Practical Wisdom

THE RIGHT WAY TO DO THE RIGHT THING

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2009, twenty-two other cities had created their own veterans' courts and at least thirty-nine others were planned. Such veterans' courts are only the tip of a huge movement of judicial institution building. Judicial statesmen like Judge Russell began promoting such alternative "problem-solving" courts in 1989 when judges and local officials in Florida's Dade County realized that harsh mandatory minimum sentences were no way to handle the explosion of drug-related crimes. They opened the first drug treatment court offering offenders the choice between prison time and mandated substance abuse treatment. Since then, hundreds of drug courts have been created in the United States and these have become models for other problem-solving courts—teen courts, mental health courts, domestic violence courts. By 2007, nationwide, there were over thirty-two hundred problem-solving courts, about two-thirds of them drug courts. Such problem-solving courts, focusing on guided rehabilitation, have been, said the *New York Times*, "strikingly successful around the country in reducing crime, saving money and repairing lives." The judicial statesmen who built them were able to reinvigorate the importance of practical wisdom in the justice system at the very moment when mandatory sentencing regimens were elsewhere trying to squeeze it out.

THE ETHICAL LAWYER

Anthony Kronman has worried a lot about whether "ethical lawyer" is an oxymoron. In 1981, before he became dean of Yale Law School, he suggested to the editors of the *Yale Law Journal* that law might be a profession that was morally unworthy at its core. The reason was its commitment to advocacy as an ideal. Unlike "the truth-seeking enterprise of scholarship," Kronman said, advocacy "corrupts the soul by encouraging a studied indifference to the truth." But Kronman came to see that there was a better way to frame the problem. Yes, there is an inherent tension built into the practice of the law—the lawyer must defend his client, but the lawyer also has an equally important public obligation to seek justice and to act as an officer of the court. Loyalty to the client and loyalty to the public must always be balanced. Law professors and practicing lawyers who are concerned about the corrosion of practical wisdom are trying to build institutions that encourage lawyers to learn how to achieve this balance.

Nurturing Practical Wisdom in Law Students

The teaching method at the heart of a modern legal education is the case method. The cases studied are typically contested lower-court cases that have gone to appellate courts. Students are asked to consider what rule of law the appeals court judges used to determine their ruling, and, perhaps more important, they are asked to judge whether the reasoning and conclusions of the appeals court judges were sound. In the best classes, good law professors mentor and coach their students by forcing them to reenact the reasoning and the decisions of experienced judges in the classroom. Students are encouraged to think not just logically but analogically—to determine in what way this case is similar to or different from the precedent set in an earlier case. They are encouraged to pay attention to the context—*this* particular case—and not just general principles or rules. By reenacting the case, the participants are expected to simulate the kinds of thinking and argument that lawyers and judges engage in when they adjudicate.

The theory is that this kind of pedagogy encourages students to learn how to balance empathy and detachment appropriately because students have to enact both sides of the case. They are required to defend positions they do not agree with, or may even find morally offensive. They must strain to see the justice of whichever claim they have

been given to defend, to sympathize with another perspective and not simply to tolerate it. But then students must move from being empathetic to being detached because they are also forced to play the role of judge, someone who does not have a bias toward one party or the other—someone who has a stake in the administration of justice.

The problem with this pedagogy, its critics say, is not the theory but the practice. A true Socratic dialogue may be a good way to promote reflective judgment, but far too often these classes are highly manipulative and authoritarian affairs "in which students compete to please the teacher with glib responses within rigid time constraints." And even when it is done well—even when the teacher is "a master artisan guiding a roomful of novices through the early stages of learning a craft"—there is still an important ingredient of practical wisdom missing—experience with the practical.

Professor William Sullivan, a director of the Carnegie Foundation's Preparation for the Professions Program until June 2010, has examined this dominant law school pedagogy and concluded that, even at its best, the overreliance on this method has a potentially damaging effect on the "moral apprenticeship" of lawyers. There is a message, Sullivan explained to us, in what the faculty focus on and what they leave out. And what the students are told to focus on, particularly in their all-consuming first year, are the procedural and formal aspects of legal reasoning. Not only is there no actual experience with clients, but the actors in the appeals court cases are reduced to legal categories like plaintiffs and defendants. The rich human narratives of these people are condensed into just those facts that the appeals court judges are considering. Furthermore, most faculty routinely ignore, or even rule out-of-bounds, ethical-social issues like compassion for the client and concern about substantive justice or equity. Sullivan found that the tacit messages many students learn are that it is "soft" to look at the human side and that legal thinking can justify anything.

Concern about this kind of demoralization of law and other professions led Sullivan to leave academia for the Carnegie Foundation. He thinks demoralization can be stemmed if professional schools build the right kind of programs, and he has brought together educators in engineering, theology, medical, nursing, and law schools to look at what's going wrong, to identify some "best practices" that get it right, and to bring research in the cognitive sciences to bear on how people learn not only technical skills but ethical skills and motivation. One successful program Sullivan's Carnegie Foundation group studied was the "legal clinic." They found that the kind of mentorship and hands-on experience that is built into such clinics promotes a technical and moral apprenticeship and encourages the students to develop wisdom that is quite practical.

Harvard law professor Robert Bordone runs just such a clinic. Bordone is the director of the Harvard Negotiation and Mediation Clinical Program. He is an expert on dispute resolution who has worked with corporate clients, public schools and universities, orchestras, hospitals, nonprofits, government agencies, and the International Criminal Court at The Hague, and is coeditor of *The Handbook of Dispute Resolution*. Bordone emphasized to us just how important practical wisdom is to being a good negotiator. It's impossible to anticipate every possible move in a negotiation. At any time, there can be unexpected outbursts: critical new facts can suddenly come to light, someone's "emotional hot button" can accidentally get pressed. Mediation is so dynamic and interactive that it can't be scripted. Negotiators, says Bordone, are like improvisational actors or jazz musicians. They need to "learn to be comfortable with the unexpected without learning prescriptive formulas." That means learning to listen carefully, to interpret words, actions, and emotions, and watching for body-language clues both onstage and in the audience.

Before students can get into Bordone's negotiation clinic, they need to take his class. He told us that one of the first things he has to do is *untrain* most of his law students. "They think negotiation is how to

make a more persuasive argument. But it's not. It's about understanding the other. Perspective taking. How to help the clients you are working with know their own interests. The client may say: I want A, B, C, and D. But what are their actual underlying interests? It's rare that a client understands these. It's like fights over who is supposed to do the dishes. It's not about the dishes. It's about being unappreciated. It's about something else." To get at this something else, he tries to teach his academically sophisticated students how to do "active listening" and perspective taking. He and his assistants model what this looks like. He then divides the students into small teams, has each listen to a classmate argue for a contentious position, and then has them try to give a neutral summary. It turns out that it is remarkably hard for his bright Harvard law students to empathize with the speaker. The class then analyzes why. Bordone's method is "Tell. Show. Do. Review." And the students learn to improvise like actors.

The students who go on to take the negotiation clinic go much deeper, learning through practicing hands-on, actual negotiations. The center Bordone directs has little trouble finding clients who want help. One recent client was the Southern Coalition for Social Justice in North Carolina. The ownership of large blocks of land deeded to black families after the Civil War—some of it now quite valuable—was in frequent dispute. Over generations, the number of heirs had grown, and many had died without wills. The titles to the land were highly fractionated, and the Southern Coalition was worried. Not only were disputes over this land tearing families apart, but many low-income black families were at risk of losing their property.

Bordone assigned three of the clinic students to work out and implement a "consensus-based model" for resolving one such property dispute. With the guidance of Bordone and an assistant, the students first did a "stakeholders assessment." They contacted everyone in the family, Bordone explained. "Someone might say: 'No way am I going to give up this piece of land.' We ask why. We try to understand their reasons. We try to figure out: what are the different interests of each party and is it possible to bring them all to the table and build a consensus?" Next the students put together an assessment and developed a plan. Then they went down to North Carolina and brought together the whole family and met with them for a week. By the end of the process, the family had agreed to form a limited liability company and had decided that the company would do prawn farming.

Bordone's approach has all the hallmarks of the hands-on clinical practice Sullivan and his Carnegie Institute team found so valuable. Sullivan sees all professional practice—nursing, teaching, doctoring, engineering—as an exercise in practical wisdom. "Judgment in action," he calls it. Such judgment, he says, "is reasoning not from a set of rules but by analogy to model cases and precedent." But absent hands-on clinical experience, the judgment students can learn by sitting in a classroom—and looking only at model cases and precedents drawn from decisions of appeals court judges—is severely restricted. In a clinic, a student can develop this judgment by practicing how to support a client at the same time as he questions her. In actually assuming the role of a counselor, the student lawyer is put "in the role of cooperative problem solver with the client rather than the distanced expert who solves the client's problem." Discerning how to listen, resolving conflicts of interest or questions of confidentiality, balancing the inevitable tensions—between empathy and detachment, counseling and advocacy, duties to the client and duties to the public interest—all these issues are embedded in everyday clinical practice. And the student has the advantage of learning these skills with a mentor who can serve as a model and a coach.

We once knew, says Sullivan, that apprenticeship—modeling and coaching by mentors—was the way to prepare professionals. But that has been forgotten over the past century as professional education has moved into university classrooms and relied on more academic instruction. The expert practitioners and scholars he brought together at Carnegie point

to recent findings in the learning sciences (cognitive psychology, linguistics, philosophy, evolutionary and neural biology, and artificial intelligence) that resurrect the central role of apprenticeship in initiating novices into the wisdom of practice. The habits of the practical mind are instilled "as the learner sees expert judgment in action and is then coached through similar activities." Sullivan likes to use the metaphor of "scaffolds" to underline how apprenticeships teach novice professionals expert judgment. Accomplished practitioners show students how things are done, sometimes breaking things down into discrete tasks or steps. Then the students practice themselves, and get coaching and criticism from their mentors—for example, Bordone's "Tell. Show. Do. Review." Rules and procedures are essential scaffolds for learning lawyering skills. They give the beginner a basic grasp of how to function in a variety of legal situations. But the particularities of each context will soon start to overwhelm efforts simply to apply rules. The expert mentor can model what to do. She can help the apprentice to focus on the goal and not just the formal rules, to see analogies that might help solve the problems, "to recognize new situations as similar to whole remembered patterns, and, finally, as an expert, to grasp what is important in a situation without proceeding through a long process of formal reasoning." Notably, this scaffolding is strikingly similar to the building of cognitive networks we discussed in chapter 6.

Sullivan and his colleagues are not simply urging more legal clinics. Hundreds of these have been created at law schools around the country. But they generally remain peripheral to legal education. Such practical training is optional, and the clinics are often taught by a separate faculty, one that typically is not tenured and has a lower academic status. Sullivan argues that the apprenticeship embodied by these clinics should be at the core of legal education. One model his colleagues analyzed was the law school at the City University of New York. It recruits students of far more limited means and far weaker academic backgrounds than Bordone's Harvard students, but it encourages a far more practical education. In addition to taking typical first-year law courses (criminal procedure, contracts, torts), the CUNY "first years" are also in small "lawyering" seminars that not only encourage close faculty mentoring but link legal theory to practice by assigning students to work on simulated cases. By the third year, all students are required to do real-world lawyering in a supervised field placement or in the school's on-site legal clinic.

This kind of education is not simply an apprenticeship in technical and moral skill. It is also an apprenticeship in moral will. As one clinical professor explained, "Clinics try to resensitize students after being desensitized in law school." Sullivan urges a restructuring of law programs so this desensitization doesn't happen in the first place. Clinical education changes the hypothetical questions typical in most legal education ("What might you do?") to questions that are more immediately involving and demanding: "What will you do?" or "What did you do?" Sullivan emphasizes that this "puts responsibility for clients and accountability for one's own actions [at] the center of clinical experiences." Such responsibility and accountability should be at the center of law school experience. They are what encourage moral will and moral skill.

And After Law School?

A law school graduate who wants to do good and to do well—to aim at the right things and earn a living—has a number of options. She could work at one of hundreds of nonprofits that deal with issues of environment, poverty, labor, health care, human rights, women's issues, and social justice. He could work in a legal clinic or as a public defender or in family law or perhaps start a small individual practice. She could work for an elected official or in a government agency. But what if this lawyer wanted to work for a corporate law firm? It's hard to find firms

that encourage wise practices and minimize the demoralization that has become the norm. But it's not impossible. Chris Schultz helped shape and run such a firm.

Mahoney, Bourne, and Thiemes is not a social services or advocacy or public-interest law firm. The Buffalo firm's major clients are real estate developers, hospitals, a bank, and the Catholic archdiocese. But Schultz and his partners have intentionally created a firm that encourages practices far different from the prototypical corporate firm described by Patrick Schiltz.

Chris Schultz had been mentored by Brian Mahoney since he joined Mahoney's law firm right out of law school in the late 1960s. He was drawn in by Mahoney's commitment to social justice and the public interest, by his work with Catholic hospitals and charities and religious orders, and with liberal political campaigns. But when Mahoney died suddenly of a heart attack in 1972, and Schultz found himself catapulted into a management position, he realized that he had to change the legacy of Mahoney's rather loose and free-spirited business style, the lack of attention to the financial implications of his good works. Schultz quickly moved to put the firm on a more even financial keel, instituting procedures to better manage personnel, collect fees, create new billing processes, and control expenses. He looked to hire people who knew how to make money but who also shared his commitment to keep Mahoney's work going. He wanted a viable firm yet one in whose soul was a commitment to serve the public interest. "We knew we could make money," said Schultz, "and still do what Brian Mahoney did."

At a time when traditional pro bono work was being squeezed out of corporate firms by the pressures to work more billable hours, Schultz encouraged his lawyers to do more than pro bono. Serving the public, he argued, also meant working for low-paying community clients as part of the regular work of the firm. Arthur Laughlin, a partner, explained it as continuing the grand tradition that law was not a commodity to be bought and sold, but a form of public service. Schultz himself serves on boards of poverty organizations active in housing, neighborhood development, legal services, and care for the elderly. But he does more than model the behavior he encourages. He brings up public service at performance reviews, and firm policy encourages everyone to participate in some form of community service. And very important, he has made sure that the firm's compensation scheme doesn't discourage it.

Schultz set up a compensation system that aimed to minimize the monetarization of work. Schultz insisted that compensation would not be tied to billable hours or the revenues generated by a particular lawyer. He also maintained absolute secrecy about the number of hours each lawyer billed to avoid what he saw as the destructive internal competition over who bills the most or who is most valuable to the firm. Furthermore, the compensation differences among the highest- and lowest-paid lawyers are unusually low by law firm standards. All this encourages a dedication to work *and* service. The common pressure to abandon public-interest work to gain higher pay or status is not there. Schultz says, "I don't want anyone feeling that work for some Catholic Charities group is less valuable to the firm than real estate syndications." Laughlin explained that public service is "on an equal footing with, and sometimes even prevails over, economics." A senior associate who works largely in banking transactions explained that he feels much better to know that he is, in effect, subsidizing the firm's public-interest work.

The ethos of public service also spills over into the willingness of Mahoney's lawyers to do the tough work of wise counseling. Lawyers reported being more willing than most to restrain a client, convincing him, for example, to restructure a transaction to avoid an out-and-out sham. One of Mahoney's corporate clients suggested that public service at Mahoney informs its sophisticated thinking about service to their private clients. Public and private work together, he said, so that Mahoney's

dedication to serving others is different from the ethos of "being an expert." Mahoney also encourages wise counseling by promoting long-term relationships with clients, which generates commitment and trust. Its lawyers are encouraged to know the client's organization and help the client figure out its long-term interests. One lawyer referred to the pleasure in dealing with "relationship clients." It allowed him to be a "full-blown counselor" who "brainstorms" with the client.

The lawyers at Mahoney describe an ethos of equal treatment and a collegial way of practice. "No one is looking at the hours," explained one partner. "Pride drives us to work hard." "The moment you worry or even begin to think about whether others should be making more or less than you," explained another, "you create tensions that aren't here now. The security, the respect, the fine clients, the fun that comes with association with this firm are part of the compensation." The effect of this organization and culture is to moralize work in another way—by building morale among lawyers and staff. They take pleasure in serving others and in the work relations they have with each other.

Schultz also takes great care—and pleasure—in developing the younger people in the firm. He is constantly giving them feedback, from pats on the back to criticism. His formal evaluations are carefully structured to address legal skills, progress toward partnership, and maturity with clients. He has periodic meetings with young lawyers in which he discusses his own mistakes and failures and how he dealt with them. He models his own process of learning through trial and error. And he wants to discourage the tendency he sees in large firms to talk only of successes, which then makes people feel terrible when the inevitable mistake or miscalculation occurs.

The firm Chris Schultz and his partners forged goes a long way toward encouraging young lawyers in the corporate world to aim at the right things and do so wisely. The firm's ability to survive and thrive is a testament to Schultz's wisdom as a lawyer-statesman. He knows what legal practice should aim at, he has the ability to balance the economic practicalities of running a for-profit firm with the ideals of legal practice, he has the skill to create structures that minimize the monetarization of legal practice, and he has the capability to educate lawyers with the passion and know-how to counsel wisely and to balance public interest and client demands. Schultz's success in building this kind of firm has only been possible because there were able and committed lawyers who were willing to work for a firm like Mahoney, who were willing to sacrifice the higher pay they could have gotten elsewhere in return for a supportive environment that encouraged work aimed at the right things. Schultz allowed such people to flourish, and they made possible a firm like the one he created.

As the profession of corporate law increasingly becomes the business of making money by practicing law, the competitive pressures to increase compensation, billable hours, size, and specialization will make wise lawyering harder to learn. Or even remember. But if lawyers like Schultz can succeed in building institutions that encourage lawyers to practice wisely, they will be keeping alive a model that others can emulate.

NURTURING THE WISDOM TO TEACH

The students at the K–8 school, in a town in Vermont we'll call Millerton (a pseudonym), had not been doing well on the statewide writing tests. When Joey Hawkins arrived to give writing workshops to the teachers, they were happy to see her. She was not an "outside consultant" coming to show them how to get test scores up by focusing on the bubble kids. She was one of them.

Ms. Hawkins was not trained to be a teacher of teachers. In 1983, she began teaching social studies (and a heavy dose of writing) to seventh- and eighth-graders at the Newton School in South Strafford, Vermont. She became a keen observer of how students learn to write—and what