunteer than Generation-Xers or baby boomers.<sup>182</sup> Helping others is “highly prioritized” in Millennials’ lives.<sup>183</sup> They feel an obligation to make a difference in their communities and the broader world and see volunteerism as a route to do so as well “as a potentially rewarding experience.”<sup>184</sup>

Research data suggests that Millennials are the most idealistic age cohort since the first wave of baby boomers.<sup>185</sup> Millennials are more likely to make decisions in purchasing products that support good causes<sup>186</sup> and are 10% more likely than Generation-Xers to indicate that

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179. The discussion herein draws from sociological analysis that suggests tendencies but certainly does not speak to every individual Millennial.

180. John Wesley Lowery, *Student Affairs for a New Generation*, in *SERVING THE MILLENNIAL GENERATION* 87, 92 (Michael D. Coomes & Robert DeBard eds., 2004).

181. ALICE KORNGOLD, *LEVERAGING GOOD WILL: STRENGTHENING NONPROFITS BY ENGAGING BUSINESSES* 25 (2005).

182. Sara Strickhouser et al., *Investing in Engagement: Volunteerism and Charitable Giving Among Millennials*, in *NATIONAL SERVICE AND VOLUNTEERISM: ACHIEVING IMPACT IN OUR COMMUNITIES* 61, 64 (Thomas A. Bryer ed., 2015).

183. *Id.*

184. *Id.*

185. MORLEY WINOGRAD & MICHAEL D. HAIS, *MILLENNIAL MOMENTUM: HOW A NEW GENERATION IS REMAKING AMERICA* 151 (2011) (quoting BRUCE TULGAN, *NOT EVERYONE GETS A TROPHY: HOW TO MANAGE GENERATION Y* 112 (2009)).

186. SIMON MAINWARING, *WE FIRST: HOW BRANDS AND CONSUMERS USE SOCIAL MEDIA TO BUILD A BETTER WORLD* 50–51 (2011).

it is important to them that their work makes a positive impact on the world.<sup>187</sup>

The iconography for the image of doing good, however, may be shifting with this generation. The grand symbol of consummate professionalism for many a lawyer has been Harper Lee's Atticus Finch,<sup>188</sup> standing alone against the world on behalf of his client.<sup>189</sup> That is not, perhaps, the best image for a champion of Millennials. Intriguingly, one of the most interesting insights on this generational shift can be seen through the prism of video game characters. Authors Jeannie Novak and Luis Levy in their text *Play the Game: The Parent's Guide to Video Games* observed the following:

Authority figures in-game have changed somewhat in the last decade. When Gen Xers (now being replaced by Millennials) were a major force in games, story lines usually involved either being an authority figure or rebelling against one. Being a team player was never a primary Xer personality trait.

With Millennials on the rise, . . . modern games have players as members of a team, with a benevolent "captain" who usually gets killed midway. Millennials are more interested in the coordinated effort of a team, while Xers trusted themselves and no one else.

As an example, *Quake II* (released in 1997) had a single marine fighting on his own terms against the Strogg. *Quake IV*, released eight years later, ditched the rebelliousness in favor of a being "just another marine" (of course, a mean one still) with no gripe against his superiors. He was happy to be part of the team and following orders.

Every multiplayer game that calls itself "modern" requires extensive team play. Multiple character classes allow for a variety of skills (all balanced), and most objectives simply cannot be achieved with a team full of lone wolves. The trend is confirmed as traditional Xer game modes such as *death match*

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187. WINOGRAD & HAIS, *supra* note 185, at 151.

188. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

189. See, e.g., MIKE PAPANTONIO, *IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS* 23–25 (1995); Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1339 (1999) (reviewing HARPER LEE, *TO KILL A MOCKINGBIRD* (1960)); Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 13 (1999); Wendel, *supra* note 133, at 574.

give way to less self-absorbed, team-oriented modes such as *capture the flag* and *team death match*.<sup>190</sup>

In general, Millennials want to work in teams, though wanting each team member to be individually valued;<sup>191</sup> thus, they are, perhaps, less a generation of Superman and more one of the Avengers.

Given the confluence of these common generational traits, it should not be surprising that “[a] new Millennial service ethic is emerging, built around notions of collegial (rather than individual) action, support for (rather than resistance against) civic institutions, and the tangible doing of good deeds.”<sup>192</sup> Millennials have a deeper want, some have even suggested need, for meaning.<sup>193</sup> By reaching beyond the wants of pure self-interest, the deeper desire for meaning within the current predominant generation that populates law schools offers opportunity and energy towards revitalizing professionalism within the legal community. As noted by business advisor Atul Dighe, “[b]aby boomers tried to tear down dominant cultural institutions, generation Xers ignored them, but the millennial generation is going to want to rebuild and reform them.”<sup>194</sup>

The question at hand, however, is how to harness this energy and properly direct it to create a consistent ethic of professionalism in legal education. As the next section addresses, the Humanizing Legal Education Movement provides a promising skeletal structure for harnessing this energy with Mindset Theory, metacognition, and self-regulated learning providing the sinew and muscle to accomplish these aims.

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190. JEANNIE NOVAK & LUIS LEVY, PLAY THE GAME: THE PARENT’S GUIDE TO VIDEO GAMES 192 (2008).

191. JOSIANE CHRIQUI FEIGON, SMART SALES MANAGER: THE ULTIMATE PLAYBOOK FOR BUILDING AND RUNNING A HIGH-PERFORMANCE INSIDE SALES TEAM 38 (2013); Shirley A. Pasieka, Exploring the Changing Workforce: Understanding and Managing the Generation of Millennial Workers 71 (Feb. 2009) (unpublished Ph.D. dissertation, Northcentral University) (on file with the *Marquette Law Review*).

192. NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS RISING: THE NEXT GREAT GENERATION 216 (2000).

193. CHIP ESPINOZA ET AL., MANAGING THE MILLENNIALS: DISCOVER THE CORE COMPETENCIES FOR MANAGING TODAY’S WORKFORCE 142 (2010).

194. Atul Dighe, *Demographic and Technological Imperatives*, in THE STATE OF NONPROFIT AMERICA 499, 504 (Lester M. Salamon ed., 2002).

*B. The Humanizing Legal Education Movement as the Skeletal Structure for Solving the Professionalism Problem*

The Humanizing Legal Education Movement, spearheaded by Professor Lawrence Krieger, grew out of the observation that lawyers are disproportionately unhappy and unbalanced people and that the source of this dissatisfaction begins in law school.<sup>195</sup> Statistics amply back up this observation. In one study by Dr. Andrew Benjamin, about 40% of law students were clinically depressed by graduation, whereas before law school, the students were no more depressed than the general population, where about 8% are depressed.<sup>196</sup> This trend continues in law practice. Other studies indicate that lawyers “have the highest incidence of depression of any occupation in the United States” and “suffer other forms of emotional distress up to 15 times more frequently than the general population.”<sup>197</sup>

Drawing on classical psychologist Abraham Maslow’s work on personal maturity, Krieger hypothesizes that the range of concerning aspects about lawyers’ well-being, including mental health issues such as depression, are tied to an “immature personality structure” in Maslow’s terminology.<sup>198</sup> This concept relates to Maslow’s work on the “hierarchy of human needs” in which he draws parallels between life satisfaction and behavior.<sup>199</sup> Krieger summarizes Maslow’s work in this area as follows:

Maslow delineated “lower” and “higher” human needs, and observed that motivation toward the different levels of need produces markedly different levels of life satisfaction. The lower needs include *survival, security, belonging, competence, and respect* from others. People focused mainly on any of these needs experience “deficiency motivation”—a strong drive to fulfill these basic needs that is accompanied by minimal life satisfaction. The experience is one of effort punctuated by “moments of episodic relief[.]” By contrast, people pursuing primarily the higher needs for self-esteem and self-actualization

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195. Weresh, *supra* note 25, at 374–75.

196. Debra Cassens Weiss, “*You Are Not Alone*”: Law Prof Who Considered Suicide Tells His Story, A.B.A. J. (Apr. 8, 2014, 10:50 AM), [www.abajournal.com/news/article/you\\_are\\_not\\_alone\\_law\\_prof\\_who\\_considered\\_suicide\\_tells\\_his\\_story/](http://www.abajournal.com/news/article/you_are_not_alone_law_prof_who_considered_suicide_tells_his_story/) [https://perma.cc/3H4L-GRUH].

197. Krieger, *supra* note 178, at 427.

198. *Id.* at 427–30.

199. *Id.* at 427–28.



experience “growth motivation,” in which they are seeking the highest levels of personal development and self-expression. This quality of motivation provides an entirely different life experience, marked by persistent satisfaction and fulfillment. Maslow found such people to be peaceful, unworried, accepting, and to experience a constant sense of gratitude, satisfaction, “overflowing abundance” and fresh appreciation for life. Their lives are also enriched by exceptional levels of fun, joy, and love.

Maslow described people experiencing the fulfillment of growth motivation to be psychologically mature, and he observed in them the following character traits that exemplify professionalism: self-governance and individuality; universal, holistic thinking; undistorted perception of reality; superior awareness of truth; service orientation and desire for the good of others; and highly democratic personality. He concludes that this level of maturity produces “the most ethical of people.”

By contrast, deficiency motivation will keep people more narrowly focused on “looking good[,]” winning, or gaining money or prestige, because the lower needs for security, belonging and gaining respect generally depend on influencing other people and obtaining limited resources from the environment. At the same time, such people feel pressure to satisfy these needs, in order to experience the episodic relief previously mentioned. People experiencing deficiency motivation are therefore unlikely to manifest the same level of ethics and morality as others who are more psychologically mature, and more likely to venture into manipulative, abusive or deceptive behavior in order to meet their needs.<sup>200</sup>

They key aspects of Maslow’s work for Krieger are Maslow’s complementary conclusions that people who are driven by “growth motivation” (and are therefore “psychologically mature” in Maslow’s terminology) are both the most satisfied and “the most ethical of people,” and correspondingly those who are experiencing “deficiency motivation” are both unsatisfied and more likely to manifest immoral and unethical behavior.<sup>201</sup> This led Krieger to conclude that both lawyers’ lack of personal satisfaction and lack of professionalism stem

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200. *Id.* at 428–29 (footnotes omitted) (citing ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY 57, 153–72 (2d ed. 1970); ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING 209 (2d ed. 1968)).

201. *Id.* at 428.

from a lack of growth motivation.<sup>202</sup> In short, Krieger explains that lawyers who draw motivation from intrinsic, rather than extrinsic sources, will be both personally satisfied and exhibit ethical, professional behavior.<sup>203</sup> Therefore, the Humanizing Legal Education Movement calls for changes to the approach to legal education that will foster growth-motivated students—students who are animated by intrinsic rather than the extrinsic motivations.<sup>204</sup>

Although some commentators have listed the Humanizing Legal Education Movement as one among other innovative efforts to teach professionalism,<sup>205</sup> the Humanizing Legal Education Movement is fundamentally different than other professionalism reforms. Instead of focusing on teaching professionalism per se as other reforms have, the focus is shifted to a holistic approach to legal education that fosters “psychologically mature” students.<sup>206</sup> Krieger explains that teaching about professionalism in and of itself is easily drowned out when “it is contradicted by the competitive, outcome-oriented institutional values one typically finds dominating law schools and the highly visible and commercialized segments of the profession.”<sup>207</sup> Thus, the Humanizing Legal Education Movement is a call for change that will affect all of legal education, not just training in professionalism.

The Humanizing Legal Education Movement’s focus on students’ internal motivations and the corresponding behaviors associated with a growth motivation fits neatly with the working definition of professionalism proposed above. The definition focused on the idea of a “professional faith” that broadly involves social responsibility, both to clients and to the profession as a whole, beyond that due in the marketplace.<sup>208</sup> Thus, professionalism involves both a recognition that entering the legal profession is a privilege and responsibility and a dedication to voluntary compliance with aspirational standards. The Humanizing Legal Education Movement’s focus on fostering internal motivation is exactly what is needed to create the lawyer’s belief in, and voluntary compliance with, aspirational standards. In short, the Humanizing Legal Education Movement’s call for legal education to

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202. *See id.*

203. *See id.* at 429–30.

204. *See id.*

205. *See* Weresh, *supra* note 25, at 374–76.

206. *See* Krieger, *supra* note 178, at 428–29.

207. *Id.* at 425.

208. *See supra* Part II.

help the student continue a journey to becoming a “psychologically mature” individual is, one could say, a call on the legal academy to nurture not only the student’s mind but also the student’s soul. Nurturing the student’s soul in this way will create a lawyer ready to believe in and uphold a “professional faith.”

A superficial understanding of the Humanizing Legal Education Movement may lead one to assume that “humanizing” is a euphemism for the type of consumerism seen in undergraduate institutions in which the program of study is made easier to capitulate to the student-consumer demands.<sup>209</sup> Not so. Rather, much like the move toward a blending of doctrine and skill instruction and greater transparency in law schools’ reporting, in this instance, delivering what our students crave has the potential to push legal education in a positive direction in many respects, including by delivering a method by which our student-consumers can internalize the aspirational aspects of professionalism. As discussed above, our Millennial students are idealistic, service-oriented, group-minded, and, moreover, have a deep desire for meaning.<sup>210</sup> The Humanizing Legal Education Movement’s focus on creating psychological mature students gives those students exactly what they crave: a greater meaning to their challenging three-year course of study in law school. The Humanizing Legal Education Movement makes explicit to students that they should put in the enormous amount of work required of law students not just to become employed in the job of their liking (although this is certainly part of the goal) but also to become self-actualized professional who is part of a team—the legal profession—that aspires to many of the ideals that they, as Millennials, already hold dear, including service. In this way, the Humanizing Legal Education Movement provides an opportunity not to buck the tide of consumerism but to ride it to a mutually beneficial and laudable goal of both professional satisfaction and belief in and adherence to the aspirational standards professionalism. The goal of effectively teaching professionalism has perhaps eluded law schools up to this point, not because the ultimate goal was actually unshared with the student-consumer, but rather because law schools had failed to effectively explain to the student-consumer why and how the goal is in fact a shared one.

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209. *See supra* Part III.B.

210. *See supra* Part V.A.

*C. The Sinew and Muscle on the Humanizing Legal Education Movement Skeleton: Using Mindset Theory, Metacognition, and Self-Regulated Learning to Create Psychologically Mature Students*

With the central idea of the Humanizing Legal Education Movement, namely a focus on producing psychologically mature students,<sup>211</sup> as the skeleton, the question remains how to flesh out that structure. If law school education is currently producing students with a deficiency motivation rather than a growth motivation, how, specifically, are law schools to reverse that practice? Krieger himself suggests that professors make explicit to students the tie between intrinsic motivation, satisfaction, and professionalism, and details certain exercises to introduce and reinforce the idea.<sup>212</sup> Giving students the big picture framework to understand psychological maturity as it relates to legal education is certainly a crucial step in the process of creating students with a growth motivation and, therefore, students ready and able to internalize the aspirational aspects of professionalism.

However, the growing body of literature on Mindset Theory,<sup>213</sup> metacognition, and self-regulated learning,<sup>214</sup> as applied to legal education, provides a systematic and developed mechanism for creating the psychologically mature students that the Humanizing Legal Education Movement seeks. Although a full review of this literature is beyond the scope of this Article, an overview of how these doctrines can foster psychological maturity in students, and, in turn, promote professionalism, is in order.

The central tenet of Mindset Theory, pioneered by Carol Dweck, is that a person's belief about whether intelligence is fixed or fluid influences how that person reacts to (and defines) failure.<sup>215</sup> Those with a "fixed mindset" believe that they have a certain amount of intelligence or natural ability that does not change much if at all over time,

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211. See *supra* Part V.B.

212. See generally Krieger, *supra* note 178.

213. See generally CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2006); Corie Rosen Felder, *The Accidental Optimist*, 21 VA. J. SOC. POL'Y & L. 63, 87–93 (2014); Corie Rosen, *The Method and the Message*, 12 NEV. L.J. 160, 166 (2011).

214. See Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 313 (2013); E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEX. A&M L. REV. 83, 118–22 (2013); Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. U. DCL L. REV. 447, 451.

215. DWECK, *supra* note 213, at 6–7, 32.

regardless of what they do.<sup>216</sup> For “fixed mindset” students, then, any success is proof that they are intelligent and any failure is proof they are not.<sup>217</sup> These students, therefore, avoid trying a task they may fail because that would be proof of their lack of intelligence.<sup>218</sup> On the contrary, students with what Dweck calls a “growth mindset” believe that intelligence is not a stable trait but instead that their efforts can have an impact on their intelligence.<sup>219</sup> These students welcome new and challenging tasks and see “failure” as an opportunity to improve.<sup>220</sup>

Students with fixed mindsets tend to have “performance goals,” meaning they want to outperform their peers and appear intelligent.<sup>221</sup> Students with growth mindsets tend to have “mastery goals,” meaning they want to master the skill at hand regardless of how their peers perform.<sup>222</sup> Professors Carrie Sperling and Susan Shapcott describe the impact that these different goals have on the learning behavior of the student as follows:

Because it is important for performance-goal-orientated students to appear intelligent, they will use strategies to promote and preserve that appearance. These strategies may include avoiding difficult tasks, cheating on assignments, and making external excuses for poor performances. Performance goal-orientated students typically do not take remedial actions to improve unsatisfactory performances because their only goal is to outperform others on the task at hand. If they fail at that goal, remedial actions, including increased effort, will not help because they believe intelligence cannot be increased and the performance is over.

By contrast, mastery-goal-orientated students are more concerned about learning than outperforming their peers or impressing their instructors. Consequently, challenging assignments do not intimidate them. They see challenges as opportunities to learn new things. Poor performances only represent one snapshot in time; the performance does not define them. Poor performances are opportunities to learn new

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216. *Id.* at 6–7.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 6–7, 32.

221. Carrie Sperling & Susan Shapcott, *Fixing Students' Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 39, 50–51 (2012).

222. *Id.*

strategies or a wake-up call that they need to increase their effort.<sup>223</sup>

Dweck explains that one can change from a fixed mindset to growth mindset and, therefore, from performance-goal oriented to mastery-goal oriented.<sup>224</sup> She posits that awareness of one's mindset in and of itself is the key to help create that shift.<sup>225</sup>

To the extent that Dweck's "growth-mindset" students are animated by internal, rather than external motivations, there is a correlation to Maslow's "growth motivated," "psychologically mature" person.<sup>226</sup> The similarity between Dweck's terminology "growth mindset" and Maslow's terminology "growth motivated" is reflective of just this connection.

One may, at first blush, believe that Dweck's theory is simply analogous to Maslow's and therefore is an alternative to, rather than a way to implement, the Humanizing Legal Education Movement's central tenet. However, the key difference is that Dweck's focus is both narrower and less abstract than Maslow's. Explaining to students that their motivations should be geared toward "self-esteem" and "self-actualization," while important, is rather abstract and far-ranging. To bring this down a level of abstraction, one can explain to students that one crucial step toward becoming "psychologically mature" relates to their own views on just one thing: intelligence. Explaining to students that their views on one specific thing—intelligence—has great impact on their ability to learn effectively and enjoy the process of learning is likely to be much more accessible to students precisely because the focus is narrowed to just one specific change in thinking—a change regarding how one views intelligence—and because the concept of intelligence is more readily definable and graspable than concepts such as "self-actualization."<sup>227</sup>

Focusing on this change in mindset specifically about intelligence, however, can bring about the larger benefits to well-being and, in turn, professional development that the Humanizing Legal Education Movement seeks. Although the current literature applying Dweck's work to the law school setting focuses on the learning benefits to

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223. *Id.* (footnotes omitted).

224. DWECK, *supra* note 213, at 46–47.

225. *Id.*

226. *See supra* pp. 1059–60.

227. *See* Krieger, *supra* note 178, at 425–27.

developing a growth mindset toward intelligence, and to some extent the benefits to students' general well-being from this change,<sup>228</sup> Krieger's observation of the tie between "psychological maturity" and professionalism strongly suggests that to the extent Mindset Theory gets students focused on internal motivations rather than external motivations, and therefore travelling down the path toward "psychological maturity,"<sup>229</sup> it will also benefit the students' ability to internalize and exhibit the aspirational aspects of professionalism.

The literature applying research on metacognition and self-regulated learning to the law school setting is yet another step down in abstraction and therefore a concrete means to implement the Humanizing Legal Education Movement's goal of "psychologically mature" students. Once students have gained a growth mindset regarding their own intelligence, they are open to the idea of learning through failure. The literature on metacognition and self-regulated learning gives a blueprint to a process of how to do just that.

The most succinct definition of "Metacognition" is thinking about one's own thinking.<sup>230</sup> Professor Anthony Niedwiecki describes the concept:

Metacognition refers to the self-monitoring by an individual of his own unique cognitive processes. Generally, metacognition refers to having both awareness and control over one's learning and thinking. Specifically, learners must have awareness over what they bring to the learning experience, such as their own cognitive abilities, learning styles, and learning preferences.<sup>231</sup>

Law schools are urged to introduce the concept of metacognition into the law school curriculum in order to create what has been termed alternatively "self-regulated learning" or "expert learning."<sup>232</sup> "Self-regulated learning ('SRL') or, as the educational psychology literature sometimes terms it, expert learning, 'involves the active, goal-directed, self-control of behavior, motivation, and cognition for academic tasks by

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228. See generally Sperling & Shapcott, *supra* note 221.

229. Krieger, *supra* note 178.

230. Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 346 (2014) ("Metacognition generally refers to thinking about thinking.").

231. Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 35 (2006) (footnotes omitted).

232. See *id.*

an individual student.”<sup>233</sup> In other words, self-regulated learners have “learn[ed] how to learn.”<sup>234</sup> They can therefore “transfer and use learned skills in unique situations” and thus are “learning not just for a test, but for a lifetime—not just for recall, but for lifelong logic and reasoning.”<sup>235</sup>

Self-regulated learners follow a three-step process during the learning of any new discrete set of information or skill (what the literature refers to as a “cognitive task”).<sup>236</sup> The first step in the process involves “forethought,” meaning “all the thought processes that precede student engagement in learning activities.”<sup>237</sup> This phase includes student’s perception of what is called for in the task at hand (task perception); the student’s perception of how the task relates to her as well the student’s assessment of how able she is to complete the task (self-motivation and self-efficacy); what the student’s goal is with regard to the task at hand, including, importantly, whether that goal is a mastery goal or a performance goal (goal setting); and finally the student’s plan for achieving his or her goal (strategic planning).<sup>238</sup>

The next step in the process is performance of the task, which is the “implementation phase” of the cycle.<sup>239</sup> “It involves not only the learning activities themselves, but also the mental processes that affect students’ efforts to concentrate and otherwise implement those activities.”<sup>240</sup> Three facets are involved in this phase: “(1) attention-focusing, (2) the activity itself (including the student’s mental process for performing the activity properly), and, most importantly, (3) the self-monitoring the student performs as she implements her strategies and begins to learn.”<sup>241</sup> In the first two phases, students must identify and

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233. Schwartz, *supra* note 214, at 452 (quoting Paul R. Pintrich, *Understanding Self-Regulated Learning*, in UNDERSTANDING SELF-REGULATED LEARNING 3, 5 (Paul R. Pintrich ed., 1995)).

234. Bloom, *supra* note 214, at 315.

235. Niedwiecki, *supra* note 231, at 35 (quoting ROBIN FOGARTY, HOW TO TEACH FOR METACOGNITIVE REFLECTION, at xvii (1994)).

236. *Id.* (“Controlling or regulating one’s learning requires actively planning, monitoring, and evaluating during the execution of a cognitive task.”).

237. Schwartz, *supra* note 214, at 455.

238. *Id.*

239. Cara Cunningham Warren, *Achieving the American Bar Association’s Pedagogy Mandate: Empowerment in the Midst of a “Perfect Storm,”* 14 CONN. PUB. INT. L.J. 67, 90 (2014).

240. Schwartz, *supra* note 214, at 458.

241. *Id.*



use strategies that will bring about the desired learning.<sup>242</sup> There is wide agreement that the third aspect of the performance phase, self-monitoring, is the most critical aspect of performance.<sup>243</sup> The student must “(1) monitor[] the effectiveness of the selected strategies for achieving the student’s learning goal, (2) monitor[] the time and effort the strategy is requiring, and (3) weigh[] the time and effort against the effectiveness of the strategies.”<sup>244</sup> This aspect of the performance has been characterized as “internal feedback.”<sup>245</sup>

The last step is reflection, in which the student reflects on both the effectiveness of her performance and on the implications of this learning experience for future tasks.<sup>246</sup> “This phase includes four facets: self-evaluation, attribution, self-reaction, and adaptation.”<sup>247</sup> The student engages in the first facet, self-evaluation, when she compares her own performance “with a standard, either in terms of the standard set by the learner or the instructor’s objectives or in comparison to other learners.”<sup>248</sup> Once the student has evaluated her performance, she develops “attribution[s]” about why her performance met or did not meet the set standard.<sup>249</sup> “[S]elf-regulated learners are much more likely to attribute failures to correctable causes, such as insufficient effort or incorrect selection of learning techniques(s), and to attribute success to personal competence.”<sup>250</sup> The attribution stage is “pivotal” because attributions to correctable causes “lead self-regulated learners to try again and to try harder when they fail” while “students who attribute their failures to ability are more likely to give up and stop trying.”<sup>251</sup>

The next two facets, self-reaction and adaptation, are closely tied to attribution.<sup>252</sup> Self-reaction occurs when the student experiences an emotional reaction to her success or failure at meeting the standard as

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242. Bloom, *supra* note 214, at 318–20.

243. See Fruehwald, *supra* note 214, at 121–22.

244. Schwartz, *supra* note 214, at 460.

245. Deborah L. Butler & Philip H. Winne, *Feedback and Self-Regulated Learning: A Theoretical Synthesis*, 65 REV. EDUC. RES. 245, 252–53 (1995); Ian Clark, *Formative Assessment: Assessment Is for Self-Regulated Learning*, 24 EDUC. PSYCHOL. REV. 205, 214 (2012).

246. Schwartz, *supra* note 214, at 460–61.

247. *Id.* at 461.

248. *Id.*

249. Bloom, *supra* note 214, at 321.

250. Schwartz, *supra* note 214, at 461.

251. *Id.*

252. See Bloom, *supra* note 214, at 321.

well as to the causes to which she attributes the success or failure.<sup>253</sup> “Self-regulated learners feel better about themselves as learners, even when they encounter learning difficulties, and therefore are more likely to persist to success.”<sup>254</sup> The final facet of the reflection stage, adaptation, occurs when the student makes modifications to her learning strategies based on her assessment of the attributions for her performance.<sup>255</sup> Ideally, to the extent performance was not optimal, the student’s forethought planning stage will be effected in the next learning task, thus completing a cycle in which the learner has learned better how to learn for the next task.

The literature on self-regulated learning in the law school setting suggests that the way many law faculty teach is not conducive to fostering this three-step process of self-regulated learning. Professor Anthony Niedwiecki posits that in both doctrinal and skills based classes, a “formula” approach is taken to education that short-circuits the self-regulated learning cycle.<sup>256</sup> In doctrinal classes, a form of Socratic method is used in which

students are told to read a case and fit it into a formula—a case brief with the facts, holding, court’s reasoning, and so forth. Based on their case briefs, the students come to class to discuss the cases they have read and how to apply those cases to new hypothetical situations.<sup>257</sup>

However, because the professor never makes explicit why the brief “formula” and the questions posed in class are important, the students “resort back to simply mimicking what happened in class.”<sup>258</sup> This type of “implicit teaching” does not allow the student to engage in the three stages of forethought, performance, and reflection that leads to self-regulated learning and, therefore, the student’s ability to apply the knowledge to a unique situation is hindered.<sup>259</sup>

In skills-based classes, professors use what Professor Niedwiecki refers to as the “‘how to method’ of teaching” that focuses on the particulars of how to perform a specific task, but not the underlying

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253. Schwartz, *supra* note 214, at 461.

254. *Id.*

255. Bloom, *supra* note 214, at 321–22.

256. Niedwiecki, *supra* note 231, at 33–35.

257. *Id.* at 33.

258. *Id.* at 34.

259. *Id.*

theory behind the “how to” instructions.<sup>260</sup> He gives an example from many first year legal writing courses: “[S]tudents are told how to organize their legal analysis using the ‘IRAC’ format (issue, rule, application, and conclusion) or some variation. The focus is rarely placed on the underlying theory of why this organization is best, or when to apply exceptions to this rule.”<sup>261</sup>

Thus, in adhering to metacognitive theory, professors would tailor their teaching methods to the three-steps of the self-regulated learning cycle, giving students opportunity for guided forethought, creating feedback mechanisms throughout the course that encourage students to both self-monitor during the task performance, and, when complete, reflect on their performance, leading to changed planning and better performance in the next task.<sup>262</sup>

At first blush, it may seem that self-regulated learning is far afield from the Humanizing Legal Education Movement’s call for psychologically mature students. However, when one considers the characteristics displayed by students who have become self-regulated learners, the connection becomes evident. Self-regulated learners “are interested in the subject matter; well-prepared; and ready with comments[,] questions, ideas, and insights; they are problem finders and problem solvers, unafraid to fail or to admit they do not understand, driven to rectify failure and to construct understanding.”<sup>263</sup> They are “intrinsically motivated” and “regularly set mastery goals, not grade goals.”<sup>264</sup> They find the learning process personally rewarding, and thus one noted benefit of creating self-regulated learners is “improved student morale.”<sup>265</sup> In short, the self-regulated learner displays many of the characteristics of Dweck’s “growth mindset” student<sup>266</sup> and Maslow’s “psychologically mature” student.<sup>267</sup> And thus, here again, Krieger’s link between psychological maturity, satisfaction, and professionalism

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260. *Id.*

261. *Id.* (footnote omitted).

262. Bloom, *supra* note 214, at 338.

263. Schwartz, *supra* note 214, at 453 (quoting Barry J. Zimmerman & Andrew S. Paulsen, *Self-Monitoring During Collegiate Studying: An Invaluable Tool for Academic Self-Regulation*, in 63 NEW DIRECTIONS FOR TEACHING AND LEARNING: UNDERSTANDING SELF-REGULATED LEARNING 13, 13 (Paul R. Pintrich ed., 1995)).

264. *Id.* at 471.

265. *Id.* at 467.

266. DWECK, *supra* note 213, at 6–7.

267. *See supra* pp. 1059–60.

suggests that the self-regulated learner will become a lawyer who is ready and able to internalize and display the aspirational qualities of professionalism.<sup>268</sup> Thus, the path to instilling the faith of professionalism in law school students can be traversed utilizing methods that draw from the structural skeleton afforded by the Humanizing Legal Education Movement and the sinew and muscle provided by the insights of Mindset Theory, metacognition, and self-regulated learning.

## VI. CONCLUSION

The pronounced increase over the past few decades for the role of consumerism in higher education in general and in law schools specifically, in which schools and students view themselves, respectively, as consumers and sellers of an educational product, has only been accelerated in recent years with the competition over the declining number of potential entering law students. With no end to this trend in site, consumerism appears to have become a part of the reality of legal education.

While there is much to be said about the negative impact of consumerism on undergraduate education, in the law school setting, it has brought about some much needed reform. However, as of yet, rather than an agent for positive reform, students' self-conception of themselves as consumers has hindered, rather than helped, law schools in fulfilling their duty to inculcate legal professionalism, a concept that involves a "professional faith" of aspirational values. This is a responsibility law schools have long been struggling to meet.

The purpose of this Article was to examine the intersection of consumerism and professionalism, and to propose that by using the Humanizing Legal Education Movement, law schools can harness the power of consumerism to give the Millennial student-consumer the greater meaning that she seeks, and at the same time, achieve the goal of successfully inculcating law schools into the "faith" of legal professionalism. To do this, law schools will have to focus on the central tenet of the Humanizing Legal Education Movement: nurturing not just the mind, but also the "soul" of the law student.<sup>269</sup> The Article also endeavored to bring this lofty goal into focus by suggesting that with the Humanizing Legal Education Movement as the skeletal structure,

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268. See Krieger, *supra* note 178, at 428.

269. See *supra* Part V.

specific educational mechanisms, namely Mindset Theory, metacognition, and self-regulated learning, can provide the flesh on the bones that brings this goal to fruition.<sup>270</sup>

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270. *See supra* Part V.