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### Practicing Practical Wisdom

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# Practicing Practical Wisdom

by Deborah J. Cantrell\*  
and Kenneth Sharpe\*\*

## I. INTRODUCTION

Here is what we believe and what we set out to test: Wisdom is not an innate character trait; no one automatically is wise; and wisdom is learned and acquired. More importantly, one can learn and acquire wisdom intentionally and skillfully—one can practice it. And, if the practice is structured in particular ways, the practice *will* improve one's capacities to act with wisdom. For lawyers, and even more so for law students, that should be heartening. For legal educators, the ability to improve one's capacity to act with wisdom should be a call to action.

We set out to discern the best conditions a legal educator could use to actually cultivate wisdom in law students. As a starting point, we needed to refine what kind of wisdom we were striving to cultivate. We chose to situate ourselves within the Aristotelian tradition, which embraces the idea of wisdom-in-action, or "practical wisdom."<sup>1</sup> Practical wisdom is dependent on the particularities and context of the specific choices made or problems solved.<sup>2</sup> It does not remain aloof or removed from the facts on the ground.<sup>3</sup> Practical wisdom does not try to abstract

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\* Associate Professor of Law, University of Colorado Law School. We want to express tremendous gratitude to the students in our legal ethics classes who so readily and profoundly engaged with us in our efforts to practice practical wisdom. Without them, this Article would not exist. We received rich feedback from our colleagues at the University of Colorado works-in-progress series. We would also like to particularly thank Brad Bernthal, Tammy Kuennen, Helen Norton, and Amy Uelmen.

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1. See BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 5 (2010).

2. *Id.*

3. *Id.* at 5-6.

itself from context.<sup>4</sup> Furthermore, and critically, practical wisdom always attends to the normative valence of context, thereby also mooring itself to higher order values.<sup>5</sup>

The first step in our project was to reconsider the legal ethics literature about professional identity and to bring together two rich strands of that literature. We labelled the first strand the “formation” strand, and it is a long-standing exploration about how the professional identity of a lawyer is formed both in law school and beyond.<sup>6</sup> We called the second strand the “role” strand. It, too, is a long-standing exploration, but it has focused on larger normative questions regarding the appropriate role of a lawyer in a democratic and just society.<sup>7</sup> Interestingly, the formation strand seldom has explicitly considered the “role” question, while the role strand seldom has explicitly considered the “formation” question. However, practical wisdom demands both questions be answered concurrently—one can only practice practical wisdom if one knows toward what aim one is striving.

Our next step was to more carefully discern the component parts of practical wisdom. In other words, what particular capacities does a lawyer need to cultivate to achieve practical wisdom? We hypothesized that practical wisdom requires a lawyer to have at least three specific

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4. *Id.* at 6.

5. *Id.* at 7-8.

6. Some examples from this rich strand of literature include the following: WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (often referred to as “The Carnegie Report”); Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 LAW & CONTEMP. PROBS. 37 (1995); Lois R. Lupica, *Professional Responsibility Redesign: Sparking a Dialogue Between Students and the Bar*, 29 J. LEGAL PROF. 71 (2004); James R. Elkins, *Symptoms Exposed When Legalists Engage in Moral Discourse: Reflections on the Difficulties of Talking Ethics*, 17 VT. L. REV. 353 (1993); Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons From the Carnegie Foundation’s Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998); Paula M. Young, *Teaching Professional Ethics to Lawyers and Mediators Using Active Learning Techniques*, 40 SW. L. REV. 127 (2010).

7. Some of the well-recognized literature in this strand includes the following: MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* (3d ed. 2004); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979); Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003); Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988).

capacities: the capacity for empathy, the capacity for compassion, and the capacity to situate the endeavor within a broader web of relationships other than just the dyadic relationship between the lawyer and client (what we called “relationality”). We explore each of those capacities more fully below.

Our final step was to craft and test a pedagogy that truly allowed the practice of practical wisdom within the context of a law school legal ethics class. We took the lesson from research on adult learning seriously—that adults learn best when they can use their own experiences to form the basis of their learning.<sup>8</sup> We also took the lesson that practical wisdom demands actual context seriously. Thus, we determined that all of our teaching and learning would start from lawyering narratives that students wrote about or orally shared in every class, and that other legal ethics texts and cases would be integrated into these narratives.<sup>9</sup> While that meant as teachers we would not actually know in advance how a class would unfold, we always knew that we would be working with deeply engaging material for the students. Further, we provided prompts prior to class for the narrative assignments so that students’ stories were usually of a piece. In that way, we had some helpful focus that was still flexible and dynamic. Finally, we introduced our students to mindfulness training<sup>10</sup> and consistently relied on it to ensure that we cultivated another important feature both of adult learning and of the development of wisdom—reflective and iterative practice.

Below, we share our story and our students’ stories of practicing practical wisdom.

## II. FRAMING THE INQUIRY ABOUT PRACTICAL WISDOM

How can law schools give students the practice they need to learn practical wisdom? Implicit in that question is the claim that practical wisdom is a competency that can and must be cultivated in an applied way. In other words, abstract or general conversations about the topic

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8. See generally MALCOLM KNOWLES, *THE ADULT LEARNER: A NEGLECTED SPECIES* (4th ed. 1990).

9. For a compelling example of narrative as a tool for developing practical wisdom, see Timothy W. Floyd & John Gallagher, *Legal Ethics, Narrative, and Professional Identity: The Story of David Spaulding*, 59 MERCER L. REV. 941 (2008).

10. There are a myriad of particular techniques that can be found under the umbrella of “mindfulness training,” almost all of which spring from some form of Buddhist meditation. See generally JAY MICHAELSON, *EVOLVING DHARMA: MEDITATION, BUDDHISM, AND THE NEXT GENERATION OF ENLIGHTENMENT* (2013). “Mindfulness” typically refers to a habit of mental attention that is fulsome and nonjudgmental. See *id.* at xv (listing several different definitions of “mindfulness”).

of practical wisdom do not build the capacity to behave in a practically wise manner. However, simply insisting that students participate in some hands-on legal practice (whether through law school clinical programs or outside externships) also likely does not cultivate practical wisdom on its own.<sup>11</sup> To answer the quandary of how law students might practice practical wisdom, we launched an inquiry along several dimensions. We thought it important to investigate the range of possibilities for what it generally means for a lawyer to be practically wise. We also wanted to be clear about what more specific competencies are imbedded in the idea of practical wisdom. And, we wanted to investigate what kind of pedagogical design would push students to actually practice practical wisdom in a classroom setting.

A lawyer with practical *intelligence* knows how to give guidance about conduct related to real problems people face and how to translate general laws and principles into concrete guidance for action.<sup>12</sup> That practical intelligence becomes practical *wisdom* if the lawyer knows how to consider multiple viewpoints relevant in the particular situation, to discern the full range of ethical and moral dimensions of the situation, and to consider all of that in light of the broad normative aims or purposes of the lawyering profession.<sup>13</sup>

The philosophy based definition of practical wisdom understands practical wisdom as a virtue and as a competency.<sup>14</sup> In other words, practical wisdom requires a lawyer to consider the particular facts presented by a problem in light of more general values; to do so one takes the perspective of the lawyer's client as well as any other person involved in the problem.<sup>15</sup> The lawyer does not tailor advice so that the client's interests automatically or unquestioningly are served over other interests.<sup>16</sup> Instead, the lawyer's advice considers the client's interest, the other interests involved, and the relevant norms.<sup>17</sup> As Anthony Kronman has argued, practical wisdom is "a certain calmness in [the lawyer's] deliberations, together with a balanced sympathy toward the

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11. One of the authors of this Article previously argued that a clinic focused on legal ethics can be a potent setting in which law students learn practical wisdom. See Deborah J. Cantrell, *Teaching Practical Wisdom*, 55 S.C. L. REV. 391, 393 (2004).

12. Robert J. Sternberg, *A Balance Theory of Wisdom*, 2 REV. GEN. PSYCHOL. 347, 351-52 (1998). The idea of practical intelligence was developed by psychologist Robert J. Sternberg. Sternberg distinguished between practical intelligence and wisdom, noting that wisdom demanded more than just practical intelligence. See generally *id.*

13. See *id.* at 353.

14. See *id.* at 358.

15. *Id.* at 353.

16. *Id.* at 356.

17. *Id.*

various concerns of which his situation (or the situation of his client) requires that he take account. These are qualities as much of feeling as of thought."<sup>18</sup> The "balanced sympathy" to which Kronman refers requires the lawyer to advise in a way that capaciously engages the interests of the individuals involved as well as considers broader systemic interests, all of which invariably include ethical and moral dimensions.<sup>19</sup>

Psychologists studying intelligence and wisdom similarly emphasize the importance of norms and the capacity to balance.<sup>20</sup> People demonstrate wisdom when they consider intrapersonal, interpersonal, and extrapersonal interests and balance those interests in deciding how to adapt, shape, or select a particular environment in a way designed to achieve "a common good for all relevant stakeholders."<sup>21</sup> For example, psychologist Robert Sternberg has articulated a balance theory of wisdom.<sup>22</sup> Sternberg argues that wisdom is a particular kind of practical intelligence.<sup>23</sup> In his research, Sternberg looked at practitioners in various fields and gave them a series of problems to solve to determine a measurement for practical intelligence.<sup>24</sup> Sternberg found that practical intelligence includes an ability to solve problems practically, verbal skills, "intellectual balance and integration, goal orientation and attainment, contextual intelligence, and fluid thought."<sup>25</sup> Sternberg further found a subset of skills he labeled and classified as wisdom including "reasoning ability, sagacity, learning from ideas and environment, judgment, expeditious use of information, and perspicacity."<sup>26</sup> Based on his research, Sternberg proposed that wisdom differs from general practical intelligence in that wisdom is a balancing of interests with the goal of achieving a common good.<sup>27</sup> Practical intelligence does not require a balancing of interests and can include a decision to be self-interested.<sup>28</sup> Furthermore, Sternberg's research

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18. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 16 (1993).

19. *Id.*

20. Sternberg, *A Balance Theory of Wisdom*, *supra* note 12, at 347.

21. Robert J. Sternberg, *Intelligence and Wisdom*, in *HANDBOOK OF INTELLIGENCE* 631, 638 (Robert J. Sternberg ed., 2000).

22. Sternberg, *A Balance Theory of Wisdom*, *supra* note 12, at 347, 353.

23. *Id.* at 351.

24. *Id.* at 351-52.

25. Sternberg, *Intelligence and Wisdom*, *supra* note 21, at 632.

26. *Id.*

27. Sternberg, *A Balance Theory of Wisdom*, *supra* note 12, at 353-54.

28. *Id.*

demonstrates that wisdom is normative and presumes a set of values.<sup>29</sup> Both Kronman and Sternberg articulate practical wisdom as requiring the ability to balance.<sup>30</sup> When we think of law and of lawyering, the word "balancing" often brings to mind the idea of two sides. We think of the image of Lady Justice holding her scales and we are reminded to pay attention to each side of the scale as we strive towards a just outcome. However, the idea of balancing two sides is too crabbed as applied to practical wisdom, including the ways in which Kronman and Sternberg have described it. The balancing required by practical wisdom is multi-faceted and more accurately described as a process that first requires the fulsome identification of the facts, players, and issues and dilemmas presented, followed by a consideration of the range of choices available, followed by a weighing and prioritizing of interests achieved with different outcomes.<sup>31</sup> Because legal problems so commonly get presented only as dyadic transactions or disputes, that structural misassumption creates a strong risk that practical wisdom will be misunderstood as the practice of balancing one side against another.

Further, to some degree, the ways that both Kronman and Sternberg investigate practical wisdom result in it becoming a kind of "end state." They ask the questions, "What is this thing called practical wisdom?" and "What features should we look for in a person who has achieved the state of being practically wise?" Those questions are critical, and the answers that Kronman and Sternberg provide are useful markers one can use. What the focus on end state misses, however, is that it is equally important to think about practical wisdom as a process.<sup>32</sup> If a person who is practically wise shows perspicacity, as Sternberg suggests, then what process and what techniques did that person use to gain such perspicacity? We took up exactly that critical process question—what does the *practice* of practical wisdom look like and what competencies are required?

Encouraging students to learn the wisdom needed to practice practical wisdom is partly a problem of pedagogy, and we will turn to that in a moment. Nevertheless, there is also a deeper (and prior) conceptual

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29. *Id.* at 358.

30. See KRONMAN, *supra* note 18, at 87; Sternberg, *A Balance Theory of Wisdom*, *supra* note 12, at 347.

31. See Sternberg, *Intelligence and Wisdom*, *supra* note 21, at 637.

32. To be sure, both Kronman and Sternberg acknowledge ways in which one learns practical wisdom. For example, Sternberg's research includes descriptions of "end states" that result from actions. See *id.* at 635. Sternberg describes the concept of "tacit knowledge," which he defines as the "knowing how." *Id.* Tacit knowledge is more than knowing a particular fact; tacit knowledge develops from action and experience. *Id.* at 635-36.



problem that appears in the literature about legal ethics. One strand in that literature emphasizes the importance of professional formation: professional identity can and should be taught and developed.<sup>33</sup> There are different visions of the pedagogy of formation and debates about whether law schools do it well. It is generally agreed that law schools are really good at teaching students to “think like a lawyer.”<sup>34</sup> It is not generally agreed that law schools are good at forming practically wise lawyers.<sup>35</sup>

When one is concerned with forming practically wise lawyers, one must widen the debates about professional formation from a focus only on teaching processes to a focus including inquiries about purpose or aim. A conversation about practical wisdom demands a normative commitment, and much of the professional formation literature leaves wide open a question critical to the true learning of practical wisdom—“formed for what?”<sup>36</sup> For a lawyer to exercise practical wisdom, that exercise must be aimed at some purpose—at some “telos.”<sup>37</sup> Katherine Kruse captures that critical question when she writes:

In exercising professional judgment, a lawyer draws on an implicit underlying understanding of professional role that strikes a balance between competing professional values, even if the balancing process remains under the surface. A lawyer's exercise of professional judgment thus contains within it an operative theory about the role of lawyers in the legal system and in society.<sup>38</sup>

Fortunately, there is a second strand in the legal ethics literature that can be helpful here: it considers what the appropriate *role* of the lawyer is in our society and how that role drives what is considered to be

33. See *supra* note 7 and accompanying text.

34. SULLIVAN ET AL., *supra* note 6, at 1-3.

35. *Id.* at 8.

36. The ethics formation literature regularly acknowledges that lawyering has ethical and moral components. See generally LUBAN, *LAWYERS AND JUSTICE*, *supra* note 7. However, the literature usually does not delve into the particulars and, instead, implicitly assumes that there is one agreed upon vision of lawyering. There have been voices scattered throughout who have argued that professional formation processes must always first be embedded in a normative point of view. See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 31 (1995); Daisy Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 196 (2012).

37. “Telos” is the Greek word meaning “[e]nd, purpose, ultimate object or aim.” OXFORD ENGLISH DICTIONARY 742 (2d ed. 1989).

38. Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 251 (2011).

appropriate and ethical lawyering.<sup>39</sup> The role literature is longstanding, robust, and nuanced.<sup>40</sup> The literature reflects many of the more general core normative debates about what constitutes a successful (and ethical) individual life and what constitutes a successful (and ethical) collective life.<sup>41</sup> We focused with our students on four views of what the role of a lawyer could (or should) be. We noted at the outset that our choices of four normative visions for the role of a lawyer were not an exclusive list of choices. We also noted that our descriptions of the four roles in some ways simplified and made static what in practice is a more complicated and dynamic experience. Nonetheless, each of the visions prioritizes certain normative principles over others. What we wanted most was for our students to see how changing normative priorities could lead a lawyer to make different ethical decisions. We asked students to wrestle with the critiques of each view as well so that they truly understood normative assumptions imbedded in each view. On a regular basis, we tried to notice in class discussions when and how it was that a lawyer could generally prefer one of the normative roles but could reasonably choose to act more consistently with a different role because a particular context offered up reasons for a lawyer to prefer the normative prioritizing choices of the different role.

The first role we considered commonly is labeled the "Dominant View" of lawyering.<sup>42</sup> Under the Dominant View, a lawyer's role is conceived in the context of the American adversary system.<sup>43</sup> That system presumes the fairest, most accurate, and therefore just, way to resolve disputes is for a neutral decisionmaker (judge or jury) to hear each side in the dispute tell her story in as robust a manner possible and to critique the other side as thoroughly as possible.<sup>44</sup> Through such vigorous advocacy the "truth should out." Because the adversary system has specialized rules and procedures, there needs to be experts available for disputants to use to navigate the system.<sup>45</sup> Thus, the lawyer's role

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39. *Id.*

40. *See id.*

41. *See id.* at 252.

42. *See* SIMON, *supra* note 7, at 7. Simon is credited for coining the label of "Dominant View." *Id.* at 9-10. Others have called the view the "Standard Conception" of lawyering. *See* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 7, at xix-xx.

43. SIMON, *supra* note 7, at 8.

44. *See* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 7, at 56-58 (describing the key features of the adversary system); *see also* Deborah J. Cantrell, *What's Love Got to Do With It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296, 302-03 (2010) (providing an overview of the Dominant View).

45. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 17, at 56-57.

is to be a vigorous, thorough, and diligent advocate for the client.<sup>46</sup> The lawyer owes loyalty to the client and follows the client's directions and wishes as fully as the boundaries of law permit.<sup>47</sup> The role is to be an agent for the client.<sup>48</sup> Thus, the attorney is not accountable for the client's moral choices or choices of action, even if those choices are reprehensible to the lawyer, so long as the client's choices are legal.<sup>49</sup>

Supporters of the Dominant View highlight its ethos of service—a lawyer who truly commits to this view does so by fully embracing their obligation to be in service to a client and to be a clean and clear conduit in representing the client's views and goals.<sup>50</sup> The principle of protecting client autonomy strongly animates the Dominant View. Students for whom this view was appealing had to face the critique that the adversary system that exists in real life is not the ideal contained in the Dominant View.<sup>51</sup> In the real world, clients (and lawyers) can and do choose to pursue goals other than letting the truth out. Clients do not always have equally-skilled lawyers, and many persons do not have lawyers. Thus, the neutral decisionmaker often may not learn the best and the worst about each side's position and may be pressed to make a decision with imperfect information. Further, students, as developing lawyers themselves, had to face the critique that basic psychological and cognitive processes regularly interfere with and impede their ability to be a neutral conduit for their clients.<sup>52</sup>

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46. *Id.* at 57.

47. *Id.*

48. *Id.*

49. David Luban refers to this feature as the “principle of non-accountability.” *Id.* at 7.

50. See Spaulding, *Reinterpreting Professional Identity*, *supra* note 7. Other defenses of the standard conception of lawyering include Stephen L. Pepper's classic defense, see Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995), and FREEDMAN & SMITH, *supra* note 7; cf. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 698 (1988) (“[L]awyers claim that the adversary ethic is an ethic of service to the autonomy—the self rule or the freedom—of clients.”).

51. For a thorough-going critique of the underlying assumptions of the adversary system, see LUBAN, *LAWYERS AND JUSTICE*, *supra* note 7, at 67-103; see also Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, *supra* note 50.

52. See generally PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* (2010); see also Robert K. Vischer, *Moral Engagement Without the “Moral Law”: A Post-Canons View of Attorneys’ Moral Accountability*, 2008 J. PROF. LAW. 213 (2008) (focusing in particular on the ways in which lawyers and clients might mistake the moral valence of their conversations).

The next view we considered is the "Rebellious Lawyering" View.<sup>53</sup> Like Dominant View lawyers, practicing Rebellious Lawyers take their role as an agent or a conduit for the client's choices seriously, and take seriously that the client is the expert about whatever challenge or problem she faces.<sup>54</sup> Rebellious Lawyering is consonant with the Dominant View in that both highly privilege client autonomy. However, Rebellious Lawyering is deeply skeptical about most lawyers' skillfulness in allowing the client to make decisions in a truly autonomous way because lawyers are readily affected by cognitive biases.<sup>55</sup>

Rebellious Lawyering posits that both the elite, privileged backgrounds of most lawyers and the training that happens in law schools cultivate a kind of arrogance in lawyers that they are the true experts about law and legal process.<sup>56</sup> Thus, instead of protecting client autonomy, most traditionally-trained lawyers subordinate their clients and interject the lawyers' own assessments and conclusions into the decision-making and problem-solving. Rebellious Lawyering calls on lawyers to be aware of, and reject, such dominating behavior and to return to a pure form of being an agent for the client-principal.<sup>57</sup>

Rebellious Lawyers are subversive in another way, too. They situate their work exclusively within communities that are underserved and subordinated because a commitment to justice should include a commitment to disrupting and changing the elite power structure.<sup>58</sup> Rebellious Lawyers do not prioritize making change through existing

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53. Gerald López created the phrase "Rebellious Lawyering." See LÓPEZ, *supra* note 7.

54. *Id.* at 26-27.

55. López called non-rebellious lawyering "regnant" lawyering. *Id.* at 24-25 (listing characteristics of "regnant" lawyering).

56. See, e.g., Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1024 (1994) ("There are . . . significant dangers when middle class lawyers get intimately involved in the task of organizing the poor. More articulate, better educated, aggressive by nature and training, some lawyers tend to dominate newly formed groups, even when they try not to . . .").

57. See Gerald López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989) (arguing that lawyers must understand clients as experts about their own lives).

58. See generally Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992) (critically examining the effectiveness of regnant versus rebellious, collectivized lawyering); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Sameer Asher, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); see also Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995).

structures like courts or legislatures because those institutions themselves are so fully captured by the elites determined to preserve their power.<sup>59</sup>

As students considered the appeal of Rebellious Lawyering, we asked them to consider whether that role situated lawyers in such a subservient position that they would no longer effectively bring their expertise into conversations with clients.<sup>60</sup> We also considered how the view of Rebellious Lawyering was helpful (or unhelpful) in settings in which the client had no choice but to engage with traditional legal institutions, such as the field of criminal defense.<sup>61</sup>

The third view we discussed is referred to as the "Moral Activist" or "Morally Engaged" View of lawyering and began with work by David Luban.<sup>62</sup> Under that normative view, a lawyer's role requires moral behavior that is consistent with the moral behavior required of every member of society.<sup>63</sup> Unlike the Dominant View, in which a lawyer is not accountable for a client's moral choices and must push the client's goals vigorously, the Morally Engaged View requires a lawyer to actively consider one's own moral stance towards the work the lawyer is asked to perform.<sup>64</sup> The lawyer must also engage the client in respectful conversations about the client's moral choices and how those choices

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59. As part of our class readings about Rebellious Lawyering, we also read literature about "cause lawyering." We defined cause lawyering as lawyering where the primary commitment is to a political or ideological goal and where lawyering actions prioritize greater social or political change over outcomes that are beneficial solely for an individual client. Cause lawyering was one of several examples of other possible normative frames we explored with students. We noted how one might consider oneself both a Rebellious Lawyer and a Cause Lawyer but that one might be a Cause Lawyer without being a Rebellious Lawyer. We also noted how one could have a primary commitment to political or social change while also situating oneself in several of the four normative visions on which we focused. Throughout, we pressed our students to unpack the underlying normative principles that they were prioritizing rather than just to label their lawyering reflexively and unthoughtfully.

60. For a critique of López's view, see Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U. L. REV. 941 (2012) (labeling the kind of role López calls for as one that requires a lawyer to be hyper-loyal to a client and describing the negative consequences of such hyper-loyalty).

61. We asked students to consider whether some settings actually required a lawyer to try and robustly persuade her client to change the client's mind. See Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479 (2007) (arguing that a criminal defense lawyer should aggressively try and persuade her client to avoid losing physical liberty).

62. LUBAN, LAWYERS AND JUSTICE, *supra* note 7, at 104-27.

63. *Id.* at 108.

64. *Id.* at 154-56.

affect the client's conduct and the lawyer's conduct.<sup>65</sup> The fact that a person is a "lawyer" or a "client" does not permit the person to act outside of expected moral and ethical behavior.<sup>66</sup> The Morally Engaged View argues that just and fair results are most likely to occur when all of the participants in a legal matter, lawyers included, pay attention to their own moral and ethical choices and respectfully, but robustly, engage with others' choices.<sup>67</sup>

Of course, our students worried about their clients' abilities to feel equally situated in the relationship with them as attorneys. They also worried that the Morally Engaged View would necessarily cause them to disempower their clients. We regularly considered what a lawyer might actually say that would invite a moral conversation with a client that ensured the client did not feel like the client was being talked down to or scolded. We also talked about how and when we assumed something about our client's moral motivations—either good or bad—and why those assumptions might matter in achieving a good and ethical result.<sup>68</sup>

The final normative role view that we discussed is what we have called the "Relational" View of lawyering.<sup>69</sup> The Relational View is consonant with the Morally Engaged View of lawyering in that it requires lawyers to comport themselves with generally-expected moral and ethical behavior.<sup>70</sup> The Relational View expands beyond the Morally Engaged View in that it asks lawyers to situate themselves

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65. See Vischer, *supra* note 52, at 222.

66. *Id.* at 214-15.

67. *Id.* at 220-23.

68. See generally THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 13-15, 94 (1991) (describing modern legal ethics as a conversation not about being a good person but about rights and, later, articulating that a key goal for a lawyer should be to help others become good persons).

69. The phrase "relational lawyering" is a nascent one. See Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513 (2012); see also Cantrell, *Social Change*, *supra* note 60, at 941 (arguing that cause lawyers and clients would be more effective if they took a relational approach to their work). Many would credit Thomas L. Shaffer for laying the foundation for the Relational View of lawyering. See Thomas L. Shaffer, *How I Changed My Mind*, 10 J. L. & RELIGION 291, 296-97 (1994) (discussing the fact of relationality in human life and in lawyering). For a more expansive overview of the idea of relationality and the law, see JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011).

70. Cantrell, *Social Change*, *supra* note 60, at 963.

within a relevant web of relationships and not just the dyadic relationship between lawyer and client.<sup>71</sup>

Under the Relational View, the focal point is not just the client.<sup>72</sup> A Relational lawyer understands herself to have moral and ethical obligations not only to the client but also to the myriad of other persons who are involved in, or affected by, the issue that the client wishes to address.<sup>73</sup> The Relational View expects that the lawyer is carefully attentive to the client's perspective and goals.<sup>74</sup> However, the Relational lawyer makes sure that she assists the client in perceiving the contours of the issue from multiple perspectives and in that way pushes the client to consider the most capacious set of goals and outcomes (competing or consonant).<sup>75</sup> Further, the Relational lawyer is attentive to the range of emotions present in the situation, embraces the positive possibilities of those emotions, and helps the client navigate the negative consequences of emotions.<sup>76</sup> The Relational View starts with the descriptive fact that no one is ever in an exclusively dyadic relationship.<sup>77</sup> Thus, one's choices always have consequences that ripple throughout one's web of relationships. A lawyer working within the Relational View provides the wisest advice and counsel only by working across the fullest web of relationships presented in the legal matter.<sup>78</sup>

For those students for whom client autonomy was paramount, the Relational View triggered worries that a lawyer would replace the

71. See *id.* at 964-65.

72. Cantrell, *What's Love Got to Do With It?*, *supra* note 44, at 331.

73. For an example of how a relational lawyer might consider multiple perspectives and help her client to do so as well, see *id.* at 330-33.

74. *Id.* at 331-32.

75. Cantrell, *Social Change*, *supra* note 60, at 963-64.

76. For an example of what this navigation might look like for a client faced with an emotionally-charged and complicated problem, see Deborah J. Cantrell, *Re-Problematizing Anger in Domestic Violence Advocacy*, 21 AM. U. J. GENDER SOC. POL'Y & L. 837, 852-54 (2013).

77. Cantrell, *Social Change*, *supra* note 60, at 963.

78. Throughout our conversations about the four normative visions on which we focused, we conversed about the idea of "client-centered" lawyering. We noted how lawyers in each of the four normative visions would likely say that they were client-centered because each view embraced the idea that a lawyer wishes to be in service to a client. Throughout class discussions, we pushed students to articulate more carefully on what underlying normative principle(s) they were relying when they said they were being client-centered. For example, did a student believe in the effectiveness of the adversary system and, thus, were lawyers acting in a client-centered manner by spending time to carefully prepare the client to be best able to rebuff the other side's cross-examination? Or, did a student believe that a client could only reach the "best" decision if the lawyer transparently and explicitly checked in the with client about the moral dimensions of the problem and, thus, the student was "client-centered" by having such conversations?

client's wishes with wishes of some other view represented within the web of relationships. Once again, we pushed students to move from abstract worry to concrete actions, and we pressed them to compare and contrast their own behaviors to discern whether they did or did not replace their client's wishes with wishes of others. The crux move here, as with the other normative views, was to insist that students situate their normative inquiries within the context of their own experiences.

In thinking about a pedagogical design through which students could practice practical wisdom, we sought to bring the formation and role strands together. We wanted students to answer the question "formed for what" by encouraging them to recognize that there were different legitimate roles for a lawyer, each of which made some claim to being the "best" at achieving a higher order moral goal like justice, fairness, or dignity. Because each role implies different and legitimate higher aims for lawyering, those aims necessarily shape that practical wisdom must be the following: the exercise of practical wisdom for a Rebellious lawyer very well could be different from the practical wisdom of a Dominant View lawyer. We wanted students to notice, argue about, and ultimately respect those equally legitimate, but competing, roles of the lawyer. We wanted to treat professional formation as the normative process that it is – and should be, rather than treating it simply as a technical process.

By acknowledging the importance of the different roles, we could design a pedagogy to encourage the students to learn the competency and the will (or the habits and the disposition) to successfully make wise judgments that are dependent on contested visions of the lawyer's telos. Concretely, this meant encouraging students to recognize and analyze the "First Principles" that guided *their* practices as student attorneys. For example, were students prioritizing individual client autonomy or prioritizing a commitment to a particular political ideology? We did not want students to start with reading the "black letter law" on legal ethics—the Model Rules of Professional Conduct (Model Rules)—without first understanding that they would need to interpret those Rules in light of their normative commitments and First Principles.<sup>79</sup>

Thus, our pedagogy for encouraging the practice of practical wisdom was deeply influenced by the role strand of the literature regarding the practice of legal ethics. But, the professional formation strand of the literature emphasized something that also was important to us: practical wisdom is a competency (or habit) that a student can cultivate and acquire.<sup>80</sup> Practical wisdom is multifaceted and includes the abilities,

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79. MODEL RULES OF PROF'L CONDUCT R. 1.0 to 8.5 (Am. Bar Ass'n 1998).

80. Lupica, *supra* note 6, at 72.



among others, to analyze a situation from multiple viewpoints, establish rapport with a client, determine competing possible courses of conduct, articulate any ethical or moral concerns raised by the situation, assess the benefits of various outcomes, and proceed with some action.<sup>81</sup> The question is the following: How might one learn the competencies that help one cultivate the disposition to act wisely? Here, we drew on the literature from the learning sciences, specifically adult learning theories.

First, we considered learning through lecture. In legal ethics lecture classes, students are presented with information, either as knowledge established or developed through hypotheticals. Students may actively participate in discussing the issues or the hypotheticals and may posit some behavior they might take as a result while not actually have to *do* anything. Students certainly learn from a lecture, and such legal ethics classes enable students to pass the legal ethics sections of bar exams. But, if the purpose of professional formation is to launch new lawyers to practice law well, that means encouraging them to have the necessary knowledge, skills, and habits. Here, the lecture pedagogy fails. Practical wisdom can be learned, but it can only be learned through experience—a common sense fact strongly supported by research.<sup>82</sup> For example, Malcolm Knowles' adult learning theory contends that experience is critical.<sup>83</sup> That theory proposes that adults come to learning environments with a sense of themselves as self-directed and motivated to learn those skills related to performing the tasks or roles they plan to undertake.<sup>84</sup> Adults learn better when they can actively participate in and reflect on the skills they are seeking to gain.<sup>85</sup> Although practical wisdom can only be learned through experience, not all experiences teach wisdom. To learn from experience you must *structure an experience so that you can learn from it*. Here, we drew on some other basic elements of learning theory. First, we embraced iterative practice with its commitment to acknowledging and harnessing error. We structured learning so that we, and our students, consistently revisited experiences through new frames. Further, we made transparent to our students that iterative practice can only be useful if the practitioner reflects on each iteration. We relied substantially on mindfulness practices, discussed more fully below, to help us and our

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81. See SULLIVAN ET AL., *supra* note 6, at 9.

82. SCHWARTZ & SHARPE, *supra* note 1, at 81-106.

83. See generally KNOWLES, *supra* note 8, at 86.

84. *Id.* at 57.

85. *Id.* at 86-87.

students move into reflection in intentional and transparent ways.<sup>86</sup> That reflective practice was heightened by our constant grounding of discussion in our lived experiences and the lived experiences of our students. In that way, none of us could become detached from the endeavor. Thus, our conversations about choices of action remained deeply personal and helped each of us to feel strongly that our learning mattered, not only to us but also to our colleagues in class and to the persons outside of class with whom we were working.

Finally, we did not separate ourselves from our students in the above processes. We talked about ourselves and our students as one “learning community.” Thus, our structure explicitly embraced the idea that any of us could be a novice in one moment while being an expert in another. In that way, we were not permitted to be passive or complacent about our place in the learning community.

### III. REFINING PRACTICAL WISDOM

#### A. *Refining the Component Parts of Practical Wisdom*

As we thought about our overall definition and framing of practical wisdom laid out above and as we considered relevant precepts of adult learning theories, we pressed ourselves to discern the critical process components of practical wisdom. Had we provided our students only with a definition of practical wisdom, described to them the end state characteristics as provided by Kronman or Sternberg, and then encouraged our students to practice practical wisdom, we would have little success in cultivating practical wisdom. We knew our students needed to have some intellectual understanding of practical wisdom, but we also knew that we had to figure out a process that would lead students to practice practical wisdom. Thus, we pressed ourselves to define critical process components of practical wisdom.

We hypothesized that practical wisdom requires one to be competent in at least three particular actions: empathy, compassion, and relationality (each of which we define and discuss more thoroughly below). We also hypothesized that each of the three actions, and thus practical

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86. We acknowledge the pioneering work of Scott Rogers and Jan Jacobowitz in bringing mindfulness practices into legal education and into the legal ethics curriculum. See Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 198 (2014); see also Peter H. Huang, *How Improving Decision-Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J. L. BUS. & ETHICS 35 (2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474448](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474448).

wisdom as a whole, could be more robustly fostered by mindfulness practices<sup>87</sup> and by intentional self-reflection (we talk about the interconnectedness of mindfulness and self-reflection in a moment).<sup>88</sup> We were completely transparent with our students that our method of learning practical wisdom included specific efforts to cultivate their capacities for empathy, compassion, and relationality, while using mindfulness techniques and intentional self-reflection in those efforts.

We discerned that empathy was an essential component of practical wisdom because it allows for a person to be more capaciously aware of the richness and nuance of the context in which decision-making is occurring. We worked with a standard notion of empathy—the ability to perceive and understand another’s perspective.<sup>89</sup> We emphasized to our students that empathy had to be more than trying to predict what one would do or how one would feel if placed in another’s situation. To put it colloquially, we urged students to move away from the limited inquiry of “What would I do if I were in X’s shoes?” to a more thorough inquiry of “Have I really listened to, and understood, what X is telling me she is feeling about the particular situation, without altering X’s story to fit my own interests or experience?”

We emphasized empathy, which truly requires one to stand in another’s shoes, because we do not think wisdom is achievable without the ability to discern other’s perspectives as accurately and non-judgmentally as possible. Practical wisdom often can lose its “wisdom” if it comes from a self-centered or self-referential position. When the frame is limited and is only self-referential, the risk is that what one believes is wisdom is instead personal judgment based on one’s own limited understanding and interpretation of the specific context.<sup>90</sup>

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87. See generally Leonard L. Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 J. LEGAL EDUC. 634 (2012) (discussing multiple articles regarding the uses and benefits of mindfulness techniques in legal education generally).

88. See generally SUSAN BRYANT, ELLIOT S. MILSTEIN & ANN C. SHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 23-24 (2014).

89. See, e.g., STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 31 (2009).

90. See NORMAN FISCHER, *TRAINING IN COMPASSION: ZEN TEACHINGS ON THE PRACTICE OF LOJONG* 10 (2012). Zen Master Norman Fischer humorously captures the distinction between taking another’s perspective from a self-interested frame and truly taking another’s perspective: “Empathy is the capacity to feel another’s feelings. It requires that we not be so self-absorbed that we’re tone-deaf to the experience of others. Most of us, unfortunately and without realizing it, are living the old joke, ‘Okay, enough about me; let’s talk about what you think about me.’”

We also emphasized that empathy need not include feeling an affinity for, or liking, the other person. Empathy and affinity are different experiences and require different habits of mind. Affinity means feeling some sense of positivity towards another.<sup>91</sup> It often can mean feeling some similarity with another or some sense of shared interests.<sup>92</sup> Affinity often does not feel like it is something that one cultivates, but rather, it is something that is present or is not. In contrast, empathy can exist (and in our model, must be able to exist) without affinity. A careful practitioner of empathy notices whatever affinity responses are made towards another person, positive or negative, and then is able to empathetically take the other's perspective without that process being transfigured by affinity.

A final crucial point we clarified about empathy is that it requires *understanding* another's perspective, *not agreeing* with another's perspective. We were aware of how typical it is to describe a setting in which we were empathizing with another by using a "but" sentence. For example, we might recount the following: "I heard Jane say how offended she was when her boss told her that her work was not as good as a male colleague's, but I think that . . . ." A "but" sentence masquerades as empathy because it acknowledges another's perspective. However, it then immediately moves to a judgment about whether the other's perspective was right, wrong, accurate, inaccurate, or the like.<sup>93</sup> Empathy in that form is like clearing one's throat in anticipation of making the real statement—the throat clearing is prefatory and intended to be ignored.

To help students be more aware of whether they were substituting another's reactions for their own reactions to a situation and when they were subtly judging instead of empathizing, we used the mindfulness technique of "noticing."<sup>94</sup> That technique simply asks a person to notice

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91. See Oxford English Dictionary Online, "affinity," [www.oed.com/view/Entry/3417?re-directedFrom=affinity#eld](http://www.oed.com/view/Entry/3417?re-directedFrom=affinity#eld) (defining "affinity" as "[l]iking for or attraction to a person or thing; natural inclination towards something; sympathy and understanding for something; an instance of this").

92. OXFORD ENGLISH DICTIONARY 217 (2d ed. 1989).

93. Scholars in the field of alternative dispute resolution have described one way to change this dynamic as "adopting the 'and' stance." DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 39-40, 194-95 (1999) (describing the importance of acknowledging that both perspectives in a dispute can be "right," and how using the technique of putting the word "and" in place of words like "but" helps to remind one of the possibility of truthfulness on both sides).

94. For a thorough-going description of a "noticing" practice in a Burmese Theravadan Buddhist practice, see NYANAPONIKA THERA, *THE HEART OF BUDDHIST MEDITATION* 89-99 (1996). We followed a similar, but simplified version, of a "noticing" practice in which the basic instruction was to notice any sensation that arose (physical or mental), and then to

what sensations—physical, mental, or emotional—arise while a person is doing any kind of activity, whether sitting in meditation, listening to another tell a story, arguing a motion to the court, negotiating a deal, or speaking with a client. For example, when a clinic student is meeting with a criminal defense client to discuss an offered plea by the prosecutor, and the client is reacting to the plea offer, the student might notice things such as: “My stomach is growling because I did not have time to eat lunch before meeting with my client,” or “I feel myself getting irritated at my client because she is talking about something that to me seems tangential to whether the plea offer is good,” or “I find myself feeling angry with the prosecutor just like my client is angry because my client and I both agree that the prosecutor is overlooking an important part of our defense.”

The second step of the “noticing” practice, as it relates to cultivating fulsome empathy, is for the student to quickly reflect whether the noticed items might have any positive or negative effect on the student’s ability to empathize with another. For example, the clinic student above might notice that her growling stomach is distracting her from carefully listening to the client, thereby impinging on the ability to effectively empathize. In contrast, when the student notices that she and the client are both angry because they agree that the prosecutor is overlooking a part of the defense, the student can notice how easy it has become to empathize with her client. A key feature of a noticing practice (and of all mindfulness practices) is to notice without judgment.<sup>95</sup> When the student notices her growling stomach, she *just notices* it. She resists making the typical move to judgment. She resists the voice in her head that says, “That was stupid of me not to eat lunch.” Thus, she also resists being captured by an unreflective and habituated response.<sup>96</sup>

Noticing practices lead easily into further and deeper self-reflection about empathy, as well as other facets of practical wisdom. We talked with our students about noticing and self-reflection as separate practices that worked best when combined. Often when we ask ourselves or others to be reflective, we presume that we or they will first be

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let the thought go and return one’s focus to one’s breath. We also began every class meeting with a short group noticing practice in which we focused on our breathing for a certain number of breaths. Noticing practices come in many forms, including secular versions, such as the ones developed by Jon Kabat-Zinn. See generally JON KABAT-ZINN, *WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE* (1994).

95. THERA, *supra* note 94, at 88.

96. See, e.g., Shauna L. Shapiro, Linda E. Carlson, John A. Astin & Benedict Freeman, *Mechanisms of Mindfulness*, 62 J. CLINICAL PSYCHOL. 373, 378 (2006) (identifying axioms of mindfulness and describing “reperceiving” as being able to “observe the contents of consciousness” without being “completely embedded in or fused with such content”).

conscientious about paying attention to the myriad pieces of information that will make the reflection useful and fulsome. In fact, however, most of us rush by that noticing step. We knew from the mindfulness literature that all of us have developed habits of thought that deeply influence how we think, and those habits are triggered without us being aware or noticing the effects of the habits.<sup>97</sup> We fail to include information needed for good reflection and to check assumptions we are making. Our reflection falls prey to cognitive biases, to time pressure, or to unacknowledged anxieties and the like. The mindfulness practice of noticing gives us the tool to interrupt those failures, and ensures that when we move into reflection, we are doing so with a full complement of information.<sup>98</sup> We now talk about mindfulness and self-reflection as “fraternal twins” because they often travel together and are paired up, but they are not exactly the same.

We also used our discussions and experiences related to empathy as the doorway for an ongoing conversation about “difference” and how the experience of being different from another might influence or impede empathy. The “difference” conversations ensured that we could engage our students on critical topics including race, gender, poverty, religion, and ethnic or cultural difference.<sup>99</sup> As we discuss further below, we always tried to situate our difference conversations within the context of the students’ actual experiences. It was important that students see the difference conversations and the affinity (or “sameness”) conversations as inextricably linked together, with both difference and sameness producing the risk that we fail to cultivate empathy to the fullness that is required to produce practical wisdom. Again, noticing practices helped us to bring the above dynamic into the foreground.

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97. See, e.g., *id.*; see also DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (describing a similar cognitive processing phenomenon of “fast” thinking based on the habits formed by cognitive heuristics as contrasted to “slow” thinking based on reflection).

98. KAHNEMAN, *supra* note 97, at 3-4.

99. As we thought about how to set up the difference conversations successfully, we drew on the rich literature about cultural competency. See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001). Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching About Identity, Culture, Language, and Difference*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* (2014). We also specifically considered the role of implicit bias. See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010). Every student completed at least two implicit bias surveys from the Project Implicit website, available at <https://implicit.harvard.edu/implicit/>. We conversed with students about how their capacity for empathy might be influenced by implicit bias without them even being aware of that influence.

We defined "compassion," our second component of practical wisdom, as the ability to perceive the discomfiture of others and to be motivated to assist the person to improve her situation.<sup>100</sup> We see compassion as the mechanism by which one makes sure that wisdom becomes more than an intellectual exercise and, instead, becomes a potentially transformative action. With empathy alone, one might be content to perceive the other's experience, reflect on and assess it, but do nothing more than engage in that process as an intellectual inquiry. Practical wisdom, however, requires more.

In many ways, compassion is empathy to which one adds a desire to affect change. Just like we insisted that the kind of empathy required for practical wisdom must be robust and nuanced, we insisted that the compassion required for practical wisdom be robust and nuanced as well. The kind of compassion we hoped to cultivate requires a person to be motivated to act for reasons other than pity for another. We think of pity as an essentially self-referential response—"In comparison to you, I am better (or better off)." We worry that if one acts out of pity, one is not really taking the perspective of the other or considering actions from the other's point of view. Instead, one is expressing one's own perspective on the other's situation. Further, compassion should not be a polite label used to justify arrogance—"I really feel for you and want to help you out of this situation, but only if we do it my way because I know better than you do what is best."<sup>101</sup>

The robust perspective-taking that we required with empathy plays a key role in avoiding self-referential and domineering, though well-intentioned, compassionate behavior. If one commits to perceiving another's experiences, one also can commit to perceiving several potential options for action, including at least one's own choice and the other's choice.<sup>102</sup> Cultivating compassion may not resolve which choice of action is best or which choice is worst, but it moves the inquiry from an abstract one about what is wise to a concrete one about what is the wise course of conduct given all that one has uncovered about the context.

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100. We defined "compassion" as including the motivation to help another improve her situation as informed by Buddhist teachings on compassion (or "bodhicitta"). See FISCHER, *supra* note 90, at 11-12.

101. We used the mindfulness technique of "noticing" in these settings as well to help us become more fully aware of the kinds of responses arising and to discern between compassion, pity, and benign arrogance.

102. See STONE, PATTON & HEEN, *supra* note 93, at 39-40.

The final component of practical wisdom is something we called "relationality."<sup>103</sup> As we have studied practical wisdom and observed the practice of practical wisdom, we have discerned that the best decision-makers view context as a dynamic, interconnected web of relationships.<sup>104</sup> They configure the setting in terms other than the dyadic relationship between themselves and the other for whom they feel empathy and compassion. In our setting, for example, the practically-wise lawyer assesses context not only from the perspective of the lawyer-client relationship, but also from situating himself or herself and the client within a larger web of relationships (namely, law colleagues, client colleagues, opposing parties, other interested friendly parties, the court system, the boardroom, family, or the affected community). Further, the relevant web of relationships is wide and not bounded by legal concepts such as plaintiff and defendant, buyer and seller, landlord and tenant, and the like.

Even if there might be a legal relationship between two people (for example, a plaintiff versus a defendant in a lawsuit), it may not be the defining feature of the web of relationships. There could be a more important relationship between the plaintiff and defendant (for example, they are business partners), and there could be other connected relationships for the plaintiff and defendant that are more important than their relationship to each other (for example, one of the business partners' spouses is dying of cancer and that partner is more committed to caring for the spouse than focusing on the business).

We think it important for a lawyer and client to discover the web of relationships explicitly because it helps to uncover the relevant context with abundant detail and nuance. An explicit discovery also helps both the lawyer and the client discover unchecked assumptions they are making about what the problem is, who in the web is motivated in what ways, what solutions might be available, and what actions are palatable

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103. We settled on the word "relationality" for brevity, even though we use it to mean a cluster of related issues. For example, relationality can mean the capacity to be sensitive to the range of relationships that are relevant to a particular situation. Relationality can also refer to the actual web of relationships. Throughout this Article, we try to be clear in what sense we are using the word.

104. Again, Norman Fischer captures this sense of interrelatedness nicely when he notes:

So it becomes almost impossible to be willfully, intentionally aggressive, almost impossible to be willfully, intentionally disrespectful of others, because we can simply see with our eyes, just as we can see the sky above and the sun when it sets, that all of life is one sky warmed by one sun.

FISCHER, *supra* note 90, at 13.



or not.<sup>105</sup> For example, if the lawyer for the business partner above with the ill spouse is focused on the legal relationship of business partner plaintiff versus business partner defendant, and the lawyer limits her conversations with the business partner to issues related to the lawsuit, then the lawyer might inappropriately assume the client also is primarily focused on winning the lawsuit. If the business partner client is focused on the other business partner's role as the defendant in a lawsuit, the client might inaccurately assume that the defendant business partner feels nothing but hostility towards the client because the relationship between plaintiffs and defendants is supposed to be adversarial.

Further, we emphasized the image of a web to help our students visualize the many different pathways and different points of connection contained in the situation so our students could practice uncovering context as abundantly as possible. We wanted our students to avoid putting themselves or a client in the middle of all else that radiated. So much of the conversation about legal ethics is framed in the dyadic perspective of the "lawyer-client" relationship.<sup>106</sup> We worry that such implicit (and maybe explicit) framing reinforces an unscrutinized choice about the perspectives that matter in decision-making—context is what the client reports it to be and what the lawyer sees it to be from the client's viewpoint. Even the modest shift in phrasing from the "lawyer-client" relationship to the "web of relationships" would help our students better avoid unscrutinized assumptions.

Finally, as with empathy and compassion, we used the noticing practice to help cultivate relationality and move into thoughtful reflection about relationality. We asked students to write about, or draw out, webs of relationships related to their clients or cases. We used a noticing practice to discern from what vantage points the students gathered a lot of information (usually their clients' or their own), from what vantage points they had less information about, and whether the context looked different in interesting or illuminating ways if different vantage points of the web of relationships were given priority.

In addition to explicitly discerning what we believed the components of practical wisdom to be, we also believed practical wisdom cannot truly develop in fields in which there are multiple normative visions unless a person first understands to which normative vision she has committed. As we noted earlier, one never *just is* practically wise; rather, one always is practically wise *about something*. As we discussed earlier, the legal profession is a field in which there are plural visions about what is the

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105. Pearce & Wald, *supra* note 69, at 529-31.

106. Huang, *supra* note 86.

appropriate role of the lawyer.<sup>107</sup> Each of those visions prioritizes a certain configuration of what we have called "First Principles." The First Principles a lawyer prioritizes affect how that lawyer discerns what is practically wise in a given context.

Consider a lawyer who prioritizes using the law as a mechanism for large scale social change and who believes that social change is more important than an individual client personally benefitting from legal action. When faced with an individual client who now wishes to resolve the matter for her own personal benefit instead of the original pursuit of large-scale social benefits, the lawyer might believe the practically-wise choice requires forcefully advocating with the client to maintain the client's initial commitment to social change. In contrast, if the lawyer prioritizes individual client autonomy as a First Principle, the lawyer might believe it is practically wise to resolve the legal matter as quickly as possible in a way that privileges the client's self-interest.

Further, we strongly believe the Model Rules embrace one normative vision of the role of the lawyer (the Dominant View) and ignore other legitimate normative visions (namely, cause lawyering) that prioritize different First Principles. A lawyer who misperceives the Model Rules as merely technical guidance is likely to act unreflectingly within the normative vision of the Dominant View. Nonetheless, the Model Rules contain many provisions that require a lawyer to exercise discretion or to interpret the scope and contours of duties or obligations. That interpretive process is guided necessarily by one's First Principles. The First Principle of "using law for broad social change" might lead one to interpret rule application in a particular setting in a different way than the First Principle of "protecting individual autonomy." Thus, as part of our process of practicing practical wisdom, we thought it critical that students explore their own commitments to First Principles before interpreting, understanding, or applying any of the Model Rules to a particular context.

As we explored different contexts with our students, our mantra was the following: Remind yourself about how you prioritize First Principles, then look to see if there are any Model Rules relevant in the context, then interpret those rules in light of your First Principles, and then consider the practically wise choice by using each component of practical wisdom.

The final process we thought important was our own commitment to meet the students where they were situated. We understood the importance of starting from a student's own experiences and vantage

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107. See *supra* notes 42, 53, 62, 69 and accompanying text.

points because a student knows her own stories so well and because a student is likely to be highly invested in her own stories and in the resulting behavior and decision-making. We thought those features would make starting a conversation about judgment, ethics, and wisdom more accessible and comfortable. We regularly supplemented our students' stories with narratives from other lawyers, but we tried to never work only from those outside narratives. Similarly, we posited hypotheticals in response to students' own stories, instead of relying on outside hypotheticals.

Further, as we built conversations with our students, we committed to framing the discussions in ways that would trigger "aha" moments, not "gotcha" moments. We wanted students to feel comfortable disclosing their mistakes or whether, after reflection, they would have done things differently. To foster "aha" moments, we often translated the mindfulness noticing technique into questions we posed to students. While the noticing was happening after the fact, it helped us to prompt reflective judgment in our students rather than imposing our own judgments on them.

### *B. Refining a Pedagogy About Practical Wisdom*

How did we build these processes into the actual class structure, and what did we observe and experience in the class? We chose to *start* with the lived experience of our students—their own stories of problems they faced, choices they made, emotions they felt, and their successes or regrets. We had two hypotheses. One was that the best way to learn competencies and habits—the essence of practical wisdom—is by actively grappling with problem-solving and choice-making. The second hypothesis was that situation-based learning is best internalized for future application if the problem is one the student has personally experienced. "Professional practice," as William Sullivan et al. noted, is "judgment in action."<sup>108</sup> A student both knows and is highly invested in her own stories and in her resulting behavior and decision-making. Thus, personally-experienced stories offer the potential to be the richest sources of learning.<sup>109</sup>

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108. SULLIVAN ET AL., *supra* note 6, at 9.

109. Legal scholars and educators have long embraced the use of narrative as a potent teaching tool. See, e.g., Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787 (2000) (reviewing literature specifically about narrative theory and legal ethics). For the use of narratives in the law more generally, see Kim Lane Scheppele, *Foreward: Telling Stories*, 87 *MICH. L. REV.* 2073 (1989).

We taught the class twice.<sup>110</sup> The first time, we structured the class so it would be a small, seminar size. The next time, the class was sized the same as other sections of the required legal ethics course and was capped at forty-five students. We offered the seminar course to students who had taken, or were taking, a clinic.<sup>111</sup> Each enrolled student had experience in one of the clinics that provided legal representation for individual clients (as opposed to working in one of the clinics in which entities are represented). For the larger class, we advised students to enroll only if they felt they had sufficient legal experience to draw on to fully engage with the narrative assignments throughout the semester.<sup>112</sup>

We based all the sessions on the stories we asked the students to bring to class about a personal lawyering experience. These were not stories about "the theory of the case" or the technical details of a transaction. Instead, the stories focused on how the students experienced their legal matter—the choices they made or might have made, their feelings and emotions, and the conundrums they experienced. The stories provided us with the "raw material," which we mined in class discussion to consider what problem-solving might look like when informed with practical wisdom. Importantly, the raw material included descriptions of the student and the relationships with a client, possibly the client's family, other parties, the decision-makers (judges, bosses, board chairs), the witnesses, and the broader justice system and society. We asked students to use techniques of reflectiveness and mindfulness when they wrote and talked about their stories, and we modeled and practiced those techniques in class.

We helped students by providing them with frameworks, theories, tools, readings, or outside narratives that encouraged them to imagine and consider alternative ways they could have handled their own

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110. The first time we taught the class, Ken was on sabbatical from Swarthmore and he was able to be in Boulder to physically co-teach the first third of class. When he returned to the east coast, he and Deborah set up regular phone calls to talk about how class was proceeding the rest of the semester and to keep him abreast of the students' stories. Deborah then taught the class the second time on her own. Ken and she continued to speak regularly by phone or e-mail.

111. Colorado Law has nine clinics. Six of the clinics focus on representing individual clients in various substantive law areas, including criminal defense, family law, and immigration. Another clinic handles environmental advocacy, generally on behalf of non-profit entity clients. One clinic focuses on business formation and handles no litigation. The final clinic pursues policy work on technology issues.

112. Students in the larger class had a mix of summer work experiences, externship experience, and clinic experience. Roughly a third of those students worked with or for entities, both private and governmental. The other two-thirds of the students primarily had experience with individual clients.

experience. The students then had a chance to “practice again” when they returned to their work settings (such as clinics or externships).

Both classes met twice a week for ninety minutes each class. Students in both classes completed the same number of written narrative assignments. Specifically, during the first four weeks of the class, every student wrote a narrative based on reflective prompts we provided, which related to that week's theme.<sup>113</sup> We read all of the narratives before the first class meeting of the week. Then, in the first class, each student randomly exchanged narratives with a classmate. Each student in a pair then provided their colleague with reflective comments about the other's narrative by the second class. We read all of those comments as well.<sup>114</sup> After the initial four weeks, students still brought their own stories into class, but we shared those stories orally.

We designed weekly themes to help the students focus their stories and the discussion. These themes and our follow-up questions were designed to prompt students to learn the core habits and skills of practical wisdom—empathy, compassion, and relationality—all of which were encouraged and buttressed through the processes of mindfulness and self-reflection. The prompts for written assignments typically started with “tell us a story about” one of the following: the best experience you have had as a student attorney with one of your clients, what you think this experience was like for your client, a matter that involved a constellation of people in addition to the client (family members, business partners, other professionals), how you and your client have determined who makes decisions in your case, a time that you disagreed with a client, about a client or a project that you really believed in, and a client you did not believe in.

In much of law school, students are asked to write about the law from a removed perspective, which risks making people ancillary. However, much of actual lawyering and lawyerly writing is about effective storytelling (to a court, to a board of directors, to a government agency).

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113. When Deborah taught the larger class, she provided everyone with technical guidance on a lawyer's duty of confidentiality to ensure that students wrote narratives in ways that would not violate the Model Rules, MODEL RULES OF PROF'L CONDUCT R. 1.6, and could be shared with everyone in class. Since Deborah read the narratives before students exchanged them in class, she was able to make sure that students were making good judgments about preserving confidential information. Deborah was worried that preserving confidentiality in the larger class might be more challenging than it proved to be.

114. The students used those weekly narratives and comments as initial material for a final, longer narrative paper in which they expanded their stories, deepened their self-reflection, and came to some conclusions about the normative role and First Principles they hoped they were committing to.

In building the class around actual stories, we not only helped the students learn how to tell and analyze stories, but we used the narratives and discussion to encourage students to notice and reflect on crucial things that enable good judgment: to locate themselves as an actor in a web of relationships, to empathize with different characters, to listen carefully, to discern nuance in different personalities, to handle ethical dilemmas, and to imagine alternative stories and outcomes.

Reflectiveness and mindfulness were not so much prompts but practices, encouraged by the very structure of the class discussions and the nature of our facilitation. For example, we typically asked students questions such as the following: What did you notice then and what do you notice now? What were you thinking? How did you feel? How did you handle your feelings? What other ways might you have handled them? What choices were not taken? We were not only drawing on their ongoing practical experience as student attorneys but also encouraging them to *practice the practice of ethics* so the habit and skills of reflectiveness or mindfulness would be learned, would become part of their repertoire, and would become a part of them. By inculcating reflection and mindfulness, we aimed for the students to connect their choices and actions to the end goal, the telos, of their roles as lawyers and to become clear about the range of normative end goals from which they could choose.

Reflection and mindfulness—like empathy, compassion, and a sensitivity to relationality—do not always “happen” by getting students to simply tell their stories. The students needed to learn *how* to reflect upon them and *how* to learn from these reflections. Such learning might (and did) include the following: learning through analogy to other student cases or other cases in the literature—noticing what the similarities and differences were; getting guidance from other cases, from principles, and guidelines like the Model Rules; and learning to challenge or interpret the usefulness of the Model Rules in the context of any particular case. We also encouraged students to learn to imagine how they might act in the future.

The format for reflecting on experience in the class always involved writing or telling stories, sharing the writing or telling the stories in class, and then discussing the stories. To help focus this process, we provided a rough scaffold for them. We did not, however, rigorously stick to this order or have a check-list requirement regarding how each paper or discussion needed to progress through the stages. However, the guideline and scaffold generally looked like this: Tell us a story from your work with a client that illustrates this kind of experience. (Experiences sometimes were points of challenge, sometimes points of connection.) Explain the choice you made and how and why you made

it. Explain how you felt about it and how you think your client or other relevant actors felt about it. Think broadly about whom the “relevant actors” could be. Now, identify what First Principles were underneath this choice. What were you aiming at? What does that say about the kind of lawyering role you are committing to? Now look at the Model Rules. How useful were they? What choices would you have had to make to interpret the rule(s) and justify your actions? Would you have countermanded your actions? Looking back on this story, how does understanding your choice, your feelings, the First Principles, and the possible relevant Model Rules help you think about the lawyering role you chose? Would you make another choice if faced with that situation again? Why? Starting with students’ lived experiences meant that the discussion in the class would not be linear. The first task was to get students to talk about their experiences and their choices. The second step was to help them bring out—to uncover or discover—the kind of lawyering role and the telos or aim that undergirded their practice. Our aim here was to encourage reflection and self-awareness. We did not want students to stop at the step where they just identified the aim implicit in their story. We pushed them to use mindfulness and self-reflection to deeply engage their choices, yet also to be curious about what might have happened had they made other choices animated by other normative end goals.

Some of these discussions affirmed the students’ choices and (hopefully) empowered them to choose more intentionally in the future. At times, the discussions caused the students to reflect on and change the kind of aim and the kind of lawyering they were doing—or planned on doing. It would not be surprising if, over the arc of their careers, this kind of reflection and change happened a number of times. (In fact, we firmly hope that this will occur.) As we noted earlier, the discussions were not meant to be a “gotcha” moment as in “look, look, see the wrong thing that you are *really* doing.” Instead, the conversations were designed to encourage an “aha” moment—“Oh, yes, I now see what I am aiming at. I am going to give myself and others an account of it. I will try to describe it, defend it, wonder about it, and reconsider it.”

In discussing the issues, we gently, but adamantly and continuously, encouraged the students to notice what ethical issues were involved in the experience they were recounting. Our aim was not to focus on identifying the technical ethical issue—“Oh, maybe I did not meet the communication standard set out in Model Rule 1.4”—although we did attend to those kinds of questions. Rather it was to illuminate that *every* moment, *every* experience, was infused with an ethical dimension that they needed to be mindful about. We needed students to understand that whether and how they assessed if there was “an ethical issue”

and whether they saw that ethical issue as small and easy, big and hard, or uncontested and contested inextricably was tied to how they exercised the core competencies of practical wisdom situated within their commitment to one of the normative roles of lawyering. The students' stories naturally proved that similar experiences can be understood and viewed differently. Since the students respected each other, they embraced our efforts to use class discussion as a practice space for reconsidering the ethical components of the stories using empathy, compassion, and relationality, and situating those competencies in each of the normative views of lawyering. By using class discussion to practice practical wisdom, our own telos was to confirm that practical wisdom is not an innate trait, but a good mental habit that can be learned and improved upon.

Thus far, we have focused on describing our hypotheses regarding practical wisdom and our design for implementing the practice of practical wisdom. We now consider whether our hypotheses and practices proved useful by exploring a handful of stories that came out of our students' writings and class discussions.

#### IV. THE STORIES

As we described above, the raw materials for each class were the stories students wrote or told about their experiences as lawyers. We revisited stories regularly, and the students updated the class on their work. At the end of the semester, students wrote a final, more in-depth reflection paper in which they considered whether and how they had developed practical wisdom. By the end of our time with these particular learning communities, we had a wealth of material we could reflect back on to consider whether our efforts made a difference in helping students better their competency in practical wisdom. Here are some examples of students practicing practical wisdom.<sup>115</sup>

##### A. *Phil, Joe, and Barbara*

Joe was set up to have a bad experience with his student attorney, Phil, the moment Phil first walked through the door. Joe had been in jail for thirty days when he first met Phil. He was charged with domestic violence (DV) for hitting his girlfriend while they were both

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115. Throughout the narratives, we have anonymized people, places, and details to preserve confidential information as required by Rule of Professional Conduct 1.6. We provided confirming source materials to the editors of Mercer Law Review for our Article to be properly checked. However, to preserve confidentiality, those materials are not publicly available.



drunk and with keeping her from getting away from him. Joe could not raise the \$500 bail to get out of jail and needed an attorney to help him reach a plea or to defend him in court. Joe's previous experiences with lawyers prepared him not to trust his student attorney.

Phil immediately noticed that Joe did not open up. When Phil read the police reports, "Joe just kept saying he was drunk and didn't remember anything in a way that suggested that he just didn't want to talk about it." Phil also noticed how despondent Joe was: alone, with no one to turn to for bail money—the letters Phil had brought to jail for Joe and which Joe had hoped contained bail money totaled only \$50. Phil also noticed how savvy Joe was about the system. Phil explained that the District Attorney (DA) offered six to nine months of jail time or twelve months of probation, and Joe was quickly willing to bargain. He would take three to six months of jail or six to nine months of probation. Phil felt that crafting the right plea for Joe demanded earning Joe's trust:

Every time we ended a meeting I told Joe when I would be back, whether or not I accomplished what I had set out to do, and then I kept those appointments . . . Even going back and telling him I didn't have much news to report because I had not heard back from the DA or had been unable to contact witnesses showed him that I respected him enough to keep my word even if from a practical standpoint it wasn't really necessary. Just the fact that I was there when I said I was going to be showed him that he was respected and not forgotten about while in jail.

In our meetings I was always very upfront about things I didn't know, and I think this also helped me gain credibility. One time [Joe] asked me what would happen if he made bail then did not show up for the hearing and I didn't know. I wasn't sure if failing to appear was violating a court order that could be its own separate charge like violating a protection order, or if it wasn't then what other penalties would be involved. I told him I didn't know, but I wrote it down in front of him, told him I'd ask my supervising attorney and would have the answer for him the next time I was back . . . I think being very willing to show my inexperience gave credibility to the things I said I was certain about and made him feel he could trust his attorney.

That trust turned out to be important. Joe seemed to favor trial (he was certain his girlfriend would not show up) or probation. Phil nudged him away from the trial, pointing out the maximum sentence if his girlfriend did appear. Then, he nudged Joe away from probation: "My primary goal was to get him out of jail; and the secondary goal was to do it without probation because if he got probation, he would probably flee the state." When Phil nudged Joe to take the plea, Joe trusted his advice. Because of the two months Joe already served in jail, in the best

case scenario, he would be released a month before Thanksgiving; in the worst case, it would be after Christmas.

By the end of the process, after Phil's five visits with Joe in jail, Phil had built more than trust.

I got to feel sympathy, compassion, and excitement for [Joe] despite the fact that I think he probably did hit his girlfriend . . . . I was a little apprehensive about how I'd feel about representing DV [domestic violence] clients, but Joe showed me that despite this one bad act I could still feel positive emotions toward him.

They were both pleased when the judge sentenced Joe to three months. Joe was released that same day after having already spent that amount of time in jail.

With Joe, Phil began to reflect on what it meant for him as a lawyer to like a client and to contrast that feeling with empathy. In many ways, Phil's starting efforts were self-focused—ensuring Joe trusted him by keeping all his meetings with Joe and being honest with Joe about legal questions he did or did not know how to answer. As Phil's relationship with Joe grew, Phil had to expand his reflection to consider, not just how Joe saw him, but how he saw Joe and whether Joe was more nuanced and complicated than merely being a DV “offender.” Phil also began to realize he had unconsciously adopted a starting normative view of a lawyer as a paternalistic Dominant View lawyer. One of the unstated reasons that Phil wanted Joe to trust him was that Phil thought he knew what Joe's best choice was (nudging Joe away from trial). Phil wanted to convince Joe to go along with Phil's advice. However, as their relationship grew and as we explicitly discussed normative lawyering roles in class, Phil became aware of, and uncomfortable with, his paternalism. Phil genuinely wanted to engage with his clients, and he wanted to be able to speak his mind with them while not dominating them. He then began to explicitly plan his actions so that they would be consonant with his developing telos of lawyering—a telos that Phil could not yet fully identify or describe but that strongly rejected certain arrogant behaviors popularly associated with lawyering.

Unlike his experience with Joe, Phil initially could not feel either affinity or empathy for his client Barbara. She never even showed up to meet Phil. Still, he represented her with diligence and competence. What motivated him, and did his work require practical wisdom?

At 2:30 a.m., Barbara drove into a rotary, smashing her SUV. She was saved by her airbag and a nearby policeman who helped her out of the vehicle. All signs pointed to her being drunk: no skid marks (she apparently had not even tried to hit the brakes); the officer smelled alcohol on her breath; and there was a blood alcohol test over the legal

limit. When Phil was assigned the case, he sought out Barbara and, not finding her, he diligently tried to track her down:

I called the phone numbers we had for her, I sent her letters, but they all got me nowhere. I even tracked down her mail [carrier] who confirmed that the address we had was only a summer home with no mailbox . . . . We continued the case [in court] until we couldn't anymore and then we just started to litigate it without her. Our only chance of winning at trial would be to keep the blood test out, and even then we were likely to lose. . . .

But Phil pressed on trying to build a case without her. The lynch pin was convincing the judge to preclude the blood alcohol results based on shoddy lab work. Phil spent days preparing his argument. An investigative report about the lab showed so many procedural errors that the lab was forced to close (and the director had resigned). Phil prepared to cross-examine the lab technician who had done the tests. However, on the "day of the hearing, Barbara didn't show so a warrant was issued for her arrest." "Normally," said Phil, "I find a tremendous amount of motivation from getting to know my clients, their families, and their problems." But, when it came to Barbara:

I felt no compassion reading about her situation in the police reports . . . . I felt almost no duty whatsoever for Barbara herself . . . never having met her she was just another drunk driver that could have killed someone. I don't have much sympathy for drunk drivers generally, and I didn't really care if she was arrested, convicted, whatever. For the first half of our relationship, I began to outright resent her . . . . What was so frustrating for me, and made me feel a bitter indignation at having been treated unfairly, was that if I had been able to get in touch with Barbara, we would have just settled the case because there was very little chance of winning her case at trial. In retrospect its crazy to blame someone for treating me unfairly, when they don't even know who I am. Regardless, I had to actively combat my apathy on her case by finding [a different] motivation . . . or else I would have done a crappy job at the hearings.

As with his initial work with Joe, Phil initially moved forward on Barbara's case motivated by his own need to be seen as competent. While Phil went through the experience, he started to consider what telos is being served by criminal defense attorneys. Phil's reflection caused him to decide to make Barbara's case about two other things. First, to hold the prosecutors to a high standard. Because "we love to incarcerate people in this country like no other in the world, I wanted to make sure the jailors jump through the proper hoops to do it." Phil knew he would lose "but god dammit I wasn't going to give them an inch they didn't earn. If this blood test was going to come in then it would

be over my kicking and screaming.” Second, Phil stepped into his role as a criminal defense attorney, and, as he said:

I made it about pride. I felt I had a duty to myself to represent myself as professionally as possible in front of the [Attorney General (AG)], the DA, and the judge. Just because I was an inexperienced student it didn't mean I was going to be a pushover even if it was the AG at the other table . . . . I also felt I had to represent myself and my cohort well out of respect for the court if not the system.

Phil eventually did meet Barbara. She called him a few months later after she was picked up for driving under restraint. They exchanged over eighty emails and he met her once—in court. Barbara took a plea. Phil then filed a number of complicated motions trying to get her license back. He got to know her “decently well”. “We've been through highs and lows together and she gave a heartfelt and sincere sentencing argument herself when she accepted her plea . . . . After so much time with Barbara, the dial has certainly moved from mild resentment to perhaps as far as mild compassion.”

We did not explicitly prompt Phil to talk about trust or tell us why trust was critical to being a competent or diligent lawyer. However, in telling his stories, Phil often reflected on the importance of building trust with Joe and, implicitly, on his own distrust of Barbara. We ran with it (though it was not “scheduled” on the syllabus) and that enabled the class to grapple with the issue concretely—to “discover” it as a potentially crucial issue of professional formation and to feel its importance in their own daily practice. In turn, that opened up a much tougher practical wisdom question of how cultivating empathy and compassion can result in gaining trust. The practical know-how to cultivate empathy and compassion is hard to learn unless it comes from experience and reflection. Phil initially articulated his struggle as one about competency. It was easy to be competent for Joe because Joe opened up and listened to Phil, but it was hard to learn to be competent for Barbara because she was absent for so long. Phil struggled with this issue.

As Phil talked about his experiences and class members reflected back to him, he noticed the difference between empathy and compassion in very concrete situations and considered how both were different from affinity. That, then, raised another critical practical wisdom question: what do you do—what motivates you—when feelings of antipathy are highly salient? In that regard, Barbara's case seemed like a brick wall that Phil ran into. In reflecting on how he pressed on, Phil drew upon broader normative motivations to cultivate empathy and compassion, including his desire to hold the prosecutors feet to the fire in a justice

system that is overcommitted to incarceration, especially of those without resources like Joe and Barbara.

What also struck us—because it was something we had been aiming for and encouraging with the stories and class discussions—was Phil's growing capacity to reflect on *where his feelings were coming from* (self-understanding) and *what he could actively do to educate his emotions*. In his final essay, which was open ended with no specific prompts from us, Phil chose to focus on understanding what compassion was for him, why he did or did not feel it, and what he could do about it. Phil observed that personally knowing a client helped him cultivate empathy and compassion. As he said, the more “involved and present a client is in her interactions with me” the more it will “directly impact my level of compassion.” With Joe (and a second client who was also in jail), Phil stated the following:

I shared much more in their human experience. I saw the food they ate. I smelled the jail they lived in. I followed orders from the same guards they did. I saw the rooms they spent 23 hours a day in . . . . With both [people] I made the decision that they should feel taken care of by their attorney, so I visited them even when it was not technically necessary . . . . [T]he legal issues were fairly easy and straightforward. They both had done what they were accused of doing, so my job was to negotiate as good of a plea as I could. And I did. I know I felt compassion for them because I was also motivated to alleviate their suffering that came from being alone.

Phil reflected “that if Barbara and I had emailed half as much but had met in person 2 – 4 more times I would have felt much more compassion for her.” Recognizing that, Phil said, “can help me push clients to meet up with me in person if we have the option.”

Phil also reflected on the way that race mattered for him when it came to compassion. “I myself am half Mexican and I speak Mexican Spanish. I can't help, or perhaps I don't want to help, that I feel a special connection with Mexican Spanish speakers which inherently makes me feel compassionate toward them.” So, he concluded, he needed to be mindful of “how much these non-Hispanic distinctions affect my compassion” and to “try to monitor this going forward and take steps accordingly.” What kind of steps?

Phil identified some very concrete goals. First, he wanted to have at least three to four personal encounters with clients. Second, he wanted to overcome the resentment that can come when a client is less helpful or less engaged. From the beginning, Phil said: “[I want to] frame our relationship as one where I am there to *assist* in his or her own defense, but am not there to *fix* a client's problem, [because] then I believe clients

will take more responsibility in their cases.” The third goal was the following:

If I notice that I'm in danger of feeling resentful toward a client I can take affirmative steps to increase my compassion toward him. I have been doing compassion building meditations lately where I first envision a friend I respect and love, and cultivate compassion toward him. Then I do the same with someone I feel neutral about, then someone who is difficult or an enemy. Then I try to picture all three of them around me and hold equal compassion toward each. I have had great success with this recently and have been able to cultivate compassion toward the few people I have despised or hated for years. If I have a difficult client I can take 20 minutes and put them in the difficult spot [i.e., placing the person in the spot where one specifically cultivates compassion for an “enemy”] I have faith this will make a tangible difference.

*B. Maureen, Mr. Moss, and Mr. Tuttle*

Maureen was not eager to focus on the call of our opening assignment, which was to discuss her best experience with a client, why she felt she was a “good” lawyer throughout the experience, and to describe her client's perspective about that experience. The extreme nervousness she felt about her ability to serve her clients made her reframe our questions as asking her to speak about “competency.” More particularly, Maureen was worried that the Model Rules required her to be competent, and she did not want to violate that ethical command. From our perspective, we needed to meet Maureen at her starting point—a worry about competency—while encouraging her to see that she could not possibly answer her own question until she could first answer the question of “competent *for what aim, or for what purpose, or for what telos?*”

In ways similar to Phil, Maureen's concerns about her competency were deeply connected to questions of motivation: she was nervous enough about being competent with Mr. Moss with whom she felt a great affinity, but she was even more concerned about being competent with Mr. Tuttle, for whom she felt antipathy. Maureen told us the following even before her first meeting with Mr. Moss at a bond hearing in a misdemeanor case:

I was nervous about a potential language barrier. I was nervous about having to deliver the news that, because of [an immigration detainer], Mr. Moss would be immediately transferred to the immigration detention facility after his criminal bond was paid — if it was paid. I was nervous to share that, regardless of his bond amount in the criminal case, Mr. Moss and his family should be prepared to pay a much higher amount in immigration court. I was nervous about giving

the client had legal advice. I was nervous about not fully understanding how Mr. Moss' criminal charges would affect his immigration case.

After interviewing Mr. Moss, Maureen knew that she would need more time to collect the evidence needed to persuade the judge to lower Mr. Moss' bond amount. That meant convincing Mr. Moss to agree that she could ask the judge to continue the bond hearing. When Mr. Moss agreed, Maureen was so grateful that she "set out on a one-woman mission to do everything [she] could to help Mr. Moss."

Maureen wrote and spoke in class about how much she was motivated in her mission by her affinity for Mr. Moss and his family. Maureen spent numerous hours collecting medical records regarding Mr. Moss' youngest daughter to buttress arguments that Mr. Moss would not leave the country given his daughter's serious illness. She made unannounced visits to witnesses to seek their statements in support of Mr. Moss. She noted how powerful it was for her to meet Mr. Moss' gravely-ill daughter, to hear Mr. Moss talk about his family, and to observe how his worries and concerns played across his face. These small encounters stayed with Maureen and were potent. She recalled how Mr. Moss' "face lit up when I talked about his youngest daughter and her newest nail polish color." She described her affinity as "'Tu lucha es mi lucha.' Your struggle is my struggle."

Maureen's deep personal affinity for Mr. Moss and his family motivated her to act in spite of her nervousness and to learn quickly as much as she could to acquire the competence she needed. This deep affinity also had its challenges. She stated, "I felt more stress, and lost more sleep, over Mr. Moss' case than I did with any other client." Maureen also felt *personally* responsible for the outcome of Mr. Moss' cases in ways that she did not for other clients. She speculated that she felt such responsibility because she thought Mr. Moss was a good person, because she was dismayed at the harshness of the immigration system, and because she was distressed that a family might be separated with tragic results.

Maureen overcame her nervousness with the help of feelings of affinity in the case of Mr. Moss, but such motivation left her in a difficult position with Mr. Tuttle. From the start Maureen's relationship with Mr. Tuttle was rocky. He did not return her phone calls. He showed up at his criminal pre-trial conference early and told the court that Maureen was his attorney, but that he did not know why she was not there. Mr. Tuttle was gone when Maureen arrived at court at the prescribed time, and she learned from others that he had gone ahead with the pre-trial conference without her, complaining about her absence. When Mr. Tuttle finally came to a meeting with Maureen, he

arrived late and high. From the start, Maureen felt disrespected by Mr. Tuttle and was offended by his behavior.

If it were not enough that Maureen found Mr. Tuttle personally challenging, she also did not find his legal case compelling. He was involved in a ruckus at a local dive bar and arrested. Throughout the criminal case, Mr. Tuttle insisted that he should not have been arrested, arguing at times that he was racially profiled and at other times that the police were "The Man" and were out to get average guys like him. As Maureen described it, "My impression was that Mr. Tuttle felt wronged by just about everyone in existence, but that he believed that he could do no wrong himself."

Maureen worried she would not be competent for Mr. Tuttle because she did not like him. Maureen put it as, "[S]uffice it to say that Mr. Tuttle has never been my favorite client." As Maureen noticed her feelings, she described how she consciously made herself do extra work on Mr. Tuttle's case to make sure she was being a competent lawyer. She even took some actions based on Mr. Tuttle's requests, not because she thought those actions would be helpful to his case, but because she did not want Mr. Tuttle to say she was unwilling to help him due to her ill-feelings. But to do this work, Maureen had to "psych herself up."

At first, Maureen looked to an abstract notion of "competency" to find something to motivate her in spite of her antipathy. Maureen talked about needing to be competent because she wanted to make sure she protected her own professional reputation and the reputation of her clinic, and because she knew part of her grade for the clinic would be based on her work for Mr. Tuttle. Maureen chastised herself for being worried about her grade.

The initial question we framed for Maureen and the class was what did it mean to them to be a good person and a good lawyer? We did not expect Maureen (and other students) to implicitly translate the question into one of being a competent lawyer. Nonetheless, that unexpected turn gave us a terrific way to start investigating differences between practical wisdom and technical lawyering prowess. Initially, Maureen saw competency as synonymous with paying attention to the technical side of the representation (namely, gathering evidence, interviewing witnesses, preparing for court hearings, and the like). To Maureen, competency did not include paying attention to her own reactions or emotions. It did not include understanding what normative role she believed a lawyer should play in our society. Nor did Maureen see competent lawyering as including her own assessment of what she thought was a fair or just outcome in her clients' cases. When she discussed fairness and justice, they were part of her explanation of why she did or did not feel affinity.



However, in response to our prompts about what client experiences made her feel good about herself and what experiences she thought were the most salient to the client, Maureen included her sense of personal connection with Mr. Moss (and lack of it with Mr. Tuttle) and her own judgment about whether the legal system was treating the clients justly (it was being just to Mr. Tuttle and unjust to Mr. Moss). Those responses opened the door for a larger normative conversation: was it appropriate for a lawyer to seek to achieve a bigger aim of justice, even if being technically competent in a case did not require seeking that bigger aim? Further, if seeking justice was an appropriate goal for a lawyer, then *whose* vision of justice should be used—the lawyer's, the client's, or someone else's? Working with Mr. Moss and Mr. Tuttle got Maureen thinking about how she wanted to be more than just a cog in the legal system—more than just technically competent. She started to think through the First Principles and, thus, what normative lawyering role she would adopt to guide her towards just results.

Maureen's stories also allowed us to continue introducing students to two of the critical components of practical wisdom, empathy and compassion. For example, even from the beginning, Maureen had a nascent sense that she would find lawyering fraught in the long term if she only was satisfied working with clients for whom she felt an affinity. However, she was extraordinarily honest and open about experiencing profoundly different senses of affinity between Mr. Moss and Mr. Tuttle.

Bolstered by our noticing practice, Maureen's openness provided us with an easy opportunity to investigate her experiences of affinity and empathy and to work through how the two are different. We found it important to spend time in class talking through what empathy actually looked like (or could look like) with particular clients like Mr. Tuttle. The students needed to have some reflective space to talk through what it actually felt like to take a client's perspective while not agreeing with it, including how to engage a client in an active, yet non-judgmental, conversation about perspectives.

For example, Maureen described trying to talk with Mr. Tuttle about the options available to resolve his criminal case. Mr. Tuttle was adamant that the criminal case should be dismissed and that the police and prosecutor unfairly targeted him. If Maureen had to rely on feeling an affinity with Mr. Tuttle to understand his perspective, she knew she would never be able to place herself in his shoes; thus, she needed to find a different way to understand his perspective. As she practiced replacing affinity with empathy, she and the other students came to *experience*, not just intellectually understand, that empathy did not mean agreement—it was a kind of perspective-taking. Maureen could see how people may feel disempowered in our society and could see how

law enforcement wielded power in harsh and punitive ways. From there, while it was still challenging for her to take Mr. Tuttle's perspective, Maureen felt the prospect of getting to his perspective was at least possible.

Because every student had some similar set of experiences, those shared stories formed the basis for rich class conversations about why empathy was more useful than affinity in cultivating practical wisdom. Those stories and the noticing mindfulness practice also prompted thoughtful discussions about why lawyers *always* will feel various levels of affinity across clients. However, that descriptive fact need not become overwhelmingly potent, as long as an attorney is also able to cultivate empathy towards every client.

Because one of the key features of empathy is being able to take multiple perspectives and not just one's own or that of the client, empathy also became a vehicle for expanding the possibilities for students to feel compassion for their clients. In settings like the one between Maureen and Mr. Moss, such feelings were easy. She watched the pain on Mr. Moss' face when he talked about how worried he was about his family making it while he was in jail. She noticed similar expressions of concern on the faces of his family members. She also strongly believed that Mr. Moss was being treated unfairly. As she said, "[T]he judicial system that I so believed in was failing me" when the judge refused to lower the amount of Mr. Moss' bond, and she "took personal offense that the great, American judicial system — whose merits [she] so deeply believed in — would allow this to happen." Thus, taking her own and her client's perspectives generated more than enough motivation in Maureen for her to help Mr. Moss.

In contrast with Mr. Tuttle, when Maureen took her own perspective, and even when she took Mr. Tuttle's perspective that he was being persecuted by the police, those perspectives only weakly cultivated compassion and motivation to help Mr. Tuttle. However, as Maureen considered other normative perspectives such as her role as a criminal defense attorney vis-à-vis the state and its powerful prosecutorial authority, her role as a student attorney in a clinic dedicated to providing free legal services to the poor, or the perspectives of friends and family of Mr. Tuttle who worried about him going to jail, those perspectives helped her cultivate a stronger compassion towards Mr. Tuttle. It was easier for Maureen to feel compassion for Mr. Tuttle when she situated him within her developing normative role view and considered how he was just like all of the defendants in the criminal system who need an attorney that can push back against the state's prosecutorial power. It was easier for Maureen to feel compassion for Mr. Tuttle once she became clear about her normative vision for the role

of the lawyer and once she saw Mr. Tuttle as a critical piece of the social justice mission of her clinic.

One of the interesting developments we observed was the qualitative difference between the motivation students showed through compassion versus the motivation students showed through obligation. When Maureen first wrote about why she worked hard for Mr. Tuttle, she relied on language like “duty-bound” and “obligation.” She was forthright that she begrudged Mr. Tuttle at times and that at times she was motivated to do her work to protect her grade in the clinic, not to protect Mr. Tuttle. As her work continued and as she contemplated empathy and compassion, she changed her language and began to talk about her “motivations to do the work” and how she could tolerate difficult clients, be motivated to work for them, and be motivated by something other than her personal connection with a client, including her commitment to the clinic's mission.

The “motivation” dialogue also proved to be a perfect entry into conversations about First Principles and the role of a lawyer. For example, Maureen initially planned her actions for both Mr. Moss and Mr. Tuttle mostly based on what she determined would constitute “competent” lawyering (or what she determined would be good after consulting with her supervising attorney). She also described her lawyerly role consistently with the Dominant View of lawyering. She was “duty-bound” to help only her client and helping her client meant following the client's instructions as consciously as possible without interfering in the client's decision making. Almost immediately, Maureen realized she was doing more for Mr. Moss compared to the rest of her clients. And, she experienced that she had to push herself to do enough for Mr. Tuttle. Thus, she noticed that even if she wanted to take the Dominant View's role of being a fulsome agent for her clients, she still faced many choices and decisions about what being a fulsome agent actually looked like in specific contexts, with different clients, and with a broader goal of lawyering towards justice.

Maureen discovered quickly that looking at how the Model Rules defined competency or diligence did not actually help her understand how much, or what kind of, work she needed to do for her clients or whether it was ethical to work harder for one client than for others. Through her writings and class conversations, Maureen maintained her commitment to being a fulsome agent for her clients, but she built out a more nuanced understanding of the process she needed to undertake to truly understand her client's perspective and goals. She commented in class that her exploration of the difference in affinity that she felt for Mr. Moss and Mr. Tuttle helped her to realize that she was likely “dismissive” of Mr. Tuttle's perspective. Maureen further reflected that

intentionally cultivating empathy and compassion for Mr. Tuttle helped her to listen more carefully to him and investigate his goals. That reflective process also became a part of how Maureen interpreted what constituted diligence and competence under the Model Rules.

*C. Zoe, Mr. Bradley, Ms. Dennis, and Ms. Ames*

Our students not only practiced the habits of empathy and compassion as they figured out how to lawyer well, they also practiced how to notice and discern the fullest range of perspectives presented by the context, which is something we called paying attention to the “web of relationships” or the “relationality” of the situation. They learned that the possibilities for achieving a good resolution to their clients’ problems were severely limited if they only took a dyadic perspective, focusing on how they or their clients saw the issues. Similarly, we wanted students to consider how a client’s own views about the available choices could be limited if the student did not attend to relationality. However, we did not want students to misperceive relationality as a call for lawyers to usurp decision-making authority.

To make that point, we asked students to challenge a common metaphor—the lawyer as the director or manager of a whole stage of actors. We suggested that a view of relationality as a kind of top-down “command and control” model is partial and imperfect. It misses the complex network in which a client is enmeshed, including friends, family, enemies, lawyers, judges, and social workers. That network can create potential obstacles for the client, while also presenting opportunities for new insights and openings. Students are able to see a good resolution when they can perceive a more expansive context that is otherwise hidden if they had focused only on the lawyer-client dyad. We wanted students to learn how to embrace and understand those dynamic, interconnected relationships so they could be open to listening and learning, not just managing, and so their clients might also be more open to listening and learning. Here, as with empathy and compassion, the habits of noticing and reflecting were important wisdom-building practices.

Zoe’s three clients had different capacities for choice-making—for exercising client autonomy—and each existed in very different webs of relationships. Learning how to respect a client’s stated choice while also working with a client to uncover the fullest range of choices always takes care. In order for Zoe to be practically wise, she needed to understand her client’s viewpoint and the viewpoints of others in the client’s web of relationships while discerning the points of commonality or friction between the various viewpoints. Then, Zoe had to determine how to present all of that information to her client in a way that

respectfully engaged her client in the problem-solving effort instead of making her client feel judged, belittled, or bullied. The reflections Zoe shared with the class as she figured out how to be practically wise in working with three different clients helped us practice relationality skills too.

[Mr. Bradley] was my very first clinic client – I'd visited him in jail and appeared in . . . court as his student attorney before the semester had even started. [Mr. Bradley] was both my first *and* last clinic client; Mr. Bradley had both mental and substance abuse issues and was perennially homeless. I ultimately handled eight of his cases throughout the course of the semester.

Zoe listened carefully to how Mr. Bradley perceived the important relationships in his life and discovered that they included people or places entirely unconnected to his current troubles, including a supposed lawyer in another state who might be “helping” him, places in the United States that were conducive to being homeless during the winter months, and possibly some “brothers” who might be able to bail Mr. Bradley out of jail. Further, Zoe found that Mr. Bradley “vacillated erratically” about what he wanted to do regarding his criminal charges. He sometimes wanted to plead to everything. At other times, he wanted to challenge everything as well as affirmatively sue the police for violating his constitutional rights. Still at other times, Mr. Bradley seemed uninterested in engaging in conversation about the criminal charges at all, but wanted to focus on other issues such as relocating.

Zoe tried to track down Mr. Bradley's relationships, but she came up empty-handed. There did not seem to be any friends or family to consider, nor were there victims or witnesses, hostile or friendly. Zoe slowly realized that Mr. Bradley's relevant web of relationships was one he did not see: the other legal professionals including the prosecutor, the public defender handling a more serious charge, Zoe's supervising attorney, and the judge. In class, for example, we discussed Zoe's account of working closely with the public defender who represented Mr. Bradley on a more serious criminal charge. At first, the defender's “abrupt” personality and “disengagement” from Mr. Bradley bothered Zoe. Later, she surmised that the public defender acted as she did because Mr. Bradley seemed unable to focus on what outcomes he wanted to pursue in his criminal cases. Despite the public defender's attitude, Zoe noticed that she still was able to negotiate a favorable outcome with the prosecutor (at least, it was favorable from the perspective of what goals an “average” criminal defense client generally pursued). Zoe also noted how in her own cases, with Mr. Bradley's vacillations, she and her supervising attorney moved to the same

strategy: negotiating vigorously with the prosecution, obtaining some deals, and setting other charges for trial.

Zoe worried, however, that she and others were acting more upon Mr. Bradley than in response to him. She did not ignore him. She regularly communicated with him. However, his capacity to rigorously engage in planning and strategy conversations was unpredictable, and he had no real personal network of relationships that Zoe could use to help engage him. Did Mr. Bradley's "decisions" reflect the decisions Zoe and her supervisor believed would be the "best" outcome rather than reflect Mr. Bradley's choices? Yes, Zoe came to think so. Perhaps relying on the experience of those involved in Mr. Bradley's professional web of relationships was justified. Zoe reasoned that it was important that she never felt that she bullied or coerced Mr. Bradley into any decision.

Zoe stated it was different to work with Ms. Dennis. At their first meeting, Ms. Dennis "was dressed in a smart business casual dress and seemed eager to make a good impression . . . ." Ms. Dennis had a "strong understanding" of the assault and domestic violence charges she was facing. While Zoe knew that Ms. Dennis had "drifted" and "struggled" since she had left the military a few years before, Zoe was impressed by Ms. Dennis' efforts to work toward an online degree, Ms. Dennis' well-spoken demeanor, and her steady clarity about her goals for the criminal case (namely, get probation). Zoe recounted the following in one of her narrative assignments:

From my own nervous and untried perspective, [Ms. Dennis] was a huge relief. She seemed more than capable of understanding what I had to say about the law, and the potential outcomes associated with various courses of action, and I felt confident she could be trusted to make her own informed decisions.

Zoe quickly discerned that the relevant web of personal relationships important to Ms. Dennis included her relatively new husband with whom she regularly discussed the case and potential plea bargains, and her former boyfriend, the alleged victim of the assault and domestic violence charges. As she interacted with people in Ms. Dennis' network, Zoe expected them to portray her as the fairly-well pulled together person Zoe knew, albeit a person under notable stress from criminal charges.

Her ex-boyfriend sowed the first seeds of doubt when he mentioned information (such as Ms. Dennis' recent DUI plea) that suggested she was making less-reasonable choices than Zoe would have hoped. Zoe felt "mildly betrayed and unsettled;" she expected that Ms. Dennis would have shared such information with her. However, when Zoe thought about Ms. Dennis in the context of the relationships Zoe had with her

other clients, she was still inclined to interpret Ms. Dennis' choices as good exercises of client autonomy. Zoe said, "I felt the urge to give her the benefit of the doubt." Zoe continued her efforts to convince the prosecutor to offer a deferred judgment. That way, the assault and domestic violence charges would not become part of Ms. Dennis' permanent criminal record. However, the best plea bargain the prosecutor was willing to offer was eighteen months of probation with various requirements to take classes and not use alcohol.

Ms. Dennis seemed to have no trouble thinking through her choices and articulating her primary goals, even if she was finding it hard to decide whether going to trial was a risk she wanted to take. Zoe did not strongly counsel her one way or the other.

I refrained from pushing [Ms. Dennis] further and inserting myself in [Ms. Dennis'] life in [contrast to the] way I'd found myself doing for my other clients . . . . The next week, [Ms. Dennis] took the offered plea and was sentenced to the minimal requirements. [Ms. Dennis] was so relieved she couldn't stop crying while the clerk processed her paperwork, and couldn't stop thanking me for all my help, although in both cases, all I had really done was assist her in processing the decisions that she had arrived at herself.

A week later, Zoe was surprised to receive a string of calls and texts from Ms. Dennis saying that her husband was kicking her out of the house, she had nowhere to stay, had no money, and was panicked that she would not be able to maintain sobriety.

The dramatic change in Ms. Dennis' circumstances really allowed Zoe to understand how much her engagement with Ms. Dennis was shaped by her experience with clients like Mr. Bradley. She ignored signals from the ex-boyfriend. She took as fact Ms. Dennis' repeated mention of her "angel" husband, especially because Zoe perceived they were genuinely working together on navigating the plea bargain so Ms. Dennis could move forward in a way that would be positive for them as a couple. Zoe could have counseled Ms. Dennis and still respected her autonomy, but she expected Ms. Dennis to need less assistance in scrutinizing, assessing, and contrasting the range of consequences that might flow from taking the plea offer or going to trial. When Zoe reflected on the experience she realized *she* wanted Ms. Dennis to perceive her as capable of resolving the criminal charges as favorably as possible. As Zoe said:

I wanted to reflect back to [Ms. Dennis] the vision of competency she seemed to view me with, and also make sure she understood that I was treating her as a true adult equal, capable of making her own

decisions, rather than someone whose life had recently spiraled out of control.

One of the reasons we found it so helpful to have Zoe describe her work with Ms. Dennis in class is the story illuminated our core “process” lessons. A core wisdom skill we encouraged Zoe and the other students to learn was how to be mindful particularly by using the practice of noticing, which was critical for identifying the relevant web of relationships (and Zoe did fairly quickly) and for interpreting them—which gave Zoe more difficulty. She did not initially notice how much her own experience created an obstacle for perceiving the important things she could have learned from Ms. Dennis’ relationships. The early challenges she experienced when engaging other clients (like Mr. Bradley with his mental health and substance abuse issues) inclined her to over-estimate Ms. Dennis’ competence in taking multiple perspectives, thinking through choices, and weighing potential consequences. Zoe’s experience with Ms. Dennis made Zoe notice how her own previous web of relationships with other clients made her assume things that an intentional practitioner would have reflected on and double-checked.

Zoe then introduced us to Ms. Ames. When we first met Ms. Ames, Zoe described her as a consummate repeat player in the local criminal justice system.

[Ms. Ames] was a self-proclaimed and almost proud recidivist – but also knew when to take a plea, when the plea offer wasn’t good enough, and when the jail time didn’t appropriately equate with her alleged crimes. She was homeless, likely alcoholic, maybe had a Master’s degree, likely drug addicted, likely bi-polar, had clear (and self-diagnosed) issues with authority and anger management, and yet I felt that she often knew much more about what was going on than I did (which was, quite literally, often very true).

Zoe also quickly discovered the broad web of relationships Ms. Ames was enmeshed in and deployed. That web included jail personnel who told “funny and affectionate stories” about Ms. Ames and permitted Ms. Ames to meet with Zoe in the jail kitchen instead of in the locked interview rooms, as protocol required. Ms. Ames’ web included prosecutors and judges with whom Ms. Ames was on a first-name basis and two “steady boyfriends,” one of whom consistently checked in with Zoe because Ms. Ames stopped answering his calls. Further, it included Ms. Ames’ son and mother and volunteer social support. Finally, Ms. Ames’ web of relationships also ultimately included irate hospital personnel and a beleaguered motel clerk. Zoe always suspected the web of relationships she saw was just the tip of the iceberg.



Unlike Mr. Bradley, who seemed to be lacking a personal web of relationships, or Ms. Dennis, who seemed supported by her personal relationships, Ms. Ames operated in a network that was chaotic and cacophonous. Zoe felt that to effectively work with Ms. Ames, she needed to engage with everyone in the web; it was often her primary means of finding and communicating with Ms. Ames and the people in this network came to look to Zoe as the only means of communication with Ms. Ames when she was choosing not to speak with them.

Zoe quickly found that she needed wisdom of another sort. Because working with Ms. Ames was chaotic from the start, Zoe found that she had to be very intentional and reflective, even if only to stay on top of what was happening. What was she doing, Zoe reflected incredulously, “staking out” a local motel and interrogating the front desk clerk to find Ms. Ames when Ms. Ames went on one of her communication black-outs? Zoe had to learn the wisdom skills to navigate the network of relationships. The network provided the context needed to understand Ms. Ames while at the same time it obfuscated and muddled the story, and it often was not clear to Zoe which was which.

Right away, Zoe started thinking about what it meant to pay attention to relationality while working with Ms. Ames. Some clients need to be encouraged to take advantage of their network of relationships to face challenges and choices. However, Ms. Ames happily attended to the widest web of relationships she could. Unfortunately, as Zoe quickly discovered, Ms. Ames could also use those relationships to avoid or dodge challenges and choices. When Zoe stepped into Ms. Ames' world, she quickly learned the importance of being mindful. Zoe's noticing practices became particularly important as they helped her avoid being manipulated while still maintaining empathy and compassion for Ms. Ames and for those in Ms. Ames' web of relationships.

One of the terrific consequences for Zoe about having three very different experiences with clients and relationality is that those experiences gave Zoe (and the rest of us) a remarkable amount of actual material on which to reflect. For all three clients, Zoe felt empathy and compassion and she wanted to “do right” by them. For all three clients, the definition of “doing right” was affected by the client's web of relationships, Zoe's own web of client relationships, and Zoe's developing normative vision of herself as a good and just lawyer. In the process of comparing the different opportunities and challenges each web of relationships presented for creating solutions that served the clients within their own webs, Zoe and the class experienced the “relationality” skills needed to make wise choices. We learned methods for intentionally noticing and capaciously engaging context and interconnectivity to

problem-solving in a way consonant with our clients and reflective of our normative commitments to the role of the lawyer.

Further, as we attended to the inherent relationality of every lawyer-client setting, we were reminded of how important it is for lawyers to check their own assumptions about when and if a client wishes to pursue "self-interested" goals. As our students uncovered the web of relationships in which their clients were situated, they also discovered that what clients wanted (namely, the client's "self-interest") usually reflected the client's thinking through outcomes vis-à-vis their own web of relationships. For example, Maureen's client, Mr. Moss, considered all of his options in light of how they would impact his family, not just him. Mr. Moss' self-interest was not about himself but instead was about the most important people with whom he was in a relationship. Maureen attended to that relational context as she thought through options to discuss with Mr. Moss. She discovered Mr. Moss was willing to stay in jail longer if it meant his bond might be lowered, which then would place less of a financial burden on his family. If Maureen had presumed that Mr. Moss' "self-interest" was purely individualized and personal, she might have mistakenly concluded that his most important priority was getting out of jail quickly.

## V. OUR REFLECTIONS

If it was important to encourage the habit and skill of reflection among our students, it was equally important to share with them, and now with you, some of our own reflections.

We anticipated that many of our students would begin class already steeped (often unconsciously) within the Dominant View of lawyering. We also knew that both of us believed the practice of practical wisdom as we devised it would push against the Dominant View's tight focus on the lawyer-client dyad and on that view's disinclination towards morally-engaged conversations. Thus, we were somewhat surprised at how difficult it was for many of our students to "move" from the Dominant View of lawyering to views that located the client—and possible solutions—in a web of relationships, and not simply in the lawyer-client dyad. Our students also found it difficult to move to a view that encouraged them to consider different priorities than client autonomy and zealous advocacy and to consider the importance of intentionally engaging in morally-based conversations with their clients rather than unreflectively engaging in such conversations or not engaging in such conversations at all.

It was not that our students fully embraced the Dominant View. Many students agreed with Luban that the Dominant View depended on an idealized version of the adversary system that does not exist in the

rough-and-tumble real world. Similarly, many were skeptical of the Dominant View because they agreed with López that it too easily brings out the arrogance of elite lawyers. Expressing their skepticism, students took reassuring refuge in defining their position as being “client-centered” lawyers. That was a more comfortable mantle because they genuinely did not wish to be arrogant, and they really wanted to make a difference for their clients. However, calling themselves “client-centered” was often unhelpful because they lacked the perspective and skills to put content into the term. There was no “there” there.

What we observed in our students was not an ethical or principled resistance to other normative views of lawyering, but a hesitancy caused by their fear of the unfamiliar and their lack of experience. The students knew their clients expected them to be lawyers but were unsettled about whether they actually knew enough to be lawyers. That made the students very worried about “getting it wrong” with bad consequences for the client. If they just listened to the client and things screwed up, well, at least they had tried to do what the client wanted. Students might defend their actions in principled terms. They did not want to be elite moralists, subtly playing God, or push the client in ways that violated the client’s stated goals and interests. The students talked as much, though, and sometimes more ardently, about affirmatively engaging their clients. The rub for them was how to *actually engage* a client well. That entry point gave us a natural opening to introduce our process of the practice of practical wisdom.

As we introduced practices related to empathy, compassion, and relationality, students tried those habits out—through role playing, discussing the conversations they had with their clients, practicing how else they might have approached them, and actually trying out their ideas from class with their clients. We started to see shifts in the students—many of which were first practical and later became the basis for reflection about normative visions of lawyering. Some of the shifts we observed were subtle. We noticed, for example, the different ways students started talking about engaging their clients in moral conversations. Also, we noticed more students begin to see their legal matters through a larger web of relationships. Students became more empathic and compassionate not simply because they came to see empathy and compassion as important (many already did), but because they learned the listening, perspective taking, mindfulness, and conversational skills needed to actually practice empathy and compassion.

They then began reporting that they felt they were being “better” attorneys. As the semester went on, when we inquired what “better” meant, students described increased confidence in their technical prowess (“Now I know what ‘resisting arrest’ means” or “I know how to

find regulations on my own and understand them") and described increased confidence that they were making intentional choices about how to behave in ways consistent with their developing commitments to one of the normative roles of lawyering.

We also observed that some of the language we used—like the language of telos and First Principles—was not a language the students readily utilized. Nor were they familiar with our terms "relationality," "web of relationships," and "sensitivity to relationships." However, the way in which students learned and adopted the ideas behind the terms was gratifying: the ways in which they began to explore innovative solutions to client problems by looking at the context in terms of a web of relationships and the ways in which they started talking about the aim and purpose of what they were doing and how that affected their interpretation of the Model Rules and informed the judgments they were making.

Fear and anxiety based on unfamiliarity was something we experienced, too. Just like the students were facing a new, unpredictable, and uncertain situation with their clients, we were facing a somewhat similar situation in class. We were trying new things—making student narratives the foundation of a legal ethics class, having students tell their stories in class, working together with them to figure out the ethical and judgment issues at stake and how to handle them better, and figuring out how to help them connect the particulars of their legal work to larger issues in the literatures on legal ethics and practical wisdom. We had to do all of that while also ensuring they could pass the ethics section of the bar exam. We knew we would face problems and make errors. For example, there was no advance guarantee we could create a safe space for discussion, stories fell flat, students saw very different things in the stories than we expected, we had to respond by altering our own conversation, and so on. When we took the conversation down a dead end path, we knew it and we knew the students knew it. Our own uncertainty was always there, and we needed to cultivate an openness to learning from our mistakes, to take what came, and to move from there so we could improve our own teaching skills. We were constantly balancing how to ask and tell, how to know when to be silent, and how to redirect in ways that opened the conversation and did not just turn the class into a lecture of the form "let us tell you what we were hoping you would say and what we wanted you to learn." When we reflect on what kept us going in spite of our uncertainty and anxiety, we noticed three things. First, we are veteran teachers. We already had some experience and skills in directing reflective conversations, and we were confident in who we were so our egos (and our jobs) were not on the line every day. Second, an important element undergirding our confidence

and energy is that we knew what we were aiming at and it was very important to us. We wanted to foster ethical, competent, and practically-wise lawyers because we see this change as the heart and soul of a critical profession that is at risk of losing its purpose. Third, we had each other. We taught each other. We prepped each other. Even when we were not teaching together, we knew we could converse by e-mail or phone. We could reflect, strategize, laugh, vent, disagree, argue, and support each other through the ups and downs. All this made the experience extraordinarily joyful for us. We do not think that one has to be a veteran teacher to find success with our methodology. However, one has to dive in wholeheartedly, and it would be terrific to identify in advance someone who would be willing to play the support role we played for each other.

## VI. CONCLUSION

We think the stories above richly illustrate our central thesis—that lawyers *can* practice practical wisdom, and that there are habits of mind lawyers that can intentionally cultivate to better allow them to be wise in any given setting. We also think that the stories illustrate that practical wisdom is practical and wise only when experience and context are situated within a larger normative vision; settling on a normative vision requires one first to consider plural contrasting visions of the role of the lawyer.

We believe these stories also show that the practice of practical wisdom is achieved more readily when one breaks practical wisdom into component parts. Cultivating empathy and compassion encourages a lawyer to deeply engage with clients without the lawyer (and hopefully without the client) becoming captured by any one point of view. Practicing those capacities with a sensitivity to relationships and a reflectiveness regarding the web of relationships encourages a lawyer to attend to dynamics other than simply the lawyer-client dyad and to probe for solutions in unexpected quarters. Using mindfulness techniques ensures empathy, compassion, and relationality happen as robustly as possible.

Finally, by investigating our students' actual stories, we tried to concretely test our hypotheses not in an objective, quantitative way but in the way that knowledge and learning can reveal themselves through lived experiences. We hope our journey and the journeys of our students are convincing evidence that questions of professional formation and questions about the normative role of the lawyer must be harnessed together if one's goal is to practice practical wisdom.

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