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[193]
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[195]
CONTENTS

WINTER EDITION
“CONSTITUTIONAL INQUISITORS:” THE PRAGMATIC ROOTS OF FEDERAL PROSECUTORIAL POWER
Scott Ingram 199

SPECIAL SYMPOSIUM EDITION
CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS – THE WIZARD OF OZ WAS RIGHT
R. Lisle Baker 287

APPENDIX TO CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS – THE WIZARD OF OZ WAS RIGHT
R. Lisle Baker 339

OF WIGS, WICKETS, AND MOONSHINE: LEADERSHIP DEVELOPMENT LESSONS FROM AN INTERNATIONAL COLLABORATION
Douglas A. Blaze 345

WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?
Elizabeth M. Fraley & Leah Witcher Jackson Teague 375

LEADERSHIP LESSONS FROM A HEROIC, IF “DIFFICULT” WOMAN: A TRIBUTE TO IDA B. WELLS
Deborah L. Rhode 467

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“CONSTITUTIONAL INQUISITORS:”
THE PRAGMATIC ROOTS OF FEDERAL PROSECUTORIAL POWER

Scott Ingram*

Abstract

“Grand jurors are the constitutional inquisitors and informers of the country, they are scattered every where, see every thing, see it while they suppose themselves mere private persons, and not with the prejudiced eye of a permanent and systematic spy.” – Thomas Jefferson to Edmund Randolph, May 8, 1793

“As soon as the [United States] Attorney possesses the case, the grand jury, judges, and rest of the judicial apparatus, which I esteem with you, as bulwarks, will travel in the work according to the forms, which you

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[199]
Suppose a foreign nation, with knowing assistance from Americans, interfered in a United States national election. Following the election, a criminal investigation begins. Who is responsible for investigating and deciding whether the evidence warrants criminal prosecution? Who decides who is prosecuted? Answering that question takes little thought. The United States Department of Justice handles the case. The Federal Bureau of Investigation conducts the investigation and works closely with the Justice Department’s Criminal Division and the United States Attorney’s Office for whichever district the crime occurred. Who else could perform such tasks?

What if, instead, the presiding judge of the United States District Court for where the offense occurred impaneled a grand jury and the grand jury, without assistance from a United States Attorney, investigated the allegations? Suppose they called their own witnesses and asked their own questions. Upon completion, they presented their findings to the court. Only then would the court involve the United States Attorney, who would conduct the trial. Rather than the central role they play today, prosecutors would play no role investigating and charging criminal activity. They would not be the constitutional inquisitors that they are today.

This alternative might have been reality had President George Washington adopted Secretary of State Thomas Jefferson’s approach to federal law enforcement rather than that of George Washington’s Attorney General, Edmund Randolph. Randolph’s proposal placed

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federal prosecutors between the criminal act and the grand jurors and the court. Once in this position, federal prosecutors remained, slowly expanding their authority.

Today, federal prosecutors wield more power than any other government official. Employing broad criminal statutes and largely unchecked power, federal prosecutors can select nearly anyone for prosecution. Their power, therefore, emanates from their discretionary authority. As former United States Attorney General Robert Jackson stated:

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

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5 Jackson, supra note 3, at 5.
This leads to the key question of who decides which cases to investigate and prosecute.6 Who are, in Jefferson’s words, the “constitutional inquisitors?”7

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6 As Jackson noted, prosecutors derive their power from their ability to decide against whom the government’s coercive power will be used. Jackson, supra note 3, at 5. Often, merely charging someone with a crime subjects the person to punishment. See generally MALCOM M. FREELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199–215 (RUSSELL SAGE FOUNDATION 1979) (providing an overview of the pretrial process).

7 Letter from Thomas Jefferson to Edmund Randolph, supra note 1. Jefferson does not define “constitutional inquisitors.” In this article, the term is used for someone who investigates in an official capacity. See Inquisitor, DICTIONARY.COM https://www.dictionary.com/browse/inquisitor [https://perma.cc/43TV-QAY4]. Therefore, a constitutional inquisitor is someone whom the Constitution authorizes to inquire and decide upon offenses. See THE FEDERALIST No. 65 (Alexander Hamilton). For example, Alexander Hamilton identified the Senate as the constitutional inquisitors on impeachment. He wrote:

> What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter, as the former,
Answers to that question differ. Most would respond that the Attorney General, as the nation’s chief law enforcement officer, possesses ultimate discretionary power. Others would assert the President is a unitary executive and the Constitution gives the President the duty to take care that the laws are faithfully executed. A final group would claim that the United States Attorney in each federal district has that power, especially in the vast majority of cases.

The answers differ because federal law enforcement was one of many questions unresolved during the Constitution’s drafting and ratification. This seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

Id.


11 JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 3–7 (2018) (arguing that the Constitution was not complete once it was ratified and that its precise contours were established through early practice).
forced those who served during the Constitution’s early years to answer these constitutional questions through practice.\footnote{Id.} Their actions became precedent for future situations.

These first constitutional practices created ambiguity about prosecutorial power.\footnote{J\textsc{oan} J\textsc{acob}y, \textsc{The American Prosecutor: A Search for Identity} xv–xvi (1980); Bruce A. Green, \textit{Why Should Prosecutors Seek Justice}, 26 \textsc{Fordham Urb. L.J.} 607, 607–10 (1998) (identifying the need to give a more detailed definition to the concept of “doing justice”); Kevin C. McMunigal, \textit{Are Prosecutorial Ethics Standards Different?}, 68 \textsc{Fordham L. Rev.} 1453, 1453 (2000) (arguing that prosecutors are advocates similar to civil attorneys thus making their ethical requirements similar); Nirej Sekhon, \textit{The Pedagogical Prosecutor}, 44 \textsc{Seton Hall L. Rev.} 1, 6 (2014) (arguing that prosecutors, through their enforcement power, should advance political dialogue in pluralistic societies). A search of \textsc{Lexis NEXIS} for “prosecutor” in the same paragraph as “chief law enforcement” revealed over fifty such references over a five-year time period. In most instances, the reference is to the Attorney General as the chief law enforcement officer of the state. There are also numerous references to the county prosecutor as the chief law enforcement officer of the county. \textit{See}, e.g., Amanda Bland, \textit{DA-Elect Kunzweiler Outlines Changes in the Works}, \textsc{Tulsa World} (Oct. 18, 2014) (District Attorney is the chief law enforcement officer for the community); Dan Liljenquist, \textit{It’s Time for Swallow to Resign or be Impeached}, \textsc{Deseret Morning News} (Feb. 21, 2013) (Attorney General is the chief law enforcement officer of the state). \textit{But see} Bruce A. Green & Fred C. Zacharias, \textit{Prosecutorial Neutrality}, 2004 \textsc{Wis. L. Rev.} 837, 895 (2004) (arguing that neutrality is not a useful concept for analyzing prosecutorial actions because the term itself consists of contested concepts). \textit{See generally} Bennett L. Gershman, \textit{Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality}, 9 \textsc{Lewis & Clark L. Rev.} 559 (2005) (arguing that prosecutors must remain neutral in relations with their}
potential Presidential misuse of prosecutorial power have reinvigorated discussion about prosecutorial power. Some scholars point to prosecutorial abuses and propose solutions. Others argue that prosecutors have too much unchecked power and that effectively checking that power requires new procedures. Federal prosecutors have received additional attention due to the fragmented nature of their discretion. In the federal system, the various constituencies); H. Richard Unviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000) (describing the prosecutor’s duty to be neutral prior to making the charging decision).


Department of Justice and the United States Attorneys share responsibility for charging cases.\textsuperscript{17} While scholars debate resolutions to the problem of prosecutorial power, they do so without understanding the prosecutor’s historical development. A small collection of scholarship exists but primarily focuses on state prosecutors.\textsuperscript{18} Even less examines the federal prosecutor’s origins.\textsuperscript{19}

\textsuperscript{17} The charging authority between the Justice Department and the United States Attorneys varies by case type. The Justice Department makes the decision in cases such as national security and tax. The United States Attorneys have authority in most other matters. \textit{See} Dep’t of Justice, \textit{Justice Manual: 902.000-Authority of the U.S. Attorney in Criminal Division Matters/Prior Approvals}, \texttt{http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-matterspriorapprovals} [https://perma.cc/WW4K-Y9TR].

\textsuperscript{18} \textit{See infra} Section I.A.

\textsuperscript{19} \textit{See infra} notes 103, 120.
This article addresses this shortcoming by identifying the origins of today's problems in a key decision made during George Washington's presidency. It argues that the Washington Administration, particularly Attorney General Edmund Randolph, adapted the prosecutor's role from that of a private advocate or minor judicial officer to one who exercises the government's inquisitorial power, ultimately deciding whom to prosecute for what. Seeking a compromise between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson, Randolph proposed inserting United States Attorneys between the people and the courts. Randolph's proposal occurred in the midst of a series of meetings and correspondence between Washington's cabinet as they debated how to enforce President Washington's 1793 Neutrality Proclamation. The discussion revealed competing conceptions of federal law enforcement power. Randolph's practical resolution prevailed and set federal prosecutors on a path that made them the nation's constitutional inquisitors.

To understand how Randolph arrived at this resolution, one must first understand the role state prosecutors performed at the time. State prosecutorial work shaped the Washington Administration's perceptions of the federal prosecutor's role. Section II explains the immediate political concerns facing Randolph, namely the need to remain neutral between France and Great Britain, as he considered how to enforce federal law. Section III details the conversation between Jefferson and Randolph, discussing Hamilton's draft instructions to Customs Collectors about neutrality.

20 This approach—examining the Founder's actions—contrasts with an approach focusing on ideological perspectives. For an example of the ideological approach, see Allison Lacroix, The Ideological Origins of American Federalism 3–4 (2010).
enforcement. Jefferson’s reaction to Hamilton’s proposal and his different approach to federal criminal law enforcement led Randolph to place federal prosecutors between the people and the grand jury. Section IV analyzes two issues raised by establishing federal prosecutors as the constitutional inquisitors. First, it examines the centralization of federal prosecutorial discretion. Should the constitutional power to inquire reside locally with federal prosecutors (i.e. United States Attorneys) or centrally (i.e. the Attorney General)? Second, it examines whom the prosecutor represents. Related to the centralization question, whom the prosecutor represents implicates the values underlying criminal prosecution decisions. The final section connects Randolph’s proposal to current debates concerning federal prosecutors.

I. Criminal Prosecution in the Founding Era 209
   A. Colonial and State Precedents 210
   B. Creating Federal Prosecution – Continuity and Change 218
      1. The Judiciary Act of 1789 220
      2. The First Federal Prosecutors 230
II. The Neutrality Crisis 239
   A. First Cabinet Meeting 242
   B. Proposed Instructions for the Customs Collectors 251
III. Federal Prosecutors as Constitutional Inquisitors 267
    A. Centralization 267
    B. Representing the United States Government 272
IV. The Practical Origins of Federal Criminal Prosecution 277
V. Conclusion 286
I. Criminal Prosecution in the Founding Era

The first Congress created the United States District Attorney—or federal prosecutor—as part of the 1789 Judiciary Act.\(^{21}\) Those drafting the Judiciary Act walked a fine line between the need to create a strong judiciary for the new national government and the people's fears that national courts would deprive citizens of their rights.\(^{22}\) This led them to adapt aspects of state court practice to fit federal requirements.\(^{23}\) One adaptation was the public prosecutor. While establishing the attorney’s qualifications, the Judiciary Act gave little guidance about how to perform the role.\(^{24}\) This made

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\(^{23}\) See LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 4–5 (1967) (asserting that the Judiciary Act borrowed the state prosecutor system). But see RITZ, supra note 22, at 5 (arguing that the federal system was a historical novelty).

\(^{24}\) Kathleen F. Brickey, CRIMINAL MISCHIEF: THE FEDERALIZATION OF AMERICAN CRIMINAL LAW, 46 HASTINGS L.J. 1135, 1137 (1994) (stating that the original role of federal law enforcement was unclear).
state prosecutors the basis for how United States District Attorneys perceived their role.25

A. Colonial and State Precedents

State prosecutors have murky origins.26 Like much of the American legal system, the prosecutor position developed over time and adapted to fit a community’s specific needs. Prior to the American Revolution, each colony developed its own unique legal system, some more functional than others.27 Consequently, prosecutors played different roles in each system. Nonetheless, some similarities existed.28

25 Huston asserts that the Judiciary Act perpetuated the county attorney system employed by the states. HUSTON, supra note 23, at 4–5.
26 JACOBY, supra note 13, at 3–5.
28 Scholars studying criminal courts during the eighteenth century often do not emphasize the importance of different levels of courts when discussing the prosecutor’s role. This leads to overgeneralizations when looking at prosecutorial function. For example, historian Allen Steinberg emphasizes the private nature of criminal prosecution arguing that lawyers played a very small role in criminal prosecution during the late 1700s in Philadelphia. See ALLEN STEINBERG, THE
Colonial and early state court systems featured two levels of original jurisdiction courts.\textsuperscript{29} Lower-level courts lacked formal procedures and mechanisms.\textsuperscript{30} Upper-level courts employed grand juries to screen cases.\textsuperscript{31} Cases with sufficient evidence were bound for trial where private and public prosecutors appeared.\textsuperscript{32} States employed attorneys general who advised the governor and handled cases in the state or colony’s supreme court.\textsuperscript{33}

Understanding prosecutorial power during the revolutionary era requires understanding the courts in which they worked. Two court levels assumed original
jurisdiction over criminal cases. Minor matters, such as simple assaults or theft, initially appeared before a justice of the peace.\textsuperscript{34} Professor Steinberg, who studied Philadelphia’s lower-level courts, known as aldermanic courts, found they informally administered private dispute resolution while binding over more serious cases to a higher court.\textsuperscript{35} Local citizens brought their complaints to justices of the peace, who often lacked legal training themselves.\textsuperscript{36} Professor Fisher, on the other hand, studied mid-level courts.\textsuperscript{37} These courts had jurisdiction over more serious offenses and utilized juries to decide fact and law.\textsuperscript{38} These mid-level courts were the official state courts and met at different sessions.

\textsuperscript{34} While the courts went by different names, they performed similar functions. For example, Steinberg studied aldermanic courts in Philadelphia. STEINBERG, \textit{supra} note 28, at 6–7. These alderman heard complaints and resolved the minor matters while sending more serious offenses to the state quarter sessions court for Philadelphia County. \textit{Id.} at 56–57. This work is strikingly similar to the justice of the peace courts Flaherty studies in Massachusetts. Flaherty, \textit{supra} note 27, at 341.

\textsuperscript{35} STEINBERG, \textit{supra} note 28, at 17–18.

\textsuperscript{36} See LAWRENCE M. FRIEDMAN, \textit{A HISTORY OF AMERICAN LAW} 17–19 (3d ed. 2005); JAMES WILLARD HURST, \textit{THE GROWTH OF AMERICAN LAW: THE LAWMAKERS} 147 (Little, Brown, & Co. 1950) (“During most of our national history, the justice-of-the-peace court was the court which the states set up to handle the small disputes of the average man.”); Steinberg, \textit{supra} note 30, at 574 (law enforcement dictated by the relationship between the court and the people).

\textsuperscript{37} FISHER, \textit{supra} note 28, at 4.

\textsuperscript{38} \textit{Id.}; see also FRIEDMAN, \textit{supra} note 36, at 17–19; Erwin R. Surrency, \textit{The Evolution of an Urban Judicial System: The Philadelphia Story, 1683 to 1968}, 18 \textit{AM. J. LEGAL HIST.} 95, 102 (1974).
throughout the state. Criminal cases generally ended at these mid-level courts because there was no appeal by either side in criminal cases.

In many instances, mid-level courts convened grand juries. Like with other facets of colonial courts, grand juries differed between states. Some places saw the grand jury as a defender of individual liberties because grand juries had protected those who rebelled against oppressive British rule. Others perceived grand juries as instruments of the state who indicted people opposing the government. In either instance, however, the grand jury stood between the government and the people. The work performed by grand juries also varied by location. In some colonies, grand juries functioned as

40 Friedman, supra note 36, at 225.
43 Jacoby, supra note 13, at 18 (stating that the prosecutor protected against grand jury abuses).
44 Brent Tarter & Wythe Holt, The Apparent Political Selection of Grand Juries in Virginia, 1789-1809, 49 Am. J. Legal Hist. 257, 260 (2007) (discussing the importance of grand juries). While grand jurors were the formal mechanism for serious criminal cases and justice of the peace handled minor matters, as the post-Revolutionary War period began, the people were seen as the group primarily responsible for enforcing fundamental law.
governing bodies.45 Other grand juries investigated local problems and presented their findings to the court or the government.46 They also heard evidence in criminal cases, deciding whether the evidence was sufficient for trial.47 In these instances, they returned indictments to the court.48 The public prosecutor drafted the indictment.49

48 Id.
49 DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 63 (1992); see Steinberg, supra note 30, at 575–77 (noting that the public prosecutor acted like a law clerk).
After indictment, private attorneys usually appeared for both sides. Attorneys and judges traveled circuits from county to county litigating criminal cases. An attorney might represent a victim in one case and a defendant in the next. Thus, attorneys served as both

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50 See STEINBERG, supra note 28, at 38 (discussing the prevalence of private prosecutions in Philadelphia).
51 FRIEDMAN, supra note 36, at 92.
52 This is inferred from the practice in three jurisdictions. In Philadelphia, a close-knit legal community developed that included William Rawle, a future United States District Attorney. Rawle maintained a journal where he recorded cases he handled. See generally William Rawle Journal, Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA (hereinafter “Rawle Journal”). Rawle indicated on at least one occasion that he represented the defendant in some cases and the “prosecutor” in other cases. Rawle Journal, July 24, 1786. Given the tradition of private prosecution in Philadelphia, it is likely these combinations worked together in criminal matters. See generally STEINBERG, supra note 28. In Connecticut, during colonial times, Jared Ingersoll served as a Justice of the Peace, a position akin to the public prosecutor. LAWRENCE HENRY GIPSON, AMERICAN LOYALIST: JARED INGERSOLL 229–30 (1971). See generally John H. Langbein, The Origins on Public Prosecution at Common Law, 17 AM. J. LEGAL HIST. 313 (1973). This was a part-time position, so Ingersoll likely used his prosecution background to his advantage. GIPSON, supra, at 48–53, 232. In 1791, in Rhode Island, Connecticut’s United States District Attorney, Pierrepont Edwards, represented several federal criminal defendants. See, e.g., United States v. Pettis, No. 83-673 (R.I. Cir. Ct. Dec. 1784) (on file at the National Archives in Boston). This resulted in attorneys who did not associate themselves with one side or the other in the case. While this has changed in the United States, it has remained so in the United Kingdom where it is not uncommon for barristers to represent the Crown one week and a criminal defendant the next. WILLIAM PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF TRIALS HAS
prosecutors and defense attorneys. In some instances, however, the victim lacked the financial resources to afford a private attorney.\(^{53}\) When this occurred, the public prosecutor, who drafted the indictment, handled the case.\(^{54}\)

Public and private prosecutors functioned together in these thirteen different systems. The colonies inherited the private prosecution system from the British.\(^{55}\) In cases where one person harmed another, the victim initiated the case.\(^{56}\) Initially, the victim presented evidence and the defendant responded. Neither side had an attorney.\(^{57}\) Over time, attorneys entered the system,

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\(^{54}\) JACOBY, supra note 13, at 18–19.


\(^{56}\) Langbein, supra note 52, at 321–22; Steinberg, supra note 30, at 571; see, e.g., 111. *A Bill for Preventing Vexatious and Malicious Prosecutions and Moderating Amercements, 18 June 1779*, NAT’L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0111 [https://perma.cc/QL9H-8WCG] (“and the name and surname of the prosecutor, and the town or county, in which he shall reside, with his title or profession shall be written at the foot of the information, before it be filed, and of every bill of indictment for any trespass, or misdemeanor, before it be presented to the grand jury”).

\(^{57}\) *See generally John H. Langbein, The Origins of Adversary Criminal Trial* 10 (Oxford Univ. Press 2003)
representing the victim.\textsuperscript{58} The public prosecutor, a feature of European systems, also appeared in America.\textsuperscript{59} In the colonies, public prosecutors handled primarily administrative matters such as scheduling cases and drafting legal documents.\textsuperscript{60} In some places, especially in colonies with highly functional court systems, public prosecutors handled morality offenses.\textsuperscript{61} These cases lacked identifiable victims; society was the victim. As a result, public prosecutors handled these cases. Public prosecutors were not the leaders of the legal profession.\textsuperscript{62} Instead, they were often newly admitted to the bar and needed work.\textsuperscript{63} Ultimately, they were minor judicial figures who served as administrators rather than inquisitors.\textsuperscript{64}

Rather than consult prosecutors on legal questions, colonies, and later states, retained attorneys general. The colonial attorney general served as the

\footnotesize{(chapter one discusses the trial as it existed prior to the involvement of attorneys).}

\textsuperscript{58} Id. at 109–10.
\textsuperscript{60} Steinberg, supra note 30, at 577; Andrew M. Siegel, When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot, 32 AM. J. CRIM. L. 325, 331–33 (2005).
\textsuperscript{61} Colonial America, supra note 27, at 253–54; Flaherty, supra note 27, at 146–47 (focusing on offenses related to sexual immorality).
\textsuperscript{63} See id.
\textsuperscript{64} JACOBY, supra note 13, at 6; Siegel, supra note 60, at 331–33 (at least this is how South Carolina worked).
English attorney general's colonial representative.\textsuperscript{65} Their duties included supervising prosecutions for offenses against the crown and its revenue.\textsuperscript{66} Like the local prosecutors, however, the attorneys filling this role were not always highly qualified.\textsuperscript{67} This meant the colonial governors did not necessarily follow the attorney general's legal advice, and the crown often resorted to hiring private prosecutors to assist with major cases.\textsuperscript{68} With the transition to statehood, the state Attorneys General retained their duties.\textsuperscript{69} This aligned them more with the executive than the judiciary because Attorneys General provided general legal advice to the executive.

B. Creating Federal Prosecutors - Continuity and Change

Against this backdrop, the first Congress brought criminal prosecution to the national level. The Constitution's drafters found the judicial branch one of the most difficult issues to resolve.\textsuperscript{70} Many believed a

\begin{flushleft}
\textsuperscript{65} GIPSON, supra note 52, at 47–48; Cooley, supra note 33, at 309–10.\\
\textsuperscript{66} Cooley, supra note 33, at 309.\\
\textsuperscript{67} Id. at 310.\\
\textsuperscript{68} Id. at 310–11; see also Steinberg, supra note 30, at 575–77 (public prosecutors were regularly superseded by private attorneys even in cases of "great public wrongs" where all agreed public prosecutors should be involved).\\
\textsuperscript{69} Cooley, supra note 33, at 311–12.\\
\end{flushleft}
strong national judiciary posed only slightly less danger than a monarch.\textsuperscript{71} During the revolutionary years, the British used the courts to control the colonists.\textsuperscript{72} This led people to equate despotic power with strong, centralized courts.\textsuperscript{73} Others believed only strong national courts could prevent state judges from refusing to enforce federal laws or failing to protect federal interests.\textsuperscript{74} This caused Constitutional Convention delegates to leave the details of the federal courts vague, creating only a Supreme Court with original and appellate jurisdiction but limiting its subject-matter jurisdiction.\textsuperscript{75} The Constitution also granted Congress the power to create inferior federal courts.\textsuperscript{76}

\textsuperscript{71} See RITZ, supra note 22, at 5.
\textsuperscript{73} Gerhard Casper, The Judiciary Act of 1789 and Judicial Independence, in MARCUS, supra note 70, at 283, 289–91.
\textsuperscript{74} Casto, supra note 70, at 11; Leonard Dupee White, The Federalists: A Study in Administrative History, 1789-1891, 392–94 (Macmillan 1956).
\textsuperscript{75} U.S. CONST., art. III, § 2; see also HURST, supra note 36, at 108 (stating that all agreed a Supreme Court was necessary to protect federal interests).
\textsuperscript{76} U.S. CONST., art. III, § 1; see also HURST, supra note 36, at 108 (stating that many objected to Congress having power to create inferior federal courts).
1. The Judiciary Act of 1789

When the First Congress met, creating lower federal courts was a top priority.\textsuperscript{77} When drafting the Judiciary Act, Congress understood it was working with a new government system. It was republican in nature, meaning that the people were sovereign.\textsuperscript{78} It was also a federal system where both the states and the national government exercised sovereign power.\textsuperscript{79} They also knew that their constituents held competing beliefs about these concepts.\textsuperscript{80} Many opposed the new national government, fearing, among other things, a centralized national judiciary. These divisions influenced how Congress organized the lower federal courts.

Congress created two levels of lower courts, essentially replicating the system used in several states.\textsuperscript{81} The lower level was the district court. Each state


\textsuperscript{78} Everyone agreed the "people" were sovereign. The problem was that not everyone agreed upon what this meant. \textit{See} Akhil Reed Amar, \textit{The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator}, 65 U. COLO. L. REV. 749, 750 (1994).

\textsuperscript{79} For an overview of the scholarship relating to this issue and the origins of the federalism concept, see \textit{LaCroix}, supra note 20, at 1–11.

\textsuperscript{80} \textit{See} Marcus & Wexler, \textit{supra} note 70, at 13–15.

\textsuperscript{81} Some scholars assert that the federal judiciary was unique and innovative and that the states eventually copied it. \textit{See} CASTO, \textit{supra} note 70, at 45 (federal circuit courts were a major innovation); RITZ, \textit{supra} note 22, at 5 ("[t]he national judicial system established in 1789 was a historical novelty. It was not modeled on the state systems; instead, the state systems have subsequently been modeled on it."). However, scholarship on the state courts at the time reflects a curiously similar
had its own district court with a single judge presiding. This court worked similarly to justice of the peace courts. Those with criminal complaints could appear before the district court. If the crime carried minimal punishment, the district court could hear the case. Otherwise, the district court could only bind the case for trial in the mid-level court, the circuit court. There were three circuit courts, one for the eastern states, one for the middle states, and one for the southern states. During the course of a year, the circuit court met twice in each state. The circuit court initially featured three judges, two Supreme Court Justices and the district court judge from that state. The circuit court, unlike today’s circuit structure. See, e.g., FRIEDMAN, supra note 36, at 17; NELSON, supra note 39, at 15–18.

82 Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1793), http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196 [https://perma.cc/GQ9N-GVRM].

83 Id. § 9, 1 Stat. at 76.

84 Id.

85 Id.


87 § 4, 1 Stat. at 74.

88 Id. at 74–75. In 1793, Congress permitted the circuit courts to hold sessions with only one Supreme Court Justice. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835 89 (Little, Brown & Co. 1926).
court, was a trial court, having jurisdiction over all federal criminal matters.\textsuperscript{89}

Congress created these courts hoping to pacify citizen fears that the new federal government would transport defendants to the national capital for trial.\textsuperscript{90} The public saw criminal prosecution as a local matter.\textsuperscript{91} Defendants could easily defend themselves with witnesses. If trials took place far from the offense location, only the wealthiest defendants would be able to secure witnesses.\textsuperscript{92} With local juries, jurors and defendants held similar beliefs, and the juries judged defendants based on local standards.\textsuperscript{93} Creating local federal courts to try federal offenses allowed federal defendants to stand trial before their home-state jurors. Congress further protected defendants by permitting each state to use its own jury selection method.\textsuperscript{94}

In addition, Congress created two new federal positions to give federal law enforcement a local flavor. First, each district had a United States marshal who had

\textsuperscript{89} § 4, 1 Stat. at 74.
\textsuperscript{90} Marcus & Wexler, supra note 70, at 21.
\textsuperscript{91} FRIEDMAN, supra note 47, at 37; NELSON, supra note 39, at 3–4, 14–15; Steinberg, supra note 30, at 573–74.
\textsuperscript{92} RITZ, supra note 22, at 6. The circuit courts were essentially the compromise to this problem. If a person was tried before the district court and found guilty, the person would secure a re-trial in the circuit court without having to leave the district. \textit{Id}. at 6, 27. As the Supreme Court only had appellate jurisdiction in such cases, there was no concern that a new trial would take place at the nation’s capital. \textit{Id}. at 36–40.
\textsuperscript{93} \textit{Id}. at 6, 30.
\textsuperscript{94} Marcus & Wexler, supra note 70, at 23.
a variety of court-administration duties. Second, each district had its own United States District Attorney.

Section 35 of the Judiciary Act defined the District Attorney's qualifications and duties. The District Attorney had to be "learned in the law." This meant that the prosecutor had to be admitted to the bar after studying law. This brought a sense of professionalism

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95 Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87, http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=210 [https://perma.cc/4U9C-3ZWJ]. The marshal was responsible for executing all written orders of the United States government. This included the Judiciary, Executive, and Legislative branches. Marshals distributed copies of new laws, handled court finances, and were supervised by the Secretary of State. See Frederick S. Calhoun, The Lawmen: United States Marshals and the Deputies, 1789-1989 15–21 (Smithsonian Institution Press 1989). Like the United States District Attorneys, the marshals worked with all three branches. Also like the judges and attorneys, Washington appointed men who were locally prominent, knowing that these people would represent the federal government in distant places throughout the United States. Id. at 12.

96 § 35, 1 Stat. at 92.

97 Id. “And there shall be in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court in which district it shall be holden.” Id. At the state level, many who served as lawyers were not necessarily legally trained. For more on the status of the legal profession at this time, see Friedman, supra note 36, at 53–60.

98 Colonial America, supra note 27, at 275; Steinberg, supra note 28, at 43; Surrency, supra note 38, at 741 (discussing the significance of the “learned in the law” language).
to the courts. At the state level, many judges and prosecutors lacked legal training.  

The federal attorney was to prosecute "all delinquents for crimes and offences" arising under the authority of the United States in their district. They also represented the United States in civil actions. Their duties ended at the circuit courts though, because the Attorney General handled Supreme Court cases. As compensation, the District Attorneys received fees based on the type and number of cases handled.

99 Surrency, supra note 38, at 741.
100 Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=215 [https://perma.cc/F32P-DNYH]. This gave a local element to criminal prosecution. However, by creating an Attorney General and then not giving the Attorney General control over the local prosecutors, Congress created a tension in federal criminal law enforcement that remains today. Should federal prosecutorial discretion be left at the local level or should it be centralized? See, e.g., Eisenstein, supra note 16, at 221.
101 § 35, 1 Stat. 73, 92.
102 Id.
103 Id. The fee-based compensation created an incentive for these part-time attorneys to work on the government’s behalf. The more cases they filed, the more payment they received. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 255–56 (Yale Univ. Press 2013). Assuming Professor Parillo is correct, this raises a question about why the Administration was concerned that the United States Attorneys might not enforce neutrality. If the government paid them sufficiently, then they would enforce the law. Yet, several attorneys also submitted bills to the government for services rendered outside of the traditional case processing duties. See Letter from Edmund Randolph to Alexander Hamilton (July 2, 1794), FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-16-02-0540 [https://perma.cc/QPT9-HHK3]
These few provisions had two important implications. First, the act effectively eliminated private prosecution from federal criminal cases, differentiating state and federal prosecutors. In state


104 The scholarship on the regular practices of the first United States District Attorneys is severely lacking. What exists consists mostly of broad generalizations or is confined to very limited situations. For example, Mary K. Bonsteel Tachau explored the workings of Kentucky's United States District Attorneys for a period of twenty-seven years in the larger context of the work of the Kentucky federal courts. See generally MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC, 1789-1816 (Princeton Univ. Press 1978). Kentucky was hardly representative of the coastal states during the early 1790s. Kentucky was the only jurisdiction to have multiple people decline to serve as United States District Attorney. Scott Ingram, George Washington's Attorneys: The Political Selection of United States Attorneys at the Founding, 39 PACE L. REV. 163, 211 (2018) (citing MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816 101 (Princeton Univ. Press 1978)). Another study looks at federal prosecutions across a larger geographic range but begins with the Jeffersonian period. See DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829 7–16 (Greenwood Press 1985). With Jefferson's presidential election came a significant change in government philosophy. See STANLEY ELKINS & ERIK MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1789-1800 13–28 (Oxford Univ. Press 1995). Due to the lack of scholarship in the area, the conclusions stated here are based on my study of the Pennsylvania District Court and the proceedings of the Middle Circuit in Philadelphia.

105 While it formally removed private prosecution, it did not prevent the United States District Attorneys from hiring
courts, private individuals brought complaints to the courts and hired private attorneys to pursue the claims; however, the Judiciary Act required United States District Attorneys to handle all federal criminal cases that went to trial. This is indicated by the language that District Attorneys prosecute all delinquents for crimes cognizable under United States authority. For a private criminal action to proceed beyond the grand jury, the District Attorney had to act upon it. Second, the people who filled the District Attorney position had to maintain a private clientele. An attorney could not survive professionally solely on fees generated from government cases. The court met only a few days each year. While the federal prosecutor had a monopoly over

special assistants, who were private attorneys, to prosecute specific cases. For example, in 1807, the government expended much effort to bring former Vice President Aaron Burr to trial. See Douglas Linder, The Treason Trial of Aaron Burr (2007), http://ssrn.com/abstract=1021331 [https://perma.cc/VPF8-KLD9] (article available for download). During the trial, Charles Lee, the Attorney General under Adams, and William Wirt, a future attorney general from Maryland, assisted the government. Id. Citizens also had the power to initiate cases before the district courts and the grand juries.

Richard Harison, the United States District Attorney for New York, Christopher Gore, the United States District Attorney for Massachusetts, and William Rawle, the United States District Attorney for Pennsylvania, worked in the largest cities in the United States and likely had the most money generated from fees. Even this trio maintained a private practice. See also Roger Conner et al., The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the "Changing Role of U.S. Attorneys' Offices in Public Safety" Symposium, 28 CAP. U. L. REV. 753, 754–55 (2000).

See, e.g., MARCUS, supra note 86, at 164 (describing the term of New Jersey’s 1791 Circuit Court).
federal prosecutions, \footnote{Parillo, supra note 102, at 255–56.} the limited work restricted federal prosecutorial power by necessitating that the attorneys find other clients, making their position part-time.

The arrangement established a simple attorney-client relationship between the government and the District Attorney. The District Attorney attended court when in session, represented the United States in any civil or criminal cases, and then handled private business until the next session.\footnote{Cf. Krent, supra note 121, at 292–95 (asserting that private citizens could initiate complaints). While they could initiate complaints, a United States District Attorney had to proceed on the case. See Scott Ingram, Representing the United States Government: Reconceiving the Federal Prosecutor’s Role Through a Historical Lens, 31 Notre Dame J. L. Ethics & Pub. Pol’y 293, 324–27 (2017) (discussing how only cases pursued by the United States District Attorney were pursued in court).} There was no policy function. There was no sense that the District Attorney was the district’s chief federal law enforcement official.\footnote{See discussion supra note 8.} When a federal criminal case arose, the District Attorney drafted the indictment and presented the evidence.\footnote{See, e.g., Henfield’s Case, 11 F. Cas. 1099, 1115 (Pa. D. 1793).} This coincided with the District Attorney’s civil responsibilities. If someone owed the government money, for instance, the District Attorney handled the collection proceedings.\footnote{See, e.g., “Original Minutes of the Circuit Court of the United States of America for the Middle Circuit from October 1790 to April 1799” (on file with the National Archives in Philadelphia).} In this respect, the District Attorney simply was a private attorney who counted the United States government as a client.

\footnote{109\textsuperscript{ }Parillo, supra note 102, at 255–56.}

\footnote{110\textsuperscript{ }Cf. Krent, supra note 121, at 292–95 (asserting that private citizens could initiate complaints). While they could initiate complaints, a United States District Attorney had to proceed on the case. See Scott Ingram, Representing the United States Government: Reconceiving the Federal Prosecutor’s Role Through a Historical Lens, 31 Notre Dame J. L. Ethics & Pub. Pol’y 293, 324–27 (2017) (discussing how only cases pursued by the United States District Attorney were pursued in court).}

\footnote{111\textsuperscript{ }See discussion supra note 8.}

\footnote{112\textsuperscript{ }See, e.g., Henfield’s Case, 11 F. Cas. 1099, 1115 (Pa. D. 1793).}

\footnote{113\textsuperscript{ }See, e.g., “Original Minutes of the Circuit Court of the United States of America for the Middle Circuit from October 1790 to April 1799” (on file with the National Archives in Philadelphia).}
In addition to the District Attorneys, § 35 of the Judiciary Act established the Attorney General.\textsuperscript{114} Like the District Attorneys, the Attorney General had to be learned in the law.\textsuperscript{115} The Attorney General was "to prosecute and conduct all suits in the Supreme Court . . . ."\textsuperscript{116} Under today's usage, one would conclude this means that the Attorney General handled criminal cases in the Supreme Court. However, based on usage at the time, prosecute meant initiating the case and could refer to civil cases.\textsuperscript{117} Therefore, the "prosecute" language did not give the Attorney General control over federal criminal

\begin{footnotesize}
\textsuperscript{114} Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=215 [https://perma.cc/F32P-DNYH] ("And there shall also be a meet person learned in the law to act as attorney-general for the United States, who shall be sworn or affirmed to faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion on questions of law when requested by the President of the United States, or when requested of any of the heads of the departments, touching any matters that may concern their departments, and shall receive such compensation as shall by law be provided.").
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} See, e.g., Chisholm v. Georgia, 2 U.S. 419, 472 (1793) (Chief Justice John Jay stating, "It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them?").
\end{footnotesize}
prosecutions. Beyond the language difference, the Supreme Court lacked constitutional authority to hear criminal cases, unless they involved ambassadors or other public ministers and consuls, because the Supreme Court only had appellate jurisdiction.\footnote{U.S. Const. art. III, § 2.}

The Judiciary Act then gave the Attorney General an additional function. The Attorney General would give "his advice and opinion upon questions of law."\footnote{Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92, http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html.} This duty differentiated the Attorney General’s relationship with the government from the District Attorney’s. The attorney general served as a legal advisor, assisting the government rather than someone who appeared only when court was in session. Yet, like the District Attorneys, the attorney general was not full-time. While the Judiciary Act established fixed compensation instead of a fee-based schedule, the amount curtailed the incumbent’s ability to give government work full-time attention.\footnote{HUSTON, supra note 23, at 5.}
2. The First Federal Prosecutors

Soon after Washington signed the Judiciary Act, he filled the new judiciary positions. Washington

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121 See Harold J. Krent, Executive Control Over Criminal Law Enforcement: Some Lessons from History, 38 AM. U. L. REV. 275, 293 (1989) (discussing the role of federal prosecutors under the Judiciary Act). The work of federal prosecutors during the Early Republic period has received scant scholarly attention. When scholars have examined their work, it has been done as part of a larger study. Most recently, legal scholars have focused on the executive's power to not enforce the law. See, e.g., Rebecca Krauss, The Theory of Prosecutorial Discretion in Federal Law: Origins and Development, 6 SETON HALL CIR. REV. 1, 4–6 (2009); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 VAND. L. REV. 671, 747 (2014). Prior to that scholars expounded on the separation of powers between the judiciary and executive. See, e.g., Susan Low Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 DUKE L.J. 561, 567–68 (1989). Historians discuss how prosecutors handled particular types of crimes or how the government addressed a particular problem. Examples include the Whiskey Rebellion and Sedition prosecutions. See, e.g., Thomas P. Slaughter, The Whiskey Rebellion: Frontier Epilogue to the American Revolution 192–204 (Oxford Univ. Press 1988); James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and America's Civil Liberties, 1798 177 (Cornell Univ. Press 1956). These studies have not analyzed prosecutorial powers but simply describe their actions.

keenly understood these initial selections were precedent setting.\textsuperscript{123} He sought those loyal to the national government and who had strong local reputations.\textsuperscript{124} The people filling the judicial positions would be the new federal government’s face in their respective districts. His District Attorney nominees included Pierpont Edwards, who would serve for sixteen years and as a federal judge for twenty more;\textsuperscript{125} Christopher Gore, who would later serve as Massachusetts governor and United States Senator;\textsuperscript{126} Richard Harison, Alexander Hamilton's former law partner;\textsuperscript{127} and John Marshall, the

\textsuperscript{123} Letter from George Washington to Edmund Randolph (Sept. 28, 1789), \textsc{Founders Online}, http://founders.archives.gov/documents/Washington/05-04-02-0073 [https://perma.cc/RHW6-8W2H] (“Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its’ political system—hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern.”); \textit{see also} Gordon S. Wood, \textit{Empire of Liberty: A History of the Early Republic, 1789-1815} 86–88 (Oxford Univ. Press 2009); Ingram, \textit{supra} note 104, at 189.

\textsuperscript{124} Wood, \textit{supra} note 123, at 107–09.


future Supreme Court Chief Justice. Edmund Randolph received the Attorney General nomination. Randolph came from a prominent Virginia legal family, had been a leading member of the Constitutional Convention and, although he initially opposed the Constitution, played an important role in Virginia's ratification.

Although Washington consulted local officials for nomination recommendations, he nominated people without consulting them. George Nicholas, James Madison's friend, declined the nomination for Kentucky. Washington's second choice, James Brown, also refused the nomination. Edmund Randolph took several months to respond to Washington's nomination before ultimately accepting it. John Marshall also declined his nomination, stating it would interfere with his state court business. Despite these few failures,

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129 Letter from George Washington to the United States Senate, supra note 122.
131 TACHAU, supra note 104, at 66–70 (discussing the numerous people who had rejected the Kentucky position).
132 Id.
133 REARDON, supra note 130, at 179–80.
many of Washington's initial appointments served several years, leaving only for more prestigious federal appointments.135

The new District Attorneys encountered two significant problems. First, they had little business. Most of their work involved dealing with revenue matters, including forfeitures and collection actions.136 Few prosecuted many criminal cases because the extent of federal criminal jurisdiction was ambiguous.137 Some believed the federal government possessed common law criminal jurisdiction.138 Others asserted the government

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136 MARCUS, supra note 86, at 8–9 (describing the work of the Circuit Courts during their first term); WARREN, supra note 88, at 58–63 (describing the work performed in the circuit courts).

137 See, e.g., Robert C. Palmer, The Federal Common Law of Crime, 4 L. & Hist. Rev. 267, 272 (1986); Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 L. & Hist. Rev. 223, 263 (1986) (both articles argue against a federal common law of crimes and describe the historical debate about the matter). But see CASTO, supra note 70, at 129–30 (pointing to an example of a federal common law crime occurring on the high seas; at the time the case was commenced, the Crimes Act had not been passed).

could only prosecute violations of federal statutes.\textsuperscript{139} While Congress passed an initial crimes law, the law covered few matters.\textsuperscript{140} Most early criminal cases involved crimes occurring on the high seas. In the District of Pennsylvania, prior to 1793, nearly every case prosecuted involved a murder, assault, or theft on a maritime vessel.\textsuperscript{141} Grand juries met in each district but were soon discharged for lack of business.\textsuperscript{142} 

Their second problem dealt with the United States District Attorney’s relationship with the Executive.\textsuperscript{143} How much control should the central

\textsuperscript{139} See, e.g., Preyer, supra note 137, at 227–28 (citing grand jury charges defining the scope of criminal jurisdiction).


\textsuperscript{141} Minutes for the Circuit Court of the District of Pennsylvania, M986, "Criminal Case Files of the U.S. Circuit Court for the Eastern District of PA, 1791-1840" (on file with the National Archives in Philadelphia) [hereinafter Minutes of Circuit Court].

\textsuperscript{142} \textit{Id.} Maeva Marcus’s edited work on the Documentary History of the Supreme Court includes a summary of every session held by the circuit courts from 1789 to 1794. In the early years, it was not uncommon for the sessions to only last a week or two, if even that long, due to a lack of business. Most of the cases presented to the circuit courts during this time were civil cases for which a grand jury was not needed. See \textit{generally} MARCUS, supra note 86.

\textsuperscript{143} HOMER CUMMINGS & CARL MCFARLAND, \textit{FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE} 7 (Macmillan Co. 1937) (discussing questions to be resolved about the administration of criminal justice following ratification of the Constitution).
government exert over cases handled by the district attorneys? This question arose in different contexts during the national government's early years.\textsuperscript{144} Would there be a strong, centralized government dictating policy for the entire nation or would the states, towns, and plantations have significant local autonomy? During Washington's first Presidential term, the local district attorneys exercised unfettered discretion.\textsuperscript{145} Only rarely did local district attorneys contact the Administration.\textsuperscript{146} In one instance, Pennsylvania’s United States Attorney, William Lewis, wrote to Washington seeking a pardon for a counterfeiting suspect who offered to inform Lewis about a larger counterfeiting ring.\textsuperscript{147} Determining control was so significant that, in 1791, Attorney General Randolph asked Congress to give the Attorney General supervisory authority over the district attorney's work.\textsuperscript{148}

\textsuperscript{144} See Wood, supra note 123, at 31–33, 53–54 (noting that the problem of centralization was a key consideration of the Constitutional Convention and that the subsequent ratification debates divided the Federalists, who favored centralization, and the Anti-Federalists, who opposed it).


\textsuperscript{146} See generally Ingram, supra note 110 (addressing the relationship between the Administration and its attorneys).


\textsuperscript{148} Letter from the Attorney General to George Washington (Communicated to Congress) (Dec. 28, 1791), in 1 AMERICAN STATE PAPERS 45–46 (Library of Congress, American Memory Series) [hereinafter AMERICAN STATE PAPERS], http://memory.loc.gov/cgi-
Failing that, wrote Randolph, “[t]he attorneys of the districts ought . . . to be under an obligation to transmit to him a state of every case in which the harmony of the two judiciaries may be hazarded . . . .” On routine matters, district attorneys clearly had autonomy, but did they have the same autonomy over cases of national significance? Could the President order the United States District Attorneys to prosecute? They were Presidential appointees and represented the United States, yet they also perceived themselves as judicial officers. Could they refuse to comply if they believed the ordered action was not warranted?

A similar situation existed for the Attorney General. Randolph attended the Supreme Court’s first session, which lasted one week. The Court admitted several attorneys and then adjourned without hearing a case. That routine continued until August 1791 when the first case arrived. It was immediately dismissed, however, because of a procedural error. While the Attorney General had few cases to argue, Randolph wrote opinions to department heads as they considered their

149 Letter from the Attorney General to George Washington, supra note 147.
150 See generally Jacoby, supra note 13; Ingram, supra note 104.
150 Reardon, supra note 130, at 191–92; Warren, supra note 88, at 46–47 (describing first day of Supreme Court).
151 See Warren, supra note 88, at 46–51 (describing the term).
152 Id. at 56 (citing West v. Barnes, 2 U.S. 401 (1791)).
constitutional and statutory authority. He soon found this work consumed substantial time. In the same letter in which Randolph requested control over the United States District Attorneys, Randolph requested funds for a clerk because of the lengthy opinions he had to write. Randolph became so engrossed in opinion writing that his private legal practice suffered. His only other major assignment as Attorney General involved reviewing the federal court system.

Though not a department head, Randolph similarly had to determine the scope of his authority. Without significant statutory guidance, Randolph adopted a pragmatic approach. Having served in politics for much of his adult life, Randolph found himself mediating between Hamilton’s and Jefferson’s

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151 Opinions written by the early Attorneys General, including Randolph’s, were not formally preserved. It was not until William Wirt became the Attorney General under President Monroe that the Attorneys General began keeping a record of their opinions. LEONARD DUPEE WHITE, THE JEFFERSONIANS; A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829 337 (Macmillan 1951) (stating that Attorney General William Wirt was the first to establish written opinions); CLAYTON, supra, note 145, at 17–18. Nonetheless, a large number of Randolph’s opinions are now available through the National Archives’ Founder’s Online database.

152 Id. at 197–206. A search of the Founder’s Online database yielded at least thirty-seven opinions from February 1790 when Randolph arrived in New York for the Supreme Court’s first term to January 3, 1794 when Randolph took the oath to become Secretary of States.

153 AMERICAN STATE PAPERS, supra note 148.

154 REARDON, supra note 130, at 195.

155 Id. at 193–96.

156 See generally Bloch, supra note 121 (arguing that the relationship between the President and Attorney General was not clearly defined).
increasingly hostile positions. Replicating the state Attorney General role, Randolph provided whatever assistance the Administration required. These obligations, coupled with his long-standing relationship to Washington, pushed the Attorney General away from judicial duties and toward an executive function. In essence, Randolph became the administration’s legal advisor rather than a neutral judicial officer.

157 Reardon, supra note 130, at 207, 212–13.
158 Washington and Randolph first worked together during the Revolutionary War. Id. at 21. Randolph, to prove his loyalty to the American side, sought and received a position on Washington’s staff. Id. at 19–21. When Randolph’s father fled to Great Britain and his uncle died, Randolph left Washington’s service to take care of the Randolph family affairs. Id. at 22.
159 Clayton, supra note 145, at 49–50 (stating that Attorney General began as a judicial figure and became administrative later). At this point, Randolph clearly moved beyond his statutory authority as the Attorney General, which was not on the same level as the Secretaries of Treasury, War, and State. Bloch, supra note 121, at 572, 578–79. For Randolph, the nature of the power exercised was more important than who exercised it. See generally Scott Ingram, “[Perhaps] the Principle is Established”: The Senate, George Washington, and the Ambiguous Origins of Executive Privilege, 28 Kan. J.L. & Pub. Pol’y 1 (2018).
160 Nancy Baker devised a continuum that assigned Attorneys General a place between legal (called “neutral”) and political in terms of the relationship with the Presidential administration. See Nancy V. Baker, Conflicting Loyalties: Law and Politics in the Attorney General’s Office 35 (Univ. of Kan. Press 1992). On the political end, the Attorney General is an advocate for the administration by promoting “both the president’s and his own policy agenda while in office.” Id. The political landscape supersedes the legal landscape. Id. On the legal side, the Attorney General is independent and answers only to the rule of law. Id. This type of Attorney General is
This was the shape of federal criminal justice as Washington began his second term in March 1793. Events in Europe forced the federal government to confront what role its lawyers played in federal criminal justice.

II. The Neutrality Crisis

As the new American federal government began, the French citizenry began a revolution, imitating their American counterparts. Americans who initially observed these events equated the French Revolution with their own. Over time, the French Revolution’s tenor changed, becoming more radical and bloodier than the American one. Nevertheless, most Americans enthusiastically supported the French Revolution with parades and festivals, celebrating French victories including their dethroning King Louis XVI. For many

“capable, cautious, thoughtful, legalistic and nonpolitical.” Id. Randolph does not fit neatly along the continuum as he displayed aspects of each position. However, by the time of the writing, Randolph was more an advocate than a neutral. CLAYTON, supra note 145, at 16–17 (Randolph set the precedent for a close friend of the President serving as Attorney General). This is not to say that Washington agreed with or abided by Randolph’s legal opinions. See, e.g., Walter Dellinger & H. Jefferson Powell, The Constitutionality of the Bank Bill: The Attorney General’s First Constitutional Law Opinion, 44 DUKE L.J. 110, 120 (1994).

161 WOOD, supra note 123, at 174.
162 ELKINS & MCKITRICK, supra note 104, at 308–09; WOOD, supra note 123, at 174.
163 JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 69, 83 (Yale Univ. Press 1993).
164 SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC
other Americans, their enthusiasm dampened as Revolutionary War hero, the Marquis de Lafayette, was forced to flee France and was captured in Austria.\textsuperscript{165} It turned to fear when the new French government guillotined Louis XVI and declared war on Europe.\textsuperscript{166}

When this news reached the United States, Washington immediately recognized the threat.\textsuperscript{167} The United States found itself between the warring powers. Still repaying its Revolutionary War debt, working under a controversial four-year old federal government, and lacking a significant military, the United States could not fight a war, especially one in Europe.\textsuperscript{168} While the

\textsuperscript{139} (Univ. of Pa. Press 1997). These events were partisan in nature. The Federalists took notice of these events but did not participate. \textit{Id.} at 120–22. These events only heightened Federalist fears that the French Revolution would come to the United States. RON CHERNOW, ALEXANDER HAMILTON 434 (Penguin Press 2004); ELKINS & MCKITRICK, \textit{supra} note 104, at 310; WOOD, \textit{supra} note 123, at 178–79, 183.

\textsuperscript{165} HARRY AMMON, THE GENET MISSION 41 (WW Norton & Co., Inc., 1973); ELKINS & MCKITRICK, \textit{supra} note 104, at 311; WOOD, \textit{supra} note 123, at 177.

\textsuperscript{166} AMMON, \textit{supra} note 165, at 42; ELKINS & MCKITRICK, \textit{supra} note 104, at 311.


\textsuperscript{168} See ELKINS & MCKITRICK, \textit{supra} note 104, at 334 (discussing the importance of the Revolutionary War debt owed to France); CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 17 (Colum. Univ. Press 1931)
Administration realized this, not all Americans did. Many still supported France and believed the United States owed the French people support just as the French had supported the Americans Revolution.¹⁶⁹ A smaller number, who held significant power within Washington’s Administration, relied on commerce with Great Britain for their livelihood.¹⁷⁰ Despite the strong desire to remain

(discussing reasons why war had to be avoided). See generally RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT, 1783-1802 36–39 (Free Press 1975); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (Simon & Schuster 2010) (discussing the controversial nature of the new national government). For the reasons why war had to be avoided, see THOMAS supra, at 17 (discussing the United States military establishment at this time).

¹⁶⁹ ELKINS & MCKITRICK, supra note 104, at 308–09; SHARP, supra note 163, at 81–86 (describing the popular divide and the different responses to it from the Administration).

¹⁷⁰ Jefferson presented his view of the divide in Philadelphia in a May 13, 1793 letter to James Madison. Letter from Thomas Jefferson to James Madison (May 13, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-26-02-0021 [https://perma.cc/V7KG-AD23]. This was the end of the same letter in which Jefferson complains about the neutrality enforcement plans presented by Hamilton and Randolph. Alexander Hamilton was the driving force of the pro-British faction within the Administration. On Hamilton’s relationship with Great Britain during this time period, see GILBERT L. LYCAN, ALEXANDER HAMILTON, & AMERICAN FOREIGN POLICY: A DESIGN FOR GREATNESS 148 (Univ. of Okla. Press 1970). On the influence Hamilton had over Washington and Jefferson’s response to it, see AMMON, supra note 165, at 4; CHERNOW, supra note 164, at 440 (Jefferson informing Genet of the influence held by Hamilton and U.S. Senator Robert Morris as English supporters); JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION 213–23 (Bloomsbury Press 2013).
out of war, the Treaty of Amity and Commerce with France, signed during the American Revolution, required the United States to aid France if France was attacked.\footnote{William R. Casto, Foreign Affairs and the Constitution in the Age of Fighting Sail 20–21 (Univ. of S.C. Press 2006) (while this was a treaty term, the French had allegedly waived the provision).} It was possible that the French would invoke this provision.\footnote{Ammon, supra note 165, at 25–27 (describing French consul Edmond Genet’s instructions for his mission to the United States).} This situation forced the Administration to find a neutral path.

A. First Cabinet Meetings

Upon learning of the war, Washington called a cabinet meeting to ask nine questions relating to the United States' response.\footnote{Casto, supra note 171, at 29–30. These questions set the stage for Cabinet dissension. Hamilton met with Washington prior to the meeting and presented the questions to Washington. Id. at 29. Also prior to the meeting, Randolph wrote the questions and distributed them Id. This likely irritated Jefferson as he recognized Hamilton’s work based on the tenor of the questions. Id.; see Minutes of a Cabinet Meeting, Founders Online (Apr. 19, 1793), http://founders.archives.gov/documents/Washington/05-12-02-0362 [https://perma.cc/W8FE-Q5AP] for a short summary of the meeting.} The first question posited whether the government should accept the new French Minister to the United States, Edmond Charles Genet.\footnote{Casto, supra note 171, at 26–27.} Hamilton argued the government should not accept him because withholding recognition was a prerequisite for the United States to be able to assert that the Treaty of Amity and Commerce between the United States and France was no longer valid due to the lack of a stable...
French government. Jefferson countered that the United States should recognize Genet because the United States was bound by the treaty’s terms as treaties bound nations, not governments. Jefferson’s position prevailed with Randolph’s support.

With the first question decided, the meeting turned to the United States’ position vis-à-vis the warring powers. All agreed that the United States should remain neutral, but Hamilton and Jefferson contested the details. Hamilton believed Washington should issue a statement proclaiming neutrality. Prior to the meeting, United States Supreme Court Chief Justice John Jay provided Hamilton a proposed proclamation. Hamilton, in turn, presented it to the Cabinet. Jefferson opposed the proclamation. He believed that the United States should seek concessions from the warring powers prior to declaring neutrality. He

175 Id.; Lycan, supra note 170, at 153–55.
176 Elkins & McKittrick, supra note 104, at 339.
178 Ammon, supra note 165, at 48; Casto, supra note 171, at 26–27 (noting that “neutrality was not a clear and precisely developed concept”); Elkins & McKittrick, supra note 104, at 337; Ferling, supra note 170, at 246. This left the Washington Administration a full cloth with which to work when crafting their version of neutrality. As made clear below, Jefferson favored a neutrality that benefitted France. Hamilton sought a strict neutrality that denied France any ally benefits from the United States. Casto, supra note 171, at 24–25.
179 Ammon, supra note 165, at 48–50.
180 Casto, supra note 171, at 28.
181 Id. at 29–30.
182 Elkins & McKittrick, supra note 104, at 337.
183 Id.; Lycan, supra note 170, at 160.
thought that this might help the United States’ standing vis-à-vis the other European nations, particularly in terms of opening their ports to United States commerce.\textsuperscript{184} When this approach failed, Jefferson argued Washington lacked the constitutional authority to declare neutrality because Congress had the power to declare war so Congress, alone, possessed the power to declare peace.\textsuperscript{185} Hamilton countered that a neutrality proclamation did not announce a new policy but merely affirmed the status quo.\textsuperscript{186} After some deliberation, Hamilton’s position prevailed, with Randolph supporting the proclamation.\textsuperscript{187}

Having decided to issue a statement announcing neutrality, Washington directed Randolph to write the draft.\textsuperscript{188} Randolph’s proposed proclamation demonstrated his preference for practicality over ideology. Likely influenced by Jay’s draft, Randolph devised a similar proclamation but wrote it such that the Cabinet could unanimously support it.\textsuperscript{189} Randolph’s proclamation contained two notable features. First, it

\begin{itemize}
\item \textsuperscript{184} \textit{FERLING}, \textit{supra} note 170, at 252–53 (using as evidence Jefferson’s report in Fall 1793 about the necessity of America freeing itself from reliance on British commerce); \textit{ROBERT TUCKER & DAVID HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON} 56 (Oxford Univ. Press 1992).
\item \textsuperscript{185} It is important to note that Jefferson did not oppose \textit{neutrality} but opposed the public declaration of it. U.S. CONST., art. I, § 8 (Congress has the power to declare war); \textit{AMMON, supra} note 165, at 48.
\item \textsuperscript{186} \textit{THOMAS, supra} note 168, at 39.
\item \textsuperscript{187} For a discussion of the debate, see \textit{THOMAS, supra} note 168, at 40–41.
\item \textsuperscript{188} \textit{REARDON, supra} note 130, at 222.
\item \textsuperscript{189} \textit{Id.} at 224; \textit{CASTO, supra} note 171, at 31.
\end{itemize}
omitted the word "neutrality." 190 Realizing that Jefferson adamantly denied the President's power to declare neutrality, Randolph wrote that the United States would "adopt and pursue a conduct friendly and impartial toward the belligerent powers." 191 While the omission of "neutrality" was significant, Randolph's final paragraph had more significant domestic consequences. He warned the citizenry that any conduct not "friendly and impartial" would result in criminal prosecution. 192 This included "committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations." 193 Tying violations to the Law


191 Id. Interestingly, Jefferson may have won this small battle but his victory likely cost him the larger political war over neutrality policy. Rather than use the term “neutrality,” Randolph used “impartial.” Jefferson did not want an impartial neutrality; however, once used in the proclamation, impartiality became the policy. THOMAS, supra note 168, at 21.

192 Neutrality Proclamation, 22 April 1793, supra note 190. This was not the first time Washington used a proclamation to warn of criminal prosecution if the citizenry did not comply. See Proclamation, 19 March 1791, FOUNDER’S ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0343 [https://perma.cc/824X-NAXP].

193 Neutrality Proclamation, 22 April 1793, supra note 190. There is some question about whether Randolph inserted this paragraph on his own or if he relied upon a similar provision in Supreme Court Chief Justice John Jay’s draft proclamation. Compare CASTO, supra note 171, at 28, with REARDON, supra note 130, at 221–23 (lacking any discussion of reliance on Chief Justice John Jay’s draft proclamation). Jay’s draft was longer than the final draft approved by Washington. CASTO, supra
of Nations provided the constitutional basis for federal criminal prosecution.\footnote{Preyer, supra note 137, at 232.} The federal government had clear authority over international affairs\footnote{See U.S. Const. art. I, § 8; U.S. Const. art. I, § 10; U.S. Const. art. II, § 2; Casto, supra note 70.} and, therefore, had power to enforce the law of nations.\footnote{See Anthony J. Bellia, Jr. & Bradford R. Clark, The Federal Common Law of Nations, 109 COLUM. L. REV. 1, 2–7 (2009) (outlining competing views on the application of the law of nations and identifying an alternate view based on the nation’s founders’ practices); Stewart Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 820–21 (1989).} After receiving unanimous Cabinet approval, Washington issued what became known as the “Neutrality Proclamation” on April 22.\footnote{For one theory about how it became known as the “Neutrality Proclamation” without using the word “neutrality” see THOMAS, supra note 168, at 48.}

While Washington likely favored Hamilton’s ideological position, Washington’s desire to proclaim neutrality also resulted from practical reality. Writing to Hamilton about the European war prior to the April 19 meeting, Washington expressed his concern about American citizens involving themselves in the war.

Hostilities having commenced between France and England, it is incumbent upon the Government of the United States to prevent, as far as in it lies, all interferences of our citizens in them; and immediate precautionary measures
ought...to be taken...as I have reason to believe...that many vessels in different parts of the Union are designated for Privateers & are preparing accordingly. The means to prevent it, and for the United States to maintain a strict neutrality between the powers at war, I wish to have seriously thought of...\(^{198}\)

Washington suspected American citizens were arming themselves to fight for the French.\(^ {199}\) He knew this could draw the United States into the war.\(^ {200}\)

The threat was greater than Washington knew. In February, even before word of the European war


reached the United States, Genet set sail from France. Rather than arrive at Philadelphia, the nation’s capital, Genet landed at Charleston, South Carolina on April 8. Following an enthusiastic welcome from Charleston’s French supporters, Genet met with South Carolina’s governor, William Moultrie, about commissioning privateers. Moultrie listened to Genet and permitted him to outfit and commission privateers because Moultrie knew of no legal prohibition. With Moultrie's  

201 AMMON, supra note 165, at 31; CASTO, supra note 171, at 1. For a detailed background on Genet, see AMMON, supra note 165, at 1–18. For a shorter explanation of Genet’s relationship with French government, see ELKINS & MCKITRICK, supra note 104, at 330–32.  
202 Why Genet landed at Charleston is a historical mystery. Genet claimed the captain had to sail south to avoid British navy vessels. Lycan, supra note 170, at 146. Historians question his assertion. He may have gone there because he knew he would receive a favorable reception from the people. WOOD, supra note 123, at 185–86 (discussing the “warmth and enthusiasm” with which he was greeted. Id. at 185). It is also possible that he chose Charleston because his instructions involved, in part, establishing forces to occupy land south and west of the United States. AMMON, supra note 165, at 25–27. Regardless of the reason for his arrival at Charleston, arriving there and taking a long journey to Philadelphia cost Genet the opportunity to influence the initial framing of United States neutrality policy and arrived in Philadelphia not familiar with Washington’s Neutrality Proclamation. AMMON, supra note 165, at 44; CASTO, supra note 171, at 35.  
203 CASTO, supra note 171, at 35. On the effect this had on Genet, see AMMON, supra note 165, at 45.  
204 This conversation occurred not only before Moultrie learned of Washington’s proclamation but before Washington even issued the proclamation. C.L. BRAGG, CRESCENT MOON OVER CAROLINA: WILLIAM MOULTRIE AND AMERICAN LIBERTY 256 (2013); CASTO, supra note 171, at 45–47; ELKINS & MCKITRICK, supra note 104, at 335.
blessing and no contrary statement from the federal government, Genet began recruiting. Privateering required a significant investment to outfit merchant ships with armaments and double the crew size because, for each prize taken, the privateer had to send a crew to sail the seized vessel. Genet found many candidates. Charleston was the largest port in the south and had many French supporters. It also teemed with merchants willing to forgo trade for the allure of capturing prizes. Within ten days, Genet had his first two privateers manned and sent to sea. The Citizen

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205 Casto, supra note 171, at 45–49. Privateers were private vessels commissioned by warring nations to attack and capture enemy vessels. Id. at 44. Generally, these privateers preyed on commercial shipping. Id. at 43. There was a thin line between privateering and piracy. Warring powers granted privateers a letter of marque. This letter recognized the official nature of the privateer. Id. at 44. Without such a letter, the attacking vessel would be considered a pirate. Id. at 45. Once a vessel was seized, the seizing vessel had to take the seized vessel to a port where an admiralty court would determine whether the seizure was lawful. Id. at 37–38. If the court so decided, the seizing vessel could sell the seized vessel and share the proceeds with the nation granting the letter of marque. The first seizures by the French in America during 1793 were condemned by the courts Genet established and then sold back to the British owners. Casto, supra note 171, at 39. Genet intended to use these proceeds to fund other aspects of his mission. Id; see also Bragg, supra note 204, at 256–58.

206 Casto, supra note 171, at 43–44.


Genet left on April 18 and Le Sans Culotte left soon after. They joined Genet’s vessel, Le Embuscade, on a journey north, seeking British commercial vessels. Reports quickly reached Philadelphia that French privateers were seizing British vessels along the United States’ Atlantic coast. The French sent the vessels to nearby American ports for condemnation. To re-sell a captured vessel, a court had to review the seizure to ensure its legality. Usually the seizing nation sent the captured vessel to the seizing nation’s closest port. Along the Atlantic coast, this posed a problem for France because captured vessels had to go to the French West Indies or across the Atlantic to France. Both options left French prizes vulnerable to recapture. To solve this, Genet established consular courts in the United States. France’s consuls to the United States served as admiralty courts, quickly ruling seizures legal while ignoring the infringement on United States sovereignty. These seizures became fodder for British complaints to the United States government.

209 CASTO, supra note 171, at 47–48.
210 Id. at 47–48.
212 CASTO, supra note 171, at 39.
213 Id. at 38.
214 Id.
215 Id.
216 Id.
217 Id. at 39.
218 Id. at 49.
219 ALDERSON, supra note 207, at 63–65; BRAGG, supra note 204, at 257–58.
B. Proposed Instructions for the Customs Collectors

To address French privateering activity, Alexander Hamilton drafted a circular letter for the Customs Collector at each United States port. On May 4, 1793, Hamilton sent his draft to Washington. Two days later, Washington consulted Jefferson about Hamilton’s instructions. According to Jefferson,

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220 The draft Hamilton showed Washington, and later, the Administration, no longer exists. Letter from Alexander Hamilton to George Washington, supra note 1. The editors of Hamilton’s papers argue that the final version Hamilton sent in August reflects his original other than the changes that are the subject of this article. Id. While this may be the case, I would suggest that the events that occurred between the first draft and the final draft caused multiple alterations. For example, the week before Hamilton sent the rules to the Collectors, Randolph presented proposed rules for arming privateers, the Cabinet discussed them and Randolph and Hamilton co-wrote rules for arming privateers which eventually went to the Collectors. See Proposed Rules Concerning Arming and Equipping of Vessels By Belligerents in the Ports of the United States, First Version, 29-30 July 1793, FOUNDER’S ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0116-0001 [https://perma.cc/TF27-VSH4]; Proposed Rules Concerning Arming and Equipping of Vessels by Belligerents in the Ports of the United States, Second Version, 29-30 July 1793, FOUNDER’S ONLINE, https://founders.archives.gov/documents/Hamilton/01-15-02-0116-0002 [https://perma.cc/GFZ8-Z7MH].

221 Letter from Alexander Hamilton to George Washington, supra note 1.

222 Id.

223 Notes on Alexander Hamilton and the Enforcement of Neutrality, 6 May 1793, FOUNDERS ONLINE, http://founders.ar
Hamilton wanted the Collectors “to superintend their neighborhood, watch for all acts of our citizens contrary to laws of neutrality or tending to infringe those laws, and inform [Hamilton] of it....” This proposal triggered discussion about the constitutionality and the practicalities of federal law enforcement. These discussions led to a policy choice that established federal prosecutors as the nation’s constitutional inquisitors.

After learning about Hamilton’s proposal, Jefferson responded in three parts. First, Jefferson voiced his objection while meeting with Randolph and Hamilton. Following that meeting, Jefferson expanded on his objections in a letter to Randolph. Five days later, after receiving Randolph’s response, Jefferson sent a letter to Congressman and confidante James Madison restating Jefferson’s arguments. Despite Jefferson’s objections, the Administration ultimately instructed the United States District Attorneys to prosecute neutrality violations based on information obtained from Customs Collectors.


224 Id.

225 Id.; Letter from Thomas Jefferson to Edmund Randolph, supra note 1.

226 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.


228 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.

229 Id.

230 Letter to William Channing [Newport, R.I.], NEW YORK PUBLIC LIBRARY DIGITAL COLLECTIONS, MANUSCRIPTS & ARCHIVES DIVISION, THE NEW YORK PUBLIC LIBRARY,
Little detail remains from the May 7th meeting between Jefferson, Hamilton and Randolph. The three discussed Hamilton’s proposal and Jefferson voiced his opposition. In the first paragraph of Jefferson’s May 8 letter to Randolph, Jefferson stated that although the whole of the proposal was “disagreeable” to him, the last section, regarding the surveillance of shipbuilding to discover ships built for France, was his initial objection. This indicates that the May 7 meeting may have focused more on domestic shipbuilding practices and their relation to neutrality enforcement than cases...
where Americans served on French vessels.\textsuperscript{232} Randolph’s May 9\textsuperscript{th} response furnishes another clue about Jefferson’s objections.\textsuperscript{233} In response to Jefferson’s fear that the Customs Collectors would become spies, Randolph reminded Jefferson “…that I was on the point of making Your very objection, as deserving consideration, when you mentioned it.”\textsuperscript{234} Otherwise, the only other certainty from the meeting was that Jefferson felt compelled to write Randolph, expanding upon his objections and asking Randolph to communicate Jefferson’s objections to Washington should Randolph have the opportunity.\textsuperscript{235}

Jefferson’s May 8 letter to Randolph provides the most complete record of Jefferson’s objections. He first objected to using Customs Collectors for investigatory purposes.\textsuperscript{236} Jefferson believed having them watch other citizens and report on citizen activity made the Customs Collectors spies.\textsuperscript{237} Jefferson argued they “are to be made

\textsuperscript{232} Letter from George Washington to Alexander Hamilton,\textit{ supra} note 231; see JOS\textsc{E}PH \textsc{E}LLIS, \textsc{A}MERICAN SPH\textsc{N}X: \textsc{T}HE \textsc{C}HARACTER \OF \textsc{T}HOMAS \textsc{J}EFFERSON 28, 39, 44 (1996) (it is also likely that Jefferson had not thought of his ideas until after the meeting. Jefferson was not noted for his oral debate skills and despised committee bickering); FERLING,\textit{ supra} note 170, at 19.

\textsuperscript{233} See Letter from Edmund Randolph to Thomas Jefferson,\textit{ supra} note 2.

\textsuperscript{234} \textit{Id.}

\textsuperscript{235} See Letter from Thomas Jefferson to Edmund Randolph,\textit{ supra} note 1. Jefferson likely inserted this because Jefferson knew that his policy arguments, especially when they opposed Hamilton’s, were not likely to be well-received by Washington. Jefferson had worn out Washington with his complaints about Hamilton during the latter half of 1792. FERLING,\textit{ supra} note 170, at 239.

\textsuperscript{236} Letter from Thomas Jefferson to Edmund Randolph,\textit{ supra} note 1.

\textsuperscript{237} \textit{Id.}
an established corps of spies or informers against their fellow citizens, whose actions they are to watch in secret, inform against in secret to the Secretary of the Treasury, who is to communicate to the President.” At that point the Administration would review the evidence and commence a criminal prosecution. If there is not sufficient evidence, according to Jefferson, “then the only consequence is that the mind of the government has been poisoned against a citizen, neither knowing nor suspecting it, and perhaps too distant to bring forward his justification.”

This comment echoes of the fears expressed by many regarding the establishment of federal courts. Jefferson then took his argument one step further asserting, “This will at least furnish the collector with a convenient weapon to keep down a rival, draw a cloud over an inconvenient censor, or satisfy mere malice and private enmity.”

This argument anticipated law enforcement usurping national authority for personal gain.

Next Jefferson turned to which government department had law enforcement responsibility. Hamilton’s proposal, according to Jefferson, moved responsibility from either the Secretary of War or State to Treasury. Jefferson wrote, “Acts involving war, or proceedings which respect foreign nations, seem to belong either to the department of war, or to that which

\[238\] Id.

\[239\] Id.

\[240\] Id. This threat may be overstated. It does not seem likely the government’s mind would be poisoned or that the person would need a defense if the government itself determined the evidence was not sufficient.

\[241\] Id.

\[242\] Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
is charged with the affairs of foreign nations.”243 After expressing his belief that Treasury only had responsibility for revenue, Jefferson stated his most serious objection, asserting Hamilton’s plan was “...to add a new and large field [sic] to a department already amply provided with business, patronage, and influence.”244 Apparently Jefferson voiced this objection at the meeting with Hamilton and Randolph and one of them, or both, responded that the Customs Collectors are in a prime position to observe violations.245 To this Jefferson returned to shipbuilding. He wrote, “[the Customs Collectors] are in convenient positions too for building ships of war: but will that business be transplanted from [its] department, merely because it can be conveniently done in another?”246

Jefferson then proposed an alternative. He first distinguished between foreigners and American citizens. Foreigners should be turned over to the military while citizens may be proceeded against through the courts.247

243 Id.
244 Id.
245 Id.
246 Id.
247 Id. Jefferson leaves us to speculate about what would happen to foreigners after they were turned over to the military. In some respects, the question was answered during the fall of 1793 when United States District Attorney Christopher Gore attempted to prosecute a French consul and chancellor for arming privateers in Boston. The case led was eventually dismissed by the direction of Randolph, as Secretary of State. See United States v. Jutau (Mass. Cir. Ct. June 11, 1793) (on file with the National Archives in Boston); Letter from Christopher Gore to Thomas Jefferson (Sept. 10, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-27-02-0075 [https://perma.cc/9PY5-LS6L]. The answer to this question lingers today in the guise of what to do about foreign terrorists seeking to attack the United
To Jefferson, the constitutional method to investigate citizens was the grand jury. He wrote, “Grand jurors are the constitutional inquisitors and informers of the country, they are scattered every where, see every thing, see it while they suppose themselves mere private persons, and not with the prejudiced eye of a permanent and systematic spy.” Using grand jurors protected citizens from false allegations: First, their information was on oath, thus making it more trustworthy and free of personal gain. Second, it was public so that the accused person could respond. Third, the grand jurors were local. Jefferson believed this meant that false allegations could be refuted immediately and effectively. Fourth, the potential for abuse, inherent with the Customs Collectors, would not arise with grand jurors. Grand jurors were respected community


248 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
249 Id.
250 Id. Today, there is a certain irony to this argument in favor of grand juries because the grand jury is one of the most secretive aspects of our government. See Sara Sun Beale & James E. Felman, The Consequence of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA Patriot Act’s Changes to Grand Jury Secrecy, 25 HARV. J. L. & PUB. POL’Y 699, 699–707 (2001).
251 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
252 Id.
253 Id.
members and their time as grand jurors was short compared to the Customs collector’s unlimited tenure.\textsuperscript{254}

Jefferson also argued that the law would be better enforced through judicial oversight. He predicted the following chain of events:

“The Judges having notice of the [neutrality] proclamation, will perceive that the occurrence of a foreign war has brought into activity the laws of neutrality, as a part of the law of the land. This new branch of the law they will know needs explanation to the grand jurors more than any other. They will study and define the subject to them and to the public. The public mind will by this be warned against the acts which may endanger our peace . . .” \textsuperscript{255}

According to Jefferson, these events would occur by simply suggesting it to the judges.\textsuperscript{256} Jefferson also perceived a foreign affairs benefit to his policy when he wrote, “foreign nations will see a much more respectable evidence of our bona fide intentions to preserve neutrality.”\textsuperscript{257}

\textsuperscript{254} \textit{Id.}

\textsuperscript{255} \textit{Id.} This would be a very slow process. Of course, this also served Jefferson’s foreign policy interests. If neutrality enforcement took time, the French could take advantage of the delays by seizing British ships with delayed impunity. On the speed of French consular courts in the United States, \textit{see} \textsuperscript{256} \textit{Id.} This happened as Chief Justice Jay and Justice Wilson quickly gave grand jury charges explaining the topic. \textit{Henfield’s Case}, 11 F. Cas. 1099, 1099–109 (C.C.D. Pa. 1793) (No. 6,360) (reprinting the charges from both Justices).

\textsuperscript{256} \textit{Id.} In fact, this happened as Chief Justice Jay and Justice Wilson quickly gave grand jury charges explaining the topic. \textit{Henfield’s Case}, 11 F. Cas. 1099, 1099–109 (C.C.D. Pa. 1793) (No. 6,360) (reprinting the charges from both Justices).

\textsuperscript{257} Letter from Thomas Jefferson to Edmund Randolph, \textit{supra} note 1.
Finally, Jefferson listed two problems caused by Hamilton’s proposal: First, society will be poisoned by the nature of secret accusations. Second, the Administration will be discredited for planting “a germ of private inquisition absolutely unknown to our laws.” With this, Jefferson concluded his policy objections and proposals by stating he was uncertain about the outcome of the previous day’s meeting but that it was not too late to change course.

Randolph received Jefferson’s objections the next day and responded immediately. He informed Jefferson that Randolph asked Hamilton about Jefferson’s concern regarding the Customs Collectors being trained as spies. Randolph knew of past allegations of Customs Collectors prying into individual conduct. Asking Hamilton, Randolph learned that Hamilton had never directed such conduct. Hamilton showed his letter-books to Randolph as proof that no such directive was sent. With his mind at ease over this matter, Randolph explained his support for Hamilton’s proposal and presented his own modification.

The attorney general first addressed Jefferson’s objection to using the Customs Collectors. Randolph did

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258 *Id.*

259 *Id.*

260 *Id.*


262 *Id.*

263 *Id.*

264 *Id.*

265 *Id.* While Hamilton apparently did not send any such directive, the absence of the directive does not mean that the Customs Collectors did not engage in such conduct on their own initiative.

266 *Id.*
not perceive that they would be spies, but merely observe conduct in the course of their ordinary duties.\textsuperscript{267} His reasoning began with the fact that Customs Collectors were executive officials; they were federal government employees.\textsuperscript{268} To Randolph, it seemed reasonable for them to perform not only their jobs, but to provide general intelligence for the executive government.\textsuperscript{269} He even suggested that their failure to provide such information was negligent, writing, “A refusal might not be the ground of an impeachment; but under the strictest constitution it would be deemed an indecorum, unless public duties absorbed too much of their time.”\textsuperscript{270} Not only should the collectors provide this information, but according to Randolph, they were duty-bound to enforce neutrality.\textsuperscript{271}

Randolph argued Customs Collectors were essential to effective neutrality enforcement.\textsuperscript{272} The United States government had to prove their neutrality to the world, especially considering “the preponderance of affection in the people towards the French. . . .”\textsuperscript{273} To Randolph, identifying suspicious activity and violators supplied the best proof. The collectors were in the best position to identify this activity: “the collectors are, for their position near the water, the scene of those violations, best qualified to assist congress.”\textsuperscript{274} They were

\begin{thebibliography}{99}
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} Id.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id.
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Id.
\end{thebibliography}
loyal to the federal government. The same could not be said of all the citizenry.

Having established the Collectors' importance, Randolph presented his modification to Hamilton’s plan. Rather than have the Collectors report to Hamilton, Randolph proposed that collectors report unlawful activity to the United States District Attorneys. He likened the collectors to ordinary citizens. “It is the right, nay duty of every citizen to enforce the laws. This has been the constant opinion of governments in most proclamations, which call upon the officers at large to cooperate in bringing offenders to justice.” Randolph also suggested only instructing the Customs Collectors at sea ports to report violations because informing “excise officers on the top of the Allegany” was useless. To Randolph, this limited the potential for corruption.

Randolph concluded by responding directly to Jefferson’s arguments. Jefferson, per Randolph’s interpretation, objected to employing alternative means to initiate a criminal case. Randolph stated that the instructions merely provided a stimulus for the collector to do something which the collector, as a citizen, could do on his own, namely report a violation of law. Once the attorney had the case, according to Randolph, the prosecution process would be no different from any other

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276 Letter from Edmund Randolph to Thomas Jefferson, supra note 2.
277 Id.
278 Id.
279 Id.
280 Id.
281 Id. This parallels the private/public prosecutor distinction and the morals offense versus victim offense distinction.
Randolph insisted that Hamilton would not receive the information directly and reminded Jefferson that Hamilton already agreed to Randolph's modification during their meeting. Finally, Randolph addressed Jefferson's separation of duty argument. He observed Jefferson barely raised the argument at the meeting stating, “The impropriety...was so slightly hinted by you during the consultation, that it did not pass thro' any discussion in my mind.” Acknowledging that the Secretary of State was the person who had the designated domestic authority, Randolph explained that the lines between departmental duties is not always clearly delineated. He suggested that the President has the authority to “instruct, whom he pleases.” This shows Randolph as pragmatic rather than dogmatic.

Jefferson received Randolph’s reply on May 10. Three days later Jefferson was still upset with Randolph’s response. Jefferson wrote to James Madison, describing the situation. Between Randolph’s letter and the letter to Madison, the cabinet met to discuss the issue and settled on Randolph’s modification. While Randolph’s modification was likely more palatable to Jefferson than Hamilton’s, Jefferson’s letter to Madison clearly expressed Jefferson’s distaste for the resolution.
Jefferson complained how “Anglophobia has seised violently on three members of our council.” 290 Considering only four served on the council, it appears Jefferson alone escaped it. The Anglophobia revealed itself whenever neutrality was discussed. 291 Jefferson then described Hamilton’s proposal, emphasizing that Hamilton’s plan made Hamilton the recipient of information about alleged violations. 292 Then he listed his three main points: (1) Hamilton’s proposal established “a system of espionage” that would be “destructive of the peace of society;” (2) the proposal gave the Treasury Department too much power; and (3) that using the judges to instruct grand jurors, “the constitutional and public informers,” would allow those accused to respond and justify their actions. 293 Jefferson’s third point relied upon the speed with which federal courts processed cases. A circuit court session lasted two weeks, at most. 294 Criminal trials took place as early as two days after a grand jury returned the indictment. 295

After giving Madison the options, Jefferson discussed Randolph’s resolution. Jefferson wrote, “E.R. found a hair to split, which, as always happens, became the decision.” 296 Hamilton was to instruct the Customs Collectors to convey any information regarding violations to the local United States District Attorney. 297 Randolph would instruct the district attorneys and inform them

290 Id.
291 Id.
292 Id.
293 Id.
294 See generally MARCUS, supra note 86.
295 See e.g., Ingram, supra note 200, at 501.
296 Letter from Thomas Jefferson to James Madison, supra note 170.
297 Id.
that they should proceed by indictment.\textsuperscript{298} In Jefferson’s mind, resolving neutrality questions hinged on Randolph’s opinion.\textsuperscript{299} Hamilton and Secretary of War Henry Knox generally voted together. Jefferson opposed. If Randolph agreed with Jefferson the vote was two to two.\textsuperscript{300} However, if Randolph opposed Jefferson, Hamilton had his majority vote.\textsuperscript{301} Jefferson described Randolph as “the most indecisive one I ever had to do business with. He always contrives to agree in principle with one, but in conclusion with the other.”\textsuperscript{302} Jefferson concluded his critique stating that Randolph’s decisions were “unjustifiable in principle, in interest, and in respect to the wishes of our constituents.”\textsuperscript{303}

The letter to Madison concludes with observations about the Administration’s neutrality policy. From Jefferson’s perspective, only the President’s inclinations and public opinion prevented an “English neutrality.”\textsuperscript{304} He also described Philadelphia’s partisan divide. “[T]he fashionable circles of Phila., N. York, Boston & Charleston” combined with business speculators, and merchants who traded with the British were British supporters.\textsuperscript{305} Those remaining—-independent merchants, farmers, and mechanics—supported the French.\textsuperscript{306} This indicates Jefferson’s objections were more factional than ideological.

\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Id. Through their correspondence, Jefferson and Madison labeled various groups. Elkins & McKittrick, \textit{supra} note 104,
Intervening events ended the debate and forced the administration to act. As Jefferson voiced his objections, Genet’s privateers captured several British vessels with the news spreading through the seaports. Customs collectors and conscientious citizens reported that Le Sans Culotte seized a British vessel, the Eagle. British Minister George Hammond petitioned the United States Government complaining that American citizens participated in the seizure. He followed his first petition with another, reporting that additional Americans served on The Citizen Genet when it captured the William near the mouth of the Chesapeake.

Washington held a Cabinet meeting to decide on a response. Discussions turned to Randolph’s modification of Hamilton’s plan and led to a vote. Hamilton and

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307 CASTO, supra note 171, at 48–50.
308 Letter from Thomas Newton Jr. & William Lindsay to George Washington (May 5, 1793), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-12-02-0423 [https://perma.cc/2QQ2-SM76]. In this letter, dated two days after the Citizen Genet seized the William, neither Lindsay nor Newton referenced the Citizen Genet. Id. Instead, they informed about other privateers, Le Sans Culotte and the Eagle. Id. More importantly, the report alleged that Americans were aboard the privateers. Id.
Secretary of War, Henry Knox, supported Randolph’s modification and Jefferson provided the lone dissent. Following the meeting, Jefferson dispatched a letter to the United States District Attorney for Pennsylvania, William Rawle. Jefferson, however, softened the Administration’s centralization efforts. Rather than write to Rawle as an executive official, Jefferson wrote as if Rawle was a private attorney. Jefferson, consistent with his preference for local action, left the charging decision to Rawle writing, "I have it in charge to express to you the desire of the Government that you would take such measures for apprehending and prosecuting them as shall be according to law." Jefferson’s expression that it was the "desire of the Government" indicates that he did not personally advocate the action and that Rawle should decide independently whether the law applied or not. Jefferson instructed Rawle to contact Philadelphia’s Customs Collector and a merchant who allegedly possessed information about "depredations on the property and commerce of some nations at peace with the United States." Rawle, who supported federal power, immediately followed Jefferson’s instructions and learned that Gideon Henfield, a Revolutionary War veteran, served as prize master on the Citizen Genet. Rawle found sufficient evidence for grand jury

consideration and later secured an indictment. Ultimately, a jury acquitted Henfield. Only then, in early August, did the Administration finally instruct the Customs Collectors on neutrality enforcement.313

III. Federal Prosecutors as Constitutional Inquisitors

Making federal prosecutors the nation’s constitutional inquisitors created two fundamental issues that remain contested today. The first issue entails who controls federal law enforcement power. Jefferson’s perspective preferred decentralized, local, citizen-based control. Hamilton took the opposite view, preferring centralized control. The second issue--related to the first--entails the duty owed by the United States District Attorneys to the federal government. As constitutional inquisitors, an expectation followed that the District Attorneys would inquire into matters the government deemed important. Although the District Attorneys had leeway to perform their overall duties, they responded to federal government instructions.

A. Centralization

Jefferson's objections illustrate a fundamental problem with the nation's federalism. When determining relative power between state and federal governments, which powers and how much power does each possess? Where does one begin and the other end? Jefferson and Hamilton took decidedly different views on the answers.


[267]
Jefferson favored a national government limited to the Constitution’s terms. If the Constitution did not specifically give the federal government the power, then the government did not possess it. This gave state and local authorities more power. Hamilton pursued expansive federal powers. Assuming state revolutionary war debt and creating the Bank of the United States illustrated this. These disputes divided Hamilton and Jefferson and neutrality enforcement expanded the divide.

Hamilton's plan to have his Customs Collectors report neutrality violations directly to him replicated the process used against merchants and shippers who brought goods into the United States without paying customs duties. His plan contained one key difference that further centralized the process. When illicit goods entered the United States they were subject to forfeiture. Customs Collectors identified violations

314 Jefferson was not an enthusiastic supporter of the Constitution. Ellis, supra note 232, at 104. Though in France during its drafting, he received a copy of the completed document. Id. He believed that a Bill of Rights was essential to cure the potential abuses inherent in the flawed document. See id. No Constitution would have appealed to Jefferson. Id. He preferred a government that could not be felt by the people. Id. at 105; see also Ferling, supra 170, at 166–67.

315 Wood, supra note 123, at 103 (noting that “Hamilton wanted people to feel the presence of the new national government.”).

316 On the rift between Hamilton and Jefferson, see Ferling, supra note 170, at 203–14. On the revolutionary war debt and the Bank of the United States, see Elkins & McKitrick, supra note 104, at 223–36. On the constitutional nature of these debates, see Kramer, supra note 43, at 49.

317 Ferling, supra note 170, at 203–14.

318 On the complexity of the revenue collection statutes, see Jerry L. Mashaw, Recovering American Administrative Law:
and reported them to the District Court who heard the evidence and forwarded an opinion to Hamilton, who then decided whether to forfeit the goods.\textsuperscript{319} To investigate neutrality, Hamilton circumvented the District Court, ordering the Customs Collectors report directly to Alexander Hamilton. Jefferson undoubtedly recognized this distinction thus concluding that neutrality enforcement was another means by which Hamilton planned to expand federal executive power.

Jefferson opposed Hamilton's expansion plans by arguing that Treasury should not oversee neutrality enforcement. Jefferson believed either the War Department or State Department should receive the information, if anyone. Embedded in his objection is a sign of Jefferson's distaste for Hamilton. Jefferson noted the Treasury Department already had enough business, patronage and influence.\textsuperscript{320} Finally, Jefferson belittled Hamilton's centralization plan by sarcastically arguing

\begin{footnotesize}


\textsuperscript{319} RAO, \textit{supra} note 275, at 67–68.

\textsuperscript{320} On the relationship between Washington and Hamilton as President and Treasury Secretary and the influence held by Treasury, see WOOD, \textit{supra} note 123, at 91–92.

\end{footnotesize}
that the Customs Collectors should also build ships because they were already located near the water.\footnote{Jefferson's analogy fails because shipbuilding takes skill while reporting on neutrality violations simply requires observation.}

The proposal Jefferson made also demonstrates a preference for localized federal law enforcement over executive branch control. Jefferson placed law enforcement in local hands by utilizing grand jurors and district court judges. Grand jurors resided where court was held.\footnote{Tarter & Holt, \textit{supra} note 44, at 261–62 (2007) (outlining the selection methods in each state).} In terms of neutrality enforcement this meant most grand jurors would come from the port cities. This included grand jurors drawn from Philadelphia and Charleston, two of the nation's largest ports and populated by those strongly favoring the French.\footnote{Both cities hosted large celebrations upon French consul Genet's arrival in their city. \textit{See AMMON, \textit{supra} note 165, at 45, 54–57; CASTO, \textit{supra} note 171, at 35, 53–54.}} Yet he undoubtedly realized that large northern port cities such as Boston and New York identified more with the British. Jefferson also knew that Washington's federal judges were more pro-British in their orientation yet he also gave them an important role.\footnote{On the appointment philosophy of Washington and Hamilton, see \textit{WOOD, \textit{supra} note 123, at 107–09.} On Washington's appointment qualifications for Supreme Court Justices, the Justices who were riding Circuit and would hear the cases see \textit{CASTO, \textit{supra} note 70, at 56.}} As the group responsible for charging the grand juries, Jefferson gave judges a significant role in neutrality enforcement.\footnote{On the importance of Grand Jury charges \textit{see CASTO, \textit{supra} note 70, at 128.}} This also gave control to local authorities as the district court judges served the district in which they resided. It

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also provided a check on federal law enforcement by spreading authority over multiple groups.

Randolph's response conceded Jefferson's ideological points but favored Hamilton's plan. Randolph analogized the Customs Collectors to any private citizen witnessing criminal activity by centralizing law enforcement without saying it. Randolph argued that private citizens could report crimes and did so regularly.\textsuperscript{326} Even if the Customs Collectors did not report to the executive, nothing prevented them from presenting their information to the court or grand jury on their own accord. Therefore, according to Randolph, requiring the Customs Collectors report to the United States District Attorney provided procedural uniformity.

Randolph used the District Attorney as a compromise between Hamilton's efforts to centralize the government and Jefferson's preference for local control. Like the judges and grand jurors, the District Attorneys were local officials. If Jefferson supported local federal judges overseeing neutrality enforcement, then Randolph reasoned federal prosecutors taking the information from Customs collectors was sufficiently similar. Including the District Attorneys not only acknowledged Hamilton's centralization plans but, by drafting these typically judicial figures into the executive branch, Randolph expanded the prosecutorial function. Randolph had complained two years before about the need for Attorney General control over the District Attorneys and likely sought the opportunity to do this.\textsuperscript{327} Randolph eventually instructed the District Attorneys to proceed by indictment when the Customs Collectors reported violations.

\textsuperscript{326} Krent, \textit{supra} note 121, at 292–95.

\textsuperscript{327} \textit{See supra} notes 147–48.
B. Representing the United States Government

The Hamilton-Jefferson-Randolph discussion also reveals competing conceptions of the prosecutorial function. Hamilton and Jefferson actually viewed prosecutors similarly. Federal prosecutors were, at most, supporting actors in criminal prosecution, who, like state prosecutors, were part-time. Randolph took a more progressive view by making prosecutors investigators, key players in federal criminal law enforcement. They could implement national policy.

Neither Hamilton’s nor Jefferson’s proposals included the United States District Attorneys. Hamilton envisioned the Customs Collectors reporting to him and then Hamilton would initiate prosecutions, perhaps with orders to the District Attorneys. Jefferson preferred judges and grand jurors. While the details of Hamilton’s plan have been lost, Jefferson’s argument reveals that, despite his progressive ideas about government, he perceived federal prosecutors the equivalent of their state counterparts. Most importantly, Jefferson labeled grand jurors the “constitutional inquisitors and informers of the country.”328 He saw grand juries investigating neutrality violations and issuing presentments about violations. Only at this stage would prosecutors appear to simply draft indictments.

Jefferson also implicitly dismissed prosecutors by expressing more concern for those accused of violations. He could not envision prosecutors investigating cases or evaluating evidence prior to proceeding with a case. Instead, he focused on false accusations. Using Customs Collectors to provide the government with violation reports would prejudice those suspected by making the

328 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
government presume guilt because of its distance from the alleged violation and inability to collect its own evidence. Jefferson also anticipated the Customs Collectors would use their power to frame rivals. It is conceivable Jefferson held the same concerns about federal prosecutors. He favored grand jurors because they only served for a single court term. Prosecutors, like the Customs Collectors, served at the pleasure of the President. If Customs Collectors had the power to frame rivals, the prosecutors possessed the same potential.

Most likely, Jefferson ignored the prosecutor’s potential power because he believed in the people’s ability to govern themselves. A government

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329 Id. The emphasis Jefferson placed on the accused presenting evidence of innocence is fascinating. In today’s criminal trials defendants are not required to present any evidence of innocence. At that time, defendants could not testify under oath on their own behalf. Stanton D. Krause, Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, 89 J. of Crim. L. & Criminology 111, 124 (1998); see also Friedman, supra note 47, at 245. Therefore, Jefferson is likely drawing on one of two ideas. First, he could be thinking to an earlier time when defendants were required to present evidence in their defense. Langbein, supra note 57 (particularly chapter 2). Second, he could be drawing on his experience in France. In European systems, the defendant often presents evidence first and then the government presents its evidence. Pizzi, supra note 52, at 89–116 (chapter five describes four different European Court systems, noting in several that the defendant must provide evidence first).

330 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.

331 See Tarter & Holt, supra note 44, at 262–63 (indicating the “small percentage” of grand jurors who served longer than a single term).

332 Christian Fritz, American Sovereigns: The People and America’s Constitutional Traditions before the Civil
prosecutor, especially one with increased power, was anathema to Jefferson’s government philosophy. In France during the Constitutional Convention, he observed the problems created by autocratic rule while missing the democratic excesses experienced under the Articles of Confederation.\textsuperscript{333} Happy in France, he reluctantly accepted Washington’s offer to become Secretary of State.\textsuperscript{334} Once in office, Jefferson and Hamilton soon clashed.\textsuperscript{335} Jefferson abhorred Hamilton’s British sympathies and believed Hamilton wanted a monarchical government in the United States. To Jefferson, monarchy was antithetical to liberty.\textsuperscript{336} Liberty required minimal government.\textsuperscript{337} Strong executive power, such as prosecutorial power, did not fit Jefferson’s political ideology.

Attorney General Randolph, to Jefferson’s dismay, sought pragmatic solutions to political problems
rather than rigidly adhere to ideology. Unlike Jefferson, Randolph played a key role in the Constitutional Convention and presented the Virginia Plan. During the Convention, Randolph’s opinion of the document soured to the point that he would not sign it. A centrist, Randolph did not want the people to have too much power but was also wary of centralizing too much power in a single executive. Ultimately Randolph supported the Constitution during Virginia's ratification debate. While Congress considered the Judiciary Act, James Madison consulted Randolph, recognizing him as one of the nation's leading legal minds. One of Randolph’s significant critiques was the vague limits on federal court jurisdiction. Soon after, Washington offered Randolph the Attorney General position. By 1793, Randolph played a key advising role, serving as the “middle position” between Hamilton and Jefferson. His solution to neutrality enforcement was the latest example.

Searching for a compromise between Jefferson and Hamilton, Randolph’s proposal envisioned a wider role for federal prosecutors than their state counterparts. He saw United States Attorneys as part of federal law enforcement. As a supporter of centralized government,

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338 REARDON, supra note 130, at 96–100.
339 Id. at 98–119.
340 Id. at 102–08.
341 Id. at 139.
342 Marcus & Wexler, supra 70, at 15.
343 REARDON, supra note 130, at 175.
345 REARDON, supra note 130, at 206–07.
346 Id. at 226.
Randolph understood the need for the new government to enforce its laws. As a political operative, Randolph understood the need to balance federal and local interests. The District Attorneys fit requirements perfectly. They were local. Each United States District Attorney was from the state he served. At the same time, each had ties to Washington and supported the national government. While many perceived the District Attorneys as judicial officials, Randolph connected the prosecutors with the Customs Collectors. He saw them as partners in federal law enforcement.

Using federal prosecutors as inquisitors was a novel idea. State criminal justice was highly decentralized. No single role predominated. When criminal justice-related policies were created, there was no guarantee they would be enforced. In most state prosecutions, if a prosecutor appeared, it was a private prosecutor hired by the victim. Morals cases were the lone exception. Grand jurors usually initiated these cases. This was the inspiration for Randolph’s response to Jefferson. Like morals cases, the Customs Collectors could report to the Grand Jury about neutrality violations. For the morals case to progress, however, the local prosecutor had to prepare the charging document. Randolph likely saw federal prosecutors serving the same function. Therefore, it was a reasonable step for Randolph to suggest that prosecutors pre-empt the grand

347 Ingram, supra note 104, at 189 (citing WOOD, supra note 123, at 106–10).
348 FRIEDMAN, supra note 36, at 211.
349 Id.
350 Steinberg, supra note 30, at 571.
351 YOUNGER, supra note 41, at 38–39.
352 This was, in fact, what happened as Randolph worked with United States District Attorney William Rawle when drafting the neutrality violation cases in Philadelphia. CUMMINGS & MCFARLAND, supra note 143, at 38.
jury and work with Customs Collectors. This established federal prosecutors as constitutional inquisitors.\footnote{\textit{Id.} at 36.}

\section*{IV. The Practical Origins of Federal Criminal Prosecution}

The Administration’s decision to connect the Customs Collectors and the District Attorneys set the precedent for future federal law enforcement by placing prosecutors between the people and the courts.\footnote{William McDonald, \textit{The Prosecutor’s Domain, in \textsc{The Prosecutor}} 27 (1979).} Not only would the Washington Administration’s process recur over the next fifteen years, but it began the steady expansion of prosecutorial power that continues today.\footnote{\textit{See generally id.} at 15–51.} Five years after the neutrality crisis, President John Adams centralized sedition prosecutions through Secretary of State Timothy Pickering.\footnote{\textsc{John Chester} Miller, \textit{Crisis in Freedom: The Alien and Sedition Acts} 73 (1951).} Ten years after that, President Thomas Jefferson copied Hamilton’s idea when enforcing the Embargo Acts against the British.\footnote{Douglas Lamar Jones, "\textit{The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts,} 24 \textsc{Am. J. Legal Hist.} 307, 307 (1980).} After these events, prosecutors further developed their relationship with federal law enforcement agents such that today’s prosecutors and agents jointly investigate and prosecute cases.\footnote{Daniel Richman, \textit{Prosecutors and Their Agents, Agents and Their Prosecutors}, \textsc{103 Colum. L. Rev.} 749, 751–52 (2003).}
Five years after Jefferson and Randolph exchanged their letters, the partisan divide widened.\(^{359}\) Washington, whose reputation held the factions together, left the Presidency after 1796 and was replaced by Vice President John Adams.\(^{360}\) Adams put aside commercial problems with Britain to deal with the deteriorating relationship with the French.\(^{361}\) As he did this, he came under heavy criticism from Jefferson's supporters.\(^{362}\) Fearing that the dissent might undermine the still fledgling national government, Congress passed, and Adams enforced, a sedition law that prohibited people from making false, critical statements about the government.\(^{363}\) Secretary of State Timothy Pickering, an ardent Massachusetts Federalist, assumed enforcement responsibility.\(^{364}\) He scanned newspapers daily, looking for hints of sedition and ordered the United States

\(^{359}\) Ferling, supra note 170, at 289–91 (explaining the political tensions at the outset of the Adams Administration in 1796); Miller, supra note 356, at 40–44 (1951) (explaining the political situation at the passage of the Alien and Sedition Acts); Smith, supra note 121, at 176–80 (describing the political context when passing the Sedition Act).


\(^{361}\) On the problems with France following the ratification of the Jay Treaty and Adams' handling of it, see Ferling, supra note 170, at 296–300.

\(^{362}\) Miller, supra note 356, at 56–59 (identifying the need to suppress dissent from French supporters as the basis for the Sedition Act).

\(^{363}\) 1 Stat. 596–597 (1798); Miller, supra note 337, at 70.

District Attorneys to do the same. He ordered several newspaper editors and a Congressman from Vermont prosecuted. He had judges instruct grand jurors to be vigilant to identify seditious statements. This was just as Jefferson feared in 1793: a centralized national government using its power to coerce adherence to a law that suppressed dissent.

Ironically, ten years later, Jefferson imitated his executive predecessors. This time, however, Jefferson grappled with the British. While France stabilized under Napoleon's dictatorial rule, the British became the United States' primary foreign policy problem. To gain leverage, Jefferson persuaded Congress to embargo trade with Great Britain. While perhaps in the national interest, many merchants who relied on British trade for

365 MILLER, supra note 356, at 88; SMITH, supra note 121, at 182–85.
366 The Congressman was Matthew Lyon. SMITH, supra note 121, at 221. Lyon came to the United States as an indentured servant, bought his freedom and fought in the Revolutionary War. Id. at 225. He was elected to Congress in 1797 and immediately became a Federalist target. Id. at 221–22. Lyon also published a newspaper in Vermont that challenged the notion that the President was infallible and had made other disparaging comments about the President. Id. at 225–26. For details about the case and Lyon's conviction and sentence, see SMITH, supra note 121, at 221–255.
367 MILLER, supra note 356, at 137–39.
368 TUCKER & HENDRICKSON, supra note 184, at 16.
369 Jones, supra note 357.
370 Id.
371 On the foreign policy problems at the start of the Administration, see JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 413–14 (2012). On the problems with the British at the start of the Embargo, see id. at 425–32.
372 Id.
their livelihood vehemently opposed it.\textsuperscript{373} The opposition caused embargo evasion to become a significant national problem.\textsuperscript{374} With violators spread throughout the different ports along the Atlantic coast and no formal federal law enforcement agency, Jefferson turned to the group that had the potential to be "an established corps of spies or informers" for enforcement.\textsuperscript{375} Jefferson had the Customs Collectors perform just as they did with neutrality violations in 1793.\textsuperscript{376} Reports went to the District Attorneys who initiated cases when warranted.\textsuperscript{377}

Within fifteen years of Randolph's pragmatic policy proposal, the existing federal law enforcement agents had established a consistent working relationship with the District Attorneys such that it became the default policy choice. The relationship continued to grow as the United States expanded westward and the national government assumed a larger law enforcement role.\textsuperscript{378}

Today's federal prosecutors work closely with investigators to prosecute offenders.\textsuperscript{379} Prosecutors must rely on federal investigators to collect quality evidence.\textsuperscript{380}

\begin{footnotes}
\item[373] Id. at 433; see also Jones, supra note 357, at 310 (1980).
\item[374] Id.; see also WHITE, supra note 151, at 434–37.
\item[375] Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
\item[376] WHITE, supra note 151, at 434–37. In many instances, Jefferson employed Hamilton's proposal and reviews the information directly from the Customs Collectors. Id. at 435.
\item[377] Not all of the United States District Attorneys obeyed the instructions, citing their disagreement with the policy. When they offered to resign, Jefferson did not accept the resignations because he did not believe political differences were grounds for removal. Id. at 414–15.
\item[378] FRIEDMAN, supra note 47, at 261–67.
\item[379] Richman, supra note 358.
\item[380] Id. at 758.
\end{footnotes}
They are also at the mercy of federal agencies regarding the types of cases investigated. Agencies such as the Department of the Interior, which enforces criminal laws relating to fish and wildlife, dictate how many agents are dispersed around the nation and where they are placed. In areas with high agent concentrations, more fish and wildlife cases will be sent to the local United States Attorney's Office.

The reliance upon federal investigators to collect evidence and bring cases began with Randolph's proposal. Cases arising in Savannah, Georgia and in Philadelphia exemplify the important role Customs Collectors played. In Georgia, the District Judge circumvented the Customs Collector—and the United States Attorney—and provided the grand jury with evidence of a neutrality violation. The grand jury indicted but the case resulted in an acquittal, because the Customs Collector and prosecutor did not act. In Philadelphia, the Customs Collector provided the prosecutor with information regarding the William. Others brought information about other violations and the grand jury indicted these too. Rawle pursued only

381 Id.
383 Id.
384 ALDERSON, supra note 207, at 115.
385 Id.
386 Minutes of the Grand Jury for the Special Session of the Middle Circuit in the District of Pennsylvania (on file with the National Archives in Philadelphia) (hereinafter Special Session).
387 Id.
one of these cases and that one he later dismissed.\textsuperscript{388} In both instances, the lack of cooperation from Customs officials correlated with unsuccessful prosecutions.

Likewise, federal law enforcement agents must work with prosecutors to complete their tasks.\textsuperscript{389} Prosecutors often direct investigations, telling the agents when the evidence is sufficient.\textsuperscript{390} In some instances, agents must receive prosecutorial and judicial approval prior to collecting certain evidence.\textsuperscript{391} Especially at the federal level, prosecutors often draft the documents requesting permission from the judge to obtain the evidence. Prosecutors also lead task forces directed at particular federal crime problems. These task forces include terrorism, gun violence and drug distribution organizations.\textsuperscript{392} They bring together agents from a variety of agencies to address a specific problem.

Randolph’s proposal also initiated this aspect of the prosecutor-agent relationship. By having the Customs Collectors report to the United States District Attorney, the prosecutor became the inquisitor. The Customs Collector could not go directly to the grand jury

\textsuperscript{388} Id.
\textsuperscript{389} Richman, \textit{supra} note 358, at 778–82.
\textsuperscript{390} Id.
himself. Instead, he delivered evidence to the prosecutor.\textsuperscript{393} William Rawle, in Philadelphia, handled a variety of matters the Customs Collector brought to him.\textsuperscript{394} Likewise, Christopher Gore, in Boston, worked with the Customs Collector to obtain evidence incriminating the French consul in Boston for arming privateers in Boston Harbor.\textsuperscript{395}

Randolph’s pragmatic solution to the Jefferson/Hamilton proposals established the notion that federal prosecutors are the nation’s constitutional inquisitors. Prior to the neutrality crisis, federal prosecutors only handled individual cases without considering enforcement priorities. During the colonial period and early statehood, governors did not dictate morality prosecutions.\textsuperscript{396} Conversely, following the exchange between Jefferson and Randolph, orders went from Randolph to the United States District Attorneys ordering them to pursue prosecutions.\textsuperscript{397} These prosecutions were necessary not only to enforce criminal law but also to demonstrate United States neutrality.\textsuperscript{398}

\textsuperscript{393} See Special Session, supra note 386.

\textsuperscript{394} Id.


\textsuperscript{397} Letter from Edmund Randolph to William Channing (May 12, 1793), N.Y. PUB. LIBR. DIGITAL COLLECTIONS, http://digitalcollections.nypl.org/items/bac0a75c-2673-b981-e040-e00a18067fd9 [https://perma.cc/EW45-FTZJ].

\textsuperscript{398} Ingram, supra note 200, at 503–06.
Therefore, these cases were not reactive criminal prosecutions but proactive matters.\textsuperscript{399}

Finally, Randolph's resolution sowed the seeds of a debate that has continued for nearly 225 years. When Congress passed the Judiciary Act, it sought to decentralize prosecution, leaving it to local prosecutors to handle cases in their preferred manner.\textsuperscript{400} Randolph's proposal to connect the Customs Collectors with the District Attorneys led to the first set of orders issued to local federal prosecutors from the Attorney General. These orders were the central government's first effort to control the United States District Attorneys and their discretionary power. Of course, this initial attempt did not resolve the matter. In fact, the history of federal criminal prosecution can be seen as an effort to increase centralization. Prior to the Justice Department's creation in 1871, several Attorneys General sought but were denied control over federal prosecutors.\textsuperscript{401} With the Justice Department's creation, the Attorney General began initiating cases from Washington, D.C. rather than relying upon local United States Attorneys. Regulatory cases came first, followed by sedition cases during World War I.\textsuperscript{402} Later, the Justice Department took control of

\textsuperscript{399} On the difference between “proactive” and “reactive” cases, see John Hagan & Ilene Nagel Bernstein, The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts, 13 LAW & SOC’Y REV. 467, 468–69 (1979).

\textsuperscript{400} See supra notes 89–95 and accompanying text.

\textsuperscript{401} Huston, supra note 23, at 13 (President Andrew Jackson seeks to give Attorney General control over criminal cases in early 1830); CLAYTON, supra note 145, at 20 (Caleb Cushing, as Attorney General, pushes for control over U.S. Attorneys in 1850s); Conner et al., supra note 107, at 757 (Lincoln gives Attorney General control over the U.S. Attorneys in 1861).

\textsuperscript{402} FRIEDMAN, supra note 47, at 265.
tax cases and RICO cases. Most recently it assumed control over national security cases ranging from terrorism to export control. The efforts to centralize discretion have extended to establishing review authority over Assistant United States Attorney hiring. Within the last ten years, the Justice Department's centralization efforts have made some prefer decentralization. A politically-oriented Justice Department used its power to prosecute political rivals in different parts of the country. United States Attorneys who did not advance these policy prosecutions were fired. The firings and the public antagonism to them trace directly to Randolph's solution to the Hamilton/Jefferson differences and the desire to centralize prosecutions despite the public's desire to maintain local control.

407 See generally Bruce A. Green & Rebecca Roiphe, Can the President Control the Department of Justice, 70 ALA. L. REV. 1 (2018) (discussing the “evolving understanding of prosecutorial independence” that has categorized the continued existence of the Department of Justice. Id. at 2).

[285]
V. Conclusion

The federal prosecutor’s central role in criminal justice administration was not pre-ordained or inevitable, nor is it the only alternative. Instead, prosecutorial power grew from the need for a practical compromise between competing ideologies. While Thomas Jefferson and Alexander Hamilton could not see beyond their ideological objectives, Edmund Randolph sought a pragmatic solution to the neutrality enforcement problem. He placed prosecutors between the people and the grand jurors. Prosecutors began working with investigators to implement federal law enforcement policy. Once in that position, federal prosecutors slowly increased their domain such that, today, they are the nation’s “constitutional inquisitors.”

410 Letter from Thomas Jefferson to Edmund Randolph, supra note 1.
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ARTICLE

CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS – THE WIZARD OF OZ WAS RIGHT

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Abstract

In the movie The Wizard of Oz, Dorothy has three companions on quests of their own: the Scarecrow seeking a brain, the Tin Man seeking a heart, and the Lion seeking courage. Much of the law school curriculum is designed for the law student as Scarecrow – to develop the student’s capacity for critical thinking. The curriculum, however, has not given as much attention to the Tin Man or the Lion among law students. This article examines ways of educating law students to enhance their strength of compassion not only for their clients but also their adversaries, as well the students’ strength of courage to make that compassion effective, including standing up for their clients in the interests of justice when it might not be popular to do so.

I. Introduction

A. The Importance of Education for Character in Law School
CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS — THE WIZARD OF OZ WAS RIGHT
14 TENN. J.L. & POL’Y 287 (2020)

B. A Thought (and feeling) Experiment – A Law School in Oz 293

II. Compassion 296
A. Cognitive Compassion 297
B. Empathetic Compassion 299
C. Caring Compassion 300
D. Self-Compassion 303

III. Courage 303
A. Physical Courage 304
B. Personal Courage 305
C. Moral Courage 306
D. Intellectuclal Courage 307

IV. Educating for Compassion and Courage – Some Threshold Issues 307
A. Are Compassion and Courage Virtues that can be Learned? 308
B. While Powerful, the Context does not Always Control Behavior, So We Still Need to Cultivate Individual Virtue 308
C. Understanding the Importance of Degree Even with Virtues like Compassion and Courage 312
D. The Importance of Preparation and Small Steps 312
E. The Importance of Motivation and the Desire to Improve One’s Character 312
F. Virtue Education as the Beginning of a Journey 313

V. Educating Law Students in Compassion 313
A. Offer Law Students Positive Exemplars 314
B. Help Students Experience Elevation and Other Positive Emotions 319
C. Have them Write a Special Gratitude Letter 321
D. Ask them to Befriend a Stranger and Appreciate an Adversary 322
E. Ask them to Undertake Appropriate Contemplative Practice to Extend their Boundary of Caring Concern 322
F. Help them Also Learn Compassion for Themselves as well as Others 324

VI. Educating Law Students for Courage 325
A. Offer Law Students Courageous Exemplars 325
B. Help them Make their Bodies their Allies 327
C. Help them Learn How to Distinguish Between their Fear and their Willingness to Act, and then Decrease the Former or Increase the Latter, or Both 328
D. Introduce them to the Courage Calendar 329
E. Help them Remember their Noble Purpose 329
F. Remember the Power of a Sense of Duty Inherent in a Role 330
G. Help them Untangle the Fear they Feel 332
H. Recall, Replay, Revise, and Foretell 333
I. Practice Confronting Moral Challenges 334

VII. Combining Compassion and Courage 334
A. Heroic Altruism 334
B. Combining Compassion and Courage Pedagogy 336

VIII. Conclusion 337
IX. Appendix – Selected Journal Assignments 339
A. Journal: Courage 339
B. Journal: Befriending a Stranger 341

I. Introduction
A. The Importance of Education for Character in Law School

The Reverend Dr. Martin Luther King, Jr. dreamed of a day when people would not be judged by the color of their skin but by the “content of their character.”¹ We care about it in our lawyers too, as attested by the enduring popularity of Harper Lee’s To Kill a Mockingbird and its portrayal of attorney Atticus Finch:

¹ Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963).
“We trust him to do right.” When lawyers, especially lawyers who are leaders, like President Richard Nixon or New York Governor Eliot Spitzer, resign from office in disgrace, a natural question is what roles should law schools have in helping their students avoid such a future? More important, perhaps, than avoiding such outcomes, is how to help law students and their future clients succeed because of the personal qualities they can bring to their future roles. Or as Professor Robert Cochran has written, “It may be that the problem in the legal profession is not too little attention to rules, but too little attention to character.” These issues are not, however, just personal issues for individual lawyers; they are also societal. In addition to serving their clients, lawyers make up a disproportionate cohort of leaders in government, business, and nonprofit organizations. The personal character and frame of mind they bring to leadership has wider impacts. Therefore, “law schools’ role of preparing leaders able to tackle pressing public problems is a matter of great public concern.”

5 Susan Sturm, Law Schools, Leadership, and Change, 127 Harv. L. Rev. F. 49, 49 (2014). It may be instructive to note that character is an explicit focus at institutions like the U.S.
Good character has been defined as “the disposition to do the morally right thing even when no one is watching.” At the outset, it may be important to acknowledge that by the time students enter law school, personal character may be set. But just as the virtues of a physician are those of particular relevance to the role as healer, so are virtues of particular importance to lawyers in their roles as advisors and advocates, and as leaders.

In an earlier article, the author explored the dimensions of character and fitness as aspirational rather than a minimum standard of conduct to qualify an applicant for admission to the Bar and explored learning interpersonal relations as part of educating lawyers as leaders. This article continues that inquiry about

Military Academy at West Point. See Kristin Schmid Callina, et al., Developing Leaders of Character at the United States Military Academy: A Relational Developmental Systems Analysis, 18 J. C. & CHARACTER 9, 10–11 (2017); Kristin Schmid Callina et al., Character in Context: Character Structure Among United States Military Academy Cadets, 48 J. MORAL EDUC. 439, 440 (2018) (describing ongoing longitudinal study (Project Arete) of character development of West Point cadets). See generally ROBERT L. CASLEN JR. & MICHAEL D. MATTHEWS, THE CHARACTER EDGE: LEADING AND WINNING WITH INTEGRITY (forthcoming 2020) (The authors are the former Superintendent and a current member of the faculty at West Point).

7 See id. at 176.
8 See R. Lisle Baker, Character and Fitness for Leadership: Learning Interpersonal Skills, 58 SANTA CLARA L. REV. 525, 528 (2018) (arguing that the Bar admission requirement of “character and fitness” can also be an aspirational goal to help provide a rationale for leadership education in law school, and that as interpersonal skills are an important part of leadership learning, it is helpful for law students to learn how to pay
character and fitness for leadership in another dimension – developing good character for the practice of law, including the role of the lawyer-leader, by cultivating the virtues of compassion and courage. To do so, the article draws on the familiar story of quests for those virtues in the fictional Land of Oz as a springboard to ask how law students might undertake similar quests of their own.

B. A Thought (and feeling) Experiment – A Law School in Oz

What if there were a law school in the Land of Oz? Like its law school counterparts in Kansas and elsewhere, its curriculum would likely focus first on

better attention to other people, be aware of their and others’ strengths, and understand and acknowledge concerns that they and others have for appreciation, affiliation, autonomy, status, and a meaningful role).

DEBORAH L. RHODE, LAWYERS AS LEADERS 5 (2013) (arguing that to be a successful leader, one must make his or her own self-interests subordinate to the greater good. This is known as the “leadership paradox” or the “paradox of power.”) Individuals reach top positions because of their needs for personal achievement. Yet to perform effectively in these positions, they need to focus on creating the conditions for achievement by others. Id. (citing Jennifer A. Chatman & Jessica A. Kennedy, Psychological Perspectives of Leadership, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 159, 169, 174 (Nitin Nohria & Rakesh Khurana, eds. 2010)).

For an elaboration of Oz as a law teaching metaphor, see Phillis Goldfarb, Teaching Metaphors, 20 S. CAL. INTERDISC. L.J. 39, 40 (2010), and for use in orientation, see Paula Lustbader, You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow, 47 WASHBURN L.J. 327, 327 (2008) (arguing for teaching compassion, among other things).
educating its students in the intellectual capacity for reasoned analysis and critical thinking.\footnote{While critical thinking is the core of legal education, it is also important to recognize other aspects that contribute to legal excellence. See Michael D. Matthews et al., Noncognitive Amplifiers of Human Performance, in Human Performance and Optimization: The Science and Ethics of Enhancing Human Capabilities 356 (2019).} After all, in the movie, *The Wizard of Oz*, the Scarecrow sang “If I only had a brain.”\footnote{See *The Wizard of Oz* (Metro Goldwyn Mayer 1939).} As in another famous movie, a fictional Harvard Law School Professor Kingsfield said, “We do brain surgery here . . . . You come in with a skull full of mush . . . and you leave thinking like a lawyer.”\footnote{See *The Paper Chase* (20th Century Fox 1973).}

I want to be clear that the character of Professor Kingsfield is fictional and not typical of law professors I know. At the same time, while it is important to help a law student in Oz gain a brain, Dorothy had two other companions. Along the Yellow Brick Road she also met the Tin Man, who sang, “If I only had a heart.”\footnote{See *The Wizard of Oz*, supra note 12.} Then she met the Lion who sang, “If I only had the nerve.”\footnote{Id.} I believe that law schools have focused more on the Scarecrow than the Tin Man or the Lion among our law students. What might the faculty in the Oz School of Law do to help educate their students in all three aspects of their character? Or to put the aspirations of Dorothy’s companions in terms of more general educational objectives, in addition to reasoned analysis and critical thinking, how might the faculty of the Oz School of Law also help its students learn compassion and courage?\footnote{See generally Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the Heart of Lawyering*, 87 Neb. L. Rev. 1 (2008) (arguing the need for law}
CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS – THE WIZARD OF OZ WAS RIGHT
14 TENN. J.L. & POL’Y 287 (2020)

This article is designed to explore these questions, but with an invitation to readers to join the quest, as it represents the beginning, rather than the end, of a yellow brick road of inquiry about character education in law school. Also, in a brief survey, some ideas worth school curriculum to include education about compassion). This discussion is also informed by two major nonlegal works: COMPASSION: BRIDGING PRACTICE AND SCIENCE (Tania Singer & Mathias Bolz eds., 2013) (an online eBook consisting of sounds, images and text available at www.compassion-training.org) and MATTHIEU RICARD, ALTRUISM: THE POWER OF COMPASSION TO CHANGE YOURSELF AND THE WORLD (2015). Readers eager to dive deeper into the subject will find both sources helpful.

17 Martin Luther King, Jr. wrote early in his life about the importance of education for character as well as intelligence:

Education must enable one to sift and weigh evidence, to discern the true from the false, the real from the unreal, and the facts from the fiction. The function of education, therefore, is to teach one to think intensively and to think critically. But education which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason, but with no morals . . . . We must remember that intelligence is not enough. Intelligence plus character—that is the goal of true education. The complete education gives one not only power of concentration, but worthy objectives upon which to concentrate. The broad education will, therefore, transmit to one not only the accumulated knowledge of the race but also the accumulated experience of social living.

Martin Luther King, Jr., The Purpose of Education, MAROON TIGER, Feb. 1947, at 123–24; see also R. Lisle Baker, supra note 8; John J. Fitzgerald, No Woe to You Lawyers: A Virtue-Based
exploring will receive only a brief introduction, which is why reader feedback will be welcome. At the outset, however, it is important to distinguish the types of compassion and courage most important for lawyers to have before deciding how they might best be taught.

For compassion, it is helpful to distinguish among four kinds of compassion: a cognitive understanding of how others might think, a capacity to feel what they feel, and the ability to care for and seek to help them, as well as being compassionate to oneself. For courage, it is important to distinguish between types of courage, as personal, moral and intellectual courage are more relevant than physical courage for lawyers to learn because they are more likely to arise in law practice or other roles lawyers undertake. Also, it may be helpful to explore when these aspects of compassion and courage might positively interact.

II. Compassion

In the movie, To Kill a Mockingbird, attorney Atticus Finch is talking with his daughter, Scout, and says, “You never really understand a person until you consider things from his point of view . . . . till you climb inside of his skin and walk around in it.” But what does that mean? For these purposes it includes at least two elements – understanding how the other person might think and also feel. The first might be called cognitive compassion; the second, empathetic compassion.

Approach to Happiness Within the Legal Profession, 4 J. MORAL THEOL. 89, 89 (2015) (asserting that many lawyers find fulfillment in the profession by utilizing theological values).

18 RICARD, supra note 16, at 53 (“In the affective dimension, I feel something for you; in the cognitive dimension, I understand you; and in the motivational dimension, I want to help you.”).

19 See TO KILL A MOCKINGBIRD (Universal 1962).
A. Cognitive Compassion

The first element of compassion is cognitive – understanding the other person’s thinking. But that is a general idea which can benefit from more specifics. For example, as a negotiator, it is important for a lawyer not only to understand the stated goals of the client, or an adversary, but also to understand the substance that underlies them and the procedure that forms the frame of reference. For instance, the substance of a goal might be both a specific position, such as a dollar amount of recovery, or a specific action. But the substance also should include the interests that underlie those positions, often reflected in the reasons for seeking the desired outcome. Skilled counsel will ask why or why not to help discern what may lie behind a stated position of a client—or even an adversary—in case there is an artful way of satisfying an underlying interest that is different from the position initially chosen to serve it, just like there may be more than one route to a destination.  

But more than the substance of positions and interests, understanding someone else’s point of view can also involve being aware of some of the procedural aspects that influence how they think independent of a specific dispute or desired outcome. Beyond the procedure of how a conversation, a negotiation, or even a trial might be undertaken, these aspects of how someone can think can include structural issues in the background. These can include how they prefer to gain information and make decisions.  

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21 See generally R. Lisle Baker, Using Insights About Perception and Judgment from the Myers-Briggs Type Indicator
which of their moral values are at stake. They can include core concerns about autonomy, affiliation, appreciation, status, and role. They may even include basic beliefs that they may have about the world around them, such as it is interesting or dangerous, among others, all of which may in turn influence behavior. In summary, to understand how people think may require more than simply asking what is on their mind. The point is that the lawyer (and law student as lawyer in the making) should remember not only that, as the late Christopher Peterson wrote, “other people matter,” but also what matters to other people.

Instrument as an Aid to Mediation, 9 Harv. Negot. L. Rev. 115 (2004) (analyzing how samples of the general public, lawyers, judges, and mediators compare in how they prefer to gain information and make decisions about it, and how mediator understanding of those different cognitive preferences can be an aid to the mediation of disputes).


23 See generally Roger Fisher & Daniel Shapiro, Beyond Reason (2006); Baker, supra note 8.


B. Empathetic Compassion

While necessary, knowledge of what matters to other people may still be insufficient because part of what makes us human is the capacity to feel what others feel, particularly when someone we care about is also in distress. This is the emotional side of empathy—feeling and identifying with the client. The challenge for lawyers is not only how to feel with their clients but also to maintain enough professional distance and independence to offer wise counsel without being distressed by the experience themselves.


27 While empathy has its importance in relating to clients and being able to tell their stories, Professors Linder and Levitt caution about over-identification with the client. See LINDER & LEVITT, supra note 26, at 25–27.

28 For example, the American Bar Association Model Rules of Professional Conduct provide: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR. ASS’N 2016).
C. Caring Compassion

The third dimension of compassion involves caring compassion – an awareness of another person’s suffering, coupled with a desire and a willingness to act to relieve it. Caring compassion implies a sincere feeling of concern, but it does not require that one mirror the other’s suffering, as in the case of empathy carried to the point of empathic distress.\(^\text{29}\) (Brain scans even indicate that feeling compassion apparently activates different parts of the brain than feeling empathy does.)\(^\text{30}\) Caring compassion offers a way to respond positively to the suffering of other people without taking on their emotional distress.\(^\text{31}\)

Much of what we value in the law—perceiving an injustice and doing something about it—might be wrapped into this third definition of compassion. In that sense, much of practicing law can be thought of as a compassionate act within a structured legal environment. Indeed, providing a legal means to respond

\(^{29}\) RICARD, supra note 16, at 53.


to difficulty offers a way to transcend the emotional fatigue of empathy by translating it into concrete action. It also can serve a larger societal function by addressing an individual injustice before it becomes systemic. Finally, helping others more than ourselves can be a recipe for greater personal happiness.\(^{32}\)

Compassion for someone close to us is familiar. What is more challenging is extending compassion to those with whom we have no prior relationship, or even to someone with whom we disagree. For example, suppose we represent a defendant charged with a terrible crime. To provide an adequate defense, the attorney needs to have enough compassion for the accused to make that case, despite the nature of the crime, to assure that justice is done. But our law students will not just attend to clients—they will also need to respond to those who may be causing distress and the counsel that represent them. Compassion in these contexts requires an open heart—like the Tin Man—even for those with whom we may disagree or even oppose.\(^ {33}\) That does not mean

\(^{32}\) S. Katherine Nelson et al., Do Unto Others or Treat Yourself? The Effects of Prosocial and Self-Focused Behavior on Psychological Flourishing, 16 Emotion 850, 850 (2016) (arguing that helping others appears to produce more happiness than helping oneself).

\(^{33}\) Martin Luther King, Jr., wrote:

Love, even for enemies, is the key to the solution of the problems of the world . . . . Let us be practical and ask the question, “How do we love our enemies?” . . . . We must recognize that . . . an element of goodness may be found even in our worst enemy . . . . This means that there is some good in the worst of us and some evil in the best of us. When we discover this, we are less prone to hate our enemies. When we look beneath the surface, beneath the impulsive evil deed, we see within our enemy-neighbor a measure of goodness and know that
condoning such conduct but recognizing that there is enough common humanity to reach across the divide—sometimes called “fierce compassion.” For example, building a relationship with his adversary, F.W. De Klerk enabled Nelson Mandela to negotiate the end of Apartheid in South Africa. These efforts sometimes

the viciousness and evil of his acts are not quite representative of all that he is. Martin Luther King, Jr., Strength to Love, 44–45 (2010 ed. 2010). Bishop Desmond Tutu wrote:

Forgiveness does not relieve someone of responsibility for what they have done . . . It is not about letting someone off the hook or saying it is okay to do something monstrous. Forgiveness is simply about understanding that every one of us is both inherently good and inherently flawed. Within . . . every seemingly hopeless person lies the possibility of transformation.

Desmond Tutu & Mpho Tutu, The Book of Forgiving: The Fourfold Path for Healing Ourselves and Our World 58 (4th ed. 2014). The author is indebted to Professor John Makransky of Boston College Law School for bringing these quotations to his attention. Professor Makransky recommends remembering through deep and repeated meditation how we have been cared for so as to build a secure base to care for others. See generally Foundation for Active Compassion, www.foundationforactivecompassion.org [https://perma.cc/KG86-SQ6J] (empowering people by providing “profound contemplative practices that support their aspirations to become better people and to make a better world”).


[302]
require recognizing the simple dignity afforded to another human being.\textsuperscript{36}

D. Self-Compassion

Being able to care for others can be challenging, especially if the other is someone disliked. But sometimes those who can extend compassion to others may find it difficult to do the same for themselves. Extending compassion to oneself does not condone mistakes or avoid learning from them but involves acknowledging that such self-compassion may also be worth learning how to do, both for academic and professional reasons.\textsuperscript{37}

III. Courage

While a compassionate heart is necessary, it needs to be supported by courage if the desire to act is to ripen into successful action to secure justice.\textsuperscript{38} We can recall the

\begin{itemize}
\item \textsuperscript{36}See generally DONNA HICKS, DIGNITY–THE ESSENTIAL ROLE IT PLAYS IN RESOLVING HUMAN CONFLICT (2011) (analyzing dignity as a motivating force behind human interaction).
\item \textsuperscript{38}See CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 197–289 (2004) (including within virtue the character strengths of honesty, zest, bravery, and perseverance). “[T]o act courageously, one must ignore danger (bravery) and continue to act (persistence), follow one’s convictions (integrity) and act with energy and enthusiasm [vitality].” CYNTHIA L.S. PURY & ROBIN M. KOWALSKI, HUMAN STRENGTHS, COURAGEOUS ACTIONS AND GENERAL AND PERSONAL
scene from the movie, *To Kill a Mockingbird*, where the father of a rape victim confronts attorney Atticus Finch before the trial of the accused defendant in the small Alabama town. In response to his question about what Atticus is going to do, Atticus responds, “I’ve been appointed to defend Tom Robinson, and that’s what I intend to do.”\(^{39}\) The father then shouts an implicit threat after him, “What kind of man are you? You got children of your own.”\(^{40}\)

To understand how such courage might be taught, it is also important to distinguish among different types of courage: physical, personal, moral, and intellectual.

**A. Physical Courage**

We hope our law students do not need the level of physical courage like those heroic people who ran toward, rather than away from, the Boston Marathon bombing.\(^{41}\) At the same time, we admire such courage because it involves taking a risk for the benefit of other people. This

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*Courage, J. Positive Psychology 1, 3 (2007).* Also, recent research indicates that courage can be important for resilience, an important aspect of well-being. See Maria Luisa Martinez-Marti & Willibald Ruch, *Character Strengths Predict Resilience Over and Above Positive Affect, Self-Efficacy, Optimism, Social Support, Self-Esteem, and Life Satisfaction*, 12 *J. Positive Psychol.* 110, 112 (2017) (predicting resiliency through study of character strengths).

\(^{39}\) *To Kill a Mockingbird* (Universal 1962).

\(^{40}\) Id.

\(^{41}\) Evidence indicates that circumstances can call forth strengths that might not have been obvious initially, such as the responses of some people to the Boston Marathon bombing’s traumatic events. See Kevin Cullen, *Choosing to Focus on the Heroes, Not the Tsarnaevs*, Bos. Globe (May 16, 2015), [https://www.bostonglobe.com/news/nation/2015/05/16/choosing-focus-boston-marathon-heroes/g0fa1w58iajb4U0XFGvREI/story.html](https://www.bostonglobe.com/news/nation/2015/05/16/choosing-focus-boston-marathon-heroes/g0fa1w58iajb4U0XFGvREI/story.html) (detailing heroic responses to Boston Marathon bombing).
aspect highlights a dimension of courage that is important to emphasize at the outset—a moral purpose. Courage has been generally defined as “(a) willful, intentional act, (b) executed after mindful deliberation, (c) involving objective substantial risk to the actor, (d) primarily motivated to bring about a noble good or worthy end, (e) despite, perhaps, the presence of the emotion of fear.” The positive purpose is important to distinguishing the courage shown by a mugger or criminal assailant. This is especially important for lawyers who have unique access to the legal system and its ability to do both harm as well as good. “For a daring action truly to display courage it must be morally desirable, respectable, and lead to laudable results.”

B. Personal Courage

This is the form of courage where individuals overcome a fear that may be apparent only to them, such as speaking in public, or consulting a therapist when in distress when the culture of law school or of law practice may seem to discourage students seeking help, especially out of concern for adverse impacts on their bar admission application. Personal courage can also include the

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42 C. R. Rate, et al., Implicit Theories of Courage, 2 J. Positive Psychol. 80, 95 (2007).
44 Legal educators can help law students in such situations who are concerned about disclosing such problems on their bar admissions applications by making them aware that an increasing number of jurisdictions are supportive of seeking treatment where needed, rather than trying to go it alone. Remarks of Marilyn Wellington, Exec. Dir., Board of Bar Exam’rs of the Commonwealth of Mass., Address at Suffolk
important ability to speak up in relationships with other people while being open to changing perspective and using language, both verbal and nonverbal, wisely.45

C. Moral Courage

For lawyers, and the judges that they may become, it is especially important that they be able to manifest moral courage, which involves standing up for principle even when it appears to involve risk to themselves, as did Atticus Finch in the earlier example.46 Robert F. Kennedy put it this way: “Moral Courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential, vital quality for those who see to change the world which yields most painfully to change.”47

45 The author is indebted to Daniel Ellenberg, Ph.D., for pointing out how interpersonal communication with those close to us can also require courage. His colleague, Rick Hanson, Ph.D., also emphasized the importance of wise speech in the process. See Friendly & Fearless, GREATER GOOD SCI. CTR., https://ggsc.berkeley.edu/what_we_do/event/friendly_fearless_combining_kindness_and_assertiveness_in_important_relations TAB-OVERVIEW [https://perma.cc/Z7QL-2LVX] (the agenda includes a section on “wise speech”).
47 Robert F. Kennedy, Address at the University of Capetown, Day of Affirmation Address (June 6, 1966) https://www.j
D. Intellectual Courage

This kind of courage is like moral courage but as part of the role of the lawyer as someone who upholds honesty, fair dealing, and accuracy. This is the role of the lawyer in cross-examining expert testimony or offering adverse judicial authority to a court having to decide a difficult case.\(^\text{48}\) It can also include the courage for a young associate to come forward with a quandary to a senior attorney in a firm, rather than simply trying to struggle along without seeking guidance.\(^\text{49}\)

IV. Educating for Compassion and Courage – Come Threshold Issues

Highlighting the importance of compassion and courage is worthwhile. But at the same time, we need to be able to educate law students in these virtues. How to do that requires some background. Are these virtues that can be learned or are they just innate? If they are not

\(^{48}\) See David L. Hudson, Jr., *Lawyers Have a Duty to Disclose Adverse Legal Authority even if It Hurts Their Case*, ABA J. (June 1, 2019, 1:15 AM), http://www.abajournal.com/magazine/article/duty-to-disclose-adverse-legal-authority [https://perma.cc/X27M-47R7].

innate, are they just behaviors shaped by the context? If they can be learned, what means of instruction are available to legal educators to teach them? It is important to examine these threshold issues first.

A. Are Compassion and Courage Virtues that can be Learned?

If compassion and courage are traits we have—like eye color, which is not subject to change through education—then this can be a short article. We admire these traits when we observe them and go on with educating law students in critical thinking, which legal educators already teach. But it is apparent that these qualities can also be strengthened, though in the case of courage, doing so may be “an art more than a science.”

B. While Powerful, the Context does not Always Control Behavior, so we Still Need to Cultivate Individual Virtue

At the outset it is important to note that individuals act within a context, which can often control the situation. For example, a spectator cell phone conversation during an oral argument in court would be unlikely, even if it might occur on the sidewalk outside.


51 MICHAEL D. MATTHEWS, HEAD STRONG – HOW PSYCHOLOGY IS REVOLUTIONIZING WAR 135 (2014) (“[D]eveloping individual courage at this point is far more an art than a science.”).
The premise of this inquiry is whether we can help strengthen the moral identity of law students so that they might transcend the countervailing influence of the context when it is important to do so in the interest of justice. That is not to say that the context does not matter, and sometimes that the situation itself can be shaped in a positive way, but exploring how to do that is beyond the scope of this article, which focuses on enhancing the likelihood that law students will choose to act in an exemplary way whatever the situation they encounter.

In the Biblical parable of *The Good Samaritan*, one stranger aids another stranger while others turn


53 See, e.g., Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE WESTERN L. REV. 975, 975 (2019) (discussing behavior legal ethics in the context of corporate counsel). Indeed, on a personal note, the situational frame of reference about avoiding wrongdoing was my introduction to law practice. I was admitted to practice before the Supreme Judicial Court of Massachusetts in 1968 after having passed the Massachusetts Bar Examination which then contained no questions on legal ethics, as it now does. (I voluntarily took and passed the Multistate Professional Responsibility Examination several years ago.) At my swearing in, Justice Reardon of the Supreme Judicial Court spoke to us and said he had three pieces of advice for us as new lawyers. I still remember his words vividly, even fifty years later, because he delivered the advice so briefly and so emphatically: “Never mingle client funds with your own. *Never* mingle client funds with your own. *Never mingle client funds with your own*.” Justice Paul Reardon, Address at Swearing In Ceremony at the Supreme Judicial Court in Massachusetts (Nov. 19, 1968).
aside and pass by.\textsuperscript{54} This parable was the subject of a famous experiment where divinity students were asked to give a talk about the Good Samaritan across campus. Along the way to their speech, each student encountered an individual in distress. Many hurried on, but some

\textsuperscript{54} See Luke 10:25–37 (New International Version)

On one occasion an expert in the law stood up to test Jesus. “Teacher,” he asked, “what must I do to inherit eternal life?” “What is written in the Law?” he replied. “How do you read it?” He answered, “Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind; and, ‘Love your neighbor as yourself.’” “You have answered correctly,” Jesus replied. “Do this and you will live.” But he wanted to justify himself, so he asked Jesus, “And who is my neighbor?” In reply Jesus said: “A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper. ‘Look after him,’ he said, ‘and when I return, I will reimburse you for any extra expense you may have.’” “Which of these three do you think was a neighbor to the man who fell into the hands of robbers?” The expert in the law replied, “The one who had mercy on him.” Jesus told him, “Go and do likewise.”

Id.
stopped to offer help. Those who did not stop may have asked themselves what will happen to me? Those who did stop to help may have asked what would happen to him? These positive exemplars illustrate that sometimes the context often does—but need not always—control what we do. Important examples include those “righteous Gentiles” who rescued Jews during the Nazi occupation, discussed more below.

Looking at the good people among us is not the way lawyers usually work. Indeed, one of the most eminent of American Jurists advised to look at the law as would “a bad man.” But what if, instead, we looked at it as would a good one and tried to learn from such lawyers? This is a question explored more below in the discussion of exemplars.


56 Martin Luther King, Jr. on the parable of the Good Samaritan: "I imagine that the first question the priest and Levite asked was: 'If I stop to help this man, what will happen to me?' But by the very nature of his concern, the good Samaritan reversed the question: 'If I do not stop to help this man, what will happen to him?'” MARTIN LUTHER KING JR., STRENGTH TO LOVE 34 (1963).

57 “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 460 (1897).
C. Understanding the Importance of Degree Even with Virtues like Compassion and Courage

Before getting into specific pedagogy for compassion and courage, it is important to clarify that each are similar but different from allied behavior. Recklessness and cowardice both involve action or inaction in the face of danger, as does courage, but are not esteemed. Empathy without caring may leave the lawyer exhausted, but shutting down is not a good alternative.58 Distinguishing what to do and when is part of the task, and indeed, can call upon some of the “practical wisdom” of the Scarecrow.59

D. The Importance of Preparation and Small Steps

A hallmark of effective lawyering involves careful preparation. Cultivating new habits takes time, so while it is possible to introduce some practices to law students, continuing them will require those practices to become more habitual.

E. The Importance of Motivation and the Desire to Improve One’s Character

It may be self-evident to say that learning requires motivation, and the law has long acknowledged that motive matters. A legal educator can decide that it

is important to educate law students for virtue, but if there is no interest among the students it will not likely succeed. At the same time, does anyone dispute that our society needs our lawyers—many of whom end up in leadership roles—to be at their best? Developing such motivation should not be ignored but is itself likely to require a longer article than is available here. Suffice it to say that this article presumes that a law student would like to have greater compassion and courage and is willing to work to strengthen them.

F. Virtue Education as the Beginning of a Journey

For purposes of this discussion, the article will assume that the virtues of compassion and courage can be learned, and therefore taught, while recognizing that the means to do so need far more exploration. Nonetheless, like Dorothy on the Yellow Brick Road in Oz, she had to start somewhere; so here.

V. Educating Law Students in Compassion

Helping law students understand and practice cognitive, empathetic, and caring compassion—for others and themselves—is important for educating the Tin Man among our law students.60 Certainly enlisting the Scarecrow to explain compassion and courage, as outlined above, is important at the outset, but if it is not only knowledge, but also behavior, that we want to help

60 Horia Jazaieri, Compassionate Education from Preschool to Graduate School – Bringing a Culture of Compassion into the Classroom, 11 J. RES. INNOVATION TEACHING & LEARNING 22, 29 (2018) (reporting prior reports of law school discouraging compassion).
law students to learn, how can we help them do that? Other law faculty have offered suggestions such as learning from literature, reflection, and experience, drawing on precedents in medical education. A psychologist has suggested student reflections on compassion (or lack of it) or classroom discussions and experiential exercises. Here are a few suggestions for teaching compassion which I have found helpful or have learned about and wish to explore.

A. Offer Law Students Positive Exemplars

One part of my courses in Positive Psychology for Lawyers and Leadership and Character Strengths involves students finding positive exemplars in the legal profession that they can admire, identify with, and emulate. During the courses, I invite exemplary lawyers to the class, such as senior partners in law firms or a former President of the Massachusetts Bar Association, so that the students can interact directly with highly regarded legal professionals. I also invite students to write about exemplars of their own, asking them to discuss whom they admire and why. Exemplars can also help educate law students about compassion. Here are two examples:

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62 See Jazaieri, supra note 60, at 50.
63 For a thoughtful discussion of the importance of moral exemplars, see Linda Trinka Zabzubeski, Exemplarist Moral Theory 1–29 (2019).
Dr. Daniel Brown is a psychologist in the Department of Psychiatry at Harvard Medical School. He tells a remarkable story about the late Robert F. Kennedy seen through the eyes of a 14-year-old busboy. Some readers may remember Juan Romero as the young man whose distraught image was caught on camera cradling the head of a dying Senator Kennedy just after he was assassinated in the Ambassador Hotel in Los Angeles on June 5, 1968. Dr. Brown interviewed Juan Romero late in life and learned what happened.

Dr. Brown reported that Juan Romero grew up with his mother and stepfather in Mexico and then immigrated to the United States. Dr. Brown learned that Juan had been beaten as a child and had low self-esteem. He didn’t feel seen and felt like he didn’t matter in life. Several weeks before the Robert Kennedy assassination, Juan had heard Robert Kennedy, along with Cesar Chavez, speak at a rally in support of the rights of Mexican American immigrant farmworkers. Juan

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Interview with Dr. Daniel Brown (June 4, 2019) (notes on file with the author and assertions made with Dr. Brown’s review and approval) [hereinafter Interview].
recalled that Robert Kennedy acknowledged these immigrants as hard-working citizens worthy of respect, dignity, and fair treatment. Immediately following the talk, Kennedy became Juan’s new hero. He felt that he and his people had been seen and acknowledged. The weekend before the Kennedy assassination, Juan was temporarily brought in as a busboy at the Ambassador Hotel. When he heard a room service call come down from Kennedy’s room he said to the headwaiter, “This really means a lot to me. I’ll volunteer to wait tables for 2 weeks if you let me deliver this order.” Juan wanted to meet his new hero and went up to see if Kennedy was genuine or not. He nervously knocked on the door. Kennedy was on the phone and asked him if he would wait. Upon ending the call Kennedy warmly smiled, offered him both hands, and said, “Now, tell me who you are.” Forty-five minutes later, Juan reported that he left feeling that he had been truly seen and that he had been acknowledged by someone likely to be the next President of the United States: “You could tell when he was looking at you that he’s not looking through you — he’s taking you into account. And I remember walking out of there like I was 10 feet tall.”68 He told Dr. Brown, “For the first time in my life I felt like I mattered.”69 Yet, because of his low self-esteem doubt set in. He greatly needed to find out if Senator Kennedy would at all remember him. Several days later, the day of the assassination, Juan had learned that Kennedy was coming through the hotel kitchen after his speech.70 He went to the kitchen and positioned

69 Interview, supra note 67.
70 See Esty-Kendall, supra note 68.
himself right in Kennedy’s path. Juan was not certain Kennedy would remember him.\textsuperscript{71} When Kennedy came by, he saw Juan, gave him a big smile and said, “Hello, Juan. Nice to see you again.”\textsuperscript{72} Juan immediately felt acknowledged thinking, “The next President of the United States knows who I am. I matter.”\textsuperscript{73} Excitedly he shook Kennedy’s hand and wouldn’t let go.\textsuperscript{74} Then the shots rang out.\textsuperscript{75}

Dr. Brown said that for years, Juan Romero blamed himself for Kennedy’s death because he believed that if he hadn’t held Kennedy’s hand so vigorously and so long, then the angle of the gun might have been different, Juan having even received a letter blaming him.\textsuperscript{76} Yet, Kennedy had indeed paused to acknowledge him. Later, Juan Romero reported visiting Kennedy’s gravesite to express his regret, buying and wearing the first suit he had ever had as a sign of respect: "I felt like I needed to ask Kennedy to forgive me for not being able to stop those bullets from harming him . . . When I wore the suit and I stood in front of his grave, I felt a little bit like that first day that I met him. I felt important. I felt American. And I felt good."\textsuperscript{77} While this story has a tragic ending, Kennedy’s death should not obscure that for Juan Romero, Robert F. Kennedy, who was himself a lawyer, exemplified compassion in acknowledging a young busboy as worthy of recognition. How many of us acknowledge the many people in the varied roles who enable us to do what we do?

\textsuperscript{71} Interview, supra note 67.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See Esty-Kendall, supra note 68.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
Another example is provided by compassion for an opponent. Sara Tucholsky of Western Oregon was at bat in a softball game with Central Washington on April 26, 2008. A senior, she had never hit a home run before, but did so that day. Unfortunately, in rounding first base, she missed it, and in turning back, tore a ligament in her right knee. The umpire ruled that if her teammates tried to carry her around, she would be ruled out, and if a pinch runner were inserted to take her place on base, the home run would be a single. Then two teammates from the opposing team asked if they could carry her around the bases instead, which apparently violated no rule. Then they did, making a chair with their hands so she could be lowered to touch each base, allowing her to score a home run. Watching the video of this act helps demonstrate not only the importance of compassion for someone who might be an adversary, but also the elevating and uplifting effect it had on those who witnessed this positive act.


79 See Sara Tucholsky, supra note 78.
80 See id.
81 See id.
82 See id.
83 Id.
Finally, legal educators are role models. “By exercising compassion and showing empathy toward our students, faculty members model the very behaviors we want them to emulate—but when faculty members treat students with indifference and even disdain, they cannot blame anyone but themselves when students are uncaring and cold with others.”

B. Help Students Experience Elevation and Other Positive Emotions

Thomas Jefferson described the feeling of uplift when we hear or observe examples of compassionate behavior, like the two above. Like these feelings, awe also can help change perspective, such as what occurs in viewing the earth from space. But we do not need to

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leave the atmosphere to gain similar perspectives. Even sixty seconds of observing tall trees produces more helpful behavior than sixty seconds of observing a tall building.\textsuperscript{88} That article inspired me to take my class outside to observe the tall trees in the Granary Burial Ground across the street from Suffolk University Law School, just to help reinforce experientially the science just learned, as well as the importance of natural systems amidst the urban hardscape.

These experiences are fleeting and raise the tantalizing question of how peak experiences can sometimes change perspectives toward more prosocial behavior on a more durable level.\textsuperscript{89} The challenge is that such transcendent experiences are not ones that we choose, but appear to happen spontaneously, like the blinding light experienced by Saul (later Paul, the Apostle) on the road to Damascus.\textsuperscript{90} Also, depending on Divine Intervention is not a viable pedagogic strategy for helping educate law students in compassion, miraculous as it may be.\textsuperscript{91}

\begin{footnotes}
\footnotetext{88}{See Paul K. Piff et al., \textit{Awe, the Small Self, and Prosocial Behavior}, 108 J. PERSONALITY & SOC. PSYCHOL. 883, 893–95 (2015) (reviewing study with test subjects looking at tall trees or tall buildings).}
\footnotetext{89}{See generally \textit{BEING CALLED – SCIENTIFIC, SECULAR AND SACRED PERSPECTIVES} (David Bryce Yaden, Theo D. McCall, & J. Harold Ellens eds., 2015) (providing a discussion on positive psychology and its relation to prospection); David Bryce Yaden et al., \textit{The Varieties of Self-Transcendent Experience}, 21 REV. GEN. PSYCHOL. 143 (2017) (analyzing self-transcendent experiences and how they pertain to human behavior).}
\footnotetext{90}{Acts 9:3 (NRSV).}
\footnotetext{91}{For an interesting discussion of these issues, see MILLER, \textit{supra} note 4, at 219–48.}
\end{footnotes}
C. Have Them Write a Special Gratitude Letter

On a more structured level, research indicates that compassion itself may be taught over an extended period. However, such a long-term educational program may not always be possible for law students. Are there other options?

Dr. Katherine Nelson-Coffey is a psychologist focusing on care-giving behavior. Dr. Nelson-Coffey has been working on strengthening the experience of caregiving for both parents and children, specifically to enhance the compassion that parents can bring to their roles as caregivers, especially where they as children may not have had such compassionate parental care themselves. At the Sixth World Congress on Positive Psychology in Australia, Dr. Nelson-Coffey presented some preliminary research on a gratitude-based intervention that showed promise in enhancing parental compassion among her study participants. Specifically, she asked participants in her study to write a letter of thanks (without needing to deliver it) addressed to someone who in the past helped make them feel especially cherished, protected, or accepted, describing in specific terms why they were grateful to this individual and how his or her behavior affected their lives. If Dr.

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92 See generally Horia Jazaaieri, et al., Enhancing Compassion: A Randomized Controlled Trial of a Compassion Cultivation Training Program, 14 J. HAPPINESS STUD. 1113 (2013) (overview of a study on compassion).
93 Katherine Nelson-Coffey, Ph.D., Presentation to the Sixth World Congress on Positive Psychology in Melbourne, Australia (July 20, 2018) (author’s recollections of this event are confirmed by Dr. Nelson-Coffey).
94 Id.
Nelson-Coffey’s research results confirm the value of such an intervention, it might also prove helpful for helping law students learn compassion.

D. Ask Them to Befriend a Stranger and Appreciate an Adversary

For example, we can ask students to undertake certain experiences, and then write journal entries about them, like befriending a stranger, and even appreciating an adversary.\(^95\) This is an activity I ask my students to undertake.\(^96\) This is an important skill when a difficult matter is being negotiated, as in those situations, the adversary needs to be persuaded of the value of a deal or a settlement from the adversary’s point of view.\(^97\)

E. Ask Them to Undertake Appropriate Contemplative Practice to Extend Their Boundary of Caring Concern

\(^95\) See Appendix, infra. A student in my fall 2017 course Positive Psychology for Lawyers wrote in her final paper: “As I mentioned in class, I once walked into a store and struck up a conversation with the cashier, who ultimately became a good friend of mine by the end of the conversation. We still make an effort to see each other.” Leah Kofos, Final Paper (Dec. 2017) (on file with author). Another student in the fall 2017 course wrote: “For example, this semester I am working with a challenging opposing counsel. Instead of treating her with anger in response to her hostility, I treat her with compassion and kill her with kindness. This is more effective with court staff and, in turn, more advantageous for my client.” Morgayne Mulkern, Final Paper (Dec. 2017) (on file with author).

\(^96\) See Appendix, infra.

\(^97\) The late Harvard Law School Professor Roger Fisher once told me that in negotiation, “the judge is on the other side of the table.” Conversation with Roger Fisher, Former Law Professor, Harvard University (1969).
Aside from specific activity, students can also learn through contemplative practice. As we are often distracted, I have found it helpful to lay down a foundation of enhanced ability to pay attention, useful for all four kinds of compassion. Because research indicates that our brains are more plastic than previously thought, contemplative practice to improve attention can pay dividends over time.\textsuperscript{98} Building on that foundation, I also invite students to undertake a contemplative practice of extending their boundary of caring concern through what is sometimes called “loving-kindness meditation,” where goodwill is extended from those we naturally care for, like family and friends, to others outside of our natural “circle of concern.”\textsuperscript{99} Research shows that, when compared to a control group, “loving-kindness meditation” helps generate positive emotions, themselves important for our students’ well-being.\textsuperscript{100} A student in my Leadership
course reported that the practice enabled him to deal with an often grouchy colleague, as well as keep his head in a crisis on the subway to work.  

F. Help Them Also Learn Compassion for Themselves as well as Others

As indicated above, psychologist Kristin Neff has worked on helping people develop self-compassion, a sense of in effect being their own best friend in the circumstance, and giving themselves permission to engage the parasympathetic nervous systems—the “tend and befriend” system, rather than fight, flight, or freeze response. Self-compassion is distinct from self-esteem. Self-esteem is often how we feel compared to others, and it is a less successful way of coping with difficulty.

least for women) as indicated by telomere length. See Elizabeth A. Hoge et al., Loving-Kindness Meditation Practice Associated with Longer Telomeres in Women, 32 BRAIN BEHAV. & IMMUNITY 159, 161 (2013). The authors noted that shorter telomeres, which are often associated with chronic stress, may indicate that a person will age faster than others. Id. at 159. The study found that individuals who practiced loving-kindness meditation for several years had relatively longer telomeres than those who did not. Id. at 161.

101 E-mail from Steve Pageau to author (June 13, 2019) (on file with author).

102 See generally KRISTIN NEFF, SELF-COMPASSION: THE PROVEN POWER OF BEING KIND TO YOURSELF 64 (2011) (ebook).

VI. Educating Law Students for Courage

Like compassion, courage may be cultivated. Here again are a few ways to help students face and overcome their fears.

A. Offer Law Students Courageous Exemplars

As with compassion, exemplars can be an aid. Psychologist Dr. Cynthia Pury, who has studied courage extensively, suggests creating “a book of courageous role models, just for you.”\textsuperscript{104} These can include times where you acted courageously in the past, as events to recall, as well as when you saw friends and family acting courageously.\textsuperscript{105} Older readers may recall the film portrayal of Sir Thomas Moore who refused to take an oath in which he did not believe in order to validate King Henry’s divorce of his wife who had not yet given him an heir.\textsuperscript{106} In other contexts, such as business ethics, educators have argued that “exposure to moral exemplars in fiction will help students to build the moral courage they need to carry out ethical decisions in the workplace.”\textsuperscript{107}

Psychologist Robert Biswas-Diener reports a story of a young lawyer who discovered a mistake in transactional documents in his client’s favor but still

\textsuperscript{104} Pury, \textit{supra} note 50, at 128.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{A Man for All Seasons} (Columbia Pictures 1966).

raised it with the partner in charge as an error that should be corrected, even though he was concerned it might adversely affect his career.\textsuperscript{108} Former President John F. Kennedy's \textit{Profiles in Courage} tells of political leaders who acted courageously to put the welfare of the country first.\textsuperscript{109} Professors Douglas Linder and Nancy Levitt have offered riveting portraits of four lawyers who were themselves profiles in legal courage, well worth reading.\textsuperscript{110} One is John Adams, who defended the British soldiers in the Boston Massacre.\textsuperscript{111} Another is Justice Department Civil Rights lawyer John Doar, who single-handedly averted a likely bloody clash between protesters and police in Jackson, Mississippi in 1963, as well as later won convictions of many of those responsible for killing civil rights workers.\textsuperscript{112} Another is German Judge Lothar Kreyssig who defied the Nazis and hid Jews at his home after his forced retirement.\textsuperscript{113} Their last profile is of African-American Tennessee lawyer Noah Parden, who defended an African-American defendant in a rape trial in 1906 and won a criminal contempt case in the U. S. Supreme Court against the perpetrators who lynched his client while his appeal was pending.\textsuperscript{114} More recent examples include Nancy Hogshead-Makar, Founder and CEO of Champion Women, who brought justice to the victims of sexual abuse in the world of athletics, resulting in new federal legislation.\textsuperscript{115}

\textsuperscript{108} Biswas-Diener, \textit{supra} note 43, at 101–02.
\textsuperscript{110} See Linder & Levitt, \textit{supra} note 26, at 36–65.
\textsuperscript{111} See \textit{id.} at 37–38.
\textsuperscript{112} See \textit{id.} at 40–49.
\textsuperscript{113} See \textit{id.} at 57–58.
\textsuperscript{114} \textit{Id.} at 58–65.
Exemplars such as these offer law students people to emulate, even in a small way.

B. Help Them Make Their Bodies Their Allies

Many of us remember Anna’s song from the musical *The King and I* that “whenever I feel afraid, I hold my head erect, and whistle a happy tune so no one will suspect I’m afraid.”\(^\text{116}\)

It turns out that the song was closer to science than its composer might have imagined.

Acting *as if* can apparently aid the mind.\(^\text{117}\) Just as when we are sad, we tend to withdraw; when we are confident, we fill the space.\(^\text{118}\) Psychologist Amy Cuddy has written how the effect can work both ways—rather than the feeling inducing the posture, the posture can induce the feeling.\(^\text{119}\) She advises that adopting a positive

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\(^\text{116}\) “Whenever I feel afraid, I hold my head erect
And whistle a happy tune, So no one will suspect I’m afraid
While shivering in my shoes, I strike a careless pose
And whistle a happy tune, And no one ever knows I’m afraid
The result of this deception, Is very strange to tell,
For when I fool the people, I fear I fool myself as well
I whistle a happy tune, And every single time,
The happiness in the tune, Convinces me that I’m not afraid
Make believe you’re brave, And the trick will take you far,
You may be as brave, As you make believe you are.”

*THE KING AND I MUSICAL, WHISTLE A HAPPY TUNE* (1951).


\(^\text{118}\) If the author can be forgiven a marine metaphor, we can close up like a clam or reach out like a starfish.

physical aspect can help improve performance, like practicing before (not during) a challenging performance by striking a winning pose with your arms in the air, or the Superman or Wonder Woman stance with arms on the hips to appear confident. For law students, this advice can be helpful, but it is also important that the necessary preparation be done as well, just as actors rehearse their lines, or a solid written brief lies behind successful oral argument.

C. Help them Learn How to Distinguish Between their Fear and their Willingness to Act, and then Decrease the Former or Increase the Latter, or Both

Psychologist Robert Biswas-Diener distinguishes courage in the face of physical danger from courage in the face of a private fear, such as speaking in public. He has written that both can be remedied by diminishing the fear, increasing the willingness to act, or both. For example, students afraid of public speaking may ease their fear if they can move their focus from themselves to their audience, and increase their willingness to act by recognizing that failure is a learning opportunity rather than a cause for embarrassment. This can be done through progressive muscle relaxation or other techniques that help reduce anxiety and increase confidence.

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120 Id. at 1367.
122 Biswas-Diener, supra note 43, at 10–11 (describing the courage quotient as an index composed of two separate processes each of which may be modified such as by deflating fear or increasing the willingness to act).
123 Id. at 11.
than a defeat.\textsuperscript{124} Again, we can ask students to practice this learning and then report the results in journal entries recording their use of these practices, such as the student who reported changing her behavior in class in a positive way.\textsuperscript{125}

**D. Introduce them to the Courage Calendar**

Psychologist Robert Biswas-Diener recommends making a Courage Calendar. He suggests putting a particular fear or challenge on the calendar, making a conscious effort to overcome that fear and then marking it off on the calendar once done.\textsuperscript{126} For example, a student who has difficulty speaking up in class might mark it on and check it off on the calendar to get more used to it. Regular activity is important because “courage is a habit . . . a practice, and . . . a skill that can be learned.”\textsuperscript{127}

**E. Help them Remember their Noble Purpose**

Why we do things matters, and emphasizing a noble purpose may help. An example includes the speech of Col. Joshua Chamberlain before the battle of


\textsuperscript{125} See Appendix, \textit{infra}. A student in my 2017 Positive Psychology for Lawyers course wrote in her final paper: “Before this class, I had not once raised my hand to answer a question, even if I knew the answer, just because I was afraid of being wrong. After reading this book, I have raised my hand countless amounts of time. I have stopped letting fear paralyze me from accomplishing my goals, and it is a great feeling.” Taylor Russo, Final Paper (Dec. 2017) (on file with author).

\textsuperscript{126} BISWAS-DIENER, \textit{supra} note 43, at 64.

\textsuperscript{127} Id. at 16.
Gettysburg to enlist soldiers from Maine that had mutinied into a battle that they were fighting “to set other men free.”

F. Remember the Power of a Sense of Duty Inherent in a Role

Sometimes courage, especially physical courage, involves a sense of duty inherent in a role. Indeed, we call police and firefighters “first responders” because of our expectation that their roles will lead them to put themselves in harm’s way for our safety’s sake. When the expectations inherent in a role are not met, the personal consequences can be severe, as in the case of the security officer charged with criminal neglect to care for the victims of the Parkland shooting. Such a sense of duty to act can grow out of a perception of the role, such as when a teacher confronted and disarmed a shooter, or

128 See Baker, supra note 8, at 541 (citing GETTYSBURG (Turner Pictures 1993)) (citing the speech of Col. Joshua Chamberlain).
130 According to one narrative:

A fifty-year old teacher, a survivor of a school shooting, attributed his rescue of students to the helping norms inherent in his teaching role. He entered a classroom where a fourteen-year-old boy had killed a fellow teacher and shot three of his classmates. The shooter had walked into the classroom and shot one student point-blank, then another sitting behind the
a boy who was a hall monitor went back to help classmate victims of an earthquake.\textsuperscript{131} For a fictional but still illuminating example of the power of role to cultivate courage, it is helpful for students to hear Henry V’s “Saint Crispin’s Day” speech before the battle of Agincourt where his troops defeated a French force five times larger than his army.\textsuperscript{132}

While these examples involved physical courage, they can help students think about how assuming the first, and then a third—all of them in the same row . . . He said he was going to take a hostage. And the teacher responded:

And I guess I volunteered; I don’t remember doing it. So he motioned me to come toward him and he said, “I’m going to put this gun in your mouth.” . . . And at that time I was about five or six feet away, and I knew it was probably my best chance to end the situation. So I charged him and pinned him with my body against the wall and also grabbed the gun with his hands on it and pinned it against the wall.

In reflecting on the reasons behind his brave act, he told us . . . “I’m a teacher.”


\textsuperscript{131} A nine-year-old Chinese boy was a hall monitor in his school when there was a massive earthquake during which the ceiling of the school fell, killing many of the children. The young boy escaped and while running noticed other children struggling to get out; he ran back and saved them. When asked why he ran back, the boy replied, “I was the hall monitor! It was my duty, it was my job to look after my classmates!” Philip Zimbardo, \textit{What Makes a Hero?}, \textit{Greater Good Mag.} (Jan. 18, 2011), https://greatergood.berkeley.edu/article/item/what_makes_a_hero [https://perma.cc/5U9A-SMM2].

\textsuperscript{132} Baker, \textit{supra} note 8 (quoting \textit{Henry V} (Renaissance Films 1983)).
role of a lawyer shapes our conduct in difficult situations. The remarks by Atticus Finch about his duty to defend his client is another example.\textsuperscript{133} This is consistent with the idea that courage can occur as working out a consistent sense of one’s identity.\textsuperscript{134}

Also, as a clue to what may be helpful in developing the capacity to act when needed is preparation. As with military service, first responders are trained how to act in difficult situations. Lawyers do the same in preparing for trial, for example, and preparation is the hallmark of superior legal representation. What may be necessary here, then, is to learn from these examples and use the same diligence in preparation for the challenges that may come.

\section*{G. Help them Untangle the Fear they Feel}

Professor Heidi Brown has written a thoughtful and helpful book, \textit{Untangling the Fear in Lawyering}, recommending that the fear we encounter in law school or law practice can be deconstructed to aid in responding to it.\textsuperscript{135} A basic insight from her book is that

\begin{quote}
The gift, the key, the challenge for us in this journey toward untangling fear is to identify specific and concrete scenarios in our lives in which we feel incredibly brave and powerful, even though those environments might, or even probably would, invoke fear in someone else. Then, we can extract exactly what drives our
\end{quote}

\begin{footnotesize}
\textsuperscript{133} See \textsc{Lee}, supra note 2, at 270–71.
\textsuperscript{134} See Melissa Koerner, \textit{Courage as Identity Work: Accounts of Workplace Courage}, 37 \textsc{Acad. Mgmt. J.} 63, 63 (2014).
\textsuperscript{135} See generally \textsc{Heidi K. Brown}, \textit{Untangling Fear in Lawyering: A Four Step Journey Toward Powerful Advocacy} (2019).
\end{footnotesize}
boldness, courage, and strength in those circumstances.\textsuperscript{136}

To reframe fear into fortitude, law students and lawyers can engage in a four-step process: (1) identify scenarios in our personal and professional lives that \textit{should} induce fear but do not, and those that arguably should \textit{not}, but do; (2) reframe and reboot our mental approach to fear in lawyering—using vulnerability, authenticity, and humility to tap into personal power; (3) cultivate an athlete’s mindset toward the physicality of fear; and (4) foster a culture of fortitude in tackling individual legal challenges and helping others.\textsuperscript{137}

\section*{H. Recall, Replay, Revise, and Foretell}

Daniel Brown, Ph.D., has a powerful guided meditation designed to cultivate courage. It has four steps: (1) Recall a time when you acted courageously in as much detail as you can, including the thoughts and feelings; (2) Recall a time when you did not do so, and wish you had acted differently, including those thoughts and feelings; (3) Imagine you had acted in that second situation as you wish you had, what would it have been like to do so, and how would it have felt? (4) Imagine carrying that courage from the first courageous act and the act you wanted to do over into a future situation you can foresee encountering? What is might it feel like to do that?\textsuperscript{138}
I. Practice Confronting Moral Challenges

Those advocating educating nurses in moral courage have argued for training through experiential learning of encountering situations requiring moral awareness, decision-making, and action. ¹³⁹

VII. Combining Compassion and Courage
A. Heroic Altruism

It may be instructive that in The Wizard of Oz, Dorothy finally destroys the Wicked Witch by throwing water on the Scarecrow to put out the fire the witch has set, which also splashes on the witch. Dorothy’s purpose to help her friend gave her the capacity to act, despite describing herself initially as “Dorothy, the small and meek.”¹⁴⁰ What happens when compassion and courage are combined?

Compassion for others carried to a positive extreme involves what is known as heroic altruism, where a concern for the welfare of others leads to putting one’s own life at risk, as in the case of the righteous gentiles who sheltered Jews in Nazi-occupied Europe during the Second World War.¹⁴¹ These are extraordinary acts combining compassion and courage.¹⁴² The people

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¹⁴⁰ The Wizard of Oz, supra note 12.
¹⁴² Ordinary people are capable of both heroic and conventional altruism and that they are ordinary members of a moral community who have internalized the ethics of caring, virtue, and social responsibility from their loved ones, as well as being in contact with
involved had a personal ethic of care that they felt compelled to act, almost as if they had no choice. More modern examples include the Carnegie Heroes, those otherwise ordinary individuals who voluntarily came to the aid of others at their own risk, like running in front of a train to pull a wheelchair bound woman to safety, or pulling a passenger out of a burning car. In the case of other moral leaders in a certain period of their life. They have internalized the notion that persecution, oppression, and the lack of helping others is not an acceptable part of their moral universe.

Oliner, supra note 130.

An example is a forty-nine-year-old man risked his life to save a paralyzed woman from being hit by an oncoming train—the spokes of her wheelchair had become stuck between the tracks. He told [researchers] that he was heading south alongside the tracks when he noticed the woman crossing the tracks while the gates were lowering, signaling the approaching train. She was shaking the wheelchair and crying out for help. So he just stopped his car and jumped out. He saw the train was coming; it was about fifty yards away and fast approaching . . . When asked why many others might not risk their lives in a similar life-threatening situation, he offered the following: “I think there might be some liability they’re afraid of; something might happen . . . . Well, I don’t think that’s right. I think you have a certain degree of responsibility, if you see something happen like that, to try and offer some kind of help.”

Oliner, supra note 130, at 99–100.

Another rescuer had feelings of empathy when he was attempting to rescue a young woman from her burning car.
of heroic altruism, decisions to help by these everyday heroes were “overwhelmingly dominated by intuition” and “significantly more intuitive than a set of control statements describing deliberative decision-making.”145 “This remained true [even] when the Carnegie medal winners had enough time to think before they acted, suggesting that the gut-level decision overrode any deliberative process.146

We hope that our law students need not be called upon to act in mortal danger with such compassion and courage. Yet caring compassion combined with moral courage may be required of them at some point in their careers to help achieve justice. If we are to prepare them adequately for the challenges of the legal profession they are entering, we should be aware of and help them cultivate these important virtues.

B. Combining Compassion and Courage Pedagogy

My arms were getting all torn up, my face was getting burned, my eyebrows were catching on fire. So I almost had her out. It was to the point where I was completely exhausted and I was about ready to give up. But I wouldn’t have left her. I would have died there with her, I think. . . . I know. I have a very vivid memory, and I know that seeing her that way, begging for my help, and just knowing that she was relying on me for her life, and then if I [had] failed, I never would have been able to live with it. I would have stayed right there. I couldn’t have left.

Id. at 103.


146 Id.
Looking at compassion and courage together, rather than separately, also has the benefit of considering the pedagogy which may be common to both. For example, cultivating compassion involves small and progressive steps, which can be true of cultivating courage. Both can benefit from encouragement—either from others but also from oneself, if that can be done with some self-awareness. Both can reinforce each other in that it may take courage to be compassionate with oneself.

Finally, a common element in educating lawyers for compassion and courage may be to focus on identity rather than action. While it involved testing for honesty, research indicated that the injunction to be honest was far less effective than the injunction to be an honest person. In other words, educating lawyers for compassion and courage may involve helping them form a self-concept as compassionate and courageous people which they then will better uphold than if simply urged to be compassionate or courageous. In this regard, it may be worthwhile to return to the exemplar of Sir Thomas More, who refused to take an oath which he found repugnant to his conscience: “Well, as a spaniel is to water so is a man to his own self. I will not give in because I oppose it—I do- not my pride, not my spleen, nor any of my appetites, but I do– I!”

VIII. Conclusion.

When our students walk down their own yellow brick road toward a successful career, their well-being

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148 A MAN FOR ALL SEASONS (Columbia Pictures 1966).
and success requires that they bring compassion and courage to help their capacity for legal reasoning. As legal educators, we can help enhance their journey by teaching the Tin Man and the Lion as well as the Scarecrow among them. After all, to go home, Dorothy needed all three of her companions to succeed.
In his book, *The Courage Quotient*, Dr. Robert Biswas-Diener points out that courage is often displayed in overcoming a personal fear, either by controlling the fear or increasing the willingness to act, or a combination of the two. Sometimes you can benefit from joint action, but for the moment focus on yourself. His book elaborates useful ideas with which you should be familiar. To take advantage of your capacity to be courageous as an attorney when the occasion requires, please prepare three journal entries.

Part A: Recall a time when you felt you were courageous. Was it personal or general? What happened, and can you reconstruct it in terms of both the fear and
the willingness to act? As an example of such an event, Dr. Biswas-Diener reports the story of an attorney who refused to prepare a document with a term providing for an unfair advantage to his client. Tell your own story, citing to *The Courage Quotient* as appropriate.

Part B: Describe a situation where either your fear was too great or your willingness to act was not great enough, but it was important enough to you that you should have been able to act when you needed to. Drawing on *The Courage Quotient*, please describe one or more ways you might manage your fear, and one or more ways you might increase your willingness to act, so that you can increase your likelihood of being sufficiently courageous. To give an example from the book, visiting the site of a talk without an audience can help reduce the fear of facing the same space later filled with people waiting to hear you speak. Or having a talisman in hand may give you the confidence boost you need. Remember Dumbo and the magic feather? Or it might be from assuming the role of a lawyer where duty requires you to take risks that you would normally not as a layperson.

The point of these two entries is not to prescribe an example, but to help you to examine your own past successes for clues as to what works for you, as well as prompt you to try something new if it might help you succeed.

Part C: Finally, it may be possible to increase your capacity for courage by taking small steps when the stakes are low. Conclude your journal in Part C with one or two modest but regular actions you could take that might raise the baseline of your capacity for courage in some domain where the risks are low but still daunting. For example, addressing a small group as a way of getting ready to address a much larger one. Or introducing a deliberate error, as Dr. Biswas-Diener suggests, so that you can understand that error is possible, but need not be decisive. The point of this Part
C journal entry is to explore how modest, but steady, action can help you develop your capacity to be a courageous attorney, while recalling the old expression that there “is no growth in the comfort zone and no comfort in the growth zone.”

B. Journal: Befriending a Stranger

Part A:
1. All of us have a circle of concern. Think of someone who is not currently within your circle of concern and how you might bring him or her within it.
2. Write a brief journal entry about how you demonstrated regard for that person, acknowledgement and appreciation for him or her, and how it affected both of you.

Part B:
Write a second brief journal entry on that person (whose identity can be concealed) and the good qualities you find in him or her, notwithstanding your concern. Note that you are not being asked to like that person, but simply to be open to finding merit in some aspect of what they say or do. As attorneys, we often take sides, but we also need to be able to reach out to adversaries to resolve matters, even when our clients may not yet be able to do so. Record how it felt to look for something positive in this person. Can you imagine you expressing that positivity to him or her directly? If so, how? Note that you do not yet have to take this step, but you can explore in your mind how it might work.
CHARACTER AND FITNESS FOR LEADERSHIP: EDUCATING LAWYERS FOR COMPASSION AND COURAGE AS WELL AS BRAINS – THE WIZARD OF OZ WAS RIGHT

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ARTICLE

OF WIGS, WICKETS, AND MOONSHINE: LEADERSHIP DEVELOPMENT LESSONS FROM AN INTERNATIONAL COLLABORATION

Douglas A. Blaze*

I. Introduction 346
II. Lawyers as Leaders: Transpacific Perspectives 348
   A. Backdrop 348
   B. Getting Started 350
   C. The Course 352
      1. Basic Structure 352
      2. Students 353
      3. Goals 353
      4. Classes 355
         i. Leadership Overview 356

* Art Stolnitz and E.E. Overton Professor of Law and Dean Emeritus, University of Tennessee College of Law. Professor Blaze is the founding director of the Institute for Professional Leadership at the College of Law. This class, and article, would never have been possible without my remarkable friends and collaborators, Sarah Derrington, Roger Derrington, and Brad Morgan.
ii. Leadership Development 357
iii. Career Planning and Professional Development 359
iv. Leadership as Lawyers 360
v. Extracurricular Activities 361
vi. Course Conclusion 362

III. Lessons Learned 364
A. Immersive Learning 364
B. Experiential Development of Cultural Competence 366
C. Going Where the Class is Ready to Go 369
D. Teatime 370
E. Facilitating vs. Teaching 371

IV. Conclusion 373

“This course was the highlight of my legal education so far. I had the time of my life, and I grew personally and professionally. I learned who I am as an individual as well as a leader and, along the way, I developed lifelong friendships. I became an informed leader, developed a style of leadership that is most effective for me, and broadened my perspective.”

- Sarah Blessing (UT Law ’17)¹

I. Introduction

In his book, How Will You Measure Your Life, Clayton Christensen writes about the importance of being open to serendipitous opportunities.² Fortunately, on December 31, 2014, I was. Though the entire

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university was closed, I came into my office to meet with the then-dean of the University of Queensland, T.C. Beirne School of Law, Sarah Derrington, and her husband, Roger. The meeting had been arranged by mutual friend, Wayne Ritchie.

Sarah, Roger, and I hit it off right away. Both schools were interested in exploring potential collaborations. Sarah was trying to encourage pedagogical innovation at her school. I was very interested in exploring expanded international opportunities for our students. When we started talking about the new UT Law leadership program and Sarah’s recent experience at the Center for Creative Leadership, Sarah quickly and emphatically said “let’s collaborate on a leadership course for a combined group of students from each school!” Later that evening at a reception celebrating the Sarah and Roger’s visit to Knoxville,

3 Sarah Derrington is now a federal judge and President of the Australian Law Reform Commission. Justice Sarah Derrington served as Dean and Head of School of the T.C. Beirne School of Law at the University of Queensland from 2013 until her appointment to the bench in January, 2018. See President: The Hon. Justice S.C. Derrington, President, AUSTRL. L. REFORM COMMISSION, https://www.alrc.gov.au/about/president/ [https://perma.cc/2TQ3-JU8Q]. Her husband, Roger Derrington, is also a federal judge, having been appointed to the bench in 2017 after a very successful career as a barrister QC. See The Hon Roger Marc Derrington, Fed. Ct. AUST., https://www.fedcourt.gov.au/about/judges/current-judges-appointment/current-judges/derrington-j [https://perma.cc/643N-XKC7].

Sarah announced, to a collection of lawyers, judges, and political leaders, our very tentative plan as a fait accompli.

And so, we did. We have been together teaching that course every New Year’s Eve since, alternating between Brisbane and Knoxville. Along the way, all of us, faculty and students, have learned a great deal.

II. Lawyers as Leaders: Transpacific Perspectives

A. Backdrop

Three years before I met the Sarah and Roger Derrington, Buck Lewis\(^5\) and I decided to design and to teach a course about leadership. Buck and I (but mostly Buck) started exploring what other schools were doing. We initiated a conversation with Deborah Rhode at Stanford and researched the programs at Elon, St. Thomas, and Ohio State. A copy of Santa Clara Law Review *Symposium on Leadership Education for Lawyers and Law Students* became a permanent fixture on my desk.\(^6\)

Within a few months Buck had created a library of possible course materials, developed a tentative syllabus, and started lining up guest speakers. Buck and

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I co-taught the course, *Lawyers as Leaders*, for the first time in the fall of 2012.\(^7\) The first cohort of thirty students responded enthusiastically. Several students commented that as a result of the class, and for the first time since starting law school, they felt excited about becoming a lawyer.\(^8\) The course also resonated with alumni. Several expressed an interest in providing financial support. Our class also served as an important supplement to the professional development aspects of the law school’s career services program, student pro bono program, and mentoring program. We quickly recognized the value of increasing the connection and coordination between our efforts and those programs.

So, in 2014, based on the work of a faculty working group, the full faculty voted to establish an Institute for Professional Leadership. The Institute was formally approved by the University in July, 2014.\(^9\) About the same time, we secured a major estate gift to support the

\(^7\) Buck served, and continues to serve each fall, as the Larry Wilks Distinguished Practitioner in Residence at the law school. *George T. Lewis, supra* note 5. Larry Wilks, a friend of both Buck and me, was a giant of a lawyer and leader whose untimely death resulted in a bequest that supported the creation of the leadership program at Tennessee. *See Institute for Professional Leadership: History of the Institute, U. TENN. C. L.*, https://law.utk.edu/programs/leadership/history/ [https://perma.cc/4BXQ-45K3]. In his role as Practitioner in Residence, Buck has been the moving force behind the growth of the leadership program at UT Law.

\(^8\) These recollections can be found in student reflection papers on file with the author.

\(^9\) *Institute for Professional Leadership: History of the Institute, supra* note 7.
Institute and that gift enabled us to raise additional funds for the program.\footnote{See id.}

With that backdrop and foundation, Sarah Derrington and I made the decision to build on our new leadership program and offer a yearly course as a collaboration between our two law schools. We decided we would alternate the course location between Brisbane and Knoxville.

When we first began talking about leadership in the context of legal education, Sarah remarked that “we need to do more than just educate graduates who are capable of doing their jobs; we need to be striving to produce people of influence and impact fifteen and twenty years after they graduate.”\footnote{Email from Sarah Derrington, Australian Law Reform Comm’n, to author (Mar. 9, 2020) (on file with author).} Her aspirational statement helped guide our work in designing the course.

\textbf{B. Getting Started}

The course we envisioned, and ultimately developed, is somewhat unique. Most study-abroad programs are limited to a cohort of students from their home country studying in a foreign country. Many study-abroad programs take place over multiple weeks or months. Our proposed course, in contrast, involves a mixed group of students from two different countries all living together and learning in a very immersive, condensed format.

Our first challenge was to find a time period to offer the course that would work for both law schools. Since we were each located in different hemispheres, our seasons and, as a result school terms, did not align. Our UT summer break coincided with the middle of the UQ winter term, and vice versa. We finally identified a
small two-week window – between Christmas and mid-January – that would work. Students at both schools would have to give up a bit of their summer and winter breaks respectively, but we assumed (correctly) that the timing would not be an impediment to student interest.

As with any successful project, both Dean Derrington and I had to identify critical partners to help make the course possible. Upon her return to Brisbane, Sarah secured financial support for her students from an enthusiastic donor.\(^\text{12}\) She and Roger also found a location for the course, including needed housing, at Emmanuel College.\(^\text{13}\) I recruited Brad Morgan, then-Associate Director of the Institute for Professional Leadership, to help design and teach the course.\(^\text{14}\) Having worked and taught with Brad for several years, I had learned that getting him involved with a project ensured its success.

Before we tackled the course design, perhaps putting the cart before the horse, we all felt the need to come up with a meaningful course name. We wanted something that clearly differentiated the course from the

\(^{12}\) This information has been confirmed by Dean Derrington.

\(^{13}\) Emmanuel College is one of eleven residential colleges within the University Queensland. See generally Our Values Our History, EMMANUEL C., https://www.emmanuel.uq.edu.au/our-values-our-history/ [https://perma.cc/EFL4-FDXF]. At the time Roger Derrington was serving as Deputy Chair of the Council at Emmanuel College. See The Hon Roger Marc Derrington, supra note 3. Emmanuel College continues to serve as an important and very supportive partner as the course enters its fifth year of being offered.

\(^{14}\) Brad Morgan has played a number of important roles at UT Law. He is presently serving as Interim Dean of Students after very successful service as Director of Career Services. Meet the Deans, U. TENN. C. L., https://law.utk.edu/our-college/deans/ [https://perma.cc/89XQ-48WQ].
pre-existing UT course, *Lawyers as Leaders*. We struggled for a few days exchanging ideas via email. Then Sarah, on the long trip back to Brisbane, came up with an elegant and meaningful name - *Leading as Lawyers: Transpacific Perspectives*.

C. The Course

1. Basic Structure

The holidays and the start of the spring semester in Tennessee limited our window to a two-week period that includes the New Year holiday. As a result, we realistically had ten class days with which to work. We scheduled classes from 9 a.m. to 12 noon every day, with sessions on two afternoons for specific leadership exercises. An additional debrief class was scheduled in Brisbane and Knoxville for the respective student groups after the end of the core class.

Consistent with the Emmanuel College tradition, the course kicked off with an opening dinner. The dinner provided a relaxed social opportunity for the students and faculty to get to know each other. We planned a similar closing dinner the last evening of the course.

Recognizing that much of the students’ learning would occur outside of class through discussions and social interaction, we wanted to ensure a significant amount of unscheduled time, especially on weekends. We did, however, schedule several optional field trips to local

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15 Our first year in Brisbane, we also conflicted with the celebration of Boxing Day in Australia. Normally celebrated on December 26th, because the 26th fell on a Saturday, that year Boxing Day was observed on Monday, December 28th. Although most businesses and schools were closed, Emmanuel College graciously accommodated the class and our students.
points of interest, sporting events, and dinners at faculty homes.\textsuperscript{16}

2. Students

Both financial considerations and our desire to maximize student interaction and cohesion, we decided to limit the course to twelve students, six from each school. We also wanted to ensure that the cohorts from each school were equal in size to make it easy to pair American and Australian students.

To ensure access to all students regardless of their available financial resources, both schools decided to subsidize the housing accommodations for each student.\textsuperscript{17} The schools separately selected the participating students based on applications and statements of interest.\textsuperscript{18} In making those selections we looked for, among other things, a demonstrated interest in leadership and a commitment to service.

3. Goals

While our primary objective was to introduce students to basic leadership principles and the value of service through the lens of lawyers, our international collaboration presented some unique possibilities. We wanted to leverage the cross-cultural opportunities to have both American and Australian law students experience and examine the subtleties in styles and

\textsuperscript{16} See infra text and accompanying notes 27–28.
\textsuperscript{17} Students remained responsible for all travel and personal expenses.
\textsuperscript{18} Because law school in Australia is normally an undergraduate program, Sarah recruited students at UQ that were in their penultimate year of studies.
approaches of the two legal systems on either side of the Pacific.

To achieve those broad goals, we identified a fluid set of teaching objectives. Our initial list of objectives was:

1) To develop in students a better understanding of leadership attributes, skills, and styles;
2) To help students understand their own leadership attributes, skills and styles and to develop further those attributes, skills and styles;
3) To provide students with self-leadership strategies and tools to manage stress and maintain well-being;
4) To develop in students a purposeful approach to professional development and career planning;
5) To develop an understanding of the unique way lawyers are called upon to lead; and,
6) To help students understand the importance of the concept of legacy.

Sarah, Brad, and I also shared less clearly defined aspirational goals for the students’ educational experience. For example, we hoped our students would broaden their perspectives and gain a deeper understanding of other people, countries, and cultures. We also hoped our students would become more confident and effective as lawyers functioning in an increasingly

19 A copy of the most recent syllabus is available upon request to blaze@utk.edu.
20 Id.
21 While we, as discussed below, include a number of field trips and comparative presentations, we correctly assumed that most of this learning objective would be achieved through the out-of-class interaction between the students.
globalized profession. Finally, we very much wanted our students to have fun in the process.

4. Classes

We sequenced the classes, based on our teaching objectives, in four phases. First, the class surveyed leadership generally by identifying effective leadership characteristics, including the skills needed to exhibit those characteristics. Second, students began to explore leadership development in more depth through experiential application, with feedback, of specific leadership skills. Third, we examined methods of career planning and professional development. Fourth, we considered the unique opportunities for lawyers provide leadership for positive changes in their profession and communities. We also wanted students to learn, throughout the entire course, about the differences between the Australian and American legal professions, systems of legal education, political systems, and cultures more generally.

In keeping with the immersive, experiential focus of the learning experience, we kept reading assignments to a minimum. All students read Deborah Rhode’s *Lawyers as Leaders* as the basic text.\(^{22}\) We supplemented the text with a few articles from a variety of sources. We also invited several exceptional guest speakers including judges, prominent lawyers, and faculty colleagues with interest and expertise relevant to the particular class or topic.

\(^{22}\) Deborah L. Rhode, *Lawyers as Leaders* (2013) [hereinafter *Lawyers as Leaders*].
Our first class started with an exercise that provided a foundation for later discussions about specific leadership skills. We paired the students – one UT student with one UQ student – and had them interview and then introduce each other. We later used the exercise as a reference point for discussions of active listening, oral presentation, and self-awareness.

Most often leadership is viewed in terms of “traits, processes, skills, and relationships.” So we begin the exploration of leadership by having the students create lists, as a group, of what characteristics and actions effective leaders demonstrate, and what characteristics and actions ineffective leaders demonstrate. The discussion is always robust and, with minor differences, consistently results in an inventory of characteristics and skills that includes self-awareness, integrity, effective communication, empathy, social awareness, vision, and competence.

We then take the list generated and have the students rank, in small groups, the three most important attributes of effective leaders. We conclude the discussion by sharing research that ranks the top attributes of “most admired leaders,” in order, as honest, forward-looking, inspiring, and competent. Focusing on those four attributes, supplemented with additional items from the student generated list, we drill down into the skills

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24 The similarity the lists produced in multiple classes is consistent with the research. See, e.g., LAWYERS AS LEADERS, supra note 22, at 3–4.
necessary to demonstrate those attributes. For example, students regularly identify the skills or actions of communication and transparency as essential to the leadership attribute of honesty.

ii. Leadership Development

Using the discussion of characteristics and skills as a foundation, the students then spend the next two classes learning to develop and to apply specific leadership skills through exercises followed by peer and faculty feedback. This part of the class is loosely divided into two overlapping components: leadership of self and leadership in groups.

With regard to leadership of self, the class first focuses on the critical skill of self-awareness. All the students take the Myers-Briggs Type Indicator\textsuperscript{26} and the VIA Character Strengths Survey\textsuperscript{27} before the course begins. We debrief in class the survey results by engaging in a discussion of potential lessons regarding increased understanding of ourselves and of others. This part of the class finishes with a discussion of methods of obtaining meaningful feedback and the importance of mentors. We then turn to the topics of self-discipline, stress management, and well-being. The discussion is robust and wide ranging, and concludes with a presentation of strategies to increase positive emotion and well-being.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{26} See THE MYERS & BRIGGS FOUNDATION, https://www.myersbriggs.org [https://perma.cc/C8G2-UPUT].
  \item \textsuperscript{27} See VIA INSTITUTE ON CHARACTER, https://www.viacharacter.org [https://perma.cc/FW5R-CJ7S].
  \item \textsuperscript{28} Students are provided with a variety of materials and other resources developed at the Positive Psychology Center at the University of Pennsylvania. See generally PENN ARTS &
\end{itemize}
After a brief discussion of group interaction and dynamics, the students participate in several exercises designed to increase their understanding and skills. First, the students engage in an active listening exercise followed by self, peer, and faculty feedback. Second, the students are divided into teams and plan and execute a group task achievement exercise developed by Brad Morgan and a business school colleague, Dr. Mandyam Srinivasan. Third, the students work on oral presentation skills by making a pitch to the faculty on why they should be hired for a legal position of their choosing.

The final exercise continues through the remainder of the course both in and outside of class. Students, in pairs, are assigned to observe their assigned partner’s interaction with themselves and others with the goal of providing constructive feedback on how that behavior might be improved. Utilizing the Situation–Behavior–Impact (“SBI”) model of feedback, students exchange the feedback SBI’s on the last day of class. The feedback session is a particularly meaningful exercise. The students have told us that the exercise helps them

29 We have used a number of different active listening exercises. All of the exercises have a similar structure: one student interviews and counsels another on a relevant topic, e.g., job choice, with a third student observing and providing feedback.


significantly increase their self-awareness and improve their group interactions by being more observant and purposeful in their behavior.

iii. Career Planning and Professional Development

One of our major goals is to encourage the students think more deeply about the kind of lawyer and leader they want to be. Through a focus on professional planning and development, we push the students to be more intentional about putting their thoughts into action. We also want the students to begin to plan the steps they will need to be successful once they enter the profession in whatever capacity they chose.

My colleague, Brad Morgan, always introduces this part of the class by presenting a dialogue from Alice’s Adventures in Wonderland in which Alice is seeking advice from the Cheshire Cat.

Alice asks the Cat:

“Would you tell me please which way I ought to go from here?”

“That depends a good deal on where you want to get to,” said the Cat.

“I don’t much care where —, “said Alice.

“Then it doesn’t matter which way you go,” said the Cat.

“- so long as I get somewhere,” Alice added as an explanation.
“Oh, you’re sure to do that,” said the Cat, “if you only walk long enough.”  

During this phase of the course, we discuss topics such as mentors, resumes, strategic planning, and credentialing. We also talk about the value of becoming involved in Bar Associations and Law Societies, as well as judicial clerkships. The students also examine the future of the legal profession though readings, guest speakers, and classroom discussion. At the conclusion of the course, students are required to prepare a professional development plan, followed by a meeting with the faculty to provide feedback on their efforts.

iv. Leadership as Lawyers

The last class session examines the role of lawyers as leaders for positive change. Discussion of topics like public service, access to justice, law reform, and community leadership are supplemented with case studies and guest speakers. Most recently, the students have participated in virtual legal clinic, answering online legal questions for people who cannot afford a lawyer through the ABA-supported Free Legal Answers website.

33 We are fortunate to have a wonderful colleague, Ben Barton, who is a thought leader on the topic presented to the class when it is in Knoxville. See, e.g., Benjamin H. Barton, Glass Half Full: The Decline and Rebirth of the Legal Profession (2015).
34 Free Legal Answers, A.B.A, https://www.abafreelegalanswers.org/ [https://perma.cc/K8UV-JKR8]. Free Legal Answers, and its original creation as Tennessee Online Justice, is the brainchild of another incredible colleague, George “Buck” Lewis. See Meeting the Need, U.
As the course concludes, we turn to concept of personal and professional legacy. The goal is to get the students, who are understandably focused almost exclusively on their short-term goals of graduation and gainful employment, to begin to think about their long-term impact on their profession and community. We begin the discussion with an exercise asking the students to identify three significant expenditures of their time that proved worthy, and three that proved unworthy. The vitally important roles of friends, family, new experiences, and helping others are highlighted over and over again. The faculty conclude the conversation by offering our thoughts on our own legacies.

v. Extracurricular Activities

We strongly encourage extracurricular activities to build group cohesion and to foster a better understanding of our respective professions and cultures. But we also understand that, as a matter of leadership development, we should leave most of the planning for out-of-class time to the students themselves. The faculty, however, arrange field trips related to the legal profession, particularly the courts. In both Brisbane and Knoxville, we devote one full afternoon to visit and learn more about our respective state and federal courts, interact with judges, and visit with members of the bar. In Brisbane, we visit both law firms and barristers’ chambers. The visits help the American students better understand the distinction between barristers and solicitors. Giving the students a chance to model a barrister’s wig is always a highlight of the field trip.
The faculty also help organize at least one additional field trip to explore a unique aspect of our respective locations. In Brisbane, we visit the Lone Pine Koala Sanctuary. In Knoxville, we arrange a tour of the extensive athletic facilities of the University of Tennessee and, depending on the winter weather, encourage a visit to the Great Smoky Mountains National Park.

We also try, knowing our students, to provide an optional opportunity to attend local sporting matches and other special events. For example, in 2016, we took advantage of the fact that the Lawyers Cricket World Cup was held in Brisbane contemporaneously with the course. The matches and awards reception provided a great opportunity for the students to interact with lawyers from around the world.36 While in Knoxville, the students always enjoy attending a Lady Vols basketball game.37

vi. Course Conclusion

The course concludes with a closing dinner. While the primary purpose of the dinner is to celebrate the course and each other, the students have two assignments for the evening festivities.

Early in the course, the students are assigned to make a personal coat of arms building on the class


37 Both the Lady Vols games and the athletic facilities tour are due to the gracious support of Joan Cronan, the former Director of Women’s Athletics at UT, and a strong supporter of our leadership program. See Joan Cronan, TENN. SPORTS HALL FAME, http://tshf.net/halloffame/cronan-joan/ [https://perma.cc/HQN6-TK88].
materials, speakers, and discussion. More specifically, we ask them to divide the coat of arms “shield” into four quadrants. The upper left quadrant is for their leadership skills. The upper right quadrant is for their passion. The lower left section is for their key values. And the lower right quadrant is for a particular time they experienced a strong sense of success or competence. We encourage them to be creative in designing and illustrating the contents of each quadrant. Finally, they are asked to craft and place a personal motto at the top of the coat of arms. After dinner, the students present and explain the coat of arms they have crafted. The effort and thought that each student puts into their coat of arms and their presentation is consistently exceptional. The assignment underscores, for the faculty at least, the students’ personal and professional growth during the course.

The second assignment involves the exchange of toasts between the students. During the last class session, students are again paired, UQ students with UT students. The faculty confer to determine the pairing assignments based on our observations of the students during the course. We urge the students to be creative with their toasts. Songs and poems are encouraged. The toasts are always exceptionally well-done - thoughtful, meaningful, and usually a bit humorous. The tradition is a wonderful way for the students to celebrate their shared experiences and bonds of friendship.

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38 We began using this exercise during the third iteration of the course.
III. Lessons Learned

All courses and classes provide great learning opportunities for the teachers. But the unique format, locations, and content of Leading as Lawyers: Transpacific Perspectives has provided a number of invaluable lessons for leadership development work.

A. Immersive Learning

I have helped teach our original leadership class, Lawyers as Leaders, in a twice a week class format for seven years. While each class responds somewhat differently, I am frequently disappointed with lack of depth to the discussions of more personally challenging topics like wellness, work-life balance, gender equality, and diversity. In contrast, the discussion of those topics in Leading as Lawyers: Transpacific Perspectives is almost always, deep, robust and, inspiring.

I attribute the difference between the discussion quality in the two courses to two things. First, the exceptional teaching abilities of my colleagues, Sarah Derrington and Brad Morgan, create a safe space for deeper discussions in Leading as Lawyers. Both Sarah and Brad connect well with every student and both are exceptional listeners. The students feel comfortable opening up and sharing almost immediately.

39 I am aware that the label of “immersive learning” has a specific meaning in the context of learning language and online learning. E.g., Immersive Learning Explained, RACOON GANG, https://raccoongang.com/blog/immersive-learning-explained/ [https://perma.cc/6FPC-VRE7]. I think the same principles that underlie the appropriateness of the label in those contexts support my use here. But cf. THE PRINCESS BRIDE (Act III Communications 1987) (“You keep using that word. I do not think it means what you think it means.”).
Second, and most important, the students are all immersed in the course for two weeks. All twelve students live together, attend class together, eat together, and socialize together. Within the first two days, the trust that develops between the students is obvious in the classroom. The discussion becomes increasingly open and honest, even when dealing with value-laden issues like gender bias in the legal profession and the value of diversity. The conversations about well-being and stress management are much more meaningful because the students are willing to share their concerns, fears, and weaknesses.

The value of the immersive format of the course extends beyond the class sessions. The faculty occasionally drop in on the students during their lunch following class. The discussions we observe are almost always focused on the topics we covered earlier that day in class. Additionally, as students work together to make social plans, they have the opportunity to utilize the leadership and communication skill lessons from class.

The concept is not unique; intersession courses follow a similar model. But the mix of students from two countries, half of whom are in a very new place, seems to make the condensed class format an even more effective learning experience.40

40 The format has proven so successful that another colleague and I have utilized it to teach a course on well-being, Thriving as a Lawyer. While we do not leave campus for two weeks, we structure the course over two weekends in the spring semester. From Friday mid-day through Sunday mid-day, students and faculty are together for class sessions and most meals.
B. Experiential Development of Cultural Competence

For the initial 2015–16 course, we assumed that most of the learning about similarities and differences between the United States and Australia would occur out of class through interaction between the students. We did, however, have a unique resource available. A lawyer in Brisbane had grown up in Knoxville, attended both the University of Tennessee College of Law and the T.C Beirne School of Law, and had worked as a lawyer in both countries. In fact, the joint alumna, Cynthia Sullivan, had been a student of both Sarah Derrington and me during her time at our respective schools. Due to Ms. Sullivan’s availability, we did not have her speak to the students until very late in that first course. The feedback from the students was unanimous – have a comparative information session at the very outset of the class. The students felt strongly that an overview of each country’s legal, political, and economic systems would help facilitate discussions on those issues among the students both in and out of class.

Since the first course, we have always devoted a significant portion of the first class to a comparative informational session on the Australian and American legal professions, legal and political systems, and systems of legal education. A combination of judges, senior lawyers, and junior lawyers present to the class and answer questions. The students are often surprised, as evidenced by their questions and comments, by both

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the differences and the similarities in the cultures, legal professions, and political systems of the two countries. The class helps the students begin to experience what Professor Raquel Aldana refers to as a shift from an ethnocentric to an ethnorelative attitude.

Building on the in-class informational presentations and discussion, the students then experience and discuss various cultural differences throughout the remainder of the course. Together, the students visit each other’s homes, attend cricket, tennis, and basketball events, celebrate the New Year, socialize, party, go to the beach, eat barbeque, try moonshine, and talk about their lives and futures. There are significant individual and shared cultural competency learning outcomes from these experiences and interactions.

For example, in their post-course reflection papers, a number of students have commented in depth about the differences in the communication styles of the

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42 For example, the students ask a great deal about professional distinction between barristers and solicitors in Australia, mandatory voting in Australia, law school as a graduate program in U.S. public ownership of law firms in Australia.

43 E.g., stress of practicing law, work-life balance issues, rapidly changing legal profession in both countries.

44 See Raquel Aldana, Intercultural Legal Sensibility as Transformation, 25 S. CAL. INTERDISC. L.J. 1, 12 (2016). The American students often comment that their Australian counterparts are more informed than the American students about American political issues. Most Australian students have far more international travel experience than the American students as well.

students, particularly between the Australians and Americans. For example, one student wrote:

[The Australians] possess a quiet humility and are careful to listen before speaking. I found that much of their outward demeanor was reflective of their culture. When put in a large group, the American students, myself included, consistently voiced their opinions and emotions. If we were tired, hot, or hungry, the whole group would know. The Australian students, however, kept such observations to themselves. I realized that, in my interactions with any of the Australians, I felt valued. They listened attentively, and they rarely shifted the conversation to themselves.\(^{46}\)

This lesson of conscious attention to the process of communication, and the associated empathy and self-awareness, is essential to effective leadership and lawyering.\(^{47}\) In the process, the same experiences can help students to shed stereotypes and biases.\(^{48}\)

The cross-cultural interaction also helps the students become more adaptive and emotionally resilient.\(^{49}\) One student, for example, thrived in the course despite having lost all his luggage and tearing his

\(^{46}\) Student reflection paper on file with the author.

\(^{47}\) See Bryant, supra note 45, at 72–73 (cross-cultural experiences encourage purposeful attention to communication process).

\(^{48}\) Id. at 76–78.

ACL the first day of class. At the conclusion of the course, he wrote: “I limped away from this course with an appreciation for knowing myself, focusing on the small things, being authentic, not wavering in my morals, and ultimately with an appreciation of the differences among all of us.”

C. Going Where the Class is Ready to Go

As mentioned at the outset of this article, we need to deliberately plan but, at the same time, recognize and be open to emergent opportunities that arise. Thanks to my colleagues, we have utilized that approach in teaching the course with great success.

Brad, Sarah, and I very intentionally plan our course coverage class-by-class. We carefully select the materials, decide on assignments, and outline the topic coverage for every session. But then, using that outline, we meet at the end of each class session to review and rethink our plan for the next day. Brad, Sarah, and I talk about how we might be able to build on that day’s discussion as a foundation for another topic. For example, one class concluded with a discussion of the students’ concerns about their post-graduation futures. Much of the conversation revolved around the students’ concerns about the stress of practicing law. The next day, in response, we started class with a presentation and discussion about work-life balance. Sarah then turned

50 The injury occurred during an Americans vs. Australians game of netball. The Americans prevailed, but only because our polite Australian hosts were reluctant to call too many fouls.

51 Student reflection paper on file with the author.

52 I use the phrase “work-life balance” here because there is a somewhat common understanding of what the topic entails. In
the focus to the unique challenges faced by women lawyers, and the class ended up having a very rich discussion of gender inequality in the profession.

We occasionally do the same thing on the fly during a class session. After our first two or three class sessions, Sarah, Brad, and I learned to interact very effectively with a reasonable understanding of where each of us was headed in the discussion. As a result, the three of us have become more adept at pivoting during discussion on one topic to another related topic based on perceived interest and receptivity of the students. For example, a discussion of barriers to effective leadership might shift to the importance of feedback and mentors, even though coverage of that topic was planned for the professional development class two days later.

While it may sound like we jump around in class, the contrary is true. By going to where the class seems ready to go, we cover the material more cohesively and effectively. Admittedly, the condensed format of the course makes our approach more appropriate, but I strive to achieve greater flexibility in my other classes as well.

D. Teatime

Thanks to Sarah’s foresight, we included the Australian tradition of morning teatime during the first offering of the course in Brisbane. About the middle of the morning session, we would break for tea, coffee, and

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our class we avoid the phrase, noting for the students that work is a subset of life and that balancing the two is conceptually impossible. Instead we refer to “value-based decision making.” See Kelsey Knoer, Thinking Bigger Than Work-Life Balance, A.B.A: Young Lawyers Division (July 31, 2019), https://www.americanbar.org/groups/young_lawyers/projects/no-limits/thinking-bigger-than-work-life-balance/ [https://perma.cc/XQ94-4QG5].
pastries for twenty to thirty minutes. Presumptively a social time, our morning teatimes proved to be an important part of the educational experience. Students and faculty regularly debrief the morning discussion, talk about career goals and planning, and get to know each other better on a personal and professional level. Guest speakers for the day are also invited and readily participate. As a result, the morning breaks reinforce the learning from the morning class session and help maintain a collective sense of energy and commitment for the rest of the class.

Teatime in Australia proved so important, we made sure to replicate teatime – albeit with limited culinary success – in Knoxville.

E. Facilitating vs. Teaching

Teaching leadership development is, for me, far different than teaching a doctrinal course, whether it is criminal law, maritime law, or even pretrial litigation. In my introductory comments to the students in Leading as Lawyers, I emphasize that the students will learn far more from each other than from the faculty. Leadership development necessarily focuses on the unique skills and attributes each student must utilize to be a successful leader. The student learning, as a result, involves an individualized process of self-discovery and development by the student guided by the faculty.

53 Sarah, Brad, and I teach maritime law, criminal law, and pretrial litigation, respectively.
55 Id.
The role of the faculty, we have learned, should be that of a facilitator of the students learning, rather than that of a traditional teacher imparting information and knowledge. “Facilitation is different from teaching in that trainers are usually process guides, and the activity is more experiential, collaborative and less didactic.”

All three of us have adopted a facilitation model for our teaching. After introducing a topic, we immediately ask for student thoughts and ideas on the issue, sharing our knowledge or information only sparingly and as necessary. To introduce leadership principles, for example, we ask the students to identify the characteristics of effective leaders based on their own experience or observation of others. Only when we have completed that discussion, and the students have ranked those characteristics in terms of importance, do we share research into what are recognized as the most important leadership attributes and skills. The step for sharing the research and our knowledge is, most often, simply one of validating the students’ work.

The faculty also have extensive one-on-one interaction with students both in and out of class. While we still function as facilitators of the student learning in those one-on-one settings, our individual interactions with students are more appropriately characterized as coaching and mentoring. Those roles, we have found, continue long after the conclusion of the course.

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57 We all continue to serve as mentors and advisors to many of the students long after the course.
IV. Conclusion

Leading as Lawyers: Transpacific Perspectives has been the highlight of my teaching career. The impact on the students, and me, has been life changing. The program has provided me with a renewed sense of purpose and enthusiasm for my professional role. Teaching alongside Sarah Derrington and Brad Morgan has been inspiring. Working with the students has been a source of hope and excitement about the future. There is an incredibly talented and committed generation of new leaders emerging.

The globalization of our profession and legal education, coupled with the increasing attention to leadership training in law schools,\textsuperscript{58} presents the opportunity for other law schools to provide similar courses and programs. I hope that some of you will consider exploring the idea. We need to work together to develop future lawyer-leaders committed to positive change in our profession and our communities.

\textsuperscript{58} More than forty law schools now report having courses or programs in leadership development. See Law School Leadership Development Programs, BAYLOR U., https://baylor.app.box.com/s/v53753qbp8xdt2xqdh7nvcf4wgn8u4 [https://perma.cc/9EZD-ZEKS].
ARTICLE

WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?

Elizabeth M. Fraley and Leah Witcher Jackson Teague

I. Introduction
II. Leadership Development Requires Training Beyond Analytical and Skills-Based Learning
   A. Distinguishing between Professional Development and Leadership Development
   B. Law Schools Have Been Slow to Promote Professional Development
   C. The Impact of Law School’s Hidden Curriculum is Significant
III. How Can Law Schools More Effectively Train in the Third Apprenticeship?
   A. The Relation between Mission Statements and the Third Apprenticeship
      1. Methodology Used for Study of Mission Statements
      2. Review of Mission Statements that Include Leadership
      3. Review of Mission Statements that Include Leadership Concepts
B. A Commitment to Leadership was Difficult to Discern from a Review of Learning Outcomes

1. Law Schools’ Inexperience with Learning Outcomes

2. Review of Learning Outcomes that Include Leadership

3. Review of Learning Outcomes that Include Leadership Concepts

IV. Updated Review of Leadership Development Offerings in Law Schools Shows Growth in the Area

V. Commitment to Leadership Development Requires Intentionality

VI. Committing to Leadership Development Benefits Law Schools, Law Students, the Legal Profession and Society

VII. Conclusion

I. Introduction

Research into the current generation of law students and young lawyers reflects a desire to be agents for change. Before the JD, a study based on a national survey conducted by Gallup for the Association of American Law Schools (AALS), sought to understand student views on law school, including why they chose to attend law school rather than another professional school.

1 The “public-spirited motivations” found to be top reasons for considering law school are the type of leadership aspirations that draw many to law school.2

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2 See id. at 3; see Martha Minow, Why Do Law School Graduates Become Leaders, HARV. L. BULL., Fall 2012, at 1. (“Many people with aspirations to serve as leaders are drawn to law school.”).
Aspiring undergraduates reported they perceived a J.D. could open a door to careers in public service and allow them to help others while “advocate[ing] for social change.” The study reported 44% believed law school to be “a pathway to a career in politics, government, or public service”; 42% were passionate or had a “high interest in this type of work”; 35% believed they would have “opportunities to be helpful to others” or useful to society/giving back; and 32% wanted to “advocate for social change.” Meaningful numbers of those considering professional school believed law school could be a leadership training ground, but the belief was far from universally held.

Those of us in legal education applaud applicants for their desire to be change agents. We encourage them to apply to our law schools to fulfill that hope. The authors are among a growing number of faculty and administrators who believe law school should prepare students for leadership. After all, lawyers have a long history of serving as leaders. Lawyers such as Thomas Jefferson and Abraham Lincoln led our country at critical junctures. Of those men who have held the office of president of the United States, 57% have been lawyers, while lawyers comprise less than one-half of one percent of the population. Despite the relatively small number of lawyers in America, their influence is significant and

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3 See Gallup & Ass’n of Am. Law Sch., supra note 1, at 43.
4 Id.
5 Id.
6 Id.
7 Id.
9 Deborah L. Rhode, Lawyers as Leaders 1 (2013).
their impact on decisions made every day is important.\textsuperscript{10} Today’s lawyers advocate for causes, counsel businesses, and serve nonprofits. Their effective leadership, through their many roles and responsibilities, advances these causes and enhances these enterprises.

Alexis de Tocqueville recognized in the 1830s that the special training of lawyers as problem solvers and advocates and the role of lawyers as keepers of the rule of law ensured for them “a separate station in society.”\textsuperscript{11} de Tocqueville referred to lawyers as the “American aristocracy” with a duty to protect our democracy.\textsuperscript{12} In the modern era, however, the public appears to have forgotten lawyers’ leadership contributions to American society. While lawyers still serve as heads of government, business, and nonprofit organizations, our influence appears to be declining. For example, the percentage of the members of Congress who are lawyers has gone from nearly 80\% in the mid-19th century to less than 60 percent in the 1960s.\textsuperscript{13} Today that number is approximately 39\% – less than half of what it was a century earlier.\textsuperscript{14} Does having fewer leaders trained and

\begin{thebibliography}{9}
\bibitem{tencer02} Id.
\bibitem{robinson17} Id. at 307.
\bibitem{manning19} \textit{See Jennifer E. Manning, Cong. Research Serv.}, R45583, \textit{Membership of the 116th Congress: A Profile} 3–5 (2019), https://fas.org/sgp/crs/misc/R45583.pdf (Out of 541 members of Congress, including nonvoting delegates from the District of Columbia and U.S. territories, 192, or 35.5\%, reported “law” as their occupation. A total of 214 members, or 39.6 \%, reported having law degrees) [https://perma.cc/LKY2-2SLE].
\end{thebibliography}
experienced in strategic planning, advocacy, and negotiation make a difference?

This decline in congressional leadership positions may simply be emblematic of the disappearing role of lawyers in serving and advocating for ordinary citizens. It also reflects, however, that law schools do need to place a premium on the intentional training and development of leadership skills. How will lawyers learn to be leaders if the skills needed for effective leadership are not part of the law school curriculum? Deborah Rhode noted in her book *Lawyers as Leaders* that “the legal profession attracts a large number of individuals with the ambition and analytic capabilities to be leaders, but frequently fails to develop other qualities that are essential to effectiveness.”15 Attorneys are not given sufficient leadership training, either while in law school or after leaving.

Ben Heineman articulately wrote about the low priority and presence leadership and leadership training have in legal education:

The profession and the law schools should more candidly recognize the importance of leadership and should more directly prepare and inspire young lawyers to seek roles of ultimate responsibility and accountability than they do today. Why do I advance this thesis? First, our society is suffering from a leadership deficit in public, private, and non-profit spheres. The core competencies of law are as good a foundation for broad leadership as other training. Second, the legal profession, by many accounts, is suffering from a crisis of

15 RHODE, *supra* note 9, at 1.
morale, from a disconnect between personal values and professional life. Providing leadership can affirm—and test—our vision and core values. Third, other professional schools—business and public policy—have as their explicit mission the training of leaders for the public, private, and non-profit sectors. The graduates of our law schools are at least as talented as those who enter other professional and graduate schools. And law schools should have a similar vision to enhance the careers of their outstanding students, thus serving society and addressing the values crisis that affects portions of the profession. But today’s law schools are muted or ambivalent about leadership.\(^\text{16}\)

In this article, we discuss in Part I a series of reports spanning the last twenty-plus years which encouraged law schools to expand their educational programming beyond a traditional primary focus on intellectual training. Uniformly, the studies recommended including training to better prepare students for their professional obligations and leadership opportunities. In Parts II and III, we seek to evaluate the mission statements and learning outcomes of law schools to see if leadership can be identified as an articulable goal. Beyond mission statements and learning outcomes, we also provide an update on law schools’ curricular, co-curricular and extra-curricular offerings that include leadership training. As we wrote this article we created a


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table that includes each law school’s mission statement, any learning outcomes that mention leadership development, as well their leadership programs, course and designations. The comprehensive table is too large to attach as an appendix to this article. A link is provided to the table. In Part IV, we comment on a non-exclusive group of schools which seem to highlight their commitment to leadership across the spectrum. What we found was that schools who fail to be intentional in their use of leadership language in these areas do not communicate, internally or externally, a commitment to this important aspect of development. We assert in Part V that a commitment to leadership development efforts in law schools not only benefits law students but also is essential for the future the legal profession and the preservation of the rule of law in our society.

II. Leadership Development Requires Training Beyond Analytical and Skills-Based Learning

What process do law students undergo in their training, and what role does leadership training play in that process? While the study of legal education has been going on since at least the early 1900s, the more recent works include the MacCrate Report of the American Bar Association (ABA) in 1992, Educating Lawyers:

Preparation for the Profession of Law (known as the “Carnegie Report”) in 2007\(^{19}\) which included references to the 2006 Best Practices for Legal Education.\(^{20}\) The Carnegie Report in particular references a “three apprenticeships” model of professional education and applies the apprenticeships to legal education.\(^{21}\)

These three apprenticeships represent steps through which a professional needs to progress for true professional competence. As described by William Sullivan, the first apprenticeship consists of “intellectual training to learn the academic knowledge ease and the capacity to think in ways that are important to the profession” – often described as learning to think like a lawyer.\(^{22}\) The second apprenticeship is skills based – teaching novices the skills and craft know-how that marks expert practitioners of the domain.\(^{23}\) At the time of the Carnegie Report, law schools did not do a particularly good job of teaching usable skills – learning

\(^{21}\) See The Carnegie Report, supra note 19, at 27 (“In these recent Carnegie Foundation studies and reports on professional education, we use the metaphor [of apprenticeships] but extend it to the whole range of imperatives confronting professional education. So we speak of three apprenticeships.”).
\(^{23}\) Id. at 410.
to act like a lawyer – and did not use clinics or simulation learning techniques routinely in the curriculum. More damaging to legal education was the fact that schools also did not integrate learning to think like a lawyer with learning to act like a lawyer. This silo-based approach was not effective in legal education and did not prepare students for practice where one rarely had the luxury of merely sitting around and thinking like a lawyer. “The third apprenticeship is concerned with providing entrants to the field with effective ways to engage and make their own the ethical standards, social roles and responsibilities of the profession, grounded in the profession’s fundamental purposes.” Put another way, at some point, students headed into practice had to learn to BE a lawyer, with all that entails.

The educational methods used by law schools received poor grades in the reports when evaluated on teaching the second and third apprenticeship skills. Law schools did a good job on the first apprenticeship, using case analysis and Socratic method to teach students to think like a lawyer. Schools fared worse on the second apprenticeship of skills-based training. The lowest grade, however, came in teaching the third

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26 Another way to consider the apprenticeships as learning to (1) Think, (2) Act, and (3) Be like a lawyer.
28 See Davis, supra note 20, at 732.
apprenticeship, how to “be” a lawyer with all that the profession would require of them.\textsuperscript{29} The key notion from the Carnegie report was that the existing common core of legal education needed to tie basic components together, “organized by an overarching aim of educating students for the full range of legal competence, including the skills of practice as well as legal analysis and commitment to the defining values of the profession.”\textsuperscript{30} Not only did these defining values of the profession need to be taught, but they needed to be taught, internalized, analyzed and absorbed by students in ways that were not abstract and hypothetical but woven into the fiber of their concept of what being a lawyer meant. Additionally, \textit{Best Practices} reminds legal educators that we should address what is expected of lawyers ‘by the public and by the best traditions of the legal profession.’\textsuperscript{31}

Law schools were not alone in the world of professions where the student at some point had to become a member of the profession. Medical schools and residency programs struggled with the process of helping students and house staff “be” doctors, with all the ethical, moral and practical dilemmas that entailed. “[M]ovements to reclaim professionalism have gained increasing traction in recent decades.”\textsuperscript{32} In the business world, as human capital become more valuable, schools struggled to develop the third apprenticeship for students. As the margins between law and business blur, teaching how to “be” becomes more important.

Many articles have categorized this third apprenticeship in terms of professional formation or

\textsuperscript{29} Sullivan, \textit{supra} note 25, at 334.

\textsuperscript{30} \textit{Id.} at 335.


\textsuperscript{32} Sullivan, \textit{supra} note 25, at 340.
identity, which it certainly encompasses. This article, however, suggests that to teach students what it means to “be” a lawyer requires teaching them to be leaders, consistent with the mores of our profession, and that those leadership concepts should be clearly discernible in the mission statements and educational objectives of law schools.

A. Distinguishing between Professional Development and Leadership Development

It may be worth discussing the difference between professional formation or development and leadership training, as the concepts overlap but are also distinctly different in other ways. The MacCrate Report highlighted professional development as a value of the legal profession, suggesting it should occur “in an employment setting where [the lawyer] can effectively pursue his or her professional and personal goals.” Both professional formation and leadership target individual growth with an eye toward pursuing professional and personal goals. Those writing and teaching leadership agree that a fundamental principle of leadership development is an individual focus sometimes referred to a leadership of self.

33 Id.
34 The MacCrate Report, supra note 18, at 220.
35 See Barry Z. Posner, Leadership Development in Law Schools: Myths, Principles, and Practices, 52 Santa Clara L. Rev. 399, 409 (2019) (noting that “[w]hen difficult, generally unexpected, circumstances emerge, these provide teachable moments to examine the consistency between values and actions (whether at a personal, individual, or organizational level); a key leadership test.” (emphasis added)). See generally Neil Hamilton, Leadership of Self: Each Student Taking
Beyond individual development, formation and identity and examine the interplay within various practice areas and situations but tend to remain focused on the individual’s role. Professional formation tends to focus on ethics, professional responsibility and how those concepts are interwoven into practice. UC Irvine has offered a Legal Profession Course for first year students, designed to “squarely” address the Carnegie challenge to teach the third apprenticeship.\textsuperscript{36} The focus of this well-regarded course, however, is not teaching leadership. Teaching leadership is more than teaching professional identity or formation.\textsuperscript{37} Leadership seeks to


\textsuperscript{36} The first-year Legal Profession course at UC Irvine Law School “teaches students what it is like to practice law in a variety of settings, including large law firms, small law firms and government offices. The course also teaches students about the sociology, psychology, and economics of being a lawyer, while teaching legal ethics from the very beginning.” UC Irvine’s curriculum is “designed to incorporate real-world learning by requiring in-house legal clinic experience of every student . . . working with an actual client or clients under close supervision in an environment designed to encourage reflection on the values and responsibilities of the legal profession.” \textit{Redefining Legal Education}, UCI SCH. L., https://www.law.uci.edu/academics/ [https://perma.cc/PS7J-89UQ].

\textsuperscript{37} This distinction, however, is not universally so. For instance, “[a]mong the legions of leadership books in publication, we found most focus on individual practices and personal character traits. We also observed that many corporate leadership training programs and management consulting firms do the same. But without a team . . . there can be no leadership.” JOCKO WILLINK & LEIF BABIN, EXTREME OWNERSHIP 8 (2015). We would argue that even team leadership stops short of the ultimate leadership goal: leadership of community or leading change for good.
develop lawyers who not only have mastery of self but are inspired to make a difference.\textsuperscript{38} Lawyer leaders not only recognize the professional obligation to serve but also embrace the opportunity to impact individuals, organizations and communities in order to make a positive difference in society.

The ABA Model Code points out the obligation to serve:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice... a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.\textsuperscript{39}

Leadership development efforts in law schools also help law students see the opportunities to use their legal training and law degrees in ways that will enhance their professional performance and positively impact the world around them.

This article suggests that full development as lawyer should incorporate being a lawyer leader, which in itself incorporates leadership of self, leadership of others and leadership of community. Helping students learn to be lawyers involves wiring them into the rich history and traditions of leadership in today's world. Mastering leadership of themselves, learning to lead in a firm, corporate or governmental setting and then taking

\textsuperscript{38} Posner, \textit{supra} note 35, at 400, 404.

\textsuperscript{39} \textit{Model Rules of Prof'l Conduct: Preamble} (2019).
those leadership skills and using them in a larger context of governmental service or otherwise promoting the rule of law and the system of justice are what constitute true mastery of the third apprenticeship.\textsuperscript{40}

\textbf{B. Law Schools Have Been Slow to Promote Professional Development}

While advocates of the third apprenticeship can publish and argue at length for teaching professional development and leadership, there are significant barriers to implementation. The McCrate and Carnegie reports highlight a fundamental barrier: law schools historically have focused on thinking like a lawyer and have been slow, even in the face of admonitions from a variety of sources, to expand that to a skills-based curriculum. There has been poor integration of thinking and doing skills in the classroom, but at least students are exposed to skills training since the ABA mandated experiential learning through what is now Standard 303.\textsuperscript{41} Since “doing” or “acting” skills can be assessed,\textsuperscript{42}

\textsuperscript{40} To address this gap in leadership training for lawyers, sectors of the profession have begun incorporating in a more intentional and systematic approach to leadership. The American Association of Law Schools created a Leadership Section whose stated purpose is to “promote scholarship, teaching and related activities that will help prepare lawyers and law students to serve in leadership roles.” Section on Leadership, ASS’N OF AM. LAW SCH. (2017), https://www.aals.org/sections/list/leadership/ [https://perma.cc/MA7X-KE7A].


\textsuperscript{42} The Carnegie Report highlighted that “[l]aw schools demonstrated an underdeveloped state of assessment as
and now must be assessed to comply with ABA Standard 304, skills training will continue to grow. As additional studies such as the *Foundations for Practice* link the skills to desires of legal employers, those skills serve as a marketable commodity in a tight legal market.

By contrast, the “soft” skills of leadership and professional formation are more difficult to quantify in terms of whether they are being learned and what marketable value they bring. Despite this fact, a specific finding of the Carnegie report noted that failing to provide systematic and effective training in the full range of capacities needed for legal practice neglected developing the ethical and contextual dispositions essential to professional identity. The *Foundations for Practice* report included similar findings. In other words, if we do not put students in the type of positions they actually may face, complete with ethical, moral and financial dilemmas, they will be ill-prepared to respond. If we do not teach them leadership skills, we cannot be surprised when lawyers fail to lead. And if we do not instill leadership as a core professional value for lawyers, they will not believe leadership to be fundamental to the profession.

We must rethink our role as legal educators. We need to produce skilled, analytic, productive professionals who can serve and grow beyond their own bounds. And we need that process to begin in law school.

compared with other professional fields and should pay more attention to the formative as well as the summative uses of assessment in order to enhance student learning.” Sullivan, *supra* note 25, at 335.

If law schools do not provide the needed third-apprenticeship training to achieve these goals, schools deprive their students of the tools to become leaders for change and good. Given the economic pressures on law firms, we can hardly expect leadership training to happen on the job after an individual has supposedly completed his or her legal training.

C. The Impact of Law School’s Hidden Curriculum is Significant

An additional factor in the analysis of how and whether we teach leadership is the role of the hidden curriculum in law school. If law schools are teaching leadership, it is largely through a hidden curriculum, and law schools may actually be discouraging leadership through that hidden curriculum.

The concept of a hidden curriculum contrasts the formal curriculum. The ‘formal’ curriculum consists of the syllabus, readings and lectures in specific subjects and lessons which professional accreditation organizations, law schools, professors and bar examiners boards (for example) design to promote the educational achievements. “The Hidden Curriculum refers to the unwritten rules, values and normative patterns of behavior which students are expected to conform to and learn while in school.” We learn much from the way things look and feel, from spaces that are warm and

44 See generally Philip W. Jackson, Life in Classrooms (1968) (discussing this widespread phenomena which is not unique to legal education).


46 Id.
inviting or cold and forbidding. The hidden curriculum absorbs these messages.

The hidden curriculum can be positive or negative. For example, even in medicine the hidden curriculum can teach respect for authority, respect for others’ opinions, ethical patterns, work ethic, etc.\textsuperscript{47} A negative hidden curriculum can inject stereotyping, bias, or discrimination.\textsuperscript{48} Early elementary education provides good examples of a gender stereotyping hidden curriculum, such as the one below, where a young student altered the assignment to suggest both genders could enjoy toys rather than their being sex-specific.\textsuperscript{49}


\textsuperscript{49} See id. (notably, an updated version of the article, premised on the comments of one user, suggests that this assignment was meant to demonstrate bias, rather than premised on hidden curriculum associated biases, however, the preceding analysis regarding hidden curriculum remains valid).
The hidden curriculum assumes that toys are gender-specific, that boys don’t play with Barbies, and girls don’t play war video games.⁵⁰

The hidden curriculum may be reflected in a school’s ‘ethos’—the character, atmosphere, or climate of the school. That ethos might reflect whether there is an emphasis on academic success versus athletic or artistic success; whether there is an emphasis on equal opportunities for all student, whether there is an emphasis on respect for diversity reflected in not only programming but also attitudes among faculty and staff.⁵¹

In the law school context, the very style of traditional teaching communicates a hidden curriculum. Moss noted that:

in front of a Socratic model large class, one might extol the benefits of team work, brainstorming, collaborative inquiry, effective communication, and problem

⁵⁰ See id.
⁵¹ See id.
WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?
14 Tenn. J.L. & Pol’y 373 (2020)

solving, along with other skills deemed essential not only for resolution dispute but for lawyering in general. However, when doing so from the front of an auditorium-style classroom, where students’ voices are only acknowledged on a limited basis, the message that is conveyed may be at odds with the message that is actually heard.\(^{52}\)

In this format, there seems to be only one leader: the professor. Given the doctrinal emphasis on the first apprenticeship – thinking like a lawyer – this curricular reality conveys clear messages about the merit of various learning experiences across the three years of a legal education program including seriously distorted messages about law and lawyers. By focusing heavily on the first and second apprenticeships, law schools fail to convey additional needed information and skills about being a lawyer rather than merely thinking and doing. This hidden curriculum inaccurately suggests that lawyers mostly analyze and argue appellate law and that other functions are less common or important.\(^{53}\) Lost in the formal curriculum in most schools is curricular direction on being a leader, being a professional, healthy boundaries and lifestyles to battle the depression and substance abuse common to the profession. Since these are not doctrinal topics, are they being addressed by the


hidden curriculum? We maintain that entrusting leadership solely to a hidden curriculum deprives students of needed instruction and experience in the third apprenticeship: being a lawyer.

III. How Can Law Schools More Effectively Train in the Third Apprenticeship?

Given the need for third apprenticeship integration into law school and the desires of students to be forces for good, should law schools more explicitly endorse, both in their mission statements and their learning objectives, leadership as a core value of legal education and the profession? We believe strongly that law schools should, so we undertook to study the current state of leadership as a core value or principle in law school mission statements.

If law schools want to be more intentional about preparing students for leadership, where do they begin? The starting point should be in the law school’s mission statement. Successful change requires identification of core values and an institution that embraces those values. As Sullivan wrote, “successful change requires the wide dispersion of a new, catalytic reframing of the goals of professional preparation, including an articulation of overreaching goals.”54 Presumably, a law school’s mission statement, then, should articulate the overarching goals of the institution.

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54 Sullivan, supra note 25, at 343–44.
A. The Relation between Mission Statements and the Third Apprenticeship

Law schools have a love/hate relationship with mission statements.55 Every law school approved by the American Bar Association (“ABA”) is required to have a mission statement.56 As part of the self-study process, schools are required to create “a statement of the law school’s mission and of its educational objectives in support of that mission.”57 Used as part of the accreditation process, the mission statement should allow the site visit committee as well as the school, its students and prospective students and the profession to understand those core concepts central to the mission of that school and educationally, how that mission is supported.

The Association of American Law Schools (“AALS”) does not require member schools to adopt a mission statement but does expect that member schools

55 Irene Scharf & Vanessa Merton, Your Mission, Should You Choose to Accept It: Taking Law School Mission Statements Seriously, 56 Washburn L.J. 289, 292 (2017) (“Most who have been involved in devising, amending, or employing [mission statements] in their organizations consider them to be useless.”).

56 See Am. Bar Ass’n, Standard 204: Self Study, in Standards and Rules of Procedure for Approval of Law Schools 2018-2019 11 (2019) (“Before each site evaluation visit the law school shall prepare a self study comprised of (a) a completed site evaluation questionnaire, and (b) a law school assessment that includes [ ] a statement of the law school’s mission and of its educational objectives in support of that mission” and an assessment of the “educational quality” of the law school’s program).

57 Id.
will subscribe to a set of “Core Values.”\(^5^8\) The AALS’ Core Values have been described by a recent Association president as intended to provide guidance to member schools. He said:

The core values of AALS emphasize excellent classroom teaching across a rigorous academic curriculum. They focus on the importance of faculty scholarship, academic freedom, and diversity of viewpoints. The core values also establish an expectation that member schools will value faculty governance and instill in our students commitments to justice and to public service in the legal community. All of these objectives are to be supported in an environment free of discrimination and rich in diversity among faculty, staff, and student body. These core values combine to provide an environment where students have opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service. In this environment our students are exposed to the best kinds thinking in a culture of learning from a talented and engaged faculty and from fellow students who enrich the learning environment in and out of the classroom.\(^5^9\)


\(^5^9\) H. Reese Hansen, President, Ass’n of Am. Law Sch., Presidential Address to the House of Representatives
WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?

14 TENN. J.L. & POL’Y 373 (2020)

A law school’s mission statement, then, should identify not only the school’s mission but also its educational objectives in support of that mission.60 While the ABA requires mission statements, not every school has one published61 and most law schools “seldom review the mission statement between accreditations.”62 In other words, a significant number of law schools treat their mission statement either as a required box to check in the accreditation process or a helpful marketing tool to be quoted in glossy recruiting materials. This view of mission statements causes schools to miss a key opportunity to clearly identify their core values and to get significant organizational buy-in to those values.

“A mission statement” is intended to be “a statement of the fundamental reason for an organization’s existence.”63 In broader use, mission statements are recognized as powerful tools within the


60 AM. BAR ASS’N, supra note 56.

61 We reviewed the 202 law schools listed as ABA-accredited law schools at https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ [https://perma.cc/5ZTG-RT6Y]. A list with known mission statements, and leadership learning outcomes and leadership development courses and programming is contained in the table created as a companion to this Article. See Leadership Mission Statements and Learning Outcomes, supra note 17.


63 Id.
organization. Steven Covey, in *The Seven Habits of Highly Effective People*, notes that “[a]n organizational mission statement – one that truly reflects the deep shared vision and values of everyone within that organization – creates a great unity and tremendous commitment. It creates in people’s hearts and minds a frame of reference, a set of criteria or guidelines, by which they will govern themselves.”\(^{64}\) This is true for mission statements only if what gets put on paper (or website) actually reflects a process of introspection, goal setting and clarity of purpose that has then been encapsulated into the language of the mission statement.

Since law schools, like most organizations, have finite resources, those charged with guiding the institution have to make intentional choices about how resources are used and the direction of the particular curriculum. And should these choices not be clearly articulated in the school’s mission statement? “Absent a defined mission and the identification of attendant student and institutional outcomes, a law school lacks focus, and its curriculum becomes a collection of discrete activities without coherence.”\(^{65}\) A law school mission statement, then, should identify both for readers within the institution and for those considering whether to attend the school’s educational objectives and priorities as well as how the school intends to achieve those goals. Where, then, does leadership fit into the frame of reference, criteria or guidelines for schools educating tomorrow’s lawyers?

A recent survey of law school mission statements included a word cloud of the key themes in the

\(^{64}\) Steven Covey, *The Seven Habits of Highly Effective People* 143 (1989).

If we as a profession recognize our heritage as leaders, we need to train the next generation of lawyer leaders, both in how to lead as well as understanding why lawyer leaders are so important to society.

1. Methodology Used for Study of Mission Statements

We undertook to survey and analyze all ABA-accredited law schools’ mission statements to identify the

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68 See id.

69 See id.

70 Id.
extent to which leadership is reflected as a part of the law school’s mission and the education objectives that support the mission.\textsuperscript{71} We first identified those law schools with a discernible mission statement and looked for use of the words “lead,” “leader(s)” and “leadership.” We looked at the context in which those words were used and the message and strength of message those words conveyed about the leadership development of their students as a core value. We evaluated whether the

\textsuperscript{71} We reviewed and included the 202 law schools listed as accredited by the ABA as of August 2019. \textit{List of ABA-Approved Law Schools in Alphabetical Order}, ABA, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order/ [https://perma.cc/2AFD-FPCZ]. This did not include Arizona Summit Law School because of a notice of closure posted on the school’s website. \textit{Welcome to Arizona Summit Law School}, ARIZ. SUMMIT L. SCH., https://www.azsummitlaw.edu/index.php [https://perma.cc/3X5X-P5QN]. Much of the data contained in the table created as a companion to this Article was originally published in a chart by Irene Scharf and Vanessa Merton. \textit{See Table of Law School Mission Statements}, supra note 66. To create this chart, the existing data was verified by checking each school’s mission statement from the provided web address shown on the previous table. If the web address was no longer active or valid, the law school’s home web page was visited and the key words “mission statement” and “mission” were searched. Then the web addresses, where needed, were updated. After locating the mission statement on the law school’s web page, all the statements were checked against the previously published data. If a mission statement was different from the previously published table, those updates were recorded in this chart. Additionally, there were several law schools who did not have a mission statement when the previous table was published. All of those schools were contacted, multiple times via phone, and at the time of this publication, only a few have responded either confirming that their respective school has no mission statement or provided their school’s mission statement.
method of achieving this mission was also part of the mission statement as required by the ABA. Where leadership was not explicitly part of the mission statement, we looked to see if the mission statements identified competencies central to most leadership values and core concepts. We tried to gauge whether the mission statement, even though not using explicit language about leadership, still communicated commitment to leadership as a core value or goal of the institution to those looking at the mission statement. We noted those schools whose mission statements contained neither express nor implicit endorsement of leadership. Because there was not a well-definable way to construct this evaluation, we then went beyond mission statements and looked at the learning outcomes espoused by the schools and whether there were specific leadership classes or programming at the school. In other words, we attempted to evaluate both in messaging and in substance what we could tell as outsiders looking in the overt commitment to teaching leadership as the third apprenticeship.

72 The mission statement should also state the school’s educational objectives in support of that mission. AM. BAR ASS’N, supra note 56.

73 Rhode explains that while effective leadership must vary by context and situations, “certain competencies are central” to most all leadership positions. She focuses on five such core capabilities: (1) individual and group decision-making, (2) influence (i.e., strategies that motivate followers), (3) fostering innovation and managing change, (4) conflict management (how to negotiate, mediate, and resolve disputes), and (5) communication skills. RHODE, supra, note 9, at 4, 40–81.
2. Review of Mission Statements that Include Leadership

Explicit use of “lead,” “leader,” or “leadership” terminology seemed an appropriate place to begin the inquiry, but a deeper reading of the mission statements showed significant variability in whether the word choice conveyed the role of leadership development for their students as a part of the mission or core values of the institution.

We reviewed 201 ABA-accredited law schools and found 91 with mission statements that specifically used the words “lead,” “leader(s),” or “leadership.” The table created as a companion to this Article is a chart of 201 ABA accredited that includes a column with the mission statement that are available. In the mission statement column, the leadership words are bolded. A closer examination of the mission statements reveals that 27 law schools use a leadership word in reference to the law school’s reputation or standing in some respect, not in reference to a desire to enable or train their students in leadership. For example, Elon aspires to “[b]e a national leader in examining and addressing opportunities and problems in the legal profession and legal education through research, publish service and innovation,” focusing its leadership goals on the institution rather than its students.

The 64 law schools that use a leadership word in reference to their students differed significantly in how the words were used and whether the words captured core values or offered much guidance in the educational

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74 See Leadership Mission Statements and Learning Outcomes, supra note 17.

[402]
objectives that supported that mission. Several of the statements used leader or leadership without those words comprising a significant part of the mission statement. For example, Case Western indicates that its “campaign for support will continue to attract high-quality students with outstanding leadership potential . . .” but seems to limit its interest in students who already arrive with leadership potential rather espousing a focus on developing leaders or leadership qualities during law school. Appalachian notes that many of their graduates “remain in the region . . . and serve as . . . community leaders.” Beyond that, however, the mission statement is silent on whether the school plays a role (and how) in those alumni becoming community leaders.

The University of Missouri states it is a “national leader in the field of dispute resolution” and that it “seeks to graduate well-rounded lawyers . . . ready to be leaders in promoting justice,” a fairly narrow view of leadership in the mission statement context. Moreover, the statement is purely aspirational in terms of seeing to graduate students who are ready to lead. Ave Maria School of Law “graduates are equipped for leading positions in law firms, corporate legal offices, the

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76 See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 16 (synthesizing Case Western’s mission statement).
78 See id.
80 Id.

[403]
judiciary and . . . government” but the mission statement offers no information about how that process happens. The mission of the University of Baltimore School of Law is “providing the region with highly educated leaders who make distinctive contributions to the broader community.” Their vision is “[t]o be the premier regional university for career advancement, where leaders grow, thrive and learn to apply their skills for solving local and global challenges.” “New York Law School “creates a bridge from scholarship and service to leadership and practice.”

Wayne State “trains the next generation of lawyers, advocates and leaders” which may well be true but does not connect that as a goal or value of the institution as opposed to a fact or by-product of going to school there. Emory “cultivate[s] leaders who serve the community through roles in the judiciary, government, legal education, public interest law, corporations and law firms;” whether those roles require different training or how those leaders get cultivated is not disclosed.

82 See id.
84 Id.
86 See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 116 (for Wayne State’s mission statement).
WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?

14 TENN. J.L. & POL’Y 373 (2020)

Other schools used express leadership language and provided some information about the educational objectives to achieve that goal. Concordia “provides an experiential legal education that integrates the knowledge, skills, and values necessary for our graduates to become engaged servant leaders.”

The next tier of mission statements provided more depth, both about the role of leadership and how the school’s mission and leadership values get communicated to the students. UCLA seek[s] to be the model publicly-supported law school in the nation, devoted not just to serving the interests of our own students, faculty, and alumni, but also the needs of the legal profession and community at large . . . best reflected in the school’s commitment to providing our students with the most sophisticated interdisciplinary education imaginable, while at the same time instilling within them a deep understanding of their obligations to society as future leaders in the legal, business and political worlds.”

Capital University Law School’s entire mission statement is that it “offers dedicated students the intellectual, ethical and practical foundation to become successful lawyers and leaders.” The University of Arkansas “is dedicated to producing students who are

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89 See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 79 (for UCLA’s ongoing mission statement).
prepared to contribute to their community.”

It prepares students to be “leaders in their communities,” and identifies that this objective (among others) “can best be realized by a talented and dedicated full-time faculty working in partnership with an interested and involved bench and bar.” Arizona identifies a couple of ways it “trains ethical and effective lawyers and leaders,” including by providing an “intensive, individualized learning experience” and by engaging the “imagination, participation and support of our alumni, friends and the broader university community.”

Finally, a small subset of schools not only endorsed leadership as a core value but were fairly explicit in how that training took place. Duke’s mission statement notes that its commitments to leadership and other core values are “memorialized in the Duke Blueprint to LEAD, a set of principles for leadership growth that informs the development of committed, ethical lawyers, well-equipped for the 21st century.” The idea of a blueprint for leadership embodying the core principles seems a very effective way to communicate Duke’s views and goals vis a vis leadership. Columbia notes that its “mission of teaching and research serves

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93 See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 76 (for Arizona’s mission statement).
the world at large and instills in our students a cosmopolitan worldview that prepares them to be exceptionally capable, ethical and resourceful leaders. Northwestern’s mission statement identifies that its strategic plan “Plan 2008: Preparing Great Leaders for the Changing World” not only identifies core values related to leadership but also that there is an articulated plan for how those goals are accomplished. Maryland, “[t]hrough excellent teaching in both classroom and clinical settings...seeks to prepare our students for productive leadership and professional roles in the law, public service, business and government.” The mission statement nicely articulates robust methodology and core values.

Baylor’s mission statement explains:
The obligation to develop students prepared for professional leadership also mandates that Baylor Law expose students to the history, traditions, and values of the legal profession. Among these values is a commitment to public service and leadership within one's community and profession, a commitment to ensuring meaningful public access to our system of justice, and respect for and

96 See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 48–49 (for Northwestern’s mission statement).

[407]
adherence to the ethical standards of the profession.
Perhaps the most fundamental value in a profession dedicated to service of clients, however, is the value of attaining and maintaining competence in one’s field of practice. Meeting the obligation of preparing students to assume their responsibilities within an honorable profession therefore is the principal mission of Baylor Law.98

The impression left after reading these mission statements is that there is a clear and articulable vision and commitment to training law students as leaders, endorsing leadership as a core value of the institution and with, in many instances, a specific and written plan for leadership development.

3. Review of Mission Statements that Include Leadership Concepts

Recognizing that leadership qualities could comprise part of a school’s core values and mission statement without using specific language, we attempted to analysis and categorize mission statements based upon Rhode’s five characteristics of leadership.99 As Professor Rhode noted, the “most well documented characteristic cluster in five categories.”100 Those categories are “values (such as integrity, honesty, trust and an ethic of service)”; “personal skills (such as self-
awareness, self-control and self-direction); “interpersonal skills (such as social awareness, empathy, persuasion and conflict management); “vision (such as forward-looking and inspirational); and “technical competence (such as knowledge, preparation and judgment).”\textsuperscript{101} While the characteristics were well recognized, the results were fairly disappointing in terms of the clarity of purpose when other language or attributes were used. First, when the mission statements did not use explicit language about leadership, analyzing whether a characteristic or language in the mission statement actually could be imputed to leadership as a core value as opposed to expressing a different value. Technical skills like knowledge and preparation are not specific to the third apprenticeship; it is part and parcel of thinking like a lawyer and “doing” like a lawyer. Persuasion is a lawyerly skill but again, not unique to leadership. This overlap in other areas made it difficult to attribute developing these characteristics to leadership as a goal. Second, the characteristics of leadership could not readily be searched in a statistically significant way or to get consistent and reproducible results. At the end of these efforts, what we learned was that leadership has to be identified specifically to have much utility or meaning in a mission statement.

Some examples illuminate the difficulty in imputing leadership as part of a given school’s mission. The language “[p]repare students to anticipate and adapt to future developments in the law” and to “[e]ngage in ongoing self-assessment to ensure that the institution is

\textsuperscript{101} Id.
meeting its stated goals”102 could be consistent with “vision” as a leadership characteristic, but it could also be consistent with a wide variety of other core values and goals. Similarly, the statement “[c]reate and foster ideas and knowledge to advance and transform the law and our society”103 is consistent with leadership but is consistent with a tremendous range of other goals as well.

When evaluating whether mission statements identify “values,” the vast majority aspire to the type of values Rhode ascribes as traits of leadership: “teaches and reinforces the ethical core of good lawyering, the values of professionalism and service”;104 “we seek to train lawyers of high intellectual and practical ability who are committed to ethical practice”;105 “professional values that they need to excel in a diverse and dynamic world”;106 “whose aim, guided by transcendent values, is to develop lawyers who possess moral conviction”;107 “to provide an education that is spiritually strengthening, intellectually enlarging, and character building”;108 “prepare [students] for their roles as competent and

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ethical members of the legal profession”,\textsuperscript{109} and “train[] students to become excellent lawyers with a high degree of professional skill and a special sensitivity to ethical and moral concerns.”\textsuperscript{110} Seventy-one of the 201 law schools had mission statements that referred to values, but they could not universally be identified as traits of leadership.\textsuperscript{111} Commitment to an ethical practice of law is not in and of itself a leadership trait. The picture was compounded by the fact that several of the schools linked the values in their mission statement to the religious

\textsuperscript{109} See Leadership Mission Statements and Learning Outcomes, supra note 17; see also Table of Law School Mission Statements, supra note 66, at 24 (for Faulkner’s mission statement).


\textsuperscript{111} See generally Leadership Mission Statements and Learning Outcomes, supra note17; Table of Law School Mission Statements, supra note 66.
tradition associated with their law school, a geographic identification, or an affiliation with race or ethnicity.

B. A Commitment to Leadership was Difficult to Discern from a Review of Learning Outcomes

After reviewing the mission statements for language about leadership and leaders, we next attempted to evaluate both in messaging and in substance what we could tell as outsiders looking in about the overt commitment to teaching leadership. We

112 See Leadership Mission Statements and Learning Outcomes, supra note 17 (for mission statements belonging to: Ave Maria, Baylor, Belmont, Boston College, Brigham Young, Catholic University, Concordia University, Dayton, Detroit Mercy, Duquesne, Faulkner, Georgetown, Gonzaga, Liberty, Loyola – Chicago, Loyola-Los Angeles-Marymont, Loyola-New Orleans, Marquette, Mercer University, Mississippi College, Notre Dame, Pepperdine, Regent University, Saint Louis, San Francisco, St. Mary’s, St. Thomas-Florida, St. Thomas-Minnesota, Touro, and Villanova); see also Table of Law School Mission Statements, supra note 66, at 4–5, 6–7, 9, 10, 16, 22, 24, 30, 35, 37–38, 38, 38–39, 39, 41–42, 49, 55, 58, 64, 64–65, 72, 83, 84, 102, 104.

113 See Leadership Mission Statements and Learning Outcomes, supra note 17 (for mission statements belonging to: Appalachian, Charleston, Florida International University, Hawai, Iowa, Maine, Memphis, Nebraska, New Mexico, North Dakota, South Dakota, Southern University, Utah, and West Virginia); see also Table of Law School Mission Statements, supra note 66, at 3, 85, 96–97, 98–99, 99–100.

114 See Leadership Mission Statements and Learning Outcomes, supra note 17 (for mission statements belonging to: Atlanta’s John Marshall, Barry, CUNY, District of Columbia, Howard, North Carolina Central, North Texas, and Southern University, Thurgood Marshall School of Law, and Western New England School of Law); see also Table of Law School Mission Statements, supra note 66, at 4, 6, 32, 44, 106–07.
began our study by reviewing the published learning outcomes of law schools.

1. Law Schools’ Inexperience with Learning Outcomes

Identifying and publishing learning objectives is a new phenomenon in legal education with law schools laboring to create, implement and then assess them as a now mandatory part of the ABA accreditation process. Ultimately, learning objectives should reflect the school’s mission statement, but how those outcomes are stated and then measured continues to be a challenge. Recognizing that leadership skills likely will be included in the learning outcomes for schools committed to leadership development, we also attempted to evaluate law school’s learning outcomes as they relate to teaching leadership.

In 2014, the American Bar Association amended the ABA Standards and Rules of Procedure for Approval of Law Schools to include Standard 302 which for the first time required American law schools to establish and publish learning objectives as follows:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

(a) Knowledge and understanding of substantive and procedural law;
(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.\textsuperscript{115}

Law schools are instructed to formulate learning outcomes that are “clear and concise statements of knowledge that the students are expected to acquire, skills students are expected to develop, and values that they are expected to understand and integrate into their professional lives.”\textsuperscript{116} The guiding principles confirm that schools are not required to ensure “that every student achieve each outcome.”\textsuperscript{117} With that said, the importance of the learning outcomes to the “mission” of a law school is also emphasized in the guidance from the ABA. “The outcomes should identify the desired knowledge, skills, and values that a school believes that its students should master.”\textsuperscript{118}

Neil W. Hamilton, Holloran Professor of Law and Founding Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law, along with his colleague, Professor Jerry Organ, created a website to gather and study the learning outcomes developed by law schools in compliance with ABA Standard 302.\textsuperscript{119}

\textsuperscript{115} \textit{Managing Director’s Guidance Memo, Standards 301, 302, 314 and 315} 1, 4, A.B.A. SEC. ON LEGAL EDUC. \& ADMISSIONS TO Bar (June 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.pdf [https://perma.cc/V4X8-HHU2] [hereinafter \textit{Managing Director’s Guidance Memo}].

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{See id. at 3.}

\textsuperscript{118} \textit{Id. at 4.}

This ongoing project to collect and study the learning outcomes for all American law schools serves to create a repository of learning outcomes and derive knowledge from them. As law schools gain experience with learning outcomes and competency-based education, schools likely will modify their outcomes to ensure they can assess them. We believe that as law schools engage in future strategic review of their programs, learning outcomes likely will be realigned to more accurately reflect their mission statements or mission statements will be modified to more accurately describe what they seek to assess.

The Holloran Center database for law school learning outcomes includes an index of law schools by topics. Through that database and our own search of websites, we are aware of only thirteen law schools that

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a.cc/UC98-GJZZ [hereinafter Learning Outcomes Database]. “The Holloran Center’s mission is to provide innovative interdisciplinary research, curriculum development and programs focusing holistically on the formation of both students and practicing professionals into ethical leaders in their communities.” Holloran Center Mission, U. ST. THOMAS SCH. L, https://www.stthomas.edu/hollorancenter/about/mission/ [https://perma.cc/4EV2-WKVU].

120 When last reviewed on September 9, 2019, the Holloran Center Learning Outcomes database included learning outcomes available to them in August 2018. See Learning Outcomes Database, supra note 118. Eleven schools were listed with leadership as an outcome. See Holloran Center: Learning Outcomes 302(c) and (d), U. ST. THOMAS SCH. L, https://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes302c/ [https://perma.cc/YYZ8-2UAT]. Baylor’s learning outcomes were not included in the database, but were furnished to the Holloran Center database after that time by the authors of this article.
mention “lead” or “leadership” in their learning outcomes. Just as some mission statements were not overt in their language about leadership, a review of other schools’ learning outcomes reveals aspects of leadership development for their students without being intentional in their language. We first discuss the learning outcomes with specific leadership language and then describe language from other learning outcomes that ascribe to the type of values Rhode ascribes as traits of leadership as discussed above.

2. Review of Learning Outcomes that Include Leadership

The majority of schools that specifically mention leadership in a learning outcome lists it as an ABA Standard 302(d) professional skill. For example, Virginia expects students to “develop professional skills, such as leadership, collaboration, and advocacy, and foster a commitment to public service through extracurricular activities.” “Villanova University Charles Widger School of Law recognizes the need to educate students holistically, fostering . . . a portfolio of metacognitive skills (including leadership, determination, self-awareness, and relationship building).” Specifically, in Learning Outcome 6.3, Villanova associates leadership with teamwork by expecting graduates to “work as part of a professional team, demonstrating leadership,

121 See id.
collaboration, and conflict-resolution skills.”

Indiana University Robert H. McKinney School of Law has a similar association of leadership with teamwork. University of Nevada – Las Vegas similarly lists leadership as an interpersonal perspective their graduates should be able to demonstrate along with “[e]motionally intelligent engagement, team building, collaboration, [and] cooperation.”

As the introduction to its learning outcomes, Chicago describes its program as “designed to train superb lawyers who will be leaders in all parts of the profession.”

Texas Tech School of Law has a goal to “[e]mpower students to be community leaders, agents of needed reform and change, and exemplars of ethical conflict resolution.”

Hawaii wants to “enable them to provide leadership.” Loyola University Chicago’s curriculum will “[p]repare[] [L]oyola [s]tudents to be

124 Id.

125 See Mission Statement, IND. U. ROBERT H. MCKINNEY SCH. L., https://mckinneylaw.iu.edu/about/administration/mission-statement.html [https://perma.cc/CWM5-6CM4] (stating that one educational objective is that a graduate will “[s]erve as a leader or contributing team member in professional settings . . . ”).


accomplished and ethical leaders in the legal profession and the larger community.”

Four schools focus not on the act of leadership or the “doing” or “being,” but instead on developing understanding of the leadership roles that lawyers are expected to play in society. Southwestern wants its students “to appreciate the role of the legal profession in fostering justice and diversity through leadership, public service, and community involvement.” Appalachian expects its graduates to “develop and embrace a sense of civic responsibility and leadership...” Baylor wants its graduates to “understand lawyers’ obligation to provide service and leadership to clients, courts, the profession, one’s community and the public.” Kansas expects its students to “recognize service obligations and opportunities for service and leadership.” Southwestern students are expected “to appreciate the role of the legal profession in fostering justice and

diversity through leadership, public service, and community involvement.”  

3. Review of Learning Outcomes that Include Leadership Concepts

In looking for indication of leadership development as a learning outcome, we reviewed those associated with ABA Standards 302(c) and (d) which address competency in “(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.”  

We again used the Holloran Center Learning Outcomes database.

As part of the description for the listing of learning outcomes related to ABA Standard 302(d), the Holloran Center adds, “[t]his includes some ‘other professional skills’ associated with professional and ethical responsibilities such as cultural competence, integrity, diligence, self-directedness, teamwork, etc.”

These “other professional skills” fall within Deborah Rhode’s characteristics of leadership so we limited our review to learning outcomes published in the Holloran Learning Outcomes Database listed as learning outcomes in compliance with ABA Standard 302(d).

As with mission statements, we attempted to analyze and categorize mission statements based upon Rhode’s five characteristics of leadership and focusing primarily on “values (such as integrity, honesty, trust and an ethic of service)”; “personal skills (such as self-

135 Sw. Learning Outcomes, supra note 131.
136 Managing Director’s Guidance Memo, supra note 115, at 1.
137 Learning Outcomes Database, supra note 119.
awareness, self-control and self-direction); “interpersonal skills (such as social awareness, empathy, persuasion and conflict management); “vision (such as forward-looking and inspirational);” and ignoring “technical competence.”

The results were perhaps more disappointing than with the review of missions statements and again what we learned was that leadership has to be identified specifically to have much utility or meaning in a mission statement or a learning outcome. Here are a few examples:

- American University Washington College of Law: “Professionalism and ethics (including integrity, community involvement, promotion of the public interest, commitment to service, networking, entrepreneurship and business development).”

- University of Massachusetts School of Law: PC3.3.1: “Graduates will understand their role as legal professionals as a form of service to others that transcends their personal interest.”

- Illinois College of Law: “Demonstrating an understanding of lawyers’ distinctive role in society and how participation in public service and pro bono representation fulfills

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138 RHODE, supra note 9, at 4.
their responsibility to contribute to society.”

- University of St. Thomas School of Law Learning Outcome 1: “Graduates will demonstrate an understanding of their professional and ethical responsibilities in serving clients, the profession, and society. Whether working in law, business, government, or the non-profit sector, each graduate will be able to describe his or her evolving professional identity, which is grounded in a moral core, includes a commitment to self-directed professional learning, and reflects a concern for the disadvantaged and those who lack access to justice.”

- University of St. Thomas School of Law Learning Outcome 6: “Graduates will demonstrate competence in initiating and sustaining professional relationships and working with others toward common goals. Graduates will also demonstrate competence in interacting effectively with people across cultural differences.”

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143 Id.
IV. Updated Review of Leadership Development Offerings in Law Schools Shows Growth in the area

Some law schools no longer assume their students will naturally become leaders. As described in Training Lawyers for Leadership, some law schools acknowledge the need for, and now offer, leadership courses or programs. This trend represents a sea change: ten years ago, the number of leadership courses in American law schools could be counted on one hand. The steadily increasing number of leadership courses has been aided by a new section on Leadership within the American Association of Law Schools. The Section on Leadership’s mission seeks “to promote scholarship, teaching, and related activities that will help prepare lawyers and law students to serve in leadership roles.”

The table created as a companion to this Article lists known leadership development programs and leadership courses at the 201 ABA accredited law schools. This chart contains the information gathered for the Training Lawyers for Leadership article and published in 2018. The search was conducted by looking for courses and programs that had “lead” or

145 Id. at 650–56.
146 Id. at 650.
147 See id. at 651–54.
148 See Section on Leadership, supra note 40.
149 See generally Leadership Mission Statements and Learning Outcomes, supra note 17; Table of Law School Mission Statements, supra note 66.
150 Teague, supra note 143, at 665–72.
“leadership” in the title or in the description. In that article, 37 law schools were listed with a program or course on leadership. Since that article, professors and deans have reached out to report what they are doing in the area of leadership development for their students and additional searches of each law school’s website continued to uncover information about existing or new programming. As a result, the table created as a companion to this Article contains 85 law schools with at least one leadership development program, course or designation for their students.151 This significant increase does not necessarily represent a tidal wave of new courses and programming in the area, but rather highlights the lack of attention paid to this important topic in the past.

The table created as a companion to this Article includes the following information: (1) law school name; (2) mission statement (with leadership words in bold); (3) leadership development programs; (4) any leadership certificate or designation for students; (5) course(s) with leadership development as a significant component of the program, at least based on the description.152 To the best of our knowledge, the majority of the programs and courses were created in the last six to seven years. Efforts will continue to chronicle the progress and growth of this movement.

In addition to the schools listed in the table created as a companion to this Article,153 we are aware of faculty at other law schools who believe that developing

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151 See generally Leadership Mission Statements and Learning Outcomes, supra note 17; Table of Law School Mission Statements, supra note 66.
152 See generally Leadership Mission Statements and Learning Outcomes, supra note 17.
153 See generally id.
leadership skills is as important to their students’ future success as equipping them with the analytical skills viewed as fundamental to legal education. Implementing this commitment has been hampered by barriers which prevent the creation of leadership courses or programs at some schools. These barriers include lack of support by doctrinal faculty who continue to view the first apprenticeship as the foundation for law school education; skepticism that leadership could or should be taught in a classroom setting; and concern about whether a given faculty member has sufficient qualifications to teach leadership.\textsuperscript{154} The new Leadership Section of the American Association of Law Schools plans to address such concerns by promoting an understanding of the leadership skills that can be taught and enhanced in a law school environment.\textsuperscript{155} By sharing resources and providing training and support for those who have an interest in teaching leadership courses, the new section will facilitate the creation of programs and courses at other law schools.

Where teaching a separate leadership course is not yet feasible, some professors are likely incorporating leadership development concepts in courses, clinics and programs where the focus is not primarily leadership development. For example, at Pitt Law, Professor Michael Madison, through the Innovation Practice Institute that he directs, offers an annual short leadership course.\textsuperscript{156} The Leadership and Innovation Forum meets once a week to provide leadership development programming for all interested students, graduates, faculty and staff.\textsuperscript{157} The forum is free but does

\begin{footnotesize}
\textsuperscript{154} Teague, supra note 144, at 652.
\textsuperscript{155} See Section on Leadership, supra note 40.
\textsuperscript{156} The Leadership and Innovation Forum, MADISONIAN, http://madisonian.net/leadership/ [https://perma.cc/AZS9-PV2D].
\textsuperscript{157} Id.
\end{footnotesize}
WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?
14 TENN. J.L. & POL’Y 373 (2020)

have required readings and work and the students do not receive any course credit.¹⁵⁸

Clinical experiences, as well as other co-curricular and extra-curricular activities, also provide fertile ground for leadership training, even though leadership development is not the primary purpose of the clinic.¹⁵⁹ New efforts by individuals and the AALS Leadership Section to develop resources will include modules and exercises that can be utilized in a variety of courses, clinics and programs.¹⁶⁰

V. Commitment to Leadership Development Requires Intentionality

If a law school fully embraces the benefit of intentionality when it comes to teaching leadership values and skills, consistent messaging should be expected. From their guiding documents (mission statements, core values and learning outcomes) students should see and hear that developing leadership characteristics and values and honing leadership skills is important to their future success as a positive influencer in society. Opportunities through courses and programs should be prevalent or at least discoverable in its curricular and extra-curricular offerings. Only a handful of law schools have consistent messaging to students that they need to be aware of lawyers’ obligation and opportunities as leaders and they need to be prepared to assume those roles. We then reviewed in combination the law school mission statements, learning outcomes and

¹⁵⁸ Id.
¹⁶⁰ See Teague, supra note 144, at 651–54.
curricular and extra-curricular offerings to determine which law schools weave leadership development into the fiber of their teaching and training of their law students. Searching for law schools whose mission statements, learning outcomes, program descriptions and course catalogs include specific mention of leadership yields only a few law schools. Recognizing that we are still in the process of discovering what law schools are actually doing (now that attention is being brought to this subject), we will broaden our discussion in this section to law schools with leadership focus in most of the categories in the table created as a companion to this Article.161

The University of Virginia School of Law is one of only two law schools with leadership components listed in all 5 categories in the table created as a companion to this Article.162 Virginia’s mission statement notes that it was founded in 1819 by one of the country’s founding leaders and includes a dedication to instilling in their students “a commitment to leadership, integrity and community service.”163 Virginia created a learning outcome that “[s]tudents should be able to develop professional skills, such as leadership, collaboration, and advocacy, and foster a commitment to public service through extracurricular activities, such as involvement in student organizations, participation in moot courts and academic journals, and engagement with pro bono service.”164 Virginia has both a leadership development program, “the Tri-Sector Leadership Fellows Program,”

161 See Leadership Mission Statements and Learning Outcomes, supra note 17.
162 See id.
164 Id.
and it offers noncredit leadership workshops. The Tri-Sector Program, developed in 2014, identifies eight third-year law students and eight students from each of the Darden School of Business, and Frank Batten School of Leadership and Public Policy who meet with guest speakers. The guest speakers guide the students through discussions about leadership and decision-making from a “tri-sector approach” in which private, public, and social institutions working together to address complex issues.

The other law school including leadership development across all five categories is Baylor Law. We recognize it may seem as if we identified these particular categories to highlight our program. That was not our motivation or our methodology. One of the objectives of this article is to invite, and hopefully ignite, conversation about the “how” and “what” of leadership development. Given the relative newness of leadership training as a part of law school curricula, we felt it important to identify concrete characteristics and programming schools looking to develop leadership programs could use as a base. We hope to encourage those with leadership development programming to share their experience and approach so that all of our efforts are increased and enhanced for the sake of our profession and society.

At Baylor Law, we have been thinking about leadership development as part of our training. This was driven in no small part by our awareness of the many and varied leadership roles our alumni assumed during their careers. We took that awareness and sought to be more

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166 Id.
167 Id.
purposeful and effective in providing knowledge, skills-training and experiences during law school to better equip students for those leadership roles. In approximately 2013, we implemented specific programming directing students to seek opportunities for impact and influence in their communities. At Baylor Law, our mission statement, our learning outcomes and our marketing communicate our commitment to developing lawyers who are prepared to lead. The Baylor Law website announces our credo: “Baylor Lawyers. Ready to practice. Prepared to lead.”\textsuperscript{168}

Baylor Law’s mission statement recognizes that as a professional school, we “ha[ve] a particular obligation to develop students who have the character, maturity, skills, and values needed to assume leadership positions...”\textsuperscript{169} Our learning outcomes include an expectation that all graduates will “understand lawyers’ obligations to provide service and leadership to clients, courts, the profession, one’s community and the public.”\textsuperscript{170} We begin conversations about the role of lawyers as leaders at orientation, and we carry that training throughout their law school experience in the required Professional Development Program and our infamous third-year, rigorous and required Practice Court Program.\textsuperscript{171} Students can augment their training through an elective course and Leadership Development Program which can lead to a designation at graduation

as a Leadership Fellow.\textsuperscript{172} A number of faculty and staff are involved in the students’ journey of self-discovery and growth, moving to what Lou Billions, former Dean of the University of Cincinnati College of Law, refers to as the whole-enterprise or whole-building approach.\textsuperscript{173} With this approach, everyone in the building takes a vested interest in the professional development and personal growth of our students to move them from novice law students to mature lawyer-leaders.

While not covering all five categories, several schools have adopted a comprehensive approach to leadership training. New York University Law takes a similar whole enterprise approach. “At NYU Law, leadership is more than a buzzword; it’s a mindset that infuses the entire Law School experience. As soon as students arrive on campus, we begin providing opportunities for them to develop their leadership capacity and preparing them to be leaders in their chosen fields.”\textsuperscript{174} The NYU first-year \textit{Lawyering} program takes students on a journey through their coursework to learn “what it means to be a leader.”\textsuperscript{175} NYU supplements their leadership training with elective courses and programs.\textsuperscript{176}

\textsuperscript{173} Louis D. Bilionis, Presentation at Holloran Center Professional Development Workshop, Minneapolis, MN (June 30, 2019).
\textsuperscript{174} \textit{Leadership Mindset}, N.Y. U. SCH. L., https://www.law.nyu.edu/about/leadership-mindset [https://perma.cc/R5UG-RXV3].
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
George Mason Law describes the “The Scalia Law Advantage” as “LEARN. CHALLENGE. LEAD.” Their mission statement adds that the school has “the aim of producing the leaders of bench, bar, business, government, education and scholarship in service of the public good.” George Mason students can earn a certificate through their Leadership and Professional Development Program Training.

Boston College proclaims, “A Tradition of Leadership. A Commitment to Justice.” Their mission statement does not identify intentional leadership development, but it recognize a “commitment to the advancement of the common good,” and a desire to “train a diverse student body not merely to be good lawyers, but to be lawyers who lead good lives, and who will be prepared to seek and to find meaningful work in service to others that will enrich their communities.” They credit the success of the law school to “shaping leaders prepared to grapple with society’s most important moral and ethical questions.” The school offers training to current students through courses such as Mindfulness & Contemplative Practices for Lawyers and the Leaders Entering and Advancing Public Service (LEAPS)

180 About the Law School, B.C. L., https://www.bc.edu/content/bc-web/schools/law/about.html [https://perma.cc/ZZV5-L4L].
181 Id.
182 Id.
Program where can earn the designation of a LEAPS Scholars.\textsuperscript{183}

Similarly, the mission statement for the University of Chicago does not specifically mention leadership development.\textsuperscript{184} Identifying (or even implying) that the school focuses on developing their students as leaders is also difficult. The preamble to their learning outcomes, however, makes clearer their intention to develop leaders. “The Law School’s program of instruction is designed to train superb lawyers who will be leaders in all parts of the profession.”\textsuperscript{185} That instruction begins before classes begin with an off-site retreat for all their first-year law students as part of the Kapnick Initiative originated in 2014.\textsuperscript{186} “Through a series of team-building exercises, leadership challenges, and social events, 1Ls are introduced to their classmates and learn about their own leadership style and effectiveness in team situations.”\textsuperscript{187} The instruction continues during the first year with “a number of “modules” related to specific areas of leadership development, which include such topics as personality and leadership, building relationships and influencing others, and public speaking.”\textsuperscript{188} In their second-year, law students can continue to participate as the facilitators for

\textsuperscript{183} Leaders Entering and Advancing Public Service, B.C. L., https://www.bc.edu/content/bc-web/schools/law-centers/leaps.html [https://perma.cc/35TW-M6WH].
\textsuperscript{187} Id.
\textsuperscript{188} Id.
the Kapnick Initiative. As result of the Kapnick Initiative, “students gain insights about cultivating their own leadership abilities and are better prepared for the challenges and opportunities in their careers.”\textsuperscript{189}

Ohio State University’s Moritz College of Law proclaims “a deep commitment to teaching and professional training, and the development of future leaders.”\textsuperscript{190} Their mission statement supports this commitment with a goal that their students “become outstanding legal professionals equipped to aid and improve society.”\textsuperscript{191} While their learning outcomes do not include a specific reference to leadership, learning outcome number 6 emphasizes the need for leadership develop in the form of “Interpersonal Skills and Professionalism.” “To succeed, lawyers need skills such as motivating others; influencing others; working as a team; and relating to people who differ culturally, economically, linguistically, or in other ways.”\textsuperscript{192}

Ohio uses the current need for well-trained and effective leaders to market their Program on Law and Leadership. “As calls for effective leadership grow louder, the preparation of a new generation of skilled lawyer-leaders begins here.”\textsuperscript{193} They seek, through their leadership program, to provide students with “a deeper understanding of leadership that is both intellectually stimulating and personally significant.”\textsuperscript{194} They recognize that the leadership training received will

\textsuperscript{189} Id.
\textsuperscript{190} About Moritz, OHIO ST. U. MORITZ C. L., https://moritzlaw.osu.edu/about/ [https://perma.cc/LEH6-9WHY].
\textsuperscript{191} Id.
\textsuperscript{194} Id.
benefit law students in their careers while also enabling them to help their communities.\textsuperscript{195}

In her welcome to viewers of the Columbia website, Dean Gillian Lester notes that “[f]or more than 150 years, Columbia Law School has been known as a wellspring of leading scholarship and as a center for ideas that shape the path of law and policy, both domestic and abroad. We draw on that legacy to inspire a forward-looking culture that will equip our students to become leaders in solving the world’s most difficult problems.”\textsuperscript{196} Listed as a strategic initiative at Columbia, the Davis Polk Leadership Initiative is “a new, cross-disciplinary initiative designed to prepare students to succeed as leaders in a wide range of sectors.”\textsuperscript{197}

Indiana University Robert H. McKinney School of Law’s commitment to leadership development is stated more subtly than those identified above. Indiana’s mission statement and learning outcomes mention leadership and the school offers a course on law and leadership. Understanding how their program will “empower students to be leaders” is not apparent.\textsuperscript{198} In Dean Andrew Klein’s welcome message, he offers that

\footnotesize
195 \textit{Id.}
their “faculty is passionate about mentoring a new generation of lawyers and leaders.”

One of the newer comprehensive leadership development efforts for law students is occurring at Brigham Young University under the leadership of Gordon Smith. “Over the past two years, we have employed a 'whole-building approach' to leadership training with the aspiration to develop a common vocabulary, shared goals, and vital skills for contributing to the development of students at every touchpoint, in and out of the classroom,” shared Dean Smith. In answering the question of “Why BY Law” BYU responses by describing how they create leaders, “Pursuing solutions in the areas of practice that interest them most, students and alumni share how their BYU Law experience has equipped them to make an impact.” Beyond this initial message, the website is replete with ways BYU commits to training students to impact and influence their firms and communities. BYU graduates are portrayed as “Influencers. Empowered to Make an Impact.” The admissions webpage offers the simple message “Leaders. Thinkers. Doers. Welcome Home.” While these messages may be intended to attract applicants who already view themselves as, or aspire to be, leaders, BYU has created programming to enhance their leadership abilities.

200 Email from Gordon Smith to Leah Jackson Teague (Jan. 20, 2020) (on file with author).
A total of 118 law schools listed in the table created as a companion to this Article have some indication of a commitment to leadership development. A number of those law school have strong indicators even though they do not check every category or even a majority of them. For example, Harvard Law School’s mission statement is “to educate leaders who contribute to the advancement of justice and the wellbeing of society.” They have leadership courses and regular programming as indicated in the table created as a companion to this Article. In the closing paragraph of Dean John F. Manning’s welcome message on the Harvard website he exclaims, “no law school better prepares lawyers, public servants, and leaders for a changing world than does Harvard Law School.” Although leadership development is not mentioned as a specific learning outcome for Harvard, the preamble states, “Harvard Law School prepares students to be outstanding lawyers who will achieve success in all parts of the profession and become leaders who further the best ideals of law and justice across many fields.”

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204 See generally Leadership Mission Statements and Learning Outcomes, supra note 17.
205 See Table of Law School Mission Statements, supra note 66, at 31. The link in that table no longer works. A search of the Harvard Law School website does not locate any mission statement.
206 See generally Leadership Mission Statements and Learning Outcomes, supra note 17.
207 Dean’s Welcome, HARV. L. SCH., https://hls.harvard.edu/about/deans-welcome/ [https://perma.cc/7MXD-78HR].
Other law schools have programs and courses but do not express a specific commitment to leadership development in their mission statements or learning outcomes. In the table created as a companion to this Article, we list law schools which now have leadership courses or programs or both. Some in this category offer strong messages on commitment to leadership development of their students. For example, from University of Tennessee webpage, we see the following language: “CHANGING LIVES TOGETHER. We are fostering the next generation of leaders and lawyers through academic diligence, experiential learning, and a call to improve the lives of those in our communities.”

On Santa Clara’s homepage, they advertise that “Santa Clara University is home to generations of leaders innovating with a mission. Ethical global citizens who transform lives, shape society, and aspire to make the world a better place.” Finally, Cleveland State identifies that “[w]e are an iconic, 122-year-old student-centered law school committed to both excellence and opportunity, social justice and producing lawyers that are also leaders . . . The Groundbreaking P. Kelly Tompkins Leadership in law program is one of the first in the nation to provide core leadership training to law students.”

VI. Committing to Leadership Development
Benefits Law Schools, Law Students, the Legal Profession and Society

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209 See generally Leadership Mission Statements and Learning Outcomes, supra note 17.

[436]
As noted in the introduction to this article, the ability to use a law degree as a pathway to service or change significantly motivated undergraduates considering law school. This suggests that law schools should create leadership development opportunities to better prepare students for these desired positions of influence and impact. Of the 22,189 undergraduates surveyed in the Before the J.D. report, we note that only 71% were likely to attend a graduate or professional school and of that group, only 15% expressed an interest in law school.213 While the report was viewed as good news for legal education,214 does that relatively small percentage demonstrate that undergraduates do not perceive law school as a vehicle that could drive their desire to change the world and be a force for good? Could better messaging in law school’s mission statements, websites, learning outcomes and other marketing materials more clearly demonstrate our commitment to developing leaders? The authors believe this report should motivate law schools to educate prospective students and the public and make our profession more appealing and accessible. “Our country needs diverse, talented, and well-educated lawyers and judges if it is to continue to strengthen and benefit from the rule of law.”215 In the current terse and adversarial political

215 ASS’N OF AM. LAW SCHS., HIGHLIGHTS FROM BEFORE THE JD: UNDERGRADUATE VIEWS ON LAW SCHOOL 1 (2017),
climate, law schools could become a strong voice for teaching effective leadership which is not built on personal attack but on an understanding of the rule of law.

Promoting a Juris Doctor as the best training ground for leadership skills and a life of positive impact is an important endeavor for legal education. Because of the important role that lawyer-leaders should hold in society, attracting the best and the brightest to law school is also critical to the legal profession and society. Law schools therefore need to make clear through their messaging the role they can play in developing the future leaders of our country.

VII. Conclusion

Intentionality seems to be the key to including leadership in messaging and core values. In our review, we expended significant effort simply trying to locate language about leadership at the various law schools. If trained researchers specifically looking for leadership language struggled to find it, will a prospective student really get the message that a given school is committed to leadership development? If law schools want to take advantage of the findings of the Before the J.D. report and help train the next generation of leaders, we need to be clear in our messaging that leadership development happens, and happens effectively, at law schools. Not only can we identify our commitment in websites, mission statements and learning outcomes, we can tout our graduates who have taken our training and put it to use in making an impact. This cradle-to-grave approach takes leadership training out of the theoretical and into the practical for undergraduates trying to decide how


[438]
WHERE THE RUBBER HITS THE ROAD: HOW DO LAW SCHOOLS DEMONSTRATE A COMMITMENT TO TRAINING LEADERS?
14 Tenn. J.L. & Pol’y 373 (2020)

best to change the world. As law schools, we love to see our graduates make their mark; promoting their leadership accomplishments should not be a controversial move for most schools.

One difficulty with this holistic approach to leadership as a promoted part of law school lies in whether the school as a whole actually recognizes leadership training and development as central to the mission of the school. Can faculty and administrators agree on whether leadership training, even if a core value, can be taught and who is qualified to teach it? While these are important and practical considerations, a commitment to leadership and inclusion in the values and learning outcomes of a school can and should take place even if the method of delivery is not yet perfected. Professors routinely include in their teaching opinions just released by courts even though we may not have a full understanding of the ramifications of those opinions. We teach newly adopted statutes on the eve of their implementation, even though the full impact of the new statute is unknown. The mere fact that leadership skills training is still being developed in the law school setting is hardly an acceptable excuse to avoid the attempt. Open conversations about leadership and its role at the school can be an important step in adopting it as a core value. Creating scholarship and sharing scholarship with colleagues can add validity to the endeavor. Actively soliciting and monitoring student feedback can lend support as well. Using intentional, specific and consistent language in the mission statement and learning outcomes highlights in a meaningful way the role of leadership.

Going forward, we hope to see the AALS Leadership section provide guidance on leadership training and resources, including encouraging its
members to author leadership training materials, suggest concrete ways to add leadership training to the overt doctrinal curriculum and to develop a robust and current set on exercises for use in leadership courses, professional development activities and student bar-sponsored events. Our experience teaching leadership suggests the need for a variety of types of exercises and for a nimble and evolving set of prompts depending on the particular characteristics of an individual class. Working in conjunction with the Holloran Institute, the section and schools should develop some concrete learning outcomes to identify what we want students to “learn” as they become leaders and to quantify those outcomes. If leadership training is truly part of the third apprenticeship, we want to measure movement toward competence in this area.

This partnership between law schools which define their leadership training goals and the AALS providing resources and guidance provide a strong framework to create the lawyer leaders of tomorrow. We look forward to the fruits this burgeoning academic field will bear.
ARTICLE

LAWYER LEADERSHIP IN THE PRACTICE OF LAW

Donald J. Polden*

I. Lawyers as Leaders: A Reality Check 444
II. Lawyer Skills and Competencies; Leadership Traits and Skills 448
   A. “MacCrate Report” on Lawyering Skills and Values 449
   B. The Carnegie Report: Educating Lawyers for the Profession of Law 452
   C. “Next Generation’ Articulations of Essential Lawyering Abilities: Post-Recession Environment 455
III. Conclusion 464

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A longstanding question, going back to the turn of the last century, among lawyers, law professors and their professional organizations is what skills and values should lawyers have to successfully and ethically practice law and, more significantly, perform the public functions that lawyers perform in our society. This discussion has evolved over the years as the roles and responsibilities of lawyers have changed and the practice and business of law has changed. In Abraham Lincoln’s time, lawyers were often thought to largely perform private dispute resolution functions in solo or small practice settings.¹

Today, lawyers function in major corporate and government positions, in thousand-lawyer international firms, in small “county seat” law firms and in boutique specialized law organizations. This evolution of law practice and lawyer roles as advisors and advocates has not resolved the ongoing discussion about skills, values and competencies necessary for today’s lawyers, although the skills and knowledge that today’s lawyers must possess are very different than those of lawyers in Abraham Lincoln’s time.

This Article addresses the important question concerning the necessary lawyering skills and professional values and, in particular, whether leadership and other contemporary law practice competencies are fundamental attributes of being an exemplary attorney. To the degree that the answer is “yes,” then law schools and law firms should focus more attention on education and development to young lawyers’ leadership skills. Conversely, if the answer to the question is “no,” then we need to continue our long

search for definitional certainty on the issue of what are essential skills, competencies and attributes of exceptional lawyers.²

This Article will consider how development of leadership skills, competencies and attitudes are central to success in the practice of law, especially since the last decade’s economic recession when many of the beliefs and assumptions of essential lawyer abilities were challenged. This focus of the Article is on an examination of several expert reports on fundamental or necessary lawyering skills that preceded the recession and, then, on post-recession examination of necessary skills. The Article also serves as a reminder to law schools, law firms, mentors for young lawyers, and professional coaches that the competency landscape has changed in law schools and law practice and it is critical to the success of lawyers, especially new lawyers, that they are focused on these post-recession lawyer skills and abilities.

The first section considers some of the contemporary arguments about the relationship between leadership by lawyers and leadership by other

² The analysis in this Article intentionally considers the relationship between exemplary lawyering and exemplary leadership because of the belief that average or mediocre lawyering—just getting by in performing work for the client—is not a sufficient goal of either legal education or law practice organizations. Rather, the goal must always be aimed at exceptional lawyering competencies because the ethical representation and counseling of clients demands that level of competence and commitment by attorneys. In the Preamble to the ABA Rules of Professional Responsibility, it states that: “A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” MODEL RULES OF PROF’L CONDUCT: PREAMBLE (2019).
professionals (in business, government and politics, for example), and it examines various myths about how leadership development is not a goal or aspiration applicable to the work or responsibilities of lawyers. The Article then considers how the fundamental lawyering skills and abilities have changed—really, evolved—in the last 30 years and the practice of law has changed and with it the core skills and abilities that lawyers need to be able to demonstrate for their professional development, for their success in representation and service to clients, and to the success of their law practice organizations. The Article surveys some leading scholarship that evaluates the evolution of legal education and its training of lawyer competence beginning in early 1900s to the present time. Particular emphasis is placed on the research on contemporary lawyering competencies and skills that has been published in the last decade. The Article concludes with a call for law schools, law firms and other law organizations that educate, train and mentor lawyers in the practice of law to develop leadership skills and values more broadly.

I. Lawyers as Leaders: A Reality Check

In recent years, a significant movement has occurred in legal education—to develop leadership skills and abilities in law students in order to prepare them for the roles and responsibilities they will face in the practice of law. This imperative may come as a surprise to some

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3 This movement has been documented in the growth of leadership courses being taught in American law schools, the significant increase in legal scholarship about leadership development and lawyers, and by conferences on teaching leadership at the University of Tennessee, Santa Clara University, and Stanford Law School. See Deborah L. Rhode, Preparing Leaders: The Evolution of a Field and the Stresses of
lawyers who believe that good lawyering requires one to be a follower and a “drone” to billable time requirements. To those lawyers, the notion of “lawyer as leader” is paradoxical since lawyers’ counseling clients have an ethical duty to provide advice, not to lead them, and clients are not followers of the attorney. However, this paradox does not prevent lawyers from exercising forms of leadership to the clients they advise; indeed serving clients’ representation and advising needs calls for skills in leading the client through the critical and overarching decisions that the clients must make.


According to a recent report, the number and types of leadership for lawyers courses and programs in American law schools has dramatically increased.\textsuperscript{6} This is undoubtedly a good thing because lawyers are asked to, and expected to, provide leadership in many different capacities—in their professional roles and in their personal lives. However, there still remains either the obstinate refusal to recognize that lawyers need to be able to lead others or the lack of understanding—the myths—about leadership and lawyers. Professor Barry Posner of Santa Clara University’s Leavey School of Business wrote an insightful article for a symposium on leadership skills and lawyers’ skills in which he mentioned several myths about leadership development and the importance of leadership—generally and with respect to lawyers and law students.\textsuperscript{7} He identifies some of the major myths about the roles and functions of leadership education and professional leadership development including the misguided beliefs that:

- That people come with leadership abilities already imbedded, or genetically imbued, and that training in not necessary to get better leadership out of them;\textsuperscript{8}
- That leadership happens by status, rank or title, but rather, he argues, it “happens in dealing one-on-one with a client, working on tactical and strategic matters with association, in addressing juries, and in

\textsuperscript{6} Teague, supra note 2, at 650–56 (reporting on her survey that found leadership courses are now being taught at two dozen American law schools and that several other schools have other forms of leadership development being offered).


\textsuperscript{8} Id. at 401–02.
striving to find solution that are nobler than what exists right now.”

- That people should only take on tasks that play to their strengths and skip the areas that are weaknesses; rather, he argues, people need to extend themselves because that is where personal growth and real learning take place.

- That leadership is a “solo” activity when, really, it requires collaboration and inclusiveness to make great things happen.

- That leadership comes naturally to some people when, in reality, exemplary leadership requires training and effort to really make a difference.

Posner’s insightful reflections on the myths and the realities of demonstrated leadership and the lawyer’s capacity to lead permit us to understand how leadership is critically important to lawyers. The core leadership competencies—or practices of exemplary leadership, as Jim Kouzes and Barry Posner formulate them—can be learned and developed, are important to the work we all do with our organizations and clients, and can permit us to achieve an extraordinary level of success and enjoyment in our work as lawyers.

The next section of the Article extends Professor Posner’s contention that leadership is for everyone,
including lawyers.\textsuperscript{14} It argues that lawyers are fundamentally no different than political leaders, business CEOs, military officers and others in their capacity to lead and in the need for leadership skills in the performance of their roles at lawyers, judges, and public servants.

\textbf{II. Lawyer Skills and Competencies; Leadership Traits and Skills}

In this section, I describe some of the contemporary perspectives on how lawyers competently represent their clients, lead their organizations, and serve as civic leaders in their communities through their acquired skills and attitudes. This section describes how interested educators and legal profession experts engaged in efforts to document and describe what skills are needed to practice law and describe what legal education should be preparing students for.\textsuperscript{15} Over the past 40 years, there have been various attempts to define and describe the essential competencies of lawyers, notably the \textit{MacCrate Report},\textsuperscript{16} published in 1992. Then,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{14} See Posner, supra note 7, at 399 (noting that his mantra – along with his co-author Jim Kouzes – is “[l]eadership is everyone’s business.”).
\item \textsuperscript{15} See, \textit{e.g.}, ALFRED ZANTZINGER REED, \textit{TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 3–4 (1921); HERBERT L. PACKER & THOMAS EHRlich, \textit{NEW DIRECTIONS IN LEGAL EDUCATION} xv–xvi (1972).}
\item \textsuperscript{16} AM. BAR ASS’N, \textit{LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP} (1992) [hereinafter \textit{MacCrate Report}].
\end{itemize}
\end{footnotesize}
a subsequent section of the Article examines and explicates more contemporary articulations of the panoply of skills, abilities and values that, according to experts, lawyers must have to meet the demands of the contemporary practice of law.

A. “MacCrate Report” on Lawyering Skills and Values

In 1992, a task force assembled by the American Bar Association published a major report providing a comprehensive look at what lawyers needed to be able to do in the modern practice of law and how law schools, law firms and the organized bar were preparing young lawyers for careers in law practice.\(^\text{17}\) More significantly, the report also stressed how legal education and the practicing bar could, and should, assist law students and young lawyers in learning how to perform those key skills and possess fundamental values.\(^\text{18}\) The study group included law professors, major law firm lawyers, such as its Chairman, Robert MacCrate, who identified ten vital skills for lawyers entering the practice of law following law school.\(^\text{19}\) The skills identified by the task force were:

1. Problem solving,
2. Legal analysis,
3. Research skills,
4. Factual investigation,
5. Communication,
6. Counseling,
7. Negotiation,
8. Alternate Dispute Resolution,
9. Organization and management, and
10. Ethical reasoning.\(^\text{20}\)

\(^\text{17}\) Id. at 6–7.
\(^\text{18}\) Id. at 8.
\(^\text{19}\) Id. at 135.
\(^\text{20}\) Id. at 138–40.
According to the authors, these are skills that are necessary for successful attorneys to learn while in law school, or to be trained to do when entering the practice of law.\textsuperscript{21} The \textit{MacCrate Report} was produced to inform students, law schools and law practice organizations about the importance of training and learning the critical lawyering skills identified and described in the Report.

The \textit{MacCrate Report} also identified progress and innovation in the legal field that has increased the productivity and efficiency of legal practitioners.\textsuperscript{22} The Report looked at legal trends from the early 1900’s until 1992, the year the report was published. Some of the innovations that law firms have embraced are pro bono client representation, specialization in the work that attorneys perform, and the expanding and broad scope of practice settings, from national law firms to solo practice.\textsuperscript{23} The Report also identified the progress of corporations as they increase their reliance on in-house counsel to manage the fee structures charged by large national law firms.\textsuperscript{24} The Report successfully recounted the innovations and progress in the legal profession while predicting the future of the legal profession and what would be important to future generations of lawyers.

The \textit{MacCrate Report} was enormously useful in starting a conversation among lawyers, judges, and law professors about what lawyers do and what young lawyers need to be able to do and the important role that law schools, in particular, and the Bar played in that educational and development process.\textsuperscript{25} In significant

\textsuperscript{21} \textit{Id.} at 331–32.
\textsuperscript{22} See generally \textit{id.} (including brief examples and a discussion of how the practice of law has evolved).
\textsuperscript{23} \textit{Id.} 35–85.
\textsuperscript{24} \textit{Id.} at 34.
\textsuperscript{25} See, e.g., Russell Engler, \textit{The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should See to}
part, the Report encouraged law schools to consider providing a broader educational program of instruction that featured more clinical and experiential learning opportunities for law schools.\footnote{MacCrate Report, supra note 16, at 234–35.}

Today, many of the curricular revisions envisioned by the \textit{MacCrate Report} authors have been established at law schools and most law schools now provide instruction in the broad array of professional skills and values identified in the Report. Clinical and experiential learning opportunities in law school are now required by law accreditation standards,\footnote{AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2019-2020 standard 303(a)(3) at 16 (2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf [https://perma.cc/3D9E-AND4].} and most law schools provide a variety of “skills courses” and clinical education programs.\footnote{See Peter A. Joy, \textit{The Uneasy History of Experiential Education in U.S. Law Schools}, 122 DICK. L. REV. 551, 576–77 (2018).} However, as the growth of enrollment in law schools increased in the 1990s and early 2000s, there was concern that new lawyers were not really prepared for the realities of law practice.\footnote{Id. at 574–75; see also Todd A. Berger, \textit{Three Generations and Two-Tiers: How Participation in Law School Clinics and the Demand for “Practice Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors}, 43 WASH. U. J.L & POL’Y 129, 152–54 (2013).} This led

to a second major report, by the Carnegie Foundation, on legal education and preparing for the practice of law.

**B. The Carnegie Report: Educating Lawyers for the Profession of Law**

The Carnegie Foundation initiated a long term project to investigate how professionals in several fields acquire the core skills, perspectives and values needed to be an excellent practitioner in those fields. One of the first learned professions investigated was law and the research on professional education in all fields was premised on two key areas of inquiry: (1) that all fields of professional education would benefit from the insights of modern learning research and (2) that comparison of approaches toward educating for those professions would yield important insights for each profession.

In its initiative on lawyers’ professional development, the Carnegie Report authors examined the ways the legal education system developed and attempted to capture the strengths and weakness’ inherent to legal education. The report makes important observations about legal education and the process of educating lawyers for the practice of law and then offers several recommendations that would advance legal education to a more modern educational standard. The report recommends that a more integrated model of legal


31 Id. at 333.

education is necessary to enhance the education of lawyers and their preparation for careers in law practice.\textsuperscript{33} The legal education system understands that there is an opportunity to augment its competency. The authors state that legal education must do more to unite the two sides of legal knowledge: formal knowledge necessary to be an effective practitioner and the acquisition of the experience of professional practice.

Some of the main observations made by the authors of the Carnegie Report are: First, law schools are incredibly effective institutions in educating a large number of students in a fiscally prudent way, but there is still room to improve.\textsuperscript{34} Second, they observed that law schools are dependent on one type of teaching, the case-dialogue method, where other professional educational programs use multiple teaching methods and approaches.\textsuperscript{35} Third, the case-dialogue method has valuable strengths but also unintentionally takes non-legal issues (such as cultural or societal considerations for example) out of the student’s mindset.\textsuperscript{36} Next, the report observes that American legal education struggles to assess student learning, relying too much on rankings and end-of-semester tests providing summative assessment.\textsuperscript{37} Finally, the authors observed that legal education is not a comprehensive process, but rather an additive one, which is not the most pedagogically sound way of teaching for professional competency.\textsuperscript{38} The main observations went to the heart of the process of teaching law by American law schools and it generated controversy in the law school community because, in

\textsuperscript{33} Id. at 194.
\textsuperscript{34} Id. at 185–86.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 187.
\textsuperscript{37} Id. at 188–89.
\textsuperscript{38} Id. at 189–90. 
large part, the observations were perceived as criticisms of the ways in which law had been taught for years.

The authors made several recommendations to improve the process and craft of teaching law students. The first recommendation is that law schools should offer an integrated curriculum, which would better prepare students for the variety of legal fields. Second, the authors recommended that law schools stress legal analysis and professionalism at the start of law school, allowing more time for students to engage in those subjects. Third, the report recommends improving the use of the latter two years of law school, and, in particular, using the third year as a capstone year that develops student’s law practice skills. Fourth, the report recommends law schools employ more support faculty and disperse them throughout the curriculum. Fifth, the authors recommend developing curricula that weave together disparate kinds of knowledge and skill, allowing students with different learning abilities to take advantage of all the classes of law school. Sixth, the report recommends that the legal education community recognizes a common purpose and pursue that purpose. Finally, the Carnegie Report recommends that legal educators working together within and across institutions to implement integrated curricula that are organized similarly throughout the legal education system.

The importance of the Carnegie Report was its evaluation of contemporary legal education through the

39 Id. at 194.
40 Id.
41 Id. at 195.
42 Id.
43 Id.
44 Id.
45 Id.
lenses of higher education’s methods of preparing students for professional engagement. The Report emphasized that all professional education had the common task of “preparing students for the complex demands of professional work—to think, to perform, and to conduct themselves like professionals.”

C. “Next Generation’ Articulations of Essential Lawyering Abilities: The Post-Recession, Mid-Pandemic Environment

The MacCrate and Carnegie Reports, together with other major evaluations of legal education, created, in the legal profession and in legal education, an urgency and energy about understanding what contemporary lawyers needed to be educated and trained for, what legal education should be training and educating students for, and what law firms and other law offices needed to do to develop the talent in their offices. “Lawyering competencies and skills” became an important discussion at many local, state and national bar association gatherings, and at legal education groups. Law schools responded by building into their curricula courses on skills identified in MacCrate Report and emphasizing educating their students for the apprenticeships described in the Carnegie Report. Gradually, legal education began to educate for the contemporary practice of law and to prepare students for more rapid engagement in law practice.

The economic recession of 2005–2008 had devastating effects on legal education, the practice of law,

46 Id. at 27.
47 See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).
49 Joy, supra note 28, at 576–78.
and the career goals and objectives of law students and recent law school graduates.\(^5^0\) Law firm lay-offs, large numbers of unemployed or underemployed lawyers, and dramatic changes to the practice of law were consequences of the recession.\(^5^1\) During that time, there were an unprecedented number of law firm failures, often attributed to poor leadership of the firms, but also to the significant changes in how law was being practiced in the wake of the recession and stresses on law firms due to client demands and the growth of alternative legal services providers.\(^5^2\) The recession’s impact on legal education and the practice of law resulted in the realization that the skills and abilities of new lawyers had changed in significant respects and that different talents and abilities were needed in the post-recession era.

The Covid pandemic beginning in winter of this year created a new wave of challenges to the legal profession, law practice organizations, and legal education. Obviously, the pandemic did not affect just lawyers and the law business, but rather exerted a devastating impact on most communities and countries. Again, the effects of the pandemic will require lawyers and law students to adapt to a very different environment with new skills and attitudes.


\(^{51}\) Id. at 441–44.

Research done by Roland Smith of the Center for Creative Leadership and Paul Marrow underscores the critical importance of leadership skills in today’s law practice environment. They report that in the current state of complex challenges to law firms and organizations, lawyers need to develop the following critical skills:

- Building strategic leadership skills, including how to lead and developing the tools for leadership.
- Managing talent and promoting the sustainability of their organizations, including the task of finding attorneys who can promote the new economic model of law firms.
- Making decisions and setting strategic directions for the firm and law organizations.
- Retaining clients and promoting client satisfaction.
- Managing growth and developing new and existing markets and legal practice areas.

Drilling even deeper, the authors describe results of a survey of independent law firms, managing partners and other law practitioners who were asked to identify the key competencies for effective participation in the contemporary practice of law. The list includes the following competencies and abilities that are needed by today’s law practitioners:

- Adaptability

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54 *Id.* at 34–35.
• Building and mending relationships
• Building effective teams
• Change leadership
• Coaching
• Collaboration (working across boundaries effectively)
• Credibility
• Decisiveness
• Driving innovation
• Influence
• Leveraging differences\textsuperscript{55}

Importantly, the authors stress the concept of “emotional intelligence” as a differentiator in today’s law practice. They state:

This research is consistent with other historical studies on leadership impact. It confirms that, although technical excellence and intellect are critical factors for success as a lawyer, emotional intelligence is the differentiating factor for successful leadership.\textsuperscript{56}

Harvard’s Daniel Goleman has produced path-breaking research on the importance of emotional intelligence to success in many fields and, as Smith and Morrow point out, success as a practicing lawyer is no different.\textsuperscript{57}

According to Goleman, the key driver of effective performance is emotional intelligence and he cites to numerous studies that have documented what personal capabilities lead to outstanding performance.\textsuperscript{58} The components of emotional intelligence are: self-awareness

\textsuperscript{55} Id. at 36.
\textsuperscript{56} Id.
\textsuperscript{58} \textit{Makes a Leader}, supra note 57, at 2.
(the ability to recognize and understand your own emotions and drives); self-regulation (the ability to control disruptive impulses or suspend good judgment); motivation (having a passion for the work you do); empathy (the ability to understand others’ emotional makeup and to act in line with that recognition); and social skills (to manage relationships with others).  

An important dimension to today’s successful lawyer is competence in business and technology. It is not enough to be a highly skilled and knowledgeable student and practitioner of the law; rather highly competent lawyers much know the “business” of running a successful law firm or organization and must know the business of their clients. “Client development” has long been an essential talent that lawyers are hired for, groomed for, promoted to partner for, and generally expected to be able to perform. But, today, much more is necessary for success as a lawyer than well-developed base of legal knowledge (even such knowledge in his or her practice specialty area) and excellent lawyer skills.

In a recent and very thoughtful study, the authors argue for a more multi-dimensional competency foundation for today’s lawyers, including the possession of strong foundations in legal knowledge and skills, personal effectiveness skills and “process, data and technologies” abilities. These three foundational

59 Id. at 3.
61 Natalie Runyon & Alyson Carrel, Adapting for 21st Century Success: The Delta Lawyer Competency Model, THOMASON REUTERS LEGAL, https://legal.thomsonreuters.com/en/insights/white-papers/delta-model?gatedContent=%252Fcontent%252Fnewp-marketing-websites%252Flegal%252Fgln%252Fen%252Finsights%252Fwhite-papers%252Fdelta-model&gatedContent=%252Fcontent%252Fnewp-marketing-websites%252Flegal
abilities by lawyers produce what the authors call a “Delta Lawyer.” 62 Personal effectiveness skills, the authors contend, include leadership abilities, emotional intelligence, strong character development and highly effective communication skills. 63 These fundamental contemporary lawyer competencies and attitudes mirror the Smith/Marrow identified traits and skills needed by effective lawyers today and the Goleman components of emotional intelligence in important ways. In addition, the authors add another critical foundation, “business & operation,” including skills in law firm technology as well as clients’ technology, data analytics, fundamental understanding of business (of the law firm and of the lawyer’s clients) and project management. 64 The lack of understanding of basic business concepts, transactions and skills leave young lawyers at a disadvantage in working with their clients. 65 This is a major shortcoming of legal education in that it doesn’t adequately prepare its students for the business realities of the practice settings that their students will go to. Clearly, many students prefer a practice setting that includes

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62 Id.
63 Id.
64 Id.
65 There is no definite list of those fundamental business knowledge and skills that law students need to have in order to effectively represent clients. Most efforts to create a list include basic accounting concepts, introductory microeconomics, managerial relationships and organizational structures (e.g., proprietorships, partnerships). Transactional strategies (e.g., mergers, vertical acquisitions), basic finance theory, labor relations within the organization, and government regulation (antitrust and securities law for example)
representation of low income individuals, rather than handling major M&A transactions, but fundamental business knowledge is essential for nearly all client representation and engagements.

The importance of these three foundations for lawyer competencies is described in the report and the source of their findings stem from their research survey on the top competencies that law firms and law practice organizations. These include the following survey findings:

- 92% of the survey respondents cited “relationship management” as a top 10 competency;
- 83% named “communication” as a top 10 competency;
- 66% of the respondents named “entrepreneurial mindset” as a top 10 competency, especially in solving firm and client problems;
- 75% reported that emotional intelligence is a top 10 competency, especially the ability to manage oneself, to take responsibility for his or her own behaviors and to guide their conduct in an appropriate manner.66

The survey results described in the Delta Lawyer and the Smith/Morrow articles are especially pertinent in light of studies of the grave difficulties facing law firms and legal departments in recent years.67 Law practice organizations have reported great challenges in retaining talent, understanding and managing technology (both the clients’ technology and the law firms’ technology

66 Delta Lawyer, supra note 61.
67 See, e.g., 2018 Firms in Transition Report, supra note 52; Delta Lawyer, supra note 61.
needs), serving clients in a more cost-efficient manner, and fostering innovation in the practice of law. These challenges have been magnified exponentially by recent economic and public health catastrophies.

The Smith/Morrow survey results, together with Goleman’s typology of effective traits and skills that he terms “emotional intelligence,” reveal the key attributes of successful lawyering and successful leadership as becoming a “leading lawyer.”

- Technical competence. People will not follow someone who doesn’t know what they are doing.
- Able to envision change, the need for change, and why the “status quo” is clearly insufficient. This refers to the belief that leaders are needed when positive change (and often positive, ethical change) is needed.
- Clear judgment and the ability to make smart decisions promptly and as needed. Judgement is important in every industry

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68 Polden, Lawyers Innovation, supra note 50, at 442–51.
69 These attributes and skills are what should be taught in a well-designed course in leadership for lawyers. See 2018 Firms in Transition Report, supra note 52; Makes a Leader, supra note 57, at 3.
70 See Delta Lawyer, supra note 61 (“Clients increasingly demanded that their lawyers use technology tools and process improvement to enhance delivery of their legal services.”).
71 The concept of a “leading lawyer” is rooted in the notion that effective lawyers and effective leaders share some traits and skills but there are other traits and attributes that in tension. See ROBERT W. CULLEN, THE LEADING LAWYER: A GUIDE TO PRACTICING LAW AND LEADERSHIP (2010); Polden, supra note 60, at 902–04.
or occupation, but in law, it is what their clients pay for.\textsuperscript{72}

- The ability to influence, persuade and establish credibility. People will not follow someone if they don’t trust them; this is without question true for lawyers.\textsuperscript{73}
  Whether working with juries, colleagues or judges, a leading lawyer makes his living by his ability to convince, ethically and genuinely, others of the value, merit and importance of the lawyer’s “case” or position.\textsuperscript{74}

- Self-regulation and self-awareness. These are two of the key pillars of emotional intelligence and they take on particular importance for lawyers because of the public calling of the law and the “statesmanship” that is often called for among lawyers.\textsuperscript{75} Attorneys need to be in control of situations involving clients and others who depend on them for advice, direction and leadership.

- Empathy. Being able to feel compassion for another person is essential to healthy

\textsuperscript{72} \textit{See Delta Lawyer, supra} note 61 (naming “Legal Judgment” competency as a key insight of the study).

\textsuperscript{73} \textit{Makes a Leader, supra} note 57, at 1.

\textsuperscript{74} \textit{See also} JAMES M. KOZES & BARRY Z. POSNER, CREDIBILITY: HOW LEADERS GAIN AND LOSE IT, WHY PEOPLE DEMAND IT xi (2011).

living and in a business-like law, this is absolutely critical.\footnote{See Makes a Leader, supra note 57, at 1.}

- Entrepreneurial. This refers to the ability to be creative and adaptive in solving problems and in planning for the future. This too is a critical skill of new lawyers today.\footnote{See Delta Lawyer, supra note 61 (adding “entrepreneurial mindset” to the make-up of the “personal effectiveness” analysis).}

The possession of these lawyer-leader abilities does not guarantee that a lawyer will win all his or her cases; there is no matrix of skills and talents that can promise absolute success. However, these skills and attributes will, over the long haul of one’s career as a lawyer, lead to a highly satisfying and rewarding career and one that includes the respect of others with whom the lawyer works in the practice of law. And, perhaps, it is just another in a growing list of fundamental skills and abilities that today’s lawyers need to serve their clients and have positive relationships within the practice of law. More empirical research will be needed to determine whether any of the lists of skills, competencies and values—McCrake, Carnegie, Smith/Morrow, Delta Law, or the one offered in this article—is the best, most helpful articulation of what lawyers need to be able to do. In the meantime, law schools, law firms and law organizations should be educating and developing law students and young lawyers for these highly relevant and current lawyering skills and abilities.

III. Conclusion
The Article promotes the idea of self-sufficiency of lawyers who are asked to lead or who wish to lead. Today, leadership by lawyers requires a skill set that equals the set of skills, competencies and abilities that lawyers need in order to address client needs in the current environment. It is not enough simply to be prepared to practice law, with requirements that one understand the law, the rules of procedure, and some of the others practical requirements to be a lawyer today. Instead it is necessary for today’s lawyers to have a more comprehensive set of skills, abilities and values in order to navigate the practice of law. This Article has surveyed some of recent literature on the topic of necessary competencies and skills of today’s lawyers, while also drawing on the history of literature on the topic, to articulate a composite, yet comprehensive set of fundamental lawyering skills for today’s lawyers. I hope that the summary of literature on this important subject and observations about relevant skills needed in today’s practice of law will be useful in advancing leadership education in law schools and in contributing to the literature on the competencies that are needed in the practice of law.
ARTICLE

LEADERSHIP LESSONS FROM A HEROIC, IF "DIFFICULT" WOMAN: A TRIBUTE TO IDA B. WELLS

Deborah L. Rhode*

I. 469
II. 489
III. 492

Ida Wells was, even by her own account, a “difficult woman.”1 It is not difficult to see why. As the nation’s first prominent African American female journalist and the founder of the nation’s anti-lynching movement in the late 19th century, she encountered virulent racial and gender bias; anyone with her identity

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and commitments was bound to seem unacceptable to much of mainstream white society. But Wells, despite her moral heroism, also alienated many colleagues of color and fellow travelers in the civil rights and women’s rights movements who shared her objectives. And it is that mixed legacy that holds lessons of leadership for contemporary social and political activists.

Laurel Ulrich’s claim that “well-behaved women seldom make history” has become an organizing principle for many of today’s feminists.\(^2\) But a less palatable insight is that “badly” behaved women by conventional standards have often been burned at the stake, or the metaphorical equivalent.\(^3\) This dual legacy reflects a variation of what I have elsewhere described as the leadership paradox. The qualities that propel individuals to positions of influence are not always what they need when they get there.\(^4\) This was true of Wells. She rose to prominence in part because of her moral passion and defiance of social conventions. But her need for recognition and insensitivity to the concerns of potential allies kept her from forging necessary coalitions and winning the trust and collaboration of fellow activists.

This essay focuses on the experience of Ida Wells as a way of exploring challenges for leaders seeking social change. It proceeds in three parts. Part I provides a brief biographical overview of Wells and her anti-lynching and civil rights accomplishments. Part II focuses on Wells’

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\(^2\) See generally LAUREL ULRICH, WELL-BEHAVED WOMEN Seldom Make History (2007).

\(^3\) For the gender bias encountered by women who appear overly assertive or abrasive, see DEBORAH L. RHODE, WOMEN AND LEADERSHIP 11, 80–81 (2017).

\(^4\) For variations on this paradox, see DEBORAH L. RHODE, LAWYERS AS LEADERS 5 (Oxford Univ. Press 2013); Deborah L. Rhode, Leadership in Law, 69 STAN. L. REV. 1603, 1620–21 (2017).
leadership style—both its strengths and limitations. Part III summarizes Wells’ legacy and the lessons it holds for contemporary leaders.

I.

Ida Wells was born a slave in 1862, in Holly Springs, Mississippi, just two months before President Lincoln issued the Emancipation Proclamation.\(^5\) Her father was a carpenter, her mother a cook, and both continued to work at those jobs after the Civil War brought them freedom.\(^6\) Wells’ father was a man of principle who lost his job when he refused to vote the way his white employer dictated.\(^7\) Both parents believed strongly in the value of education, and Wells attended school until she was sixteen, when her mother, father, and one of her seven siblings died of yellow fever.\(^8\) Wells was visiting grandparents at the time, and on learning of the tragedy, she courageously insisted, against all medical advice, on immediately returning home.\(^9\) Once there, her father’s fellow Masons came up with a plan to divide and place the orphans among friends who would


\(^{6}\) GIDDINGS, supra note 1, at 10.


\(^{8}\) GIDDINGS, supra note 1, at 10.

\(^{9}\) BAY, supra note 7, at 30.
take them.\textsuperscript{10} Wells resisted.\textsuperscript{11} Her mother had been separated from her family at auction, and both she and her husband, Wells believed, would “turn over in their graves to know their children had been scattered like that.”\textsuperscript{12} Wells agreed to care for them if the Masons would help her find work.\textsuperscript{13} They did, and she got a job as a teacher in a country elementary school nearby.\textsuperscript{14}

Her schedule was grueling. She spent the work week at the school, while her grandmother cared for the children at home.\textsuperscript{15} Wells returned on the weekends to do the laundry, cleaning, and cooking for the next week.\textsuperscript{16} During the summers, she studied at the local university until a quarrel with the administration led to her expulsion.\textsuperscript{17} Although at the time, she was deeply resentful, she later acknowledged that her own “tempestuous, rebellious, hardheaded willfulness” was to blame.\textsuperscript{18} Her unconventional domestic arrangements throughout this period also caused problems. Young women did not normally live without the protection of a father or husband. Rather than give Wells credit for her efforts to keep the family together, some community members spread rumors that she wanted to live independently in order to have illicit relationships with white men.\textsuperscript{19}

\begin{footnotes}
\textsuperscript{10} GIDDINGS, supra note 1, at 10–11.
\textsuperscript{11} \textit{Id.} at 11.
\textsuperscript{12} \textit{Id.}.
\textsuperscript{13} \textit{Id.}.
\textsuperscript{14} \textit{Id.}.
\textsuperscript{15} \textit{See} WELLS, supra note 7, at 17.
\textsuperscript{16} \textit{Id.}.
\textsuperscript{17} McMURRY, supra note 5, at 13.
\textsuperscript{18} McMURRY, supra note 5, at 14; \textit{see also} DAVIDSON, supra note 5, at 50.
\textsuperscript{19} WELLS, supra note 7, at 17; McMURRY, supra note 5, at 16.
\end{footnotes}
After three years, Wells accepted an invitation to live with her aunt in Memphis, where she could earn higher wages, be close to other family members, and escape ugly unfounded rumors. She took three of her youngest siblings with her; her brothers stayed behind as apprentice carpenters. She found a job outside the city and commuted by train. In 1884, a railroad conductor ordered her to give up the first-class seat she had purchased for the ladies’ car and demanded that she move to the crowded smoking car. She refused and bit the conductor when he attempted to drag her from her seat. When he finally succeeded, she got off the train, rather than sit in second class. White passengers cheered derisively as she turned to walk back to Memphis.

On her return, Wells hired a lawyer to sue the railroad. She won in the lower court and refused to settle when the railroad appealed. Although the law allowed trains to segregate by race, it required them to offer opportunities for first class accommodations to all passengers. In finding for Wells, the Tennessee trial court noted that she was “a person of lady-like appearance and deportment, a school teacher, and one who might be expected to object to traveling in the company of rough or boisterous men . . . .” The local

20 See Wells, supra note 7, at 18.
21 See id.
22 See id.
23 See id.
24 See id. at 19.
25 Wells, supra note 6, at 18–19; see also Bay, supra note 7, at 48; McMurry, supra note 5, at 26.
26 Wells, supra note 6, at 19.
27 Bay, supra note 7, at 53; Wells, supra note 7, at 19–20.
28 See Bay, supra note 7, at 55–57.
29 Id. at 52.
newspaper was less complimentary and ran a story under the headline “A Darky Damsel Obtains a Verdict for Damages . . . $500.” The Tennessee Supreme Court reversed the verdict on the implausible ground that the two cars were in fact equal. In the court’s view, Wells’ behavior on the train demonstrated that she was no “lad[y]” but merely a “mulatto passenger,” whose purpose was “to harass with a view to this suit.” And she was held liable for court costs, a devastating blow, given her own substantial legal fees and financial struggles as a sole breadwinner with a minimal salary.

That unhappy outcome did have one redeeming byproduct. The editor of a Black newspaper, The Living Way, asked her to write about the incident. Wells had already been publishing columns as the editor of the Memphis Lyceum newspaper, and a few had been reprinted in The Living Way. Unlike the vast majority of female journalists in that era, who confined their work to feminine subjects, Wells wrote on issues of general interest to the Black community. Among her best work was criticism of racism by white officials and white-dominated political parties. For example, one column documented racial bias in the criminal justice system: a

30 Wells, supra note 7, at 19 n.4.
31 Bay, supra note 7, at 54.
32 See Chesapeake, O. & S. R. Co. v. Wells, 4 S.W. 5, 6 (Tenn. 1887).
33 Davidson, supra note 5, at 109 (quoting Chesapeake, O. & S.R. Co., 4 S.W. at 5); Wells, supra note 7, at 20; see also Bay, supra note 7, at 55.
34 Davidson, supra note 5, at 100; Sarah L. Silkey, Black Woman Reformer: Ida B. Wells, Lynching and Transatlantic Activism 49–52 (2015).
35 Giddings, supra note 1, at 75–76; Wells, supra note 7, at 24.
36 Giddings, supra note 1, at 78.
37 Id. at 81–83.
white city official who had stolen “six thousand dollars of taxpayers’ money” was pardoned after a fifteen-month sentence, while a Black man who had stolen food, alcohol, and cigars worth about seven dollars was sentenced to eight years in prison.\textsuperscript{38} Wells also underscored the responsibilities of Black leaders to give back to their communities. In one 1885 column, she asked, “What material benefit is a ‘leader’ if he does not, to some extent, devote his time, talent and wealth to the alleviation of the poverty and misery, and elevation of his people?”\textsuperscript{39} However, she also wrote columns on the “Women’s Mission,” and “The Model Woman,” in which, according to her diary, she tried to “suppress her ‘unfeminine’ anger.”\textsuperscript{40}

In 1889, Wells became an editor and part owner of the \textit{Free Speech and Headlight}, making her the first and only Black woman in the country to achieve that status at a major city newspaper.\textsuperscript{41} Her editorial responsibilities made for a grueling schedule, when combined with her full-time work as a teacher.\textsuperscript{42} However, that problem ended when the school district refused to renew her contract in retaliation for one of her columns.\textsuperscript{43} It had criticized the crowded and dilapidated conditions in Black schools and the practice of board members of awarding teaching jobs in return for “illicit” sexual favors.\textsuperscript{44} Although Wells was not earning enough from

\begin{itemize}
  \item\textsuperscript{38} McMurry, \textit{supra} note 5, at 128.
  \item\textsuperscript{39} \textit{Id.} at 107.
  \item\textsuperscript{40} Davidson, \textit{supra} note 5, at 103; Giddings, \textit{supra} note 1, at 85–86.
  \item\textsuperscript{41} Giddings, \textit{supra} note 1, at 85–86
  \item\textsuperscript{42} \textit{Id.} at 163.
  \item\textsuperscript{43} \textit{Id.} at 167.
\end{itemize}
journalism to afford losing her teaching position, she felt it was “right to strike a blow against a glaring evil and [she] did not regret it.”

To make up for her lost income, Wells concentrated on boosting her paper’s sales. She began seeking invitations to speak in nearby cities, where she could find new audiences. As a result, the newspaper’s circulation increased 250%. Her writing explored a wide range of issues until the 1892 murder of three Black businessmen in Memphis focused her attention on lynching.

Although in contemporary usage “lynching” conjures up hanging, its original meaning was much broader. The term originated during the Revolutionary War era, in a practice by a Virginia justice of the peace, Charles Lynch. He ordered whippings of suspected Tories and horse thieves who supplied them, all without formal trial proceedings. The term “lynch law” evolved to describe any act of vigilante justice, including hanging, shooting, and burning at the stake, done with broad public approval. Motivations for lynching varied in different regions and time periods. In the post-Reconstruction South, such violence was targeted at

42 Wells, supra note 7, at 36; see Davidson, supra note 5, at 115, 118; Giddings, supra note 1, at 167; Silkey, supra note 34, at 52.
43 Wells, supra note 7, at 37.
44 Davidson, supra note 5, at 122.
45 Wells, supra note 7, at 47.
46 Bay, supra note 7, at 96.
48 Id.
49 Bay, supra note 7, at 96.
50 See McMurry, supra note 5, at 145.
Blacks and served, as Wells put it, to teach the “lesson of subordination.”

The 1892 lynching that changed Well’s life involved one of her friends, Thomas Moss. He was a polite and unassuming letter carrier who had used his savings to purchase the People’s Grocery store in a Black neighborhood just outside of Memphis. A white competitor, W. H. Barrett, was looking for an opportunity to destroy the business, and found one after a fight broke out near the store among a racially mixed group of boys playing marbles. Barrett entered the store looking for a suspected participant and started another fight. Moss and two employees were arrested.

After Blacks held a meeting to strategize about responses, Barrett used rumors of unrest to persuade a judge to issue warrants for further arrests. He also spread rumors in the Black community that a white mob was preparing to attack. When a sheriff’s posse not wearing uniforms came to the grocery to make arrests, Black neighbors mistook them for part of a mob and shot and wounded several officers. That sparked outrage; whites lynched Moss and his employees and looted his store. W. H. Barrett bought what was left at a fraction of its value.

In covering the incident, white newspapers...
caricatured Moss as a “turbulent, unruly negro;” he and his employees were presented as “desperados,” motivated by “vicious and venomous rancor,” part of a “nest of vipers” intent on slaying innocent whites.63 The lynching was described as “one of the most orderly of its kind ever conducted . . . There was no whooping, not even loud talking, not cursing, in fact nothing boisterous. Everything was done decently and in order.”64 Wells was incensed. That incident, she later explained, “opened my eyes to what lynching really was. An excuse to get rid of Negroes who were acquiring wealth and property and thus keep the race terrorized . . .”65 Her first column after the lynching claimed that

There is therefore only one thing left that we can do; save our money and leave a town which will neither protect our lives and property, nor give us a fair trial in the courts but [will] take[] us out and murder[] us in cold blood when accused by white persons. 66

Some 4000 to 6000 Black residents agreed and left Memphis.67

Wells then channeled her outrage into investigative journalism. She became the first American to research the causes of lynching and debunk conventional wisdom.68 White-owned newspapers often claimed that interracial rapes were rising, and that

63 BAY, supra note 7, at 85; DAVIDSON, supra note 5, at 138; see also McMURRY, supra note 5, at 132.
64 DAVIDSON, supra note 5, at 134; McMURRY, supra note 5, at 134 (internal citations omitted).
65 WELLS, supra note 7, at 64.
66 Id. at 52.
68 BAY, supra note 7, at 103.
lynchings were a response to the “brutal passion of the Negro.”\textsuperscript{69} Even the \textit{New York Times} declared in 1892 that the offense of rape was “one to which the African race was particularly prone.”\textsuperscript{70} But after compiling statistics from white-owned newspapers, Wells found that that allegations of rape were present in only one-third of all reported lynchings, and in some of those cases, the relationships were consensual.\textsuperscript{71} In one notorious example, an Arkansas mob insisted that a white woman claim that her Black lover had raped her and that she light the bonfire that burned him to death.\textsuperscript{72} Shortly after Moss’s murder, Wells responded to a local newspaper’s account of an interracial rape with an editorial claiming that:

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Nobody in this section of the country believes the old threadbare lie that Negro men rape white women. If Southern white men are not careful, they will over-reach themselves and public sentiment will have a reaction; a conclusion will then be reached which will be very damaging to the moral reputation of their women.\textsuperscript{73}
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Wells’s implication that white women were sexually attracted to Black men infuriated local whites. A local newspaper suggested that the “black wretch” who had authored such a “foul lie should be . . .burned at a stake.”\textsuperscript{74} A mob organized by local businessmen trashed her newspaper’s office and threatened any future

\begin{footnotesize}
\textsuperscript{69} \textsc{Davidson}, \textit{supra} note 5, at 154 (internal citations omitted)
\textsuperscript{70} \textit{Mob Law in Arkansas}, \textsc{N.Y. Times}, Feb. 23, 1892, at 4.
\textsuperscript{71} \textsc{Mcmurry}, \textit{supra} note 5, at 143–46.
\textsuperscript{72} \textsc{Davidson}, \textit{supra} note 5, at 162.
\textsuperscript{73} \textsc{Mcmurry}, \textit{supra} note 5, at 146–47. For other inflammatory critiques, see \textsc{Townes}, \textit{supra} note 7, at 116.
\textsuperscript{74} \textsc{Wells}, \textit{supra} note 7, at 66.
\end{footnotesize}
publisher with death.\textsuperscript{75} Wells had the foresight to be out of town at a conference when the story broke.\textsuperscript{76} Her co-owner, however, received threats of castration and hanging, and was forced to flee the city; the paper’s former owner was pistol whipped.\textsuperscript{77} When white leaders vowed to kill Wells if she dared to return and posted sentinels at the train station, she decided not to test their resolve.\textsuperscript{78}

Wells relocated to New York, where her experience with mob violence gained widespread publicity. The editor of the \textit{New York Age} hired her to write weekly articles and gave her partial ownership in return for the subscription list of the gutted Memphis paper.\textsuperscript{79} In 1892, she published the first statistical study of lynching, later republished as a pamphlet, \textit{Southern Horrors: Lynch Law in All its Phases}.\textsuperscript{80} Wells found that most victims were Blacks who had run for political office, competed with whites in business, failed to pay debts, or were too “sassy.”\textsuperscript{81} The pamphlet also noted that rapes of Black women by white men were rarely punished; mob retribution had more to do with race than sexual

\textsuperscript{75} Id.
\textsuperscript{76} McMurry, supra note 5, at 148.
\textsuperscript{77} Giddings, supra note 1, at 1; see also McMurry, supra note 5, at 148.
\textsuperscript{78} Ida B. Wells, \textit{The Offence, in United States Atrocities: Lynch Law}, 1–3 (1892) [hereinafter \textit{United States Atrocities}]; see also McMurry, supra note 5, at 146–49; Wells, supra note 7, at 62–63.
\textsuperscript{79} Wells, supra note 7, at 63; Davidson, supra note 5, at 160.
\textsuperscript{81} Davidson, supra note 5, at 161; Southern Horrors, supra note 80, at 29.
assault. To combat lynching, Wells called for new strategies including self-defense and civil disobedience. Train and trolley car boycotts were also necessary because the “appeal to the white man’s pocket has ever been more effectual than all the appeals ever made to his conscience.” By the time of *Southern Horrors*, the number of African Americans lynched across the nation exceeded that of whites, even though Blacks constituted less than twelve percent of the population. Somebody "must show that the Afro-American race is more sinned against than sinning,” wrote Wells, ”and it seems to have fallen on me to do so.” At a time when few women were willing even to use the term “rape” in polite company, Wells’ willingness to discuss its dynamics earned her a reputation as “dauntless.”

Wells’ expose was a bombshell. She began to lecture widely, at a time when female lecturers were rare and Black female lecturers were rarer still. Wells also published a follow-up pamphlet, *United States Atrocities: Lynch Law*, which situated the crime in a broader context.

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82 *Southern Horrors*, supra note 80, at 26–28 (detailing stories of white men who were not punished for perpetrating violence against Black women).

83 *Id.* at 42.


85 GIDDINGS, supra note 1, at 229.

86 *Id.*

87 BAY, supra note 7, at 110; see also McMURRY, supra note 5, at 169.
discussion of discrimination and debunked the romanticized view of frontier justice. Wells cited cases like a Louisiana lynching in which the victims were the children of the man whom the mob really sought but had been unable to catch. She also described the pressure on white women in biracial relationships to fabricate claims of rape, and challenged the myth that lynchings were necessary to secure justice. As Wells noted, “With judges, juries and prosecuting attorneys all Southern white men,” Blacks were unlikely to escape punishment for consensual relationships with white women.

In 1893 and 1894, Wells took her anti-lynching campaign abroad, while serving as America’s only paid Black correspondent for a daily paper. In Great Britain, she gave over a hundred lectures and occasionally addressed crowds of more than a thousand. There was widespread press coverage, which Wells made sure was mailed to prominent American politicians, newspapers, and clergy. Not all the accounts were favorable, however. Some white newspapers denounced her as a “wench,” “strumpet,” “courtesan,” and “notorious woman of ill repute,” who was “raising money for her own personal use” in the anti-lynching campaign.

At a time before professional civil rights advocates routinely appealed for financial support, the New York Times questioned whether her purpose in fund-raising “may plausibly be supposed to have been an income rather

88 See generally United States Atrocities, supra note 78.
89 See id. at 20.
90 United States Atrocities, supra note 78, at 8–13, 19–21.
91 Id. at 19.
92 Wells, supra note 7, at 125.
93 Davidson, supra note 5, at 164–66.
94 Giddings, supra note 1, at 245; McMurry, supra note 5, at 214; Silkey, supra note 34, at 106.
LEADERSHIP LESSONS FROM A HEROIC, IF “DIFFICULT” WOMAN: A TRIBUTE TO IDA B. WELLS
14 TENN. J.L. & POL’Y 465 (2020)

than an outcome.”95 Even some Black leaders criticized her for “sowing scandal” and “polluting the minds of the innocent and pure.”96 When condemned for her allegedly salacious coverage of lynchings, Wells responded:

I see the Memphis Daily Commercial pays me the complement of calling me a “Negro Adventuress.” If I am become an adventuress for simply stating facts, by what name must be characterized those who furnish these facts? However revolting these lynchings, I did not perform a single one of them, nor could the wildest effort of my imagination . . . equal the reality. If the same zeal to excuse and conceal the facts were exercised to put a stop to these lynchings, there would be no need for me to relate . . . these tales of barbarity.97

Wells’ efforts abroad had a significant impact. A widely-publicized British Anti-Lynching Committee took up the cause and helped shame some American states into passing anti-lynching legislation.98 The trip also gained her considerable public recognition in the United States, though much of it was critical. In commenting on her first public lecture after returning from Great Britain, the New York Times reported a recent incident in which a “negro had made an assault upon a white woman for purposes of lust and plunder.” 99 The paper hoped that “the circumstances of this fiendish crime may serve to convince the mulatress missionary . . . just how

95 GIDDINGS, supra note 1, at 315–16.
96 McMURRY, supra note 5, at 154–55 (quoting MEMPHIS APPEAL-AVALANCHE, June 8, 1892).
97 WELLS, supra note 7, at 187.
98 BAY, supra note 7, at 6, 192, 198.
99 N.Y. TIMES, July 27, 1894.
her theory of negro outrages is, to say the least of it, inopportune.” Wells, however, remained unconvinced. In her lecture, she noted that “black women have had to suffer far more at the hands of white men than white women at the hands of black men. Every single report [of rape] which is published should be investigated . . . .” The Times responded that she was “slanderous and dirty-minded,” that no “decent” colored woman had been raped by a white man, and that no “reputable or respectable negro” had ever been lynched.

The attacks took a toll. Some Black as well as white Americans shied away from association with Wells. Many were also put off by her assertions about consensual relationships between white women and Black men, which could exacerbate racial tensions. But, unfazed by criticism, Wells returned to Chicago where she helped set up an Anti-Lynching Committee and fielded speaking invitations from around the country. In 1895, she published The Red Record, a one-hundred-page pamphlet describing lynching in the United States since the Emancipation Proclamation. By her estimate, more lynchings were occurring each year than lawful executions. The pamphlet included several graphic photographs, as well as descriptions of

100 Id.
101 GIDDINGS, supra note 1, at 317.
102 Id. at 318; see also BAY, supra note 7, at 199; British Anti-Lynchers, N.Y. TIMES, Aug. 2, 1894, at 4.
103 SILKEY, supra note 34, at 117; WELLS, supra note 7, at 220–23.
104 See WELLS, supra note 7, at xix.
106 Id.
particularly brutal incidents involving torture and mutilation.\textsuperscript{107} Wells’ efforts met with some success. More states passed anti-lynching legislation, and such crimes began to decline after 1892, the year that she started her campaign.\textsuperscript{108} But failures to obtain adequate legal prohibitions in the South or at the national level gave continued urgency to her activism.

In 1895, Wells married and began a difficult decade of balancing work and family responsibilities. She had been in no rush to find a husband and wrote in her diary after moving to Memphis, “I am an anomaly to myself as well as to others. I do not wish to be married but I do wish for the society of gentlemen.”\textsuperscript{109} She seemed, however, to have found an ideal partner in Ferdinand Barnett, a Black lawyer and founder of Chicago’s first Black newspaper, \textit{The Conservator}.\textsuperscript{110} Wells had worked with Barnett on race-related issues, and he had advised her on a potential libel suit against a white-owned newspaper for calling her a “black harlot” and the mistress of her Memphis coeditor.\textsuperscript{111} Just before the marriage, Wells bought \textit{The Conservator} from Barnett because he was about to become Illinois’ first Black assistant state’s attorney and needed to avoid conflicts of interest.\textsuperscript{112} And, in another decision that was highly unusual at the time and signaled her feminist

\textsuperscript{107} See \textit{id.} at 157–71.
\textsuperscript{108} GIDDINGS, supra note 1, at 348.
\textsuperscript{109} BAY, supra note 7, at 59 (quoting IDA. B. WELLS, \textsc{The Memphis Diary of Ida B. Wells} 80 (Miriam DeCosta-Willis ed., 1995) [hereinafter \textsc{The Memphis Diary}]); McMURRY, supra note 5, at 56 (internal citation omitted).
\textsuperscript{110} GIDDINGS, supra note 1, at 345–46.

\textsuperscript{111} BAY, supra note 7, at 138–40; see also McMURRY, supra note 5, at 183, 238.
\textsuperscript{112} Id. at 217.
commitments, she chose to hyphenate her name.\textsuperscript{113} In commenting on this unconventional start to domestic life, one journalist noted that Wells-Barnett’s “determination to marry a man while still married to a cause” was sure to be a topic of national interest.\textsuperscript{114}

Barnett had two sons from a previous marriage and lived with his mother, so his wife immediately inherited significant family responsibilities.\textsuperscript{115} This caused some tension, and when the couple began having children of their own, the two teenage boys and their grandmother took up a separate residence.\textsuperscript{116} Wells-Barnett had ambivalent feelings toward domesticity. Although in a column on the “Model Girl,” she had endorsed housekeeping as among women’s “best accomplishments,” she had little taste for it herself; her husband did much of the cooking, another highly unconventional arrangement in that era.\textsuperscript{117} In her autobiography, Wells-Barnett speculated that her “early entrance into public life . . . had something to do with smothering the mother instinct.”\textsuperscript{118} Or perhaps her early experience of caring for her brothers and sisters left her feeling somewhat “entitled to the vacation from [her] days as nurse . . . .”\textsuperscript{119} After the birth of her first child, she confessed that “although I tried to do my duty as mother toward my firstborn and refused the suggestion not to nurse him, I looked forward to the time when I should have completely discharged my duty in that

\begin{footnotesize}
\begin{enumerate}
\item GIDDINGS, \textit{supra} note 1, at 353, 355, 358.
\item Id. at 358.
\item BAY, \textit{supra} note 7, at 217–18.
\item Id. at 218.
\item BAY, \textit{supra} note 7, at 72, 218; McMURRY, \textit{supra} note 5, at 239.
\item WELLS, \textit{supra} note 7, at 251.
\item Id. at 251.
\end{enumerate}
\end{footnotesize}
When her son was five months old, Wells-Barnett took him with her to a conference of an organization that became the National Association of Colored Women. It was such an unusual decision that the group dubbed him the “Baby of the Federation.” Shortly afterward, when organizers asked her to help campaign for a woman seeking statewide office, she agreed if they would arrange for childcare. In remarking on the arrangement, Wells-Barnett observed, “I honestly believe that I am the only woman in the United States who ever traveled throughout the country with a nursing baby to make political speeches.”

Over the next two decades, she continued to juggle personal and professional activities. In 1897, Wells-Barnett responded to an editorial in the Chicago Times-Herald claiming that one reason citizens resorted to lynching was because justice was delayed through legal technicalities. She countered with a letter to the editor pointing out the absence of evidence to back up that claim. Who benefitted from delays, she asked rhetorically. “Poor men, criminals who are ignorant, penniless and friendless? Certainly not . . . Appeals cost money, and plenty of it . . . Let it be confessed with sorrow that many an innocent man has gone to prison or to his death because poverty stood between him and substantial justice.” Wells-Barnett also remained active in local civic activities. On her trip to Great Britain, she had been impressed with English women’s organizations, and after her return, she helped establish

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120 Id. at 248–49.
121 GIDDINGS, supra note 1, at 372, 375–76.
122 Id.
123 Id. at 376–77.
124 WELLS, supra note 7, at 244–45.
125 See Letter to the Editor, CHI. TIMES HERALD (Nov. 21, 1897).
126 Id.
several similar organizations, including one that bore her name.\textsuperscript{127} The Ida B. Wells Club focused on racial conditions in Chicago, and in 1897, established the city’s first Black kindergarten.\textsuperscript{128} Childcare was an issue of particular importance “for blacks whose families had a high proportion of working mothers.”\textsuperscript{129} The kindergarten initiative was controversial and time-consuming, which may have contributed to her announcement after the birth of her second child that she was giving up public life.\textsuperscript{130} She resigned as editor of the \textit{Conservator}, and as president of the Ida B. Wells Club in order to remain at home with her children.\textsuperscript{131}

Her resolve lasted three months. Then, in 1898, a particularly brutal lynching occurred in South Carolina.\textsuperscript{132} The victim, the first African-American postmaster in a small city, had refused to give up his position even after whites boycotted the post office and then burned it to the ground.\textsuperscript{133} Finally, a mob set his house on fire and shot and killed him and his one-year-old infant.\textsuperscript{134} His other children were badly injured by bullet wounds but survived.\textsuperscript{135} Although some members of the mob were ultimately indicted, they were all acquitted.\textsuperscript{136} Black protestors around the country demanded federal action and persuaded Wells-Barnett to join lobbying efforts in the capital. As she explained in her autobiography, it “seems that the needs of the work

\begin{footnotes}
\item [127] \textit{Wells, supra} note 7, at xix.
\item [128] \textit{Giddings, supra} note 1, at 384.
\item [129] \textit{Id.} at 383.
\item [130] \textit{Giddings, supra} note 1, at 385.
\item [131] \textit{Id.} at 384.
\item [132] \textit{Id.} at 385.
\item [133] \textit{Id.} at 385.
\item [134] \textit{Id.}
\item [135] \textit{Id.}
\item [136] \textit{Id.} at 413.
\end{footnotes}
were so great that again I had to venture forth.”137 She spent five weeks in Washington, making speeches, raising money, and lobbying Congress.

Later that year, she visited Susan B. Anthony, who gave her some unsolicited advice.138 Anthony, who was unmarried, told Wells-Barnett that domesticity was not for “women like [her] who had a special call for special work.”139 Motherhood gave her a “divided duty.”140 The exchange helped convince Wells-Barnett to reenter public life, but the challenges that she confronted there continued to present tensions for her marriage. On one occasion, her political activity so alienated the Illinois governor that it almost cost her husband his job as assistant state’s attorney.141 She also believed that her reputation was partly responsible for her husband’s inability to attain his dream of becoming the city’s first Black municipal judge.142 It did not help when newspapers suggested that Ida wore the “trousers” in the family or identified Ferdinand simply as the “husband of the brilliant Ida B. Wells-Barnett.”143 The couple had two more children, and the demands of raising a family of four limited her professional activities.144 She avoided further significant work outside the home until her youngest child was eight.145

When her family obligations eased, Wells-Barnett became more fully engaged in racial justice causes. She

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137 WELLS, supra note 7, at 252.
138 Id. at 255.
139 Id.
140 WELLS, supra note 7, at 255.
141 See GIDDINGS, supra note 1, at 396.
142 GIDDINGS, supra note 1, at 621.
143 McMURRY, supra note 5, at 239; see also GIDDINGS, supra note 1, at 396.
144 WELLS, supra note 7, at xxiii.
145 Id.
helped to found a number of national and local organizations, including the National Association for the Advancement of Colored People (NAACP), the National Association of Colored Women (NACW), and the Chicago Negro Fellowship League. The League helped provide poor Black men with employment, food, temporary housing, and back wages; Wells-Barnett supported its activities from her salary as the city’s first Black probation officer. She fought segregation in the schools and in public transportation, campaigned for women’s suffrage, and organized responses to race riots. For example, in 1922, she traveled to Little Rock, Arkansas following riots triggered by Blacks’ refusal to sell cotton at the reduced prices that white businessmen demanded. Twelve Blacks were arrested, beaten, tortured, and sentenced to death after what Wells-Barnett labeled a “mockery of a trial.” She met with the prisoners, helped organize protests, raised money for their defense, and threatened to launch an exodus of Black laborers if the men were executed. After a new trial, the defendants were acquitted.

146 Id. at 327; DAVIDSON, supra note 5, at 168.
147 WELLS, supra note 7, at 297–306, 327, 333, 410; see also BAY, supra note 7, at 288–89; McMURRY, supra note 5, at 293–98.
148 WELLS, supra note 7, at 274–78, 345, 383–404; see also BAY, supra note 7, at 293, 300–01; DAVIDSON, supra note 5, at 168; GIDDINGS, supra note 1, at 444–45, 562–63; McMURRY, supra note 5, at 303–04.
149 WELLS, supra note 7, at 398–401.
150 Id. at 399.
151 Id. at 398–404.
152 WELLS, supra note 7, at 404. It is, however, not clear how much credit goes to Wells-Barnett as opposed to the NAACP, which was responsible for the men’s defense. See BAY, supra note 7, at 313.
Not all of Wells-Barnett’s efforts ended so happily. During the latter part of her life, she suffered a long series of slights and thwarted ambitions in Black organizations, partly attributable to her own limitations as a leader.\(^\text{153}\) She also lost an election for the Illinois state legislature.\(^\text{154}\) Her contributions were even omitted in some histories of lynching and profiles of notable Black activists.\(^\text{155}\) According to a leading biography by Paula Giddings, part of the reason for this marginalization was Wells-Barnett’s reputation as a “difficult woman.”\(^\text{156}\) She was, as Giddings adds, certainly that “even when taking into account the double standard applied to assertive independent women.”\(^\text{157}\) “One of her chronic difficulties was that her domineering style often resulted in her being the issue rather than the principle she was trying to impart.”\(^\text{158}\) Other accounts similarly note that her “militancy,” “dominating” approach, and lack of “diplomatic skills” cost her allies.\(^\text{159}\)

Another biographer chronicles how Wells-Barnett’s “prickly personality,” “uncompromising self-righteousness,” and “need to be the leader of movements in which she participated” often sabotaged her efforts.\(^\text{160}\) She did not “mince words or spare the feelings of those

\(^{153}\) See Bay, supra note 7, at 223, 228, 265, 273, 321, 327; Davidson, supra note 5, at 169; Wells, supra note 7, at xxix.

\(^{154}\) Bay, supra note 7, at 327.

\(^{155}\) Giddings, supra note 1, at 7, 301.

\(^{156}\) Id. at 6.

\(^{157}\) Id.

\(^{158}\) Id. at 534.

\(^{159}\) Richard Lingeman, O Pioneer!: Ida Wells-Barnett Led the Fight Against Lynching, N.Y. TIMES SUNDAY BOOK REV., May 18, 2008, at 25; see also Bay, supra note 7, at 230.

\(^{160}\) McMurry, supra note 5, at 243, 329.
whom she decided were ‘do-nothings.’”¹⁶¹ Nor did she hesitate to offend potential donors, other civil rights leaders, or women whom she considered to have a “petty outlook on life.”¹⁶² Even she acknowledged these shortcomings. In her diary, she entreated God “help me to better to control my temper.”¹⁶³ Her autobiography notes that “temper . . . has always been [her] besetting sin” and chronicles multiple examples.¹⁶⁴ The same anger that inspired her crusades for justice also compromised her effectiveness as an organizational leader in those efforts.¹⁶⁵

Further problems arose from her assertedly outsized ego and need to dominate every organization in which she played a significant role. One Black newspaper editor claimed that she had “delegated to herself the care and keeping of the entire colored population of the United States,” and that the Black press should “resent this egotistic self-appointed” spokesperson.¹⁶⁶ In explaining her exclusion from top positions at the NAACP, one of the association’s officers noted that she was a “great fighter, but . . . she had to play a lone hand.”¹⁶⁷ Another NAACP officer complained that after the Chicago riots in 1919, Wells-Barnett had “launched into a tirade” against those

¹⁶¹ WELLS, supra note 7, at xxvii.
¹⁶² GIDDINGS, supra note 1, at 509; McMURRY, supra note 5, at 289, 307 (quoting WELLS, supra note 7, at 230) (noting that Wells-Barnett made the “petty outlook” comment to Susan B. Anthony when explaining why she did not think women’s suffrage would accomplish what supporters hoped).
¹⁶³ McMURRY, supra note 5, at 69 (internal citation omitted).
¹⁶⁴ WELLS, supra note 7, at 286.
¹⁶⁵ See McMURRY, supra note 5, at 333 ("The same anger that diminished her effectiveness in organizations fueled her continual crusades.").
¹⁶⁶ Id. at 232.
¹⁶⁷ GIDDINGS, supra note 1, at 478.
who did not join her organization.\textsuperscript{168} She also had compromised the association’s efforts to establish a defense fund for rioters by raising money on her own.\textsuperscript{169} Similar criticisms occurred after the Arkansas riots, when Wells-Barnett competed for credit and funds with the NAACP, which was defending the rioters.\textsuperscript{170} As one biographer noted, she had “no gift for compromise and often departed in a huff from organizations that she helped create, her famous temper flaring when negotiations did not go her way.”\textsuperscript{171}

Much of what made the style of Wells-Barnett so off-putting to contemporaries involved gender and race. Some Black men were uncomfortable with a female leader.\textsuperscript{172} Although other prominent Blacks, including W.E.B. Du Bois, were described as arrogant, their conduct did not arouse the same hostility.\textsuperscript{173} Women were under greater pressure to be conciliatory team players, and that was not Wells-Barnett’s leadership style. So too, many white women leaders of social reform organizations did not expect “to be criticized or challenged by a Black woman.”\textsuperscript{174}

It is hard to know how much of a role her personal shortcomings, as opposed to her race and gender, played in limiting her achievements. What is clear is that her anger over personal slights impeded cross-racial alliances.\textsuperscript{175} But some of her difficulties involved matters of principle and her refusal to acquiesce in entrenched

\textsuperscript{168} \textit{Id.} at 603.
\textsuperscript{169} \textit{Id.} at 609.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{BAY, supra} note 7, at 9.
\textsuperscript{172} \textit{See McMURRY, supra} note 5, at 295.
\textsuperscript{173} \textit{BAY, supra} note 7, at 9.
\textsuperscript{174} \textit{Id.} at 264.
\textsuperscript{175} \textit{Id.}
racism. In one celebrated incident, at a 1913 parade organized by the National American Woman Suffrage Association, the organization’s leaders decided that all the Black participants would march at the end rather than with their state delegations.176 Wells-Barnett, after having lost the vote over Illinois’s compliance with that decision, simply defied it.177 As the state’s delegation marched down Pennsylvania Avenue in the nation’s capital, she stepped out from the crowd and joined the group’s white members.178 Critics noted that the consequences of this courageous act further undermined her ability to work for change within the organization. But from Wells-Barnett’s perspective, such efforts may have seemed futile. Having been unable to force change in segregationist policies, she could at least call attention to them and make a strong symbolic challenge.

III.

The combination of systemic racial and gender biases, coupled with Wells-Barnett’s own difficulty in navigating them, marginalized her leadership contributions later in life. When she died of kidney disease in 1931, at the age of 68, her death did not spark the public recognition that her achievements deserved.179 Nor was she adequately recognized for decades after.180 It took forty years to find a publisher for her autobiography, and it was not until the 1970s that her

176 Id. at 290.
177 Illinois Women Feature Parade, CHI. TRIB., Mar. 4, 1913.
178 Id.; Illinois Women Participants in Suffrage Parade, CHI. TRIB., Mar. 4, 1913, at 5.
179 WELLS, supra note 7, at xxix–xxx; GIDDINGS, supra note 1, at 658.
180 GIDDINGS, supra note 1, at 7; see also BAY, supra note 7, at 11; McMURRY, supra note 5, at xvi.
uncompromising militancy attracted new-found admiration among feminists and civil rights activists.\textsuperscript{181} This belated recognition is all too typical for civil rights leaders of color who were regarded as “difficult” during their lifetimes. Jeanne Theoharis’ account of these leaders in \textit{A More Beautiful and Terrible History} recounts the vitriol and violence that many activists experienced, stating, “even those civil rights heroes we [glorify] today were reviled in their day and made to feel crazy.”\textsuperscript{182} Rosa Parks faced death threats and suffered from ulcers and a loss of livelihood for almost a decade for her role in the Montgomery bus boycott.\textsuperscript{183} Reverend Dr. Martin Luther King, Jr. was not lionized in his lifetime. Seventy-two percent of Americans had an unfavorable opinion of him in 1966; two decades later, when his birthday became a national holiday, only twenty-four percent still did.\textsuperscript{184}

For Wells-Barnett, the lack of public recognition in her own lifetime was a source of considerable frustration. She opened her autobiography with an account of a twenty-five-year-old woman who had approached her out of ignorance of her achievements.\textsuperscript{185} As Wells-Barnett recalled, the young woman had been

\begin{quote}
[A]t a YWCA vesper service when the subject for discussion was Joan of Arc, and each person was asked to tell of someone they knew who had traits of character resembling this French heroine and martyr. She was the only colored girl
\end{quote}

\textsuperscript{181} See McMurry, supra note 5, at 338.

\textsuperscript{182} Jeanne Theoharis, \textit{A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History} 207 (2018).

\textsuperscript{183} Id. at 74, 194, 200.

\textsuperscript{184} Id. at ix–x.

\textsuperscript{185} Wells, supra note 7, at 3.

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present, and . . . she named me [Wells-Barnett]. She was then asked to tell why she thought I deserved such mention. She said, “Mrs. Barnett, I couldn’t tell why I thought so . . . I was dreadfully embarrassed. Won’t you please tell me what it was you did, so the next time I am asked such a question I can give an intelligent answer?”

That ignorance is being slowly rectified. The newly opened National Memorial for Peace and Justice in Montgomery, Alabama, which commemorates the victims of lynching, has dedicated a space to her memory, and a movement has formed to build a monument in her honor on the South Side of Chicago. An Ida B. Wells Society offers training and support designed to increase the number of journalists of color. These tributes are well-deserved and long overdue. Many now recognize that Wells-Barnett had, in the words of W. E. Du Bois, helped awaken “the conscience of the nation.”

As one of her biographers noted, few Americans before or after have more consistently refused to compromise with the evil of racial prejudice. Despite enormous combined obstacles of race, class, and gender, Wells-Barnett managed to attain international prominence as an author and activist. Her path-breaking research, passionate advocacy, steadfast courage, and candid commentary in the face of violent and vitriolic opposition

186 Id.
189 McMURRY, *supra* note 5, at 337–38 (internal citations omitted).
190 Id. at 338.
helped expose the nation’s most horrific forms of racism. More than any other individual, she kept lynching in the public eye. She was also a pioneer in using the combination of strategies necessary to push the boundaries of social change: protests, boycotts, and media coverage.

So too, Wells-Barnett was a leader in women’s struggle to combine work and family at a time when society failed even to recognize this as a significant issue. In defiance of deeply rooted social conventions, she refused to relinquish her name, her activism, or her ambitions after marriage. She ceded major domestic responsibilities to her husband and insisted that childcare be available for herself and other working mothers. By transitioning in and out of professional life when her children were young, Wells-Barnett set an example for generations to follow.

Yet her legacy is not one of unmixed accomplishment. As she herself partly recognized, her ambitions were hobbled by limitations in temperament and leadership. Her uncontrolled anger, egoism, and self-righteousness often denied her the recognition that she craved and compromised her effectiveness in the causes to which she dedicated her life. Of course, most of the obstacles she confronted were not of her own making; systemic race and gender bias helped to fuel, as well as amplify, the significance of her outbursts. But if Wells-Barnett had been more self-disciplined in the way she managed relationships, she might have had more success

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191 Id. at 124, 338.
192 See ANGELA D. SIMS, ETHICAL COMPLEXITIES OF LYNCHINGS: IDA B. WELLS’ INTERROGATION OF AMERICAN TERROR 13 (2010), for Wells’ strategies. See Rhode, supra note 4, at 184 and DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS (3d ed. forthcoming 2020) [hereinafter LEADERSHIP FOR LAWYERS], for the need for such combined strategies.
in her efforts to obtain and exercise leadership. And had she been more concerned with organizational needs and less insistent on personal recognition, she might have achieved more of it in her lifetime.

Recent protests in response to the brutal police killing of George Floyd have given many Americans a new understanding of the depths of systemic racism that Wells-Barnett faced. And the less well-publicized police murders of unarmed women of color such as Breonna Taylor have underscored the intersectionality of race, class, and gender bias. In today’s context, the use of the term “difficult” to describe Wells–Barnett should be more widely understood as reflective of the systemic racism and sexism that she sought to challenge.

Yet it is still the case that those who seek influence in public life need to be strategic in challenging the racial and gender biases that get in the way. And those who wish to be effective need to subordinate their own concerns to the greater good. No significant change can be accomplished without alliances, and the self-restraint and shared power that make such coalitions possible. To reach the ends that Wells-Barnett envisioned, the ideal leader needs her moral convictions and courage, but not her egoism and uncontrolled temper. That combination may be asking too much of any single individual, particularly a woman of color facing the entrenched intersectional biases that Wells-Barnett encountered, but it is an ideal worthy of our aspirations. Wells-Barnett’s example points the way to a more just

193 See Alex Altman, Why the Killing of George Floyd Sparked an American Uprising, TIME, June 15, 2020.
195 See LEADERSHIP FOR LAWYERS, supra note 192, for a general discussion of leadership strategies for social change.
society and the importance of leaders with her moral passion in that struggle.