

IN PURSUIT OF CALMER WATERS:  
MANAGING THE IMPACT OF TRAUMA EXPOSURE ON  
IMMIGRATION ADJUDICATORS

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I. INTRODUCTION

A significant percentage of noncitizens in the United States are likely to experience trauma in some form.<sup>1</sup> Like a pebble skipped across a pond,<sup>2</sup> or a boulder dropped into a river,<sup>3</sup> this trauma not only has an effect at the point of direct impact on those noncitizens but also creates a ripple effect that spreads out from that point to touch others that it encounters in its path.<sup>4</sup> While our understanding of the ripple impact of trauma could benefit greatly from additional study, existing information allows us to conclude that it affects adjudicators in the immigration process, the process itself, and the noncitizens, attorneys, and others participating in it.<sup>5</sup> My previous article, *Ripples Against*

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1. Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53, 71–72 (2013) [hereinafter *Ripples Against the Other Shore*].

2. LAURA VAN DERNOOT LIPSKY WITH CONNIE BURT, *TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS* 17 (2009) [hereinafter *TRAUMA STEWARDSHIP*].

3. JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 452–53 (Dennis Leski, ed., 3d ed. 2007) [hereinafter *KOH PETERS, REPRESENTING CHILDREN*].

4. *Ripples Against the Other Shore*, *supra* note 1, at 67.

5. *Id.* at 102–10.

*the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators (“Ripples Against the Other Shore”),*<sup>6</sup> focused on this phenomenon: the existence of trauma exposure<sup>7</sup> in the immigration process, the effects of that exposure on immigration adjudicators, and the resulting impact on the immigration process.

The term “trauma exposure” refers to contact with trauma particularly in those not directly exposed, such as individuals who work in some capacity with victims of trauma.<sup>8</sup> “Trauma exposure response” is an umbrella term encompassing the effect on these exposed individuals.<sup>9</sup> It is also sometimes referred to as secondary or vicarious trauma.<sup>10</sup> This is a naturally occurring phenomenon, and is not an entirely negative occurrence. It allows those exposed indirectly to empathize with primary victims and, if managed successfully, may be a source of strength and growth for an individual. However, it can also have profoundly negative consequences for individuals and systems. For immigration adjudicators, it may manifest as oversensitivity or insensitivity, irritability or anger, hyper-arousal, lack of patience, and difficulty concentrating.<sup>11</sup> Such symptoms may inappropriately affect the outcome of immigration proceedings and certainly affect the experience of noncitizens and attorneys appearing before these adjudicators.<sup>12</sup>

This article considers the logical next question: What can and should be done about the impact that trauma exposure has on the immigration process? As the title of this article alludes, the goal is to move towards calmer waters, to reduce the intensity and the reach of the impact of trauma on those who experience it both directly and indirectly. Stated another way, it is neither possible nor desirable to completely eliminate trauma exposure response in the immigration process. Instead, the objectives are twofold. First, we must persuade immigration adjudicators and their agencies that trauma exposure response is real and something that needs to be addressed. Second, the legal profession should explore reforms that would better manage trauma exposure response so as to have, at a minimum, a less negative impact on all participants

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6. *See generally id.*

7. I primarily use the phrases “trauma exposure” and “trauma exposure response” because I believe they are the most accurate and least problematic descriptions of the impact of trauma on immigration adjudicators in the expansive sense in which I will discuss it here. *Id.* at 65–68. Because the terms secondary trauma and vicarious trauma have similar meanings, and appear frequently in the literature in the legal context, they will also appear occasionally in this article. *Id.* at 67–68.

8. *Id.* at 66–67; VAN DERNOOT LIPSKY, *supra* note 2, at 17.

9. *Ripples Against the Other Shore*, *supra* note 1, at 66–67; VAN DERNOOT LIPSKY, *supra* note 2, at 17.

10. *Ripples Against the Other Shore*, *supra* note 1, at 65–68.

11. *See id.* at 102–10; Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 22–23 (2008); Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

12. *Ripples Against the Other Shore*, *supra* note 1, at 102–10.

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in the immigration process. While this conversation is tied to the larger discussion surrounding immigration reform, its focus is much narrower. This article, then, will not set forth general arguments for or against comprehensive immigration reform.

*Ripples Against the Other Shore* focused specifically on the impact related to the trauma exposure of adjudicators working for the Executive Office of Immigration Review (“EOIR”) (Immigration Judges (“IJs”) and Board Members of the Board of Immigration Appeals (“BIA”)) and for United States Citizenship and Immigration Services (“USCIS”).<sup>13</sup> The article took this focus for two different reasons.<sup>14</sup> First, limited and insufficient attention has been paid to the effect of trauma on this group. Second, these adjudicators exercise great control over the immigration process and the impact of their trauma exposure response can be significant. Reforms targeted at this group have the potential to have great effect.

This article will further narrow this focus to IJs employed by EOIR and officers working for USCIS. I emphasize these trial-level adjudicators—those who are responsible for hearing, and sometimes gathering, evidence and making decisions based on that evidence in the first instance<sup>15</sup>—for two reasons. First, a greater amount of information on the impact of trauma exposure on them is available. Second, they are likely to have a greater degree of influence on the effect of trauma exposure in the immigration process. As trial-level adjudicators they interact most directly with noncitizens and the nature of the claims they hear are likely to expose them to trauma. While they are only a subset of adjudicators in the immigration process, I will use the shorthand “adjudicators” to refer to them throughout this piece.

Section II of this article addresses the preliminary issue of whether anything should be done to manage the impact of trauma exposure on the immigration process. Sections II.A. and II.B argue that, somewhat contrary to popular perception in the legal field, the practical impact of trauma and other related emotional responses on the immigration process is real and the rules governing the professional conduct of judges and attorneys encourage, if not mandate, attention to the subject. Section II.C establishes the goal of this reform: to manage but not eliminate the effect of trauma exposure. Managing trauma exposure has a dual aim. The first objective is ensuring that the

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13. *Id.* at 77–102. These adjudicators are not necessarily all attorneys, but all perform attorney-like functions and this article will therefore not differentiate among them. *Id.* at 77 & n.103, 81.

14. *See id.* at 81–84.

15. For the most part, these adjudicators conduct in-person hearings or interviews with non-citizen applicants who may have suffered traumatic experiences and are therefore exposed more directly to trauma. There are, however, some cases handled by USCIS such as self-petitions under the Violence Against Women Act for victims of domestic violence and applications for U and T visas for victims of certain specified crimes and trafficking that are typically decided based on the submitted paperwork alone. *Id.* at 72, 98–99. Such cases therefore do not result in in-person contact with trauma victims for the assigned officers. *Id.* at 107.

immigration process operates as fairly as possible. The second objective is reducing the negative impact of the process for all participants.

Section III introduces proposals for specific reforms. Section III.A focuses on personal and institutional strategies targeting trauma exposure and related psychological phenomena specifically. Section III.B considers systemic institutional reforms of both EOIR and USCIS more generally to address factors that may cause or exacerbate the impact of trauma exposure. Section III.C addresses possible critiques of these proposals for reform from two opposing directions. It considers arguments stating that the reforms go too far and complaints stating that they do not go far enough.

Section IV concludes that these reforms are important and that implementing even some of them would prove highly beneficial. Unfortunately, progress towards these changes is likely to be slow and incremental, as the inertia of a strong institutional culture must be overcome in order for real advancement to occur.

## II. WHY REFORM?

In order to lay the groundwork for the specific proposals for reform laid out in Section III, this section will address why changes in the immigration system and process are a necessary and appropriate response to the impact of trauma exposure. Section II.A will unpack and refute the resistance in our legal culture to acknowledging emotional effects as “real” or of significance. This resistance may stem from both the personal characteristics of those attracted to the legal profession and the lack of attention traditionally paid to the emotional aspect of the practice of law in the legal system and legal profession. One route to overcoming the resistance and acknowledging the very practical impact of emotions, then, is simply to pay greater attention to and conduct additional research on both emotions generally and trauma exposure specifically. Section II.B argues that rules of professional and judicial conduct at a minimum promote, if not require, this increased attention and research both for the legal profession as a whole and for individual adjudicators in the immigration process. Change in the immigration process to better address the impact of trauma exposure is necessary from both a practical and a legal perspective.

Section II.C focuses on the goals behind necessary reform. Two fundamental concepts should be at the heart of all proposed changes. First, the focus should be on better managing, not eliminating, trauma exposure response and its impact on the immigration system. Second, the underlying aim should be to create a system or process that has a more positive impact on overall wellbeing for all participants: adjudicators, attorneys, and noncitizens alike.

### A. *Unpacking Resistance to Emotional Response*

In *Ripples Against the Other Shore*, I set as an explicit goal of the article “normalizing the discussion of the emotional dimension of lawyering and its impact in and on our legal system.”<sup>16</sup> This is a necessary and important goal precisely because emotions and emotional responses still continue to be ignored or discounted in legal education and the legal profession.<sup>17</sup> I suggested in conclusion that “[t]he culture of logic and resistance to considering the emotional dimension of lawyering in our legal system generally . . . must be overcome in order to acknowledge . . . and begin to address” the impact of trauma exposure response on the immigration process.<sup>18</sup> As the first steps in overcoming this culture, this section will begin by establishing that the emotional aspect of the practice of law is real. It will then explore where the culture of logic and emotional resistance in the legal profession comes from, how it is perpetuated, and what measures have begun to chip away at it.<sup>19</sup>

#### 1. Emotional Response Is Real

Lawyering has an emotional dimension. This should not be a surprising statement. All human interaction has an emotional component, and much of lawyering consists of human interaction—lawyers with clients, lawyers with co-counsel and opposing counsel, adjudicators with lawyers, adjudicators with litigants and so on.<sup>20</sup> In fact, most lawyers spend far more time interacting with others than engaged in tasks more typically thought of as lawyer’s work, such as researching, analyzing and arguing the law.<sup>21</sup> It is therefore unavoidable for emotions to have a very real impact on the practice of law.<sup>22</sup>

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16. *Id.* at 55.

17. *Id.* at 54–55, 79–80.

18. *Id.* at 111.

19. I undertake these tasks with the caveat that, “like many if not most attorneys, I am not a trained mental health professional. While I was far luckier than most in this regard, psychological and sociological topics still played only a secondary role in my legal education.” *Id.* at 55 n.3.

20. See, e.g., Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 276 (1999–2000) [hereinafter Silver, *Love*] (“emotional responses are triggered in virtually every human encounter”); Melissa L. Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 422 (1996) [hereinafter Nelken] (“Yet the process of lawyering, as distinct from legal theory, inevitably involves the lawyer deeply in the hopes, fears, and conflicts of her clients; and these inevitably arouse responses in the lawyer, no matter how much the professional ideal would have us believe otherwise. In addition, in representing her clients, the lawyer has no choice but to be who she is: her own conflicts, and attitudes toward conflict, will inform every task she undertakes on a client’s behalf.”).

21. Silver, *Love*, *supra* note 20, at 284 (citing Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199, 203–04 (1956)).

22. See, e.g., Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173, 1193 (1999) [hereinafter Silver, *Emotional Intelligence*] (“Emotions are part and parcel of the biological reactivity of the human animal and are therefore irremovable. While they may be modified and grotesquely distorted, they are always present to influence all human behavior, even that of lawyers.” (quoting Andrew S. Watson, *The Quest for Professional*

However, this aspect of a lawyer's work still receives far less attention than, for example, a skillful closing argument or cross-examination.<sup>23</sup>

The fact that trauma exposure impacts immigration adjudicators and the immigration system as a whole is part of this larger truth that lawyering has an emotional dimension. Evidence shows that trauma exposure affects individual adjudicators, and, through them, the immigration process at large on a very concrete and practical level.<sup>24</sup> Despite this strong evidence, the first reaction of many attorneys is likely to be that this claim is far-fetched or over-blown.

Before exploring further where this resistance comes from, this section will begin by briefly situating this discussion within the study of emotion generally to provide context and vocabulary. Preeminent psychologists John Mayer and Peter Salovey first formulated the concept of "emotional intelligence" in their seminal 1990 article.<sup>25</sup> They defined "emotional intelligence" as "a type of social intelligence that involves the ability to monitor one's own and others' emotions, to discriminate among them, and to use the information to guide one's thinking and actions."<sup>26</sup> While they acknowledged that they could have also used the label emotional *competence*, they intentionally chose to use *intelligence* for several reasons. First, intelligence was a more accurate description of the mental aptitude or abilities they were studying.<sup>27</sup> Second, they wanted to link their work to existing

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*Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L REV. 91, 124 (1968)).

23. While both of these activities may have a strong emotional component, that component is not the facet of them that receives explicit public interest and consideration. Even those who advocate strongly for the teaching of practical skills in law school do not necessarily explicitly include interpersonal and intrapersonal skills among the list of those necessary for practicing attorneys.

24. *Ripples Against the Other Shore*, *supra* note 1, at 80–81, 102–10.

25. See Peter Salovey & John D. Mayer, *Emotional Intelligence*, in 9 IMAGINATION, COGNITION, AND PERSONALITY 185–211 (1990) [hereinafter Salovey & Mayer, *Emotional Intelligence*].

26. John D. Mayer & Peter Salovey, *The Intelligence of Emotional Intelligence*, 17 INTELLIGENCE 433, 433, 435 (1993) [hereinafter Mayer & Salovey, *The Intelligence*] (citing Salovey and Mayer, *Emotional Intelligence*, *supra* note 25). Mayer and Salovey elsewhere defined emotional intelligence as "the ability to perceive emotions, to access and generate emotions so as to assist thought, to understand emotions and emotional knowledge, and to reflectively regulate emotions so as to promote emotional and intellectual growth." John D. Mayer & Peter Salovey, *What Is Emotional Intelligence?*, in EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE: IMPLICATIONS FOR EDUCATORS 3, 5 (Peter Salovey & David Sluyter, eds. 1997).

27. See Mayer & Salovey, *The Intelligence*, *supra* note 26, at 439 ("We did not use the term intelligence to create a controversy, but because we really are talking about a mental aptitude—one that assists in intellectual processing. We are not talking about reaching a criterion, as would be implied by a competence conception. Nor are we talking about an ability divorced from intellect, but rather enhanced processing of certain types of information: in short, emotional intelligence.").

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literature, including in particular the work of Howard Gardner, a psychologist who developed the theory of multiple intelligences.<sup>28</sup>

Emotional intelligence has been described as consisting of five major components: knowing one's emotions, managing emotions, motivating oneself, recognizing emotions in others, and handling relationships.<sup>29</sup> As Mayer and Salovey explained:

Different types of people will be more or less emotionally intelligent. Emotionally intelligent individuals may be more aware of their own feelings and those of others. They may be more open to positive and negative aspects of internal experience, better able to label them, and when appropriate, communicate them. Such awareness will often lead to the effective regulation of affect within themselves and others, and so contribute to well being.<sup>30</sup>

Since the concept was first introduced in 1990, it has captured the public imagination and grown widely in both recognition and significance.<sup>31</sup> Additional research has been performed, and our understanding of our minds and the role of emotion has expanded greatly.<sup>32</sup> Emotional intelligence has come to be understood as an aptitude that can be developed through education and practice.<sup>33</sup> However, the concept is still not universally accepted and remains the subject of much criticism and even disdain.<sup>34</sup>

## 2. *Where Does Resistance to Emotional Response Come From?*

A tendency to resist acknowledging the impact of emotions is not a characteristic limited to attorneys, but is in fact shared by many people in the population at large.<sup>35</sup> In fact, the educational system in the United States as a

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28. Gardner previously identified and defined two specific intelligences related to emotions and human relations: "Interpersonal intelligence is the ability to understand other people: what motivates them, how they work, how to work cooperatively with them. . . . Intrapersonal intelligence, a seventh kind of intelligence, is a correlative ability, turned inward. It is a capacity to form an accurate, veridical model of oneself and to be able to use that model to operate effectively in life." Silver, *Emotional Intelligence*, *supra* note 22, at 1176–77 (quoting HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* 9 (1993)). Mayer and Salovey labeled the combination of these two concepts emotional intelligence. Mayer & Salovey, *The Intelligence*, *supra* note 26, at 433–34.

29. Silver, *Love*, *supra* note 20, at 259–60 n.6 (citing DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ*, 42–44 (1997)); *see also* Silver, *Emotional Intelligence*, *supra* note 22, at 1176–77.

30. Mayer & Salovey, *The Intelligence*, *supra* note 26, at 440.

31. *See, e.g.*, DANIEL GOLEMAN, *Introduction to EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ*, at ix–xiii (10th Anniversary Edition 2005) [hereinafter GOLEMAN, *EMOTIONAL INTELLIGENCE*].

32. *Id.* at xii–xiii.

33. *Id.* at xv–xvi.

34. *Id.* at xii–xiii, xvii–xviii.

35. *See* Silver, *Love*, *supra* note 20, at 278 ("Most of us have difficulty acknowledging the influence of the unconscious in our daily lives." (citing Sigmund Freud, *Five Lectures on Psycho-Analysis, Leonardo da Vinci, and Other Works, Fifth Lecture, in XI THE STANDARD EDITION OF*

whole has been criticized for failing to adequately teach emotional intelligence.<sup>36</sup> While there is a movement towards what is known as social-emotional learning, which is “based on the idea that emotional skills are crucial to academic performance,” comprehensive programs focused on teaching emotional intelligence are still the exception rather than the rule.<sup>37</sup> This means, then, that many students will enter law school without the necessary emotional skills and predisposed to disregard the emotional aspect of their education and legal career.<sup>38</sup>

Beyond this general difficulty and lack of formal education on acknowledging the impact of the unconscious, lawyers appear to be particularly resistant to exploring the emotional aspect of their profession.<sup>39</sup> It is profoundly difficult to determine with certainty exactly why this is. There are, however, some factors that distinguish lawyers from other professions that likely contribute: “the disposition with which the average student enters the study of law, the training received in law school, and the reinforcement that comes with practice, all contribute to lawyers’ inclinations to deny the power or influence of their emotions.”<sup>40</sup> Each of these factors will be discussed individually in the subsections below. Ultimately, each works to reinforce the others, together helping to confirm a world view that the law “is based on facts, not feelings.”<sup>41</sup>

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THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 52 (James Strachey ed., 1957) (1910)); Nelken, *supra* note 20, at 421.

36. See, e.g., Silver, *Emotional Intelligence*, *supra* note 22, at 1179 & n.29 (1999) (“[O]ur schools and our culture fixate on academic abilities, ignoring *emotional* intelligence, a set of traits — some might call it character — that also matters immensely for our personal destiny.” (quoting DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 34–36 (1997))); Dakota Snow, *Emotional Intelligence: What We Really Need to be Teaching in School*, ELEPHANT J. (Jan. 23, 2014), available at <http://www.elephantjournal.com/2014/01/emotional-intelligence-what-we-really-need-to-be-teaching-in-school-dakota-snow/>. As discussed below, *infra* section II.A.2.b, there are aspects of legal education that make this a particular issue.

37. See Jennifer Kahn, *Can Emotional Intelligence Be Taught?*, N.Y. TIMES MAG., Sept. 15, 2013, at MM44, available at [http://www.nytimes.com/2013/09/15/magazine/can-emotional-intelligence-be-taught.html?hpw&\\_r=1&](http://www.nytimes.com/2013/09/15/magazine/can-emotional-intelligence-be-taught.html?hpw&_r=1&).

38. See Silver, *Love*, *supra* note 20, at 307–08 (“Although ideally a law student would arrive at law school already equipped with a grounding in psychology and psychological skills through prior education and life experience, most law students have no such preparation.”).

39. See, e.g., *id.* at 278 (“Among the helping professions, lawyers tend to be especially resistant to acknowledging the power of the unconscious.” (citing Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987))).

40. *Id.* at 281; see also Silver, *Emotional Intelligence*, *supra* note 22, at 1181 (“The personality profile of the typical law student; the emphasis on rational, analytical discourse and the Socratic method in law school; the talents that are ratified and rewarded in practice: all contribute to the devaluation and denial of emotional processes and influences.”).

41. Nelken, *supra* note 20, at 421; see also *id.* at 424 (“We all trust the accuracy of the lens through which we view the world, and it is only through repeated confrontation with its distortions that we begin to question it.”). In fact, emotional and rational thinking are closely and inseparably intertwined. See, e.g., Silver, *Emotional Intelligence*, *supra* note 22, at 1180–81



*a. Predisposition of Lawyers*

The first, and perhaps most significant, factor that may help to explain the resistance of attorneys to acknowledging emotions is the predisposition of those drawn to the practice of law. The legal profession tends to attract people who prioritize logic and reason over emotion:

[T]he psychological profile of the typical law student or lawyer is of one who is drawn to logical thinking and rationality. Studies using the Myers-Briggs personality indicators have found that the great majority of high-functioning law students and lawyers are “thinkers” rather than “feelers.” Such thinkers tend to devalue emotional responses.<sup>42</sup>

The Myers-Briggs Type Indicator, or MBTI, is a personality inventory based on C.G. Jung’s theory of psychological types.<sup>43</sup> It evaluates an individual’s preferences on each of four dichotomies related to perception and judgment, that is to “ways of becoming aware of things, people, happenings, or ideas [and] . . . ways of coming to conclusions about what has been perceived.”<sup>44</sup> The four dichotomies are (1) Extroversion or Introversion, (2) Sensing or Intuition, (3) Thinking or Feeling, and (4) Judging or Perceiving.<sup>45</sup> It is the third dichotomy, between Thinking and Feeling, that sets law students (and lawyers) notably apart from the general population.<sup>46</sup> Both Thinking and Feeling are ways of making decisions:

Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner. . . . They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice. Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. . . . They are interested in the person behind the idea or the job. They seek to do what is right for

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(“One problem with the dichotomy, however, is its promotion of the concept of a *separation* between thinking and feeling—the notion that not only are these attributes distinct, but that they are largely mutually exclusive . . .”). What we are discussing here, and throughout this section, then, is an individual’s predisposition to value or credit one over the other.

42. Silver, *Love*, *supra* note 20, at 279–80; *see also* Nelken, *supra* note 20, at 422 (“As one student said to me many years ago: ‘If I’d wanted to learn about feelings, I wouldn’t have gone to law school.’”).

43. *MBTI Basics*, THE MYERS & BRIGGS FOUND. (last visited Nov. 2, 2014), <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/> [hereinafter *MBTI Basics*]; *see also* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1392 & n.339 (1997) [hereinafter Daicoff, *Lawyer*].

44. *MBTI Basics*, *supra* note 43.

45. *Id.*; *see also* Daicoff, *Lawyer*, *supra* note 43, at 1392 n.339.

46. Daicoff, *Lawyer*, *supra* note 43, at 1365–66, 1392–94; *see also* Silver, *Love*, *supra* note 20, at 279–80; Nelken, *supra* note 20, at 421–22.

themselves and other people and are interested in mercy.<sup>47</sup>

The finding that law students and lawyers are disproportionately<sup>48</sup> Thinkers rather than Feelers is particularly noteworthy because it has been demonstrated in multiple studies across a considerable period of time. Furthermore, it did not change significantly following the increasing entrance of women into law school and the legal profession.<sup>49</sup>

Empirical studies have also demonstrated that students who choose to go to law school tend to be “highly focused on academics and . . . scholastic achievement” (that is, rational pursuits), are motivated by achievement, and have “a low interest in emotions or others’ feelings.”<sup>50</sup> Emotion is likely to have been continuously deemphasized or ignored throughout the life of law students.<sup>51</sup> A desire for intellectual stimulation is one of the top three reported motives for attending law school, while altruistic motives motivate a smaller percentage of students to attend law school than to attend other professional schools.<sup>52</sup> This phenomenon may occur, at least in part, because students self-

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47. Daicoff, *Lawyer*, *supra* note 43, at 1366 (citing Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 149, 152 (Susan J. Bell ed., 2d ed. 1992)).

48. As compared to the proportions of Thinkers versus Feelers in the general population.

49. Daicoff, *Lawyer*, *supra* note 43, at 1365–66, 1392–94 (citing Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 149, 152, 153 (Susan J. Bell ed., 2d ed. 1992); Debra Cassens Moss, *Lawyer Personality*, 77 A.B.A. J. 34, 34 (1991); Frank L. Natter, *The Human Factor: Psychological Type in Legal Education*, 3 RES. PSYCHOL. TYPE 24, 24–29 (1981); Paul Van. R. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 465–66 (1967); Lawrence Roy Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States* 229–30 (1994) (unpublished Ph.D. dissertation, Temple University) (on file with Temple University); PAUL VAN R. MILLER, A FOLLOW-UP STUDY OF PERSONALITY FACTORS AS PREDICTORS OF LAW SCHOOL PERFORMANCE (1967) (unpublished report to the LSAT Council, 1966–67, Princeton, New Jersey: Educational Testing Service)).

50. Daicoff, *Lawyer*, *supra* note 43, at 1349–50 (citing Martin J. Bohn, Jr., *Psychological Needs of Engineering, Pre-Law, Pre-Med, and Undecided College Freshmen*, 12 J.C. STUDENT PERSONNEL 359, 359 (1971); Edwin N. Shneidman, *Personality and "Success" Among a Selected Group of Lawyers*, 48 J. PERSONALITY ASSESSMENT 609, 609, 613 (1984)).

51. Daicoff, *Lawyer*, *supra* note 43, at 1349–50 & n.38 (citing Heather M. McLean & Rudolf Kalin, *Congruence Between Self-Image and Occupational Stereotypes in Students Entering Gender-Dominated Occupations*, 26 CAN. J. BEHAV. SCI. 142, 155–57 (1994)).

52. Daicoff, *Lawyer*, *supra* note 43, at 1357–61 (naming an interest in the subject matter and a desire for professional training as the other two of the top three motives for attending law school) (citing Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 614 (1973); Don S. Anderson et al., *Conservatism in Recruits to the Professions*, 9 AUSTL. & N.Z. J. SOC. 42, 43 (1973); James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 791, 814 (1979)). It is worth noting that women report altruistic motives for attending law school at a higher rate than men, but that realistic as opposed to altruistic motives for attending law school in women are positively associated with a higher level of career satisfaction. Daicoff, *Lawyer*, *supra* note 38, at 1361 (citing Georgina Williams LaRussa, *Portia's Decision: Women's Motives for Studying Law and Their Later Career Satisfaction as Attorneys*, 1 PSYCHOL. WOMEN Q. 350, 360 (1977)).

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select into law school based on the public stereotype of lawyers as dominant, ambitious, aggressive, and competitive.<sup>53</sup>

Law students, then tend to arrive at law school strongly predisposed to discount feelings and emotion. Regardless of why this occurs, as discussed below both legal education and the legal profession reinforce the value of logic and rationality over emotion.

### **b. Legal Education**

Traditional legal education builds on the predisposition of law students towards logic and devalues the emotional aspect of the practice of law.<sup>54</sup> Academics have historically dominated practical skills in many law schools. Legal educators often describe their mission as not to teach law students to practice law, but instead to teach them to “think like lawyers,” which is a somewhat complex and multifaceted concept that has legal reasoning at its core.<sup>55</sup> Since the 1870’s, law schools’ core curriculum has been based on the Langdellian case method, which prioritizes “analytic thinking, in which students learn to categorize and discuss persons and events in highly generalized terms.”<sup>56</sup> The case method is frequently coupled with the Socratic method, a pedagogical technique based on asking and answering questions to stimulate thinking and illuminate critical ideas. The use of the Socratic method is in particular blamed for intellectualizing inquiry and eliminating emotional

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53. Cf. Daicoff, *Lawyer*, *supra* note 43, at 1350–51 (“[C]oncern for emotional suffering and for the feelings of others was less emphasized in law . . . students’ families . . .” (citing Barbara Nachmann, *Childhood Experience and Vocational Choice in Law, Dentistry, and Social Work*, 7 J. COUNS. PSYCHOL. 243, 245 (1960))); *id.* at 1352 (“[L]awyers . . . see life in less emotional terms.”) (citing James L. Hafner & M. Ebrahim Fakouri, *Early Recollections of Individuals Preparing for Careers in Clinical Psychology, Dentistry, and Law*, 24 J. VOCATIONAL BEHAV. 236, 239 (1984))).

54. See, e.g., Daicoff, *Lawyer*, *supra* note 43, at 1381 (“Law students may be Thinkers rather than Feelers before coming to law school, but law school’s exclusive emphasis on ‘objective thought, rational deduction and empirical proof’ likely exacerbates these tendencies . . .” (citing G. Andrew, H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students*, AM. B. FOUND. RES. J. 225, 246, 250–51 & n.65 (1986))).

55. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 185–86 (2007) [hereinafter CARNEGIE REPORT]; Daicoff, *Lawyer*, *supra* note 43, at 1385 (1997) (citing Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29, 121–24 (1994)); Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 891–903 (2009) (“Legal educators have long possessed the power of naming the most crucial lessons learned in law school, using the phrase “thinking like a lawyer” to encapsulate the challenges that face generations of law students. In a sense, the legal academy has embraced this trope as its own core identity (much as Rumpelstiltskin reveled in the power of his own name.”); Geoffrey R. Stone, *The Importance of Law School*, N.Y. TIMES (July 25, 2011, 11:41 AM), available at <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/the-importance-of-law-school/>; cf. Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356–57 (2011) (“It is not true that we do a particularly good job of teaching students to ‘think like lawyers,’ at least not in the richest sense.”).

56. CARNEGIE REPORT, *supra* note 55, at 186.

content.<sup>57</sup> Professors applying the traditional Socratic and case methods are primarily asking students to explain the rationale behind a court's decision in particular cases. Since emotion is not typically a factor in most court decisions, emotional arguments are implicitly, if not explicitly, devalued.<sup>58</sup>

One major consequence of this focus is that law students “come to understand the law as a formal and rational system.”<sup>59</sup> For law students who already entered law school as Thinkers, then, law school reinforces the worldview that likely brought them to law school in the first place.<sup>60</sup> Their predisposition to perceive, understand, and judge the world around them through a lens that prioritizes logic and order is strengthened through their legal education. Even students who enter law school as Feelers, however, are affected by the overwhelming emphasis on logical analysis. Feelers typically enter school focused on “the relational aspect of human nature,” which is sometimes described as an “ethic of care.” These students are likely to demonstrate a substantial shift towards “a rights orientation focuse[d] on rights, rules, standards, individuality, independence, justice, fairness, objectivity, accomplishments, ambitions, principles, personal beliefs, and freedom from others' interference” by the end of their first year of school.<sup>61</sup>

The predominant culture of law school further reinforces prioritizing the objective and rational and discourages attention to emotional intelligence. As individuals who over-rely on logical analysis and searching for rational answers to issues while deemphasizing interpersonal skills and solutions, the majority of law students will tend not to seek help from others in solving problems or collaborate in learning concepts and skills.<sup>62</sup> Law school, with its emphasis on grading primarily through a single, individual, final exam and the importance of personal grades and class rank, encourages these likely pre-existing tendencies. This pattern is self-reinforcing; even students who might otherwise devote time and attention to developing personal and supportive relationships with their colleagues are discouraged from doing so by the prevailing culture and expectations:

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57. See, e.g., Silver, *Emotional Intelligence*, *supra* note 22, at 1181; *id.* at 1192–93 (citing Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 124 (1968)).

58. See, e.g., Silver, *Emotional Intelligence*, *supra* note 22, at 1181 n.41 (quoting a law student who explained: “I’ve been taught [here] that emotion in an argument is a minus and in my culture emotion in an argument is a plus. And here whenever you present an emotional side of an argument—which I think is just as valid as many other arguments—you know, about the abortion issue. You know, how a woman feels about having to have a baby—and I mean why isn’t that any more legitimate than endless arguments about the constitutional right to privacy? I don’t think one really should take precedence over the other. And I think it’s instilled in you that if you make an emotional argument then it’s wrong.”).

59. CARNEGIE REPORT, *supra* note 55, at 186.

60. See *supra* Section II.A.2.a.

61. Daicoff, *Lawyer*, *supra* note 43, at 1399–1402 (citing Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 234 (1991)).

62. Daicoff, *Lawyer*, *supra* note 43, at 1380–81.

Empirically, there does appear to be a pressure or tendency in law school to keep interpersonal relationships on a professional and competitive basis rather than a cooperative basis and thus indirectly to increase competitiveness among students. This tendency also may discourage students from seeking social support systems to cope with their problems and may inculcate an isolationist, competitive, noncollaborative attitude . . . .<sup>63</sup>

In addition to placing an overwhelming emphasis on rational and analytical thought, law schools often completely fail to teach intrapersonal and interpersonal skills.<sup>64</sup> This should not be particularly unexpected given that the lawyers and law professors who run and teach in law schools are also likely to have the same inherent tendencies and education and socialization towards the rational over the emotional.<sup>65</sup> While there is a history of literature urging “lawyers, legal educators and law students to learn about basic psychology and the operation of unconscious processes in the practice of law,” these concepts are not taught and there appears to be little awareness of the previous work done on them.<sup>66</sup> Law students are not taught to engage in self-analysis of their own emotional reactions, or to consider how those reactions may influence their behavior with clients, with other attorneys, in the court or conference room, or even in the classroom itself. The significance that these intrapersonal and interpersonal skills might have played in the fact patterns and litigation leading up to the appellate cases in their case books are seldom, if ever, discussed. Law students do not learn, then, to consider how emotions might have contributed to or be related to resolving the cases they will confront in practice.

This failure conveys to law students, likely already predisposed to prefer Thinking and discount Feeling, that there is in fact no emotional dimension to

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63. *Id.* at 1415.

64. *See, e.g.,* CARNEGIE REPORT, *supra* note 55, at 187 (“[T]he task of connecting these conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method.”); Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Teaching*, 17 ST. THOMAS L. REV. 513, 523 (2005) (“I cannot emphasize enough that without my social work background, I believe my legal training would offer minimal guidance for practicing Therapeutic Jurisprudence.”); Daicoff, *Lawyer*, *supra* note 43, at 1381 (“Also, because legal education does not assist or encourage students to acquire interpersonal skills and often concentrates exclusively on the development of analytic skills, students may ignore the social and emotional consequences of decision-making.”).

65. *See* Daicoff, *Lawyer*, *supra* note 43, at 1401 & n.402 (“Here, the classic ‘chicken and egg’ problem exists: given that law students may be predominantly Thinkers before they come to law school, and that law professors are likely to be predominantly Thinkers as well, it is unlikely that legal education is the sole reason for the lack of emphasis on relationships and human issues. Rather, this orientation may be the reflection of preferences inherent in the individuals who make up law schools.”).

66. *See generally* Silver, *Love*, *supra* note 20, at 283–290 (discussing the importance of the limited literature available from the past several decades that is focused on emotional intelligence and lawyering).

the practice of law or, at a minimum, that this emotional aspect is so unimportant as not to warrant a lawyer's attention and action.<sup>67</sup> That is, the failure both contributes to the problem described in this article and makes lawyers reluctant to recognize that the problem even exists or merits attention.

Legal analysis is obviously critical to the practice of law. The logical and the rational, however, should not be prioritized at the complete expense of the emotional. As one prominent call for the reform of legal education has already pointed out: "Neither understanding of the law is exhaustive, of course, but law school's typically unbalanced emphasis on the one perspective can create problems as the students move into practice."<sup>68</sup>

### c. *The Legal Profession*

Given the predominant personality characteristics of prospective attorneys and the reinforcing and conforming effect of legal education, it should not be surprising that the legal profession continues to fail to acknowledge or to undervalue the emotional aspect of the practice of law. While lawyers have been studied significantly less frequently than law students, and there is therefore less information available regarding their attitudes and focus, the data that does exist "is almost entirely consistent with the research on law students (and even pre-law students)."<sup>69</sup> In particular, as compared to the general population, lawyers are more homogenous in personality type and are overwhelmingly Thinkers as opposed to Feelers.<sup>70</sup> The focus in our legal system on the adversary system of justice and lawyering "is more or less well suited to training those with an inclination toward aggressiveness and competition [but] . . . ill serves problem solvers and counselors."<sup>71</sup>

### 3. Steps Forward?

Despite these strong tendencies, it would be an overgeneralization to say that all classes and all professors in all law schools teach only the logical and rational and never incorporate any aspects of emotional intelligence. In fact, appeals to educate lawyers on the emotional dimension of the practice of law

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67. See, e.g., Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 167-69 (2007) ("Does legal training tend to encourage students to separate themselves from emotions by dealing with case law and statutory law in an emotional vacuum?"); Nelken, *supra* note 20, at 423 n.9 ("Certainly there is little in the standard law curriculum to dissuade anyone from the view that the practice of law, like the study of it, is a purely rational enterprise."); *id.* at 422 ("Resistance to the human dimension of the lawyer's work is built into most law training.").

68. CARNEGIE REPORT, *supra* note 55, at 188; cf. Daicoff, *Lawyer*, *supra* note 43, at 1413 ("Our entire system of justice may depend on its administrators (lawyers) to be logical, rational, objective, unemotional, and impartial in order to administer the laws 'fairly.' If so, then society should consider carefully the consequences of having lawyers who are less impartial, objective, and rights-oriented, before concluding that they should change.").

69. Daicoff, *Lawyer*, *supra* note 43, at 1408-09.

70. *Id.*

71. Silver, *Emotional Intelligence*, *supra* note 22, at 1191.

are not a new phenomenon – the former dean of Harvard Law School Erwin Griswold called for human relations training in law school in a 1955 speech.<sup>72</sup> Marjorie Silver details the long history of the incorporation of social science and psychological principles in law school classes, course books, and scholarship in her article *Love, Hate, and Other Emotional Interference in the Lawyer Client Relationship*.<sup>73</sup>

More recently, there have been strong calls for reform of legal education, including the incorporation of interpersonal and intrapersonal skills and the impact of emotion, that law schools have begun to heed. There are numerous contemporary examples of excellent, creative ways that legal educators have incorporated the teaching of emotional intelligence into the law school community, curriculum, and scholarship. The emotional aspect of the practice of law is clearly critical to many in clinical legal education.<sup>74</sup> Clinical courses commonly include one or more classes or lessons focused on intrapersonal and interpersonal skills. For example, clinics often explicitly teach skills related to collaboration.<sup>75</sup> Clinics also commonly include a session focused on cross-cultural lawyering that addresses both the ways that culture affects the student attorneys' own way of perceiving the world, including their clients, and ways in which cultural differences may affect various aspects of the student attorney/client relationship.<sup>76</sup>

Sometimes these lessons prove so important that they develop into courses or programs of their own. For example, at the Katharine and George Alexander Community Law Center at Santa Clara University School of Law, psychology clinicians now teach a stand-alone companion course on representing clients who had experienced trauma. This course grew incrementally out of more informal methods of training students in the clinical program on the emotional aspects of representing victims of trauma as part of their clinical experience.<sup>77</sup>

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72. Silver, *Love*, *supra* note 20, at 284 (citing Erwin N. Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199, 201–02 (1956)).

73. *Id.* at 283–89.

74. See generally Ass'n of Am. Law Schools, 37th Annual Conference on Clinical Legal Education: Becoming a Better Clinician (Apr. 27–30, 2014), available at <http://bestpracticeslegaled.files.wordpress.com/2014/05/clin14bookletweb.pdf>. The 2014 American Association of Law Schools Conference on Clinical Legal Education, an annual conference put on by and for clinicians, contains one track specifically focused on mindfulness and numerous plenaries and concurrent sessions focused on issues such as happiness, finding meaning in your work, self-care, and human development. See *id.* at 5, 9–10, 20–21, 37.

75. See, e.g., Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 461–62 (1992–93).

76. See, e.g., Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, AND LAW 47–62 (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001–02).

77. See Parker, *supra* note 67, at 186–93.

Legal educators outside the clinical community have also paid attention to the role of emotional intelligence in legal education and the practice of law.<sup>78</sup> Non-clinical courses on topics such as Interpersonal Dynamics for Attorneys<sup>79</sup> have been developed and taught. Law schools undertaking curricular reform have explicitly discussed and incorporated the teaching of emotional intelligence in particular courses or sometimes even across the curriculum.<sup>80</sup> The same is true for newer law schools.<sup>81</sup> In addition, some schools now offer joint degree programs for law students with a school of social work, better equipping future lawyers with the inter- and intrapersonal skills necessary to work effectively with their clients and in the legal system.<sup>82</sup>

Law schools have also begun to provide opportunities to address the emotional aspect of the practice of law as well as the impact of emotions in students' lives, including the interconnectedness of students' professional and personal lives outside the classroom. Some schools require participation in programs related to emotional intelligence. Students at Barry University School of Law, for example, must complete six hours in a Student Professionalism Enhancement Program that includes courses on topics such as respect of self and others, interpersonal skills, client relationships, awareness of community, time management, stress management, image awareness, and etiquette as a requirement for graduation.<sup>83</sup> Other schools make available optional programs focused on emotional and mental health. For example, Georgetown Law offers a non-credit course focused on the emotional challenges of the study and practice of law called Lawyers in Balance that "teaches important skills that are not typically addressed in the classroom but are highly useful in your coursework, the profession, and leading a balanced

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78. See, e.g., Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy about Legal Education and Parenting*, 1 BRIT. J. AM. LEG. STUDIES 297, 300–301 (2012).

79. *Interpersonal Dynamics Class Offers Law Students a Mirror for Relationship Skills*, CUTTING EDGE LAW (Feb. 17, 2009, 10:15 PM), <http://www.cuttingedgelaw.com/content/interpersonal-dynamics-class-offers-law-students-mirror-relationship-skills> (course taught at the University of San Francisco School of Law); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621 (2002) (describing the course and the rationale behind it in more detail).

80. See, e.g., Silver, *Emotional Intelligence*, *supra* note 22, at 1197–1200 (discussing rethinking the educational program at Touro College Law Center); *Introducing EQ, Emotional Intelligence Assessment, Our Distinctive 1L Year*, NYU LAW, <http://www.law.nyu.edu/about/whynylaw/distinctive-1l-year> (last visited Jan. 21, 2015) (discussing the incorporation of an emotional intelligence component in courses throughout the curriculum including the required 1L Lawyering Program).

81. See, e.g., *Our Schools*, THE INFILAW SYSTEM, <http://www.infilaw.com/our-schools> (last visited Dec. 30, 2014).

82. Rutgers-Newark School of Law, for example, offers a joint J.D./M.S.W. program with the Rutgers School of Social Work. See *Dual Degree Programs*, RUTGERS SCHOOL OF LAW-NEWARK, <https://law.newark.rutgers.edu/academics/joint-degree-program>.

83. See, e.g., Helia Garrido Hull, *Legal Ethics for the Millenials: Avoiding the Compromise of Integrity*, 80 UMKC L. REV. 271, 283–84 (2012).



life as a student and lawyer.”<sup>84</sup> Many law schools also offer or otherwise make available counseling and related services to their students.<sup>85</sup>

Focus on intrapersonal and interpersonal skills may continue even after graduation from law school. A Google search for CLE (continuing legal education) and “emotional intelligence” brings up thousands of results.<sup>86</sup> These courses are even required by some State Bars. Florida, for example, requires all new lawyers to complete a one day Practicing with Professionalism course that includes sessions on management skills including decision making and human resources/supervision skills, time management, communication, chemical dependency, and stress management.<sup>87</sup> Secondary trauma is explicitly addressed in this program.<sup>88</sup> Like law schools, many state bars offer counseling and other assistance through lawyer assistance programs.<sup>89</sup> Indeed, there are so many excellent examples of ways to educate law students and lawyers on emotional intelligence that omission of one here means nothing more than the fact that multiple entire law review articles could be devoted to this topic alone.

Despite these many examples, real progress towards sufficient attention paid by all legal educators and attorneys to the emotional dimension of the legal profession at all stages of legal education and the practice of law has been

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84. *Lawyers in Balance*, GEORGETOWN LAW, <http://www.law.georgetown.edu/campus-life/health-wellness/lawyers-in-balance/> (last visited Oct. 28, 2014).

85. See, e.g., *Counseling and Psychiatric Services (CAPS)*, GEORGETOWN LAW, <http://www.law.georgetown.edu/campus-life/advising-counseling/personal-counseling/index.cfm> (last visited Nov. 1, 2014); *Counseling*, NEW YORK UNIVERSITY, <http://www.nyu.edu/life/safety-health-wellness/student-health-center/services/mental-health/counseling.html> (last visited Nov. 1, 2014).

86. See, e.g., *Managing Partners Diversity Initiative Events, Emotional Intelligence, EQ not IQ: Developing Other Soft Skills for Attorneys*, CBA COLUMBUS BAR ASSOCIATION, [http://www.cbalaw.org/cba\\_prod/Main/Resources/Legal-Professionals/Diversity/Events.aspx](http://www.cbalaw.org/cba_prod/Main/Resources/Legal-Professionals/Diversity/Events.aspx) (last visited Nov. 1, 2014); *Contemplative Lawyers Group: Emotional Intelligence for Lawyers*, NEW YORK CITY BAR, [https://services.nycbar.org/iMIS/Events/Event\\_Display.aspx?EventKey=CLG101013](https://services.nycbar.org/iMIS/Events/Event_Display.aspx?EventKey=CLG101013) (last visited Nov. 1, 2014); *There Will Be Emotions: Build Emotional Intelligence for Practice With People*, UNIVERSITY OF CINCINNATI COLLEGE OF LAW, CENTER FOR PRACTICE, CONTINUING LEGAL EDUCATION WORKSHOPS, <http://law.uc.edu/institutes-centers/center-practice/emotionalintelligenceforlawyers> (last visited Nov. 1, 2014).

87. THE FLORIDA BAR CONTINUING LEGAL EDUCATION COMMITTEE AND THE YOUNG LAWYERS DIVISION, FLYER, PRACTICING WITH PROFESSIONALISM (Spring 2014), available at [http://www.floridabar.org/FBWEB/CLEReg.nsf/89194632da1e6ec285256ce7006b56ea/4c6d35760f7e2b8d85257c0f006329a4/\\$FILE/1649-YLD-14.pdf](http://www.floridabar.org/FBWEB/CLEReg.nsf/89194632da1e6ec285256ce7006b56ea/4c6d35760f7e2b8d85257c0f006329a4/$FILE/1649-YLD-14.pdf); *Continuing Legal Education*, THE FLORIDA BAR YOUNG LAWYERS DIVISION, <http://www.flayld.org/clepwp/pwpmaterials.php> (last visited Nov. 1, 2014).

88. *Id.* Secondary trauma is a term with a meaning similar to trauma exposure and trauma exposure response. See *supra* n.7; *Ripples Against the Other Shore*, *supra* note 1, at 67–68.

89. See, e.g., *Lawyer Assistance Program*, D.C. BAR, <http://www.dccbar.org/bar-resources/lawyer-assistance-program/> (last visited Nov. 1, 2014); *Florida Lawyers Assistance Program*, <http://fla-lap.org/> (last visited Nov. 1, 2014); *Practice Resources: Lawyer Assistance Program*, NEW YORK STATE BAR ASSOCIATION, <https://www.nysba.org/LAP/> (last visited Nov. 1, 2014).

and will continue to be difficult. Much of the literature and innovative progress discussed above, despite how wide spread and pervasive it has become, is not part of the mainstream discussion regarding reforming legal education and the legal profession.<sup>90</sup> There are multiple factors that contribute to making change in this regard so challenging.

First, the current status quo is deeply ingrained and self-perpetuating in our legal profession and legal system. Future lawyers enter law school already predisposed to see the world and make decisions through the lens of logic and analytical thinking.<sup>91</sup> With some notable exceptions, law schools remain committed at base to a traditional philosophy of legal education as discussed in subsection II.A.2.b above, a philosophy in which emotions have no place.<sup>92</sup> When law students enter law school predisposed to discount emotions and only a tiny minority of the legal profession is exposed to and fully educated regarding the impact of emotions, it is to be expected that the legal profession will continue to discount the importance of emotions and emotional intelligence. This tendency towards the rational and away from the emotional is reinforced at each step along the way, through the lawyer's legal education, entry into the profession, and practice of law.<sup>93</sup>

Ultimately, an orientation towards logic is deeply embedded in the culture of the legal profession. Lawyers report that they “rely less on emotions and more on rational analysis in making decisions.”<sup>94</sup> Indeed, some have suggested that this development is a positive adaptation:

Our entire system of justice may depend on its administrators (lawyers) to be logical, rational, objective, unemotional, and impartial in order to administer the laws ‘fairly.’ If so, then society should consider carefully the consequences of having lawyers who are less impartial, objective, and rights-oriented, before concluding

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90. See, e.g., Silver, *Love*, *supra* note 20, at 289 (“[M]ost of this literature appears to be largely unknown outside of a small community with a particular interest in or inclination towards psychology. It is likely that the earlier-discussed phenomenon of resistance within the profession is at least partly responsible for the relative obscurity of these writings.”).

91. See *supra* Section II.A.2.a.

92. See *supra* Section II.A.2.b. See also, e.g., CARNEGIE REPORT, *supra* note 55, at 186 (“Compared to other professional fields, which often employ multiple forms of teaching through a more prolonged socialization process, legal pedagogy is remarkably uniform across variations in schools and student bodies. Excepting a few schools, the first-year curriculum is similarly standardized, as is the system of competitive grading that accompanies the teaching and learning practices associated with case dialogue. The consequence is a striking conformity in outlook and habits of thought among legal graduates.”).

93. See, e.g., Nelken, *supra* note 20, at 422 (“Indeed, since the profession idealizes the lawyer as the amoral agent of her client's ends—having no wishes, hopes, or fears of her own—the impact of the lawyer's personal conflicts on her ability to function in her professional role is officially denied and is seen as a failing, rather than as a vehicle for learning.”).

94. Daicoff, *Lawyer*, *supra* note 43, at 1362 (citing LAWRENCE R. RICHARD, PSYCHOLOGICAL TYPE AND JOB SATISFACTION AMONG PRACTICING LAWYERS IN THE UNITED STATES 229–34 (1994) (unpublished Ph.D. dissertation, Temple University) (on file with Temple University)).

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that they should change.<sup>95</sup>

Studies have shown that those attorneys who are “objective, rational, and logical in decision-making style” are the most satisfied in their careers.<sup>96</sup>

Moreover, with the exceptions of wholesale curricular reform and the incorporation of emotional intelligence into required courses or CLEs, the opportunities discussed above are voluntary.<sup>97</sup> Law students and lawyers who already prefer Feeling over Thinking are more likely to self-select and take advantage of them, while those who are most resistant to acknowledging the emotional dimension of lawyering will likely opt out completely. This means that, no matter how beneficial and successful the programs are, they may never be able to contribute to an overall shift towards acknowledging the importance of intrapersonal and interpersonal intelligence in the legal profession.

Many of the programs and opportunities discussed above will provide ideas for and insight into addressing trauma exposure response in immigration adjudicators. At the same time, however, the resistance to addressing issues of emotional intelligence in the legal profession means that actually implementing such programs is likely to prove difficult. It is therefore particularly important to look at why such programs should be utilized. The next two subsections will look at two different sets of reasons for reform. Subsection B will consider existing rules that may suggest or require reform. Subsection C will lay out the goals of the changes to be made.

### ***B. Professional Responsibility***

This section will consider a wide-ranging selection of possible sources of professional regulation for adjudicators in the immigration process. It includes guidance specific to and issued by the relevant federal administrative agencies, the Department of Justice (“DOJ”) and the Department of Homeland Security (“DHS”). It also explores more general sources of guidance, specifically the Code of Conduct for United States Judges; the American Bar Association (“ABA”) Model Rules of Judicial Conduct; the Model Rules of Judicial Conduct for Federal Administrative Law Judges; and the ABA Model Rules of

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95. *Id.* at 1413. This perspective of course ignores the “myriad roles lawyers play and serve in our society.” Silver, *Emotional Intelligence*, *supra* note 22, at 1191–92 (“[I]t is a terrible mistake to try and conform all lawyers to a single aggressive, adversarial mode. . . . Not only is there room in the profession for thinkers *and* feelers, we should aspire to cultivate thinking *and* feeling. Legal education must be responsive to all appropriate varieties and styles of lawyering by helping cultivate emotional as well as analytical skills.”).

96. Daicoff, *Lawyer*, *supra* note 43, at 1362 (citing LAWRENCE R. RICHARD, PSYCHOLOGICAL TYPE AND JOB SATISFACTION AMONG PRACTICING LAWYERS IN THE UNITED STATES 232–34, 250 (1994) (unpublished Ph.D. dissertation, Temple University) (on file with Temple University)).

97. This is one aspect of an observation made by the Carnegie Report regarding reform of legal education: law schools tend to reform their curriculum incrementally, by adding additional skills and coursework, instead of by stepping back and attempting to undertake comprehensive reform. CARNEGIE REPORT, *supra* note 50, at Summary, Observation 5, 7–8.

Professional Conduct. Taken together, these sources and the rules and provisions discussed encourage, if not mandate, changes to better manage the impact of trauma exposure in the immigration process.

Identifying precisely and comprehensively the sources of professional guidance that govern adjudicators in the immigration process is somewhat complex for a variety of interrelated reasons. First, these adjudicators are likely to be subject to multiple sources of guidance. Guidance on issues of professional responsibility and conduct directed specifically at immigration judges and USCIS officers does exist. In addition, many adjudicators will also be subject to guidance on these issues targeted at larger groups within the legal profession. Normally, the rules of professional conduct govern attorneys in the jurisdiction in which they are licensed and sometimes the jurisdiction in which they are practicing. Similarly, the rules of judicial conduct typically govern judges for the type of court in which they sit. Second, these rules do not always appear directly applicable to adjudicators in the immigration process and so it can be challenging to determine their import. While outwardly their roles and functions may appear similar if not identical, IJs and USCIS officers are not Article III judges or even Article I administrative law judges and are therefore not within the groups targeted explicitly in rules of judicial conduct for judges and administrative law judges. As for the rules of professional conduct governing attorneys more generally, there is some question as to how exactly they apply to attorneys employed and acting in an adjudicatory capacity. Furthermore, many USCIS officers need not be attorneys at all.<sup>98</sup>

Because there is no perfect match applicable to all adjudicators, then, this section will consider broadly the potential sources of ethical guidance as they relate explicitly to trauma exposure and implicitly to trauma exposure response. The rules themselves for the most part do not directly address trauma. This discussion, therefore, will focus primarily on the guidance provided for on the bench conduct<sup>99</sup> generally and for the possible manifestations of trauma exposure response in this conduct specifically.

### 1. Guidance Specific to Immigration Judges

A variety of statutes, regulations, and executive branch memoranda governs the conduct of IJs.<sup>100</sup> These standards provide important guidance on

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98. See *supra* note 13 and accompanying text; see also *Ripples Against the Other Shore*, *supra* note 1, at 77 n.103; *Careers at USCIS*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/careers> (last updated Dec. 8, 2014).

99. While technically USCIS adjudicating officers do not sit “on the bench” when adjudicating individual cases, this phrase will be used throughout as shorthand to refer to the adjudicatory conduct of both USCIS officers and IJs.

100. The EOIR Ethics Manual discussed in this section below states: “The ethics laws and regulations condensed in the Handbook include the conflict of interest statutes found at 18 U.S.C. §§ 202 to 209, Executive Order 12674 on Principles of Ethical Conduct for Government Officers and Employees (as amended by Executive Order 12731), the Standards of Conduct for Executive Branch Employees at 5 C.F.R. Part 2635 that implement Executive Order 12674, and the Department of Justice Supplemental Standards of Conduct at 5 C.F.R. Part 3801.” U.S. DEP’T OF

critical topics such as conflicts of interest, the receipt of gifts, misuse of a government position and outside activities.<sup>101</sup> While these rules are significant and valuable, they address only a small portion of the circumstances that will regularly confront an IJ. In fact, few of these sources specifically target IJs alone; most are directed towards the Executive Office for Immigration Review, the DOJ, and the entire executive branch generally.<sup>102</sup> This is likely in significant part a result of the fact that the federal government in the early 1990's moved towards centralized ethical regulation of the executive branch with only supplemental standards set by and for individual agencies.<sup>103</sup> The rules resulting from this centralization address ethical issues generally applicable to the executive branch of the federal government and encompass larger groups, up to and including all executive branch employees.<sup>104</sup> As a result, they concern principally an IJ's conduct off the bench and address an IJ's case-related work only in a limited and indirect fashion.<sup>105</sup> They do not address trauma exposure and its impact on the IJ's and the immigration process as a whole, either explicitly or by implication.<sup>106</sup>

In addition to these principle sources of standards of conduct, over the last ten to fifteen years, EOIR has struggled to develop additional guidance for IJs that would address their work on cases and particularly in the courtroom.<sup>107</sup> A brief historical look at this process, and at the various documents it has created, is useful in identifying both mandates and suggestions that do exist with respect to trauma exposure response and gaps for which it may be useful to consult other sources of standards of conduct to fill.

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JUSTICE, EXEC. OFF. FOR IMMIGR. REV., *Foreword* to ETHICS MANUAL, Foreword 2–3 (2001), available at <http://www.justice.gov/eoir/statpub/handbook.pdf> [hereinafter EOIR ETHICS MANUAL]. While the foreword states that the various standards of conduct and the applicable Departmental memoranda are included as parts two and three of the Ethics Manual, the online version of the Ethics Manual does not contain them. *Id.* at 3. IJs would also appear to be bound by the Department of Justice's supplemental regulations on employee responsibilities at 28 C.F.R. part 45. *See id.* at 1 n.1; *see also* 28 C.F.R. § 45.1 (2014).

101. *See generally* 18 U.S.C. §§ 202–09 (2004); 5 C.F.R. § 2635; 5 C.F.R. § 3801; 28 C.F.R. § 45; Exec. Order No. 12674, Principles of Ethical Conduct for Government Officers and Employees, 54 Fed. Reg. 15159 (Apr. 14, 1989), as amended by Exec. Order No. 12731, 55 Fed. Reg. 45257 (Oct. 19, 1990), [hereinafter Exec. Order No. 12674].

102. *See generally* sources cited *supra* note 101.

103. Exec. Order No. 12674, *supra* note 101; *Executive Order 12674 (Apr. 12, 1989): Principles of Ethical Conduct for Government Officers and Employees*, U.S. OFF. OF GOV'T ETHICS, [http://www.oge.gov/Laws-and-Regulations/Executive-Orders/Executive-Order-12674-\(Apr--12,-1989\)---Principles-of-Ethical-Conduct-for-Government-Officers-and-Employees/](http://www.oge.gov/Laws-and-Regulations/Executive-Orders/Executive-Order-12674-(Apr--12,-1989)---Principles-of-Ethical-Conduct-for-Government-Officers-and-Employees/) (last visited Nov. 2, 2014) (“In 1989, the President’s Commission on Federal Ethics Law Reform recommended that individual agency standards of conduct be replaced with a single regulation applicable to all employees of the executive branch.”).

104. *See* sources cited *supra* note 101.

105. *See* sources cited *supra* note 101.

106. This is very likely due to the fact that most other officers in the executive branch are unlikely to confront trauma in the same ongoing, sustained manner as IJs.

107. *See* discussion *infra* Section II.B.1.

First, EOIR has an Ethics Manual for adjudicators employed by the agency, specifically members of the BIA and administrative law judges in addition to Immigration Judges (collectively described in the Manual as “EOIR Judges”). The Ethics Manual was first released by the then-director of EOIR in 2001.<sup>108</sup> However, EOIR stated that the Manual was not intended to impose additional requirements, but rather to summarize and explain existing standards of conduct and provide direction on certain ethical issues.<sup>109</sup> Like the primary sources mentioned above that it incorporates and relies on, its focus is not for the most part on an IJ’s conduct on or off the bench with respect to specific cases. Instead, it is concerned with “public confidence in the integrity and impartiality of the EOIR Judges” and concentrates primarily on conduct that might create an appearance of impropriety or undue influence.<sup>110</sup>

In addition to these primary sources of standards, the Ethics Manual also contains references to some provisions of the ABA’s Model Code of Judicial Conduct that are intended to provide “aspirational guidance” on particular issues.<sup>111</sup> Section I.B of the Ethics Manual sets out fourteen general principles intended to guide EOIR Judges in their conduct in situations not covered by more generally applicable standards.<sup>112</sup> These principles include, most relevantly, charges to EOIR Judges to “put forth honest effort in the performance of their duties”<sup>113</sup> and to “avoid any actions creating the appearance that they are violating the law or the ethical standards.”<sup>114</sup> In explaining these principles, the Manual cites to Canon 3B and its Commentary in the Model Code of Judicial Conduct in support of the following “Note:”

EOIR Judges have a duty to hear all matters delegated to them fairly and with patience. They also should maintain order and decorum in proceedings. These duties are not inconsistent with the obligation to dispose of matters promptly and efficiently. EOIR Judges can be prompt and efficient while being patient, deliberate, dignified, and courteous.<sup>115</sup>

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108. Memorandum, *in* EOIR ETHICS MANUAL, *supra* note 100.

109. *Id.*

110. 27 of the 28 pages providing substantive guidance in the Ethics Manual deal with the receipt of gifts, conflicts of interest, misuse of the position, and outside activities; the first page explains the “basic obligation of public service.” *See id.*

111. *Id.* at Memorandum; *see also id.* at Foreword at 4 (“Although EOIR Judges are not required to comply with the Model Code of Judicial Conduct, its canons and commentary represent principles of ethical conduct EOIR Judges should aspire to achieve.”).

112. *Id.* at 2–3 (referring in particular to “the standards set forth in 5 C.F.R. part 2635”).

113. *Id.* at 2 (referring to General Principle 5).

114. *Id.* at 3 (referring to General Principle 14).

115. *Id.* This reference is presumably to the 1990 version of the ABA’s Model Code of Judicial Conduct, as the Model Code was reorganized beginning with the 2007 revision into canons followed by black-letter rules and explanatory comments rather than sections. *See* AM. BAR ASS’N JOINT COMM’N TO EVALUATE THE CODE OF JUDICIAL CONDUCT, REPORT 3 (2006), *available at* <http://www.americanbar.org/content/dam/aba/migrated/judicialethics/report.authcheckdam.pdf>. The equivalent provision in the current version of the Model Code of Judicial

Regulation of demeanor and conduct on the bench are particularly important facets of this discussion of the ethical rules governing immigration adjudicators. Potential issues with an adjudicator's professional behavior in this respect may in fact be directly related to the impact of trauma exposure. IJs may demonstrate trauma exposure response through, for example, avoiding testimony regarding traumatic incidents, an oversensitivity to potentially fraudulent claims, irritability or anger, lack of patience, insensitivity, hyperarousal, and difficulty concentrating.<sup>116</sup> The Ethics Manual's Note cited above does provide important and valuable guidance in this respect. However, it is the only portion of the Ethics Manual to address an IJ's demeanor and conduct while on the bench and does so only in a very brief and limited way.

Shortly after the Ethics Manual was released in 2001, the Executive Office for Immigration Review generally began to be the subject of increasing scrutiny and criticism. This censure was likely provoked in part by changes made to the structure and process of the BIA first in 1999, and again by then-Attorney General John Ashcroft in 2002,<sup>117</sup> and public outrage at these so-called streamlining measures.<sup>118</sup> These procedural reforms resulted in increased appeals of BIA decisions to the federal courts, thereby highlighting problems in the initial proceedings conducted and decisions made by IJs.<sup>119</sup> A

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Conduct would be Rule 2.8, Decorum, Demeanor, and Communication with Jurors. See AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT, Rule 2.8 (2011), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html) [hereinafter MODEL CODE OF JUDICIAL CONDUCT].

116. See *Ripples Against the Other Shore*, supra note 1, at 104–05.

117. See Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135–36 (Oct. 18, 1999); Executive Office for Immigration Review, Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878–79 (Aug. 26, 2002).

118. Executive Office for Immigration Review, Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35510, (June 28, 2007) [hereinafter EOIR Codes of Conduct] (“On January 9, 2006, the Attorney General directed a comprehensive review of the Immigration Courts and the Board of Immigration Appeals . . . in response to concerns about the quality of decisions being issued by the immigration judges and the Board . . . .”); AM. BAR ASS'N, COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES 2, available at [http://www.americanbar.org/content/dam/aba/migrated/Board\\_of\\_Immigration\\_Appeals\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Board_of_Immigration_Appeals_2.authcheckdam.pdf) (“These changes have inspired much debate as to whether the BIA as currently structured adequately serves as an oversight and adjudicative body.”); see also *Ripples Against the Other Shore*, supra note 1, at 96–97.

119. AM. BAR ASS'N, COMM'N ON IMMIGRATION POLICY, PRACTICE, AND PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 2–3 (2003), available at <http://www.ilw.com/articles/2003,1126-aba.pdf> (“The rate at which BIA decisions are being appealed to the federal courts tripled between October 2001 and October 2002: about 15% of BIA decisions were appealed in October 2002 as compared to 5% a year earlier. In March 2003, 844 BIA decisions were appealed to the federal circuit courts as compared to 183 in February 2002, the month that the reforms were proposed.”); see also Stacey Caplow, *ReNorming Immigration Court*, 13 NEXUS J. OP. 85, n.39 (2007) (“A five year comparison of federal appeals filed nationwide shows an increase in proceedings originating from the BIA from 4,449 in 2002 to 11,911 in 2006. That latter figure represents 17.8% of all appeals filed and 90.9% of all

series of highly publicized decisions in which federal courts of appeal took to task IJs in individual (mainly asylum) cases for intemperate and abusive behavior<sup>120</sup> were also likely a contributing cause. Whatever the initial impetus, however, the response was not limited to the streamlining measures themselves or to other particular complaints. Instead, the resulting criticism ranged widely over removal proceedings generally including the conduct of IJs in proceedings before the Immigration Court.<sup>121</sup> This conduct was not a new issue. Rather, it was either newly brought to light by the streamlining regulations or simply captured public attention and indignation in a way that it had not previously.

In large part in response to this scrutiny, in January 2006 Attorney General Alberto Gonzales strongly criticized individual IJs “whose conduct can aptly be described as intemperate or even abusive and whose work must improve.”<sup>122</sup> After ordering “a comprehensive review of the Immigration Courts and the BIA,” he issued a memorandum in August 2006 directing the implementation of twenty-two separate measures for overall improvement.<sup>123</sup> Among those measures was the development of a “Code of Conduct” specifically for “immigration judges and Board members.”<sup>124</sup> The subsection

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appeals from administrative agencies.”) (citing Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts 2006*, tbl. B-3 (Mar. 31, 2007)); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court: An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 4, 43–48 (2005).

120. See *Immigration Judges*, TRAC IMMIGRATION (July 31, 2006), [hereinafter *Immigration Judges*] <http://www.trac.syr.edu/immigration/reports/160/> (“Possibly contributing to the attorney general's decision to launch this top-level investigation has been a series of federal appeals court decisions finding fault with its handling of a number [of] individual immigration cases.”); Caplow, *supra* note 119, at 85–86 (“Federal appellate judges have been scathing in their criticisms and the national media has latched onto these stories. . . . This spate of bad publicity captured Attorney General Alberto Gonzales' attention; he announced that it is finally time to reform the Immigration Courts.”).

121. It is worth noting in this respect that the problems brought to light in this spate of criticism had likely existed for some time. See, e.g., Caplow, *supra* note 119, at 85 (“Critiques of immigration adjudication are not new, but the increased intensity of such criticisms has focused a spotlight onto these administrative tribunals, traditionally a haven for immigration enforcement officials who have landed secure civil service jobs.”). Indeed, in the individual cases where IJs were excoriated by the circuit courts of appeal, the hearing during which the problematic behavior occurred happened sometimes years prior to the decision of the federal court criticizing it. *Id.* at 91 (“The problems presumably existed and were widely known long before critical decisions were handed down by federal appeals courts years after the original misbehavior.”).

122. *Immigration Judges*, *supra* note 120 (quoting Memorandum from Alberto Gonzales, Att’y Gen., to Immigration Judges (Jan. 9, 2006)); see also EOIR Codes of Conduct, *supra* note 118, at 35,510 (“On January 9, 2006, the Attorney General directed a comprehensive review of the Immigration Courts and the Board of Immigration Appeals . . . in response to . . . reports of intemperate behavior by some immigration judges.”).

123. Memorandum from the Att’y Gen. to the Deputy Att’y Gen., et al. 1 (Aug. 9, 2006), available at <http://www.justice.gov/ag/readingroom/ag-080906.pdf>.

124. *Id.* at 4. Others of these measures, including performance evaluations, a two year trial period for IJs, improved training, monitoring mechanisms, complaint procedures, budget



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of the memo on the Code of Conduct specifically is only three sentences long, and contains no direction on the intended contents or focus of the code. However, the rest of the memo contains references to “the appropriate judicial temperament and skills,”<sup>125</sup> “poor conduct,”<sup>126</sup> and “immigration judge temperament problems.”<sup>127</sup> The Code of Conduct, then, seems clearly intended to address an immigration judge’s conduct on the bench and the very public criticism of that conduct that had been occurring. As discussed above, this problematic on the bench conduct may very well include behavior potentially related to trauma exposure.

The Attorney General’s 2006 memo gave a relatively short deadline of December 1, 2006, for a draft Code of Conduct to be submitted to the Deputy Attorney General. For a period after his memo, there appeared to be significant momentum towards addressing issues with IJ’s temperament and behavior on the bench in an explicit and concrete way.<sup>128</sup> Steps were taken to create a proposed Code of Conduct and the on-bench behavior of IJs was made part of EOIR’s five-year strategic plan. Ultimately, however, this progress stalled, and it took significantly longer to make even moderate advances towards guidance for IJ’s with regard to their on-bench behavior.

A draft Code of Conduct was published as a proposed rule on June 28, 2007.<sup>129</sup> The proposed rule itself is somewhat brief. The portion specific to IJs covered just over one Federal Register page and consisted of sixteen substantive canons that, with one exception, are each only one sentence in length.<sup>130</sup> The draft Code of Conduct is offered along with some general commentary, but there are no explanations or examples given for the individual canons.<sup>131</sup> Despite this lack of explicit direction, the substance of several of the canons and a few of the general comments made could have been used to address manifestations of trauma exposure response more specifically than previous ethical guidance available to IJs. Indeed, at the time the draft Code of Conduct was published in 2007, it was widely regarded as a significant step forward in addressing the conduct of IJs on and off the bench. Contemporaneous commenters spoke positively of the focus of the proposed rule and its intended effects.<sup>132</sup>

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increases, and expanded pro bono programs, will be further explored below in section III’s discussion of reform.

125. *Id.* at 2.

126. *Id.* at 3.

127. *Id.*

128. Caplow, *supra* note 119.

129. EOIR Codes of Conduct, *supra* note 118, at 35,510.

130. *Id.* at 35,510–11. The single canon longer than one sentence addresses ex parte communications. *Id.* A second section directed at Members of the Board of Immigration Appeals is similar. *See id.* at 35,512–13.

131. *See id.* at 35,511–13.

132. *See, e.g.,* Caplow, *supra* note 119, at 90 (“These provisions appear to address directly the criticisms about behavior and temperament voiced of many federal judges. Of particular

Canons IX, X, and XI of the draft Code of Conduct are particularly relevant to the issue of managing trauma exposure response. Canon IX directs IJs to “be patient, dignified, and courteous”<sup>133</sup> and in Canon X to “act in a professional manner.”<sup>134</sup> Canon XI orders IJs to “refrain from any conduct . . . that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge’s official position.”<sup>135</sup> While Canon XI is focused in part on avoiding the potential or actual conflicts of interest addressed in the earlier sources of ethical guidance available to IJs, it is clear in context that it should also be read as addressing manifestations of the “intemperate behavior” that led the Attorney General to call for this Code of Conduct in the first instance.<sup>136</sup> Several statements from the general commentary are particularly enlightening with regard to this general goal of the proposed rule:

An immigration judge who manifests bias or engages in unprofessional conduct in any manner during a proceeding may impair the fairness of the proceeding and may bring into question the impartiality of the immigration court system. An immigration judge must be alert to avoid behavior, to include inappropriate demeanor, that may be perceived as prejudicial.<sup>137</sup>

While the draft Code of Conduct stops somewhat short of admitting the full degree to which an IJ’s behavior or demeanor can and does affect the substance and procedure of removal proceedings, its import is clear: the type of conduct criticized by the federal Circuit Courts of Appeal and in the press is inappropriate, harmful, and unacceptable.

The draft rule as published in the Federal Register called for comments to be submitted by no later than July 30, 2007.<sup>138</sup> In order for this proposed Code

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interest are Canons V, VIII, X and XV which concentrate on competence, impartiality, professionalism and civility, and ex parte communications.”); compare Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 503 (2008) (“The EOIR Codes demonstrate a renewed emphasis on professionalism for IJs and BIA members, perhaps acknowledging the effects of inappropriate judicial conduct on the perceived integrity of the immigration structure.”), with *id.* at 504–05 (“The EOIR Codes fail to adequately address the unique nature of immigration court. . . . One immigration judge, speaking off the record, noted that the Codes do not provide any real guidance, since they do not contain anything ‘different from what all of us should try to do in the first place.’”).

133. EOIR Codes of Conduct, *supra* note 118, at 35,511.

134. *Id.*

135. *Id.*

136. *Id.* at 35,510.

137. *See id.* at 35,511.

138. *Id.* at 35,513. At least one comment was received, from the United States Office of Government Ethics. The Office of Government Ethics stated that the rule did not comply with “the supplemental rulemaking requirements of Executive Order 12674, as implemented by 5 C.F.R. § 2635.105,” which require that any proposed supplemental agency ethical rule be submitted first to them for approval before publication in the Federal Register. Letter from Robert I. Cusick, Dir., U.S. Office of Gov’t Ethics, to Paul J. McNulty, Deputy Att’y Gen., Dep’t of Justice, & Kevin Chapman, Acting Gen. Counsel, Exec. Office of Immigration Review, Dep’t of Justice 1 (July 16, 2007), available at <http://trac.syr.edu/immigration/reports/210/include/10->

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of Conduct to take effect, the DOJ would have had to receive and consider these comments and then publish their response and the final rule in the Federal Register at least thirty days before it was to take effect.<sup>139</sup> These steps were never taken and no final rule was ever published. Without offering a contemporaneous public explanation, EOIR moved away from publishing a code of conduct through the rulemaking process and instead decided to update its Ethics Manual.<sup>140</sup>

As merely a proposed rule, the draft Code of Conduct does not have legally binding effect. Nevertheless, it should be considered in a discussion of sources of guidance that suggest or mandate acknowledging and responding to the impact of trauma exposure response in the immigration courts for several reasons. First, the draft Code of Conduct can be used to inform an interpretation of later sources of guidance issued by EOIR. It appears that EOIR moved away from a code of conduct in the form of a regulation for procedural rather than substantive reasons.<sup>141</sup> There are multiple indications that EOIR continued to be concerned with addressing particular behavior in immigration judges that could very well be, at least in part or in some instances, a manifestation of trauma exposure response. Indeed, as will be discussed in detail below, there are substantial similarities in some of the language discussed above in the Code of Conduct and provisions in the Ethics and Professionalism Guide issued by EOIR as a stand-alone document in 2011.<sup>142</sup> Second, because the draft Code of Conduct was drafted and published at a particular historical moment when the conduct of IJs while on the bench and adjudicating individual cases was under heightened scrutiny and criticism, it is particularly revealing regarding EOIR's attitude towards and intent to guide that conduct.

Shortly after publishing the draft Code of Conduct as a proposed rule, EOIR's five year strategic plan (for fiscal years 2008 to 2013) also

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Code\_of\_Conduct\_comments\_OGE.pdf.

<sup>139.</sup> Administrative Procedures Act, 5 U.S.C. § 553(c), (d); 3-15 Administrative Law § 15.01.

<sup>140.</sup> See *Supporting Details: Implementation of the 22 Improvement Measures*, TRAC IMMIGR., <http://trac.syr.edu/immigration/reports/194/details.html> (last visited Nov. 4, 2014) ("EOIR has abandoned its attempt to implement a code of judicial conduct through the rule making process. In a statement provided to TRAC immediately before this report was published, EOIR wrote: 'After review by the Office of Government Ethics and the Department's Ethics Office, the code was revised and incorporated into the existing ethics manual.' 'Upon further review,' EOIR reports it is still making revisions to the ethics manual, and no firm date has been set for completing the revision of the new ethics manual ('soon')."). EOIR's reasons may, however, have included the negative comment regarding procedure received from the United States Office of Government Ethics and the NAIJ's objections to the substance of the rule. See *Immigration Courts: Still a Troubled Institution*, TRAC IMMIGRATION, section 10 (June 30, 2009) [hereinafter *Still a Troubled Institution*], available at <http://trac.syr.edu/immigration/reports/210/>.

<sup>141.</sup> The single comment received objected to the rule on procedural grounds. See *supra* note 138.

<sup>142.</sup> See *infra* notes 156–65 and accompanying text.

incorporated many of the same considerations as the Code.<sup>143</sup> Concerns with the conduct of EOIR employees are echoed throughout the document.<sup>144</sup> In a discussion of the agency's core values, the plan emphasized the importance of "treat[ing] those who appear before its tribunals with respect, dignity, and compassion."<sup>145</sup> Three of the agency's four new long-term goals addressed related themes.<sup>146</sup> Goal one addressed "ensuring due process and fair treatment for all parties"<sup>147</sup> and goal four was to "[p]rovide for a workforce that is skilled, diverse, committed to excellence, and exhibits the highest standards of integrity."<sup>148</sup> Most relevantly, Goal 2 was to "[d]eliver services to the public in a professional, courteous, and timely manner."<sup>149</sup> Like the draft Code of Conduct, EOIR's strategic plan was heralded at the time as a positive shift in the agency's focus and attitude.<sup>150</sup>

Despite this early apparent momentum for change, however, progress stalled with no new actual guidance for IJs. Two years later, the Ethics Manual remained unchanged. In 2011, five years after Attorney General Gonzales first called for the development of a code of conduct, EOIR instead published an Ethics and Professionalism Guide for Immigration Judges.<sup>151</sup> The Guide appears to be a negotiated settlement or agreement between EOIR and the National Association of Immigration Judges ("NAIJ"), as it is signed by representatives of both parties and has a provision providing for communications between an agency point of contact and a NAIJ point of contact.<sup>152</sup> The NAIJ "is the recognized representative of Immigration Judges

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143. See generally U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FISCAL YEARS 2008-2013 STRATEGIC PLAN 1 (Jan. 2008) [hereinafter EOIR STRATEGIC PLAN], available at <http://www.usdoj.gov/eoir/statspub/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf>.

144. *Id.*

145. *Id.* at 4.

146. *Id.* at 7; see also Caplow, *supra* note 119, at 88-89.

147. EOIR STRATEGIC PLAN, *supra* note 143, at 7-10.

148. *Id.* at 7, 14-15.

149. *Id.* at 7, 10-12.

150. See, e.g., Caplow, *supra* note 119, at 88-89. However, Caplow was writing at around the same time the draft Code of Conduct and EOIR's strategic plan were released, and was focused primarily on the potential impact of the policy changes on the agency norms and culture rather than on the still mainly in the future implementation of the plan itself. She herself noted that "not everyone would agree" that the changes appeared to be beginning "to move the court in positive directions" and quoted the National Association of Immigration Judges as saying that these lofty, agency-level policy changes had not made an impact on the "reality in the trenches at the Immigration Courts." *Id.* at 89 (quoting Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 3, 12 (2008)).

151. U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES (2011), available at <http://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf> (Jan. 2011) [hereinafter EOIR ETHICS GUIDE FOR IJs].

152. *Id.* at 16, 17; see also *Still a Troubled Institution* *supra* note 140 at section 10 (noting that "[r]evisions to the Ethics Manual may trigger negotiation requirements under the collective

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for collective bargaining purposes.”<sup>153</sup> The apparent existence of a disagreement between NAIJ and EOIR and the need for a resolution may explain, at least in part, why EOIR chose to proceed by creating this separate document. A Code of Conduct created by notice and comment rulemaking or immediate revision of the Ethics Manual would not have provided the same opportunity for negotiated terms and a binding outcome between the parties.<sup>154</sup> In a press release announcing the publication of the Guide, EOIR stated that the Guide would ultimately be a part of a revised EOIR Ethics Manual but that it would be available in the interim on the agency website.<sup>155</sup>

For the most part, the Ethics and Professionalism Guide echoes and offers a small amount of additional guidance on the types of off-the-bench issues already addressed in the other sources of guidance available to and binding on IJs: conflicts of interest, the receipt of gifts, misuse of a government position and outside activities.<sup>156</sup> One section of the Guide, titled “Acting with Judicial Temperament and Professionalism,” does address an IJ’s conduct while on the bench and in the courtroom.<sup>157</sup> That section provides, in whole:

An Immigration Judge should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice.<sup>158</sup>

It is worth noting that this language is substantially similar to Canons IX<sup>159</sup> and X<sup>160</sup> of the draft Code of Conduct. The Ethics and Professionalism Guide goes

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bargaining agreement between the Justice Department and NAIJ.”); Press Release, U.S. Dep’t of Justice, Exec. Off. for Immigr. Rev, The Executive Office for Immigration Review Releases Immigration Judge Ethics and Professionalism Guide (Apr. 4, 2011) [hereinafter Judge Ethics and Professionalism Guide], available at <http://www.justice.gov/eoir/press/2011/IJEthicsGuide04042011.htm> (stating that “EOIR worked with the National Association of Immigration Judges to develop the content of the guide.”).

153. National Association of Immigration Judges, <http://naij-usa.org/>.

154. The procedural requirements in 5 C.F.R. § 2635.105, including the requirement of prior approval by the United States Office of Government Ethics, may be another reason that EOIR did not proceed through the informal notice and comment rulemaking process. *See supra* n.130.

155. Judge Ethics and Professionalism Guide, *supra* note 152.

156. EOIR ETHICS GUIDE FOR IJS, *supra* note 151.

157. *Id.* at 3 (Section IX).

158. *Id.*

159. EOIR Codes of Conduct, *supra* note 118, at 35,511 (“An immigration judge *shall* be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in his or her official capacity and *shall* not, in the performance of official duties, by words or conduct, manifest bias or prejudice.”) (emphasis added to highlight differences between the draft Code of Conduct and the Ethics and Professionalism Guide; the Guide furthermore refers to “*improper* bias or prejudice”).

160. *Id.* (“An immigration judge shall act in a professional manner toward the parties and their representatives before the court, and toward others with whom the immigration judge deals in an official capacity.”).

beyond the draft Code of Conduct by also including several notes that provide some additional explanation and clarification. That additional guidance is limited, however, and the whole section is less than one page in total.<sup>161</sup> The notes caution that inappropriate demeanor on the bench may cause the appearance of bias, and that such apparent bias or prejudice “impairs the fairness of the proceeding and brings the immigration process into disrepute.”<sup>162</sup> Examples offered of inappropriate behavior include “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant reference to personal characteristics.”<sup>163</sup> Less extreme behavior is not explicitly addressed, although the list of examples does state that it is not all-inclusive.<sup>164</sup>

As noted above, Canons IX and X of the draft Code of Conduct when taken together and Section VI of the Ethics and Professionalism Guide are virtually identical. In fact, almost all Canons from the Code of Conduct are mirrored in substantially similar or even identical language in the Ethics and Professionalism Guide.<sup>165</sup> There are, however, some notable exceptions. First, the broad provision related to professional conduct in Canon XI,<sup>166</sup> has no equivalent in the Ethics and Professionalism Guide. Second, the instruction in Canon III to IJs to obey the rules of professional conduct or their equivalent in the state where they are barred and the state with jurisdiction over the Court in which they sit,<sup>167</sup> is also not included in the Ethics and Professionalism Guide in any form.

In addition to not including these several Canons, the Ethics and Professionalism Guide differs from the proposed Code of Conduct in at least two major ways. First, as already mentioned above, the Ethics and Professionalism Guide contains “Notes,” providing additional explanation and guidance for many of its provisions while the Code of Conduct does not.<sup>168</sup>

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161. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 3. This guidance appears to be drawn heavily from the Model Code of Judicial Conduct, and in particular Rule 2.3 and its accompanying commentary. *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.3 and Commentary.

162. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 3.

163. *Id.*

164. *Id.*

165. *Compare* EOIR Codes of Conduct, *supra* note 118, at 35,510–11, with EOIR ETHICS GUIDE FOR IJS, *supra* note 151. In addition to the two Canons discussed below in this paragraph, Canon XIV, limiting public comment on pending matters, and Canon XVI, on recusal, are not incorporated into the Ethics and Professionalism Guide. It is important to emphasize, however, that despite this significant overlap in substance, as previously discussed, the source, format, and structure of the Code of Conduct and the Ethics and Professionalism Guide do still differ substantially.

166. EOIR Codes of Conduct, *supra* note 118, at 35,511.

167. *Id.*

168. This is likely due in significant part to the respective sources of the two documents.

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Second, the Guide also contains twenty additional provisions with no equivalent in the draft Code of Conduct.<sup>169</sup> These provisions, with only limited and partial exceptions, concern almost exclusively an IJ's conduct off the bench.<sup>170</sup> Without diminishing their value, this substantial number of provisions shifts the perceived focus of the Guide and dilutes the force of the provisions on on-the-bench behavior that have more prominence and importance in the draft Code of Conduct.

Although EOIR has repeatedly stated its intention to revise its Ethics Manual over the years, and even stated in 2008 that such revisions would be coming "soon," the Manual has still not been revised since its issuance in 2001.<sup>171</sup> The Ethics and Professionalism Guide for Immigration Judges is still available as a stand-alone document on the EOIR website.<sup>172</sup> Since 2011, the Ethics Manual and the Ethics and Professionalism Guide have again faded from focus. Little has been said or written about them, either by the agency or by outside commenters. EOIR may in fact be continuing to work on updating the Ethics Manual, but if so, the process lacks transparency.<sup>173</sup>

## **2. Guidance Specific to United States Citizenship and Immigration Services Officers**

USCIS does not appear to provide any additional ethical guidance, explicitly or by inference, on trauma exposure response to its officers. In fact, much less information than was previously discussed for the DOJ and EOIR is available regarding the history of ethical regulation within the DHS and current agency-specific standards that govern the professional conduct of USCIS officers.<sup>174</sup> However, USCIS officers are subject to some ethical guidelines, discussed below to provide context.

As a result of the centralization of ethical standards for the executive branch discussed above in the section on EOIR, USCIS adjudicating officers are governed by many of the same statutes, regulations, and executive branch memoranda as IJs and other employees of EOIR.<sup>175</sup> This means these officers are subject to some of the same generally applicable ethical guidance on topics

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The fact that the Guide was not issued as or intended to be a regulation gave its drafters more latitude with respect to format and content. *Compare* EOIR Codes of Conduct, *supra* note 118, at 35,510–11 (June 28, 2007) *with* EOIR ETHICS GUIDE FOR IJS, *supra* note 151.

169. EOIR ETHICS GUIDE FOR IJS, *supra* note 118, at 6–15.

170. *Id.*

171. *See* EOIR ETHICS MANUAL, *supra* note 100; *Still a Troubled Institution*, *supra* note 140.

172. EOIR ETHICS GUIDE FOR IJS, *supra* note 151.

173. *Cf.* Benedetto, *supra* note 132, at 512 ("Many of the Attorney General's initiatives are 'internal,' and it is possible that significant changes are being implemented without publicity.").

174. This is not particularly surprising for a variety of reasons: DHS and USCIS are much newer agencies than DOJ and EOIR; DHS has not historically been subject to the same kinds of criticism as EOIR; and DOJ, given the overall nature of its focus and activities, is likely to be inherently more concerned with ethics in an adjudicatory context than is DHS.

175. *See* 18 U.S.C. §§ 202–09; 5 C.F.R. § 2635; 5 C.F.R. § 2635.105 (2014); Exec. Order No. 12674, *supra* note 100.

such as conflicts of interest, the receipt of gifts, misuse of a government position and outside activities.<sup>176</sup> Unlike the DOJ, however, the DHS has not finalized supplemental standards for ethical conduct for its employees.<sup>177</sup> A proposed rule was published in the Federal Register in October 2011, but to date no final action on this proposed rule has been taken.<sup>178</sup> In any event, the substance of the proposed rule is focused on outside employment and activities and “waste, fraud, abuse and corruption,” not on officers’ conduct in adjudicating the petitions and applications filed with USCIS and other components of DHS.<sup>179</sup>

The available references to ethical standards in USCIS’ materials appear to refer primarily to external sources rather than creating unique internal guidance and are somewhat opaque and confusing. USCIS’ Adjudicator’s Field Manual provides that “[a]ll officer corps employees and supervisors are subject to the provisions of . . . the Department of Justice Ethics Manual which is available on their website at: <http://www.usdoj.gov>.”<sup>180</sup> This reference to DOJ standards is perhaps merely a holdover from pre-2002 times before the creation of DHS,<sup>181</sup> when the functions now performed by USCIS were the responsibility of the Immigration and Naturalization Service (“INS”), a component of DOJ.<sup>182</sup> USCIS has recently announced their transition to a centralized Policy Manual that will eventually replace the Adjudicator’s Field Manual.<sup>183</sup> On the other hand, the only volume so far released of the Policy Manual deals with

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176. See 18 U.S.C. §§ 202–09; 5 C.F.R. § 2635; 5 C.F.R. § 2635.105 (2014); Exec. Order No. 12674, *supra* note 100.

177. 5 C.F.R. § 2635.105 (2014).

178. Dep’t. of Homeland Sec., Supplemental Standards for Ethical Conduct for Employees of the Department of Homeland Security, 76 Fed. Reg. 63,206–10 (Oct. 12, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-10-12/pdf/2011-26160.pdf>. The finalized Supplemental Standards for Ethical Conduct for Employees of the Department of Homeland Security are to be incorporated into the Code of Federal Regulations in a new section at 5 C.F.R. § 4601; the most current version of title 5 available on LexisNexis (updated through the February 27, 2014, version of the Federal Register) still does not contain this part. In 2012, the proposed rule was listed as being at the “final rule stage,” but it is now identified instead as a “long-term action.” Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, Current Unified Agenda and Regulatory Plan, Supplemental Standards of Ethical Conduct for Employees of the Department of Homeland Security, RIN 1601-AA17 (2012), *available at* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1601-AA17>.

179. Dep’t of Homeland Sec., Supplemental Standards for Ethical Conduct for Employees of the Department of Homeland Security, 76 Fed. Reg. 63,206.

180. U.S. CITIZENSHIP AND IMMIGR. SERV., ADJUDICATOR’S FIELD MANUAL CHAPTER 82, MANAGEMENT TECHNIQUES, *available at* <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26410.html>.

181. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

182. *Did You Know?: The INS No Longer Exists*, THE BEACON: THE OFFICIAL BLOG OF USCIS (Apr. 13, 2011), <http://blog.uscis.gov/2011/04/did-you-know-ins-no-longer-exists.html>.

183. Press Release, U.S. Citizenship and Immigr. Serv., USCIS Begins Transition to Centralized Policy Manual (Jan. 7, 2013), *available at* <http://www.uscis.gov/news/uscis-begins-transition-centralized-policy-manual>.



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applications relating to citizenship and naturalization. The Adjudicator's Field Manual is still available today on the USCIS website under the heading "Law: Immigration Handbooks, Manuals, and Guidance," where it specifically notes which portions of it are superseded by the new policy manual.<sup>184</sup> Updates to the Field Manual itself have been made as recently as October 2012, long after the creation of DHS and USCIS.<sup>185</sup> Those portions of the Field Manual that are not explicitly superseded or updated, then, including this confusing reference to a DOJ Ethics Manual, are presumably still relevant, current, and applicable to USCIS officers.

Even assuming that this DOJ guidance is actually applicable to USCIS officers, however, it is not clear exactly what source the Field Manual is referring to. Because this citation is to the DOJ website generally, it is difficult to determine whether this is a reference to the EOIR Ethics *Manual*<sup>186</sup> or the general DOJ Ethics *Handbook*.<sup>187</sup> In either event, USCIS officers are subject to the same guidance discussed above in the context of IJs.<sup>188</sup> As previously explained, this guidance focuses overwhelmingly on non-adjudicatory conduct and provides little to no guidance with regard to trauma exposure response or conduct in adjudicating petitions and applications more generally.<sup>189</sup> If, however, the reference is in fact to the EOIR Ethics Manual, there is some limited direction provided on conduct when making decisions in individual cases: adjudicators are to "hear all matters delegated to them fairly and with patience" and be "patient, deliberate, dignified, and courteous" in so doing.<sup>190</sup> While this guidance is by no means extensive, it does directly speak to a USCIS officer's behavior while adjudicating individual petitions and applications and may address some manifestations of trauma exposure response.

### 3. Code of Conduct for United States Judges and Model Code of Judicial Conduct

The Code of Conduct for United States Judges was first adopted by the Judiciary Committee in 1973.<sup>191</sup> It has been amended on multiple occasions since, most recently substantially in 2009 and with more minor revisions in

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184. See U.S. CITIZEN AND IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL – REDACTED PUBLIC VERSION, <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>.

185. See *id.*

186. EOIR ETHICS MANUAL, *supra* note 100 (emphasis added). The Ethics Manual was released in 2001, when INS was still part of the Department of Justice, but INS and EOIR were separate agencies within DOJ at that time.

187. See generally DEP'T OF JUSTICE, ETHICS HANDBOOK (Jan. 2010), available at [http://www.justice.gov/jmd/ethics/ethics\\_handbook.htm](http://www.justice.gov/jmd/ethics/ethics_handbook.htm) (emphasis added).

188. See *supra* Section II.B.1.

189. See *supra* Section II.B.1.

190. EOIR ETHICS MANUAL, *supra* note 100, at 3.

191. CODE OF CONDUCT FOR UNITED STATES JUDGES, at 1 (last rev. Mar. 20, 2014), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> [hereinafter CODE OF CONDUCT FOR U.S. JUDGES].

2014.<sup>192</sup> It provides binding ethical guidance for members of the federal judiciary. The Model Code of Judicial Conduct was first adopted by the House of Delegates of the ABA in August 1990.<sup>193</sup> It was intended to be, and in fact has served as, a model for states in adopting their own codes of judicial conduct.<sup>194</sup> Both the Code of Conduct and the Model Code have a somewhat greater focus on a judge's conduct on the bench than the rules that are explicitly relevant to immigration adjudicators.<sup>195</sup> They therefore provide important guidance on issues related to trauma exposure response not available in the governing rules. While there is also a Model Code of Judicial Conduct for Federal Administrative Law Judges, endorsed by the National Conference of Administrative Law Judges in 1989, that Code is based on the Model Code of Judicial Conduct.<sup>196</sup> It does not include any additional provisions or assistance beyond those discussed from the general Model Code of Judicial Conduct below.<sup>197</sup>

Neither the Code of Conduct for U.S. Judges nor the Model Code of Judicial Conduct is specifically applicable to IJs and USCIS officers (and the Model Code is of course not itself binding on anyone). Because both are addressed to individuals fulfilling similar functions, they are nevertheless instructive. Both the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct apply somewhat more broadly than might be expected. The Code of Conduct is binding on Article III judges, specifically judges in the United States circuit and district courts and the Court of International Trade,

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192. *Id.* at 1–2.

193. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115. The ABA had previously adopted Canons of Judicial Ethics in 1924 and a Code of Judicial Conduct in 1972. See AMERICAN BAR ASSOCIATION, Preface, MODEL CODE OF JUDICIAL CONDUCT, at 2 (1990 ed.), available at [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/2004\\_CodeofJudicial\\_Conduct.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf).

194. After the revisions to the Model Code of Judicial Conduct in 2007 that substantially changed the organization and to a lesser degree the substance of the Code, twenty nine states have approved revised Judicial Codes based on the revisions to the Model Code, three states have adopted interim revisions to their Codes, and fifteen states have appointed committees to review their codes. See AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, *State Adoption of Revised Model Code of Judicial Conduct*, available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html).

195. While, like the other sources of ethical guidance already discussed, the Code of Judicial Conduct for U.S. Judges and the Model Code of Judicial Conduct spend significant time addressing a judge's conduct off the bench, particularly as it relates to the appearance of undue interest or impropriety, the discussion here will focus on the provisions that address a judge's conduct while on the bench and adjudicating individual cases.

196. National Conference of Administrative Law Judges, American Bar Association, *Model Code of Judicial Conduct for Federal Administrative Law Judges*, Preface, 10 J. NAT'L ASS'N ADMIN. L. JUDGES 131, 131 (1990), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj> [hereinafter *Model Code of Judicial Conduct for ALJs*].

197. See *generally id.* The relevant, duplicative provisions of the Model Code of Judicial Conduct for Federal Administrative Law Judges will, however, be cited in the discussion below as applicable.

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but is also binding on non-Article III judges such as bankruptcy judges, magistrate judges, and judges in the Court of Federal Claims, the Tax Court, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces.<sup>198</sup> The Model Code casts an even wider net, defining “judge” as “anyone who is authorized to perform judicial functions, including an officer such as a . . . member of the administrative law judiciary.”<sup>199</sup> It emphasizes that it was designed to “address the ethical obligations of any person who serves a judicial function,” and states that it can and should be modified to serve the particular needs and characteristics of the judicial service at issue.<sup>200</sup>

While IJs and USCIS adjudicating officers are not traditional judges or even members of the administrative law judiciary, as previously discussed they do clearly serve a judicial, or adjudicatory, function.<sup>201</sup> At least portions of the guidance provided by the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct, then, should be applicable to and useful for these groups of adjudicators on the question of managing trauma exposure response. In fact, as previously discussed, the EOIR Ethics Manual already recognizes this when it cites to portions of the Model Code of Judicial Conduct as its source for additional “aspirational” guidance for EOIR adjudicators.<sup>202</sup> Additionally, there are substantial similarities between the Code of Conduct for U.S. Judges, the Model Code of Judicial Conduct, and most of the previously discussed sources binding on IJs and USCIS adjudicating officers. These similarities reinforce the idea that the sources directed primarily towards Article III and Article I tribunals also provide relevant guidance for adjudicators in the immigration tribunals that are the focus here.

Both the Code of Judicial Conduct for U.S. Judges and the Model Code of Judicial Conduct have a similarly-titled canon devoted to a judge’s conduct while on the bench and adjudicating individual cases.<sup>203</sup> Canon 3 of the Code

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198. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at 2. Some provisions of the Code also apply to special masters and commissioners. *Id.* Special masters, commissioners, and bankruptcy and magistrate judges are appointed by Article III judges to fixed terms. Judges on the Court of Federal Claims are appointed by the President with the consent of the Senate, but the appointments are to fixed terms rather than life-time. The Tax Court, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces are Article I Courts.

199. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at 6.

200. *Id.* at 6; *see also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Preface (noting that this model code for administrative law judges is based on the general Model Code of Judicial Conduct).

201. *See supra* notes 11 and 99 and accompanying text; *see also generally Ripples Against the Other Shore*, *supra* note 1, at 77 & n.103; *Careers at USCIS*, UNITED STATES CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/careers> (last visited Oct. 1, 2014).

202. EOIR ETHICS MANUAL, *supra* note 100, at 3–4.

203. *Compare* CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3, with MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Canon 2 (2011 ed.); *see also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3 (“An Administrative Law Judge Should Perform the Duties of the Office Impartially and Diligently”).

of Conduct for U.S. Judges is titled “A Judge *Should* Perform the Duties of the Office *Fairly*, Impartially and Diligently.”<sup>204</sup> Canon 2 of the Model Code of Judicial Conduct is titled “A Judge *Shall* Perform the Duties of *Judicial* Office Impartially, *Competently*, and Diligently.”<sup>205</sup> These two canons, while structured differently and using somewhat different language, address substantially similar concepts.<sup>206</sup> The Model Code of Judicial Conduct is more detailed, however, particularly with respect to the comments on the rules that it provides, than the other rules of professional conduct discussed up to this point. It therefore, as discussed below, provides additional guidance relevant to trauma exposure response not appearing in the other sources.

Like the draft EOIR Code of Conduct and the Ethics and Professionalism Guide for Immigration Judges, and similarly to the EOIR Ethics Manual, the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct direct adjudicators to be “patient, dignified, respectful, and courteous.”<sup>207</sup> Both the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct also provide guidance beyond the sources specifically applicable to immigration adjudicators in one respect particularly important to trauma exposure response.

The most important provisions included in the Code of Conduct and the Model Code but not incorporated into EOIR’s Ethics and Professionalism Guide for Immigration Judges or other executive branch sources of guidance binding on IJs<sup>208</sup> are the provisions requiring judges to take “appropriate action” when another judge’s professional performance is impaired by drugs, alcohol, or a medical, emotional, or mental condition.<sup>209</sup> Canon 3.B(5) of the

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204. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3.

205. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Canon 2 (2011 ed.).

206. This is largely true of the Code of Conduct for U.S. Judges and the Model Code of Judicial Conduct in their entirety. *But cf.* Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYST. J. 271, 278–80 (2007).

207. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rules 2.8, and Comment; CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3A(3); *see also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3A(3) and Commentary. Note, however, that the Model Code of Judicial Conduct omits the term “respectful.” In fact, as previously discussed, the EOIR Ethics Manual explicitly draws from the Model Code of Judicial Conduct for support on this point. EOIR ETHICS MANUAL, *supra* note 100, at 3–4.

208. IJs and USCIS Officers do have a narrower obligation to report misconduct, including waste, fraud, and corruption, but apparently are not subject to this more general rule requiring or encouraging some action in response to violations of the applicable Codes of Conduct by judges and attorneys. *See* EOIR ETHICS GUIDE FOR IJS, *supra* note 140151, at Part VII; EOIR ETHICS MANUAL, *supra* note 100, at 3. The draft Code of Conduct probably would have imposed this obligation on most IJs, as it specifically directed IJs to comply with the rules of professional conduct in the states where they were admitted and sat and these rules in most states include a reporting requirement. EOIR Codes of Conduct, *supra* note 118, at Canon III.

209. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3B(5) and Commentary; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.14 and Comment; *cf. also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3B(3) (“An administrative law judge should take or initiate appropriate disciplinary measures against a judge

Code of Conduct for U.S. Judges itself simply encourages judges to “take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code or a lawyer violated applicable rules of professional conduct.”<sup>210</sup> The commentary to this provision of the Code, however, specifically instructs judges to make a confidential referral to an assistance program “when the judge believes that a judge’s or lawyer’s conduct is caused by drugs, alcohol, or a medical condition.”<sup>211</sup> The Model Code of Judicial Conduct is more explicit and expansive in the rule itself. It mandates that a judge act when he or she has “a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a *mental, emotional, or physical condition.*”<sup>212</sup>

These provisions are particularly significant because they are focused on mental health and recognize the role and impact of mental and emotional health on the practice of law and adjudication. Their attention is not just on the integrity of the justice system itself, but also on assisting the judges and attorneys who are suffering from these issues.<sup>213</sup> Because substance abuse and mental and emotional health symptoms may be manifestations of traumatic experiences, this is the closest that any of the possible sources of guidance for immigration adjudicators come to explicitly requiring EOIR, USCIS, and individual adjudicators to address trauma exposure response. The language still does not go far enough, however. It does not mention trauma exposure specifically and judges may not themselves think to include trauma exposure in “mental” or “emotional” conditions. Further, judges may not be able to identify when their own or others’ conduct is impaired by trauma exposure.

#### 4. Model Rules of Professional Conduct

The last source of professional guidance, the Model Rules of Professional Conduct (“MRPC”),<sup>214</sup> may seem like an odd source to include when focusing

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or lawyer for unprofessional conduct of which the judge may become aware.”); AM. BAR ASS’N, MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [hereinafter MRPC] (“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.”).

210. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3B(5).

211. *Id.* at Commentary to Canon 3B(5).

212. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.14 (emphasis added).

213. For example, the Model Code of Judicial Conduct defines appropriate action as “action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system.” MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Comment to Rule 2.14. Both the Model Code and the Code of Conduct for U.S. Judges include referrals to assistance programs as examples of appropriate action. *Id.*; CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Commentary to Canon 3B(5).

214. The 50 states and the District of Columbia have all adopted some version of the Model Rules of Professional Conduct. See American Bar Association, *State Adoption of the ABA Model Rules of Professional Conduct*, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html).

on attorneys serving in an adjudicatory capacity. The preamble to the MRPC, however, makes clear that their scope is intended to be broad, particularly those Rules that are in nature “constitutive and descriptive in that they define a lawyer’s professional role.”<sup>215</sup> The preamble further states that the Rules operate as a baseline authority in conjunction with a number of other sources of law and guidance.<sup>216</sup> The Rules, then, should be understood to provide some guidance to attorneys working in all capacities including as adjudicators. In fact, pursuant to the draft Code of Conduct, IJs would have been specifically directed to “comply with the provisions of the rules or code(s) of professional responsibility of the state(s) where the immigration judge is a member of the bar and the state(s) where the immigration judge performs his or her duties.”<sup>217</sup>

More importantly, however, while the focus of this article is on adjudicators specifically, the purpose of the article is to illuminate the impact on the immigration process as a whole and all participants in it that occurs as a result of the trauma exposure response of these adjudicators. Noncitizens and the attorneys who represent them are critical participants; trauma exposure of adjudicators may affect both the results they receive and their experiences in the process. The same is true for attorneys representing the government in immigration proceedings. The responsibility to advocate for and make changes to the immigration process to better manage the impact of trauma exposure should be understood to lie on the legal profession as a whole not just on individual adjudicators or even adjudicators in the immigration process as a group. The Preamble to the Model Rules themselves highlights this charge: “As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”<sup>218</sup>

The various rules of professional conduct on competence at least arguably make this charge mandatory. Rule 1.1 of the MRPC provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>219</sup> Others have already recognized that this duty to provide competent representation as applied to clients who have experienced trauma includes an obligation to understand trauma and its impact.<sup>220</sup> A lack of knowledge of and skill in working with victims of trauma

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215. MRPC, *supra* note 209, at Preamble ¶ 14.

216. *Id.* at Preamble ¶¶ 1–3 (listing an attorney’s various possible roles and functions), *Id.* at Preamble ¶ 3 (pointing out rules that apply even to retired attorneys and attorneys acting in a nonprofessional capacity), *Id.* at Preamble ¶¶ 15–17 (discussing various other sources of guidance that operate in conjunction with the Rules of Professional Conduct).

217. EOIR Codes of Conduct, *supra* note 118, at 35,511, Canon III; 28 USCS § 530B (referring to an “attorney for the Government”).

218. MRPC, *supra* note 209, at Preamble ¶ 6.

219. MRPC, *supra* note 209, at Rule 1.1.

220. *See, e.g.,* Parker, *supra* note 67, at 177–80; KOH PETERS, REPRESENTING CHILDREN, *supra* note 3, at 467 (“[B]oth the duty to contain our counter-transference in any individual case,

and managing one's own response to that trauma are likely to impede lawyers from successfully undertaking such basic critical tasks as interviewing a victim of trauma, counseling a victim on available options, gathering facts and evidence in support of a claim for an immigration benefit or relief from removal, and presenting a victim's written or oral testimony.<sup>221</sup> Reasonably necessary preparation may include consulting with or associating a mental health professional to improve this knowledge and these skills when a lawyer is deficient in them or to aid with specific issues in a particular case.<sup>222</sup>

Many of the judicial sources on professional conduct discussed above also include a duty of competence.<sup>223</sup> As just discussed for the Model Rules of Professional Conduct for attorneys, this duty should be understood to include an obligation to cultivate the necessary knowledge and skills to productively address the emotional aspect of law and adjudication including trauma exposure response. This is particularly true of the Model Code of Judicial Conduct, which mirrors the language of the Model Rules of Professional Conduct—"legal knowledge, skill, thoroughness, and preparation"—and thereby goes beyond the primary focus on legal competence in the other sources.<sup>224</sup>

A duty to provide competent representation or to adjudicate competently may also be understood to include a responsibility to work to ensure that the legal system itself does not unnecessarily or unfairly impede that representation or adjudication. That responsibility means that lawyers and judges must be mindful of the impact of trauma exposure response on the immigration process and take steps towards better managing it. For example, lawyers and adjudicators must look critically at the behavior of some individual IJs in claims for asylum that have been criticized by the federal courts.<sup>225</sup> This behavior includes "failing to allow the non-citizen respondent

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and the duty to address our vicarious traumatization as the overall context of our ongoing work for all of our clients, are *ethical imperatives*."). Parker also suggests that attorneys, as professionals, may owe a heightened duty of care "to minimize or avoid vicarious trauma or re-traumatization" so as not to injure clients and others. Parker, *supra* note 67, at 180.

221. Parker, *supra* note 67, at 177–79.

222. *Id.* at 178.

223. See, e.g., EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 2; EOIR Codes of Conduct, *supra* note 118, at 35,511; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.5 and Comment; *Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3A(1); CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3A(1).

224. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Comment (1) to Rule 2.5. Furthermore, as previously discussed, the Model Code of Judicial Conduct already goes further than the other relevant codes in acknowledging the impact of emotion on adjudicators and all of its provisions should be interpreted in that light. The other sources cited in this footnote all use some variation on the language: "An Immigration Judge should be faithful to the law and maintain professional competence in it." EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 2; EOIR Codes of Conduct, *supra* note 118, at 35,511; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 104, at Rule 2.5 and Comment; *Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3A(1); CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3A(1).

225. *Ripples Against the Other Shore*, *supra* note 1, at 94.

to present evidence, reaching unsupported or unexplained conclusions of fact, making repeated intemperate and hostile remarks to the noncitizen respondent, and relying on irrelevant character evaluations of the noncitizen.”<sup>226</sup> They must both attempt to uncover the root causes of this type of conduct, including the degree to which it is related to trauma exposure, and implement reforms that will effectively prevent such conduct from reoccurring.

### 5. A Mandate on Trauma

Despite their primary focus on conduct off the bench and the appearance of undue influence or impropriety, the various sources of guidance on professional conduct available to IJs and USCIS officers do provide some direction with respect to behavior while adjudicating individual cases, in particular while on the bench. The existing manuals, codes, and rules order or urge these immigration adjudicators to maintain order and decorum in proceedings;<sup>227</sup> to be patient, deliberate, dignified, and courteous;<sup>228</sup> to act professionally; to avoid conduct that suggests partiality, is demeaning to the adjudicator’s position, or impedes proper adjudication;<sup>229</sup> to take appropriate action when another attorney’s or adjudicator’s professional conduct appears to be impaired by substance abuse or a mental or emotional condition;<sup>230</sup> and to act with professional competence, including the necessary knowledge, skill, and preparation.<sup>231</sup> Examples given of behavior to avoid include name-calling; stereotyping; and acting in a hostile, intimidating, or threatening manner.<sup>232</sup>

While there are of course many possible explanations or reasons for intemperate judicial conduct not in compliance with these guidelines, one root cause of such behavior may be trauma exposure response. Both direct and indirect contact with traumatic experiences may cause such symptoms or manifestations as oversensitivity or insensitivity, irritability or anger, hyperarousal, lack of patience, and difficulty concentrating.<sup>233</sup> Given the frequency

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226. *Id.*

227. EOIR ETHICS MANUAL, *supra* note 100, at 3; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.8, “Decorum, Demeanor, and Communication with Jurors.”

228. EOIR ETHICS MANUAL, *supra* note 100, at 3; EOIR Codes of Conduct, *supra* note 118, at 35,511; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.8 and Commentary, Rule 2.3; CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191; *see also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3A(2) & (3) and Commentary.

229. EOIR Codes of Conduct, *supra* note 118, at 35,511; EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 3.

230. CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3B(5) and Commentary; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.14 and Comment; *cf. also Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3B(3).

231. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 2; EOIR Codes of Conduct, *supra* note 118, at 2; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.5 and Comment; *Model Code of Judicial Conduct for ALJs*, *supra* note 196, at Canon 3A(1); CODE OF CONDUCT FOR U.S. JUDGES, *supra* note 191, at Canon 3A(1).

232. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at 3; MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.8, Rule 2.3 and Commentary.

233. *See Ripples Against the Other Shore*, *supra* note 1, at 102–10.



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with which immigration adjudicators are exposed to trauma<sup>234</sup> and the at least partially studied and reported impact that exposure has on them,<sup>235</sup> it is quite likely that trauma exposure response drives problematic behavior out of compliance with the guidance on professional conduct for at least some adjudicators and in some cases. If this is in fact the case, it will not be possible to eradicate the undesirable behavior and its effects without addressing the underlying cause, the trauma exposure response.

At a minimum, then, the various rules and other guidance on professional conduct require further investigation of the degree to which violations of those rules can be traced to trauma exposure. Assuming that, as expected and as would be consistent with what related studies to date have shown,<sup>236</sup> that investigation reveals a connection, it is further fair to say that the existing rules would at least encourage, if not mandate, attention towards better managing trauma exposure response in immigration adjudicators.

### C. Goals of Reform

Even if the guidance on professional conduct for adjudicators and attorneys working in the immigration system is not understood to directly order or even suggest further attention to trauma exposure response, such attention is nevertheless imperative. The system as it currently operates causes harm to individual noncitizens,<sup>237</sup> attorneys,<sup>238</sup> and adjudicators.<sup>239</sup> These negative effects on individual participants in turn have an overall undesirable impact on the immigration legal system as a whole, resulting in harmful outcomes ranging from incorrect and unjust results in individual cases to an overall distrust of and lack of confidence in the process. Simply from a moral or human perspective, if reforms that would reduce these individual and systemic damages are possible, they should be undertaken. This article argues that two fundamental precepts must be kept in mind when shaping and implementing those reforms. First, the focus should be on better managing, not eliminating, trauma exposure response and its impact on the immigration system. Second, the underlying aim should be to create a system or process that has a more positive impact on overall wellbeing for all participants, adjudicators, attorneys, and noncitizens alike.

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234. *Id.* at 90–94, 101–02.

235. *Id.* at 102–10; Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 22–23 (2008); Stuart Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

236. *Ripples Against the Other Shore*, *supra* note 1, at 102–10; Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 22–23 (2008); Stuart Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

237. *See Ripples Against the Other Shore*, *supra* note 1, at 71–77, 102–10.

238. *See id.* at 102–10.

239. *See id.*

Eliminating trauma exposure response completely would be impossible. Emotional responses generally, including reactions to direct and indirect traumatic experiences, are part of all human interaction and therefore also an inherent part of the practice of law that cannot be completely eradicated or ignored.<sup>240</sup> Furthermore, even if it were possible to eliminate trauma exposure response, such an outcome would also have unintended negative consequences. Vicarious traumatization is a naturally occurring consequence when an adjudicator opens him or herself up fully to a noncitizen's worldview and experiences; completely removing vicarious trauma would require an adjudicator to refrain from empathizing with noncitizen applicants and respondents.<sup>241</sup> In addition, with respect to the impact on the adjudicator him or herself, vicarious trauma may be related to a second phenomenon, described as vicarious resilience, whereby the adjudicator is positively impacted by learning from a noncitizen's experiences overcoming adversity.<sup>242</sup> The goal, then, should be to better manage, not to overcome, trauma exposure response and its impact on the immigration legal system through adjudicators.<sup>243</sup>

Better managing trauma exposure response means working towards an immigration system that has a more positive impact on overall wellbeing for all participants. A full, theoretical and practical, commitment to this type of approach or philosophy for clients has been labeled "therapeutic jurisprudence" ("TJ").<sup>244</sup> The founders of therapeutic jurisprudence, David Wexler and Bruce Winick, describe it in plain terms as follows:

Whether we know it or not, whether we like it or not, the law—legal

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240. See *supra* Section II.A.1.

241. Cf. KOH PETERS, REPRESENTING CHILDREN, *supra* note 3, at 469–70 (“[I]f a lawyer does experience vicarious traumatization, it is precisely because she has achieved, at least partially, a central goal of the lawyer representing children: having an authentic understanding of the life experiences of our young and vulnerable clients.”); Peter Jaffe, Claire Crooks, Billie Lee Dunford-Jackson, & Judge Michael Town, *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1, 2 (2003) [hereinafter Jaffe, et al., *Vicarious Trauma in Judges*] (“Empathy has been identified as one of the mechanisms of transfer between primary and secondary trauma. Thus, the empathy that is so critical to working with traumatized people also increases the likelihood of vicarious traumatization.”).

242. See Pilar Hernandez, David Gangsei, & David Engstrom, *Vicarious Resilience: A New Concept in Work with Those Who Survive Trauma*, 46 FAM. PROCESS 229, 237–40 (2007).

243. Cf. Silver, *Love*, *supra* note 20, at 276 (“[L]awyers must acknowledge that emotional responses are triggered in virtually every human encounter. The goal need not be - indeed could not be - to eradicate these responses. Rather the goal should be to recognize them, analyze how, if at all, they may affect the lawyer/client relationship, and resolve them appropriately.”).

244. See, e.g., *Ripples Against the Other Shore*, *supra* note 1; Silver, *Love*, *supra* note 20, at 293 (citing David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 228 (1995)); Lynda L. Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, 24 SEATTLE U. L. REV. 483, 484 (2000) (quoting Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 35 CAL. W. L. REV. 15, 17 (1997)) (describing therapeutic justice as an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it effects).

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rules, legal procedures, and the roles and behaviors of lawyers and judges—produces consequences. These affect emotional life and psychological well-being—often for the better but sometimes not. . . . TJ urges us to be aware of the law’s impact on emotional life . . . . By applying TJ in law practice, we seek to improve the law’s therapeutic functioning and lessen its anti-therapeutic (or harmful) impact without running afoul of other crucial values . . . .<sup>245</sup>

Trauma stewardship is a similar concept, but concentrated more narrowly on minimizing the harm caused by trauma exposure response and instead striving towards a more positive, healing impact.<sup>246</sup>

Primary focus in theory and practice of therapeutic jurisprudence and trauma stewardship is often placed on the client. Ultimately, however, the application of both should have a personal impact not only on clients but also on all participants in the legal process, including lawyers and adjudicators. In fact, judges and other authors have written about engaging in therapeutic jurisprudence while adjudicating and the impact that it has both on those who appear in front of them and themselves.<sup>247</sup> Furthermore, the more comprehensive the practice of therapeutic jurisprudence and trauma stewardship becomes, the more likely it is to change the legal system itself not just on the level of the roles and behaviors of lawyers and judges but also on that of the legal procedures and even rules being applied. Of course, the converse is also true—changes to most legal systems or at least processes will be necessary in order to implement a therapeutic jurisprudential approach.

### III. REFORM

The next section of this article will consider what changes to the immigration legal system consistent with the goal of a more healing, less damaging practice might look like. Section A will address reforms specifically targeted to better manage the trauma exposure response of adjudicators.<sup>248</sup>

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245. David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 A.B.A. J. 54, 56 (May 2003).

246. See TRAUMA STEWARDSHIP, *supra* note 2, at 4–6; *Ripples Against the Other Shore*, *supra* note 1, at 66.

247. See, e.g., William G. Schma, *Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts*, MICH. B. J. 25 (Jan. 2003), available at <http://www.michbar.org/journal/pdf/pdf4article536.pdf>; William Schma, *Judging for the New Millennium*, 37 CT. REV. 4 (Spring 2000), available at <http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/cr9schma.pdf>; Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12 (Spring 2000), available at [http://judgehora.com/implications\\_tj\\_principles\\_addiction\\_med.pdf](http://judgehora.com/implications_tj_principles_addiction_med.pdf).

248. The application of therapeutic jurisprudence to the immigration system generally is a much larger question well beyond the scope of this article. Others have made very useful and excellent contributions to considering its possible uses and contributions in other aspects of immigration law and practice. See, e.g., David C. Koelsch, *Embracing Mercy: Rehabilitation as a Means to Fairly and Efficiently Address Immigration Violations*, 8 INTERCULTURAL HUM. RTS. L. REV. 323 (2013); Evelyn Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L.

More effectively managed trauma exposure response in adjudicators would presumably mean that not only the adjudicators themselves but also the noncitizens and their attorneys would be less negatively impacted. These targeted reforms alone, however, will likely be insufficient. Trauma exposure response is intimately connected both to other types of emotional responses and to some general systemic issues. It is difficult if not impossible in many situations to parse out the impact of trauma alone.<sup>249</sup> Section B will thus briefly consider more general reforms. Section C will address possible critiques of both the targeted and the systemic reforms.

Before moving on to a discussion of these reforms, there are several important and generally applicable preliminary points to be made. First, the discussion of trauma exposure response in this Article should not be seen in any way as minimizing or discounting the effect of traumatic experiences on direct victims.<sup>250</sup> The effects of secondary exposure to trauma in most instances will be far less intense and debilitating than the effects on those who experience trauma more directly. Acknowledging the reality and significance of trauma exposure response in the legal system is nevertheless important, at least in part because of the impact it may have on primary victims.<sup>251</sup>

Second, these proposals are not intended to blame or criticize individual adjudicators in the immigration system. Trauma exposure response is a natural and normal reaction to a difficult situation. Most adjudicators, immigration and otherwise, are not offered the education or the assistance to deal with traumatic experiences more effectively. On top of this, immigration adjudicators must cope at the same time with structural issues such as high caseloads and limited resources that leave even less time and attention for dealing with the emotional aspect of law and practice.

Finally, and relatedly, making these changes is likely to be exceedingly difficult. In addition to the challenges presented by the complicated system of governing law and regulations and the intractable administrative bureaucracy of the immigration system, a number of other hurdles will likely present themselves. Even with the shift towards acknowledging the emotional aspect of the practice of law in legal education and the legal profession, the group of those aware of the need and prepared to advocate for these reforms is likely to be a tiny percentage of those affected and involved. This small group is likely to encounter significant resistance to the concept, let alone specific proposals, give the predisposition of individuals entering the legal profession and the fact that law school and the practice of law repeatedly reinforce a focus on the

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REV. 811 (2005).

249. See *Ripples Against the Other Shore*, *supra* note 1, at 68.

250. *Id.* at 64–65; see also KOH PETERS, REPRESENTING CHILDREN, *supra* note 3, at 452.

251. See *Ripples Against the Other Shore*, *supra* note 1, at 64 (“In the legal context, awareness of and attention to the effects of indirect trauma exposure is necessary in order to provide effective assistance to primary victims, to fairly and justly adjudicate all legal matters, and to avoid unnecessarily increasing the negative effects of trauma on primary victims.”).

rational over the emotional.<sup>252</sup> If these hurdles can be overcome, however, a combination of targeted and systemic reforms could significantly change the impact of the immigration process on the lives and emotional health of all involved for the better.

#### **A. Targeted Reforms**

There are a number of reforms that would equip immigration adjudicators to better manage trauma exposure response and its impact on the immigration process. First, the various sources of guidance on professional conduct that are actually binding on immigration adjudicators should be revised. These revisions should be drafted to place more importance on behavior while adjudicating individual cases, to explicitly acknowledge the emotional aspect of the practice of law, and to provide direction specifically on handling exposure to traumatic experiences while adjudicating immigration cases. Second, DOJ and DHS or their subcomponents should go beyond rules of professional conduct to require immigration adjudicators to acknowledge and address the emotional aspect of the practice of law and trauma exposure response. They should provide institutional support and resources to make this attention possible and productive as a practical matter. Third, the involved federal administrative agencies should encourage and support individual action by immigration adjudicators to better manage their own trauma exposure response.

Many questions remain regarding trauma exposure generally and trauma exposure response in immigration adjudicators specifically. It is very likely that a better understanding of even a small number of additional issues would contribute significantly towards better management of the adverse impact of trauma exposure response on the immigration system. Therefore, additional time, attention, and resources should be devoted to investigating the questions raised in this article and in *Ripples Against the Other Shore* with an eye towards identifying future helpful changes. This suggestion itself is a fourth and final proposal for reform.

##### **1. Revise the Rules of Professional Conduct**

While the various sources of guidance on professional conduct discussed in Section II.B taken as a whole already encourage managing trauma exposure response, it would be more beneficial if those rules that are actually binding on immigration adjudicators addressed this issue more specifically. This would make the topic more of an explicit priority both for adjudicators and for the relevant agencies. DOJ and DHS could make these changes for their respective agencies, or the President could make them for the entire executive

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252. See also, e.g., Daicoff, *Lawyer*, *supra* note 43, at 1412 (“One might conclude that lawyers should become more emotional, partial, compassionate, and interpersonally sensitive. However, there is evidence that humanistic, people-oriented individuals are the least satisfied lawyers. Further, it is unclear whether lawyers can change these impersonal attributes.”).

branch. The revisions would be both more likely to occur and more useful, however, if made by the sub-agencies EOIR and USCIS, which are particularly confronted with trauma exposure and therefore trauma exposure response. For IJs, the most relevant existing sources to consider revising are the EOIR Ethics Manual<sup>253</sup> and the Ethics and Professionalism Guide for Immigration Judges.<sup>254</sup> For adjudicating officers within USCIS, as previously discussed, it is more difficult to determine what source(s) are currently binding, but the most appropriate source for these changes may be the new Policy Manual that is currently being written to replace the Adjudicator's Field Manual.<sup>255</sup>

Requiring attention to trauma exposure response in these formal rules on professional conduct is important both because of the statement that it makes about the importance of the topic and because of the ability to enforce the rules for immigration adjudicators if and when necessary. One tradeoff, however, is that making future changes to these sources, even with a focus on these smaller agencies, is likely to be difficult and cumbersome. It would therefore also be advisable for both USCIS and EOIR (or even the two agencies in cooperation) to develop more informal sources of professional guidance that can provide more detail for adjudicating officers and IJs and will be easier to revise as knowledge and understanding of trauma exposure response develop. Useful content for these more informal sources of professional guidance can be drawn from subsections III.A.2 and III.A.3.b below.

The revisions of the ethical rules themselves should first place more importance on behavior while adjudicating individual cases. As previously discussed, the current sources of guidance focus strongly on non-adjudicatory (often relatively rare or minor) conduct.<sup>256</sup> This focus sends an unfortunate message about the relative significance of off-the-bench versus on-the-bench behavior. One expert concretely and vividly explained the problem inherent in this unbalanced focus as follows:

When you know the system, it's no surprise that an EOIR ethics manual discusses whether an immigration judge can eat pastries at a conference but has nothing to say about whether it's proper for an immigration judge to shout at and threaten an asylum applicant who's sobbing while telling how he found his sister's body with her throat cut . . . .<sup>257</sup>

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253. EOIR ETHICS MANUAL, *supra* note 100.

254. EOIR ETHICS GUIDE FOR IJS, *supra* note 151.

255. See USCIS ADJUDICATOR'S FIELD MANUAL, available at <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26410.html>; USCIS POLICY MANUAL, available at <http://www.uscis.gov/policymanual/HTML/PolicyManual.html>.

256. See *supra* Section II.B.

257. Lisa Getter, *Immigration Judges Handed Ethics Guidelines, Not Rules; Justice: A new manual offers advice on behavior, but critics say consequences are needed to counter misconduct*, L.A. TIMES, June 2, 2001, available at <http://articles.latimes.com/2001/jun/02/news/mn-5578>.

This is not to say that that actual impropriety or undue influence or the appearance of either is unimportant, but instead simply that they are being unduly prioritized over judges' and other adjudicators' conduct in actually handling individual cases.<sup>258</sup> One possible explanation for this imbalance is the lingering and difficult to overcome resistance to recognizing the impact of emotional response in the legal process that likely drives much behavior while adjudicating cases.<sup>259</sup> Regardless of the underlying reasons, however, the rules of professional conduct should be revised to reflect a more balanced approach between these two different categories of conduct and to provide more guidance to adjudicators on their behavior on the bench.

This will likely require that at least some of rules be made more detailed and explicit. For example, the direction to IJs to maintain professional competence in EOIR's Ethics and Professionalism Guide as it is currently written lacks specificity.<sup>260</sup> The Guide notes that, in order to maintain competence in the law, "Immigration Judges should strive to be knowledgeable about immigration law, should be skillful in applying it to individual cases, and should attempt to engage in preparation that is reasonably necessary to perform an Immigration Judge's responsibilities."<sup>261</sup> It does not, however, endeavor to identify what type of preparation is reasonably necessary for IJs or to comprehensively define competence. A definition of competence that references and explains proper judicial temperament would begin to overcome this lack of specificity, work to remedy the imbalance in the rules between on and off the bench conduct, and provide valuable guidance to immigration adjudicators.<sup>262</sup>

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258. This issue is part of a larger question about the history and philosophy behind rules of professional conduct for lawyers and judges that is beyond the scope of this article, but will be the subject of a future article. As Marjorie Silver explains in her article *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, the first law school courses on professional conduct likely grew out of a need to teach lawyers more about human relations and interpersonal skills. Silver, *Love*, *supra* note 20, at 283–89. The Rules of Professional Conduct today, on the other hand, are preoccupied primarily with formulaic rules focused on the extremes of problematic behavior in attorneys and judges. Significant questions exist regarding how the legal profession got from one point to the other, and on whether the current philosophy and approach is the most appropriate and productive.

259. See Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 *TOURO L. REV.* 847, 870 (2004) [hereinafter Silver, *Stress*] ("I'm amazed at how much time has been spent on the question of whether or not it is okay to make a referral, which to me is an important detail, but only a detail. I believe it speaks to the general discomfort or lack of experience of the legal profession in reference to dealing with this side of what the clients bring to you, which you do each day whether you want to do it or not.").

260. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at Part IV; cf. Benedetto, *supra* note 132, at 507 (arguing that the equivalent provision of the EOIR draft Code of Conduct lacks specificity).

261. EOIR ETHICS GUIDE FOR IJS, *supra* note 151, at Part IV.

262. Benedetto, *supra* note 132, at 507.

In addition, with respect to trauma exposure response, the rules of professional conduct governing immigration adjudicators should be reformed to acknowledge and address the impact of emotions on the practice of law generally and to provide more direction specifically on handling exposure to traumatic experiences while adjudicating immigration cases. This subsection offers several proposals drawn from the discussion of the sources of guidance on professional conduct discussed in section II.B above.<sup>263</sup>

First, a provision similar to Canon XI of the never-implemented draft Code of Conduct for the IJs and Board Members should be added to EOIR's Ethics Manual and USCIS's new Policy Manual. That Canon ordered IJs to "refrain from any conduct . . . that . . . interferes with the proper performance of judicial duties."<sup>264</sup> This rule can be interpreted to address emotional response. Ignoring the emotional aspect of adjudication, including emotional responses to cases and parties, and unaddressed trauma exposure response interferes with the proper performance of judicial duties.<sup>265</sup> Rather than simply allowing for this interpretation to be drawn, however, this proposed new provision should incorporate specific language making clear that these concepts are critical to proper performance. One way that this could be done is to say "conduct including . . ." followed by a list of possible issues including "trauma exposure response and other unmanaged emotional responses." These terms could then be further defined in the corresponding comments.

Second, an expanded provision related to the rule in the Model Code of Judicial Conduct requiring a judge to take appropriate action when he or she has "a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a *mental, emotional, or physical condition*"<sup>266</sup> should be added to EOIR's Ethics Manual and USCIS's new Policy Manual. This provision is valuable because it already lists mental and emotional conditions. A reference to trauma specifically should also be added. Furthermore, the new rule should require that adjudicators take appropriate action when they themselves are impaired by a mental, emotional, or trauma-related response, not just lawyers or other adjudicators. This addition would help to encourage adjudicators to take responsibility for their own mental and emotional health and wellbeing as an important part of continuing to be able to competently adjudicate individual cases. While it may be helpful for the new and expanded rule to contain examples of appropriate actions, it should not mandate that an adjudicator take a particular action or steps, as trauma

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263. There are many more equally beneficial ways in which this could be accomplished.

264. EOIR Codes of Conduct, *supra* note 118, at Canon XI.

265. See, e.g., *Ripples Against the Other Shore*, *supra* note 1, at 102–10; Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22, 22–23 (2008); Stuart Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2008).

266. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 115, at Rule 2.14 and Comment (emphasis added).



exposure response is highly individualized and a productive and helpful response in one situation may do more harm than good in another. An overly formalized process is likely to be ineffective.

More important than the particular format or language that these reforms take is that they explicitly name and address emotional responses generally and trauma exposure response specifically. Naming these phenomena in the rules themselves helps to normalize them and overcome resistance to the emotional aspect of the practice of law and trauma exposure response. This is an important step towards changing the institutional culture, a point that the next subsection will further discuss.

## 2. Address Emotions and Trauma Exposure Response

DOJ and DHS should go beyond rules of professional conduct to require immigration adjudicators to acknowledge and address the emotional aspect of the practice of law and trauma exposure response. They should provide institutional support and resources to make this attention possible and productive as a practical matter. A first step in this respect is providing focused, required training on trauma exposure and other emotional responses. Other steps might include building time for reflection into the day and providing a forum, with both superiors and equals, to process these responses and develop effective strategies for better managing them. The lack of such training and opportunities for community surrounding trauma exposure have been identified as factors that worsen trauma exposure response.<sup>267</sup> Providing them, then, should allow adjudicators to better manage their own trauma exposure response and, as a direct result, reduce the negative impact of that response on other participants in the immigration process. Ultimately, the goal is to change the institutional culture to one in which discussion of trauma exposure and other emotional responses is normalized and ongoing time and attention is devoted to managing these responses. As this shift in culture begins to be achieved, there is the potential for the immigration process to become a healing one for noncitizens, attorneys, and adjudicators.

First, DOJ and DHS should provide required and on-going training focused on trauma exposure response and other emotional responses. This type of training, while commonplace in other fields frequently confronted with trauma and violence, remains relatively unusual in the legal setting. Many recognize the importance of training law students with respect to the effects of trauma.<sup>268</sup> Such training has begun to be recommended, if not necessarily

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267. See Andrew P. Levin, M.D., & Scott Greisbert, M.A., *Introductory Remarks: Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 251 (2003) (“Overall they attributed their secondary trauma responses to lack of preparation in understanding the clients and lack of a regular forum to discuss and ventilate regarding their own feelings.”).

268. See Parker, *supra* note 67, at 195 n.96 (“[T]raining law students about trauma, vicarious trauma, and representation of traumatized clients is [an] integral part of training law students to be good legal advocates.” (citing Yael Danieli, *The Nuremberg Trials: A Reappraisal and Their Legacy: Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in*

implemented, for attorneys generally as well.<sup>269</sup> Because of the power and control that adjudicators exercise over the legal process and the consequent impact that their poorly managed emotional and trauma exposure responses can have on others, however, such training is perhaps even more important for them. Moreover, emotional intelligence and managing trauma exposure response are equally as important as the other skills such as legal research and writing and legal and factual analysis that are more commonly accepted as necessary for an adjudicator's job performance.<sup>270</sup> In fact, mental health experts working in the legal field have suggested the importance of training in trauma exposure response and other emotional responses for adjudicators specifically in addition to attorneys generally.<sup>271</sup>

This training should include a wide variety of components. Each component should build on previous sessions to enhance knowledge regarding trauma exposure and other emotional responses, to promote development of personal coping and healing strategies for immigration adjudicators, and to develop techniques for managing trauma exposure response in the context of the adjudication of individual cases. Trauma exposure response should not be seen as a concept that can be introduced and mastered in a single short seminar, but rather as a career-long process of personal and professional growth and development. Moreover, it will be important that such training be situated as an integral part of an adjudicator's responsibilities, rather than as something that feels like an additional burden or even a punishment. It will likely need to start with the basics, educating adjudicators first on the concept of emotional intelligence and the impact of emotions on the practice of law and adjudication generally and then building in lessons on trauma and trauma exposure response. Later sessions should be interactive. Interactivity will encourage adjudicators to process their own trauma exposure response and to develop and implement more productive strategies for the future rather than simply being passive listeners. It will further promote the development of a

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*International Law*, 27 CARDOZO L. REV. 1633, 1640 (2006)).

269. See Andrew Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, 214 PLI/CRIM 103, 110 (Aug. 4, 2008) ("In response to the risks of STS, Silver has advocated for educational programming for law students and attorneys regarding the effects of trauma on their clients and themselves. These recommendations build on the strategies advocated by Pearlman and Saakvitne, including education, support, supervision, maintenance of proper boundaries, and self care. . . . Similarly, in a recent review, Salston and Figley noted, 'We must do all that we can to insure that those who work with traumatized people--including but not limited to those exposed to crime victimization--are prepared. [...] A place to start is to incorporate stress, burnout, and compassion fatigue into our curriculum, and especially our supervision.'").

270. Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 3 ("The legal training that provides a foundation for judges' careers emphasizes a variety of experience including trial preparation and advocacy, settlement and mediation, legal and factual analysis, working with expert witnesses, and legal research. Professionals in other sectors that deal with violence, such as social workers, may be better trained to disclose their own thoughts and feelings and to process the emotional impact of their work with their colleagues.").

271. See, e.g., Silver, *Stress*, *supra* note 260, at 869–70.

community of immigration adjudicators that is accepting and supportive of the need to address such issues. The trainings should be conducted both by mental health professionals to provide their specialized knowledge and perspective and by experienced and qualified immigration adjudicators to increase acceptance of the concepts being introduced and to serve as a model for their peers. Opportunities for attorney and noncitizen involvement should be explored to make concrete for adjudicators the impact of trauma exposure response on other participants in the process and to promote the adoption of a philosophy of therapeutic jurisprudence in the immigration process.

Other writers have also developed useful proposals for related training or topics that could be beneficially included in such training. Stacey Caplow, writing in the context of the calls for reform and the Attorney General's 2006 memoranda discussed in section II.B above, argued that improved training should "include more than legal updates, but also intellectual stimulation, an opportunity to exchange ideas, exposure to new approaches, and to feel part of a larger mission."<sup>272</sup> She explained "IJs require some care and feeding in order to retain pride and motivation, but such nourishment should come from a sense that their work is important not only to the individual before them but also to humanity."<sup>273</sup> This type of expanded perspective, including an understanding of immigration adjudicators' role in the larger context of the work they do and a sense of meaning and contribution, can be tremendously helpful in addressing trauma exposure response. Michelle Benedetto around the same time and in the same context suggested improved ethics training for IJs.<sup>274</sup> Particularly with the changes to the rules of professional conduct proposed in section III.A above, such trainings could usefully ground these new concepts in the legal rules already understood and accepted by immigration adjudicators. Jaya Ramji-Nogales, Philip Schrag, and Andrew Schoenholtz, addressing the disparities in asylum adjudication, propose substantial additional training incorporating "units on judicial temperament" for immigration adjudicators, including lessons on "not taking personally the misconduct that the judges sometimes encounter from people who are desperate to remain in the United States."<sup>275</sup> It will be important for the proposed training to include such practical and concrete topics to assist immigration adjudicators in applying these teachings in their daily work.

In addition to this formal on-going training, DHS and DOJ should also take additional steps to better manage trauma exposure response. They should build regular time and structure for reflection into immigration adjudicators' daily and weekly work. Institutional value should be placed on this reflection, including regularly self-evaluating past performance and setting goals for

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272. Caplow, *supra* note 119, at 95–96.

273. *Id.* at 96.

274. Benedetto, *supra* note 132, at 514–15.

275. Jaya Ramji-Nogales, Andrew Schoenholtz, & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 380–82 (2007).

future performance or steps related to emotional response. This might be accomplished by incorporating such reflection and self-evaluation into existing performance reviews or by instituting new requirements. DHS and DOJ should also require regular, facilitated debriefing for immigration adjudicators on issues of trauma exposure and other emotional response both with supervisors and peers. Finally, as suggested by Stacey Caplow, DHS and DOJ should work to “encourage and facilitate professionalism and pride” in immigration adjudicators.<sup>276</sup> With respect to trauma exposure and other emotional responses, this might mean rewarding, praising or otherwise publicizing adjudicators who demonstrate successful coping strategies just as the agency might promote meeting case completion targets.

One serious impediment to successfully implementing any of the strategies discussed is the institutional culture within DHS and DOJ (and within the legal profession generally as discussed in section II.A above) that minimizes or completely dismisses the reality and importance of addressing emotional response. As a previous study focused on vicarious trauma in non-immigration judges pointed out, “[o]ne of the starkest contrasts arising from this research is the disconnect between what judges identify as ideal coping and prevention strategies and the reality of the judicial culture.”<sup>277</sup> Other impediments within the judicial culture include the requirement of confidentiality, which discourages sharing even when such sharing would be legally permissible; isolation; and substantial workload.<sup>278</sup> All of the strategies discussed so far would also work to begin to change that culture. Because institutional culture is such a significant barrier to achieving any of the goals addressed here, however, particular attention should be paid to shifting it whenever possible throughout implementation of any and all of the proposals made here.

### 3. Encourage and Support Individual Action

Regardless of the strength of any institutional response, ultimately managing trauma exposure response and other emotional responses must occur on an individual basis. In order to cope with trauma, and avoid the significant distress and impairment in functioning that may result in those who are exposed if trauma exposure is left unaddressed, an immigration adjudicator must revise his or her frame of reference and re-integrate her traumatic experience(s) in to her world-view. This is by definition and necessity an extremely personal process. For any individual, it must start from a place of knowing him- or herself. The process will proceed in significantly differing

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276. Caplow, *supra* note 119, at 95–96.

277. Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 7.

278. Andrew Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, 214 PLI/CRIM 103, 106 (Aug. 4, 2008) (“Further, their efforts to be impartial coupled with a sense of isolation from other judges and an inability to discuss cases with others created additional stress.” (citing Peter Jaffe, Claire Crooks, Billie Lee Dunford-Jackson, & M. Town, *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1 (2003))).

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ways from there depending on that individual's personality, background, experiences, available resources, and numerous other factors.<sup>279</sup>

Others have written extensively about the process of and strategies for this re-integration, and those discussions will not be replicated at length here. This subsection will, however, briefly mention a few in order to set the stage for the primary question to be addressed—what the DOJ and the DHS can do to support and encourage this very personal process. Jean Koh Peters offers a strategy focused around three principles: reintegration of self, reconnection to others, and reaffirmation of meaning.<sup>280</sup> Laura van Dernoot Lipsky, in her book *Trauma Stewardship*, suggests a number of practices designed around mindfulness and being present.<sup>281</sup> “[T]he key to prevention for many judges in this process leading to burnout and [vicarious trauma] is staying engaged in their work . . . .”<sup>282</sup>

The fact that these strategies must be chosen and implemented on an individual basis does not mean that the relevant immigration agencies have no role to play. Agencies can and should encourage their employees to engage in one or more of these approaches and make it possible for them to do so. The institutional steps discussed above, in particular making the time and physical space available in the work place for the type of reflection that is necessary to many of these strategies and encouraging the development of an institutional community to provide support around this process, are a good place to start. Agencies should go further, however. They can make available counselors or other mental health professionals to facilitate this process and provide additional assistance to those who need it.

It is worth noting here, at least briefly, that if only the DOJ and the DHS engage in these reforms, they will have only limited success. While some progress is better than none, change needs to start at a much earlier stage if we expect to fundamentally alter the way that we as attorneys engage with emotional and trauma-related response. At a minimum, as discussed above, more radical changes need to occur in our system of legal education and likely in our educational system more generally.

### ***B. Systemic Reforms***

Trauma exposure response is intimately connected to other types of emotional responses such as burnout, stress, anxiety, and depression, to the point that it can be difficult if not impossible in many situations to parse out

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279. *Cf.*, e.g., Silver, *Love*, *supra* note 20, at 296–99 (“In an ideal world, perhaps we would all have the time and money to undergo personal analysis, to explore our hopes, dreams and fantasies with a well-trained guide. Perhaps every lawyer’s training for the practice of law should include analysis or extensive psychotherapy.”).

280. KOH PETERS, REPRESENTING CHILDREN, *supra* note 3, at 470–75.

281. TRAUMA STEWARDSHIP, *supra* note 2.

282. Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 7 (2003).

the impact of trauma alone.<sup>283</sup> This constellation of negative psychological effects may be caused, or at least exacerbated, by some systemic issues in immigration law and practice. These issues include overloaded courts and agencies, a lack of sufficient institutional support, and inflexible standards that leave many without any opportunity to obtain legal status.<sup>284</sup>

Many of these systemic issues are widely recognized. Comprehensive immigration reform has been a particularly hot topic for the last several years, with several pieces of legislation targeted towards reform being actively considered.<sup>285</sup> In June 2013, the Senate passed a bill, S.744, that addressed several major topics of reform related to immigration, most importantly border security, interior enforcement, and changes to the current law regarding both immigrant visas and nonimmigrant visas.<sup>286</sup> The changes related to immigration visas would create a legalization program with an eventual, lengthy possible route to citizenship contingent on multiple triggers related to border security and interior enforcement being met.<sup>287</sup> Around the same time, the House of Representatives passed several piecemeal bills dealing with different aspects of immigration reform: border security, enforcement, employment verification, guest workers, and visas for STEM (science, technology, engineering, and math) graduates.<sup>288</sup> The House did not consider a comprehensive immigration reform bill until October 2013, when H.R. 15, a bill very similar to S.744 but with the House's earlier border security provisions substituted, was introduced.<sup>289</sup>

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283. *Ripples Against the Other Shore*, *supra* note 1, at 58–60, 69–71; *see also, e.g.*, Andrew Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, 214 *PLI/CRIM* 103, 105 (Aug. 4, 2008); Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 4–5; Andrew Levin, M.D., and Scott Greisbert, M.A., *Introductory Remarks: Vicarious Trauma in Attorneys*, 24 *PACE L. REV.* 245, 248–49 (2003); Stuart Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *GEO. IMMIGR. L.J.* 57 (2008).

284. *Ripples Against the Other Shore*, *supra* note 1, at 90.

285. *See, e.g.*, Immigration Policy Center, American Immigration Council, *Comprehensive Immigration Reform 2014*, <http://www.immigrationpolicy.org/comprehensive-immigration-reform-2014>. None of the existing legislative proposals have incorporated provisions related to the emotional aspect of immigration law and process generally or to trauma exposure response specifically.

286. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013); *see also* IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, SPECIAL REPORT, A GUIDE TO S.744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 3–4 (July 2013).

287. *See* sources cited *supra* note 286.

288. *See* Immigration Policy Center, American Immigration Council, *What's on the Menu? Immigration Bills Pending in the House of Representatives in 2014*, <http://www.immigrationpolicy.org/just-facts/what%E2%80%99s-menu-immigration-bills-pending-house-representatives-2014>.

289. Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. (2013); *see also* IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, SPECIAL REPORT, A GUIDE TO H.R.15: THE BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT (Mar. 2014).

While momentum has waxed and waned over time, and progress towards reform is currently at a virtual standstill,<sup>290</sup> these or other similar proposals are likely to be considered again in the future. This section, therefore, will consider briefly general reforms, both procedural and substantive, to immigration law that may also have a beneficial impact on trauma exposure response. Some of these suggestions are drawn from current legislative proposals, but others have been made in other contexts or are not currently on the table for a variety of different reasons. Because to a large extent these proposals have been discussed exhaustively elsewhere, they are only summarized here with emphasis on their possible beneficial effects for better managing trauma exposure response in immigration adjudicators.

Procedural reforms are obviously the primary vehicle for better addressing trauma exposure response and related psychological effects. S.744 does incorporate a number of very helpful provisions in this respect, coming primarily in Title III, which focuses on interior enforcement.<sup>291</sup> First, the bill would add additional IJs and court staff, as well as additional resources for judges and staff, thereby reducing the stress and burnout associated with the current overburdening of the immigration courts and resulting backlogs.<sup>292</sup> Second, the bill provides for additional and improved training programs for judges and court staff, which could be structured to include the elements discussed above in section III.A.2.<sup>293</sup>

Third, the bill requires the government to appoint an attorney for individuals within three particular groups of noncitizen respondents in removal proceedings. These three groups are any noncitizen (1) “who has been determined by the Secretary to be an unaccompanied alien child,” (2) “is incompetent to represent himself or herself due to a serious mental disability . . . ,” and (3) “is considered particularly vulnerable when compared to other

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290. See, e.g., Laura Foote Reiff, *What Is Next For Immigration Reform?*, NAT'L L. REV. (Sept. 29, 2014), available at <http://www.natlawreview.com/article/what-next-immigration-reform>. The Obama Administration had previously threatened to take steps on their own to ease deportations and reform immigration practice, but President Obama has now stated that he won't entertain the possibility of any executive action until after the 2014 midterm elections. See *id.*; David Nakamura & Ed O'Keefe, *As reform stalls, administration eyes acting on its own to ease deportations, lawmakers say*, WASH. POST, Apr. 11, 2014; see also Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES, Apr. 6, 2014 (noting that deportations under the Obama administration are at a historic high). Even if the Obama administration eventually acts in the absence of legislative reform, as the executive branch, the substance of what they can achieve will be limited.

291. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. Tit. III (2013). HR.15 includes similar provisions. Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. Tit. III (2013).

292. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. §§ 3501, 3506 (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. §§ 3501, 3506 (2013).

293. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 3505 (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. § 3505 (2013).

aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings.”<sup>294</sup> The government would be allowed to appoint or provide counsel in all other cases.<sup>295</sup> Finally, the bill would increase the efficiency of removal proceedings and reduce at least one part of the drain on adjudicator’s time and energy by requiring that noncitizens in removal proceedings have access to evidence about them in the government’s files.<sup>296</sup> These last two provisions, particularly taken together, would have the added benefit of reducing an adjudicator’s uncertainty regarding whether he or she is making the right decision in any given case. This would occur by ensuring that noncitizens have the best possible opportunity to decide how to proceed and to present the best possible case against removability or in favor of relief from removal. This uncertainty has been cited as a significant source of additional stress on adjudicators, and removing it would therefore likely have a beneficial effect on adjudicators’ overall wellbeing.

A summary of the bill describes these changes, and the rationale underlying them, as follows:

The bipartisan sponsors of S. 744 recognized that one of the consequences of the broken immigration system has been the deterioration of due-process protections and a severely strained immigration court system. The changes proposed to both systems begin to address long-standing criticisms of the government’s failure . . . to provide sufficient resources to immigration courts to process cases . . . . Justifications for these measures include not only ensuring appropriate standards of treatment, but efficiency and cost arguments related to the best way to manage a highly complex system.<sup>297</sup>

While these comments, and the bill itself, are focused on removal proceedings in particular, these same statements could easily also be made regarding

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294. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 3502(c) (2013); *see also* Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. § 3502(c) (2013).

295. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. §§ 3502(a), (b) (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. §§ 3502(a), (b) (2013); *cf. also* Mark Noferi, Perspectives: The First Immigration Public Defender System: New York City 2013, LAW AT THE MARGINS (Aug. 1, 2013), at <http://www.lawatthemargins.com/perspectives-the-first-immigration-public-defender-system-new-york-city-2013/>.

296. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 3502(b) (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. § 3502(b) (2013); *see also generally* Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567 (2003) (discussing the strong interconnections between the “fact-finding gap” and vicarious traumatization of adjudicators).

297. IMMIGRATION POLICY CENTER, *supra* note 286, at 15.



USCIS. Similar changes would have similar beneficial effects on USCIS adjudicators.

Some experts take the position that more fundamental structural change is necessary in order to give the immigration court system the resources and autonomy to resolve these and other issues. Many, including a number of immigration adjudicators themselves through the NAIJ, advocate for the creation of an Article I Immigration Court<sup>298</sup> or other more independent executive branch tribunal.<sup>299</sup> Such independent tribunals may be desirable because they would, among other possible benefits, “offer greater independence, fairness and perceptions of fairness, professionalism, and efficiency than the current system.”<sup>300</sup> While a radical structural change could have a beneficial effect, however, it is not the only way of addressing the underlying issues discussed here and, in and of itself without further reform, could not completely solve them.<sup>301</sup> Therefore, such proposals will not be discussed at more length here.

While procedural reforms more obviously address trauma exposure response and related emotional phenomena such as burn out, stress, depression, and anxiety, substantive changes to immigration law may also have an impact. For example, one possible source for some of these negative emotions for immigration adjudicators is the fact that many noncitizens appearing before them have no remedy under the law even if the immigration adjudicator wants to grant the noncitizen a benefit or protect them from removal from the United States. Such perceived helplessness is also a component of traumatic experiences and exacerbates an individual’s response to direct and indirect trauma.<sup>302</sup> A legalization program such as that proposed in SR.744<sup>303</sup> and

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298. See, e.g., NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, THE STATE OF OUR COURTS: A VIEW FROM THE INSIDE (Apr. 2013); NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, BLUEPRINT FOR IMMIGRATION COURT REFORM (Apr. 2013); AMERICAN BAR ASSOCIATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF IMMIGRATION CASES ES9–ES10 (2010); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER’S IMMIGR. BULL. 1 (2008).

299. See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (proposing the conversion of IJs into administrative law judges, who enjoy greater job security, within a new, independent tribunal inside the executive branch but outside all departments of the federal government).

300. See AM. BAR ASS’N, *supra* note 299, at ES9.

301. See, e.g., LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING TIMELINESS AND QUALITY IN IMMIGRATION REMOVAL ADJUDICATION, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 117–18 (June 7, 2012).

302. See, e.g., *Ripples Against the Other Shore*, *supra* note 1, at 57–59, 107–08; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at sec. 309.81 Posttraumatic Stress Disorder (5th ed., 2013); Marjorie A. Silver, Sanford Portnoy & Jean Koh Peters, *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion*, 19 TOURO L. REV. 847, 853 (2004); Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 4–5.

303. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744,

HR.15<sup>304</sup> alone would alone work significantly to reduce this source of stress, as it would provide options towards legal status for a significant group of those appearing before USCIS officers and IJs who previously had none. It will not completely eliminate the issue, however, as under any legalization program there will remain those who do not qualify and therefore have no viable options for gaining legal status or remaining in the United States available to them. Giving IJs more discretion under these circumstances would allow them to take back control over the world around them, and therefore work to not only reduce but also heal trauma exposure response.

### C. Critiques and Conclusion

Critiques of the reforms proposed in this article are likely to come from two different and opposite directions. Some commentators may say that these reforms go too far, while others will assert that they do not go far enough.

Critics taking the first perspective, that these proposals overstep proper bounds, may take the position that trauma exposure response is not a real phenomenon, or that its effects are over-exaggerated. Others may accept the reality and impact of trauma exposure response, but nevertheless argue that institutional or governmental reforms are not a necessary, or even appropriate, response.

The idea that trauma and other issues of emotion are valid considerations on which to base reform of our legal system is likely to be at least somewhat controversial. As previously discussed in section II.A, lawyers as a profession have a strong tendency to operate from a world view that places a strong premium on facts and rational analysis and discounts the power of feelings. The personality type of most of those who choose to attend law school, as confirmed and strengthened by conventional legal education and the legal culture and practice of law, works to reinforce this resistance to emotion in the legal system.<sup>305</sup> Arguments from this perspective, then, are deeply rooted within a highly traditional view of our legal system and the practice of law.

The fact that this type of critique exists at all, and even more so that it is likely prevalent, is the very reason these reforms are necessary. While we are talking about a radical change in legal culture, it is an essential one. Because emotion does in fact impact not only individual immigration adjudicators but in turn all other participants in the process and the immigration system itself, it is not inappropriate but rather critical to acknowledge those effects and to attempt to minimize the harm they cause. Without the changes discussed in this section, immigration adjudicators and other participants in the immigration

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113th Cong. Tit. III (2013).

304. Border Security, Economic Opportunity, and Immigration Modernization Act, H.R.15, 113th Cong. Tit. III (2013).

305. See *supra* Section II.A; see also, e.g., Silver, *Love*, *supra* note 20, at 280; Silver, *Emotional Intelligence*, *supra* note 22, at 1181; Nelken, *supra* note 20, at 421, 424.

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process will remain stuck in a system that, instead of becoming a potential agent in the recovery process, exacerbates the negative impact of trauma exposure.<sup>306</sup>

The second possible critique of these reforms, from the opposite perspective, is that they do not go far enough. These critics believe that the law, regulations, and practice governing immigration to the United States are fundamentally broken, and that the only solution is comprehensive immigration reform, perhaps even to the extent of wiping the slate of our immigration system clean and starting over. Any “mere” procedural changes, they argue, will have limited to no impact without real substantive reform.<sup>307</sup> This assessment, in so far as it goes, may in fact be correct. However, the converse is also true: the impact of substantive immigration reform can only go so far if trauma exposure response is not also addressed. Comprehensive immigration reform in and of itself will eliminate neither traumatic experiences for noncitizens coming to the United States nor exposure and response to this trauma by immigration adjudicators hearing and deciding the noncitizens’ immigration cases. This critique, then, should not be seen as demonstrating that attention should not be paid to trauma exposure response, but rather as simply an acknowledgment that recognizing and addressing trauma exposure response alone is not enough. Even if every proposal in this article were fully and perfectly implemented, it would not solve all the problems in our immigration system today.

Ultimately, some critiques of the proposals made here may be well founded. All of the suggestions proposed in this Article are by necessity preliminary and subject to further development or even elimination. A better understanding of the manifestation of trauma exposure and the causes of increased trauma exposure response in attorneys generally and immigration attorneys and adjudicators specifically will result in more targeted and effective proposed reforms.<sup>308</sup> Further studies focused on successful

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306. TRAUMA STEWARDSHIP, *supra* note 2, at 17–18 (“Like individuals, organizations and institutions may unwittingly respond to trauma exposure in ways that prevent them from fully realizing their mission to help. . . . The same is true on the societal level. Larger systems may also contribute to suffering even as they attempt to alleviate it. In the United States, we see this dynamic in examples as diverse as the health care industry and the justice system.”).

307. It is worth noting that the group of supporters in favor of comprehensive immigration reform, and even of those who advocate for radical reform, are not monolithic. There are multiple differing opinions regarding the precise shape reform should take.

308. *See, e.g.*, Andrew Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, 214 PLI/CRIM 103, 109–10 (Aug. 4, 2008) (“Future research should focus on clarifying the nature and extent of secondary traumatic responses, understanding their relationship to PTSD, and delineating the risk factors for their development in attorneys, judges, and allied professions. This work would then form the basis for identifying the most effective interventions for reducing secondary trauma among legal professionals in order to enhance the delivery of legal services to victims of trauma.”).

prevention and coping strategies adopted by adjudicators themselves would also improve these proposals.<sup>309</sup>

#### IV. CONCLUSION

Despite the current lack of as much research and information as might be desired, it should be clear after *Ripples Against the Other Shore* and this Article that trauma exposure response and other related emotional responses are real phenomena, that they impact immigration adjudicators significantly, and that we can and should address their overall effect on the immigration process and all participants in it through those adjudicators. Indeed, the rules governing the professional conduct of judges and attorneys strongly support, if not mandate, attention to the subject with an eye towards reform to better address it. The objectives for these reforms are twofold: to manage but not eliminate the effect of trauma exposure and to ensure that the process operates as fairly as possible while also aiming towards enhancing the emotional wellbeing of all participants.

These reforms should have multiple components, including both personal and institutional strategies targeting trauma exposure and related psychological phenomena specifically and systemic institutional reforms of both EOIR and USCIS more generally to address factors that may cause or exacerbate the impact of trauma exposure. With respect to targeted reforms, the various sources of guidance on professional conduct that are actually binding on immigration adjudicators should be revised to place more importance on behavior while adjudicating individual cases, to explicitly acknowledge the emotional aspect of the practice of law, and to provide direction specifically on handling exposure to traumatic experiences while adjudicating immigration cases. Second, the DOJ and the DHS should go beyond rules of professional conduct to require immigration adjudicators to acknowledge and address the emotional aspect of the practice of law and trauma exposure response and should provide institutional support and resources to make this attention possible and productive as a practical matter. Such measures would likely include requiring ongoing training and periodic debriefing and providing the time and encouragement for personal reflection. Third, the involved federal administrative agencies and their specifically applicable subcomponents should encourage and support individual action by immigration adjudicators to better manage their own trauma exposure response. With respect to systemic reforms, changes such as additional resources and support for adjudicators and their staff, providing for legal representation and full access to information in removal proceedings, and a legalization program along with additional discretionary options for IJs should be seriously considered.

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309. See, e.g., Jaffe, et al., *Vicarious Trauma in Judges*, *supra* note 242, at 2 (“Research in this area needs to be informed by judges who have developed successful coping strategies, as well as by those judges who have been more adversely affected.”).

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While these reforms are important, and implementing even some of them would have a highly beneficial impact by enhancing wellbeing for all participants in the immigration process, they are unfortunately likely to be difficult to achieve. They are likely to be subject to critiques from two opposing directions, both that the reforms go too far and that they do not go far enough. Ultimately, progress towards these changes is likely to be slow and incremental, as the inertia of a strong institutional culture that continues to resist acknowledging the impact of emotions in the practice of law must be overcome in order for real advancement to occur.