



2004

Learning “the True, the Good and the Beautiful” in Law School: Educating the Twenty-First Century Litigator

Michael T. Colatrella Jr.
Pacific McGeorge School of Law

Follow this and additional works at: <http://scholarlycommons.pacific.edu/facultyarticles>



Part of the [Legal Education Commons](#)

Recommended Citation

Learning “the True, the Good, and the Beautiful” in Law School: Educating the Twenty-First Century Litigator, 33 *The Review of Litigation* 741 (2014)

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Learning “the True, the Good and the Beautiful” in Law School: Educating the Twenty-First Century Litigator

Michael T. Colatrella Jr.*

I. INTRODUCTION.....	741
II. THE TRUE.....	747
A. <i>The Collaborative Communication Process</i>	753
B. <i>The Settlement Decision-Making Process</i>	759
III. THE GOOD.....	769
IV. THE BEAUTIFUL	784
V. CONCLUSION	797

Truth, and goodness, and beauty, are but different faces of the same All.

Ralph Waldo Emerson¹

I. INTRODUCTION

A law school education is one of the finest learning experiences American education has to offer.² This well-deserved reputation derives significantly from the Socratic method of instruction, whereby a series of detailed questions are used to

* Associate Professor of Law, University of the Pacific McGeorge School of Law. I wish to express my gratitude to the members of Pacific McGeorge’s 2013–14 Curriculum Committee, on which I served, for the deeply enriching experience of discussing law school curriculum reform in the robust and thoughtful way that has helped to shape the ideas expressed in this Article. These members include Professors Raquel Aldana, Julie Davies, Leslie Jacobs, Jeffrey Proske, and Brian Slocum, Associate Dean Dorothy Landsberg, and student members, Stephen Hallett and Michelle Scheinman. Thanks also go to the unflappable Neil Cacali for his diligent research assistance. Special thanks go to Professor Jeffrey Proske for his helpful comments to an early draft of this Article. Finally, I wish to thank my wife, Jean M. Shanley, Esq., for her support, encouragement, and comments through the writing of this Article.

1. Ralph Waldo Emerson, *Nature, in NATURE; ADDRESSES AND LECTURES* 30 (New & Rev. ed., 1898).

2. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 186 (2007) (stating that “[f]rom . . . [a] comparative perspective, law schools are impressive educational institutions”). The Carnegie Report was published in a book by its authors. *Id.*

challenge the student in an inherently competitive environment among his or her colleagues in an effort to hone his or her analytical reasoning skills.³ Law students benefit from this method, and it is generally understood that “by the end of their first year, most have developed a clear ability to reason and argue in ways distinctive to the American legal profession.”⁴ The Socratic method, sometimes referred to as the “case dialogue” method and deemed the “signature pedagogy” of law school, was first introduced into American legal education at Harvard Law School in the 1870s by Dean Christopher Columbus Langdell and still predominates at law schools today.⁵

It was a wise move on Dean Langdell’s part to take guidance from the ancient Greeks to bring intellectual rigor to legal education. The Socratic method, of course, is attributed to the ancient Greek philosopher Socrates, whose teachings were described in the works of his student, Plato.⁶ Clearly, the Socratic method places a high priority on cultivating a sharp and rational mind.⁷ In comparing the Athenian philosophy to other cultures, Plato observed that “the special characteristic of our part of the world is the love of knowledge.”⁸ The Greeks were absolutely delighted by thoughts and ideas, treasuring them as “the fair and immortal children of the mind.”⁹ Edith Hamilton, one of the twentieth century’s most revered Greek scholars, says of Ancient Greece, “never, not even in the brightest days of the Renaissance, has learning appeared in such a radiant light . . .”¹⁰ Because the practice of law involves so much analytical thinking and reasoning ability, it has strengthened the profession immensely for law schools to embrace this aspect of the Greek approach to learning. As a result, today we have a high

3. *Id.* at 2. The “question-and-answer format” is to help students to analyze “ordinary human conflicts into the distinctive ‘frame’ defined by legal points of reference and the requirements of legal doctrine.” *Id.* at 53.

4. *Id.*

5. SULLIVAN ET AL., *supra* note 2, at 50–53; Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 615 (2007).

6. THOMAS R. MARTIN, *ANCIENT GREECE* 84–85 (1996).

7. SULLIVAN ET AL., *supra* note 2, at 52–53.

8. EDITH HAMILTON, *THE GREEK WAY* 30 (1993).

9. *Id.* at 30.

10. *Id.*

caliber community of legal professionals populated with many elite thinkers.

It should not be overlooked, however, that the ancient Greeks' intellectual approach to life was by no means limited to rationality of thought. They also embraced less rationality-driven concepts such as beauty, feeling, intuitive knowledge, inspiration, sense of goodness, and sense of balance.¹¹ Hamilton explains this concept in her observation that, in ancient Greeks, “[g]reat mind and great spirit combined.”¹² The ideal human life to the ancient Greeks was one lived in pursuit of not only objective understanding and knowledge through rational thought, but also “just action” and “the subjective experience of beauty.”¹³ Collectively, these life goals are commonly referred to as “the true, the good and the beautiful.”¹⁴ Hamilton explains this concept most eloquently:

Plato is speaking as a typical Greek when he says that there are men who have an intuitive insight, an inspiration, which causes them to do good and beautiful things. They themselves do not know why they do as they do, and therefore they are unable to explain to others. It is so with poets and, in a sense, with all good men. But if one could be found who

11. *Id.*

12. *Id.* at 31. Hamilton further distinguishes the philosophies of ancient India and Egypt, which emphasized spirituality. She states:

The Egyptian way and the way of the East had led through suffering and by the abnegation of the intellect to the supremacy of the spirit. That goal the Greeks could never come in sight of What marked the Greeks off from Egypt and India was not an inferior degree of spirituality but a superior degree of mentality The spiritual world was not to them another world from the natural world. It was the same world as that known to the mind. Beauty and rationality were both manifested in it. They did not see the conclusions reached by the spirit and those reached by the mind as opposed to each other. Reason and feeling were not antagonistic.

Id.

13. WILLIAM ISAACS, *DIALOGUE AND THE ART OF THINKING TOGETHER* 13 (1999).

14. *Id.*

was able to add to his instinct for the right or the beautiful, a clear idea of the reason for its rightness or beauty, he would be among men what a living man would be in the dead world of flitting shades.¹⁵

Thus, the truly fulfilling and complete intellectual experience or education, to the ancient Greeks, was one in which there was a balance among truth, goodness, and beauty.

I believe that law schools would, once again, benefit from looking to Ancient Greece for guidance to improve the educational experience of their students and to better prepare them for the twenty-first century. The ancient Greeks, more than any other civilization before or since, understood the limits of rationality in personal and professional life and strove to balance rational thought with goodness and beauty—forms of knowledge equally important to them.¹⁶ By evaluating law schools' required core curricula in light of the Greek concepts of the true, the good, and the beautiful, we can identify a number of deficient areas, the most serious of which are further discussed in this Article. If we modify the core curricula to embrace these concepts, as the ancient Greeks did, law schools can create lawyers who more closely reflect the Greek ideal. They will be more skilled at balancing adversarial advocacy with wise counsel, good judgment, and creative problem solving. They will learn to lawyer more “holistically.”

This concept of understanding the “whole” was paramount for the ancient Greeks. They appreciated that a truly beautiful world was one that exhibited balance, order, and organized relationships.¹⁷ In all of their endeavors, whether it was poetry, art, architecture, or philosophical studies, they considered the end result in a holistic light—“system, order, connection, they were impelled to seek for.”¹⁸ For example, the Greeks took great care in the design and placement of their temples so that they became part of the landscape, situated to

15. HAMILTON, *supra* note 8, at 30.

16. *See id.* at 31 (noting that the Greeks considered both beauty and rationality to be combined and “[t]hey did not see the conclusions reached by the spirit and those reached by the mind as opposed to each other”).

17. *See id.* at 184–85 (discussing the “necessity of the Greek mind to see everything in relation to a whole”).

18. *Id.* at 29. “Greeks always saw things as parts of a whole, and this habit of mind is stamped upon everything they did.” *Id.* at 184.

create the best effect “in relation to the hills and the seas and the arch of the sky.”¹⁹ Contrast this sensibility to those architects of the Middle Ages who placed many of the great cathedrals where it was convenient, amid the small village houses, standing as majestic monumental incongruities upon the landscape.²⁰ The ancient Greeks, however, saw everything in relation to the whole. As Hamilton states, “[t]hey saw what was permanently important in a man and unites him to the rest.”²¹ The Greeks saw an object in the world “in all its pertinent relationships,” which defines true wisdom.²²

If lawyers are to be good and valuable counselors, they need to be prepared to see legal issues and legal disputes from many perspectives in the context of all their relevant relationships—in the holistic thinking style of the ancient Greeks. Historically, law schools’ required core curricula have generally overvalued lawyers as legal analysts and undervalued their roles as problem solvers.²³ What is needed is a sea change toward educating to create the more complete, or “holistic,” lawyer by cultivating not only the lawyer’s reasoning ability, but also the lawyer’s morality, creativity, professional identity, and general problem-solving skills. With these additional capabilities, lawyers will be better prepared to counsel clients and creatively prevent, manage, and litigate disputes.

Expanding lawyers’ perspective of clients’ needs and problems is more important than ever before to meet the demands of clients in the twenty-first century. The changing economic environment has forced clients in all sectors to achieve results with greater efficiency.²⁴ Clients are seeking creative problem-solvers who can participate in a team environment and appreciate not only the client’s legal rights, but also their business and psychological needs.²⁵ In such challenging times, holistic lawyering is not simply beneficial—it is increasingly required.²⁶

19. *Id.* at 185.

20. *Id.* at 184.

21. *Id.* at 205.

22. WILL DURANT, *What is Wisdom?*, in WISDOM, No. 8, 25–26 (1957).

23. Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 918–19 (2000).

24. RICHARD SUSSKIND, TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 4 (2013).

25. See Michael T. Colatrella Jr., *A “Lawyer for All Seasons”: The Lawyer as Conflict Manager*, 49 SAN DIEGO L. REV. 93, 156 (2012) (discussing a need for

This Article explores a number of specific areas where the required core curricula of law schools should be modified and expanded to produce more holistic lawyers. I examine this topic in light of the ancient Greek ideal of its citizens being educated in “the true, the good[,] and the beautiful.” I propose three ways to bring greater balance to the law school curriculum, one concept for each of these three spheres of knowledge.

First, law schools should enhance their core curricula by adding education in what I call “collaborative advocacy,” which is a form of scientific knowledge and skill that enables litigators to work effectively as advocates in collaborative processes like negotiation and mediation.²⁷ This would foster in students a more “true” understanding of the diverse skills required for lawyers beyond the “adversarial advocacy” strategies and tactics that currently predominate law school. Second, law schools should teach “the good” by adding to their core curricula assistance in the moral development of their students. Lawyers are frequently in a position of responsibility and power in relation to their clients that will test their commitment to their shared professional values—ethics—and their personal values—morals—in unique ways. Law schools need to do more than teach the minimal ethical standards²⁸—they also need to build character. Third, law schools can foster “the beautiful” by increasing the role creative thinking has in their core curricula. Creative thinking and problem solving, while always valuable, will become indispensable skills for the twenty-first century lawyer. As

lawyers to transition to roles as conflict managers and problem-solvers rather than just legal advocates).

26. See SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 173–74 (2004) (suggesting that “[p]ost-Enlightenment developments in philosophy, law, and legal practice” that incorporate psychology and emotional elements in legal practice should be synthesized into a movement).

27. JULIE MACFARLANE, *THE NEW LAWYER* 109 (2008). In her excellent book on the changing face of legal practice both in Canada and the United States, Professor Julie Macfarlane calls this “advocacy as conflict resolution.”

28. Professional education must also include instruction in that profession’s core values. SULLIVAN ET AL., *supra* note 2, at 33. The MacCrate Report found “fundamental values” of the profession that included the following: “striving to promote justice, fairness and morality.” A.B.A. SEC. LEGAL EDUC. AND PROF. DEV.—AN EDUC. CONTINUUM, A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 135–36 (1992).

more routine legal skills like discovery, research, and even brief-writing are increasingly done more cheaply and efficiently with the aid of computers and counsel in other countries, the ability for attorneys to provide value to their clients as the architects of new ideas and technologies, and as creative problem solvers, will take on paramount importance.

With declining enrollment and increasing criticism of the wide gap between what lawyers need to know to be successful professionals and what law school has traditionally taught, law schools are well advised to rethink and recalibrate how they deliver legal education. This Article, as a general rule, does not recommend specific courses, but rather addresses general topics that should in some way be incorporated into law schools' required curricula because they are essential to the practice of law in the twenty-first century. Like the ancient Greeks, who identified the core values of men to better understand mankind, law schools must identify and teach the core values of lawyering to better understand and promote our profession and our educational mission.

II. THE TRUE

The wisdom for which all philosophers are in search is the knowledge of first principles and the causes of things.

—Aristotle²⁹

The required law school curriculum places emphasis on the “true,” which the Greeks defined as “objective understanding” through rational thought.³⁰ However, the subjects that law schools focus upon to impart this “objective understanding” to law students are limited primarily to substantive law and legal analysis; this focus largely minimizes the importance of many other foundational skills that lawyers need to practice successfully.³¹ Other important lawyering skills that receive little or no attention in the core law school curriculum are negotiation, client interviewing, counseling,

29. ARISTOTLE, ON MAN IN THE UNIVERSE 5 (Louise Ropes Loomis ed., John Henry MacMahon trans., 1971).

30. ISAACS, *supra* note 13, at 13.

31. Rubin, *supra* note 5, at 641–42.

and listening to name a few.³² Therefore, law schools take too narrow a view of the relevant “truths” that form the core competencies of legal practice.

The overuse of the case method of instruction, as valuable as it is in many respects, leaves students with the impression that legal disputes are always a battle that has winners and losers and serves to narrow their view of the appropriate roles they can play in their clients’ conflicts.³³ Students read, over a course of years, hundreds of judicial opinions where disputes are resolved through litigation and where the techniques of evaluation and argument are the primary tools of dispute.³⁴ However, for many decades, it has been obvious that law schools need to do more to educate lawyers in collaborative techniques for solving their clients’ problems.³⁵ Nearly twenty years ago, Professor Paul Brest, former dean of Stanford Law School,

32. Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011) (listing 26 competencies for effective lawyering: (1) Analysis and Reasoning, (2) Creativity/Innovation, (3) Problem Solving, (4) Practical Judgment, (5) Researching the Law, (6) Fact Finding, (7) Questioning and Interviewing, (8) Influencing and Advocating, (9) Writing, (10) Speaking, (11) Listening, (12) Strategic Planning, (13) Organizing and Managing One’s Own Work, (14) Organizing and Managing Others (Staff/Colleagues), (15) Negotiation Skills, (16) Able to See the World Through the Eyes of Others, (17) Networking and Business Development, (18) Providing Advice & Counsel & Building Relationships with Clients, (19) Developing Relationships within the Legal Profession, (20) Evaluation, Development, and Mentoring, (21) Passion and Engagement, (22) Diligence, (23) Integrity/Honesty, (24) Stress Management, (25) Community Involvement and Serving, (26) Self-Development); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 133, 207 (2007) (noting that even though “many teachers use the case method exclusively,” “other methods of instruction would accomplish their educational objectives more effectively” and thus, the use of the Socratic dialog and case method should be limited).

33. Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 341 (2007).

34. *Id.*

35. Four major studies have been done regarding the American Legal Education System in recent decades. THE CRAMPTON REPORT, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS, A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR (1979); THE MACCRATE REPORT, *supra* note 28, at 135–36; STUCKEY ET AL., *supra*, note 32, at 207; *see also* SULLIVAN ET AL., *supra* note 2, at 111–13 (referring to the “Carnegie Report,” a comprehensive study of law school curricula).

observed that law schools were “strikingly weak in teaching other foundational skills and knowledge that lawyers need as counselors, problem solvers, negotiators, and as architects of transactions and organizations—roles that will pervade their professional lives.”³⁶ In the twenty years since Professor Brest made that statement, law schools have made great progress incorporating courses on dispute resolution into their curricula.³⁷ Yet, dispute resolution courses have still not made it into most law schools’ required core curricula, despite their foundational quality.³⁸ In a recent report issued by the American Bar Association’s Task Force on the Future of Legal Education, the Task Force noted that much of what they heard “from recent graduates reflects a conviction that they received insufficient development of core competencies that make one an effective lawyer, particularly those relating to representation and service to clients.”³⁹

In the twenty-first century, collaborative advocacy will be among the most important skills that a litigator can possess to adequately serve their clients. The twenty-first century litigator will need to be both a “collaborative advocate” and an “adversarial advocate,” as circumstances dictate. Traditional law school education has focused on adversarial advocacy, which emphasizes a

36. Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 6 (1995).

37. C. Michael Bryce, *ADR Education from a Litigator/Educator Perspective*, 81 ST. JOHN’S L. REV. 337, 341–46 (2007) (describing the growth of ADR programs at American law schools).

38. A survey concluded in 2012 by Professor Sean Nolon, Director of Dispute Resolution Program and Professor of Law at Vermont Law School, indicates that of the 137 ABA-accredited law schools that responded only 10.5% of the schools require their students to take at least one non-litigation dispute resolution course to graduate. More commonly, 27% of schools surveyed integrate ADR skills into other courses, like first-year Legal Research and Writing programs, but this integration usually amounts to not much more than a mere introduction to the topic. Sean Nolon, *Integrating Non-Litigation Dispute Resolution into the JD Curriculum: A Survey of U.S. ABA-Accredited Law Schools* (unpublished survey) (on file with author). For description of those schools that offer a free standing ADR course or as part of another course see interview summaries at the following: http://vermontlaw.edu/Academics/Dispute_Resolution_Program/The_NLDR_Survey/NLDR_Survey_Follow-Up_Interviews.htm.

39. A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATION 26 (2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

“system of adjudication.”⁴⁰ By contrast, collaborative advocacy emphasizes “a system of conflict resolution that includes but is not limited to adjudication.”⁴¹ Because the vast majority of litigated disputes are resolved through negotiation, it follows logically that “true” education in the law should provide teachings that enable lawyers to be effective in reaching favorable negotiated outcomes for their clients.⁴² It should trouble legal educators that negotiation is a central skill for all lawyers, especially litigators who resolve most of their disputes through this process, yet most law schools do not require negotiation in their core course of study.⁴³ Indeed, it is difficult to find another skill that so predominates the legal practice but is less represented in the core law school curriculum.⁴⁴

Collaborative advocacy requires a different set of substantive knowledge and skills, which law schools do not presently require as part of their core curricula. Adversarial advocacy, which is the primary focus of most law schools’ core curricula, relies on a rights-based dispute resolution strategy that places emphasis on substantive legal knowledge, legal analysis, and argument.⁴⁵ Collaborative advocacy, on the other hand, contemplates that lawyers may need to work with clients “to anticipate, raise, strategize, and negotiate over conflict, and if possible, to implement jointly agreed outcomes.”⁴⁶ Collaboration is defined as a “process through which parties who see different aspects of a problem can

40. MACFARLANE, *supra* note 27, at 110.

41. *Id.*

42. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL STUD. 459, 459–61, 464 (2004) (discussing the decline in number of trials due to alternative dispute resolution forums).

43. Nolon, *supra* note 38.

44. Nolon, *supra* note 38; John Lande, *Lessons from Teaching Students to Negotiate Like a Lawyer*, 15 CARDOZO J. OF DISP. RES. 1, 1–2 (2013). ADR courses are among neither the most commonly required courses nor the most highly recommended courses. See Catherine L. Carpenter, *A Survey of Law School Curricula 2002–2010*, 43 A.B.A. SEC. EDUC. & ADMISSION TO BAR 13, 67–68 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf (listing the most common required and highly recommended courses).

45. *Id.* at 49.

46. MACFARLANE, *supra* note 27, at 109.

constructively explore their differences and search for solutions that go beyond their own limited vision of what is possible.”⁴⁷ Collaborative advocacy not only frequently requires a different set of knowledge and skills than adversarial advocacy, it often requires lawyers to use strategies that are polar opposites of those that might be effective in adjudicatory settings. Instead of using intimidation, for example, a lawyer may be more effective pursuing ingratiation; instead of stating aggressive positions, a lawyer may be more effective engaging in interest-based bargaining that embodies flexibility; instead of valuing secrecy, a lawyer may need to share information about weaknesses and concerns to arrive at mutually agreeable solutions.⁴⁸ While both forms of advocacy are important, most law schools view collaborative advocacy, at best, as subordinate to adversarial advocacy, and, at worst, as optional.

While collaborative advocacy has always been valuable to clients, it is even more important in the changing economy of the twenty-first century. In this new economy, “more for less” will be a major driver of change in legal practice.⁴⁹ In *Tomorrow’s Lawyers*, the incisive, clear-eyed examination of twenty-first century legal practice, Richard Susskind alerts us that general counsel are being asked to reduce their legal department budgets by as much as 50%.⁵⁰ Small businesses and private citizens are seeking similar reductions in the cost of legal assistance.⁵¹ One primary way for lawyers to meet this demand of “more for less” is to become skilled experts at collaborative advocacy because it resolves conflicts faster and more cost-effectively than adversarial advocacy.⁵²

For example, to achieve greater efficiency in dispute resolution, many organizations have adopted early settlement

47. BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* 5 (1989).

48. MACFARLANE, *supra* note 27, at 112.

49. SUSSKIND, *supra* note 24, at 4.

50. *Id.*

51. *Id.*

52. Lisa Blomgren Amsler et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 258 (2009) (finding that ADR saved money); DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* 77 (2003).

programs.⁵³ In these programs, instead of engaging in protracted discovery and litigation, parties voluntarily exchange information about the dispute early in the process so that each can make meaningful case assessments as soon as practicable.⁵⁴ Once the parties have had a chance to assess the strengths and weaknesses of their cases, they engage in meaningful settlement discussions.⁵⁵ These programs have saved companies millions of dollars and have helped maintain productive business relationships that likely would have been damaged or broken through more adversarial means.⁵⁶ Clients not only avoid expensive litigation costs but they also maintain greater control over both the process and the outcome of the dispute than they would have had in court.⁵⁷ One of the most notable success stories for programs involving planned early assessment and settlement comes from the multinational landscaping product and service company, Toro Inc. Toro estimates that between 1991 and 1999, its early assessment and settlement program saved the company \$50 million in litigation costs.⁵⁸ To achieve this success, however, organizations like Toro need lawyers who are as adept in collaborative advocacy as they are in adversarial advocacy.

As collaborative advocates, the Toro lawyers needed to do more than analyze the strengths and weaknesses of the dispute and make legal arguments. Collaborative advocates need a new kind of substantive knowledge and skills—a new set of truths, if you will, that historically are more closely associated with social science than with law. One of these new truths is how to participate in a

53. LIPSKY ET AL., *supra* note 52, at 90.

54. See Colatrella, *supra* note 25, at 130–39 (presenting case studies of companies that have implemented unique conflict-management systems).

55. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* 10–15 (2011) (advising attorneys to carefully assess their client’s situation and interests, as well as the possible methods of dealing with the matter in every case prior to considering negotiations and settlement); LIPSKY, *supra* note 52, at 77.

56. Miguel A. Olivella Jr., *Toro’s Early Intervention Program, After Six Years, Has Saved \$50M*, 17 *ALTERNATIVES TO HIGH COST LITIG.* 65, 65 (1999) (describing the reduction in Toro’s legal costs after implementing the early settlement program).

57. *Id.* For a discussion of another successful early settlement program, see Phillip M. Armstrong, *Georgia-Pacific’s ADR Program: A Critical Review After 10 Years*, *DISP. RESOL. J.*, May–July 2005, at 19.

58. Olivella, *supra* note 56, at 65.

collaborative communication process that emphasizes the skills of interest-based problem solving and dialogue, as opposed to the skills of litigation and debate. Interest-based problem solving is an essential skill for collaborative lawyers, yet most law students graduate not knowing what it is or having the slightest idea how to do it. Popularized by the book *Getting to Yes*, interest-based problem solving is the most embraced concept in law school negotiation classes, but it is not part of most law schools' required curricula.⁵⁹ The second new set of truths law students should learn, especially litigators, is the science of decision-making and how psychological biases corrupt good strategic judgment. This Article now briefly explores each of these topics to demonstrate how they are relevant in the litigation context.

A. *The Collaborative Communication Process*

Interest-based problem solving is a powerful technique that can be used to solve interpersonal disputes, including legal disputes. In interest-based problem solving, parties focus on their respective concerns and needs rather than on who is right or wrong.⁶⁰ Here, the term "interests" refers not to what one likes to do in his or her spare time, like reading or skiing, but rather the underlying needs, concerns, or fears that are at the heart of the conflict.⁶¹ Parties' "[i]nterests define the problem."⁶² Let's look at a simple dispute between a tenant and a landlord to more concretely understand the term "interests." Suppose a tenant painted the walls of his apartment a bright pink color because it made him happy to look at it, but this act arguably violated a lease provision stating that the apartment walls must remain a "neutral color." In a rights-based dispute, which is how most lawyers would frame the problem, the dispute would be defined by whether the tenant had a legal right to paint the walls a

59. Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1087 (2010) ("[T]he vast majority of negotiation and dispute resolution law school courses advocate for the use of interest-based negotiation for doing deals and resolving conflict.").

60. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 11–12 (3d ed. 2011) (advising participants to focus on needs while attacking the problem, not each other).

61. *Id.* at 43–44.

62. *Id.* at 42–43.

bright pink, and would turn on the contractual issue of whether bright pink is a “neutral color.” We can all imagine the arguments on each side of this issue. Under an interest-based approach, however, the parties would be more focused on the underlying reasons for this clause in the lease, rather than the clause itself, and would explore possible solutions to meet those interests irrespective of the legal rights implicated. In other words, what interests was the landlord trying to protect with the clause and how can they be protected while also satisfying the tenant’s interests?

Let’s say the landlord included the “neutral paint” clause in the lease because he believes apartments that are painted a neutral color are more desirable to most prospective tenants, and he does not want to spend the time and money to repaint apartments of former tenants who liked bolder colors. In an interest-based dispute process, the parties would look beyond legal rights to the needs that those rights were meant to serve.⁶³ They would look for ways that both parties’ interests could be met, if possible.⁶⁴ One obvious interest-based solution that might work for both parties in this example is that the tenant may keep his walls pink, but must repaint them before he moves. To protect the landlord’s interests, the parties agree in advance to the color and brand of paint. The tenant could even agree to provide an extra security deposit to cover the cost of repainting the walls if he fails to live up to his end of the bargain. This solution preserves both the tenant’s interest in waking up every morning to enjoy the warm feeling that pink walls provide him and the landlord’s interest in having a neutral-colored apartment to rent.

This was a simple example, but interest-based solutions are possible in disputes of every type and complexity. For example, an interest-based solution was at the heart of the Camp David Accord between Egypt and Israel that President Jimmy Carter helped to broker in 1978.⁶⁵ For days, the negotiations were stalled over how to divide the Sinai Peninsula, which Israel had occupied since the Six Day War in 1967.⁶⁶ One side or the other rejected every permutation

63. *Id.* at 42–43.

64. *See id.* at 44 (noting that because opposing interests are not necessarily conflicting interests, efforts to accommodate both parties are likely to result in positive outcomes).

65. *Id.* at 41–42.

66. *Id.*

of proposed boundaries in an effort to reach a comprised solution.⁶⁷ Only when the parties began focusing on their underlying interests did a solution emerge.⁶⁸ Israel's main concern in handing the peninsula back to the Egyptians was that the Egyptians could then place military forces on Israel's border, threatening its security.⁶⁹ Egypt believed allowing Israel to retain the peninsula undermined its sovereignty in land that it had controlled for nearly 4,000 years.⁷⁰ Once these interests were fully understood and appreciated, the countries agreed to a "plan that would return the Sinai to complete Egyptian sovereignty and, by demilitarizing large areas, would still assure Israeli security."⁷¹ Thus, an interest-based process helped produce one of the few lasting peaceful solutions to one of the most complex and intractable border disputes in the Middle East.⁷² But attorneys, in general, are not inclined to think about disputes in an interest-based way, are they?

Attorneys tend to think in terms of what is right and wrong—legal or illegal.⁷³ Attorneys generally start with a position and use argument, persistence, and power to win the battle.⁷⁴ Yet, when attorneys engage in collaborative processes like negotiation and mediation, they often continue to choose aggressive strategies guided by the "dominant values and beliefs" that they learned in law school.⁷⁵ This is why positional bargaining and engaging in negotiation as a "zero-sum," rights-based process are so prevalent in legal negotiations.⁷⁶ Of course, there is nothing wrong with approaching problems this way in adjudicatory processes like litigation and arbitration, but many attorneys take this approach all the time, regardless of the dispute resolution process in which they

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. J. ON DISP. RESOL. 29, 45 (1982) ("Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules . . .").

74. MACFARLANE, *supra* note 27, at 76.

75. *Id.* at 75.

76. *Id.* at 75–76.

are engaged and oblivious that they are doing a disservice to their clients. Law school often leaves students who are naturally inclined to use collaborative processes feeling as if they have no choice but to be adversarial. The following statement typifies the sentiment of many lawyers: “My nature, my personality has always been much more collaborative. I struggled to get that adversarial model to begin with. It never felt right. I always felt that I wasn’t giving as good a service to my clients as I could be giving but I was forced into it because that is what the system required.”⁷⁷ Educating law students in interest-based problem solving broadens their “philosophical map” as to the kinds of tools and problem-solving “frames” that are acceptable for lawyers to use.⁷⁸

While interest-based strategies are not always possible or appropriate, all attorneys should have the knowledge and skills to participate meaningfully in them because an interest-based strategy will frequently best serve the needs of the client. Interest-based problem solving has three distinct advantages over a positional style of bargaining. First, settlement is more likely because parties make a concerted effort to look at the other’s underlying needs and concerns.⁷⁹ Second, when parties focus on trying to meet the other’s underlying needs and concerns, they are often able to come up with multiple potential solutions, which further increases the likelihood that one of those solutions will be acceptable to both parties.⁸⁰ Finally, because interest-based bargaining relies more on strategies and tactics that build relationships, like flexibility, empathy, and openness, and less on adversarial strategies and tactics, like inflexibility, threats, and deception, it makes it more likely that the disputants’ relationship can be preserved or, at least, not further damaged.⁸¹ Positional bargaining, which is most often used in adversarial advocacy, ignores the other party’s concerns and needs—further polarizing the parties and increasing animosity.⁸² Parties simply state their position and make arguments as to why they are

77. *Id.* at 107.

78. Leonard Riskin, *Mediation and Lawyers*, *supra* note 73, at 43.

79. LAURENCE BOULLE ET AL., *MEDIATION: SKILLS AND TECHNIQUES* 182 (2008).

80. *Id.*

81. *Id.*

82. Menkel-Meadow, *supra* note 23, at 907.

entitled to it.⁸³ This strategy undermines interest-based negotiation. In fact, “arguments for one’s own position or against the other’s position” are among the most destructive in obtaining interest-based outcomes.⁸⁴ Indeed, to maximize interest-based processes, lawyers need to rely primarily on an entirely different communication style, one with which most students are unfamiliar.

Collaborative advocacy benefits most from a communication style that emphasizes dialogue, rather than debate. “Dialogue” originates from the Greek word “dialogos.”⁸⁵ “Dia” means “through” and “logos” means the “word.”⁸⁶ Thus, loosely translated, dialogue means gaining understanding through the exchange of words.⁸⁷ It is “about a shared inquiry, a way of thinking and reflecting together.”⁸⁸ Dialogue involves a certain way of communicating that is characterized by definable elements. Notice how the following characteristics of dialogue are so uncharacteristic of what many lawyers define as good advocacy. The first characteristic of dialogue is the absence of coercive influences.⁸⁹ People in dialogue do not engage in arm-twisting or rank-pulling.⁹⁰ Second, people in dialogue listen with empathy.⁹¹ The focus on listening is to understand the other party’s concerns and needs, and to attempt to view the problem from the other party’s perspective.⁹² Empathy involves not just intellectually understanding the other party’s point of view, but also understanding how the situation affects them emotionally. In other words, empathy is “the ability to think

83. *Id.*

84. LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 88 (4th ed. 2009). “Substantiation” is the term for the type of positional arguments commonly used by attorneys in negotiation. Substantiation is a relatively ineffective strategy in collaborative negotiation processes because “[s]ubstantiation begets more substantiation.” *Id.* (citing Laurie R. Weingart et al., *Knowledge Matters: The Effect of Tactical Descriptions on Negotiation Behavior and Outcome*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 1205, 1205–17 (1996)).

85. DAVID BOHM, *ON DIALOGUE* 6 (1996).

86. *Id.*

87. *Id.* at 7.

88. ISAACS, *supra* note 13, at 9.

89. DANIEL YANKELOVICH, *THE MAGIC OF DIALOGUE* 42 (2001).

90. *Id.*

91. *Id.* at 43.

92. *Id.*

someone else's thoughts and feel someone else's feelings."⁹³ Third, and finally, dialogue attempts to expose the assumptions underlying a person's views.⁹⁴ It encourages all participants to examine their own assumptions, as well as the assumptions of others with respect.⁹⁵

Attorneys are trained almost exclusively to engage in debate rather than dialogue. While dialogue is about "thinking together," debate is about "imposing thought."⁹⁶ Debate is the primary form of communication in adversarial advocacy.⁹⁷ The essence of debate is to "win the argument, vanquish an opponent."⁹⁸ Communication changes when "winning" is the primary objective: In debate, one assumes that he is right and tries to prove the other wrong, instead of assuming that through "thinking together" participants might come to a more complete understanding of the problem.⁹⁹ In debate, one argues for a self-serving solution instead of exploring solutions that might also be acceptable to the other party.¹⁰⁰ In debate, one listens to find flaws and weaknesses in the other's perspective to exploit them, instead of listening "to understand and to find meaning and agreement."¹⁰¹ Debate and other forms of adversarial advocacy are important aspects of good lawyering in adjudicatory proceedings because there is a judge or arbitrator who will decide which advocate has the better argument and who will be declared a "winner." Debate has limited utility in the collaborative process, however, because there is no independent adjudicator and, thus, parties must arrive at a mutually acceptable solution.¹⁰²

93. *Id.*

94. *Id.* at 44.

95. *Id.*

96. *Id.* at 39.

97. Menkel-Meadow, *supra* note 23, at 907 (footnote omitted) (quoting Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 11 (1996)).

98. Yankelovich, *supra* note 89, at 38.

99. *Id.* at 39.

100. *Id.*

101. *Id.*

102. THOMPSON, *supra* note 84, at 88. These skills will most commonly be used when resolving disputes in either bi-lateral negotiations or mediations. However, they are also essential in variety of other professional interactions when attorneys will engage with colleagues and clients, such as negotiating litigation strategy, compensation, and workload. *Id.* at 88.

B. The Settlement Decision-Making Process

The second area of substantive knowledge and skills related to collaborative advocacy that should be added to law schools' core curricula is the science of decision-making. This is an especially critical topic for litigators in the context of settlement. There are two primary decisions in a litigation settlement in which lawyers play a central role: (1) whether to settle and (2) what amount to accept in the settlement. These are two of the most important questions on which litigators advise their clients, yet lawyers receive "scant" substantive training in law school from which to draw upon in rendering this critical legal advice.¹⁰³ This lack of education demonstrates itself in the field, unfortunately. Studies examining lawyers' competency in making good settlement recommendations have revealed a "high incidence of decision-making error by both plaintiffs and defendants."¹⁰⁴ Therefore, this is clearly an area that needs improvement for lawyers to be successful.

The most recent and comprehensive of these telling studies found considerable settlement error in 2,054 California civil cases.¹⁰⁵ The large sample size reveals the importance of this issue. This study included 5,116 attorneys, which was estimated to be approximately 17–21% of all civil litigation attorneys in the state of California at the time.¹⁰⁶ The study defined a "decision error" as occurring when "either a plaintiff or a defendant decides to reject an adversary's settlement offer, proceeds to trial, and finds that the result at trial is financially the same as or worse than the rejected settlement offer"¹⁰⁷ The study made several important findings. First, the study found that plaintiffs made decision errors in 61.2% of the cases, producing an average loss of \$43,100 per decision error.¹⁰⁸

103. RANDALL KISER, HOW LEADING LAWYERS THINK 117 (2011).

104. See, e.g., Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision-Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 551 (2008) (stating that, based on comparisons of parties' settlement positions to ultimate awards or verdicts reached in arbitration or trial, both plaintiffs and defendants are subject to a high incidence of decision-making errors).

105. *Id.* at 552 [hereinafter California Decision Error Study].

106. *Id.* at 560.

107. *Id.* at 563.

108. *Id.* at 566.

Let that statistic sink in for a moment. Essentially, this means that plaintiffs' attorneys would have done better flipping a coin. With regard to defense counsel, the study found that although defendants had a lower incidence of decision error, the cost of those errors was alarmingly higher.¹⁰⁹ The decision error rate for the defendants was 24.3%, but those errors reaped an unfortunate average cost of \$1,140,000 for their clients.¹¹⁰ These numbers are consistent with earlier, smaller studies.¹¹¹ Certainly, while economic case evaluation is never going to be an exact science because of the subjective human elements involved, these statistics are worrisome and likely reflect a lack of education on case evaluation during law school and beyond.¹¹²

Law schools are not teaching lawyers any systematic way of evaluating cases for settlement, which is necessary both to arriving at more accurate decisions on whether to settle and to achieving good settlement results. In these times, when few cases are resolved through adjudication, the primary way litigators bring value to their clients is through their ability to achieve good settlement results.¹¹³ It is more than reasonable for law schools to address this in their curricula if they intend to produce graduates who are at least minimally prepared for legal practice. The basic principles of economic case evaluation are not difficult to comprehend. It simply is a topic inexplicably ignored in the core content of legal education. It is a concept, however, taught in good negotiation and mediation courses.¹¹⁴ In 1983, Professor Gerald Williams published *Legal Negotiation and Settlement*, one of the first negotiation texts for law

109. *Id.*

110. *Id.*

111. See Jeffrey Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 114, 154 (1996) (finding in a study of 656 cases that plaintiffs had a 56.1% decision error rate with an average cost of \$27,687 and defendants had a 23% decision error rate with an average cost of \$354,949); Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1996).

112. Lack of feedback in the process leads attorneys to fail to take responsibility for their bad decision-making. RANDALL KISER, *BEYOND RIGHT AND WRONG* 78 (2010).

113. KISER, *supra* note 103, at 113.

114. JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 160 (2006); BOULLE ET AL., *supra* note 79, at 190–95.

students.¹¹⁵ In his book he has a section titled, “Economic Analysis of Cases: The Missing Lawyer Skill.”¹¹⁶ Professor Williams says that “[l]awyers are, in a sense, trapped by the legal culture into non-quantifiable and non-objective methods of evaluating cases.”¹¹⁷ In light of the California Decision Error Study, explained above, more than thirty years later it appears that the legal culture has not changed much and that the economic case evaluation skill is still missing.

Economic case evaluation is defined as “estimating the monetary value of a legal claim and determining the costs and consequences of realizing that value.”¹¹⁸ This type of case evaluation involves, in part, calculating the “expected value” of the case. Expected value is the amount the case is worth if settled now as compared to the possible value of the case if it is adjudicated.¹¹⁹ Explained from the plaintiff’s perspective: how much will she accept now in exchange for giving up the chance of obtaining a greater amount later (usually much later) if the case is tried?¹²⁰ Explained from the defendant’s perspective: how much will she pay now to avoid the risk of paying a greater amount later?¹²¹ This is the question that litigants confront every time they contemplate settling a dispute. To answer this question, the litigant and his lawyer need to know, at minimum, three values: (1) the probable average verdict, (2) the probability of a plaintiff’s verdict, and (3) the cost of obtaining the verdict. Once these values are obtained, a simple calculation will provide the expected value of the case.¹²²

Let’s look at a simple example to illustrate basic case evaluation. Assume that the plaintiff was injured in a car accident

115. GERALD WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

116. *Id.* at 110.

117. *Id.* at 111.

118. KISER, *supra* note 103, at 113.

119. PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT* 477 (2010).

120. *Id.*

121. *Id.* at 478.

122. See Richard Birke, *Decision Trees—Made Easy*, in *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 160 (2006) (discussing the use of decision trees in evaluating the worth of a lawsuit based on factors, such as the probability a plaintiff will prove each element of the tort, the possible award, and the costs incurred).

and argues that the defendant was negligent. His attorney estimates that the probable average verdict, assuming liability, would be \$100,000.¹²³ This is not his best day in court, or his worst day in court; rather, it is his most likely damage award.¹²⁴ Next, the attorney estimates that the probability of achieving a plaintiff's verdict is 60%, taking into consideration the relevant facts, the current law, and the emotional appeal of the case.¹²⁵ Finally, the plaintiff's lawyer estimates that the cost of obtaining the verdict will be \$10,000.¹²⁶ To calculate the expected value, you multiply the probable average verdict (\$100,000) by the percentage probability of success (60%), and then subtract the cost of the verdict (\$10,000).¹²⁷ The expected value in this example would be \$50,000. The equation looks like this:

$$\begin{array}{ccccccc}
 \$100,000 & \times & 60\% & = & \$60,000 & - & \$10,000 & = & \$50,000 \\
 \textit{Probable} & & \textit{Probability} & & & & \textit{Cost of} & & \textit{Expected} \\
 \textit{Verdict} & & \textit{of success} & & & & \textit{Verdict} & & \textit{Value}
 \end{array}$$

There are other equations for calculating expected value that are much more complicated than this.¹²⁸ They can include calculations regarding the time-value of money, estimates of the business costs of the litigation, or the business benefit of going to trial—such as establishing a precedent relevant to the business.¹²⁹ However, at a minimum, addressing at least the three values discussed above will provide a more objective economic evaluation

123. *Id.* at 162–63.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* When the litigant is a defendant the cost of litigation is added to the expected value because this is what they would need to spend anyway to resolve the dispute. BOULLE ET AL., *supra* note 79, at 193.

128. *See, e.g.*, Paul Prestia & Harrie Samaras, *Beyond Decision Trees: Determining Aggregate Probabilities of Time, Cost, and Outcomes*, 28 ALTERNATIVES TO HIGH COST LITIG. 89 (2010) (describing “Augmented Option Analysis” as a tool beyond conventional “Decision Tree Analysis” for evaluating litigation settlements that aggregate the probabilities of all possible ultimate outcomes to provide a more complete picture of the possibilities associated with any option).

129. Birke, *supra* note 122, at 160–61.

of the case than simply operating on gut feeling, which is what many attorneys do.¹³⁰

The entire analysis of expected value is still subjective, but having a systematic process for addressing each subjective element in the case evaluation exercise brings more objectivity, and consequently, consistency and predictability, to the results. For example, the assessment of the probable damage award and the probability of achieving that award are subjective evaluations. They are dependent upon the experience and the accuracy of the attorney.¹³¹ Nevertheless, having a formula for calculating expected value forces the attorney to parse through damages and determine what she realistically can prove.¹³² In addition, under this model, an attorney would assign a specific percentage chance of success based on factors such as the merits of the case, public records of verdicts in similar cases, and the attorney's experience in similar cases, as opposed to assigning the case such ambiguous terms as "strong case" or "weak case."¹³³ Attorneys should also be aware of the need to factor in the estimated cost of litigation as part of the value of the case, a factor often ignored or considered only after costs have escalated to unreasonable degrees.¹³⁴

Beyond the basic factors of good economic case evaluation discussed above, there is also a related body of social science principles that lawyers should be trained to consider to better conduct a sound economic case analysis.¹³⁵ These are psychological biases and heuristics (mental shortcuts) that operate on a

130. *Id.*

131. *See id.* at 162 (noting that attorneys have to evaluate the probable outcome of each factor that affects the case).

132. *See id.* at 162–64 (explaining how to incorporate expected awards when using a decision tree to determine the realistic value of a case and probability of success).

133. Marjore Corman Aaron, *Finding Settlement with Numbers, Maps, and Trees*, THE HANDBOOK OF DISPUTE RESOLUTION 204 (Michael L. Moffitt & Robert C. Bordone eds. 2005).

134. *See* Birke, *supra* note 122, at 163 (deducting trial expenses from the expected award).

135. JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* 291 (2013) (stating that psychological bias, like confirmation bias, the fundamental attribution error, and naïve realism are factors that can affect economic case evaluation).

subconscious level to undermine good decision-making.¹³⁶ Attorneys would not even realize their influence on their case evaluation without specific training and a conscious effort to identify and mitigate them.¹³⁷ Cognitive specialists have identified and studied over 100 decision-making biases that undermine good decisions.¹³⁸ Lawyers would benefit from, at a minimum, training in some of the more common biases that affect litigation choices.

To illustrate this point further, let us look briefly at two of the more relevant biases, selective perception and risk frames, in the context of a hypothetical litigation example: a wrongful death lawsuit by a family in a small rural town against a large corporation. Assume that the defense counsel for “ABC Corp.” has evaluated the facts and determined the company has a pretty good chance of success on the legal merits. Unfortunately, the settlement demand is quite high and the plaintiff is unwilling to negotiate because the plaintiff’s attorney correctly assesses that the case has significant emotional appeal to a local jury. Accordingly, the defense recommends that ABC Corp. proceed to trial, unwilling to place much value on the emotional appeal of the circumstances of the case. The emotional appeal of the case is significant, however. The decedent was a young man in his twenties who was well known around town and well loved. His death was well publicized in this small working-class community that favors the “mom-and-pop” store over “big business.” The family is devastated and its grief is very visible locally. At trial, ABC Corp. is shocked by a multi-million dollar verdict, which is, of course, way beyond the value that the defense counsel predicted. The defense counsel is disconcerted because his “gut” tells him the case is not worth that verdict.

When evaluating a case like this, the defense counsel would benefit from training in the dangers of selective perception and risk frames. “Selective perception” is the principle that humans are preconditioned to see only what they want to see, leading to a self-serving bias.¹³⁹ Indeed, a person is actively seeking to support his assumed and usually preferred view of the world. Professor

136. KISER, *supra* note 112, at 90.

137. ROBBENOLT & STERNLIGHT, *supra* note 135, at 15.

138. KISER, *supra* note 112, at 90.

139. *Id.* at 102.

Deanna Kuhn, an expert in reasoning, explains the internal, unconscious thought process as follows: “Here is some evidence I can point to as support for my theory and therefore the theory is right.”¹⁴⁰ In litigation, this bias manifests when an attorney unwittingly minimizes detrimental facts and unduly emphasizes facts favorable to his client, biasing his view of the case. For example, in an experiment where students were asked to evaluate the value of a litigated case, students’ assessments differed significantly based on whom they represented, even though they were presented with the same set of facts.¹⁴¹ In this study, where the plaintiff was suing for \$100,000, the students who were randomly assigned the role of plaintiff’s attorney valued the case at \$17,709 more than those randomly assigned the role of defendant’s attorney.¹⁴² It should be emphasized that this significant bias occurred after spending relatively little time with the case in the role of either plaintiff’s or defendant’s counsel. How much more bias do you think can occur when an attorney spends months or years with a case?

In our wrongful death hypothetical, above, the defense counsel only wanted to focus on the legal merits because he believed ABC Corp. was in a good legal posture. He diminished the overwhelming facts regarding the challenges of trying the case in an unfriendly environment of small town working class folk, as well as the sympathetic appeal of the decedent and his family. Emotional factors are relevant to advocacy, whether they undermine or support your case.¹⁴³ The failure to address this bias had severe negative consequences for the client.

A second principle to which litigators must be attentive is “risk frame.” The concept of risk frame states that people view the risk of the case differently based on whether they are in a position to gain money or to lose money, even when the statistical risk is

140. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 93 (2013) (quoting Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 *PSYCHOL. REV.* 674, 681 (1989)).

141. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 813 (2001).

142. *Id.*

143. The issue of giving little or no consideration to emotional aspects of a case can also be attributed to a lack of emotional intelligence. KISER, *supra* note 104, at 78.

objectively the same.¹⁴⁴ People are risk-averse when they are facing financial gains, and they are more likely to take risk when they are facing financial losses.¹⁴⁵ In other words, people are “conservative when given a chance to lock in a win, but daring when given a chance to avoid a loss.”¹⁴⁶ Here is a simple illustration of this concept based on an experiment conducted by Nobel Prize winner Daniel Kahneman and his colleagues. Kahneman presented participants with two sets of alternatives. In the first set, participants had to choose between “a sure gain of \$240” and a “25% chance to gain \$1000,” which is a 75% chance of gaining nothing.¹⁴⁷ Participants, by a margin of 84%, chose the sure gain of \$240, the risk-averse alternative, even though the expected value of the 25% chance of gaining \$1000 was worth slightly more—\$250.¹⁴⁸ In the second set, Kahneman presented participants with a new set of alternatives: They could choose a “sure loss of \$750” or a “75% chance to lose \$1000 and 25% chance of losing nothing.”¹⁴⁹ In this set, 87% of participants chose the “75% chance of losing \$1000,” the risk-seeking alternative.¹⁵⁰

Applying the loss/gain frame concept to our wrongful death hypothetical, ABC Corp. was facing significant financial losses if a settlement was reached, so it was more willing to roll the dice for the chance of losing nothing.¹⁵¹ This bias operated to cause the defendant to behave in a riskier way because of its vantage point in framing the risk involved in the case. Therefore, this bias contributed to a wrong decision by corrupting the decision-making process. Indeed, research supports the conclusion that “defendants’ propensity to take risky settlement positions increased as their risk of loss increased.”¹⁵² This explains, in part, why defendants in the California Decision Error Study, discussed above, produced such costly mistakes.

144. KISER, *supra* note 112, at 111.

145. *Id.*

146. DAVID G. MEYERS, INTUITION: ITS POWERS AND PERILS 155 (2002).

147. KISER, *supra* note 112, at 112.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 113.

152. *Id.*

Attorneys can take precautions to avoid the pitfalls of common psychological biases, and the law school curriculum should teach them those precautions. First, having a clear decision-making process helps to avoid a situation where the emotions of either the client or the lawyer will overtake the process.¹⁵³ In addition, seeking independent evaluations from third parties can help provide a reality check for both the lawyer and the client.¹⁵⁴ Lawyers can also explicitly seek out evidence that undermines their preferred theory of the case as a way of balancing their evaluation.¹⁵⁵ All of these have proven to be useful strategies in mitigating the effects of faulty frames and selective perception.¹⁵⁶ If law students are educated about the existence of these psychological biases and ways to avoid them, they will be well positioned to provide higher quality decision-making guidance to their clients.

Those who master the “missing skill” of case evaluation will have an “overwhelming advantage in negotiations and trials” in the twenty-first century.¹⁵⁷ The California Decision Error Study on case evaluation found that attorneys who had training and experience in serving as mediators had a lower decision error rate.¹⁵⁸ The study specifically gathered data on whether the attorney involved in the case had experience as a mediator.¹⁵⁹ For purposes of the study, the following activities qualified as having mediation experience: serving on “superior court mediation panels, being affiliated with private dispute resolution companies, or currently being a member of the Southern California Mediation Association.”¹⁶⁰ In cases where attorneys had mediation experience, the decision error for both plaintiffs and defendants was lower. Attorney-mediators representing plaintiffs had a 48.5% decision error rate as compared to the 61.2% decision error rate for the primary sample.¹⁶¹ In cases

153. *Id.* at 108.

154. *Id.*

155. *Id.*

156. ROBBENOLT & STERNLIGHT, *supra* note 135, at 15.

157. KISER, *supra* note 103, at 117.

158. Kiser et al., *supra* note 104, at 586–87.

159. *Id.* For this aspect of the study, the investigators searched cases from 1985 to 2006 and identified 369 cases that met the case-study criteria. *Id.*

160. *Id.* at 51–52 (noting that California requires a minimum of thirty hours of mediation training to serve as a mediator in court-connected litigation).

161. *Id.* at 587.

where attorney-mediators represented defendants, their decision error rate was 21.5% as compared to 24.3% decision error rate for the primary sample.¹⁶² This reduction is statistically significant, raising the question of why attorney-mediators make better case evaluation decisions.¹⁶³ The answer to this question may lie in their enhanced skills as collaborative advocates.

Collaborative advocacy, which includes, among other things, interest-based problem solving, dialogue, case evaluation, and decision-making, must find its way into the core legal curriculum.¹⁶⁴ Clients in the new economy will no longer pay the high cost of prolonged conflict that adversarial advocacy often creates.¹⁶⁵ To be competitive in this new economy, lawyers must also be adept at collaborative advocacy. Including courses on negotiation, mediation, and alternative dispute resolution in the law school core curriculum should help remedy this deficiency. If law schools desire to offer a legal education that produces fulfilled and successful lawyers, they should seek to make their curricula more “true” by adding substantive teachings, like the ones discussed above, that truly prepare the lawyer for the profession. There are, of course, many lawyers who are expert collaborative advocates, but they possess these skills in spite of law school, not because of it. Law schools that continue to see collaborative advocacy skills as optional and adjunct to adversarial advocacy skills, rather than required and equally valuable, will find themselves increasingly at odds with the needs of legal practice.

162. *Id.*

163. *Id.*

164. KENNETH CLOKE, *MEDIATING DANGEROUSLY* 174–76 (2001).

165. *See* SUSSKIND, *supra* note 24, at 4–5 (noting that access to legal counsel is unaffordable for many when legal services are delivered in the traditional way).

III. THE GOOD

*How far that little candle throws his beams! So shines a good deed in a naughty world.*¹⁶⁶

—William Shakespeare

Even the best lawyers, with the most upright natures, will from time to time find themselves faced with moral decisions where it is not immediately obvious which direction to take. While the Legal Ethics and Professional Responsibility courses taught in law school provide some basic guidelines for lawyers in this area, they by no means constitute a complete handbook for lawyers that will ensure good, just, and right decisions in all circumstances. Accordingly, when the interests of the client are in conflict with some other good or just interest, or when lawyers find themselves in situations where there is no law or guidance, questions can arise as to how the lawyer should exercise her discretionary judgment with respect to these moral questions. These questions often involve matters of integrity, self-discipline, humility, respect, self-control, compassion, accountability, responsibility, honesty, and justice—all of which fall in the overarching category of “goodness.” There is no practical way to regulate “goodness” in lawyering. Yet, public confidence in the legal profession increases when lawyers display these qualities. Thus, we must rely on individual lawyers to self-limit or self-regulate their behavior in the absence of clear, written guidance to exhibit good moral decision-making and, consequently, establish strong public confidence in the profession.

Certainly, lawyers are making moral judgments every day that call upon their sense of “goodness,” and some feel more prepared for these judgments than others. They use their own internal compass developed from whatever quality of background education and experience they have brought with them to their legal practice, but unfortunately their law school education does not formally or systematically contribute very much to the development of this moral compass. This naturally provokes discussion on whether the law school curriculum can be crafted to improve lawyers’ excellence in this area. Should law schools be concerned with

166. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 5, sc. 1, lines 90–91 (Stephen Orgel & A.R Braunmuller eds., 2002).

producing lawyers who practice with “goodness” and if so, how can this be promoted?

Ancient Greece, the first successfully self-governed society of the world, offers some useful guidance on how to promote “goodness” and justice in the absence of written laws.¹⁶⁷ The answer, ancient Greeks believed, was found in a concept that is best conveyed through the phrase “know thyself.”¹⁶⁸ Self-government is one of the purest forms of freedom, and the Greeks highly valued freedom in all areas.¹⁶⁹ Yet, they wisely contemplated that the enjoyment of freedom also required the willingness to self-limit their own freedom.¹⁷⁰ The ancient Greeks taught that goodness comes from limits, self-control, and self-mastery of the free individual.¹⁷¹ In her book, Hamilton offers further explanation of this concept:

This conception of what freedom means dawned upon the Greeks. The quality they valued most—the Greek word is *sophrosune*—cannot be expressed by any single English word. It is oftenest translated by self control, but it meant more than that. It was the spirit behind the two great Delphic sayings, “Know thyself” and “Nothing in excess.” Arrogance, insolent self-assertions, was of all qualities most detested by the Greeks. *Sophrosune* was the exact opposite. It had its nature, as Aristotle would say, in

167. The ancient Greeks believed in promoting good character even though “they had no authoritative Sacred Book, no creed, no ten commandments, no dogmas.” Hamilton, *supra* note 8, at 216. Despite no dogma, the ancient Greeks had an ideal of “excellence” in human affairs. *See id.* at 217. Moreover, this excellence was driven by “straining impulses to unrestricted freedom, shunning excess, obeying the inner laws of harmony and proportion.” *See* EDITH HAMILTON, THE ECHO OF GREECE 21 (1957). In this pursuit, written laws were subordinate to man’s self-regulation. *Id.*

168. THE ECHO OF GREECE, *supra* note 167, at 21.

169. *Id.* at 12.

170. *Id.* at 18.

171. *Id.* at 12. In referencing Socrates, Plato, Aristotle, and Plutarch, Hamilton states: “To them, as to all Greeks, freedom was first in importance. Fundamental to everything the Greeks achieved was their conviction that good for humanity was possible only if men were free, body, mind, and spirit, and if each man limited his own freedom. A good state or work of art or piece of thinking was possible only through the self-mastery of the free individual, self-government.” *Id.*

the excellent and it meant accepting the bounds of excellence laid down for human nature, restraining impulses to unrestricted freedom, shunning excess, obeying the inner laws of harmony and proportion. . . . That was the Greek ideal, and the result was their freedom. The idea that only the man who holds himself within self-chosen limits can be free is one of their great legacies to us.¹⁷²

Interestingly, the ancient Greeks further acknowledged that it was the “[w]illing obedience to law written and unwritten” that made them free; however, they attached greater importance to the unwritten law.¹⁷³ They observed that the written laws, such as the law against robbery, had little effect on most people because most people do not have the impulse to violate them.¹⁷⁴ By contrast, the unwritten law is essentially an unenforceable code of conduct that includes things such as “kindness and compassion and unselfishness and all the long list of qualities without which life would be intolerable except to a hermit in a desert.”¹⁷⁵ Therefore, they believed that this unwritten law, which carried no penalty but applied universally to everyone, had broader implications for society and therefore warranted greater attention.¹⁷⁶

Lawyers are taught a set of “written laws,” which are the ethical rules or shared values of the profession. They are designed to promote the “good” in the profession, but they are taught little about the “unwritten laws” that each of them will necessarily integrate into their discretionary moral decisions when practicing law, which carry no legal penalty and have no enforceability. These unwritten laws are the lawyers’ personal values or morals.¹⁷⁷ Just as the ancient Greeks’ approach to self-mastery involved the endeavor to “know thyself,” law schools could better assist law students in preparing for legal practice by engaging them in a process to cultivate their

172. *Id.* at 21–22.

173. *Id.* at 20.

174. *Id.*

175. *Id.* at 21.

176. *Id.* at 20.

177. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 420 n.32, 480 (2005).

personal “responsible moral judgment.”¹⁷⁸ To accomplish this, law schools should engage law students in a systematic study of the process of incorporating morals into legal practice by exploring a variety of moral perspectives as applied to common ethical and moral dilemmas that students will likely encounter practicing law. In part, this means emphasizing core professional values that have both an ethical and moral dimension, such as honesty, integrity, and justice. It also means supporting law students in developing their own moral principles in the context of the law and helping them to avoid common errors in moral decision-making. Such an education will increase students’ likelihood of successfully navigating the variety of moral and ethical dilemmas that they will encounter in legal practice, making them more satisfied and better lawyers, as well as elevating the profession.¹⁷⁹

In short, law schools currently teach some, but not enough of, the “good.” Most law school professional ethics courses focus almost exclusively on the “law of lawyering,” which usually involves the examination of regulations, statutes, and case law.¹⁸⁰ The core of the professional ethical rules are codified in the American Bar Association’s Model Rules of Professional Conduct (Model Rules), which nearly every state has adopted in some form.¹⁸¹ These rules cover a variety of topics, ranging from attorney–client relations to zealous advocacy.¹⁸² Despite the number, complexity, and variety of these rules, however, a vast sphere of lawyer behavior is left unregulated.¹⁸³ Moreover, topics that are covered by the rules often leave significant discretion for lawyers to

178. Katherine Franke, *Occupy Wall Street’s Message for Lawyers*, NAT’L L.J., Nov. 21, 2011.

179. Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 429 (2005) (stating that “[e]mpirical research for the past two decades has shown that when intrinsic values and motivation dominate a person’s choices she tends to experience satisfaction and well-being, whereas when extrinsic values and motivation are most important to her she will experience angst and distress”).

180. *Id.*

181. Barton, *supra* note 177, at 436–37.

182. Nathan Crystal, *Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 ST. LOUIS U. L.J. 1235, 1241 (2007).

183. *Id.* at 1237.

act as they deem best.¹⁸⁴ Occasionally some ethical rules conflict with no clear guidance regarding which rule takes precedence.¹⁸⁵ Thus, lawyers have significant latitude in how to resolve the many ethical issues that they will confront in practice.¹⁸⁶ Most importantly, ethical concerns usually implicate moral concerns for which the rules provide no guidance.

A classic example of an ethical issue with a significant moral dimension involves the attorney ethical duty of confidentiality. Model Rule 1.6 states, in part, that a “lawyer shall not reveal information relating to the representation of a client.”¹⁸⁷ There are, however, several exceptions to this general rule.¹⁸⁸ One exception is that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”¹⁸⁹ Suppose that a lawyer learns through representation that his client, a sole proprietorship, is discharging toxic chemicals into the environment to such a degree that the exception to confidentiality would be met—the lawyer would have the legal right to reveal the pollution to the proper authorities, but would not be required to do so.¹⁹⁰ This is sometimes referred to as a “right vs. right” moral dilemma.¹⁹¹ It is right to honor one’s duties of zealousness and loyalty to one’s client, but it is also right to “prevent reasonably certain death or substantial bodily injury” to others.¹⁹² Which course of action should the lawyer choose? Either is ethical, but which is “right” or “morally good?”

Lawyers regularly confront this type of “right versus right” dilemma in their practices, albeit most often in less dramatic form,

184. *Id.*

185. *Id.*

186. *Id.*

187. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2013).

188. *Id.* at R. 1.6(b).

189. *Id.* at R. 1.6(b)(1).

190. *Id.* (providing for permissive rather than mandatory disclosure of information regarding the representation of a client in circumstances where the duty not to reveal such information is waived).

191. JOSEPH L. BADARACCAO, JR., *DEFINING MOMENTS* 9 (1997).

192. *Id.*

with little guidance from their professional education.¹⁹³ These types of moral questions are in fact much more prevalent in practice than the clear-cut ethical issues. Lawyers must decide whether to grant extensions for filing documents to their adversaries that might provide a small but concrete advantage in the legal struggle. They must decide how much unsavory, even if legal, behavior to tolerate from clients before ceasing representation. In their personal lives, they must decide whether it is more correct to attend their child's baseball playoff game or to attend a critical hearing for an important client. What these moral dilemmas have in common is that the ethical rules provide no guidance and most law schools provide no education regarding how to manage the moral issues that are central to an attorney's professional identity. Because these courses are regularly assigned only two or three credit hours, there is little time to have meaningful discussions on values or morality, which will arise out of the myriad of dilemmas that lawyers confront.¹⁹⁴ Thus, ethics courses "give students little, if any, opportunity to think through difficult ethical dilemmas and conflicts, to determine how to balance their duty to a client with the duties to our legal system and to society, or to evaluate questions of basic moral behavior."¹⁹⁵

In fact, law schools both explicitly and implicitly encourage students to detach personal feelings and morals from legal analysis.¹⁹⁶ Law schools explicitly encourage the detachment of personal opinions and morals by over-emphasizing the case method.¹⁹⁷ The case method, as I use the term, is the teaching of substantive law and legal analysis through the critical study of judicial opinions, usually appellate opinions.¹⁹⁸ As discussed, this is often through a "Socratic dialogue" where professors test students' knowledge of the cases and analytical abilities through a series of questions.¹⁹⁹ These questions often require students to critique the analytical soundness of the judicial opinion and argue different legal

193. Crystal, *supra* note 182, at 1236. For a lucid discussion of "right vs. right" moral dilemmas see BADARACCAO, *supra* note 191.

194. Crystal, *supra* note 182, at 1241.

195. RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED 236 (1999).

196. SULLIVAN ET AL., *supra* note 2, at 187.

197. ANTHONY T. KRONMAN, THE LOST LAWYER 110, 113-14 (1993).

198. STUCKEY ET AL., *supra* note 32, at 207.

199. *Id.* at 213.

perspectives, regardless of how they believe the case should have been decided.²⁰⁰ This is a valuable enterprise, as analytical reasoning is an essential lawyering skill best learned through the case method.²⁰¹ Lawyers must analyze the strengths and weaknesses of their client's case, as well as the opponent's case, without regard to their personal feelings or morals. The problem is not that law schools use the case method of teaching, but that they overuse it to the point of essentially excluding other methods.²⁰² The approach is the predominant teaching method in the first year, and the pervasive method through the remainder of law school, which is why it is termed the "signature pedagogy" of law school.²⁰³ As a result, law students spend much of their law school career detaching their personal opinions and morality from legal analysis and, as lawyers, continue to apply this mindset as a matter of habit.²⁰⁴

The case method also implicitly encourages morally blind legal analysis. In the absence of meaningful discussion of the role that morals and values can play in legal practice, students receive a subverted message that morals and values do not play a role. This observation was made in the latest comprehensive study of law school curricula and summarized in the book *Educating Lawyers*, which is commonly referred to as "the Carnegie Report":

In law school, students learn from both what is said and what is left unsaid. There is a message in what the faculty address, and what they do not. When faculty routinely ignore—or even explicitly rule out of bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice.²⁰⁵

The overriding message in law school, both explicitly and implicitly, is that morals are not relevant to legal practice, which

200. *Id.*

201. SULLIVAN ET AL., *supra* note 2, at 187.

202. *Id.* at 186.

203. *Id.* at 31, 187–88.

204. KRONMAN, *supra* note 197, at 114.

205. SULLIVAN ET AL., *supra* note 2, at 140.

encourages what is known as the “hired gun” approach to lawyering.²⁰⁶ The rights and needs of the client are emphasized, and the lawyer’s personal morals and ethics are de-emphasized.²⁰⁷ This philosophy teaches that, with very few limitations, lawyers must zealously represent their clients, regardless of the social or moral impact.²⁰⁸ Under this approach, “lawyers must take any action to advance the client’s interest, so long as the action does not clearly violate a rule of ethics or law.”²⁰⁹ In other words, lawyers are “not morally accountable for any actions they take on behalf of clients in their professional role.”²¹⁰

Yet, one of the salient differences between “job training” and “professional education” is professional education’s transformational quality that includes the assimilation of core values, which implicate personal morals.²¹¹ Several critical evaluations of law school curricula performed in recent decades have concluded that the legal practice should encompass values such as ethics, justice, fairness, integrity, and the public good. For example, the ABA Professionalism Committee studied the “purposes of the profession, the character of the practitioner, and supportive characteristics of professionalism” and concluded that ethical conduct, integrity, and dedication to justice and the public good were among the characteristics most important to the profession.²¹² In addition, the MacCrate Report, in looking at both professional skills and values, advised that important values that are paramount in legal practice are “striving to promote justice, fairness and morality.”²¹³ The Carnegie

206. *Id.* at 140–41.

207. Crystal, *supra* note 182.

208. *Id.*

209. *Id.*

210. *Id.*

211. SULLIVAN ET AL., *supra* note 2, at 32.

212. David S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. TOL. L. REV. 421, 424–25 (2009). It is important to emphasize that personal characteristics such as honesty and integrity, and many other non-technical capacities, are highly valued by both legal employers and clients. Neil W. Hamilton, Vera E. Monson & Jerome M. Organ, *Empirical Evidence that Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 12–13 (2012).

213. *Id.* at 424.

Report, referenced above, reached similar conclusions.²¹⁴ The Report identified three “apprenticeships” that are part of every profession.²¹⁵ The first is the intellectual apprenticeship that “focuses the student on the knowledge and way of thinking of the profession.”²¹⁶ In the law, this manifests as the critical and analytical thinking, and substantive law and procedure that are taught.²¹⁷ The second apprenticeship is an introduction to expert practices, which is taught by engaging in simulated or actual practice.²¹⁸ The third apprenticeship addresses the “identity and purpose” of the profession, which “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.”²¹⁹ The Carnegie Report concluded, and I agree, that law schools provide very little support in the third apprenticeship, which encompasses the development of the lawyer’s personal morals and values.²²⁰

Therefore, it is not only appropriate but also necessary for law schools to create space in their core curricula for preparing law students for their individual moral decision-making obligations. The focus of this aspect of legal education should be to provide students with an intellectual framework for dealing with moral dilemmas that should, in part, provide answers to these dilemmas, but also help students to ask the right questions.²²¹ As discussed above, absent a discussion of the role morality plays in legal practice, lawyers tend to internalize the client-centered approach, which amounts to a philosophy of the lawyer as a “hired gun.”²²² One way to avoid this unwelcome outcome is to introduce students to alternative philosophies that are not necessarily correct, but nevertheless,

214. SULLIVAN ET AL., *supra* note 2, at 132–33, 187.

215. *Id.* at 28.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. JOSEPH L. BADARACCO, JR., *DEFINING MOMENTS: WHEN MANAGERS MUST CHOOSE BETWEEN RIGHT AND RIGHT* (1997).

222. See NANCY LEVIT & DOUGLAS O. LINDER, *THE GOOD LAWYER* 195 (2014) (cautioning that when the aim of the lawyer is client autonomy, a lawyer will erroneously abdicate responsibility for the harm caused by their actions because “[t]he client made [them] do it”).

credible. This gives them permission to develop their own philosophy of lawyering, within the framework of the core values of the profession, which may, or may not, incorporate other personal values.

Two alternative examples of such different philosophies are the “philosophy of morality” and the “philosophy of institutional value.”²²³ A philosophy of morality is one in which “lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do.”²²⁴ This philosophy does not impose any particular set of values; it simply states that a lawyer has accountability above and beyond what is minimally required under the professional rules of conduct or law.²²⁵ The consequence of this approach would be lawyers who view their obligations more broadly than merely providing legal analysis.²²⁶ This would create lawyers who are true counselors, who distribute what has been called “deliberative wisdom.”²²⁷ This philosophy contemplates giving advice that is not morally blind or based only on substantive law. A different, but equally valid philosophy of lawyering is called the “philosophy of institutional value[s].”²²⁸ This lawyering philosophy provides that “the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.”²²⁹ “Justice” under this philosophy provides that lawyers should make decisions so that the “legal merits” of the case are heard.²³⁰ In other words, lawyers are responsible for promoting the “substantially just outcome.”²³¹ These are just two examples of many possible role identities that lawyers might adopt that view lawyering as having a moral dimension.

It warrants emphasizing that ethics rules permit lawyers to consider their own morality in exercising “legal” judgment when

223. Crystal, *supra* note 182, at 1242–44.

224. *Id.* at 1242.

225. *Id.*

226. *Id.*

227. MACFARLANE, *supra* note 27, at 107.

228. Crystal, *supra* note 182, at 1241.

229. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 9 (1998).

230. *Id.*

231. *Id.*

counseling clients.²³² Model Rule 2.1, in pertinent part, states that “[i]n rendering advice, a lawyer may refer not only to law, but also to other considerations such as, economic, social and political factors, that may be relevant to the situation.”²³³ Thomas Shaffer recounts an excellent example of a lawyer exercising such judgment in his co-authored book, *Lawyers, Clients and Moral Responsibility*.²³⁴ As Shaffer tells it, in 1961 he landed his first legal job with a firm that represented a large manufacturer who operated segregated factories in the southern United States.²³⁵ The client asked his firm’s opinion regarding what effect, if any, President John F. Kennedy’s recent executive order that required that “government contractors integrate their work forces,” would have on its facilities in the South.²³⁶ After conducting the factual investigation and legal research, Schaffer informed the partner in charge of the matter that President Kennedy’s executive order would not, as a practical matter, affect its client’s operations because the company did little business with the federal government of the kind the order sought to regulate.²³⁷ Schaffer sat in on the call that the partner made to the client to inform it that it had no legal obligation to integrate its southern segregated factories.²³⁸ After the partner explained this to the client and articulated the supporting legal analysis, the client asked the partner, “Well, what do you think we ought to do?”²³⁹ The partner replied, “Oh, I don’t think there’s much doubt about what you ought to do; I think you ought to integrate those factories.”²⁴⁰ By the next year, Shaffer reports, the client was “well into the integration of those factories.”²⁴¹ While moral advice is not always necessary or

232. See MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013) (“[A] lawyer who believes his . . . moral beliefs will impair representation must allow [a] court to determine propriety of withdrawal.”).

233. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2013).

234. THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 30–31 (2d ed. 2009).

235. *Id.* at 31.

236. *Id.*

237. *Id.*

238. *Id.* at 30–31.

239. *Id.* at 31.

240. *Id.*

241. *Id.*

appropriate, wise attorneys know that it is always available to them.²⁴²

Those that advocate that law schools should not be responsible for students' moral development base this view on two faulty assumptions. The first of these assumptions is that because law students are mostly young adults, their morals are already established and resistant to change.²⁴³ The emerging field of behavioral ethics, however, suggests that morality is not a character trait "consistent across time and situation," as previously supposed, but rather, it is "situational, dynamic and constantly redefined."²⁴⁴ Along these lines, there is strong empirical evidence to support the view that social norms and culture play a crucial role in both developing morals and abiding by them.²⁴⁵ For example, studies show that "we are more motivated to model our behavior after that of an in-group member rather than that of an out-group member."²⁴⁶ The fact that morals are malleable at any age and that social identity and role, like being a "lawyer," can influence one's morals, argues persuasively for professional moral education. Education can help to create more moral, ethical, and civil students. For example, a study done in 1995 found that teaching legal ethics "in small, highly interactive seminars had a strong positive impact on students' moral judgment scores."²⁴⁷ Importantly, a different study demonstrated—not surprisingly—that "clarity of moral thinking" correlates significantly with ethical conduct.²⁴⁸ What does not help moral development, studies show, is the current way most law schools teach legal ethics, in large, rule-based courses.²⁴⁹

Law schools should also commit to a moral education provided by behavioral ethics to develop a more accurate understanding of how we make ethical and moral decisions and how

242. LEVIT & LINDER, *supra* note 222, at 218 (stating that "[t]he wise lawyer, we believe, sees the conversation between lawyer and client as a moral one").

243. SULLIVAN ET AL., *supra* note 2, at 134.

244. Lisa L. Shu et al., *Ethical Discrepancy: Changing Our Attitudes to Resolve Moral Dissonance*, in BEHAVIORAL BUSINESS ETHICS: SHAPING AN EMERGING FIELD 224–25 (D. De Cramer & A.E. Tenbrunsel eds., 2011).

245. HAIDT, *supra* note 140, at 112–13.

246. *Id.* at 9.

247. *Id.*

248. SULLIVAN ET AL., *supra* note 2, at 134.

249. *Id.*

those decisions so often go wrong. Behavioral ethics is helping to explain the psychological processes that cause us to “behav[e] contrary to our best intentions.”²⁵⁰ These psychological processes not only prevent us from recognizing ethical issues when they arise, but also prevent us from learning from our mistakes.²⁵¹ These processes include incrementalism, cognitive dissonance, and ethical fading to identify just three common “blind spots” that cause us to engage in unethical or immoral behavior.²⁵² The promise of behavioral ethics is that once professionals are aware of these blind spots in moral decision-making they can take steps to avoid them.²⁵³ Thus, this emerging science tells us that we must not only teach students what the ethical standards are, but also teach them a systematic way to “reflect realistically” on their ethical failures so they can do better next time.²⁵⁴

A second faulty, and troubling, assumption upon which the anti-moral education viewpoint rests is that there are no normative moral principles universal to the legal profession. Of course there

250. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS* 4 (2011).

251. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Ethics*, 45 ARIZ. ST. L.J. 1107, 1153 (2013) (explaining behavioral ethics in the lawyering context and providing an excellent and accessible survey of this important, emerging field of study).

252. ROBBENNOLT & STERNLIGHT, *supra* note 135, at 1116–24. Incrementalism, as I use the term, refers to the process where a seemingly minor ethical violation leads to a willingness to commit more serious ethical violations. CAROL TAVRIS & ELLIOT ARSONSON, *MISTAKES WERE MADE (BUT NOT BY ME)* 33–34 (2007). For instance, a minor ethical violation can start “a process of entrapment—action, justification, further action—that increases our intensity and commitment, and may end up taking us far from our original intentions or principles.” *Id.* Cognitive dissonance is a psychological process that creates a mental tension “whenever a person holds two cognitions (ideas, attitudes, beliefs, opinions) that are psychologically inconsistent.” *Id.* at 13. When people act in ways that might be interpreted as inconsistent with their principles, cognitive dissonance theory tells us that they will rationalize that behavior to reduce the cognitive tension. *Id.* at 15. Finally, ethical fading is a psychological process whereby a person “does not ‘see’ the moral components of an ethical decision not so much because they are morally uneducated, but because psychological processes ‘fade’ the ethics from an ethical dilemma.” Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224 (2004).

253. *Id.* at 1156.

254. BAZERMAN & TENBRUNSEL, *supra* note 250, at 158.

are. And we, as faculty, should imbue students with them by word and example. The Model Rules, Oaths of Office, and our history are replete with normative principles that have both ethical and moral dimensions. “Truthfulness,” “conflicts of interests,” and “justice” are just three of the core normative principles that have as much to do with morals as they do with ethics.²⁵⁵ Moreover, professional education is as much about who a person is as it is about what a person does.²⁵⁶ Law schools have a responsibility to shape the mind and the student in the same way that a Marine sergeant shapes the mind and the soldier (although our methods are hopefully gentler). If well executed, both are positive transformational experiences.

Still, there are dissenters who hold a different view. For example, a view that the Carnegie Report found “prevalent” among the law schools its team visited is captured in the following quote from a “senior faculty member”:

‘I want to push students to think by asking them “what would you do?” but I avoid asking them “what is good?” or “what should you be doing?” or “what role should you have?” or “what view should you take on this issue?” I consider them to be adults and would prefer them to bring their own values to law school than to try to inculcate them with my values.’²⁵⁷

But these are precisely the questions that we ought to be asking our students, and not only in legal ethics courses. In some

255. The ABA Model Rules of Professional Responsibility state that “[a] lawyer . . . is . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT pmbll., § 1 (2013). The California Attorney Oath of Office is typical of such oaths when it states: “To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” CAL. BUS. & PROF. CODE § 6068 (d) (West 2014). The MacCrate Report found “fundamental values” of the profession that included the following: “striving to promote justice, fairness and morality.” A.B.A. SEC. LEGAL EDUC. AND PROF. DEV.—AN EDUC. CONTINUUM, A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 140–41 (1992).

256. SULLIVAN ET AL., *supra* note 2, at 186.

257. *Id.* at 135–36.

circumstances, our role as faculty will be to help students develop a systematic way of recognizing and addressing moral dilemmas when there are no clear normative answers. A way to accomplish this is by guiding them to ask even harder, more important questions that might reveal an answer that is right for them: Who will I become by deciding one way or another? Whom will I hurt by deciding one way or another? What values important to me are at stake by deciding one way or another? In other circumstances, however, not only should we help students to ask these probing questions, but we should also guide them to the correct normative answers when they implicate moral imperatives of our profession. Which choice is more honest? Which choice is more just? Which choice promotes transparency? If we do not assume responsibility for handing down core professional values, we fail our students, and deny a long history of moral education that is one of the most important patrimonies of our profession.²⁵⁸

Law schools need to incorporate moral development in their core curricula, where law students can grapple with the kind of moral issues they will face when they practice. This education, I believe, must begin early in a law school career and continue throughout it if we are to graduate lawyers with a well-developed moral sense, as well as a well-developed ethical sense. A positive development in direction is that many schools have added “professionalism” courses as part of the required first-year curriculum, where students learn about, among other things, professional morals, ethics, and other good “habits” of lawyering.²⁵⁹ Finally, law schools have a duty to impart normative ethical and moral standards that are central to their identities as future lawyers and a systematic way for students to engage in ethical decision-making. As we have seen, recent research on moral development suggests that adult student morals are “dynamic” and can be improved through education.²⁶⁰ To waste the opportunity to produce morally good and ethical attorneys is, itself, a moral failing.

258. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 27–28 (1994).

259. Schools that have included professionalism as part of their core curriculum have either added “professionalism components to existing first year courses or they have offered first year students elective opportunities that include this kind of instruction.” Carpenter, *supra* note 44, at 102.

260. *Id.*

IV. THE BEAUTIFUL

Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the world.

—Albert Einstein²⁶¹

The Greeks' "subjective experience of beauty" generally refers to the creation of an aesthetically pleasing environment characterized by form, function, and balance.²⁶² In the context of the legal profession, incorporating "beauty" could mean structuring the profession so that clients find creative and functional solutions to their problems in a time- and cost-efficient manner, and lawyers could find personal satisfaction in the process. One might conclude that the best lawyers are the ones who are creative problem solvers. Creativity is the ability to produce "both a novel response and an appropriate, useful, correct or valuable response" to a client's problem.²⁶³ The process of creative problem solving in lawyers not only enhances client satisfaction, but also produces happier lawyers.

Professor Carrie Menkel-Meadow has asked, "Is it possible to speak of legal creativity or is the phrase itself an oxymoron?"²⁶⁴ One finds scant evidence that law might be a creative endeavor when one surveys law school curricula. The over-emphasis in law school on critical thinking, analysis, and substantive law leaves little room for students to appreciate that the practice of law is also a creative pursuit. These courses rely heavily on "convergent thinking," which is critical thinking that "troubleshoots, fine tunes, selects[,] and implements."²⁶⁵ Critical thinking is a form of left-brain directed thinking, which is "sequential, literal, functional, textual and

261. George Sylvester Viereck, *What Life Means to Einstein*, SATURDAY EVENING POST, Oct. 26, 1929, at 117, http://www.saturdayeveningpost.com/wp-content/uploads/satevepost/what_life_means_to_einstein.pdf.

262. See Hamilton, *supra* note 8, at 43 (discussing the simplistic, calm, and orderly style of Greek architecture).

263. BREST & KRIEGER, *supra* note 119, at 68. The authors explained, "[g]ood lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and the most precious of all qualities, good judgment." *Id.* at 3.

264. *Id.* at 68.

265. *Id.* at 13.

analytic.”²⁶⁶ Law school has historically selected for, taught, and rewarded this left-brain directed thinking through the Socratic method of instruction and through its examinations, including the bar exam.

Nonetheless, truly distinctive lawyers are those who can additionally engage in holistic and creative right-brain directed thinking. While creativity relies partly on the more judicial and critical functions of the left-brain, it also incorporates the use of the right-brain directed thinking in what is known as “divergent thinking.”²⁶⁷ Divergent thinking “conceives” and “envisions.”²⁶⁸ Naturally, creative lawyers are those who can create new arguments and do not just rely on precedent. This kind of thinking is in concert with ancient Greek rhetorical traditions that some scholars believe should be emphasized in legal education.²⁶⁹ Rhetoric, as many of the ancient Greeks understood it, was not just a bag of persuasive linguistic tricks but rather a way of seeing and engaging in the world.²⁷⁰ This humanistic way of seeing and engaging the world imparted important “humanistic capabilities” that are desirable, but often missing from modern legal practice.²⁷¹ Two of these capabilities are “ingenuity of finding similarities among seemingly different factors” and “the imaginative capacity to create a new understanding of reality.”²⁷² Thus, lawyers should have the ability to see the law as it should be or as they might wish it to be and not just how it is.

266. DANIEL H. PINK, *A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE* 26 (2005).

267. BREST & KRIEGER, *supra* note 119, at 13–14.

268. *Id.* at 13–14.

269. Francis J. Mootz, *Vico, Llewellyn, and the Task of Legal Education*, 57 *LOY. L. REV.* 135, 155 (2011).

270. *Id.* Isocrates vision of rhetoric in particular saw rhetoric as “a bias for a self-reflective performance of civic excellence.” EKATERINA HASKINS, *LOGOS AND POWER IN ISOCRATES AND ARISTOTLE* 134 (2004).

271. Mootz, *supra* note 269, at 139. These ancient rhetorical traditions were defended in a famous oration, entitled, “On the Study Methods of Our Time,” given by Professor Giambattista Vico at the 1708 University of Naples commencement, which is widely considered one of the last and best efforts arguing for the value of traditional rhetorical education in the face of the growing acceptance of the Cartesian method, which emphasizes “critical” thinking skills that form the basis of modern legal education. *Id.* at 136–37.

272. *Id.* at 139.

One of the most famous examples of this creative capability can be found in Professor Charles Reich's Article, *The New Property*, where he envisioned a new way of thinking about the rights citizens have in government assistance, concluding that government assistance was a new kind of property right.²⁷³ This new way of looking at government assistance was eventually adopted in *Goldberg v. Kelly*, the Supreme Court case that found that welfare benefits were a form of property under the U.S. Constitution deserving of due process protection.²⁷⁴ This idea seems obvious fifty years later, but was revolutionary at the time. To arrive at new and creative solutions, like the ones articulated in *The New Property*, lawyers need to make intuitive leaps, see overarching patterns, and connect ideas that are not immediately obvious.²⁷⁵ William James, the Harvard University professor who is considered one of the fathers of modern psychology, explained the creative process this way:

Instead of thoughts of concrete things patiently following one another in a beaten track of habitual suggestion, we have the most . . . rarefied abstractions and discriminations, the most unheard of combination of elements, the subtlest associations of analogy; in a word, we seem suddenly introduced into a seething cauldron of ideas, where everything is fizzling and bobbing about in a state of bewildering activity, where partnerships can be joined or loosened in an instant, treadmill routine is unknown, and the unexpected seems only law.²⁷⁶

In other words, right-brain directed thinking is not the rational, linear kind of thinking that we most often associate with "thinking like a lawyer." Rather it is a form of cognition that "reason[s] holistically, recognize[s] patterns, and interpret[s]

273. Charles Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

274. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

275. BREST & KRIEGER, *supra* note 119, at 73–74.

276. William James, *Great Men, Great Thoughts, and the Environment*, ATL. MONTHLY 456 (Oct. 1880).

emotions and nonverbal expressions.” Lawyers who can think creatively are highly valuable to their clients.

This more creative style of thinking was the way of the ancient Greeks as well. Ms. Hamilton shares her insights on this topic:

The Greek mind was free to think about the world as it pleased, to reject all traditional explanations, to disregard all the priests taught, to search unhampered by any outside authority for the truth. The Greeks had free scope for their scientific genius and they laid the foundations of our science to-day.²⁷⁷

They were a culture of constant questioners and seekers of knowledge and truth. When you combine their undying love of knowledge and truth with their passion for freedom, the result was an environment that was the ultimate breeding ground for new ideas. In Ancient Greece, unlike other ancient cultures, “[m]en were thinking for themselves.”²⁷⁸ In other ancient cultures, the importance of the state superseded the importance of individual thought.²⁷⁹ The ancient Greeks, however, were trailblazers in championing individual creative thinking, giving rise to a society where “[a]ll things are to be examined and called into question. There are no limits set to thought.”²⁸⁰

While creativity has always been a valuable quality in the practice of law, it is going to become even more vital in the twenty-first century because of the role of technology in the law.²⁸¹ This thesis is underscored by a recent comprehensive IBM survey of 1,500 chief executive officers across 33 industries, where creativity was found to be the most “crucial” factor for success.²⁸² The popular writer Daniel Pink states we are leaving the Information Age and entering what he terms the “Conceptual Age,” in which creativity, among other things, will take on paramount

277. HAMILTON, *supra* note 8, at 29.

278. *Id.* at 25.

279. *Id.*

280. *Id.*

281. BREST & KRIEGER, *supra* note 119, at 3.

282. Laura Pappano, *Learning to Think Outside the Box*, N.Y. TIMES, Feb. 5, 2014, at ED8.

importance.²⁸³ Pink defines the Conceptual Age as one in which participants have the “ability to create artistic and emotional beauty, to detect patterns and opportunities, to craft a satisfying narrative, and to combine seemingly unrelated ideas into a novel invention.”²⁸⁴ Pink posits that to survive in this new age, industries need to ask themselves: “Can a computer do it faster?” or “Can someone overseas do it cheaper?”²⁸⁵ If the answer to either question is “yes,” the industry is in trouble.²⁸⁶ Unfortunately, in the legal profession, we can answer “yes” to both of these questions, largely because of developments in technology.

In law, the future trend is for more and more “disruptive” technologies to change the way law is practiced.²⁸⁷ This is consistent with Richard Susskind’s thesis in *Tomorrow’s Lawyers* that the disruptive drivers of change are “more for less,” “liberalization” of who can practice law, and “information technology.”²⁸⁸ First, technologies are being developed to do the work that lawyers previously performed. One example is the use of “predictive coding.” Formerly, law firms would charge thousands of billable hours for lawyers to produce and review documents in discovery.²⁸⁹ Now, predictive coding, which uses computer algorithms to search documents for key terms, can perform the same task in a fraction of the time and at a fraction of the cost.²⁹⁰ Federal courts have sanctioned its use as an “acceptable substitute for manual review,” and at least one federal court has mandated its use.²⁹¹ Although still controversial, the use of predictive coding is becoming the new standard for large discovery requests, particularly because

283. PINK, *supra* note 266, at 48–49.

284. *Id.* at 48, 51–52 (adding that the Conceptual Age involves “the ability to empathize, to understand the subtleties of human interaction, to find joy in oneself, and to elicit it in others, and to stretch beyond the quotation in pursuit of purpose and meaning”).

285. *Id.*

286. *Id.*

287. SUSSKIND, *supra* note 24, at 13.

288. *Id.* at 3–14.

289. Tonia Hap Murphy, *Mandating Use of Predictive Coding in Electronic Discovery: An Ill-Advised Judicial Intrusion*, 50 AM. BUS. L.J. 609, 611 (2013).

290. *Id.* at 619.

291. *Id.* at 612; *see also* William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 487–88 (2013).

the federal discovery rule mandates that courts secure the “just, speedy[,] and inexpensive determination of lawsuits.”²⁹²

Greater technology makes creativity an important element in creating new ways to practice law more efficiently and provide new services. Again, quoting Susskind, “the challenge is to innovate, to practise law in ways that we could not have done in the past.”²⁹³ This means that lawyers with an intimate knowledge of the law and legal systems will be needed to create software and other technical systems to better serve clients.²⁹⁴ Lex Machina, a legal analytics company, offers an example of one such system. Using proprietary software, Lex Machina mines intellectual property litigation data made available through public and private databases, such as Pacer, USPTO, and EDIS, to find “meaningful patterns” that can help lawyers and clients make better decisions related to their litigation needs.²⁹⁵ In every filed IP case, the software extracts and organizes information related to “asserted patents, findings and outcomes, including damages award.”²⁹⁶ It also tracks “the players involved, including the attorneys, law firms, parties, and judges.”²⁹⁷ With this information, Lex Machina is able to offer revolutionary services that help lawyers in three ways. First, lawyers could uncover how certain judges and districts ruled on patent cases.²⁹⁸ One could even identify how a certain judge ruled on summary judgment motions and “then investigate what strategies worked in those cases.”²⁹⁹ Second, lawyers could learn how aggressive particular companies are in defending their patents and how successful they are in defending them.³⁰⁰ Third, lawyers could learn how successful various law firms are in prosecuting or defending patent litigation.³⁰¹ These are just a few of the services that Lex Machina offers that could significantly enhance litigation strategy information. None of this

292. Henderson, *supra* note 291, at 488 (quoting FED. R. CIV. P. 1).

293. SUSSKIND, *supra* note 24, at 13.

294. *Id.* at 111–12.

295. *What We Do*, LEX MACHINA, <https://lexmachina.com/what-we-do> (last visited Mar. 10, 2014).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

information could have been possible, or practically accessible, without the technological advancements in data storage and mining and the creativity and ingenuity of the lawyers who developed it.

In addition, technology facilitates legal research and communications such that more and more legal work is being assigned to offices overseas, where trained employees perform the work more cheaply than domestic lawyers. Organizations and the law firms that work for them also have accepted the economic logic of outsourcing as they increasingly use English-speaking, common-law-trained attorneys in other countries to cut legal expenses.³⁰² Although outsourcing legal work is still controversial and on a relatively small scale, it is a rapidly growing, cost-saving practice.³⁰³

This practice should cause lawyers and legal educators concern—especially in an already tight legal job market. The practice of outsourcing raises particular concerns for those attorneys who are merely good legal analysts and technicians because, as we will see, those are the traits that are more easily outsourced.³⁰⁴ It is much harder to outsource attorneys who are valued equally for their technical skills as they are for their creative and problem-solving skills, the latter two being to a greater extent culture-specific.

The presently small but growing trend of outsourcing legal work shows every sign of having a significant effect on the American legal marketplace. In the next few years organizations are

302. See Alexandra Hanson, Comment, *Legal Process Outsourcing to India: So Hot Right Now!*, 62 SMU L. REV. 1889, 1895 (2009) (listing law firms that represent Fortune 1000 companies and the companies themselves as clients of an Indian company offering document review and other legal services); Carlo D'Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or "Flattener?"*, 14 TEX. WESLEYAN L. REV. 167, 172–73 (2008) (“[L]aw schools in India and the Philippines teach an English-language based curriculum that is rooted in English common law principles . . . [therefore,] it is easy to see why law firms will be tempted to increasingly outsource legal work overseas.”).

303. See Hanson, *supra* note 302, at 1891–92 (noting that while India has become the outsourcing destination for U.S. projects, critics of the practice point to difficulties created by cultural differences, excessive distance, inadequate data protection, and perceived “widespread” corruption).

304. Jose A. Arambulo, *O Where, O Where Has My Legal Job Gone?: Examining the Realities of “Offshoring” Legal Work and Why States Can Regulate the Practice Despite Congress’ Broad Power Under the Foreign Commerce Clause*, 38 SW. L. REV. 195, 202 (2008).

expected to more than double the amount of legal work they send overseas to countries like India and the Philippines, increasing from around 35,000 jobs in 2010 to 79,000 jobs in 2015.³⁰⁵ By 2015, some forecast that revenue from U.S. offshore legal services in India will increase to four billion dollars.³⁰⁶ While researchers disagree on what percentage of legal work realistically can be outsourced, most agree that the percentage of legal work done offshore will increase, perhaps significantly.³⁰⁷

As organizations become more comfortable outsourcing legal work, the sophistication of the outsourced work is also increasing.³⁰⁸ While the outsourcing of labor-intensive tasks, such as document review, has historically generated savings, all types of legal work are being done by foreign attorneys for U.S. consumption.³⁰⁹ Legal work that is presently being done offshore includes “legal research; drafting contracts and litigation documents, including divorce papers; drafting memoranda and briefs; drafting real estate documents; and patent, trademark, and copyright work.”³¹⁰ In terms of quality of work, David Perla, co-founder of Pangea3, one of India’s largest providers of legal process outsourcing (LPO), boasts that he can hire the “best and brightest young lawyers in India” to do document reviews, while American contract attorneys hired to do the same task in America “have minimal skills and zero motivation.”³¹¹ Another India-based LPO, Lexadigm, has boasted that it “drafted its first brief for a U.S. Supreme Court case, involving the application to a tax dispute of the Fifth Amendment’s due process clause.”³¹²

Although the percentage of legal work presently being outsourced still represents only a small fraction of the U.S. legal services economy, there is considerable incentive for growth.³¹³ The

305. D’Angelo, *supra* note 302, at 174.

306. Hanson, *supra* note 302, at 1893.

307. Arambulo, *supra* note 304, at 200.

308. *Id.* at 201.

309. Hanson, *supra* note 302, at 1893.

310. Arambulo, *supra* note 304, at 202.

311. Hanson, *supra* note 302, at 1895.

312. Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS (May/June 2005), http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp.

313. The U.S. legal services market was valued at approximately \$160 billion. *See* Arambulo, *supra* note 304, at 199 (noting that only 2–3% of legal

average Indian lawyer's compensation is significantly less than his American counterpart. While difficult to get exact figures, reports are that most Indian lawyers made less than \$10,000 a year in 2008.³¹⁴ The median salary in 2008 for an American attorney working in a small firm of 11–25 attorneys was approximately \$65,000.³¹⁵ Even at the most elite Indian law firms where salaries have doubled in recent years because of growing demand, legal work can be done much more inexpensively than at most American law firms.³¹⁶ With bonuses, an Indian lawyer at an elite firm could make about \$30,000 in 2011—still about half of what the median American starting salary was during that approximate time frame.³¹⁷ The costs become even more disparate when comparing an *average* Indian law salary, and even an elite Indian law firm salary, to the \$160,000 salary of a *starting* associate at a major New York law firm.³¹⁸ As organizations increase efforts to reduce legal expenses and law firms increase efforts to maintain services while simultaneously decreasing overhead, offshoring legal work presents an attractive option.³¹⁹

To the extent that lawyers and legal educators continue to focus on improving legal analytical and technical skills to the near exclusion of other important professional skills like creativity and problem solving, American attorneys will be increasingly

services have been outsourced, but business considerations, such as cutting costs and increasing time efficiency, may motivate growth in outsourcing legal services).

314. Anthony Lin, *Legal Outsourcing in India Is Growing but Still Confronts Fundamental Issues*, N.Y. L.J. (Jan. 28, 2008).

315. *What Do Lawyers Earn? A 15 Year Perspective 1994–2008*, NALP (Aug. 2009), <http://www.nalp.org/aug09newlawyersal>.

316. Kian Ganz, *Indian Graduates See Salaries Double*, THE LAW., Dec. 5, 2011, <http://www.thelawyer.com/indian-graduates-see-salaries-double/1010532.article>.

317. *Id.* In 2011, the median starting salary for American lawyers was \$60,000 and the median firm salary was \$85,000. *Median Private Practice Starting Salaries for the Class of 2011 Plunge as Private Practice Jobs Continue to Erode*, NALP (July 12, 2012), http://www.nalp.org/classof2011_salpressrel.

318. Hanson, *supra* note 302, at 1893.

319. The American Bar Association has held that there is “nothing unethical about a lawyer outsourcing legal and nonlegal services” as long as the legal work performed is done with the “legal knowledge, skill, thoroughness and preparation reasonably necessary for representation.” Hanson, *supra* note 302, at 1896–97.

disadvantaged in the growing and flattening global legal services market. The skills of researching and writing briefs, for example, are comparable in most English-speaking, common-law-based societies. Thus, these skills can be more easily outsourced to foreign firms. As one commentator states, “[i]f young lawyers continue to graduate from law school with only back-office skills, then the consequence will be either a decrease in the starting salaries for newly hired lawyers or a drastic decline in the number of available job offerings.”³²⁰ While lawyers proficient in problem solving will not be immune from the effects of outsourcing, they will be able to provide a service not easily outsourced. Unlike legal technical skills, creative problem-solving skills and interpersonal conflict management skills are culture-specific.³²¹ The ways one deals with a dispute in India are different from the way one deals with similar disputes in the U.S.³²² While intercultural dispute resolution skills can be learned, they are not as easily transferable as technical skills.³²³ Thus, creating conflict-competent lawyers not only benefits the client, but it also benefits the lawyers by making them more competitive in the marketplace.

If lawyers are to produce consistently creative solutions for their clients, it is incumbent on law schools to train law students to engage in this type of intellectual activity. Law schools can do a better job of cultivating a whole-brain lawyer who can engage in divergent thinking, as well as convergent thinking. Law schools need to recognize that creative thinking is as valued a competency as evaluation and critical thinking. In addition to the fact that the marketplace places greater value on creativity, other academic

320. D’Angelo, *supra* note 302, at 192.

321. See Catherine H. Tinsely, *Culture and Conflict: Enlarging Our Dispute Resolution Framework*, in *THE HANDBOOK OF NEGOTIATION AND CULTURE* 193 (Michele J. Gelfand & Jeanne M. Brett eds., 2004) (noting that culture affects how individuals view conflicts because “[c]ulture is the set of solutions that a society has evolved to deal with the regular problems that face it” and since “societies face different environments, it is reasonable to expect they will develop different cultural characteristics”).

322. See JEANNE M. BRETT, *NEGOTIATING GLOBALLY* 9 (2001) (discussing the perceived differences between Western and Eastern cultures in negotiations).

323. See *id.* at 22 (noting the importance of building relationships because intercultural “[n]egotiations are not just about economic outcomes but also about relational outcomes”).

disciplines recognized long ago the growing importance that creativity plays in the new economy. Bloom's taxonomy of learning objectives nearly 20 years ago replaced "evaluating" with "creating" as its most important competency.³²⁴ Programs like moot court and trial advocacy do give students experience with creativity in formulating arguments; but by necessity, the legal problems in such programs often have a predetermined universe of arguments and counter-arguments so that the exercises are easily subject to objective grading and critique.³²⁵ Clinics offer more opportunities for students to be creative, but most law schools do not require students to participate in a clinic and, for those that do, the experience is typically limited to a small number of credit hours.³²⁶ Moreover, clinics have limited control over whether the matters that they handle are routine or would benefit from a creative solution.

By requiring courses that emphasize creativity in addition to other legal skills, law schools can cultivate students' divergent thinking abilities while heightening awareness of the role that creativity will play in their practice. Harvard Law School recently introduced such a course, a "Problem Solving Workshop," into its first-year curriculum.³²⁷ The course uses simulations to introduce students to legal problem solving by having students confront client problems "before the client's goals are clarified, before the full range of options is explored, and before a course of conduct is chosen."³²⁸ The ability to tackle problems at the start and in realistic settings permits students to use their creative problem-solving skills, as well as their legal and analytical skills. The course specifically addresses questions like: "*What sort of problems do lawyers solve? How do they solve them? What intellectual construct do they bring to bear? What practical judgments?*"³²⁹ Other schools have recognized the

324. Pappano, *supra* note 282.

325. See Michael Guanantonio, *The Practical Use of the Trial Advocacy Course in Today's Legal Education Curriculum*, 50 DUQ. L. REV. 485, 498 (2012) (comparing the skills tested by a traditional three-hour exam to those tested in a trial advocacy class).

326. Carpenter, *supra* note 44, at 67.

327. *Problem Solving Workshop*, HARV. L. SCH., <http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html> (last visited Mar. 10, 2014).

328. *Id.*

329. *Id.*

wisdom in emphasizing the role that creative problem solving plays in the practice of law and have begun to introduce similar courses in their first-year curricula.³³⁰

There are also a variety of courses perhaps better suited for the upper-division curriculum that could boost law students' creativity. One such course is *Designing Legal Expert Systems*, offered at Georgetown Law Center, which teaches law students how to create computer programs to solve real legal issues. More specifically, legal expert systems are computer applications ("apps") that "replicate the thought processes and actions of a lawyer in connection with a specific legal question."³³¹ Because they are run on a computer program, they "permit the rapid execution of complex logic and the generation of high quality documents tailored to a user's specific circumstances."³³² What makes this course particularly valuable to students is that they are developing apps for real clients with real needs. For example, a group of students created an app for the California Foreclosure Advisor, a non-profit organization that provides informational resources for consumers concerned about banks foreclosing on their homes. The app, which takes only a few minutes to use and is available on the organization's website, takes the consumers through a series of questions and then produces a detailed home foreclosure report that explains to the consumers their "rights and options, provides guidance on what to expect, and highlights resources for further assistance."³³³ The value of such a course cannot be overstated. To create such apps, students must interface with clients, understand their clients' needs, understand the substantive law, and perform complicated legal analysis. But, most of all, they must use their creative problem-solving skills to create something original, functional, and valuable. The one thing that neither they, nor the instructor, need to know for this course is how to write computer code because all of the apps are written using software that does not require

330. Elizabeth Moroney, *Suffolk Law Launches Problem Solving Workshop*, HARV. L. SCH., <http://blogs.law.harvard.edu/hlscasestudies/2013/06/25/suffolk-law-launches-problem-solving-workshop/> (last visited Mar. 10, 2014).

331. *Legal Expert Systems in the Classroom*, GEO. L. SCH., <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/legal-technologies/legal-expert-systems/> (last visited Mar. 10, 2014).

332. *Id.*

333. *Id.*

programming knowledge.³³⁴ These are just two examples of an array of possible courses that provide students a structured setting to flex their creative muscles and build skills that will distinguish them as lawyers.

If you ever have the desire to be inspired, entertained, and educated all at the same time, spend twenty minutes watching Sir Ken Robinson's 2006 Ted Talk on the topic of creativity, which has, at this writing, the well-deserved distinction of being the most viewed Ted Talk ever.³³⁵ In his talk, Robinson, an education expert, discusses how our primary and secondary educational systems are failing our children, and consequently our society, by over-valuing critical and logical thinking skills and undervaluing creative thinking skills.³³⁶ Like Pink and Susskind, he believes that the new century will need creative thinkers more than ever.³³⁷ Moreover, Robinson believes that "we don't grow into creativity, we grow out of it [and o]ften we are educated out of it."³³⁸ What Robinson believes about primary and secondary education, I believe about most law schools in our current system. Students that enter with little creativity leave that way, and students that enter with well-developed creativity frequently leave with those abilities diminished. Law schools should place greater emphasis on teaching creativity because of the prominent role it will play in the professional lives of lawyers in the twenty-first century.

334. The course uses the company Neota Logic that "provides an authoring interface to build the system without programming knowledge." *Id.* You can find more information about Neota Logic at <http://www.neotalogic.com>. You can find information about the Georgetown course at <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/legal-technologies/legal-expert-systems/>.

335. As of this writing, Sir Ken Robinson's 2006 Ted Talk has been viewed 26,656,999 times. *See* Sir Ken Robinson, *How Schools Kill Creativity*, TED TALK (June 2006), http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity.html.

336. *Id.*

337. KEN ROBINSON ET AL., *OUT OF OUR MINDS 2* (2001).

338. *Id.* at 50.

V. CONCLUSION

[Y]ou are better and more completely educated . . . because you have seen the truth of things beautiful and just and good.

—Plato³³⁹

I have looked to the wisdom of Ancient Greece, a cluster of city-states that existed long ago for a short time, for guidance on how modern law schools can better prepare litigators for the challenges and opportunities they will encounter in twenty-first century legal practice. Our intellectual journey back to Ancient Greece suggests that law schools can help their students meet the modern challenges in legal practice by including more of “the true, the good and the beautiful” in the form of collaborative advocacy, professional moral development, and creativity in their core curricula. In *Tomorrow’s Lawyers*, Susskind observes that most law schools are still clinging to a twentieth-century legal educational model (substantially similar to a nineteenth-century legal educational model) that seeks to create “face-to-face, consultative advisors who specialize in black-letter law of individual jurisdictions and charge by the hour.”³⁴⁰ Susskind concludes, and I agree, that this “traditional” law practice is rapidly becoming less relevant because of a need for greater cost-effectiveness in a new global economy, liberalization of laws governing who can provide legal services, and, most of all, emerging technologies that are transforming legal practice.³⁴¹ Law schools have done a remarkable job in the last century in attaining academic credibility, which was one of Dean Langdell’s goals in introducing the Socratic method to legal education.³⁴² If law schools are to maintain their status as highly regarded academic institutions, however, they must follow Dean Langdell’s example of reforming legal education in ways that respond to the needs of the current and future generations of lawyers whose clients will expect of them a

339. PLATO, REPUBLIC ¶ 520, at 172 (G.M.A Grube trans., 1971).

340. SUSSKIND, *supra* note 24, at 135–36.

341. *Id.* at 136. Susskind says that we should be trying to produce future generations of lawyers “to be more flexible, team-based, hybrid professionals, who are able to transcend legal boundaries, speak the language of the boardroom, and are motivated to draw on techniques of modern management and information technology.” *Id.*

342. Rubin, *supra* note 5, at 612–13.

broader definition of what it means to be an “advocate” than the one most law schools have previously contemplated. Embracing an expansive definition of advocacy will not only make happier clients, but also make happier lawyers. The ancient Greeks defined happiness as the “exercise of vital powers along lines of excellence in a life affording them scope.”³⁴³ I believe that expanding the core content of the law school curriculum in the ways expressed in this Article will produce lawyers who will better serve their clients and better appreciate the wide-ranging challenges and opportunities that a life in the law affords them for the exercise of their “vital powers.”

343. HAMILTON, *supra* note 8, at 24.