

Traditionalists, Technicians, and Legal Education

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Legal education, the ethical training ground for lawyers, is in desperate need of a conversion from the two schools of thought that have dominated our educational inquiry for some time now.¹ We are surely trapped in a seemingly endless dialogue between what I will call here the traditionalists and the technicians. The MacCrate Report,² coming down rather heavily on the side of the technicians, did absolutely nothing to change this.³ Nor did the various reforms prompted by it.⁴

The traditionalist and technician schools of thought rely on competing assumptions about the central constitutive components of the practice, legal

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1. In preparing this commentary for a much procrastinated publication, I reviewed recent literature and, while there are many interesting and important articles, found nothing that would change the analysis presented here. The footnotes often reflect this more recent review. Encouragingly, from the perspective offered in the commentary, I did find a new seriousness about *thinking like a lawyer* as the practical wisdom of our practice. Some of this has been prompted by ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). See, e.g., Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 *CLINICAL L. REV.* 247, 247-51 (1998); Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 *AKRON L. REV.* 107, 109-10 (1999). Both of these works provide excellent and important contributions.

2. AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATION CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992) [hereinafter *MACCRATE REPORT*]. For a recent description of the MacCrate Report, its implementation in various settings, and an assessment of its impact, see Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 *CLINICAL L. REV.* 109 (2001).

3. See Robert J. Condlin, *Learning from my Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 *CLINICAL L. REV.* 337, 342 n.16 (1997).

4. Sometimes we understand this dialogue as between the classroom and the clinic, or substance and skills, or theory and practice. I am not making any of these distinctions here, however. There are, for example, traditionalist clinicians—I know; I was one—and there are certainly classroom teachers who are technicians.

pedagogy, and the legal apprentice's relationship to the practice.⁵ Traditionalists assume that *thinking like a lawyer* is the central constitutive component of the practice.⁶ It is central in the same way that practical wisdom is central to all Aristotelian virtues because the ideas are the same. Thinking like a lawyer, as the practical wisdom of our practice—although traditionalists have seldom expressed it this way—is both the practice's primary internal good and its primary product. It is not a skill and it cannot be well learned by teaching its parts, nor can it be well measured by its products. It is much more a matter of what a good student of the law will become in the process of study than of what that student can do at the end. It requires nothing less than a transformation of the person, an acquisition of a manner, bearing, and style of thought for life.

The traditionalist assumption about legal pedagogy is that a particular teaching methodology will initiate good students into this desired manner, bearing, and style of thought and, most problematically, that this initiation will somehow transfer to actual practice.⁷

Finally, traditionalists assume that once this initiation is completed good law students will submit themselves to the authority of the craft for the

5. Of course, neither of the two schools of thought I described here would accept, much less use, this particular terminology. Nevertheless, the difference I describe in the text to follow is conceptual and much more than a matter of emphasis. The history of this division between traditionalists and technicians is obviously a long and complex one and the elements of the division I describe in the text to follow – arguments about central constitutive components of the practice, pedagogy, and the apprentice's relationship to the practice – are there in many other disciplines as well. The tension has become particularly acute with the growing dominance of technique in the second half of the twentieth century according to Don Schön. "How comes it that in the second half of the twentieth century we find in our universities, embedded not only in men's minds but in the institutions themselves, a dominant view of professional knowledge as the application of scientific theory and technique to the instrumental problems of [the] practice?" DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 30 (1983). For the best recent exploration I have found of the philosophical positions involved in this division, see JOSEPH DUNNE, *BACK TO THE ROUGH GROUND: PRACTICAL JUDGMENT AND THE LURE OF TECHNIQUE* (1993). In this book Dunne takes on the following task: "My purpose in this book is precisely 'to open up inquiry' about practitioner's knowledge and to look for adequate conceptual resources 'to describe' it." *Id.* at xv. This commentary is, in part, a plea for more of the same in the context of legal education.

6. See, e.g., Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 *GEO. L.J.* 875, 891 (1985) (describing centrality of thinking like a lawyer as the traditional focus of preparation for the practice of law).

7. *Id.* at 891 (describing the methodology as "a fuzzy, nonexplicit mystification which has had the effect of concealing the underlying indefiniteness and confusing ways of addressing [thinking like a lawyer]"); see *id.* at 920 ("The essence of the first year of law school is that students, through some mystical process, acquire the undefined skill of thinking like a lawyer."); see also Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 *U. MIAMI L. REV.* 409, 423-26 (1986).

maturing of their practical wisdom and for almost everything else needed for the exercise of good judgment and strong advocacy.⁸ The apprentice's primary motivation for doing this will be the internal goods of the practice.

For technicians, however, the central constitutive component of the practice of law is the acquisition and proficient utilization of certain techniques in the performance of identifiable lawyering tasks.⁹ Practice can be learned by teaching its parts and it can be measured by its products. Learning the practice of law for technicians is more a matter of what the good student can do at the end of law study than of what he or she will become in the process.

The technician pedagogical assumption is that a particular methodology, one that is experientially based within a replicated but controlled practice context, will initiate good students into the constitutive techniques of practice and, most problematically, that this initiation will somehow provide a sufficient basis for generalization to all practice contexts.

The technician assumption is that once good law students are initiated into the techniques, further practice is needed only to complete the acquisition. Legal apprentices will submit themselves not to the authority of the craft, but to that of technical experts for the development of the expertise that good lawyering requires. This will often be a non-legal technician, for lawyers seldom have the focus necessary to become technical experts. The apprentice's primary motivation for doing this will be the external goods that technical expertise can provide for the lawyer and, most important, for the lawyer's

8. See William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 204-210 (1996) (describing and lamenting the traditionalist attitude towards the acquisition of skills needed for practice); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 381-86 (1997) (describing and lamenting the traditionalist attitude towards the acquisition of skills needed for practice).

9. This point gets lost in the terminology used for often technicians describe what they are doing as a focus on skills. The primary meaning of "skills," however, turns out to be particular types of performances – techniques in other words – of lawyering tasks such as legal analysis, interviewing, counseling, negotiations, trial advocacy, and so forth. This is obvious in the MacCrate Report, for example, but the MacCrate Report was just building on a long history of confusion about this. The Cramton Report, for example, defined competency as "an individual's capacity to perform a particular task in an acceptable manner." Samuel Thurman, *Introduction to REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 2* (1979)[hereinafter CRAMTON REPORT]. I have explored the development of the technician school in legal education before in H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 397-403 (1980). This same development is well described under the rubric of the "Lawyer Competency Movement" in Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 13-19 (1992).

clients.

This description of these dominant schools of thought makes it easy to see why both schools are in trouble. The traditionalists' assumption about a virtue as the central constitutive component of the practice has been an extremely difficult position to maintain for a long time. There are many reasons for this. For present purposes, the most important may be this assumption's dual dependency upon a corrupted practice and a teleology of that practice that has remained muddled since the failure of its earlier republican vision.¹⁰ As a result, the central constitutive component of the traditional viewpoint has become badly impoverished: so impoverished that traditionalists lack a vocabulary adequate to describe it. For example, traditionalists use the awkward combination of opposites, "sympathetic detachment," to describe a relationship with clients essential to its exercise¹¹ because they know of no simpler way of saying that the rationality of our particular practical wisdom as lawyers depends upon an underlying emotional involvement.

Understandably, these difficulties have been problematic for the traditionalist view. Primarily among these, I believe, is a shift from a focus on the effect of the study of legal materials on students to a focus on the materials of law themselves and, especially, on the teacher's reaction to these materials.¹² In simplest terms, rather than providing a shaping experience for the students, these corrupted traditionalists now provide a message. They are the *policy mongers* in legal education and they are everywhere.

10. For an excellent analysis of the history of our practice's reliance upon civil republicanism, an argument about the modified version it took, and an interesting explanation of its demise, see Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 384-400 (2001). See also Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); Jack L. Sammons, Jr., *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. LEGAL ETHICS 609, 612-14 (1989); Norman W. Spaulding, *The Myth of Civil Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003).

11. See KRONMAN, *supra* note 1, at 113-16, 160; Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 850-53 (1987).

12. See R. L. Bard, *Advocacy Masquerading as Scholarship; Or, Why Legal Scholars Cannot Be Trusted*, 55 BROOK. L. REV. 853, 859-62 (1989); see also Richard S. Markovits, *Taking Legal Argument Seriously: An Introduction*, 74 CHI.-KENT L. REV. 317, 322 (1999). Markovits states some

law teachers react to their conclusion that there are no internally-right answers to contestable legal-rights questions by substituting analyses of what the law ought to be from a personal-ultimate-value perspective that they endorse for what the law is without indicating to students that that is what they are doing.

Id.

Part of what drives this corruption, and others like it, is that in its current impoverished state the virtue of thinking like a lawyer is too insubstantial to provide the orderliness and the authority that teachers need to feel comfortable with what they do as teachers. So we see law schools corrupting the traditionalist view by providing substitutes for thinking like a lawyer—economic analysis in the case of George Mason—that have an apparent orderliness and an apparent authority.¹³ This seems to impose less on the autonomy of students than teaching the practical wisdom of lawyering. But economic analysis is just an easy example; far more prevalent are those traditionalists who substitute thinly disguised claims of a purportedly self-evident and universal ethical analysis for the practical wisdom of lawyering.¹⁴ We hear this in those who talk of a humanistic approach to lawyering or who seek to deliver political messages from the left or from the right or from nowhere.

Technicians, however, offer no relief from any of this, because their assumption about technique as the central constitutive component is just as difficult to maintain. They too suffer from the impoverished conception and inadequate vocabulary that plague the traditionalists. This would surprise many, for technicians notoriously eschew the need for any overall conception of a practice. Legal education technicians, however, cannot do what technicians in other disciplines typically do to avoid overall conceptions. That is focus attention upon the component parts of a practice and ask how each could be done better in its own terms.¹⁵ For many reasons, legal practice has had no

13. See William H. Adams, III, *The George Mason Experience*, 50 CASE W. RES. L. REV. 431 (1999); Ronald A. Cass, *One Among the Manne: Changing Our Course*, 50 CASE W. RES. L. REV. 203, 211 (1999); Gary Minda, *Cool Jazz but Not so Hot Literary Text in Lawyerland: James Boyd White's Improvisations of Law as Literature*, 13 CARDOZO STUD. L. & LITERATURE 157, 172 (2001) ("From the rational-actor model, Posner derived what he called the fundamental principles that could explain the hidden logic of the entire law school curriculum 'Thinking like a lawyer' was translated into 'thinking like an economist,' and common sense notions were said to be untrustworthy.").

14. See, e.g., Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978); see also Michael L. Perlin, *Stepping Outside the Box: Viewing Your Client in a Whole New Light*, 37 CAL. W. L. REV. 65 (2000). "I believe that there are at least five goals to which we, as legal educators, should strive . . . 3) to promote professional responsibility growth; 4) to inspire self-knowledge; and 5) to increase human relations understanding." *Id.* at 73. I am sure that Professor Perlin is a wonderful teacher and he sounds like a person I would much admire and from whom I would have much to learn. My problem with what he says here, however, is that rather than these goals being self-evident, I do not know what they mean (and I hope that my moral failures are not such that I am the only one who does not) and that, even if I did, I do not know how such goals would differentiate becoming a lawyer from a whole slew of other activities.

15. The primary example, of course, would be the practice of science.

adequate understanding of its own techniques to offer to those technicians who wish to teach them. Good technicians, of course, know this, and thus they know that learning the practice is not a matter of doing better what has already been done. Learning comes instead from critical examination of what they perceive as the practice's failures, often from points of view and disciplines that we have thought of as quite external to the practice of law. In essence our technicians are really attempting a re-creation of the practice. Yet, this is a highly problematic thing for a technician to do, for it demands that they articulate the conception of a good practice that drives their re-creation of it. Technicians are thus faced with this puzzle: what a good interviewing technique is, for example, depends on what a good interview is, which depends upon what good advocacy or counseling requires, which depends upon what good lawyering is, which depends upon an adequate description of the activities of lawyering, which depends upon—well, it just goes on for any thoughtful technician. As one can see this quickly leads to the types of questions that the technician's approach is uniquely unsuited to and, in fact, quite incapable of addressing.

The upshot is that technicians, like their traditionalist counterparts, find themselves relying upon an impoverished central constitutive component and lacking a vocabulary adequate to describe it.¹⁶ In this state even the technician's techniques seem too frail to provide the orderliness and authority that teachers need to feel comfortable with what they do as teachers.

These difficulties produce corruptions of the technicians' view to match that of the traditionalists. One prevalent corruption occurs when a technician substitutes poorly considered alternative conceptions of practice in place of the authority the real practice should have for a truer technician. We see this regularly when the description of the lawyer as a problem-solver are offered as a foundation upon which the central constitutive components of the technician could be built.¹⁷

The traditionalists' problems are created by their reliance upon a central virtue that has become too abstracted from the practice. Traditionalist assumptions offer an Aristotelian way of determining what good lawyering could be, but these assumptions provide no coherent methodology for either confirming or producing it.¹⁸ The problems with technician assumptions are

16. See generally Bard, *supra* note 12.

17. This description only ignores the central issues of what qualifies as a problem and as a solution and from what perspective. It assumes that the problems we address as lawyers have solutions we can provide; it both broadens and narrows our function without any offered justification.

18. Traditionalists often assert that the case method somehow does this. For a recent and very thoughtful version of this see David D. Garner, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307. Beyond the case method,

exactly the opposite. Their assumptions offer a methodology for confirming and producing good lawyering, but no way for determining what good lawyering might be.¹⁹ Obviously these problems are very closely related. In simplest terms, we could say that one school knows where it is going and why, but not how to get there, while the other knows how to get there, but not where it is going or why.

We could not have asked for a clearer example of this problem than the MacCrate Report. This report struggled to compensate for technician inadequacies by resorting to *values* identified and defined completely apart from its description of the practice.²⁰ The clear, but unstated, message is that none of what has been described as competent lawyering has anything to do with these values. What it does concern, we do not know or cannot say. Therefore, the question must be asked: By what possible authority could the MacCrate report justify its particular description of a good practice? It is certainly not, as claimed, from the practice itself because, good legal technicians that they are, the drafters of the MacCrate Report were quite clearly offering a re-creation of the practice.²¹

What the MacCrate Report relied on in its efforts to return value or, as I would put it, meaning to the practice, was the personal commitment of each lawyer—not as a lawyer, but as a person—to do the right thing.²² I do not know what this means. It is exactly what the traditionalists thought law students were incapable of doing until they had been adequately initiated into the virtues of the practice. The message this gives to our apprentices is that the practice has no internal goods to offer, and therefore no ethical motivation of its own. All the apprentice can acquire in practice is additional expertise. In fact, this is precisely how the MacCrate Report defined excellence in the

traditionalists—good Aristotelians that they seek to be—usually offer vague counsel concerning mentoring in practice. See KRONMAN, *supra* note 1, at 113-21.

19. See Garner, *supra* note 18, at 307.

20. See, e.g., MACCRATE REPORT, *supra* note 2, at 151-52, 160-64. The relationship between the two is described as: “the specific skills examined . . . together with the more general skill of self-appraisal . . . are essential means by which a lawyer fulfills his or her responsibilities to a client and simultaneously realizes the ideal of competent representation.” *Id.* at 137. In other words, skills are necessary to competent representation and being competent is a value. But, of course, the real issue in any practice worthy of the name is how to understand competency as a moral achievement or, in other words, what relationship of morality to competency is carried by the practice.

21. It seems obvious to me that MacCrate was, for example, accepting a certain contestable understanding of the nature of the relationship between the lawyer and the client in its equally contestable description of counseling and encouraging the same in its description of negotiations. For discussions of this see Wallace Loh, *Introduction: The MacCrate Report – Heuristic or Prescriptive?*, 69 WASH. L. REV. 505 (1994).

22. See MACCRATE REPORT, *supra* note 2, at 151-52, 156-57.

practice: the acquisition of additional techniques beyond those the MacCrate Report identified as centrally constitutive of the practice.²³

How any of this addresses the problem that drove the MacCrate Report initially, that is how to improve the competence of the bar, remains unclear. By taking this technician's approach, the MacCrate Report addressed itself almost exclusively to new attorneys. Yet, I know of no study showing that the problem of competence in the bar was that new lawyers lacked technical proficiency. This approach conveniently masked what many believed was the real problem of competence: the corruption of the truer excellences of our practice by large law firms and large clients.²⁴ The MacCrate Report masked this real problem because, if technical proficiency is the central constitutive component of the practice, these firms are doing nothing wrong.²⁵

23. *Id.* at 163-72.

24. The problem is created by the fact that large firms, in combination with their large clients, devalue the practical wisdom that, according to the traditionalists, is the central constitutive component of our practice and its primary internal good and value. In its place, a narrow specialized expertise delivered by narrow specialized people who are, essentially, fungible as technicians and who must then be rewarded with external goods that, when out of balance with internal goods, corrupt the practice as they would any practice. This is sometimes described under the rubric of the "commercialization of the practice," but commercialization, as a reflection of rampant individual equalitarianism, includes many other forms of corruption as well. See generally Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

Robert Kagan and Robert Eli Rosen reached a similar conclusion ...they found that ... "the influential and independent counselor role is now an exceptional rather than a common aspect of large firm practice." Clients did not want lawyers to fulfill this role and lawyers did not believe the role to be appropriate. In effect, elite lawyers had become hired guns subject to client control and having no responsibility for the public good.

Id. at 408-09 (citing Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985)); see also Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985).

25. I have had good friends tell me that in some small way I may be to blame for this and for that I hereby apologize. Parts of the MacCrate Report are based on work that Dr. Russell Cort and I did at Antioch Law School more than twenty years ago under the leadership of Edgar Cahn. See H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397 (1980). What Russ and I wanted was a system of evaluation of lawyering performances that could be used, after collection of sufficient data, to determine what worked and what did not work pedagogically. We were certainly not trying to design a checklist for educational or lawyer decision-making; we were, instead, trying to create as neutral a system of diagnosis and evaluation as we could. (Perhaps this was naive of us.) As applied to lawyering, we assumed that all lawyering tasks involve some identifiable array of *competencies*—a trendy term used at the time to distinguish the identified thing from Bloom's taxonomy with its

The position we are in then is that neither of the dominant schools of thought can provide a unified conception of the practice and of learning that is adequate for making sense of curricula decisions or teaching strategies. Nevertheless, my hope is that each brings to the other at least part of what the other lacks. If this is true, what we need now is a latter day Thomas Aquinas who can fuse these competing schools of thought into a single and satisfying conception that does not unduly offend either school of thought.

This is the conversion that legal education needs. It is a conversion to technical-traditionalists, or traditional-technicians, who are willing to examine the virtues of the traditionalists' good lawyer together with the technicians' methodology. We need technicians willing to ask what these virtues are so that they can be adequately understood for teaching and traditionalists willing to help provide the answers.

So how might a school go about doing this hard work? Much of the answer may be in the classroom, but surely part of it is to be found in curriculum design. I suggest that a school should start thinking about its curriculum by seeking faculty agreement on what kind of lawyers it wants its students to be. I do not mean what they, the students, should be able to do, although that is part of it, but what they should be. This is, of course, the very last conversation that most faculty members will want to have. Yet a law school cannot be well designed without it. I would ask faculty members to reject the obvious objection that there is too much diversity in the practice to permit such an analysis because, if the traditionalists are correct in their analysis, then all students should be prepared for the general practice of law. For it is only in preparation for the general practice of law that students can begin acquiring the unique set of virtues that distinguishes the law as a profession. The theologian Stanley Hauerwas often says that the only remaining moral training grounds in America, the only remaining schools of virtue, are law schools and the U.S.M.C.²⁶ This would be truer if law schools borrowed the Marines' idea that all Marines must be trained for the infantry because it is in training for the

knowledge, skills, and attitudes. We then set out to identify these competencies so that the pedagogical methods of teachers, law schools, continuing legal education programs, and law firms, could be evaluated in their terms. If we could convince enough people to analyze student lawyering performances (in the clinic, in the classroom, and in practice) in competency-based terms, we believed, we could start them on a more rigorous method of analysis that could eventually lead to good guidance on teaching methods, course design, curricula design, and individualized instruction, especially remedial instruction (the driving force behind the project). MacCrate had almost nothing to do with our efforts. Instead, MacCrate, I think, offered a normative description of a preferred particular practitioner's performances at some unspecified stage in his or her development.

26. See Stanley Hauerwas, *Christian Practice and the Practice of Law in a World Without Foundations*, 44 *MERCER L. REV.* 743, 744-45 (1993).

infantry that one becomes a Marine.²⁷

What would be needed next, after these discussions, would be to design a structured progression toward a general practice of law informed by a traditionalist understanding of the craft as a craft and an ethical enterprise, or more accurately, as an enterprise with an ethic. In other words, the curriculum design should convey the message that success in the practice of law is something internal to the practice. Curriculum decision-making could then be driven by those internal criteria within the practice of law—practical wisdom, rhetorician virtues, and so forth—by which we can measure the success of a life well-lived in the practice.²⁸

27. As I learned from personal experience in 1968, all Marine officers are required to attend The Basic School in Quantico, Virginia, regardless of what specialty they may wish to enter.

28. What I mean here is that we could identify the make up of the good lawyer better than the traditionalists ever have and use this identification to inform our teaching and curricula design. Of course some have attempted to spell out thinking like a lawyer or the practical wisdom of lawyering as a collection of particular skills. See, e.g., Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 423-64 (1986). While this can be helpful, it is not at all what I have in mind. In place of skills, the description would be in terms of those virtues carried by the practice by which we identify good lawyering when we see it. Here is how I described this in another context:

Imagine, if you will, that you are a lawyer and that you are observing a gathering of people sitting at a round table. The assembled group is there addressing a particularly difficult problem in the local community — it does not really matter what the problem is so long as it is a complex one. The group includes a priest, an accountant, a business executive, a psychologist, an engineer, a philosopher, a physician, a city planner, an architect, and a lawyer; but you do not know the occupations of any of the people. If I asked you to identify the lawyer, my guess is that you could do so readily, even if the conversation had not afforded the lawyer the opportunity to display his or her knowledge of legal matters. In fact, if I pressed you harder, and the conversation was long enough, you probably would be able to give me some gross assessment of the lawyer's merit as a lawyer.

The reason you would be able to do this is that the practice of law shapes lawyers toward certain habits of thought and manners of being that lawyers then recognize in each other. For example, consciously or not, to identify the lawyer in the group, another lawyer would likely look for: the ability to recognize what is shared in competing positions; an attentiveness to detail, especially linguistic detail; an attentiveness as well to the ambiguities of language; a use of these ambiguities both for structuring the conversation and analyzing the issue; a focus on text and a markedly different sense of its restraint; a rhetorical awareness of the reactions of potential audiences to each competing position and even to each argument; an imaginative anticipation of future disputes; a realistic assessment of the situation even as a partisan in it; a recognition of the persuasive elements of all positions, especially those in opposition to the lawyer's own; a very particular form of honesty; an insistence on

Schools should not be satisfied with traditionalist abstractions or assumptions about how this would happen. Instead, good pedagogy requires that students progress toward practice by being required to perform lawyering tasks in increasingly complex contexts ending in the sixth semester in simulated or real practice.²⁹ In essence schools should apply technicians' means to traditionalists' ends and, in the process, add substance to the former and method to the latter. To do this well, a school would have to work backwards from what it decided it wanted its students to be and to be able to do in their final semester. Schools need to ask, as specifically as their situations allows: How does one progress toward becoming the kind of person who can perform well in the way we have defined it in sixth semester simulation courses like these?

Do schools, collectively, need to think through all of the technician progressions that would be necessary to answer this question carefully? Do schools need, for example, to catalogue the type of thinking requisite to thinking like a lawyer—the knowledge, the skills, and the attitudes—and assign these to courses? Do schools need to start over with the MacCrate Report? The answer is no. For now that is far too complex a task for any law school to do in a useful or meaningful fashion. Instead of a catalogue, schools should seek a structure in which a general progression toward the craft of the general practitioner could happen for all students. If a school does this well, if its choices reflect an adequate and well-informed understanding of our craft, then many of the necessary specific technicians' progressions will fall neatly into

practicality combined with an acceptance of complexity; a shying away from broad principles and “proud words”; a concern with the procedures by which decisions are to be made; an equal concern with the quality of the roundtable conversation itself including a concern that all voices round the table be well heard and considered; an evaluation of positions in terms of an objective hypothetical authoritative decision-maker who serves as stand-in for social judgment, and, thus, a consideration of each proposed course of action from a particular social perspective.

Many other practices may shape its practitioners toward many of these same habits of thought, and surely this is all a matter of degree. Nevertheless, these habits of thought, these virtues of the practice of law, if you will, considered collectively can be seen as defining a unique character for lawyers as an ideal.

Jack L. Sammons, *The Georgia Crawl*, 53 MERCER L. REV. 985, 985-86 (2002). Notice that these are observable, but they are observable characteristics of the person—of what he or she has become—rather than of performances of particular tasks—of what he or she can do.

29. For a good example of the importance of context in legal pedagogy, see Lerner, *supra* note 1, at 125-38. See also Jack L. Sammons, *Law School Efforts to Enhance Professionalism*, 52 S.C. L. REV. 481, 483-85 (2001) (describing “contextualization” as the central motif in recent pedagogical developments in legal education). Of course, there is nothing new about a suggestion that student courses be organized as a progression of increasing scope and challenge. See, e.g., CRAMTON REPORT, *supra* note 9, at 14.

place.

What I have been describing is the process Mercer Law School went through in designing its Woodruff Curriculum.³⁰ Here, is a list of some progressions I have seen in the Woodruff Curriculum over the past ten years:

a. A progression through the primary functions of lawyering: legal analyst, legal counselor, and multi-faceted legal advocate—an advocacy broadly understood to carry forward the virtues of counseling and dispute resolution, the latter steps assuming the previous ones just as they do in practice.

b. A progression in earlier parts of the curriculum through the materials of law study: cases, statutes, administrative regulations, and external norms. The progression is from case analysis to case analysis within statutory analysis to case analysis within regulations issued pursuant to a statute—a progression through increasingly complex analytical contexts.

c. Task progressions throughout the three years. For example, all students will have introductions to counseling, negotiation, and other dispute resolution processes. Many will have specific skills courses in these tasks and all will take advanced skills courses in which they refine their performance of these tasks in particular practice settings.

d. Subtle progressions in substantive areas (similar to what you may have in your own curriculum). For example, evidence progresses from the appellate role to a broad trial role within a limited context to full scale trial practice to advanced evidentiary problems in trial practice. Again, this is a progression of increasingly complex contexts.

e. Another progression in the knowledge of the systems studied. This builds from a first year start in legal systems (the study of the organizations, institutions, and systems unique to the lawyer's world—not just the law governing them, but the organizations, institutions, and systems themselves) toward, for example, health care law, in which there are numerous interlocking systems that provide realistically complex settings for problem solving, advice giving, and advocacy. The students' understanding of the lawyer's role broadens through this progression in the complexity of systems.

f. Progressions in cross-cutting skills, so called by clinicians because they cut across all courses and subject matter. Purposive thinking is an example of a cross-cutting skill as is the preeminent lawyerly virtue of good judgment.³¹ Another important example: The moral capacity of seeing, listening to,

30. Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 27-29 (1992)(describing the Woodruff Curriculum).

31. If we want students to see a progression towards good judgment as an excellence of our practice—as one reason unique to lawyering, for being a lawyer—then we must show them that this good judgment is not the good judgment they bring with them, although that judgment can be its beginning. It is, instead, the specific good judgment developed through the practice and the study of law.

understanding, and sometimes accepting the other side. In the first year, we ask students to internalize this capacity by shifting the source of their thoughts from themselves to that of a hypothetical judge. The second year counseling courses show this capacity to be part of what lawyers offer to clients as the students come to understand that one of the lawyer's central ethical questions is: What might the other side say about this? The third year expands this capacity to a much broader context in a Dispute Resolution Workshop. In this context, the students come to see understanding the other side as essential to any legitimate analysis of the problems clients bring to us and to any form of dispute resolution. Finally, sixth semester Advanced Skills Courses further develop this capacity in the full context of advising clients and representing them in specified substantive practice settings.

g. Many other cross-cutting themes: idea generation, ends/means thinking, and peripheral visions. These seem to progress through the three years as well. We could, of course, try to teach these directly as some technicians do, notably Dean Paul Brest of Stanford,³² but at Mercer we were daunted by the problems of generalization and transference.

h. Finally, but importantly, a progression in faculty relations with our students. It is a progression toward the advanced skills courses and required final semester seminars. To work well, these require relationships of professional friendship, of camaraderie within a disciplined profession. Ideally each student can become uniquely valued for what he or she brings to these sixth-semester courses as a lawyer.

If these progressions exist, their presence confirms for me that the process I am recommending is at least on the right track. As faculty members continue to discover these progressions in our teaching, we can do what technicians have always done, but what traditionalists never did: We can make these progressions a more conscious part of what we are trying to accomplish. In this way, and over time, the curriculum will tell us, if we listen carefully enough, what we should be trying to accomplish in our particular courses.

Yet, listening carefully to a curriculum may require more than most teachers are willing to give. Accepting a traditionalist understanding of the practice not only means that much work is to be done on the technician's side, but also means that we need to articulate our conception of the good lawyer far better than the traditionalists have ever done.³³ Virtues as standards for a practice work well, I believe, only when they are adequately located within a functional understanding of what it means to be a good practitioner. This functional understanding in turn must be located within a strong tradition of

32. See, e.g., Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994).

33. See *supra* note 29 and accompanying text.

inquiry about the practice in which the functional understanding itself is under constant challenge. To arrive at such an understanding of our practice requires far more truthful conversations about who we are as lawyers than most of us are willing to have at faculty and curriculum meetings.

The curriculum decisions law schools argue about are more important than we are willing to admit. They are about the meaning of our life's work through our responsibility for the work and lives of our students. They are about how our story will be told, in other words, when it is told truthfully. So, I suggest in conclusion something you probably do not want to hear—I do not want to hear it either—and that is that we are not only entitled to get upset about curriculum matters, we are also obligated to do so. In thirteenth century France, the battle for control of the curriculum of the University of Paris was understood to be a struggle for the souls of students.³⁴ Perhaps they perceived its importance correctly.

34. See Alasdair MacIntyre, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* 112-13, 232 (1990).