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## NARROWING THE GAP BY NARROWING THE FIELD: WHAT'S MISSING FROM THE MACCRATE REPORT—OF SKILLS, LEGAL SCIENCE AND BEING A HUMAN BEING

Carrie Menkel-Meadow\*

*Et tu, Brute?!*

*from Shakespeare's Julius Caesar*

### I. INTRODUCTION: OF FALSE POLARITIES—THINKING LIKE A LAWYER AND DOING LIKE A LAWYER

I come here today, not to bury the MacCrate Report,<sup>1</sup> but to criticize it, not for what it includes, although that is part of my critique, but for what it leaves out. I also want to situate my critique in the contentious intellectual history of legal education and legal scholarship,<sup>2</sup> that, in my view, has too long polarized both the intellectual value and rigor of “law” (conceived of either as doctrine or theory) and “skills” (those nasty things that real lawyers have to do to express “the law” and represent clients). Among the most recent entries to this debate is a work I will juxtapose to the MacCrate Report, Anthony Kronman's, *The Lost Lawyer*,<sup>3</sup> which argues, in its powerful section on law schools, for another dualistic conception of legal education: “scientific realism”, and its progeny of the abstract theories of law and economics and critical

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\*Professor of Law, UCLA School of Law; Visiting Professor, Georgetown Law Center 1994. I have benefited from conversations and presentations about the ideas expressed herein at the Washington Law Review Symposium on the 21st Century Lawyer, April 16, 1994, and with the faculties, students, and others at Georgetown University Law Center, George Washington National Law Center, DePaul University College of Law, and with colleagues at UCLA.

1. Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter *MacCrate Report*].

2. There are many versions of these old debates, see, e.g., *Symposium on Legal Scholarship*, 90 Yale L.J. (1981); *Symposium on Legal Education*, 91 Mich. L. R. (1993); *Symposium, Civic and Legal Education*, 45 Stan. L. Rev. (1993) Robert Stevens, *Law School: Legal Education in America From the 1850s to the 1980s* (1983); Carrie Menkel-Meadow, *Too Little Theory, Too Little Practice: Steven's Law School*, 1985 Am. B. Found. Res. J. 675 (1985) (review essay); Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); M.H. Hoeflich, *Plus Ca Change, Plus C'est La Meme Chose: The Integration of Theory and Practice in Legal Education*, 66 Temple L.Q. 123 (1993); George Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 Buff. L. Rev. 681.

3. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1994).

legal studies, and “prudential realism,” which focuses on the lawyer’s judgment, experience, feeling, and character, as well as reason.

In elaborating my critique of the MacCrate Report I want to suggest that it expresses a certain irony for a “skills-of-lawyering” oriented document. I read the MacCrate Report as attempting the kind of taxonomic, scientific, classificatory, and schematic thinking about lawyering that comes closer to a Langdellian statement of “scientifically derived principles”<sup>4</sup> about lawyering than any area of doctrinal law has accomplished.<sup>5</sup> It is thus, too over-determined, too rigid and, at the same time, too incomplete for me. It enacts a particular picture of the lawyer, as principally a litigator, a “means-ends” thinker who maximizes an abstracted client’s goals.<sup>6</sup> It also assumes or subsumes a particular view of the legal system as an adversarial one in which the best of all worlds is achieved if everyone and everyone’s lawyer looks out for themselves. Thus, while attempting to clarify and codify a view of the lawyer that can be “taught” in either law school or continuing legal education, the MacCrate Report encodes a particular image or vision of a lawyer, one that I find troubling and incomplete. As an intellectual matter, the attempt to clarify and formulate a “Statement of Fundamental Lawyering Skills and Professional Values” exposes the narrowness of the Task Force’s thinking about lawyering and, in my view, fails to deal with all

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4. Discussions of whether the Langdellian method is inductive or deductive are often confusing and incomplete. Some focus on the Socratic method and see the process as deductive application of general principles, *see, e.g.*, Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *Stan. L. Rev.* 1627, 1629 (1993); *see also* Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 *Stan. L. Rev.* 1759 (1993). To the extent that rules or principles are derived from reading the cases, the process is inductive (though what is considered relevant is also political, as well as “logical”). When the principles or rules thus derived are then applied to a new fact situation the process becomes deductive, with a continuing political, as well as logical, process of considering which facts are relevant or “determinative.” Thank you, Anita Allen, my colleague at Georgetown. The image that comes to mind is the hour-glass—at the top we sift through the sands to allow a few through to create the principles which then expand to cover the expanding universe of more cases and more sands to which the principles can be applied. The principles stated in the MacCrate report match this model. The Statement of Principles of Skills and Values [hereinafter “SSV”] are clearly “induced” from the experience of lawyers and law teachers on the committee, working on cases and teaching students, but then are now meant to be applied as general principles to the “facts” of ongoing legal education.

5. This statement may be a little exaggerated. In fact many of the ALI’s Restatements have accomplished the kind of rationalized, formalized statements of law, derived from the common law, that would make any “scientist” of law proud.

6. For a thoughtful discussion of how the client is constructed as a generalized abstraction in legal education *see* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 *Stan. L. Rev.* 1731 (1993).

of the skills, attributes and competencies that lawyers will need in the century to come.

I am thus, in the awkward position of being a skills teacher who will criticize the teaching of skills as suggested in the MacCrate Report—am I a Brutus about to stab Caesar? I hope that instead you will think I have contributed to a broader conception of what a lawyer should be—a professional with a wide range of particular skills but also a human being who exercises judgment, cares for her fellow human beings, both clients and the larger society and who has a vision of what professional work should be that goes beyond litigation.

I hope to accomplish two small projects here—one is to critique the MacCrate Report on its own terms and, as situated in the larger debate about the goals of legal education, to expose, once again,<sup>7</sup> the false dualism of so-called intellectual rigor in legal ideas and “science” and the presumed “weakness” of skills training by demonstrating that both theory and skills are “legal science” and rigorous, and both are also incomplete and partial statements of what a lawyer needs to know. Second, I hope to demonstrate that any conception of legal education and law that focuses on a particular kind of rigor or “scientific” notion of lawyering is missing what is most important—call it the “art” of lawyering,<sup>8</sup> the “prudence” of judgment<sup>9</sup> or simply the necessity of being a caring human being who uses professional work to make the world a better, not worse, place when she leaves it than when she found it.<sup>10</sup> For me, the MacCrate Report pays insufficient attention to the human aspects of lawyering—variously called empathic, affective, feeling,<sup>11</sup> altruistic,<sup>12</sup>

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7. Unfortunately, much ink has already been spilt on this topic, *see, e.g.*, Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1987); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 Clev. St. L. Rev. 555 (1980).

8. *See, e.g.*, Howard Raiffa, *The Art and Science of Negotiation* (1983) recognizing that at least one of the lawyer's functions consists of both art and science.

9. *See* various formulations in Kronman, *supra* note 3; William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988).

10. In an informal poll I conducted of my colleagues of why they went into law teaching and what they hoped to accomplish as law teachers, about half expressed goals that had to do with social justice or *uses* of the lawyer's work in more than instrumental ways. *See also* Association of American Law Schools Plenary Session, *The Legal Educator: Who We Are and What Are We Doing?* (Jan. 1994).

11. *See, e.g.*, Nussbaum, *supra* note 4; Id. Martha C. Nussbaum, *Upheavals of Thought: A Theory of Emotions: The Gifford Lectures* (1993); Martha C. Nussbaum, *Emotions as Judgments of Value*, 5 Yale J. Criticism 201 (1991); Arlie Hochschild, *The Managed Heart: Commercialization of Human Feeling* (1983).

12. Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 Ga. St. U. L. Rev. 385 (1992).

and service<sup>13</sup> aspects of lawyering, whether the representation is of an individual, an entity, or a “cause”<sup>14</sup> or issue. In short, from the various points of critique that I apply to the MacCrate Report—intellectual, sociological, feminist, mediative or problem-solving, normative, and political—I hope to offer a more (re)constructive view of what it would mean to be a lawyer and to teach a lawyer how to *be* and *do*, as well as to *think* “like a lawyer.”

The education of lawyers should deal with the cognitive, behavioral and experiential, affective, and normative aspects of being and learning as a professional. While traditional legal education has emphasized the first of these over all others, some forms of skills training emphasize the second over all others. I aim for a statement about legal education that recognizes all of these constituent elements of being a lawyer and a human being and acknowledges that they are intertwined and related to each other, not necessarily in any particular linear or hierarchical order.

## II. ONCE AGAIN WITH FEELING: LAW AS SCIENCE—LAW AS ART

Both the MacCrate Report and Tony Kronman’s, *The Lost Lawyer*, take off from the same point: a concern and fear that the work of law schools (both its teaching and its scholarship) has grown increasingly remote and alienated from the work of the profession.<sup>15</sup> In Professor Kronman’s formulation there has been a dramatic sea-change in legal education in the last twenty years. Thirty years ago, law professors were at one with themselves in that their teaching, informed by the case method’s analogical and incremental reasoning, was of a piece with their scholarship, “local solutions” to problems of doctrine, and the need for mid-course corrections to rationalize and make better particular areas of the law. Today, law teachers suffer from “schizophrenia” in the disjunction between their teaching duties,<sup>16</sup> which still draw on case methods, variously “diluted” by increasing use of lectures and other

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13. Jill Chaifez, *The Value of Public Service: A Model for Instilling A Pro Bono Ethic in Law School*, 45 Stan. L. Rev. 1695 (1993); *Symposium on Mandatory Pro Bono*, 19 Hofstra L. Rev. 755 (1991).

14. See “cause lawyering” project, Austin Sarat & Stuart Scheingold (1994).

15. Kronman, *supra* note 3, at 168. See also Alex M. Johnson, *Think: Like A Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. Cal. L. Rev. 1231 (1991) and Edwards, *supra* note 2.

16. It is important to note here how many scholars of the legal profession have noted this “disjunction”, both in the past, see Hoeflich, *supra* note 2, and in the present, see Edwards, *supra* note 2 and Stevens, *supra* note 2.

more didactic methods,<sup>17</sup> and scholarly requirements to engage in the “big think”<sup>18</sup> of developing “background philosophical theories” to explain not only doctrinal developments in the law, but larger political and institutional developments as well. For Kronman, specific developments in legal scholarship, such as the ascendancy of modern legal scientism in the “totalizing” theories of law and economics and critical legal studies, with their “hostility” to case-method “gradualism” have led to a world in which legal scholars have nothing to say to practicing lawyers.<sup>19</sup> The Task Force on Narrowing the Gap shares this observation, along with other scholars and practitioners like Judge Harry Edwards and Robert Stevens, and seeks to redefine what a legal education should consist of to better prepare students to enter their own profession—not the one of their teachers.<sup>20</sup>

For me the issue of what is appropriate education for a lawyer is intimately connected to what ends and means the lawyer employs for what she will be doing. Unlike many of the more jurisprudential scholars who write about what law is, I believe that legal, indeed all professional, knowledge changes<sup>21</sup> with the demands of changing institutions and individual needs, and thus, although some forms of the debate about theory/doctrine versus skills have been with us since the beginning of legal time, I think that what is meant by these terms and their relation to each other has changed over time as well. Unlike conservative critics who fail to see how the diversity of the legal education profession actually changes legal knowledge,<sup>22</sup> I believe that

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17. See, e.g., Richard A. Posner, *Legal Scholarship Today*, 45 *Stan. L. Rev.* 1647 (1993), for at least one view, largely shared, that the Socratic method has been replaced by lecture (though few would share Posner’s suggested reason for its “decline”).

18. This is the UCLA formulation of what is required of the modern legal scholar. Each anthropologist of her own institution can reconstruct the particular vocabulary that each local scholarly community has used to denominate what is required for tenure.

19. Kronman, *supra* note 3, at 264–70.

20. This tension between law professors who teach people to do not what they do, but something else, is also long noted in the literature, see, e.g., Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 *Va. L. Rev.* 637 (1968); Kay, *AALS Newsletter*, From the President (1991); Carrie Menkel-Meadow, *Can A Law Teacher Avoid Teaching Legal Ethics?*, 41 *J. Legal Educ.* 3 (1991); John Elson, *The Case Against Legal Scholarship, or If the Professor Must Publish, Must the Profession Perish?* 39 *J. Legal Educ.* 343 (1989).

21. For my views on how feminism, for example, has changed what we consider to be “legal knowledge,” see Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 *Pac. L.J.* 1493 (1992).

22. See, e.g., Posner, *supra* note 17; Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 *Stan. L. Rev.* 1607 (1993); Larry Alexander, *What We Do and Why We Do It*, 45 *Stan. L. Rev.* 1885 (1993).

not only do conditions change how we come to know things (technology's influence on legal knowledge for example<sup>23</sup>), but who produces the knowledge affects what we know as well.<sup>24</sup>

To briefly review the now familiar history of the tension between theory and practice in legal education: The early history of legal education in the United States was characterized by the apprenticeship system, where some lawyers read law in the colonies and others studied and worked in England. Yet even in the relatively early years, there was some effort to treat law as a subject worthy of university study. George Wythe, with whom Thomas Jefferson read law, was appointed by Jefferson to a lectureship at the College of William & Mary in one effort to systematize law teaching and study and to remove it, at least somewhat, from practice. The teaching method was principally lecture, and the idea was to teach general principles of law and some political philosophy, removed from the distractions of everyday practice. The move from apprenticeship to the university was actually more complicated than many writers have told us. Some academic lawyers, like Langdell, were motivated to establish law as a legal science, influenced as they were, in part, by the European social sciences as well as by "natural" science. Some members of the profession sought to make law study more "rigorous" so as to limit the number of practitioners, while others hoped that formal educational requirements might actually make the profession slightly more democratic.<sup>25</sup>

In the contest over who would get to control legal education—the practitioners or the "academic lawyers" (they are not called legal scholars until much later)—a rich literature was produced in arguing for the benefits of particularity in learning (through the actual cases of practice) versus the generality of principles learned either by the case method, as later developed by Langdell, or by lectures on particular substantive topics. The way the debate has been framed by many writers conflates and confuses a number of interesting tensions and ironies, all of which have been carried through to the present day.

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23. See Gary Blasi, *What Lawyers Know: Cognitive Differences Between Novice and Expert Attorneys* (1994) (unpublished manuscript, on file with the author).

24. See Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Law*, 42 U. Miami L. Rev. 29 (1987); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 Stan. L. Rev. 1981 (1993); cf. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989) (critiquing the claimed "essentialism" in knowledge produced from group membership).

25. For general sources on this history in more detailed form, see Stevens, *supra* note 2; Hoeflich, *supra* note 2; Lawrence M. Friedman, *A History of American Law* (2d ed. 1985); Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1975).

First, there is the concern about *where* the education ought to take place—law office or university? This is recapitulated in the “compromise” solution offered by the MacCrate Report. The report takes the view that legal education is a continuing process<sup>26</sup> which begins with “foundational learning” in the law school, which emphasizes some substantive law, legal writing, legal reasoning, some skills training, and the ability to critically reflect on practice with a methodology designed to carry the lawyer through a self-critical learning process throughout her professional life.<sup>27</sup> Following law school, education continues through “bridge the gap” programs, continuing education programs, and for those who are lucky enough to work there, sophisticated in-house training, done by the major law firms. The locale of training raises questions about whether what is learned differs depending on where it is learned—can legal reasoning be divorced from judgment? What kind of legal analysis is learned where facts are fixed and not dynamic as in the real world? For those who teach in clinics, this debate is a false one, because judgment, reasoning, fact-finding and ethics are all taught in the university, *and* in a practice setting—a form of situated practice learning quite common to most other professions.<sup>28</sup>

By successfully completing the project to move most, if not all, of legal education, to the university, reformers moved to the *what* and *how* of legal study. Here Langdell’s substantive message and the robustness of his method are often confused. Initially, Langdell’s argument for the study of cases was based in a belief that law could be made a science with principles induced from the “data” of cases. Thus, “thinking like a lawyer” was seen as the analogy to the scientific method, and the hope was that law (in each of its subjects) would be reducible to a finite number of foundational principles. The process of inducing these principles would, as a by-product, teach young men (and I do mean men<sup>29</sup>) a method of thinking that coincided with the judicial tasks of interpreting the law in a common law system and the task of the lawyer in sifting the relevant from the irrelevant in preparing and arguing a case.

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26. *MacCrate Report*, *supra* note 1, at 3–8.

27. See, e.g., Anthony Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. Legal Educ. 612 (1984).

28. See Donald Schon, *The Reflective Practitioner: How Professionals Think in Action* (1983), and *Educating the Reflective Practitioner: Towards a New Design for Teaching and Learning in the Professions* (1987). See also Symposium, *Theoretics or Practice: The Integration of Progressive Thought and Action*, 43 *Hastings L.J.* 717 (1992).

29. For a brief introduction to the notion that women might reason differently than men and learn differently, see Mary Field Belenky et al., *Women’s Ways of Knowing* (1986); Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829 (1990).



Note that this mixed inductive-deductive process could just as easily have been conducted from the real cases of the law office—it is just that those cases might not present the full range of issues as selected by a teacher who was free to survey the whole field.

Langdell's scientific project proved less successful than his methodological one. Though we continue to ask students to parse cases and sift the relevant from the irrelevant in the hopes they will learn the sharpness of mind<sup>30</sup> that comes with "thinking like a lawyer," most of us no longer think that the rules or principles that are so derived have the same staying power as scientific laws.<sup>31</sup> Instead, as law teachers, we often seek divergent ends—some pointing to the political underpinnings of the rules,<sup>32</sup> others to the efficiencies of the rules,<sup>33</sup> others to the competing arguments that can be made "on either side" of the rule, anticipating its change in other factual circumstances. What unites the law teachers who use this method is no longer a belief in the end-product, a series of "scientifically derived" principles, but a belief that the process of "Socratic dialogue" (even if now somewhat distorted)<sup>34</sup> teaches a way of thinking that is peculiarly what lawyers do. That the method has worked so well with such a large student-teacher ratio and has thus made legal education cheap and profitable from the university perspective says more for its economic success than its intellectual worth.

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30. Or, in its more cynical formulation: "law makes a man's mind sharper by narrowing it."

31. There is an interesting competing strand in the Langdellian literature, which I cannot fully pursue here, which contrasts the physical science paradigm (law as biology, botany or geometry, *see, e.g.,* Kronman *supra* note 4 at 181–85 (Langdell's "pointilliste" plan); Hoeflich, *supra* note 3, with the social science paradigm. As a measure of human artifacts, rather than "natural" ones, law, in my view, could still be assimilable to the more tentative and changeable propositions of social science, *see* Carrie Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 Fla. St. U. L. Rev. 91 (1990). *See also* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983). For an argument that natural or physical science is as subject to human "control" in interpretation and selection of material, *see* Sandra Harding, *Whose Knowledge? Whose Science?: Thinking from Women's Lives* (1992); *The Science Question in Feminism* (1986).

32. This is done both from a critical perspective, *see* Mark Kelman, *Guide to Critical Legal Studies* (1987) or a more conventional and mid-range policy or pluralistic conception of the old Hart & Sacks "process" school, *see* Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958).

33. *See, e.g.,* William Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. & Econ. (1993).

34. I say distorted because what passes for Socratic dialogue in the law school classroom is neither Socratic (too many students) nor dialogue (in its conventional form the teacher dominates and already knows the answer to questions he poses) and many classes don't engage in it anymore at all.

Any history or critique of legal education must thus confront both legacies of the Langdell heritage—the substantive project of legal science and the methodological one of “thinking like a lawyer” from the case (appellate) method as taught in the university classroom. Ironically for me, the MacCrate Report seems to have brought the two together again—in its efforts to specify a “Statement of Fundamental Lawyering Skills and Professional Values,”<sup>35</sup> it attempts to classify both skills and values in a taxonomy as detailed as any statement of tort or contract law principles that Langdell would hope to deliver.

Thus, if Tony Kronman can claim that both law and economics and critical legal studies are derived from the same scientific strand of legal realism, I could add that the particular conception of skills training described in the MacCrate Report could similarly be accused of an effort to develop foundational principles and rigid formulations. The push to require law schools to teach particular skills is an ironic twist on the question of where law should be learned. In broadening the subject of “legal science” to include skills, the report now encourages the teaching of practice, as well as theory and doctrine, in the law school. This effort to change the what and where of legal education is a development I mostly applaud—there is hope that legal science and legal realism can be united in a productive way in this effort. But what is problematic to me is how that effort is defined.

In legal realism’s critique of the Langdellian version of legal science, several competing themes emerge<sup>36</sup> and are well canvassed by others,<sup>37</sup> most recently Professor Kronman.<sup>38</sup> Here my focus is on that aspect of

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35. *MacCrate Report*, *supra* note 1, at 138–221.

36. Some of these themes include different conceptions of both law and lawyering as defined in reaction to the Langdellian ideal type. Some examples include law as a social and policy science that needs empirical study to develop corrections; the lawyer as social engineer or “policy wonk” as opposed to single client representative, the lawyer and judge as molded by extra-legal values that must be studied and understood. Legal realists differed among themselves in terms of how much could be done about the extra-legal influences on legal decision-making (the famous “what the judge had for breakfast” more arbitrary description of Jerome Frank’s brand of realism) and whether either law or “values” could be cabined within some greater political purposes. Kronman, for example, suggests that Lasswell and MacDougal in essence thought they could create a “science” out of values that had greater “meta” power over law but also could be studied and learned, *see* Harold D. Lasswell & Myres S. MacDougal, *Legal Science and Public Policy: Professional Training in the Public Interest*, 52 *Yale L.J.* 203 (1943); Kronman, *supra* note 3, at 201–09.

37. *See, e.g.*, Laura Kalman, *Legal Realism at Yale, 1927–1960* (1986); John Henry Schlegel, *American Legal Realism and Empirical Social Science from the Yale Perspective*, 28 *Buff. L. Rev.* 459 (1979); Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 *Va. L. Rev.* 689 (1968); William L. Twining, *Karl Llewellyn and the Realist Movement* (1973).

38. Kronman, *supra* note 3, at 168–225.

legal realism which Karl Llewellyn called craft or “horse-sense”<sup>39</sup> or the art of lawyering. Like Jerome Frank,<sup>40</sup> Llewellyn thought it important that law be studied as a social science, with an emphasis on how the variations in the factual or empirical world might create variations in the applicability of doctrine. Like Frank, he recognized, as well, that a lawyer’s and judge’s values would affect the interpretation and practice of law and that it was necessary to teach students to develop their skills and craft in putting law, facts, and values together. (Recall my earlier statement that law must be learned and practiced on the cognitive, affective, behavioral, and normative levels simultaneously). Unlike Frank, who seemed only to want to make us all aware and conscious of these influences (Kronman calls this Frank’s “therapeutic” approach to lawmaking), Llewellyn reveled in the joy of learning to express the craft from both an artistic sense and from a humanistic sense.<sup>41</sup> This approach, evoking intuition, *verstehen* in the Weberian sense,<sup>42</sup> empathy, and a “balanced shrewdness” that comes from living a life in the law, has been echoed in a variety of modern approaches to lawyering and judging that focus more on the human than the scientific side of lawyering. The Brandeis “Doing Justice” program,<sup>43</sup> which draws on the use of literature to explore deeper human meanings and relationships for judges outside of the limitations of their cases is one such example. Recent scholarship which seeks to explore the emotional, empathic, and human side of law and lawyering is another.<sup>44</sup> Thus, in both the Holmesian sense of the

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39. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); Kronman *supra* note 3, at 209–25.

40. See, e.g., Jerome Frank, *Law and the Modern Mind* (1970); *Why Not a Clinical Lawyer School?*, 81 U. Pa. L. Rev. 907 (1933).

41. See Spiegel, *supra* note 7, at 588; Kronman *supra* note 3 at 213–225. Kronman writes approvingly of Llewellyn as one who had a heightened sense of prudential wisdom, who saw in the habits of mind that experience and expertise create a “horse-sense” that recognizes the judge and lawyer as human, as having to develop an empathic and intuitive understanding of the situations people get into that require legal manipulation. See Karl N. Llewellyn, *The Study of Law as a Liberal Art*, in *Jurisprudence: Realism in Theory and Practice* (1962).

42. Max Weber, *Max Weber on Charisma and Institution Building* (S.N. Eisenstadt ed. 1968); Roslyn W. Bologh, *Love or Greatness: Max Weber and Masculine Thinking—A Feminist Inquiry* (1990); Anthony T. Kronman, *Max Weber* (1983); David Trubek, *Reconstructing Max Weber’s Theory of Law*, 37 Stan. L. Rev. 919 (1985) (book review).

43. Saul Touster, *Doing Justice*, Brandeis University. This program engages judges in discussing the factors that affect their decisionmaking, through discussions of literature, not real cases, to engage their reactions to human dilemmas at a deeper level.

44. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law; New Words, Old Wounds*, 87 Mich. L. Rev. 2099 (1989); Carrie

“logic of the law is experience”<sup>45</sup> and Llewellyn’s craft sense, law and lawyering are part of an artistic, intuitive sensibility that reminds us that we are humans, not chemical elements or plant sub-species that can be fixed in taxonomic categories. It is in this dimension of the “art” of lawyering—as well as to the values of what lawyering should be done for—that I think the work of the MacCrate Report misses its mark.

### III. CONCEPTIONS AND DESCRIPTIONS OF THE LAWYER: MACCRATE’S LITIGATOR AND KRONMAN’S “PRUDENTIAL LAWYER-STATESMAN”

What is the conception of lawyering and of the use of the law that the MacCrate Report describes? In my view, the picture of lawyering created by the MacCrate Report enacts a kind of “technocratic problem-solver” that is vaguely rooted in one branch of the legal realist school of lawyering and most firmly rooted in a conventional litigation conception of lawyering—lawyering is, if you will, “scientized” (sanitized?) here. Although the “Statements” (of Fundamental Lawyering Skills and Professional Values) look like they allude to lawyering “arts” and “ethics,” I read these statements as “supplementary add-ons”<sup>46</sup> that are not really incorporated into the document in any meaningful way.<sup>47</sup> After

Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA W.L.J. 287 (1992); Menkel-Meadow, *supra* note 11.

45. Oliver Wendell Holmes, Jr., *The Common Law* 5 (1881).

46. In structure, the statements remind me of the critique by critical legal scholars that the rules always contain the possibility of supplementation (like unconscionability in contract doctrine) to offer the possibility of blunting harsh rules or to permit the expression of discretionary standards within an otherwise harsh and rigid sense of principles, while the enforcers and interpreters of the rules have the choice of what side of the line of “indeterminacy” to follow, *see, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 Buff. L. Rev. 205 (1979); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984); Clare Dalton, *An Essay in the Deconstruction of Contract Law*, 94 Yale L.J. 997 (1985).

47. Candor forces me to disclose here that I attempted some input into these statements and suspect the Task Force thought it was responding. Through my dean, Susan Westerberg Prager, who was a member of the Task Force; several of us with a broader view of lawyering (expressing the values of the alternative dispute resolution movement on one hand, and transactional lawyering on another) submitted comments and suggestions to the drafters. The result, discussed more fully above, was an “add-on” such as found in Skill # 8, Litigation and Alternative Dispute Resolution Procedures. No one with any real knowledge of the skills implicated in dispute resolution choices and practice would recognize as defining or complete any of the skills and values statements found in the report. Indeed, in its final statement in the accompanying commentary, the report indicates

I complete my critical project, I hope to suggest what a more developed and modern view of the lawyer would look like.

In an honest effort to demonstrate how broadly it conceived its mission, the Task Force on Narrowing the Gap Between the Profession and the Law School canvassed the increasing diversification of the bar on at least two dimensions—the changing format of practice (size and specialization) and the changing faces of the practitioners (along race, gender and class lines), although it does little to relate these developments to each other.<sup>48</sup> Indeed, while acknowledging the diversity of the profession, the “reasons for a statement” preamble to the statement itself reflects a continuing desire on the part of the ABA (and to a lesser extent, legal educators’ desire) to frame a statement with a view toward the “traditional vision of a unitary profession,”<sup>49</sup> in the hope of creating and stating, “the fundamental values of the profession.”<sup>50</sup>

Though the report recognizes that some lawyers work in teams, rather than alone, the normative form of representation clearly still contemplates a lawyer representing a single client (even if an entity client) and assumes a representational-litigation posture in virtually all of its statements.<sup>51</sup> The lawyer is called “a problem-solver”<sup>52</sup> who develops a strategy or plan on behalf of the client (to achieve the client’s goals) in which she gathers facts, marshals arguments, does legal research, counsels a client about *the* decision to be made (emphasis added—since

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that a well-trained “generalist need not be familiar with the intricacies of the various forms of ‘primary’ and ‘hybrid’ alternative dispute resolution mechanisms.” How then is a dispute resolving lawyer supposed to advise a client? (This is less than the Colorado bar requires of its lawyers in its new ethical requirements that lawyers advise their clients about what methods of dispute resolution might be appropriate for their cases. Colorado Rules of Professional Conduct, Rule 2.1 Advisor (1993).)

48. See some other efforts to do this, Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 Case W. Res. L. Rev. 621 (1994); Carroll Seron, *When Lawyers Go to Market: The Re-structuring of Private Practice* (1994 mms.); *Lawyer’s Ideals/Lawyer’s Practices: Transformations in the American Legal Profession* (Robert Nelson, David Trubek & Rayman Solomon, eds. 1992); Richard Abel, *American Lawyers* (1989).

49. *MacCrate Report*, *supra* note 1, at 124.

50. *Id.*

51. It is important to acknowledge that the Report does reflect the possibility that lawyers might work for governmental agencies or work in-house in a corporate setting or work in a variety of public interest settings, but there is virtually no discussion of the typical lawyering tasks of facilitating transactions, planning an administrative or governmental policy strategy, acting as a third party neutral or drafting legislation.

52. *MacCrate Report*, *supra* note 1, at 141–51.

when does a client make a single decision?), negotiates “*with the other side*” (emphasis added)<sup>53</sup> and when that fails, tries and appeals a case unless it “in appropriate circumstances” requires administrative or alternative dispute resolution treatment instead,<sup>54</sup> while at the same time managing legal work both efficiently and ethically.<sup>55</sup> This description of the lawyer, taken from the specified skills, is an effort to develop a protean and generalized statement of what lawyers do so that a unitary profession can be described for purposes of describing the education that could serve that “unitary” profession well.<sup>56</sup> In one sense, then, the report continues a long ABA project of looking to ways to include all lawyers in its descriptions of lawyering so that the ABA can both represent and regulate “the profession.”

This description of the lawyer is not unique to the Task Force’s conception. Professor Kronman also seeks to establish some core ideas that characterize the lawyer as having particular skills or qualities that both distinguish the lawyer from other professionals and create enough commonality for lawyers out of the one thing they hold in common—their legal education—to instill a sense of common virtue and pride in the lawyer’s work. Kronman’s conception of the lawyer is similar to that envisioned in the MacCrate Report: the law trained professional is primarily a judge, a counselor or an advocate<sup>57</sup>—all traditional, litigation-oriented<sup>58</sup> functions. What Kronman does add to

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53. Do all legal matters have “another side”? What about an uncontested probate of a will, a simple adoption, drafting a power of attorney or living will? Note the language throughout the SSV assumes a particular posture toward the client’s “problems” and the rest of the world.

54. Both the order and the language used in Skill # 8 convey a strong notion of litigation at the core and other forms of dispute resolution at the periphery. See Carrie Menkel-Meadow, *Dispute Resolution: The Periphery Becomes the Core*, 69 *Judicature* 300 (1986).

55. Note that the tone of the ethical skill # 10, Recognizing and Resolving Ethical Dilemmas, treats the lawyer’s ethical issues as just another problem to be “solved” or resolved—as if all law practice dilemmas—both client problems and lawyer problems are subject to a “solution.” Specifically, the statement suggests that the lawyer “identify a solution that satisfies the applicable ethical rules and principles while at the same time, accommodating any competing interests of a client.” *MacCrate Report*, *supra* note 1, at 206.

56. This effort to perpetuate a notion of the unitary profession by the organized bar is reminiscent of the reaction to the Reed Report on legal education and its failed attempt to recognize diversity in legal education for different segments of the bar. See Stevens, *supra* note 2, at 112–23.

57. Kronman, *supra* note 3, at 116–54.

58. Note here that I call this conception only *litigation-oriented*, not litigation-based. Kronman recognizes the lawyer as counselor and most significantly, for my purposes, sees the lawyer-statesman as a facilitator of the political fraternity and as a builder of a “transactional community.” *Id.* at 152–54. However, he still orients the lawyer’s work toward the constitutive elements of lawyering as argument, rhetoric, persuasion, the ability to predict what judges (and less convincingly, juries) would do if the case were litigated. The lawyer develops his knowledge from

the picture, however, is a nuanced and sophisticated attempt to describe the affective elements of lawyering—practical wisdom and judgment, which consist as much of intuition, feeling, and sympathy (the art of lawyering) as reason and the science of lawyering. In that, Kronman's description of the lawyer recognizes important aspects of lawyering which are barely mentioned in the MacCrate Report, and if they are mentioned at all, are not really integrated in the statement of principles.<sup>59</sup> Thus, Kronman's description of a practical or prudential wisdom incorporates the kind of affective knowledge that is scarcely recognized in the MacCrate Report.

Interestingly, and consistent with my own views, Kronman believes that these affective aspects of lawyering can be taught and learned<sup>60</sup> (a point I return to below). Thus, unlike other defenders of the legal education faith, he does not exclude the development of sympathy or an ability to look at client's decisions from the perspective of both client and lawyer as things which cannot be taught. This should be contrasted to the overly mechanistic and "rationalized" description of counseling

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appellate cases and such knowledge is case dependent. Aside from the fact that practicing lawyers are much more likely today to consult form documents on computers than run to cases in deciding what to do for clients, Kronman's vision still is nostalgically based on the potentiality of litigation coloring all that the lawyer does—a notion I critique in the text above. This focus on litigation as the basic core of what lawyers do has led, I believe, to a "romanticism" about litigation which I have criticized in other contexts, principally when opponents of alternative dispute resolution posit a "base-line" comparison to litigation which is often inaccurate. These critics of ADR are, in my view, "litigation romanticists." See e.g. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Judith Resnik, *Many Doors? Closing Doors? ADR's Ideological Hostility to Adjudication*, Ohio St. J. on Disp. Resol. (1994).

59. Initially I was inclined to label this a feminist critique of the MacCrate report for reasons I have long been on record about—that women would be more likely to desire, appreciate, and perform the affective aspects of lawyering. See Carrie Menkel-Meadow, *Portia In a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley W.L.J. 31 (1985); Carrie Menkel-Meadow, *The Feminization of the Legal Profession in Lawyers and Society: Comparative Theories* (Richard L. Abel and Philip S.C. Lewis, eds. 1989). I am slightly less inclined to do that now, both because of a more complex reading of women's behaviors as lawyers, see Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, Va. J. of L. and Soc. Pol'y (forthcoming); Mona Harrington, *Women Lawyers: Rewriting the Rules* (1994) and because of recent efforts, both theoretical (see Joan Tronto, *Moral Boundaries* (1993)) and descriptive, to detach gender from affective behavior and concerns of male lawyers. See Kronman, *supra* note 3; Stephen Ellmann, *The Ethic of Care As An Ethic for Lawyers*, 81 Geo. L.J. 2665 (1993). I still believe that male descriptions of a concern about human caring in lawyering are different (I seem to be an irrepressible difference theorist)—see the moral "distance" described by Ellmann at 2679-2698 and Kronman's notion of sympathy and detachment, Kronman, *supra* note 3, at 128-146.

60. Kronman, *supra* note 3, at 66-74, 98.

provided in Skill #6, Counseling, in the MacCrate Report.<sup>61</sup> In particular, note the “negative” way in which the lawyer’s “objective” distance is discussed in the MacCrate Report—that the lawyer should “strike a proper balance” between “the need to maintain dispassion and objectivity despite the role of partisan advocate for the client” and the “lawyer’s need to guard against being so dispassionate and objective as to be unable to view issues and options from the client’s perspective.”<sup>62</sup> Could this have been stated more positively, perhaps in the framework suggested by Kronman, as having both sympathy for and detachment from the client, at the same time?<sup>63</sup>

#### IV. A CRITIQUE OF THE MACCRATE CONCEPTION: THE CONTESTABILITY OF LAWYERING SKILLS, THEORIES, AND THE NEED FOR A BROADER RANGE OF SKILLS

Indeed, for me, the overarching difficulty with the MacCrate Report and its “scientific” deductive description of law and lawyering is its

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61. *MacCrate Report*, *supra* note 1, at 176–84. I recognize that much of what appears in the MacCrate report on counseling is indeed derived from the work of my own colleagues, David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (1991), whose work was pathbreaking in its attempts to construct a model of client-centered counseling. nevertheless, I think the model pays insufficient attention to the emotive aspects both of the client’s intra-psycho processes in decision making and to the complex relationship between lawyer and client, which we now know may vary a great deal depending on the social distance between client and lawyer and other factors which vary in the multitudinous ways in which lawyers and clients meet. See Shalleck, *supra* note 6; Stephen Ellmann, *Lawyers and Clients*, 34 *UCLA L. Rev.* 717 (1987); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 *UCLA L. Rev.* 697 (1992); Nelson, *Partners with Power: Social Transformation of the Large Firm* (1988). In its most recent form, the Binder text at least attempts to deal with variations in what the counseling decision is about—transactional decisions, decisions that do not involve “other sides” (like drafting a will). The MacCrate Report suggests other kinds of decisions, wills, and bankruptcy filing, but seems to assume single decisionmakers—an individual client. Virtually none of the counseling literature does a good job of discussing decisions when made by groups (not just class members in litigation, but entity, organizational, corporate and other group settings where the lawyer may have to “facilitate” decisionmaking among many decisionmakers). For one good attempt to wrestle with some of these problems, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 *Va. L. Rev.* 1103 (1992); see also Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 *Ohio St. L.J.* 1 (1993).

62. *MacCrate Report*, *supra* note 1, at 177–78.

63. While I am somewhat critical of the professional “detachment” model, see Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 *U. Pa. L. Rev.* 761 (1990), at least Kronman is able to hold two seemingly disparate concepts at the same time. That to me is the essence of professional work—refusing to live at the poles of one extreme but being able to act from the complex location of competing issues and concerns that is our existential condition from “knowing so much.”



failure to take account of the complexity of differing theories about both law and lawyering. I could easily subscribe to a statement that students and lawyers should be taught counseling and negotiation, for example. Unlike others who cringe at any requirement that skills be taught in the law schools at all,<sup>64</sup> I support the notion that behavior and skills should be taught (the art as well as science of lawyering), but I cringe at the adoption of particular conceptions of those skills in a number of areas where the conceptualization of those skills is every bit as controversial as whether economics has something to say about the right to free speech.<sup>65</sup> Different theories or approaches to skills are the sign of a developing and exciting new discipline about lawyering and should be presented to students and lawyers with all of the richness and controversy as is exhibited in the more traditional curriculum of the "science" of doctrine and theory.

Let me briefly illustrate this perspective on the theory of skills, as both science and art, with three examples, client counseling, negotiation, and dispute resolution.

#### *A. Client Counseling and Communication*

In a laudable effort to create a model or statement of principles and objectives in client counseling (and also to respond to a concern that, at least in some areas,<sup>66</sup> lawyers tend to dominate their clients, a client-centered model of counseling was born.<sup>67</sup> The impulse behind this model, that the client must live the life that comes after the decision (and not the lawyer) and thus should make the decision is both noble and ethical (that is, it was technically the rule in the Model Code of

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64. See, e.g., Paul Brest, *When Should A Lawyer Learn the Way to the Courthouse*, *Stanford Lawyer* (Fall 1993) 2; John Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 *J. Leg. Ed.* 157 (1993).

65. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

66. Particularly those involving poor clients and elite lawyers. See, e.g., Lucie E. White, *To Learn and Teach: Lessons From Diefrontein on Lawyering and Power*, 1988 *Wis. L. Rev.* 699; Stephen Wexler, *Practicing Law for Poor People*, 79 *Yale L.J.* 1049 (1970); Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1 (1990); Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 *N.Y.L. Sch. L. Rev.* 7 (1990); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 *W. Va. L. Rev.* 305 (1988); Gerald P. Lopez, *Rebellious Lawyering* (1992).

67. See, e.g., David A. Binder & Susan C. Price, *Legal Interviewing and Counseling*, 1977; Thomas Shaffer, *Legal Interviewing and Counseling in a Nutshell* (1976).

Professional Responsibility<sup>68</sup>). Recent rigorous inquiries into the complexities of lawyer-client decisionmaking, by lawyers, ethicists, and sociologists to name a few,<sup>69</sup> have suggested that the power and socio-economic relationships between clients and lawyers may suggest variations on who should be the primary decision maker in particular matters or settings. More recently, several commentators have suggested that it is more important that there be a “moral dialogue”<sup>70</sup> about the factors involved in a decision than that a particular rule should specify who does the deciding—a “principle” which grants both the client and the lawyer their human and professional dignity and craft interests.<sup>71</sup> Thus, for my taste, the effort to state, even “aspirationally” the particulars of the skill of counseling rigidifies a far more complex and textured possibility of teaching and learning what the factors should be in client-lawyer decisionmaking responsibilities, variations which include who the client(s) are, who the lawyer(s) are and what their vision of lawyering is,<sup>72</sup> as well as the variations of types of decisions to be made—policy, litigative, transactional, legislative, governmental, private interest, or familial.

As a teacher of counseling, I am much more interested in teaching some basic foundational skills (like the “art” of question framing (see below)) and the multiplicity of theories that now inform how these skills

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68. See, e.g., Ethical Considerations 7-7 and 7-8. Clients should be apprised of all considerations in making decisions, but particularly when non-legal matters are involved clients should decide what to do. See Rule 1.2, Model Rules of Professional Conduct for modern expression of the means-objectives division of labor between lawyer and client.

69. See Mark Spiegel, *Lawyering and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. Pa. L.J. 41 (1979); Nelson, *supra* note 64; Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling and Negotiation: Skills for Effective Representation* (1990); Ellmann, *supra* note 61; Robert D. Dinerstein, *Client Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501 (1990).

70. For writers who have written eloquently on this moral dialogue see Warren Lehman, *In Pursuit of A Client's Interest*, 77 Mich. L. Rev. 1078 (1979); David Luban, *Lawyers and Justice: An Ethical Study* (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988).

71. See, e.g., Elizabeth Dvorkin et al., *Becoming A Lawyer* (1980) and Howard Lesnick, *Being A Lawyer: Individual Choice and Responsibility in the Practice of Law* 66–117 (1990).

72. I have not even begun to attempt a description here of a variety of different expressions of what the lawyer's vision of herself is—from the new “civic republicanism”, see, e.g., William H. Simon & Robert V. Gordon, *The Redemption of Professionalism?*, in *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Robert Nelson et al. eds., 1992); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1987); to political and social activist, see White, Lopez, *supra* note 66; to entrepreneur, see Seron, *supra* note 48; to Marvin Mendes & Alan Acock, *Hero, Trickster, Helper: A Report on Lawyer Image*, 1982 AmB. F. Res. J. 177 (1982); to power-brokers, Edward O. Laumann et al., *Lawyers and the Structure of Influence in Washington*, 22 Law & Soc. Rev. 237 (1988).

should be exercised than to assume an all-purpose model that works in some abstracted or assumed-to-be-true conception of where lawyering always takes place.

The assumptions of an overly abstracted, and standardized conception of counseling are evident in Skill #5, Communication, the constituent skill of any lawyering task, which specifies an instrumental, not affective, approach to lawyer-client communications. Lawyers are to gather facts, determine what are relevant arguments, tailor words to the audience and “attend to emotional and interpersonal factors that might be affecting the communication”<sup>73</sup> without one expression of “caring” for the client’s concerns, putting the client at ease, learning how to actively listen so as to create a relationship, not just to process information. In short, the communication suggested here is to benefit the lawyer instrumentally in performing tasks for the client—it is not written to facilitate a true relationship between lawyer and client.

### B. *Negotiation*

The MacCrate Report’s effort to specify skills gets into deeper trouble (with me) when it attempts to deal with the scientifically and artistically complex task of negotiation. In its attempts to specify some variations in context (dispute-resolution negotiation or transactional negotiation) it conflates some highly disputed theories about when particular models of negotiation might be appropriate.<sup>74</sup> In the end, the description of negotiation skills adopted by the MacCrate Report returns to a reified approach to distributional negotiation<sup>75</sup> by suggesting that the negotiator should look for “settling points”, “bottom lines,” “ranks” of outcomes and “reciprocal concessions.”<sup>76</sup> The standards do what much negotiation literature does—they conflate goals and purposes with styles. Not all disputes can be divided into zero-sum versus non-zero sum disputes *a priori*. Indeed, it is the very skill of the negotiator that can “create

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73. *MacCrate Report*, *supra* note 1, at 174.

74. *See, e.g.*, Roger Fisher et al., *Getting to Yes* (2d ed. 1992); James J. White, *The Pros and Cons of Getting to Yes*, 34 J. Leg. Ed. 115 (1984); Gerald P. Williams, *Legal Negotiation and Settlement* (1983); David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Cooperative Gain* (1986).

75. It is particularly troubling for me to critique this section, since much of it is based on my own work, *see* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Legal Problem-Solving*, 31 UCLA L. Rev. 754 (1984), and some of it was drafted in response to comments I made to drafts of the report.

76. *See MacCrate Report*, *supra* note 1, at 185–90.

value”<sup>77</sup> and transform a problem from a distributional problem to an integrative one. This is distinct (*analysis* of the problem) from the behaviors used by negotiators to achieve their objectives (choice of “styles” in cooperative, competitive, or collaborative behaviors).

Let me illustrate both the contestability of negotiation frameworks, and the power of “models” from my own teaching. Recently, I had students conduct a simulated role-play designed to test their ability and willingness to lie and dissemble in order to reach agreement.<sup>78</sup> The Teacher’s Manual for the problem suggests that the only way the students can reach agreement is for one side not to mention a possible eminent-domain condemnation of the property for sale and the other side must not reveal who its actual principal is and what the intended use of the property is. In over half of my students’ role-plays the students revealed the problematic facts and constructed remarkably creative solutions to the problems—shared risk, shared uses, proposals to seek historic preservation status to prevent condemnation and many others. These students (possibly “brainwashed” by an unreconstructed problem-solving instructor, teaching with her own “model”) demonstrated the best in creative lawyering—they “fought the hypo” and solved the legal and economic problems encountered by the parties. All of this would have been quite complex to arrange in “real life” with real clients, but the skills of seeing how to take a negotiation “problem” and convert it into an “opportunity” for development (both in terms of real property and in creative thinking) demonstrated to me the significance of how one teaches particular models or conceptions of lawyering. To focus on “bottom lines” and “settling points” here not only might have “killed the deal,” and prevented a “Pareto-optimal” use of the property, but certainly could have led to deals with deceptive conduct that might have been used to overturn the contract later.

Thus, while the MacCrate Report drafters probably thought they were paying attention to the models of distributional and integrative or problem-solving negotiation, they in fact “enacted” a particular substantive model that does not illuminate how lawyers should analytically approach problems and how they might go about analyzing whether a particular negotiated outcome is appropriate or not. The MacCrate Report suggests that lawyers (and students) learn how to

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77. See Lax & Sebenius, *supra* note 74; Howard Raiffa, *The Art and Science of Negotiation* (1982).

78. The problem was the Colonial Confectioners, Inc. problem in Stephen Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes* 87 (1992) and Teacher’s Manual at 22–26 (1992).

conceptualize whether a problem can be dealt with “competitively” or “cooperatively,” but in doing so they have reduced all negotiation to “style” or behavior and have not suggested how lawyers can learn to “open up” legal problems, conceptually to “expand the res” or reconfigure and disaggregate elements of the problem.<sup>79</sup>

Once again, even Kronman, who does not really focus on skills, suggests a much more sophisticated analysis by suggesting that in every negotiation the lawyer must consider not only his own client but the “welfare and self-interest” of the other side, if only to motivate an agreement. Kronman is here taking account of the now extensive game theory and empirical literature<sup>80</sup> which suggests the cooperative aspects of even the most competitive negotiation game<sup>81</sup>.

Kronman goes on further to elaborate a more normative view of negotiation—that the transactional negotiator can be creative and public-spirited in enjoying and finding fulfillment in creating and encouraging “transactional communities.”<sup>82</sup> The same could be said of the dispute resolving negotiator who creates value, solves a problem or improves relations after a disrupted situation ripens into a “litigative” situation. Thus, Kronman suggests the affective and artful side of negotiation, now supported by the many scientific studies of negotiation, thereby illustrating the connection of “science” and “art” and the simple-minded foolishness of adopting a particular substantive model of litigative negotiation as does the MacCrate Report.

Interestingly, in a recent study of how lawyers valued their legal education, researchers Bryant Garth and Joanne Martin<sup>83</sup> found that recently graduated practitioners now thought that legal negotiation was not only important to their practices but could be taught and learned in law school.<sup>84</sup> The authors attribute this finding to the growth of theory in the field of negotiation (as distinguished from other skill areas). Thus, in pointing out that success in the legal academy depends on the intellectual value of the scholarship and “production of knowledge” function of

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79. See Menkel-Meadow, *supra* note 75, at 794–829.

80. See, e.g., Robert Axelrod, *The Evolution of Cooperation* (1984); Eric Rasmusen, *Game Theory* (1992); William Poundstone, *Prisoner's Dilemma* (1992); see also R. Picker, *Law & Economics: Intellectual Arbitrage*, 27 *Loy. L.A. L. Rev.* 127 (1993).

81. See Kronman, *supra* note 3, at 151–54.

82. *Id.* at 153.

83. The study was a replication of the survey study of lawyers done by Frances Kahn Zemans and Victor G. Rosenblum in the 1970s, *The Making of a Public Profession* (1981).

84. Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 *J. Legal Educ.* 469, 505 (1993).

research, Garth and Martin, in essence, refute the charges of Judge Edwards and others that there is a growing disjunction between research in the academy and the needs of practitioners. Where academic research has clarified and focused on issues that meet the needs of practitioners—both in a pure form (game theory) and in an applied form (distributional versus problem-solving models), it has been recognized as contributing to the education of lawyers. Thus, it is both the rigorous and contested conceptualization of skills (and the concomitant creation of theory), rather than a rigidified and non-controversial statement of skills, that has actually increased the interest of law students and the effectiveness and usefulness to lawyers of “skills” education.

Negotiation is a particularly fertile ground to explore the science and art forms of lawyering because it does involve both conceptualization of the goals and res of the negotiation and, secondarily, the behavioral and instrumental aspects of its performance. This is exactly the kind of rigorous “craft” that Llewellyn might have contemplated could be effectively taught in the law school.<sup>85</sup> That the MacCrate Report enacts a particular conception of negotiation and fails to appreciate the complexity of the issues to be studied and learned is unfortunate.

### C. *Alternative Dispute Resolution and Litigation*

From my own particular vantage point the expression of fundamental skills involved in Skill #8, Litigation and Alternative Dispute Resolution Procedures, is most problematic. It is fairly obvious that the Alternative Dispute Resolution section is an “add-on” and not integrated with the lawyer’s role as a dispute resolver. To begin such a section with “knowledge of the fundamentals of litigation at the trial-court level,” reveals that the default position of the drafters is to begin with litigation, rather than to attempt to “solve the problem,” as Skill #1 would seem to

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85. Is it a coincidence that one of the first and most effective negotiation teachers and scholars, James J. White at Michigan, was also a commercial law scholar? White’s co-authorship of one of the first texts on negotiation, with Judge Harry T. Edwards, *Problems, Readings, and Materials on the Lawyer as Negotiator* (1977), demonstrates the close relationship between skills and substance (both theory and doctrine) in a wide variety of courses in the law—commercial law, labor law, contracts, and property law to name a few. See also Cornelius Peck, *Cases and Materials on Negotiation* (2d ed. 1980) (negotiation text developed by torts and labor law scholar). In its attempt to “sell” skills teaching as a separate concern, the MacCrate report fails to address the important connections between teaching doctrine and skills together. For several examples of trying to focus on more than doctrine at once, see Leonard L. Riskin & James E. Westbrook, *Lawyers and Dispute Resolution* (1989) (an effort to teach dispute resolution and lawyering skills pervasively in the first year curriculum) and Deborah Rhode, *Ethics By the Pervasive Method*, 42 J. Leg. Ed. 31 (1992). This would be a new illustration of the “seamless web of the law.”

require. Truly understanding the “fundamentals of proceedings in *other* dispute resolution forums” would suggest considering those which could be used before litigation even begins—negotiation, mediation, conciliation, ombuds services, to name a few. Thus, the drafters reveal, in this statement, their own biases and the biases of many skills training programs—litigation and litigation of a particular type is the norm, and “other” forms of dispute resolution are the exception. Yet we know that in actual importance to their practice, lawyers will spend less time in formal litigation than in a host of other skills. It may be more important for lawyers to know how to facilitate meetings, both with committees seeking to accomplish a task and with “opposing sides” in order to effectuate client purposes, than to develop proficiency in the “presentation of proofs.”

Furthermore, the failure of this section of the report to relate ADR to transactional work demonstrates just how uninformed the drafters were with respect to how these processes operate. That ADR is called “proceedings” and that lawyers are to learn about the “presentation of proofs and arguments” in ADR proceedings demonstrates just how little the drafters were able to educate themselves about some very basic processes such as mediation, with or without assistance of counsel. These processes are not new and are indeed mandated in a wide variety of court settings<sup>86</sup> which would require even the most conventional of litigators to know about how they function. That the commentary of the section concludes that “a well trained generalist need not be familiar with the intricacies of the various forms of primary and hybrid alternative dispute resolution mechanisms,”<sup>87</sup> suggests that the Report does not even require enough knowledge of ADR to satisfactorily counsel a client who could be ordered by a court to attend one of the hybrid processes.<sup>88</sup> Given the elaborate work done by a variety of ADR legal professionals to develop standards for the conduct of ADR in a variety of settings,<sup>89</sup> the

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86. See, e.g., Cal. Civil Code § 4607 (West 1983 and Supp. 1990) (mandatory mediation in child custody); Civil Justice Reform Act, Civil Justice Expense and Delay Reduction Plans 28 U.S.C. § 471 (1990) (mandated study of and suggested use of ADR to reduce delay in federal courts).

87. *MacCrate Report*, *supra* note 1, at 199.

88. The Northern District of California federal court, for example, directs cases to an Early Neutral Evaluation process which is just such a hybrid between a settlement conference, mediation and negotiation, see Wayne Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver and Whether They Threaten Important Values*, 1990 U. Chi. Legal F. 303 (1990).

89. For an inquiry not unlike that conducted by the MacCrate committee and one fraught with many similar problems, see Carrie Menkel-Meadow, *Measuring the Art and Science of Mediation*, 9 Negotiation J. 321 (1993). For examples of efforts to specify standards see Honeyman, *Guidelines*

MacCrate committee demonstrates its commitment to old ways of solving legal problems by not even educating itself enough about these significant changes in the legal system. I do not mean to belabor the absence of attention to my own field, but rather to use it to illustrate the dangers of the specification of such detailed standards that immediately date the functioning of lawyers.<sup>90</sup> As the increasing complexity of conventional legal problems (like environmental siting and responsibility) and global disputes makes clear, problems are no longer bi-polar<sup>91</sup> and will need to employ different methods than adversarial presentations for resolutions.<sup>92</sup>

Though the MacCrate Report and Kronman's book attempt to specify "timeless" standards of lawyering, both are flawed in their focus on the status quo and inability or unwillingness to look to the lawyer's work of the future. As both suggest that the lawyer is a problem-solver, focused on cases, facts, persuasion and advocacy, they fail to elaborate a broader and potentially more "timeless" conception of the lawyer's work and legal education.

#### V. LAWYERING FOR THE 21ST CENTURY: COGNITIVE, BEHAVIORAL, AFFECTIVE, NORMATIVE, AND TECHNICAL COMPETENCE

Were I designing an educational program for lawyers of the twenty-first century (and this Symposium offers me a brief opportunity to do so)

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for Mediation Performance and Evaluation, 9 *Negotiation J.* 295 (1993); ABA Family Law Section, Ethics Standards for Mediators, Institute for Judicial Administration and the Center for Dispute Settlement, Standards for Court-Connected ADR Programs, ACLU Guidelines for Use of ADR; ABA, AAA, SPIDR, Joint Committee on Standards of Conduct for Mediators (1993).

90. No doubt other areas of legal work have been left out as well. Would we say in 1994 that a fundamental skill of lawyering would require some computer literacy and technical skill?

91. Has the bi-polar conception of legal problems been too long under the influence of a "cold-war" conception of seeing how the world operates? Whether ADR ultimately transforms legal practice, it is clear that more complex methods of dispute resolution will be essential for world problem-solving. The litigation oriented lawyer will have a hard time becoming the "lawyer statesman" that Kronman envisions if the MacCrate standards dominate legal education. Thank you, Susan Gillig, my colleague and dear friend at UCLA for countless conversations about the teaching of lawyering and its relation to larger problem solving in the world.

92. Sitting where I do (writing both in Los Angeles and Washington DC) it is impossible to conceive of the world in simple plaintiff-defendant terms. The parties are more complex (entities, splits within plaintiff groups, multi-racial, multi-ethnic individual disputes), the resources may be scarcer and the needs for creative problem solving that involve and empower multiple parties are even greater than we ever imagined them.



I would attempt a broader (and less detailed) vision of what a lawyer would need to know. I would attempt a broader engagement of the lawyer (and the clients the lawyer serves) as a full human being who needs to be educated on a variety of different levels, and I would leave the specification of details to be filled in by the needs and requirements of the times—events, circumstances and changes that we cannot foretell today. I will briefly outline some of the dimensions of this learning.

#### A. *Cognitive Knowledge*

There is, in my view, something to the phrase, “thinking like a lawyer,”<sup>93</sup> and this skill of parsing cases, “spotting” issues, separating the holding from the dictum, the relevant from the irrelevant fact, and the law from the policy must be learned by anyone who calls herself a lawyer. Yet, unlike Tony Kronman, I do not see the case method as the only way to train a legal mind. If it, in his words, procures a certain skepticism for theories and abstractions and general solutions to problems,<sup>94</sup> then the lawyer will have trouble legislating, lobbying and administering laws, even if he can persuade judges, juries and people on the other side of transactions. In the twenty-first century lawyers will also have to solve problems, synthetically and creatively,<sup>95</sup> as well as analytically; they will have to read and write and enforce statutes. Thus, they will need a variety of new and more complex skills and new ways of understanding legal problems. In learning to think creatively and solve problems, they might draw from such disciplines as engineering, architecture, and artificial intelligence. In order to understand wordcraft, lawyers might be as informed by literary criticism as case reading.<sup>96</sup> We will need to offer courses in statutory construction and legislation, as well as common law subjects. We will need to balance private law courses with public law courses and we will need to study processes more inclusively (civil systems including ADR, criminal systems including plea bargaining). Most importantly, at the intellectual

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93. See the excellent descriptions of it in Karl N. Llewellyn's, *The Bramble Bush: On Our Law and Its Study* (1960), and Edward Levi's, *An Introduction to Legal Reasoning* (1949), as well as the newest entry in Anthony Kronman's description of the case method. Kronman *supra* note 3, at 109–12.

94. Kronman, *supra* note 3, at 154–62.

95. See, e.g., Martin Gardner, *Aha! Insight* (1978); James L. Adams, *Conceptual Blockbusting: A Guide to Better Ideas* (3d ed. 1990).

96. See, e.g., Richard Weisberg, *Three Lessons From Law and Literature*, 27 Loy. L.A. L. Rev. 285 (1993).

level, the well-educated lawyer will need to understand basic economic concepts<sup>97</sup>, statistics, and enough social science to be able to analyze empirical effects of lawmaking and law-enforcing. If we are to take seriously recent pleas to make lawyers more sensitive to their public calling,<sup>98</sup> then we will need to focus more on moral and political philosophy as well. Personally, I would recommend a return to the institutional process courses so popular in the 1960's and 1970's (Hart & Sacks)<sup>99</sup> to instill in law students some policy, historical, and political sense of institutional competence beyond constitutional separation of powers. In short, the intellectual or cognitive aspects of learning to be a lawyer will continue to include what is best about the first year case system but will have to expand to make room for the "liberal arts" of lawyering as well. The modern law school will, of necessity, have to be a "law and . . ." school.

### B. Behavioral/Experiential/Skills Training<sup>100</sup>

The well-educated lawyer of the twenty-first century will also be educated about "doing like a lawyer," while in law school, as well as in continuing education programs. In this, I support the basic thrust of the MacCrate Report—skills must first be introduced in the law school setting,<sup>101</sup> where theories about skills can be developed and tested, where students can "experiment" with their behavioral repertoires without hurting real people (in simulation settings), and where feedback is connected to educational goals and not to client and economic incentives. This will require a reordering of some priorities—behavior and action

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97. Some law schools, like Columbia, already require first year students to systematically study economics; others like Chicago and George Mason have it dominate the intellectual environment—do students know what "brand" of law they are learning?

98. See American Bar Ass'n, Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for Rekindling of Lawyer Professionalism* (1986); Kronman, *supra* note 3, at 354–381.

99. See Hart and Sacks, *supra* note 32.

100. Is there any significance to the fact that skills is always paired to "training", while cognitive learning is paired with teaching? The hierarchy of sentiments expressed in this wording seems both sociologically and intellectually false. There is as much "training" in Socratic dialogue and case reading as there is in interviewing skills teaching and students probably feel that there is not enough "training" (with implied notions of feedback and repetition) in any form of legal education. For a description of how professional education could borrow productively from the sports concept of "coaching," see Schon, *supra* note 28.

101. I hear the calls of my deans and others complaining that resources are not adequate for such teacher-student intensive ratios, but alas, I believe we must find the resources. Legal education is the "cheapest" form of graduate education in terms of the person-power attached to students in the learner role.

will have to be treated as seriously as minds and ideas. What a radical idea!

In my ideal educational system, foundational skills will be learned first, as foundational concepts are taught first in the cognitive program.<sup>102</sup> Student-lawyers will learn the constituent aspects of lawyering first—the logic of question-framing—when an open question, when a closed; opinion writing, then persuasive writing, and then active listening and interactive skills with other people, such as collaboration.<sup>103</sup> Then these foundational skills can be broadened to particular lawyering tasks—argument in trial, discussion in negotiation, argument at appeal, counseling individual clients, counseling organizations and entities, negotiating disputes, negotiating transactions, negotiating in dyads, negotiating with coalitions, negotiating with clients and adversaries, and negotiating with legislatures, government agencies, and foreign governments. In short, skills training would be organized functionally and contextually with building blocks going from the specific and individual to the more complex and diverse. Students would begin in the first week of law school with an interview<sup>104</sup> to understand the relation of facts to law and skills to context.<sup>105</sup> They would go on to simulation based basic skills courses in the constituent skills (questioning-interviewing, advising-counseling, writing, research-ing); then to more complex skills (negotiation, fact investigation, trial advocacy, mediation), and finally to “real case” clinics, as is the norm in other forms of professional education—medical, clinical psychology, social work, and some forms of management education, as well as education itself. In law, this sequencing would tie “process” knowledge of skills to simultaneous learning of “substantive” doctrine.

In my ideal world, after law school graduation, the lawyer of the twenty-first century would not only be required to take continuing education courses about changes in the substantive law, but would have

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102. For another expression of the importance of sequencing legal education, see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (1983).

103. Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 Vt. L. Rev. 459 (1993).

104. As Northwestern has done in its combination legal writing-clinical program and as is commonly done in many medical schools today.

105. Both UCLA and NYU have attempted programs in the first year, called Lawyering Process that focus on this kind of integrated learning. See, e.g., John Sexton, *The Preconditions of Professionalism: Legal Education for the Twenty-First Century*, 52 Mont. L. Rev. 331 (1991); David Binder, *Lawyering Skills Program* (memo to UCLA faculty, March 1994).

on-going skills clinics as well, to brush up on old skills, learn new ones, and be given feedback on current competency levels.

Cognitive and skills learning would be unified<sup>106</sup> in courses that combine learning about doctrine and theory while watching the “law in action” and the “gap” between the law on the books<sup>107</sup> and the law as it happens. Because I truly believe that participatory learning (role-playing, problem methods, skills exercises)<sup>108</sup> is what makes learning stick<sup>109</sup> and illuminates how the law is effectuated, it would be used in virtually every course in legal and continuing education.

### C. *Affective Human Learning*

What is most missing for me in the MacCrate Report and in legal education is any systematic teaching and learning about what has been called “the human arts of lawyering.”<sup>110</sup> To the extent that most lawyers spend most of their time with people there is insufficient attention given to the arts (and science<sup>111</sup>) of interacting with others. Kronman points out that the ability to be “sympathetic” to the client is an essential part of lawyering. Unlike others who write about lawyering and the legal profession, he believes it can be, unlike intuition, “discursively explicated.”<sup>112</sup> He suggests that the good lawyer must develop an “imagination” for considering the world view and values and choices of the person whom one is trying to help (the client).

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106. See, e.g., Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. Rev. 1995 (1993).

107. Richard Abel, *Law Books and Books About Law*, 26 Stan. L. Rev. 175 (1973).

108. See Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology in Clinical Education for the Law Student* 374 (1973).

109. For that I will be eternally grateful to David Filvaroff, who as one of my first year teachers at the University of Pennsylvania, taught torts and judicial process, in part through simulations and role-plays, long before clinical education knew what to call these educational modes. It is because of this experience as a student that I became a clinical teacher and proudly continue to use participatory learning in all of my courses, no matter what the subject matter.

110. Gary Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. of Legal Ed. 5 (1975-76).

111. See, e.g., work in neurolinguistics on human interaction; Don Peters, *Forever Jung: The Myers-Briggs Type Indicator and Learning Negotiation*, 42 Drake L. Rev. 1 (1993); Deborah Tannen, *You Just Don't Understand* (1991)

112. Kronman, *supra* note 3, at 66.

Thus, lawyers must learn how to “feel with” others.<sup>113</sup> This process, which I call “empathy training,” is an essential part of the client-lawyer relationship and like Kronman, I believe it can be taught and learned. I distinguish sympathy from empathy and suggest that lawyers need to learn to experience “the other” from the values that the other holds, not those of the lawyer—this is the challenge of most lawyer-client relations and lawyer-opposing side relations. While I and others have called this an “ethic of care” in other contexts,<sup>114</sup> what I mean is a willingness to truly apprehend the reality of the other (be it client or administrative bureaucrat or opposing counsel); not just to understand instrumentally how to move, persuade or affect that person, but to understand what meaning the interaction has for that person in a caring and existential sense. The lawyer who hopes to effectuate a successful transaction or settle a lawsuit or amend an administrative regulation needs to understand what the goals and feelings of the other are, if only to effectuate the needs and goals of the client (the “instrumental” justification for affective learning). I prefer to take this a step beyond the instrumental to suggest that the good lawyer needs to understand, from a human point of view, what the other wants to happen in the world (the “humanist” justification for affective learning).

While a position of openness and non-judgmentalism should at least begin the relationship, there will be occasions later for evaluation, judgment, and what Kronman calls “detachment.” For me the reason for a human approach to lawyering is that it is what motivates at least some, if not all, to come to law—to improve the human condition and to serve other human beings. To do this effectively means to connect to human beings beyond the instrumentalism of the professional relationship. What the lawyer cannot understand she cannot serve.

On the intellectual level, it comes as no surprise to me that we feel the pull toward narrative and stories at this time in law, when counterweights in legal scholarship and scholarship in general have led us to the abstractions and emptiness of “efficiencies” and “deconstruction.” We seek to reconnect to the people who are affected by law. Even Tony Kronman, who approaches his subject from a far more conservative (in the sense of accepting and justifying the status quo) position than I, suggests that what distinguishes law from other disciplines is that it

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113. I have explored the importance of empathy in lawyering and legal education in three contexts and it is the crux of my teaching in mediation and negotiation courses, *see* Menkel-Meadow, *supra* note 12; Menkel-Meadow, *supra* note 44; Menkel-Meadow, *supra* note 91.

114. *See* Menkel-Meadow, *Portia*, *supra* note 59; Ellman, Tronto, *supra* note 59.

focuses on the cases of real people and uses theory in service to solving cases and problems, instead of using cases only to substantiate or falsify theories.

Kronman's formulation of the need to adopt a "bifocal" view of compassion and detachment in order to determine what is best to do in a situation illustrates what he means by developing prudential or practical wisdom. The general principles of law and skills suggest possibilities to us, which then must be tested by the particular individuals situated in a problem. What is important in Kronman's formulation is that his image reminds us that professionals must be able to hold two ideas together at once—for those of us who tend to be too compassionate and overly connected to those we help,<sup>115</sup> some detachment will be necessary; for others who do not know how to connect to other human beings, lawyering education should teach us how to cross that human divide.

While the MacCrate Report genuflects to the instrumental importance of communication as a skill, it fails to consider how this is actually to be accomplished. We are just beginning in legal education to take account of how to teach the human arts—we are, in short, about where general lawyering skills education was twenty years ago. New developments, such as mediation courses and greater emphasis on ethics and even law office management may provoke more attention and greater sophistication with respect to these issues in the future.

For the lawyer of the twenty-first century, I would add another form of affective learning—that is attention to the issues that the diversification of our profession and the world present to us in learning how to "feel with" others who are different from the often assumed homogenous world of lawyers and clients.<sup>116</sup> "Diversity training" may be a current buzz-word of management courses, but in a discipline and profession devoted to civil rights and justice, learning how "to live together and get along" should be a particular province of the lawyer and legal education.

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115. This is true for many, but not all, women, see Carol Gilligan, *In A Different Voice* (1982); Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (1987); Tronto, *supra* note 59.

116. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multi-Racial Society*, 81 Cal. L. Rev. 863 (1993).

*D. Normative Learning*

The lawyer of the twenty-first century needs to consider the ethical and moral implications of her work. Whether she begins from the starting point of the formal rules (as the MacCrate Report would have her do) or from the tenets of Kant's categorical imperative, the lawyer must learn to consider the consequences of what she does—how does lawyering work and decisionmaking affect the client, those near the client, and the larger society. What others label “civic mindedness” or public accountability, I simply call “ethical consequentialism”—the lawyer must learn to consider what are the effects of her work—is she doing more good than harm? These are not easy questions to answer in concrete situations, and neither legal education nor continuing education will provide all the answers, but law schools can instill in the neophyte lawyer an ethical methodology or series of questions that the lawyer can learn to ask herself and think about posing to clients who may need to consult equivalent concerns about how their actions impact on the “public good.”<sup>117</sup> Whether one employs one of the metatheories of human nature or the more commonly studied “mixed motive” theories of today,<sup>118</sup> an awareness of the effects of legal work is consistent with both a normative approach to the use of one's skills, as well as to the instrumental aspects of “rational choice” theory. Costs must be balanced against benefits. The lawyer seems particularly well suited to acting as a referee between individual and community or polity interests, as well as to mediate when interests conflict, translate when ends and means are confused, and deliberate when ends and means must be chosen by those who seek different goals. While I take no formal substantive position here on the goals of normative discourse (unlike Kronman, for example, who expresses the goal of lawyers as facilitating political fraternity and community life) beyond a form of utilitarianism (that the goals of lawyering are to make the most of what we have to create a more just world for the greatest number), I do believe that ethical “education” is necessary, if not sufficient, for those entrusted with a public profession.<sup>119</sup>

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117. See, e.g., Harry Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. Rev. 1148 (1990).

118. See, e.g., Jane Mansbridge, *Beyond Self-Interest* (1989).

119. In my view ethics education *must* go beyond the formal rules to consider the moral underpinnings of our actions, see, e.g., David Luban, *Lawyers and Justice* and Thomas Shaffer, *Lawyers and Their Communities* (1992) for some illustrations of this inquiry.

*E. Technical Competence*

While I hesitate to end with the most banal of suggestions, it is clear to me that both the MacCrate Report and Kronman's, *The Lost Lawyer*, look backward to a false "nostalgia" of the nineteenth-century conception of the lawyer as an independent professional facilitating client ends. Today's lawyers are most often employees in large organizations working with computers, faxes, telephones, and modems, not just in the United States, but all over the globe. We must not only be competent in these new technologies, but we must also consider how to "control" our production of these technologies before they control us. What are the ethical consequences of faxes making information available instantaneously to many people? What are the consequences of access to information on computers? What are the consequences of lawyers' acts which facilitate the use of deadly technological advances in science and industry? As the artifacts of human invention increase in their capacity to do harm, what role should the lawyers play? Technical training cannot prevent bad things from happening, but lawyers need to understand the consequences of the technical advances of our society. What will/should happen to legal work with telecommuting, the "virtual office," and the increased access of work to the home? Should lawyers be significantly involved in the issues of how technology will affect the quality of their lives,<sup>120</sup> as well as those of their clients?

VI. CONCLUSION

That the profession should be interested in "narrowing the gap" between the profession and education is a concern I share. As a skills teacher who believes we learn best when more than one of our senses is engaged, I applaud the push for more diversity in our teaching techniques and in our attempt to "cover" more of what lawyers actually do. Nevertheless, the well rounded lawyer of the twenty-first century will need to be proficient and competent in a much broader set of skills and competencies than the MacCrate Report has touched on. Both lawyers and the legal academy need to understand the positive relationship between the "science" and "art" of lawyering, just as both scholars and practitioners must realize there is a much closer connection between theory/doctrine and skills than we can often imagine. I firmly

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120. See Juliet Schor, *The Overworked American: The Unexpected Decline of Leisure* (1991). Technology produces flexibility, but it also permits work to intrude on more and more of our lives.



believe we can only narrow the gap by widening our mutual purview—we must learn “and-and” thinking in the legal profession, not “either/or thinking.”<sup>121</sup>

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121. See Emily Levine, “Dualisms”—A Comedy Presentation at Women & Work Conference, UCLA Institute of industrial Relations, Dec. 6, 1993.