2002

Lawyers and Decisions: A Model of Practical Judgment

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LAWYERS AND DECISIONS: A MODEL OF PRACTICAL JUDGMENT

ALEXANDER SCHERR*

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* Assistant Professor of Law and Director of Civil Clinics, University of Georgia School of Law. I thank my colleague and clinical mentor, Carolyn Wilkes Kaas, for her patience, flexibility and wisdom in the course of my development of this Article, which blossomed from our joint work on a related piece. Without her reassurance, prodding and practical insight, this Article would not have achieved its current form. I also thank my mediation mentor and friend Suzanne Terry for helping me to understand the human dimensions of conflict and, particularly, the centrality of emotion and intangible interests. I thank Dan Coenen, Michael Wells, Kimberly O’Leary, Paul Tremblay, Ron Carlson, Bea Moulton and Ed Larson for valuable comments on drafts; and Linda Meyer for formative conversations about the nature of thought and decision-making. I recall with anxiety and gratitude the reactions of participants at the UCLA/IALS Conference on “Conceptual Paradigms in Clinical Legal Education,” October 23-27, 1997, and particularly of Ian Weinstein and Gary Blasi; those comments precipitated a central revision in approach to the ideas in this Article. My gratitude goes also to my clinical students, whose reactions to the ideas here have ranged from bemusement to energetic adoption; and I give particular thanks to Lisa Taylor, whose editing provided essential learning for me. Finally, I thank Deans Edward Spurgeon and David Shipley for their consistent financial support, as well as for their understanding of the difficult balance between administration, clinical teaching and scholarship.

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WHAT do lawyers do, and how do they think in practice? Certainly, lawyers analyze law, and apply it to facts: the law school answer. This article proposes a more fluid notion: that lawyering prompts a mindfulness associated with decision-making, a mindfulness that engages and integrates a number of different capacities. Lawyers engage in a complex and unique thought process that relies only partially on rigorous analysis of legal principle. Lawyers must also integrate non-legal and even non-conceptual realities in considering client decisions. This integration emerges from the lawyer-client relationship and flexes to the demands characteristic of lawyering tasks. Lawyering is thus a form of legal decision-making, equivalent in force and effect to judging or legislating.

1. See Carrie Menkel-Meadow, The Legacy of Clinical Education: Theories About Lawyering, 29 CLEV. ST. L. REV. 555, 555 (1980) ("The Developing Clinical Legal Education Movement has been concerned with the central question 'What is it that lawyers do?').

2. "Non-conceptual realities" refers to realities felt, but not easily expressed in language, nor susceptible to structured analytical exposition. See infra Sections III.A.1-3, 5 (discussing narrative, emotion, relationships and interests). Conceptual realities refer to realities more typically articulated in words and structured into argument, debate and intellectual analysis. See infra, Sections III.A.3 (money and other resources) and III.B. (law).

3. An earlier co-authored draft of this Article argued that lawyers possess a distinctive kind of intelligence, which a co-author and I labeled "decisional intelligence." We proposed a model of this intelligence that automatically considered certain elements in formulating the lawyer’s understanding of her work. Moreover, that draft also presented a teaching model by which teachers might foster that intelligence in law students. See Alexander Scherr and Carolyn Wilkes Kaas, Decisional Intelligence: Fostering Contextual Judgment (Unpublished paper presented at the UCLA/IALS Conference on "Conceptual Paradigms in Clinical Legal Education," October 23-27, 1997). For a discussion on why this model proved dissatisfying, see discussion infra Section II.C.3.

In its place, this Article presents lawyering as an interplay between the decisional situation and the lawyer’s mind. I develop this interplay more fully in Section III. The teaching model that formed a part of the original paper will appear in a separate article.
This description crystallizes a theory of lawyering developed over the last half-century. As discussed in Section II below, American legal culture has self-consciously and explicitly worked towards a theory of what lawyers do as lawyers. Starting with the Langdellian reforms (now over a century old), various realists, clinicians, philosophers, and political and scientific critics, have developed a consensus about the centrality of lawyer judgment as an influence on law in our culture. Particularly over the last ten years, a rich debate has sprung up in disparate, cognate areas: the role of the lawyer in his or her relationship with clients; the integration of neutral practice into an adversary system; the contextualization of lawyering behavior through inquiries based on social science, particularly anthropology, sociolinguistics and cognitive science; and a separate contextualization, by critical voices, locating lawyering within political and cultural biases or seeking to unbundle the skeleton of lawyering for action by others.4

Lawyering is decision-making in phases and is strongly dependent on the bond between lawyer and client.5 The phases of lawyering process—assessment, decision and action—bear a dynamic relation to each other.


5. For further discussion of the lawyer/client relationship, see infra Sections II.B.2 and III.B. To characterize the lawyer-client relationship as the central context for lawyering judgment seems to exclude law practices in which the client is diffuse, general or only conceptually defined, such as corporate representation, government agency practice or criminal prosecution. However, even here, ethical codes or statutory mandates impose an obligation to act in the interests of the organization or agency, or in the public interest. These obligations, coupled with the natural tendency to set goals by reference to the lawyer’s internal sense of the relevant interests, generate a psychological context for which the “lawyer-client relationship” serves as an apt metaphor.
They rarely separate into distinct tasks. When they do, it is never for very long. Indeed, this decision-making process centers and guides the characteristic legal tasks of negotiation, advocacy and planning. These jobs bring realities to bear that further shape the lawyer’s mind and the lawyer’s decisions.

Throughout, the lawyer accommodates influences well beyond legal doctrine. Doctrine remains a necessary, distinctive part of a lawyer’s thought, but is neither sufficient nor always dominant. Instead, it serves as one among many “topics” which surface regularly in a lawyer’s handling of decisions. Other topics include narrative, emotion, relational realities, power, interests and resources. These topics comprise internal and external influences and engage both conceptual and affective dimensions. The lawyer’s ability to integrate these influences, and to act on them within practical constraints, constitutes a distinctive capacity, for which I use the term “practical judgment.”

I offer three caveats. First, practical judgment here references decisions made by lawyers in regular practice, whether through case appraisal, counseling, planning, negotiation or advocacy. It refers neither to adjudication nor to legislation. Second, I do not ask, “how should lawyers think?” I ask a more descriptive question: “How do lawyers think?” I may suggest what lawyers should do, but will not advance my suggestion as conclusive. Finally, this descriptive effort is neither empirical nor scientific, but propositional and humanistic. It draws on historical and conceptual sources to suggest both an agenda for research and a language for explaining the methods of lawyering.

Practical judgment in the hands of lawyers requires a unique mixture of conceptual skill and personal, even subjective, rigor. It requires responsiveness to non-legal, and often non-conceptual, realities and experiences. Practical judgment engages not only the lawyer’s intellect, but also his or her emotions, values and social capacities. Indeed, it occurs in a relational context and emerges from joint decision-making. Finally, it requires a degree of personal and moral discipline and care that develops only slowly and with experience. What blossoms in law school ripens only later, after regular encounters with problems for which legal doctrine offers only partial, incomplete answers.

II. LAWYERS AND DECISIONS

At the outset, we should ask whether finding a “lawyering theory” involves a futile search. Defined as the actions and thoughts of lawyers in practice, “lawyering” might resist abstract conceptualization, allowing at

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6. “Lawyering” itself may be the gerund of a non-existent verb. The Oxford English Dictionary (OED) does not list a verb form of “lawyer” and lists “lawyering” as a verbal noun: “lawyering vbl. sb. colloq., the following of the lawyer’s profession.” See Oxford English Dictionary 720 (2d ed. 1989) (referring to noun “lawyer”).
best a diverse, disunified appraisal of its features. Why try? Lawyers need to know the law; beyond that, the argument goes, they need only apply the law to the situations they encounter to produce results deductively. Problem solved. Theory found.

But the extensive writing on what lawyers do presents no such simplicity. The review of literature that follows divides into three roughly chronological phases. The first addresses the sources of thought about lawyering process: the Langdellian revolution in education and the revisionist account of the legal realists. The second phase focuses on some of the foundational work from the 1950s through the 1970s: John Bradway’s work at Duke; Gary Bellow and Bea Moulton in The Lawyering Process; and David Binder, Susan Price and (later) Paul Bergman’s “client-centered lawyering” project. The third phase loses chronology in a delta of interwoven influences: negotiators and dispute resolution theorists; “critical lawyers”; lawyering scientists; and philosophers, Aristotelian and otherwise, inquiring into practical judgment. These most recent writers have refined and articulated the model without rejecting it.

Despite wide, creative divergence in views, this literature shows surprising consistency. One answer, then, to “why try?” is “to articulate this consistency” and to describe the standard model of lawyering. This section discusses the literature; I describe the model of practical judgment more directly in Section III. In so doing, I focus on theories and models of “lawyering,” express or implied. Theories of law or theories of law-making (for example, of adjudication) appear only where they allow more or less direct inferences about lawyering.

7. Modern views of lawyering process present the lawyering process as a series of disparate tasks, only loosely connected by a common thread. It is plausible to argue that no coherent definition of lawyering exists, beyond propositions about specific practice areas. This Article rests on a different view, but the reductive vision provides a critical reference to the discussion that ensues. For a further discussion of prevailing views on the lawyering process, see infra Section III.A.

8. This blunt version of the lawyer’s task might acknowledge some cleanup work: explaining likely results and options to clients, persuading opponents or adjudicators of desired outcomes or scrivening a plan for avoidance of disputes. But, in its bluntest form, this model of lawyering focuses on the deductive process of applying rules to facts to produce results. But see Richard K. Sherwin, Lawyering Theory: An Overview What We Talk About When We Talk About Law, 37 N.Y.L. SCH. L. REV. 9, 20-22 (1993) (arguing that new “cultural terrains” make new views on legal theory, legal practice and legal pedagogy possible).

9. I also avoid a second question: how to teach and learn this model of lawyering. While this literature comes from the legal, and particularly, the clinical academy, the writers have articulated a vision of lawyering that at the least allows, and may even require, diverse methods of teaching and training. As Section III.H. (on lawyering development) argues, much of this learning occurs throughout an individual lawyer’s professional life.

10. One might argue, to paraphrase Karl Llewellyn, that “what lawyers do . . . is the law itself.” See KARL LLEWELLYN, THE BRAMBLE BUSH 16-17 (1960). Llewellyn’s perception about the subjectivity and idiosyncrasy of authoritative officials has been developed more recently into a perception of the subjectivity and idiosyn-
A. Sources

1. "Legal Science"

From its inception, case method sought to teach not only the law, but also a central skill of lawyering. The method required rigorous appraisal of appellate opinions, or "cases" (and, in a more modern era, the parsing of statutes), and emphasized conceptual and analytical thought. The method established not only a pedagogical practice new for its time, but also a new attitude towards the appraisal of the law, one rooted in propositions about "legal science." Justified initially by reference to this scientific approach, the method drew ongoing support for its practical utility: "the new system trained students to understand the sources as a practicing attorney must understand them.

Case method assumes an empirical proposition. Lawyers determine what the law is by reference to its original sources. The original sources of the law lie in appellate opinions. Therefore, a lawyer must study these opinions as a scientist would study data, using inductive reasoning to discredit of lawyers in active practice. Some recent visions of "lawyering" stress this interpretation of "law-making" and "lawyering." See infra Sections II.C.2 and II.C.4.

11. See LLEWELLYN, supra note 10, at 20 (noting that law students are taught law by reading appellate decisions). The term "cases" should be used advisedly. Appellate opinions reflect a distillation of the facts as presented to a trial court for decision. Trial court determinations of fact in turn reflect a winnowing out of information about the underlying dispute by the lawyers into whose hands the conflict was entrusted. We can only speculate about the winnowing that occurs before the case comes to lawyers. See generally Jerome Frank, Why Not A Clinical Lawyer-School?, 81 U. Pa. L. REV. 907 (1933) (arguing that study of trial transcripts provide more useful data than study of appellate decisions).


13. See LAPIANA, supra note 12, at 55-78 (discussing how principles of law are learned from studying and analyzing cases); see also ANTHONY T. KRONMAN, THE LOST LAWYER 170-74 (1993) (referring to Christopher Columbus Langdell's introduction of case method of instruction).

14. See LAPIANA, supra note 12, at 28, 55-58 (describing law as science of principles or doctrines illustrated in cases). In one of his rare public statements about the case method, Langdell makes explicit the reliance on scientific method:

We have . . . constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.


15. See LAPIANA, supra note 12, at 26 ("The goal of [the case] system was to lay a foundation of elementary knowledge that could be applied in practice.").
cover the principles which flow from the cases. After inducing the law from the decided cases, the lawyer applies those principles deductively to the prediction and decision of the case at hand. The interplay between inductive discovery and deductive application of legal principles characterizes the methodology implicit in the case method. It assumed that a lawyer in active practice does the same.

We now find many reasons to criticize case method, but it has prevailed and continues to occupy the center of many if not most law school

16. The method contrasted at its inception with a second approach to instruction in law: the discussion and recitation of general principles of law, identified and organized through the efforts of scholars, but taught as broad principles from which more specific conclusions might be deduced. See LaPiana, supra note 12, at 24-28 (relating introduction of case method to impact on law students and legal profession). Indeed, the efforts of Langdell and the reformed Harvard Law School to establish the new case method apparently received primary opposition from those who believed in a more lecture and deduction method of legal instruction, opposition lasting well into the twentieth century. See id. (discussing initial displeasure law students experienced when confronted with case method of teaching law). LaPiana provides a useful review of the legal philosophy undergirding this more traditional method of instruction. Compare id. (noting advocates of scientific history believed students should be taught by thinking instead of relying on ideas of others), with Kronman, supra note 13, at 157 (discussing mixture of cases and methods of philosophy and economics founding law school case books).

17. See Kronman, supra note 13, at 157 (discussing how case method allows students to learn by doing what professionals do in practice). During his generation, Langdell's method came to dominate law teaching based on the Harvard Law School model; one of his most articulate counterparts, Oliver Wendell Holmes, Jr. had a mixed attitude towards the value of Langdellian instruction. See LaPiana, supra note 12, at 119 (quoting Oliver Wendell Holmes, Book Notices, 5 Am. L. Rev. 715, 715-16 (1871) (book review)). Holmes had written in 1871 that "the common law 'begins and ends with the solution of the particular case,' so that 'the best training . . . is found in our moot courts and the offices of older lawyers.' The implication is that effective learning comes by doing, a belief perfectly compatible with the ideas about education that accompanied introduction of the case method." See id. In LaPiana's view, Holmes believed that "[s]tudying cases as the course of the law was the way to learn principles, but Langdell's way of studying cases was defective." See id. (discussing controversial, intellectual relationship between Holmes and Langdell).

18. See LaPiana, supra note 12, at 132-36 (discussing opposition faced by case method in legal community).

Modern critics have pointed out that Langdell ignored the realities of the law, that by limiting his focus to the few general principles found in selected cases, he squeezed law into a few preconceived and artificial categories. In addition, the case method vastly overemphasized the appellate courts' importance in the legal system.

William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures 103-04 (1978); see also discussion infra Section II.A.2. (detailing Jerome Frank's views of "cases" on which case method relies).

For purposes of this Article, one of the more cogent critiques focuses on the validity of a legal text, specifically the reported case, as a datum for scientific induction. See LaPiana, supra note 12, at 138 (referring to case method as erroneous because cases are not original sources of law, but are only application of principles to particularized facts). Such a text differs from data observed in the physical sciences, despite Langdell's contrary assertion. See id. at 35 (discussing how law is not science if cases rather than principles define law). Cases represent sophisticated
classes and curricula. This persistence suggests the continued vitality of its assumptions. Indeed, one can plausibly argue that the case method is a form of clinical training, defined as "a form of simultaneously direct and mediated experience, less a kind of artisan training than initiation into professional life." "Students trained in case study ... acquired a method of analysis by which they could eventually gain as much knowledge as they needed and under whatever new and unforeseeable circumstances that might arise." Case method satisfies the demand for a tool to find and interpret the law reliably and consistently in a form that can address a mental output, resulting in a formal deliberative process. This process rests on "facts" selectively developed, presented, weighed and filtered through carefully developed screens of argumentation and evidentiary testing. It is a truism that cases reflect only a portion of realities experienced by the original parties to the "underlying action." Even so, that partial picture and the abstractions that it produces, serve as an immediate point of reference for lawyers in practice.

19. See Speigel, supra note 12, at 584 (discussing theoretical aspects of case method and its persistence over time). For a useful discussion both of the characteristics of the Langdellian method and of its current use by law professors, see Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being, 69 WASH. L. REV. 593, 599-601 (1994) (describing methods of teaching used in law school, from theory and doctrine to application in practice). Menkel-Meadow distinguishes between the "substantive project of legal science" and the more durable methodology of case analysis. See id. at 601 (referring to hope that legal science and legal realism can be united for teaching purposes). She also describes the "divergent ends" to which law professors might put the method. See id. at 596 (discussing what education of lawyers should entail).

20. Chase, supra note 14, at 336 (citing MICHEL FOUCAULT, THE BIRTH OF THE CLINIC 81-82 (1973)). Chase advances the intriguing proposition that we should understand case method in its era as a compromise method of instruction, more practically oriented and clinical than the prevailing lecture method; and more uniform, rigorous and reliable than the then largely discredited apprentice system of the time. See id. at 337 (comparing and contrasting classroom, clinic and practice). Chase attributes this broader effort to conceive of case method as clinical partly to Langdell, but more substantially to Harvard's then president, Charles Eliot, who was also simultaneously reforming medical education along clinical lines. See id. at 333-35 (discussing legal education's adoption of case method); see also LAPIANA, supra note 12, at 169-70 (noting Langdell's justifications for promoting case method); Gary Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 375 (COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY 1973) (discussing what clinical legal education is and how its label is applied). See generally Anthony Chase, The Birth of the Modern Law School, 23 AM. J. LEGAL HIST. 329 (1979) (illustrating law school instruction at Harvard Law School in 1870).

client's concern. This assumes lawyering as piecework, the apprehension of principles and legal processes in particular, variable situations.

Case method works with given, hypothetical facts. It says little about how other, non-conceptual realities might influence legal rules in more fluid situations. The realists, and later the clinicians, filled out this interplay. The Langdellian revolution established a central feature of the standard model of lawyering. Lawyering requires a method to find law and calls upon inductive and deductive analysis, coupled with rhetorical skill, to interpret and communicate those findings. Law-finding and analysis is essential to bringing law to bear on client decisions.

2. **Realists**

How legal rules relate to lawyering realities provided a rich and regular focus for the legal realists. Jerome Frank and Karl Llewellyn in particular set the parameters for much of the modern discussion of this relation. While they share Langdell's assumptions about law-finding, they sought to integrate strict legal analysis into other lawyering realities.

At first blush, of course, Jerome Frank seems to have dealt harshly with case method. Frank does not reject inductive reasoning, which lies

22. *See Robert Stevens, Law School: Legal Education in America From the 1850's to the 1980's* 269 (1983) (comparing advantages of case method to other methods of teaching). The analytical tools taught by the case method overlap with methods now widely viewed as central to modern "skills" training. See infra Section II.B. ("Foundations"). Moreover, whatever the merits of the widely used, much-maligned "Socratic" method, the classroom practice of dialectical exploration (through question and answer) of the concepts and rhetoric of the law introduces students to habits of argument, and to a professionalized sense of legal discourse, which pervade both clinical instruction and law practice.

23. *See LaPiana, supra note 12, at 103, 107.* "The case method, in other words, made the 'scientific' study of law a manageable enterprise . . . . [T]he professor could, in turn, argue that his students were being given the tools to achieve the same depth of knowledge when the circumstances of their legal practice required it." *Johnson, supra note 18, at 105* (discussing case study as a "method of legal study and investigation").

24. *See Frank, supra note 11, at 919* (discussing other realities inherent in practice of law).

The critical question, however, was whether facility in the analysis of leading cases fit the actual circumstances of legal practice. That question was never squarely confronted in the nineteenth century because the proponents of case study were, in many cases, unfamiliar with the actual duties and responsibilities of the active practitioner.

*Id.*

25. Jerome Frank's *Why Not A Clinical Lawyer-School?* offers a scathing ad hominem attack on Langdell himself, arguing:

The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the "atmosphere" of a case,—everything that is undisclosed in judicial opinions—was virtually unknown (and was therefore meaningless) to Langdell. A great part of the realities of the life of the average lawyer was unreal to him.
at the heart of the case method. Instead, he argues that the material from which induction works, the reported case, reflects an incomplete source of data to understand the underlying case. Even in this view, lawyers must have "knowledge of . . . rules and principles, of how to 'distinguish' cases, and of how to make an argument as to the true ratio decidendi of an opinion, [as] part of the indispensable equipment of the future lawyer." 26

For Judge Frank, lawyering turns on litigation. 27 He describes an instrumental use of legal principles to resolve decisions, whether in litigation or in transactions. Transactional work requires little more than anticipation of how a future court might rule. 28 In his view, this anticipation inevitably entailed uncertainty. He attributes this to the subjectivity and particularity with which decision-makers approach problems, both legally and factually. 29 To learn to cope with this uncertainty, law students

Frank, supra note 11, at 908. For Frank, a true "case method" would study cases from the trial decision upwards, focusing on the refinement of raw facts through layers of judicial decision into the refined version of the case. See id. at 916 (providing possible improvements to casebooks).

26. See id. at 910. Indeed, Frank grudgingly acknowledges some of Langdell's clinical intent: "one cannot help feeling that he was seeking obliquely and fumblingly to return to some limited extent to court-room actualities." Id. at 909-10. Frank immediately qualifies this brief nod, arguing that Langdell "was patently thinking of the lawyer as brief-writer and nothing more." Id. at 910.

27. See id. (stating work of lawyer revolves around specific decisions in definite pieces of litigation). "Litigation is the ultimate reference for the lawyer. By and large, in the last analysis, legal rights and duties, so-called, are nothing more or less than actual or potential success or failures in lawsuits." Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L.J. 1303, 1305-06 (1947).

28. See Frank, supra note 27, at 1306 (describing planners solely as predictors of trial outcomes).

The work of the lawyer revolves about specific decisions in definite pieces of litigation. When he draws a will or passes on a mortgage to secure a bond issue, organizes a corporation, negotiates the settlement of a controversy, reorganizes a railroad, or drafts a legislative bill, the lawyer is as truly concerned with how the courts will act in some concrete case as when he is trying such a case.

Frank, supra note 11, at 910.

29. See Frank, supra note 27, at 1306-07. Frank expresses this as uncertainty both as to the merits of the decision, and as an uncertainty in determining the facts necessary for such a resolution. See id. at 1307-10 (discussing how judges and juries interpret facts based on personal prejudices). "[T]he legal rights and duties of your client . . . under any given document, or in connection with any given transaction, may mean simply what some court, somewhere, some day in the future, will decide at the end of a trial in a future concrete lawsuit . . . ." See id. at 1306. He also notes that, as decisions rest on the decision-maker's view of the facts, factual uncertainty represents another significant parameter of the lawyering task:

The facts, then, for decisional purposes are no more than what trial judges or juries guess—what they think the facts are (or, more accurately, what they publicly say or imply they think the facts are). The "facts" consist, therefore, of the fallible subjective reactions of the trial judge or jury to the fallible reactions of the witness.

Id. at 1307.
should be exposed to other disciplines, and as well as to trial observation and the "techniques" of lawyering. 30

Karl Llewellyn offers a different appraisal, focused less on external, non-legal realities and more on the lawyer's internal judgments. 31 Llewellyn sees non-legal elements as a part of any "working situation," which the lawyer must come to terms pragmatically. 32 For Llewellyn, the lawyer must master the ability to think about both legal rules and the non-legal realities into which those rules must merge. Accepting the Langdellian view, he stresses the need for clear, precise mastery of traditional legal analysis. 33

30. See id. at 1312-13. Frank's actual proposals for reform of legal education are quite modest, and include a forceful criticism of what he understood to be clinical education of the time. See id. Interestingly, in a footnote added after his Yale Law Journal article went to press, Frank takes note of the work of one of the pioneers of clinical education, John Bradway, discussed infra Section II.B.1. See id. at 1544 n.104 (discussing clinical teaching methods used at Duke University Law School). Frank approves of the methods of instruction described in one of Bradway's books. See id. (describing pros and cons of clinical teaching method at Duke). Even so, he offers mild criticism of Bradway's method, in part because it "is not closely integrated with 'social studies,' psychology and philosophy." See id. (criticizing clinical teaching method at Duke).

31. See KRONMAN, supra note 13, at 200 (noting subjective nature of decision making in law). Anthony Kronman has traced two distinct elements in Llewellyn's assessment of judgment in law. See id. at 201 (discussing Llewellyn's overall position on legal science). In his early articles, Kronman argues, Llewellyn created and argued for "a purely descriptive enterprise whose aim is to explain judicial behavior without assessing its correctness or merit." See id. at 199. Kronman labels this strain in Llewellyn's thinking as "legal science," and traces its progress into and beyond the writings of Harold Lasswell and Myres McDougal. See id. at 201 (noting with particularly Harold D. Lasswell & Myres McDougal, Legal Science and Public Policy: Professional Training in the Public Interest, 52 YALE L.J. 203 (1943)). Kronman identifies the second strain of Llewellyn's thought as "prudential realism," rooted in "a certain conception of prudence or practical wisdom . . . If scientific realism reflects a Hobbesian conception of law, prudential realism may therefore be said to embody an Aristotelian one." Id. at 209-10. The discussion in the text traces Llewellyn's ideas of prudential realism, not his earlier strain of legal science. See id. at 210. Later, we will review many of the more modern embodiments of each strain, including both modern day scientists of lawyering and strongly Aristotelian arguments about lawyering judgment. See infra Section II.C. and Section III. Kronman himself develops from Llewellyn the more Aristotelian notion of practical "wisdom." See infra Section III.

32. See LLEWELLYN, supra note 10, at 16.

[T]he work of business counsel is impossible unless the lawyer who attempts it knows not only the rules of law, knows not only what these rules mean in terms of predicting what the courts will do, but knows, in addition, the life of the community, the needs and practices of his client—knows, in a word, the working situation which he is called upon to shape as well as the law with reference to which he is called upon to shape it.

Id. Llewellyn does not restrict this discussion to transactional lawyers: "Even as advocates, I am prepared to argue, they need, desperately, full knowledge of the facts of the life of the community, against which law must play." Id.

Llewellyn refined the deductive aspect of case method, through which rules produce decisions of specific cases. Llewellyn took special pains to assess the interaction between legal rules and non-legal (for him primarily commercial) realities in reaching present decisions. Legal rules can serve different functions in different contexts and the practicing lawyer must be able to assess the variable "significance" of rules. Not only might the deductive process produce different answers to similar

The technical job becomes one of concentrating one's effectives; of organizing them for mutual supplement and reinforcement at the single point of concentration chosen for attack. Of course, there must be no slip-up, anywhere. The "law"-side must be done in correct doctrinal form, and must be adequate to sustain its part of the case.

Indeed, Llewellyn's writing indicates a solid commitment and strong defense of the case method as a necessary component of preparation for lawyering. See LLEWELLYN, supra note 10, at 37-38 (discussing useful purposes of case method). In The Bramble Bush, he gave sustained effort to explaining and defending the inductive analysis at the heart of case method. Chapters two through seven of The Bramble Bush represent a particularly strong introduction to the inductive reasoning that lies at its core. Llewellyn acknowledges the value of the decided case as a focus of analytical inquiry, but, like Frank, he notes that the case report reflects only a portion of the entire reality confronted by its creator, the judge. See id. at 35-38. Integrating a "realist" appraisal of the value of case reports into a strictly Langdellian approach to case analysis, Llewellyn revitalizes it as a teaching form. See id. at 48-49. Llewellyn is unapologetically Langdellian in this, adapting without rejecting an assumption that lawyers in everyday practice must engage in stringent appraisal of the primary sources of law. See id.

34. See id. at 77-79. Like Frank, Llewellyn adhered to a notion of "lawyering" that focused on resolution of specific cases or concerns.

[Y]ou will also have to look into the question of what difference what the judges do is going to make to you, or to your client, or to any other person who may be affected by the judges' rulings on disputes. And even that will not be all. For when you find out what difference the judges' acts will make, you will then be confronted with the task of figuring what you, or your client, are to do about it.

Id. at 5.

35. See Llewellyn, supra note 33, at 167-70. In one instance, he undertook an extended discussion of the influence of the notoriously uncertain parole evidence rule on concrete drafting problems. See id. at 170-75 (illustrating relevance of "background purposes, nature, legal techniques of the commercial transactions").

36. See id. at 183 (noting that lawyers must find and apply appropriate rules to each case). "[T]he law" to the commercial counselor must still be taken to be what it will do, or what he can get it to do for him: foundation, tool, or hazard." Id. at 176-77. This language of "significance" derives from a contemporaneous effort by David Cavers: "The problem of understanding legal materials is essentially one of appreciating the significance they have for the lawyer when he is seeking to resolve the various questions that he is called upon to answer." David F. Cavers, "Skills" and Understanding, 1 J. LEGAL EDUC. 395, 396 (1949). Cavers presents a short case study, tracing the influence of an ambiguous case precedent on the drafting of the contract: in the client's assessment of risk; the contesting lawyers' assessments of likely outcomes, first at trial, then two levels of appeal; in the appellate court's "reinterpretation" of precedent; in legislative assessments of policy, in scholarly discussion; and in a law-school case book, the eventual dumping ground of the rule. See id. at 396-99.
questions, but deduction itself may not provide a complete basis for practical decision.

Like Frank, Llewellyn saw authoritative decision-makers as firmly subjective, case-specific and therefore not fully predictable.\footnote{37. \textit{See} Llewellyn, \textit{supra} note 33, at 182 (discussing technically perfect case). Llewellyn tempers this skepticism about the unpredictability of decision-makers with an equivalent trust in the regular patterns within which most state decision-makers operate:}

\begin{quote}
The main thing is what officials are going to do. And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow. \textit{Llewellyn, supra} note 10, at 4 (emphasis in original). This regularity has value for Llewellyn, not because it allows the construction of systematic, conceptually coherent doctrine, but because of a psychic reality: “judges think that they must follow rules, and people highly approve of that thinking.” \textit{Id.} This perception defines a central feature of the lawyer’s task, “in considerable measure the art of finding what rules are available to urge upon him, and of how to urge them to accomplish your result. Rules . . . and their arrangement, and their logical manipulation, make up an unmistakable portion of the business of the law and of the lawyer.” \textit{Id.}
\end{quote}

\footnote{38. \textit{See} Llewellyn, \textit{supra} note 33, at 183 (discussing lawyer’s need to have case make sense in terms of “life and justice”). For example, in another passage, Llewellyn discusses the apologetic tone with which litigators in his lifetime once spoke of introducing “atmosphere” in litigation, by which he meant factual information not strictly necessary for the application of legal principles. \textit{See id. Llewellyn approvingly describes his perception of a shift in that tone:}

\begin{quote}
It is no longer a question of “introducing atmosphere.” It is now a question of making the facts talk. For of course it is the facts, not the advocate’s expressed opinions, which must do the talking. The court is interested not in listening to a lawyer rant, but in seeing, or discovering, from and in the facts, where sense and justice lie. \textit{Id.} at 183.
\end{quote}

\footnote{39. \textit{See discussion infra} Section III.C.1.}

\footnote{40. \textit{See} Llewellyn, \textit{supra} note 33, at 183 (discussing advocate’s use of statement of facts to frame legal issue). By focusing on the problem of predictive uncertainty in the lawyer’s task, Frank and Llewellyn focus attention on a cognitive reality that later received expanded analysis and debate in cognitive psychology. \textit{See generally Judgment Under Uncertainty} (Daniel Kahneman et al. eds., 1968) (providing comprehensive overview of research on judgmental heuristics and exploring their effects).}

\footnote{41. \textit{See Llewellyn, supra} note 10, at 16 (stating that as counselor, lawyer needs to anticipate court and structure clients’ conduct).}
they offer as foundation and tools for building, or else according to the nature and degree of the danger which they offer of producing an upset or other undesired result."\textsuperscript{42} Llewellyn deserves significant credit for the first non-predictive, value-added view of transactional practice.\textsuperscript{43}

For Llewellyn, lawyering in all practices involved a distinct mental activity, one not limited to the inductive-deductive processes of the case method. His language for describing this mental activity varied; his most compelling language describes it as a form of "hunching."\textsuperscript{44} In some

42. See Llewellyn, \textit{supra} note 33, at 168 (discussing variable nature of legal rules). By contrast, for advocates, according to Llewellyn, a legal rule:

is . . . not merely an area of risk, as it is to the counselor; it is also to the advocate an area of opportunity: he may be able to win his case with the help of one or more of these . . . rules not merely as threatening "chanciness," but also as offering chances; not chances in general and in the abstract, but chances in terms of what he can manage to do with them in this particular case in the particular available courts and, perhaps, against a particular known adversary.

\textit{Id.} at 169; see also discussion \textit{infra} Section III.B. (revisiting the disparity in treatment of litigation and transactional lawyering). For a discussion of the interaction between the conflict resolution and transactional elements in lawyering, particularly in negotiation, see \textit{infra} Section II.C.1. (describing modern negotiation and dispute resolution theory) and Section III.B. (describing nature and parameters of different practice contexts on practical legal judgment).

43. Llewellyn's influence on describing and defining the discrete components of the lawyering tasks took many forms. Anthony Kronman, in \textit{The Lost Lawyer}, attributes to Llewellyn the notion of "law jobs," which in Kronman's gloss of Llewellyn's ideas consist of judging, counseling and advocacy. See Kronman, \textit{supra} note 13, at 121 n.5 (citing Karl N. Llewellyn, \textit{The Normative, The Legal and the Law-Jobs: The Problem of Juristic Method}, 49 \textit{Yale L.J.} 1355 (1940)). Separately, Llewellyn actively advocated for definitions of the lawyering "skills" that might, and perhaps must, be taught in law schools. See Stevens, \textit{supra} note 22, at 214 (articulating rationale underlying legal education). In 1944, he served as principal author of a report of the American Association of Law Schools' (AALS) Curriculum Committee, in which the Committee noted the inadequacy of case method as a vehicle for producing "reliable professional competence." See \textit{id.} (discussing attempt to isolate legal skills). As Stevens has noted, "outside analytical skills, however, there was little agreement as to what were legal skills." \textit{Id.} (discussing complexity of law and inadequacy of current instruction). This effort finds its modern echo in the MacCrate report. See generally Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, \textit{Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap} (Robert MacCrate ed., 1992) [hereinafter MacCrate Report] (addressing utility of various methods of legal education as bridge to active law practice).

44. See Llewellyn, \textit{supra} note 10, at 113. Discussing case method, Llewellyn says:

[T]he schooling of your \textit{hunching-power} as to the outcome of a case, as to the way a court will jump. If I am right in what I have argued as to the uncertainty of the law in \textit{any one detail}, if I am right about the leeway open to the court on facts and precedent, if I am right about the huge importance of court-attitude—then hunching must be vital to your practice. . . . Good hunching-power is a resultant of good sense, imagination, and \textit{much} knowledge.

\textit{Id.} Here, Llewellyn's analysis focuses on hunching based on case analysis, the ability to predict what judges will do based on diligent, informed reading of court
places, hunching is prediction, guesswork schooled by assessment of appellate cases. Elsewhere, hunching includes appraisal of the non-legal elements in a situation, centered on completing tasks and making decisions. He posits a failure by the legal profession to articulate the exact nature of its “craft”: “skills, and wisdoms, . . . practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; and then in skills for regularizing the results.” From another angle, he stresses “[v]ision and sense for the Whole, and skills in finding ways, smoothing friction, handling [people] in any situation, with speed, with sureness: these mark our best. These things . . . have been the true heart of our craft . . . .” Llewellyn thus sees lawyering as a distinctive mental process, which merges rigorous legal analysis with an equally rigorous grasp of non-legal realities, in the service of practical decisions.

This remains the central modern vision of what lawyers do and how they think. The realists posed the core, now uncontested, propositions about lawyering: the challenge of subjectivity in decision-making and in law practice; the lawyer’s task of integrating legal rules with non-legal realities; and the overlap and division in the roles of counselor, litigator and

See id. (discussing knowledge as it impacts hunching). “The better quality the knowledge has, the more open-eyed the reading of the cases, the more skillful will be the hunch. So that your case-work here builds a foundation in another way, for all your practice . . . . You need more cases, more cases, more and more and more.” Id.

45. See Karl N. Llewellyn, The Study of Law as a Liberal Art, in Jurisprudence: Realism in Theory and Practice 390 (1962). Llewellyn used other terms for this “hunching” capacity, including “craft” and “horse-sense.” See Kronman, supra note 13, at 215-16 (discussing habits that constrain judges in deciding cases). Kronman’s gloss on Llewellyn’s idea describes it as a form of practical wisdom, and stresses the craft element of Llewellyn’s vision. See id. at 215 (explaining theories behind Llewellyn’s beliefs).

46. See Kronman, supra note 13, at 215 (discussing ways judges decide cases). In discussing the influence of military service during World War II on the practice of law, Llewellyn states: “Here is what we are up against, in terms of situation and facts and people and how these people are organized and think and feel and act. Here, next, is what we want to get done. So, now, how do we do it?” Llewellyn, supra note 33, at 170. After the war, he describes “the articulate growth among the better lawyers, of this type of problem-situation thinking and of operational approach to what ‘the law of the situation is.’” See id. at 175 (noting “most significant recent development on the ‘legal’ side of commercial transactions”).

47. See Karl N. Llewellyn, The Crafts of Law Re-Valued, 15 Rocky Mt. L. Rev. 1, 3 (1942) (discussing lack of lawyers called to service at time when other professions are serving their country). This assessment involved a detailed questioning of why lawyers as such were seen to have less value to the war effort than, for example, doctors or engineers. See id. at 1. He again notes the interpretation of legal analysis with this more pragmatic case of thought: “[K]nowledge of the law we do have, and we do need, but such knowledge is but the precondition of our work.” Id. at 2-3.

transactional planner. These propositions also include the central pre-
mise that lawyers develop a unique mental ability for decisions under the
law.

B. Foundations

Clinical teachers, in both theory and practice, have engaged in an
extended debate over the nature and purpose of lawyering.49 Early efforts
at “legal aid clinics” drew mixed reviews as teaching devices.50 Little writ-

49. See generally Menkel-Meadow, supra note 1, at 555 (discussing theories of
lawyering). As noted earlier, the Langdellian revolution defined itself at least in
part in opposition to the unstructured method of learning lawyering through ap-
prenticeship. See Stevens, supra note 22, at 52-53. That revolution did not silence
Area, who continued to advocate for practice-oriented training, even during the
period of Langdell’s ascendancy. See id. at 214-15 (discussing various legal clinic
programs). As early as the 1890s, law schools began to operate “legal aid offices,”
designed to provide service to the poor and needy. See id. at 162-63. However, not
until the 1930s did a law school formally incorporate such an office into its curricu-

lum as a training methodology, starting with the pioneering work of John Bradway
at Duke, along with other clinicians. See id. (mentioning Tennessee, Louisville Law
School, Colorado, Connecticut and Wisconsin as schools supporting clinical
work). Effective locally, these efforts of individual schools did not translate into a
national movement until the late 1960s. See id. at 211 (describing cyclical changes
in course curriculum). The modern era of clinical education dates from then, and
particularly from the Ford Foundation’s funding of the Council on Legal Educa-
tion for Professional Responsibility, or CLEPR. See id. 240-41 (noting inclusion of
practical education in law schools); see also Spiegel, supra note 12, at 581-93 (1987)
(arguing that both case method and legal realist approaches to legal education can
be characterized as either theoretical or practical).

50. See Johnson, supra note 18, at 140 (providing disadvantages of legal aid
clinics); Stevens, supra note 22, at 241-43 (citing examples of law schools that in-
corporated clinical programs in curriculum). These early clinics had a limited im-

pact on the teaching of law, and indeed drew criticism precisely for their intention
to serve the specific, particular needs of the impoverished. See Spiegel, supra note
12, at 605 (discussing movement in late 1960s and early 1970s to incorporate
clinical education as part of law school training). According to Johnson:
[L]egal aid clinics would not prove to be the answer to providing the
desired practical dimension of legal practice. Because the clinics were
limited basically to the crisis needs of the very poor, it had “only a rela-
tively narrow role as a teaching institution.” . . . O.L. McCaskill of the
Cornell Law School, for example, criticized the legal aid program at Min-
nesota for giving the student work that was “not really legal in character.”
He noted that “a total of 72 percent of the work is devoted to petty wage
claims, domestic troubles, collections, and advice on everything that
comes.” In only one instance did a law student actually go into a court
room or attend a judicial proceeding and “that was on a garnishment
proceeding.” And not only was the work centered outside the courts, it
was office work that mainly “consisted in running errands, riding five
miles on a street car to serve a summons, making collections, writing
down statements of clients, and making settlement.” This work, McCas-

kill concluded, “does little more than supply the opportunity to study
character.”

Johnson, supra note 18, at 140. Note the assumptions (in McCaskill’s critique if
not Johnson’s text) that: (1) small scale cases for individuals provide few opportu-
nities for learning; (2) only litigation is valuable as an experience of lawyering; (3)
ing was produced on lawyering. What was written was mostly in the work of one author, John Bradway.51 Other texts on clinical and “skills” education began to emerge in the late 1960s, but not until the late 1970s did lawyering writers produce what proved to be influential texts.52 Gary Bellow & Bea Moulton in The Lawyering Process: Materials for Clinical Instruction in Advocacy,53 David Binder and Susan Price in Legal Interviewing & Counseling,54 with others,55 set the parameters for much of the later debate on lawyering. This section appraises the foundational work of Bradway, Bellow and Moulton, and Binder and Price.56

"investigation" and "making settlement" is office work, almost clerical in nature; and (4) the study of character is an activity secondary to the study of law. See generally id. (discussing argument against practical training in law school).

51. See generally John Bradway, How to Practice Law Effectively (1958) [hereinafter Bradway, How to Practice]; John Bradway, Basic Legal Aid Clinic Materials and Exercises on Taking Hold of a Case at Law (1950) [hereinafter Bradway, Basic Legal Aid Materials] (providing materials for teaching legal aid course); John Bradway, Clinical Preparation for Law Practice (1946) [hereinafter Bradway, Clinical Preparation] (discussing methods and objectives of clinical study course); John Bradway, Legal Aid Clinic Instruction at Duke University (1944) [hereinafter Bradway, Legal Aid Clinic] (discussing methods of teaching clinic course); John S. Bradway, How to Organize a Legal Aid Clinic (1935) [hereinafter Bradway, How to Organize] (advocating use of legal aid clinic).


53. See generally Bellow & Moulton, supra note 48 (providing materials for counsel instruction in advocacy).


55. See generally Louis M. Brown & Edward A. Dauer, Planning By Lawyers (1978) (discussing two interrelated purposes of book, “the institutional view of the profession and process of planning”); Mark K. Schoenfeld & Barbara Pearlman Schoenfeld, Interviewing and Counseling (1981) (discussing art of interviewing and need for attorney to acquire these skills); Thomas Shaffer & William Redmount, Legal Interviewing and Counseling (1976) (discussing technical and moral dimensions of interviewing and counseling); Andrew S. Watson M.D., The Lawyer in the Interviewing and Counseling Process (1976) (theorizing that interviewing skills are as crucial as analytical skills). Carrie Menkel-Meadow provides a useful early review of the “lawyering” theories extant in the seventies. See generally Menkel-Meadow, supra note 1, at 558-68 (discussing contemporary schools of thought on lawyering).

56. For a discussion of Bradway’s work, see infra Section II.B.1. For citations to Bellow and Moulton, see infra Section II.B.2. For a discussion on the work of Binder and Price, see infra Section II.B.3. It may prove risky to rely too heavily on these “texts” for views about lawyering. Not only are these works “texts” in the literary sense, they are also demonstrably “texts” in the pedagogical sense: works intended to teach new practitioners. Each thus makes assertions about lawyering to a particular audience, law students, who must be presumed to have little understanding of lawyering. See, e.g., Bellow & Moulton, supra note 48, at 123 (describing tasks lawyers must be familiar with in practice of law); Binder & Price, supra note 54, at 1-5 (discussing lawyer-client interaction); David Binder et al., Lawyers as Counselors 1-16 (1991) (discussing counseling considerations concerning client’s various legal and non-legal problems); Bradway, How to Organize, supra
1. John Bradway

John Bradway provided the transition between the legal realists of mid-century and present-day clinicians. Bradway founded the first in-house teaching clinic at Duke University Law School in 1931 and assisted in the development of clinics at the University of Southern California Law School, Temple Law School and other law schools. But his writing on clinical training, and its implications for lawyering theory, remains largely unexplored. Indeed, none of the principal lawyering texts of the 1970s cite his work. He had no explicit textual influence, nor was his specific theoretical or pedagogical approaches consciously adopted by later clinics.

Note 51, at 34-42 (setting forth typical set of interviewing rules used by legal aid clinics). Whatever their merits as instructional tools, they might vary from the authors' considered opinions when presenting these views to a more informed, experienced audience. Indeed, acquiring the decisional capacity required for lawyering involves a process of cognitive, affective and moral change in the lawyer that extends far beyond the brief years of law school. The utility of a single text in this view is limited to setting base parameters towards the lawyer's self-determined future growth: no slight task, but one necessarily and avowedly incomplete.

With this caveat, it seems justifiable to appraise these works as statements about what lawyering could be, and to infer from the instructional devices they present something about the authors' views about what lawyering is. Indeed, the titles of two of these works (Bradway's How to Practice Law Effectively and Bellow and Moulton's The Lawyering Process) lay claim to complete accounts of lawyering; Binder and Price's title, Legal Interviewing and Counseling: A Client Centered Approach, is at least more modest.

57. See Frank, supra note 27, at 1344 (concluding in footnote that Bradway's method "(1) comes late in students' law school career, (2) is not closely integrated with 'social studies' ... and (3) does not stress the importance of policy-making ... and ... trial-court fact-finding [reform]"). Jerome Frank recognized Bradway's work as presenting a useful, if incomplete, implementation of Frank's views of legal training.

58. See Douglas Blaze, Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education, 64 TENN. L. REV. 939, 945-47 (1997) (reviewing Bradway's work at Duke and University of Southern California, crediting him with founding first ongoing in-house program in 1931, and acknowledging his influence on formation of Tennessee's clinical law program, now oldest continuously operating in-house program in United States); see also John S. Bradway, The Beginning of the Legal Aid Clinic of the University of Southern California, 2 S. CAL. L. REV. 252, 253 (1929) (discussing first legal clinic at University of Southern California and close contact between clinic and legal aid society); John S. Bradway, Legal Aid Clinics in Less Thickly Populated Communities, 30 MICH. L. REV. 905 (1932) (commenting on lack of legal aid materials and clinics in less populated cities); John S. Bradway, The Nature of a Legal Aid Clinic, 3 S. CAL. L. REV. 173 (1930) (describing structure and organization of legal aid clinics); John Bradway, The Objectives of Legal Aid Clinic Work, 24 WASH. U. L.Q. 173, 176 (1939) (reviewing need for legal aid clinics to provide balance between learned skills and information). Bradway's ideas found no explicit reference in any of the later writing by lawyering theorists. His ideas anticipate, and in many ways, persuasively articulate the central premises of the modern clinical movement. It would be a useful historical review to trace the extent to which Bradway's ideas influenced later clinical thinking, not through written work but through his assistance on program and curriculum design and through his personal influence.
Bradway identified three primary phases for lawyering: “taking hold of a case,” “planning a campaign at law” and “closing out a case.” The first and the last correspond roughly to appraising the facts and the law in the client’s situation and to acting on decisions made by lawyer and client. Between these two phases lies a third, which Bradway described in strategic terms. This phase involves creation and evaluation of options, and choice between those options by the client; it describes counseling as a central function of lawyering. Bradway left no doubt about the complexity of this central phase:

[T]he process of planning a campaign requires in the highest degree qualities of creative legal statesmanship. Our thinking should be comprehensive, imaginative, precise. We should be able to decide when to be bold and when cautious, in what circumstances we need tact or brutal firmness. We must be balanced, shrewd, tireless, resourceful, skilful, mature.

Bradway thus models lawyering as an orderly progression from appraisal of the client’s situation (“taking hold”), through assessment of and decision between options (“planning a campaign”) and concluding with implementation of the decision through action (“closing out”).

For each of these phases, Bradway describes subcategories of lawyering method. For “taking hold of the case,” he identifies the initial client interview, followed by parallel factual development and legal analysis and research. For “planning a campaign,” he describes “collecting all imaginable goals,” goal evaluation and assessing which actions might implement the realistic goals. Finally, for “closing a client’s problem,” he identifies multiple possible forms of action by lawyer and client, including education.
tion, conciliation, arbitration, litigation, legislation or "other," a category which includes a range of possible non-legal means to address the problem. He provides painstaking detail in each of these sub-phases, while relating each phase and sub-phase to the overall task of handling the case, thereby creating a persuasively integrated vision of the entire lawyering task.

Indeed, Bradway consciously chose to present his view of lawyering as an integrated whole, what he described as a "method." "A legal aid clinic course then is designed to teach not law but method. The word method means to use an orderly thinking process, but it is the process of the practicing lawyer and not of the judge or legal scholar."

Moreover, Bradway's view of the mental process involved in this "method" was notably complex, involving two sorts of thought processes: "topical" and "functional." Both are essential for the successful practitioner. By "topical" thinking, Bradway means the kind of thought process engaged by the Langdellian classroom—"more of an observer... intellectual thinking... more impersonal, scholarly, [and] theoretical." By "functional thinking," Bradway means an appreciation for the non-legal, and even non-conceptual elements of the lawyer's task—"more of a participant... emotional thinking... more individualized (accomplish the solution of a particular client's problem)—practical, realistic."

Bradway left little doubt that the two together provided conjoint elements in the practicing lawyer's mind:

To be a competent and well-rounded lawyer in general, an applicant for admission to the Bar first acquires a hard core or foundation of topical thinking about the law. He surrounds this with or superimposes upon it an equally significant body of functional thinking with a view to making himself an above average general practitioner.

The capacity to integrate the results of Langdellian methodology for discerning law into an assessment and solution of the client's problem relies on more than the inductive-deductive process of that method. It requires a strategic ability to integrate the non-legal into the legal to generate practical solutions:

65. See id. at ch. VII ("Closing out the client's problem"), VIII ("Closing out the client's problem by education"), IX ("Closing out the client's problem by conciliation") & X ("Closing out the client's problem by litigation"); see also Bradway, Basic Legal Aid Materials, supra note 51, 129-48 (commenting on both legal and non-legal means of attaining goal of case).

67. See Bradway, How to Practice, supra note 51, at 5 (discussing development of sound professional habits).
68. Id.
69. See id. at 5-6 (discussing topical thinking).
70. See id. at 6 (referring to functional thinking).
71. Id.
Functional thinking begins with a client who has a problem to be solved. It breaks down into the types of professional thinking involved: (a) in taking hold of the client's problem and (b) in solving or trying to solve it. It requires the lawyer: to win the client's confidence, to obtain all pertinent relevant facts, to develop all practicable theories of law, to work out an appropriate and realistic plan of campaign and then carry it on to a successful conclusion; or at least one as successful as is possible under all the circumstances.  

In his assessment of the lawyering task, Bradway thus stresses the process of strategizing solutions to client problems using a broad range of possible means. He consistently uses military metaphors to describe the strategic mindset (for example, "planning a campaign at law"). Yet Bradway acknowledges that strategy does not require adversarial process:

"While we had the greatest respect for the litigation process and recognized the need for the student to know how to operate in court in a professional manner, it did not cover our clients' needs. In perhaps 90 per cent of our cases, and cases in law offices generally, there was no occasion to go to court. Our clients seemed glad when court action was not indicated. For the sake of clients and students, we had to know other methods of closing out cases at law. . . . We heard our clients insist that they did not care very much what the law was. They wanted to know what we could and would do for them."  

Indeed, of the possible actions that he suggests for implementing decisions with lawyers, only two involve adversarial process (arbitration and litigation); two more involve informal, consensual persuasion (conciliation and legislation); and the final two involve no action by the lawyer beyond direct dealings with the client (education and "other").  

Bradway's lawyering sounds thin to ears tuned to the more modern sound of political struggle, cognitive process, lawyer-client relations and the subjective influences. Indeed, a central tenet of Bradway's pedagogy...
sounds almost willfully naive: He suggests the reduction of his sophisticated model of lawyering (born of decades of indigent representation and clinical supervision) into "checklists" that instructors insist young lawyers use to learn their craft. Yet, however thin, checklists are still with us, and, in Bradway's case, reflected a conscious choice rooted in his conception of the lawyering task. 76 For him, lawyering involved a mental process, one in which new practitioners may require guidance to avoid developing ineffective mental habits. The checklist, if followed and internalized, allows young lawyers a psychic foundation from which to build a more personalized set of mental habits for the central lawyering tasks. 77 For Bradway, lawyering at its root involves "certain orderly routines implicit in functional thinking of the above-average general practitioner of law." 78

This optimistic cognitivism stresses the mental, and indeed the conceptual, content of lawyering, even about non-legal elements. 79 One of Bradway's primary contributions to the literature of lawyering lies in his articulation of lawyering as a coherent process, relating its component parts to that central coherence. Moreover, Bradway identified as central the integration of the conceptual material of the law into the practical, non-legal aspects of client problems.80 Yet, despite his acknowledgment of the "emotional" and "functional" element to lawyering, Bradway does not

76. See Bradway, Clinical Preparation, supra note 51, at 76 (discussing use of checklists by students to secure general view of legal problems of case). For highly selective examples, see Binder & Price, supra note 54, at 53-103 (describing now famous "three-staged" process for interviewing clients); see also Binder et al., supra note 56, at 112-96 (describing revised "two-stage" model, including specific methodologies for assessing case theory during interview); Stefan Krieger et al., Essential Lawyering Skills: Interviewing, Counseling, Negotiation and Persuasive Fact Analysis 33-37, 187 (1999) (presenting six-step model to assist lawyers in strategizing solutions).

77. See Bradway, Basic Legal Aid Materials, supra note 51, at 10 (using analogy of football game as mental exercise to determine "plays most likely to succeed").

If the reader finds the outline . . . unimaginative and the check lists absurdly simple, he is asked to remember that even this progress has been made only with the expenditure of "blood, sweat, and tears" . . . [W]e may not have taken [the young lawyer] to the end of the road . . . but at least we have given [the lawyer] a solid foundation as a general practitioner.

Id.

78. See Bradway, How to Practice, supra note 51, at 7 (discussing needed skills in topical approach).

79. See id. at 7-8. The optimism lies in an implied assertion from teacher to student. "If you learn these mental habits (which I have induced from my experience as lawyer and teacher), you will become an [effective] attorney." The cognitivism consists in the focus on "mental habits" and "mental method," locating the primary work of lawyering as an intellectual, albeit not exclusively conceptual activity.

80. See id. (noting factors for solution of client problems). In this, he follows Frank, and particularly Llewellyn, but he goes beyond both in his capacity to arrange even the most mundane of lawyering tasks in a coherent picture of the overall process. See id. (describing orderly routine in functional thinking).
dwell on the influences of subjective realities on the lawyering of decisions, nor does he spend time assessing the influence of the lawyer's own subjective realities on the lawyer's work. This assessment would await the clinical explosion of the 1970s.

2. The Lawyering Process

One moves from Bradway to Bellow and Moulton over a gap of twenty years, as if from a simple, compelling song worked out in plain (albeit subtle) harmonies, to a complex, challenging modern symphony, rich with dissonance and compelling improvisational riffs. In The Lawyering Process, 81 Gary Bellow and Bea Moulton attempt something like an encyclopedic account of lawyering. Its very ambition makes the book difficult to read, to absorb and especially to emulate. Like Bradway's work, it seems to have inspired relatively little critical response to its overarching ambition. 82 Yet unlike Bradway, the authors' personal influence in clinical education 83 and the modernity and comprehensiveness of their approach to the lawyering task make it a necessary challenge for anyone considering the development of current ideas of lawyering. 84

How can one get one's mind around the diverse, often contradictory, texts in the book? The authors occasionally offer templates, but they clearly do not share Bradway's optimistic cognitivism, nor do they rely much on internalization of methods. Rather, they consistently suggest contradictory views of core tasks and of how to accomplish them, much in the style of a traditional doctrinal case-book—leaving the reader (espe-

81. See generally BELLOW & MOULTON, infra note 48 (discussing skills for practice of law).

82. Later citations to the book generally refer either to (a) particular passages or arguments presented in discrete sections of the text or (b) the general significance of the text as an influence. None attempt to replicate the overall ambition of the text.

83. See generally BELLOW & MOULTON, infra note 48 (discussing lawyering as personal experience); Bellow, infra note 20 (describing original essay addressing problems of clinical teacher training). "No discussion about theories of lawyering could begin without reference to Gary Bellow, generally regarded as the theoretical father of clinical education." Menkel-Meadow, infra note 1, at 558; see also Martha Minow, Political Lawyering: An Introduction, 31 HARV. C.R.-C.L. L. REV. 287, 289-90 (1996) (referring to Gary Bellow's contributions to political lawyering).

84. Other authors had already attempted a clinical case-book. I have already reviewed some of Bradley's efforts. Less than a decade after the end of his clinical program at Duke, the CLEPR, with Ford Foundation support, began an ambitious five year program of funding for law school clinical programs, which contributed to the rapid spread of the "clinical method." See, e.g., SELECTED READINGS IN CLINICAL LEGAL EDUCATION i-iii (1973) (discussing growth of clinical legal education in United States and abroad); see also Robert L. Bogomolny, Prefatory Remarks, 29 CLEV. ST. L. REV. 345, 345-47 (1980) (reviewing evolution, growth and diversity of clinical programs in United States law schools). A number of authors have focused their writing on articulating teaching methods for the "new" context. See, e.g., BINDER & PRICE, infra note 54, at vi (discussing models as basic guidelines rather than rigid formulas); FREEMAN & WEIHOFEN, infra note 52, at 1 (describing two new trends in legal education).
cially the student) to the hard tasks of synthesis. Yet if one stands back from the suggestions, tangents, outbursts, metaphors, methods, analogies, analyses and narratives, a view of what the book is begins to emerge: a complex portrait of how the mind of an expert lawyer functions, in all its tentative, experimental and opportunistic glory. Whatever slight comfort this might give a novice lawyer, the text conveys with unsettling power the diversity, fluidity and intensity of expert law practice. 85

The authors arrange this portrait around a rigorous template that unifies the book and lends it its forward drive. After an exploration of lawyering role and of the values inherent in that role, the book explores six lawyering tasks: interviewing, case preparation and investigation, negotiation, witness examination, oral argument and counseling. 86 In this sequence, counseling comes at the end, even though counseling occurs earlier in the lawyering process than negotiation or litigation advocacy:

Obviously counseling is not the last stage in the process. Throughout every case you will be advising and being advised by the client. We consider this question last because giving advice requires that you be able to imagine (and describe to your clients) what will occur in each of the states we have already discussed: planning, inquiry, exchange, and advocacy. 87

Decision-making process remains central to lawyering. Decision-making between lawyer and client occurs in an integrated fashion throughout


86. See Bellow & Moulton, supra note 48, at xli-xl (summarizing book’s contents). In this preface, the authors openly acknowledge the incompleteness of this picture of all lawyering, recognizing that their model relates primarily to the lawyer’s role as litigator. See id. at xxix (stating that book requires considerable supplementation). The authors state: [T]he entire book is tilted toward lawyering problems in conflict situations. Although many of the models and principles are equally applicable to negotiation and counseling in non-adversarial circumstances, there are many important differences between the two. Non-litigation planning and collaborative bargaining receive only scanty treatment, but are obviously essential to any full understanding of the law-making and law-applying activities in which lawyers engage.

Id. at xxiv-xxv. The authors refer to a separate text for materials emphasizing “transactional” lawyering. See generally Brown & Dauer, supra note 55 (discussing writing of books and manuals for transactional lawyering). I discuss later the relative absence of clinical texts on transactional lawyering. See infra Section III.A. Moreover, even the authors’ picture of dispute resolution process requires revision in light of the rapid growth of professional practice in voluntary resolution processes. See infra Section II.C.1.

87. Bellow & Moulton, supra note 48, at 966. The authors also justify the shift on pedagogical grounds, stating that “we have found that students seem to deal more thoroughly with the complexities of advice-giving after they have thought hard about their role as planners and advocates.” Id. at xxiii-xxiv.
each of the earlier phases of lawyering. The anticipated legal action (negotiation, planning or dispute resolution) strongly affects both how lawyering tasks occur and what decisions will result.

Each chapter's discussion of the separate tasks uses a consistent structure. A section called “preliminary perspectives” includes both “images and fragments” (narrative descriptions of the task) and “an orienting model” (a metaphor expressive of the essence of the particular task). A second section describes “the skill dimension” and presents the authors' assessment(s) of the behaviors required by the task. A closing section covers “the ethical dimension,” with both critical reviews of relevant ethical rules and problems for analysis in context. The collected texts include narrative, metaphor, cross-disciplinary and particularly scientific analogy, ethical inquiry, behavioral advice and structuring, and speculations about cognitive, affective and even spiritual realities. These texts revolve around a consistent, even slavishly traditional structure. As written expression of complex attentiveness surrounding a core of rigorous habit, this methodology remains unrivaled as an account of the lawyer's mind in practice.

What are the mental attributes of the lawyer that this multi-faceted, highly contextual fabric seeks to convey? Some have argued that Bellow and Moulton's vision consists of a notion of role identification. But in an early and influential article, Bellow carefully distinguishes between "role assumption" as a teaching methodology and the mental activities...


89. See Minna Kotkin, Reconsidering Role Assumption in Clinical Education, 19 N.M. L. Rev. 185, 193 (1989) (discussing variations in success of role assumption model); Menkel-Meadow, supra note 1, at 559 (describing role expectation as function of self-perception).

The separation of professional functions into discrete areas or processes permits generalizations to be made about each of the functional "hats" or roles that a lawyer must perform. Bellow and Moulton liken the lawyer's roles to those of actors in a theatrical production. By studying the character . . . the actor can master its constituent elements, its essence and its gestalt, and thereby learn to perform the role.

Id. Menkel-Meadow describes Bellow and Moulton as presenting lawyering as a function of role, drawing inferences about lawyering behaviors and tasks from the dynamics of role assumption. See id. (stating that role recognition can lead to practice and result in mastering needed skills). The lawyer assumes certain functions assigned to her by the "legal system;" during that assumption of role-appropriate behaviors, she learns by inference and experience about the mental content of her work. See id. (concluding that this model is "simultaneously procedural, instrumental and evaluative"). Learning (as well as mental activity) emerges from aligning personal behaviors with external expectation. See id. (discussing Bellow and Moulton scheme of lawyering process as roles, skills, models and issues); see also Kotkin, supra, at 186-87 (questioning use of "role assumption" as pedagogical tool, basing critique on review of experiential and psychological models of learning and learning style, and advocating for alternative methodology focusing on "role modeling," coupled with critical appraisal of modeling attorney).
elicited by the lawyering tasks. Describing "clinical teaching" as a methodology, Bellow identifies "role assumption" as a central feature of the method, in which the student-actor must learn the characteristics of the position, the behaviors necessary to demonstrate role compliance and the aptitudes needed to perform the position. Yet Bellow also stakes out a claim to describe lawyering as a mental process concerned with something more than learning an actor's part:

The method requires choice and judgment . . . The actual application of principles to problems of ethical choice and decision, however, takes on a special character and requires its own art, the art of deliberation, involving the envisioning of alternatives, the weighing of options, and the rehearsal of consequences . . . . [T]he student . . . must live with consequences in a way which makes discussion of the problem of responsibility a meaningful concern.

Bellow stresses decision-making and particularly "the art of deliberation." Elsewhere, he describes this decisional process as fostering, even demanding integration: a "synthesis of personal, professional, subjective and empirical dimensions of lawyer behavior." The parallel treatment of role identification and decisional content reappears in The Lawyering Process; Bellow and Moulton characteristically present both as theories of lawyering. Within the wide diversity of tex-

90. See Bellow, supra note 20, at 380-82 (noting that role assumption is methodology that differs from mental activities of lawyering process).
91. See id. at 380 (describing what one must do in performing role). John Bradway had anticipated this much-quoted observation of Bellow's in his work. In fairness to Bellow, his article focused on clinical teaching as a teaching methodology. See id. at 377 (characterizing clinical education in methodological terms). Bradway's work, by contrast, refers to lawyering itself as a method of mental activity. For a discussion of Bradway's work, see supra note 51 (providing summary of Bradway's works).
92. Bellow, supra note 20, at 396-97.
93. See id. at 396 (discussing use of problems instead of cases in law school teaching).
94. See Bellow & Moulton, supra note 48, at xix passim (exploring "how one learns (or conforms) to a professional role" while learning the "nature of advice and guidance in lawyering"). Chapters I and II of The Lawyering Process illustrate the parallelism. Chapter I, Becoming a Lawyer, involves a problem of conformity with various norms for lawyering behavior. See id. at 2-34 (discussing experiences of new lawyers encountering professional roles for first time). Chapter II, Being a Lawyer, involves a problem of implementing values in an advocacy model, values which include not just institutional values associated with the lawyering role, but also the lawyer's own personal values, as well as values which emerge from the relational reality between lawyer and client. See id. at 55-121 (discussing lawyers personal ethics in light of ethics generally accepted within legal profession). For an interesting indication of the implicit influence of Bellow and Moulton's developmental themes, see generally Elizabeth Dvorkin et al., Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism (1981) (criticizing role-defined legal education while arguing for increased attention to human
tual materials, many stress the subjective, cognitive and decisional components of the lawyering task without reference to role. For example, in the penultimate chapter, for the "skill dimension" of the counseling task (where "the circle closes"), Bellow and Moulton present counseling as a process of "assessment" and "advice." 95 Assessment entails the clarifying of objectives, the identification of alternatives and the prediction of consequences, while advice engages the lawyer in allocating responsibility for decision-making with the client, communicating the lawyer's judgments, clarifying client preferences and coping with ambiguities and emotions. 96 Assuming that counseling requires mastery of the other five tasks, Bellow and Moulton guide the reader towards an appreciation of the central phenomenon of counseling: "the art of deliberation." 97

The very diversity of their texts embodies the by-then traditional view of decision-making in lawyering: the synthesis of the conceptual material of legal rules with the often subjective realities of the situation which calls for a decision. 98 Yet Bellow and Moulton's approach is distinct. Stated

aspects of legal profession); HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW (1992) (using traditional study of professional responsibility to force students to consider their place in legal profession).

The contrast between "role assumption" and "decision-making" as theories of lawyering creates some interesting echoes. Note that at least one of the schools of modern refinement of lawyering focuses almost exclusively on behavioral observation as a method of describing lawyering. See infra Section II.C.3 (discussing field of lawyering scientists who use empirical methods to study lawyering behavior and thought). One part of that school, however, stresses cognitive content and activity. See Blasi, supra note 85, at 321-30 (focusing on cognitive ability as product of legal expertise). Other schools stress the political or subjective content of lawyering. See infra Section II.C.2 (arguing career choices and lawyering styles are products of lawyer's identity). A third school looks at the precise nature of deliberation as a mental practice. See infra Section II.C.4 (discussing modern philosophical approaches to study of decision making by lawyers). A fourth focuses both on behavior and mental processes, within an inquiry on negotiation and alternate neutral processes. See infra Section II.C.1 (addressing models of negotiation theory). It appears that in discussing lawyering we have not yet settled whether we are on the outside looking in or on the inside looking around. This Article uses both vantage points, stressing lawyering behavior in its assessment of the lawyering process and its relational context, while assessing the mental content of lawyering in considering practical judgment.

95. See BELLOW & MOULTON, supra note 48, at 966 (discussing ability of lawyer to counsel clients in every stage from planning to advocacy).

96. See id. at 998–1080 (claiming assessment includes "framing of choices" while advice entails "helping the client choose").

97. See Bellow, supra note 20, at 396-97 (discussing training for counseling).

98. We have already seen how Frank and Llewellyn have encouraged a view of law practice that includes this notion of synthesis and integration. For a discussion of Frank and Llewellyn, see infra Section II.A.2. Indeed, Bellow and Moulton seem to have accomplished in textual form Frank's advice to integrate inter-disciplinary material into the practice of law. See BELLOW & MOULTON, supra note 48, at 141 (using doctor-patient relationship in discussion of interviewing tensions). Moreover, we have also seen Bradway identify two modes of lawyering thought: the "topical" mode, concerned with legal rules; and a "functional" mode, concerned with
simply, the lawyer in Bellow and Moulton's model must learn her own subjectivity. She must integrate that subjectivity into diverse and complex realities that include not only the client's subjectivity but also hard realities of power, role, institutional resistance, conceptual complexity and political values.

Generous in its sharing of models and of perspectives, *The Lawyering Process* remains difficult today because of its implicit, forceful challenge to the reader. This challenge goes beyond the learning and mastery of role expectation, the synthesis of diverse and conflicting texts and the control of behavior and mind which lawyering requires. Indeed, the challenge goes well beyond the dimensions of the decisional process of appraisal, decision and action, which the book rigorously preserves from Bradway's unseen (and unacknowledged) model. Rather, the authors demand that lawyers bring their own values and emotions into their lawyering, while simultaneously managing the cognitive complexity which legal rules and situational realities demand. The book embodies an expert legal mind, at the center of which lies self-discipline, emotional awareness, diversity of values, cognitive complexity and predictive uncertainty that takes time, patience and no small tolerance for error. The book pushes its readers to excellence, not just of legal analysis or lawyering behavior, but also of spirit and of engagement with the humanity of being a lawyer.

### 3. The Client-Centered Project

David Binder and Susan Price, in *Legal Interviewing and Counseling: A Client-Centered Approach* (joined by Paul Bergman in the text's second edi-

pragmatic, situational and emotional realities. See Bradway, How to Practice, supra note 51, at 5 (“To be a competent and well-rounded lawyer in general, an applicant for admission to the Bar first acquires a . . . Foundation . . . of topical thinking . . . . He surrounds this with . . . an equally significant body of functional thinking . . . “). Finally, another earlier (and ultimately more influential) text already had stressed the subjective and relational realities of decision-making between lawyer and client, with particular focus on the client's psychic concerns. See Binder & Price, supra note 54, at 147-55 (concluding client is in better position to make ultimate decision on which alternative is best, for example, litigation or settlement).

99. See Bellow & Moulton, supra note 48, at 158-62 (using initial interviewing practices in psychiatric practice to show importance of lawyers subjectivity in interviewing clients). At least one text focused almost exclusively on the psychodynamics of lawyering from the lawyer's perspective, discussing counter-transference and transference in the lawyer-client relationship and presenting a "psychologica
taxonomy of lawyer conflicts." See Watson, supra note 55, at 93-113 (discussing importance of understanding and improving skill in understanding transference responses). The taxonomy includes psychic challenges of "con
cience conflict," including issues of truthfulness, narcissism, misuse of power, sexual temptation and peer discipline. Also included in the taxonomy are "self-
image" conflicts and problems of self-mastery in case management, including rec
ognition of the lawyer's risk aversion in the presence of uncertainty and the law
er's mishandling of relational realities. See id. at 94-99 (discussing taxonomy division into categories and illustrating categories using charts).
tion) present an arguably truncated version of lawyering.\textsuperscript{100} The first edition focuses on interviewing and counseling, while the second edition combines these topics into one section entitled "lawyers as counselors."\textsuperscript{101} Despite this modesty, the Client-Centered project has had a success and influence that no other work has matched. Supporters and critics acknowledge its primacy both as a source-book on lawyering process and as an expression of a new lawyering stance—"client-centered counseling."\textsuperscript{102}

\textsuperscript{100. See generally Binder & Price, supra note 54 (providing "objectives of the legal interviewing and counseling processes, the forces which motivate clients . . . and the basic techniques which are needed to successfully achieve the goals of legal interviewing and counseling."); Binder et al., supra note 56 (continuing "client-centered" approach of Legal Interviewing and Counseling: A Client-Centered Approach while setting forth standards for counseling).}

\textsuperscript{101. See Binder et al., supra note 56, at iii (providing analysis of lawyer's obligations in client-centered approach).

[W]e examine interviewing (information-gathering) not as a separate task, but as an integral part of the counseling process. Because we see lawyers' principal role as helping clients solve problems, we approach interviewing as an opportunity to learn about problems from clients' perspectives as well as to gather legally salient data.  

\textit{Id.} See generally Binder & Price, supra note 54 (dealing with listening, questioning and counseling client).

Close examination of the second text in fact reveals a more richly textured treatment of the "counseling" process than the first, in at least three ways. See Binder et al., supra note 56, at 32-81 (arguing that active client participation coupled with lawyer's active listening and proper questioning creates positive counseling atmosphere). First, it expanded the first edition's coverage of the fact-gathering phase between initial lawyer-client contact (the "interview") and decision-making ("counseling"). See \textit{id.} at 84 (reflecting Binder and Bergman's collaboration on a separate project, David Binder & Paul Bergman, Fact Investigation: From Hypothesis to Proof (1984)). Second, it expanded its coverage of both the interview and counseling phases of lawyering. See Binder et al., supra note 56, at 32-81 (focusing on interviewing as means to helping clients solve problems). Compare Binder et al., supra note 56, chs. 4-14 (counseling clients with help from information gathering techniques) and chs. 15-23 (utilizing counseling skills and information gathering to aid clients in making decisions), with Binder & Price, supra note 54, chs. 2-6 (dealing separately with interview techniques) and \textit{id.} at chs. 8-11 (discussing counseling process). Third, it explicitly recognized that differences in lawyering contexts between litigation and transactional work influence how these early phases might progress, implicitly acknowledging a fuller vision of lawyering. See Binder et al., supra note 56, at 362-75 (applying counseling techniques discussed in earlier chapters to litigation issues).

\textsuperscript{102. See Robert Dinerstein, Clinical Texts and Contexts, 39 UCLA L. Rev. 697, 700 (1992) (discussing influence of Binder and Price's client-centered approach on clinical law students and teachers); Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 Ariz. L. Rev. 501, 504-06 (1990) [hereinafter Dinerstein, Client-Centered Counseling] (reviewing arguments in favor of and against client-centered counseling and refining context of term "client-centered"); see also Michelle S. Jacobs, People from the Footnotes: The Missing Element in Client-Centered Counseling, 27 Golden Gate U. L. Rev. 345, 347 (1997) (praising client-centered model for providing effective communication skills to lawyers, but criticizing model for failure to address effects of race, class and gender on lawyer-client interaction).}
Indeed, the project articulated the last foundational element of modern lawyering theory: the centrality of the lawyer-client relationship.

We should acknowledge what is not new in the Client-Centered project. It presents lawyering as a coherent process, a series of behaviors and mental habits focused on the solution of problems, both in disputes or in transactions. Lawyering integrates law with non-legal realities, including both conceptual and affective elements. It stresses the cognitive challenge of lawyering, one that lawyers meet by developing regularized routines of lawyering behavior.\textsuperscript{103} It advises preparation, prediction and development of alternative solutions. Finally, the focus on counseling places client decision-making at the center of lawyering.

Yet the text does far more; it tells a story. The story describes two seekers engaged in a complex psychic connection with goals to achieve and barriers to overcome. The Client-Centered project narrates the relationship of Lawyer and Client, a story influenced by legal and other realities of enormous fluidity and power, centered around a quest: the “solution” to a “problem.”

Clients come to lawyers seeking help in solving problems . . . The range of people and problems that lawyers encounter is enormous. The array embraces differences in size, complexity, emotional content and legal status. Some problems involve disputes over past events and others focus on planning for the future. . . . your principal role as lawyer will almost always be the same—to help clients achieve effective solutions to their problems.\textsuperscript{104}

The Client plays the principal role, has the best lines and experiences the most interesting psychic states. She lives in a world of complex reali-

\textsuperscript{103} See generally Binder & Price, supra note 54 (using system of “discrete stages or steps” to describe interviewing and counseling and offering techniques to facilitate lawyer-client dialogue); Binder \textit{et al.}, supra note 56 (“[L]awyers principal societal role is to help clients resolve problems, not merely to identify and apply legal rules.”). In both phases of the client-centered model, for example, the authors stress the use of a particular questioning device, indeed a series of questioning devices, for developing information: the timeline method of structuring information; and the T-Funnel method of eliciting theory-relevant client data. They introduce both methods in \textit{Legal Interviewing and Counseling: A Client Centered Approach} and defend both against implicit attack in \textit{Lawyers as Counselors}. See Binder & Price, supra note 54, at 92-98 (urging use of T-Funnel interviewing pattern where lawyer begins with open ended questions to obtain general responses before narrowing questions); Binder \textit{et al.}, supra note 56, at 112-43, 171-85 (urging development of timeline phase for litigation and use of T-Funnel pattern and offering reasons why timeline approach is superior to other forms of information gathering). Neither method is presented with the same degree of optimistic cognitivism that characterizes Bradway’s work; rather, the authors justify the methods based on their own experience and on arguments about each method’s instrumental ends. See Binder \textit{et al.}, supra note 56, at 114-24 (justifying timelines); \textit{id.} at 169-80 (supporting use of T-funnels).

\textsuperscript{104} Id. at 2–3.
ties and knows most, but not all, of those realities. Yet the Client may not always reveal her secrets because of motivations that are either “inhibitors” or “facilitators” of disclosure. The Client also may be reluctant, atypical, difficult and perhaps slightly obstinate. As they approach decision (at least in the first edition), the Lawyer and Client discover a shocking truth: the Client cannot in fact describe what she wants or how she will know which solution will work:

It is our belief that, by and large, lawyers cannot know what value clients really place on the various consequences. Our belief is largely derived primarily from our clinical observations of clients' behavior during the decision making process. Since clients cannot precisely identify for themselves what values they place on various consequences, clients generally cannot convey to their lawyers their unique personal values.

105. See Binder & Price, supra note 54, at 137-41 (noting legal and non-legal consequences); Binder et al., supra note 56, at 2-14 (explaining legal and non-legal dimensions of client's situation).

106. See Binder & Price, supra note 54, at 9 (discussing common psychological factors that enhance or interfere with client motivation); Binder et al., supra note 56, at 34 (explaining common psychological factors that affect client motivation). The “inhibitors” include such psychic states as ego threat, case threat, role expectations of the client, “etiquette barriers,” the presence of personal trauma, a perception that some information is not relevant, or that need advises a different course: all psychic states described as internal to the client. See id. at 35-40 (stating that factors “prevent clients from fully participating in dialogues”). By contrast, the “facilitators” all reflect appeals made by the Lawyer to the Client and include: “empathic understanding,” “fulfilling expectations,” “recognition,” “altruistic appeals,” and “extrinsic reward.” All of these are realities that involve a mixture of the Client’s psychic states and the Lawyer’s conscious action. See id. at 40-44 (explaining five techniques that lawyers can use to encourage client to engage in lawyer-client dialogue).

107. See Binder & Price, supra note 54, at 104-23 (stating reasons for clients’ unwillingness to supply complete and accurate information). The chapter includes reasons for reluctance such as a reluctance to discuss specific topics, a reluctance to conduct an interview, fabrication, or rambling. See id. at 104-22 (explaining techniques to motivate clients to provide full information).

108. See Binder et al., supra note 56, at 237-56 (discussing techniques for gathering information from “atypical or difficult” clients).

109. See Binder & Price, supra note 54, at 149 (arguing that decisions should be made by client due to lawyer’s inability to determine which choice will provide greatest client satisfaction). But see Bellows & Moulton, supra note 48, at 103 (quoting William Simon, Presentation at Conference on Critical Theory and Law at the University of Wisconsin (1977)). Simon stated that:

The lawyer . . . has no reliable way of learning the client’s ends on his own. Because these ends are subjective, individual, and arbitrary, the lawyer has no access them. Because the lawyer’s only direct experience of ends is his experience of his own ends, he cannot speculate on what the client’s ends might be without referring to his own ends . . . .

Id. at 104.

With Lawyers as Counselors, the Client has become more communicative, and the Lawyer a bit more acute in listening and a bit more active in disagreeing with what she hears. During this second journey, the Lawyer appreciates the unique-
As decision looms, the Client can get difficult: "extremely indecisive;" insistent on the lawyer's explicit help; close-minded, or at least overly attached to one solution; foolish or unwise; immoral; and, in the worst case (or at least in a separate chapter) in need of mental health treatment. The Lawyer accepts these shortcomings but with a calculated mixture of shrewdness and empathy, overcomes them and helps the Client onwards.

Despite these difficulties, Lawyer and Client struggle towards a compelling goal: a solution that will achieve the "greatest client satisfaction" or "maximum satisfaction." In both editions, the struggle between them culminates in a difficult conversation, involving complex inquiries and sophisticated questions, and designed to elicit the Solution. The goal of satisfaction is relative, tinged with the sadness of imperfection. The solution will be, after all, as much as the Client can get, given pragmatic limits and conflicts internal to the client. It may involve sacrifice, the acceptance of risk and awareness of the loss of alternatives with no guarantee that the desired benefit will occur.

Throughout, the Lawyer is a shadowed figure, lacking the Client's depth. The narrators urge the Lawyer on with excellent, sophisticated advice on how to deal with client difficulties. This advice constitutes a major element of the book's success: it is a coherent, fully rationalized set of tools for the Lawyer to bring to bear on the non-legal elements of the quest. If case method trains the mind to the complexities of conceptual law, the Client-Centered project (with other texts) developed similar tools

ness of the Client's view of the problem; actively engages the Client in reaching the goal of problem-solution; encourages the Client to make those decisions which have significance; identifies and integrates client values into the advice; and responds empathetically to client emotion. See id. at 21 (discussing how values must be considered when providing advice). Implicit in this new travelling ethic is a fresh assertion of confidence, absent from the first edition: the Client can communicate client-specific realities to the Lawyer. See id. (noting change in lawyer-client communication).

110. See Binder & Price, supra note 54, at 192-218 (examining types of difficult clients and counseling techniques for aiding them); Binder et al., supra note 56, at 347-59, 407-13 (discussing common problems that develop working with clients).

111. See Binder & Price, supra note 54, at 148 (emphasizing client satisfaction in decision making); Binder et al., supra note 56, at 261 (explaining that maximizing client satisfaction is of primary importance) (emphasis in originals).

112. See Binder & Price, supra note 54, at 149 (illustrating struggles of client when given ultimate decision making power).

113. See id. at 150 (emphasizing trade-offs in decision making); Binder et al., supra note 56, at 10-13, 263-64 (discussing costs and benefits inherent in decision making). Negative non-legal consequences can be found in even a client's most desired solution. As a result, the client's chosen course of conduct may impact the positive non-legal consequences of an alternative solution and will require a choice between various sets of negative consequences. See Binder et al., supra note 56, at 11-12 (noting that client's desired solution may rest on choice between legal and non-legal negative consequences of various alternatives).
for facts and subjective realities. With Langdell’s razor, these tools round out the kit of Llewellyn’s craft.

To use them, the Lawyer needs empathy, energy, cognitive skill and humane insight into the client’s human frailties and values, both trivial and fundamental. She is, in short, the Heroine, filled with skill and drive, and proof against the temptations and illusions of lawyering. Yet nowhere, in either edition, do we learn who the Lawyer might be or how she might feel about her task. Her motivations are hidden, her reluctance unexplored. We hear nothing of inhibitors or facilitators. We assume she can listen and exercise cognitive skill, but she has no frailties that might render her deaf or clumsy. She hews to the straight and narrow. She will not be difficult, atypical, reluctant, rambling, secretive, hostile, indecisive, foolish, stubborn, immoral or mentally ill.


115. See Llewellyn, supra note 47, at 3 (“The essence of our craftsmanship lies in skills and wisdom.”). As already noted, this effort to find a method for non-legal elements is not new; Llewellyn’s essays, and Bradway’s training materials and descriptive writing all posit both the possibility of such a method and the utility of specific habits in training the lawyer’s mind to exercise such a method. See Bradway, How to Practice, supra note 51, at 6 (arguing for a more client-centered approach to the law). However, as noted next, Bradway’s vision of “functional” method did not stress the relationship between lawyer and client, nor the powerful subjectivity brought out in the course of that relationship. See id.

116. See Binder et al., supra note 56, at 2-4 (emphasizing importance of understanding legal and non-legal elements of client problems). The opportunity to understand client values only becomes available in the second edition. In the first, unfortunately for the Lawyer curious about her Client, the Client cannot adequately convey those values. See Binder & Price, supra note 54, at 149 (stating that clients often cannot identify personal values or convey these values to lawyer). This lends a heroic quality to client-centeredness: a transfer of the goal over to the Client by the Lawyer, who at the last will remain in ignorance of the true principal of decision. See id. at 348 (asserting that lawyers should not offer opinion until clients’ values are expressed and understood).

117. We do learn in the second edition that we might not have reason to trust the Lawyer; his or her interests and those of the Client may be adverse for reasons not particularly flattering to the Lawyer. See Binder et al., supra note 56, at 265 (asserting that lawyer may not be trusted because of conflicting interests between lawyer and client). The text gives a handful of examples of the Lawyer’s divergence from the Client’s interest. See id. (providing examples where conflict of interest may make lawyer untrustworthy). In deals, the Lawyer seeks to introduce more contingencies in contractual drafting than the Client might want, out of fear of a later malpractice suit. In negotiation, the Client may reject a settlement more
But the Lawyer does have two cardinal virtues, at least for a Heroine: (1) social, political and personal values that help him or her to see when a Client is morally wrong; and (2) the insight to discern when the Client diverges from expressed interests. But how does the Lawyer gain these values, and develop this insight? Do they come from using the narrators' tool kit as a result of taking their advice? Or do they emerge _ex machina_ from somewhere outside the training structure? The great surprise of the story lies in this: the sudden revelation of the Lawyer's inner world, which emerges, after long restraint, to influence but not to dominate the Client at the last. The drama of the skilled Lawyer serving as expert assistant to an edgy, emotional Client who faces real suffering and real opportunity is almost irresistible, particularly if it ends in virtue and wisdom for the Lawyer.

If it were only drama, the Client gets the better role, even assuming the oppression and loss she may suffer. She gets to have more humanity, both in her frailty and her resilience. To find out only at the end that the Lawyer has wisdom and values makes the earlier parts of the story less convincing. Virtues rarely come without flaws. I would want to recognize both attributes earlier and to know how they influence the cognitive tools the books recommend. If the Lawyer does have flaws, moreover, I want to know why: Are they defects in character? Is there cultural, political or class conditioning? Is the lawyer blinded by raw self-interest? As rich and dramatic as the climactic conversation may be, I would like it to start earlier, last longer and allow for both false and fresh starts. I want the Lawyer to be less of a Heroine and more of a human being.

The client-centered model articulates the last structural foundation of lawyering theory in the modern era. It assumes the standard model, but places it squarely in the relationship between lawyer and client, a social context dominated by subjectivity. The client-centered texts both warn

convenient for the Lawyer. In litigation, the Lawyer and Client may disagree as to whether to take a deposition or call a witness. The Lawyer's inner motivation here seems crass: fear of malpractice in the deal and convenience or financial gain in the other examples. See _id._ (providing specific examples of lawyers' possible hidden motivations).

118. See _id._ at 281-84 (discussing circumstances in which lawyer considers client decision wrong). The existence of this portion of the Lawyer's inner life sets up what has proved to be the most central debate to emerge from the client-centered counseling model: the extent to which the Lawyer can "make decisions for" the client, considered as a question of legal ethics, or at least of good practice. See, _e.g._, Dinerstein, _Client-Centered Counseling_, supra note 102, at 534-38 (assessing role of lawyer in fostering client's decision-making in light of ethical considerations); Stephen Ellmann, _Lawyers and Clients_, 34 UCLA L. REV. 717, 731-33 (1987) (discussing lawyers paternalistic role in decision-making process); William Simon, _Lawyer Advice and Client Autonomy: Mrs. Jones's Case_, 50 Md. L. REV. 213, 213 (1991) (examining contrasting views concerning how much influence lawyer should have on client's decisions and judgments); Mark Spiegel, _The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling_, 1997 BYU L. REV. 307, 336-38 (1995) (discussing lawyer's influence over client).

119. None of these critiques are new, as Section II.C will show.
against and celebrate client subjectivity, while minimizing the subjectivity of the lawyer. But they force us to see that lawyer and client relate and talk and must cope with the subjectivity the other brings to the conversation. The decision-making that occurs in lawyering occurs in discourse and thus in the stress and opportunity of relational and subjective realities.

C. Refinement and Articulation

The foundational account of lawyering just described has remained remarkably stable since the 1970s. At the same time, it has undergone

120. See Binder et al., supra note 56, at 17-19 (discussing advantages and limitations of client-centered approach). As already noted, the text presents many of the client's psychic realities as barriers to the lawyering task, impeding the flow of information necessary for case appraisal, and strongly shaping the outcome of decisions. See id. at 260-64 (considering impact of differences between clients' subjective view and lawyers' objective opinion on decision-making). "Distorting" is too value-laden a term, which the text stops just short of using. At the same time, the client's needs, preferences, interests and values remain the center of "client-centered" decision-making, acting both as the lode-star for structuring choices and the justification for finality when decision occurs. See id. (emphasizing client's subjective needs and values as central to decision-making). This mix of attitudes towards a client's subjectivity expresses an impatient, slightly irritable empathy fairly common among active practitioners (in my anecdotal impression) and is, if paradoxical, still livable, without disrespect to the client or coercion of her choices.

121. See id. at 288 (stressing lawyers' "impartiality throughout the counseling process"). The contrast between the Legal Interviewing and Counseling: A Client Centered Approach project's relative silence on, and The Lawyering Process' aggressive reminder of, the need for subjective and moral development by the lawyer is striking. It does not undervalue the former's contribution to notice that the conceptual complexity of the cognitive methods it describes occurs without explicit advice on achieving the intuitive, moral and emotional development required for lawyering performance. See generally id. (introducing methods for counseling, information gathering and decision-making). By contrast, The Lawyering Process makes the need for such development explicit; and its structure, its diversity of texts, and the questions it asks of the reader, go much farther to suggest the dimensions of the task of developing the lawyer's character. See generally Bellow & Moulton, supra note 48 (including discussion on ethical dimension). In this sense, Bellow and Moulton's text expands Frank's assessment of judging as based in personal subjectivity, centering it squarely in the lawyer's own decision-making influence.

Later criticisms of the Legal Interviewing and Counseling: A Client Centered Approach project's relative silence on lawyer subjectivity appropriately stress this as a failing. One can usefully speculate on whether the absence of such a challenge in the project's vision accounts for some portion of its popularity. We would all like to be Heroes and Heroines, if becoming one involves only the mastery of cognitive methods.

122. More recent lawyering texts have maintained the notion of lawyering as a coherent process of thought and action, centered around decision-making, and necessarily implicating subjective and interpersonal realities inherent in private talk between lawyer and client. See Binder et al., supra note 56, at 288 (offering techniques for dealing with typical clients in counseling process); Shaffer & Elkins, supra note 114, at 24-26 (explaining lawyer's role as problem solver and companion to client). Many of these texts offer—to varying degrees—cognitive templates for acquiring basic lawyering skills. See Binder et al., supra note 56, at 199-63 (illustrating specific theories of counseling that can be utilized in client-
significant refinement and rearticulation. Here, I assess four strong influences: (1) negotiation and dispute resolution theorists; (2) critical lawyering theorists; (3) a resurgent group of "lawyering scientists;" and (4) legal philosophers writing on practical judgment.\textsuperscript{123}

1. Negotiators and Neutrals

Two models of negotiation theory and practice have emerged since the 1970s. The first, characterized as competitive, positional, adversarial, and viewed as traditional, describes negotiation as a power struggle between adversaries in an effort to gain the largest share of limited resources.\textsuperscript{124} The second, characterized as interest-based problem-solving, sometimes considered "principled" problem-solving,\textsuperscript{125} describes negotiation as collaboration between parties and seeks to maximize joint gains.
through interest identification and resource expansion. Both models focus primarily on lawyering in dispute resolution.

During the same time, dispute resolution theory and practice has flourished. The "ADR" movement has developed the promise both of consensual process (as in mediation) and of private adjudication (as in arbitration) and encouraged the rise of a professionalized "other" dispute resolution practice. The negotiation and dispute resolution theorists focus on the use of diverse processes to advance client goals.

Both groups of theorists stress the role of the lawyer as "problem-solver." In a seminal article on legal negotiation, Carrie Menkel-Meadow articulates the now widespread model of problem solving as a construct for developing negotiation strategy. She argues against the view that

126. See Menkel-Meadow, supra note 124, at 794-829 (providing framework for problem solving negotiation).
127. See id. at 758 n.6 (noting that primary focus of Article is negotiation in dispute resolution).
128. See Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1199 (describing courts preference for alternative dispute resolution as means to reduce judicial workloads). "ADR" stands for “alternative” dispute resolution, with emphasis falling on alternatives to litigation. The terminology assumes a normative description of litigation as the “primary” or “mainstream” process. Reliable statistics indicate that, amongst filed cases, more cases settle than receive final disposition by courts. See David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 89 (1993) (stating that “most cases terminate through settlement negotiations”). Less reliable but still compelling statistics indicate that participants resolve a fair majority of disputes before court filing. See Richard Miller & Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & Soc’y Rev. 525, 537, 542-45 (1980-81) (noting percentage of disputes that result in court involvement). Widespread negotiation, the rise of administrative hearings, and the prevalence of arbitration during this era lead one to think that a more neutral, less normative phrase would describe this movement as the "dispute resolution" movement. Cf. Trubek et al., supra, at 89 (“Trials are rare; pretrial activity modest, and most cases terminate through settlement negotiations.”).
129. Compare Menkel-Meadow, supra note 124, at 795 (describing principles of problem solving negotiation), with Binder & Price, supra note 54, at 2-3 (stressing lawyer’s role as problem solver). Earlier authors, such as Bradway or Llewellyn, occasionally used the rhetoric of “problem-solving,” without adopting it as a descriptive moniker. See Bradway, How To Practice, supra note 51, at 10 (discussing client’s realization that problem “needs to be solved”). The present article adopts different phrasing, asserting that lawyering serves as a form of “decision-making”. See Binder et al., supra note 56, at 259 (noting that decision-making defines “counseling role”). This may slice the semantic distinction too fine, but the notion of problem-solving may have more normative content than decision-making.

First, problem solving may assume that all situations brought to lawyers involve problems in the sense of existing disputes. If so, problem solving refers more to dispute resolution than transactional work. See Menkel-Meadow, supra note 124, at 795 (noting that parties have needs or objectives based on dispute or transaction). Transactional lawyering fits less well into the rhetoric, unless we broaden the notion of problem to something more like a puzzle. See id. at 793 (“When negotiators adopt zero-sum conceptions of the problems or transaction they seek to resolve or plan, they unnecessarily limit themselves in a number of ways.”). Moreover, one of the central normative arguments for problem-solving strategy
adversarial negotiation represents the exclusively acceptable form of negotiation.130 “Problem-solving” stresses the usefulness of collaborative analyses and encourages integration of legal and non-legal concerns. Menkel-Meadow notes how legal resolutions are limited by the remedial capacities of courts. She contrasts these resolutions with solutions achieved through creative assessment of party needs and interests, within the limits of available - compares it to litigated outcomes, which are not always useful for the wider field of transactional structuring. See Binder & Price, supra note 54 (applying interviewing and counseling techniques to litigation issues).

Second, problem-solving has come to refer specifically to a particular theory of negotiation, and even a particular theory of legal strategy—one focused on the identification and joint satisfaction of party needs, interests and objectives. See Bassert & Harbaugh, supra note 114, at 393-96 (comparing adversarial and problem-solving strategies). Other schools of thought exist on how to produce solutions and some situations may not lend themselves to this approach: for example, in strongly distributive situations where one party both strategizes and acts from an adversarial vantage. See Fisher & Ury, supra note 125, at 101-11 (discussing strategies for negotiation when one party is more powerful).

Third, problem-solving language assumes solution as a standard, in the sense of satisfying significant client interests. It accounts poorly, however, for situations where solutions are not possible, or at least extremely implausible. This is true because of oppression or radically restricted resources or for situations where the solution is avoidance, not a solution an activist lawyer relishes, but the focus of advice that lawyers deliver on regular occasion. See Bassert & Harbauch, supra note 114, at 396.

Finally, problem solving may invoke too easily the coercive exercise of expertise. The lawyer as problem-solver locates the meat of solution in the activity of the lawyer, stressing the passionate desire to solve the problem. See id. (stating that competitive problem-solvers “formulate the issues as problems that must be solved instead of resources that must be divided”). To be sure, the phrase lawyers as decision-makers runs the same risks, posing the risk of the lawyer making the decision.

Viewing lawyering as a form of negotiated decision-making (albeit by clients and negotiators with lawyer assistance) avoids many of these risks. See Binder et al., supra note 56, at 260-62 (arguing that clients should have opportunity to make decisions). It also places lawyering squarely in the same rhetorical tradition as adjudication or legislation, albeit with the distinctive parameters discussed in this article. See id. I should stress that I do not see these usage arguments as compelling, even if worth making in this footnote. Moreover, I accept that for purposes of practical judgment, problem-solving and decision-making offer substantially similar meanings.

130. See Menkel-Meadow, supra note 124, at 757-58 (suggesting that negotiators should not limit themselves to adversarial approach). Menkel-Meadow’s rhetoric does not assume the more assertive vision of “problem-solving negotiation” that appears in Fisher & Ury’s Getting to Yes. See id. at 829-40 (writing that problem-solving models of negotiation are limited by inequality of bargaining parties and differences in ideology and personality). In Getting to Yes and its sequels, the authors describe an approach similar to Menkel-Meadow’s as “principled negotiation,” explicitly arguing that “positional bargaining” is wrong as a normative matter and instructing adherents to a “principled bargaining” approach not to engage in “adversarial” analysis or tactics. See Fisher & Ury, supra note 125, at 11 (discussing points of principled bargaining). Menkel-Meadow argues more modest goals: the acceptance of “problem-solving” negotiation as a valid construct for negotiation practice. See Menkel-Meadow, supra note 124, at 758 (examining practice of problem solving negotiation).
ble resources. Menkel-Meadow argues that "problem-solving" leads to a range of solutions more responsive than those offered by the limited remedial powers of a court. She argues that joint efforts to expand resources may lead to better individual results as well as to increased joint gains.\footnote{131}

Persuasive on their merits, Menkel-Meadow's arguments expand the standard model of lawyering. First, a lawyer's planning for negotiation involves mental assessment of the entire situation from which the problem arises. Planning is not just an "economic evaluation of the case and some prediction of how a court would rule in dispute resolution."\footnote{132} The assessment also includes, in Menkel-Meadow's argument, "parties' underlying needs and objectives" as well as the opportunities to expand resources determined through the use of specific analytical devices.\footnote{133}

Second, in considering objections to the problem-solving model, Menkel-Meadow assesses wealth, power, ideology, the need for value-defining rules\footnote{134} and the personalities of the negotiators themselves. Far from seeing these as barriers, Menkel-Meadow identifies these as additional elements for consideration as part of problem solving.\footnote{135} Menkel-Meadow recognizes that legal negotiations work under the shadow of laws, but also argues the opposite, that in negotiation, legal rules operate in the shadow of negotiation realities.

\footnote{131. See Menkel-Meadow, \textit{supra} note 124, at 763-64 (explaining that problem solving can benefit both parties). Menkel-Meadow advances a range of justifications for her normative arguments. \textit{See id.} at 801-13 (describing structure of problem solving negotiation). She asserts a utilitarian argument on the effectiveness of the solutions the approach can achieve. \textit{See id.} at 813-14 (explaining how problem-solving model can find just and fair solutions). "[A]greements will be more effective when the parties conceive of their purposes as solving the problem or planning the transaction, rather than winning or gaining unilateral advantage." \textit{Id.} at 840. She also appeals to an implicitly participatory politics; the problem-solving approach "returns the solution of the problem to the client" while using the lawyer "to perform her essential role in the legal system—that of solving problems." \textit{Id.} at 841 (urging negotiating parties to view goal as solving problem, not as winning).

\footnote{132. See id. at 818 (promoting "conceptualization and planning" as "the crux of the problem solving approach").

\footnote{133. See discussion of interests \textit{infra} Section III.C.6.

\footnote{134. See Menkel-Meadow, \textit{supra} note 124, at 835-36 (noting potential difficulties with problem-solving). "Nonetheless, some disputes will be appropriately settled by total victory—one-shot cases where the law must be clear, as in abortion, school busing, etc." \textit{Id.} at 835.

\footnote{135. See id. at 834-35 (describing how issues with problem-solving model can be resolved). Menkel-Meadow forcefully distinguishes this inclusive approach to problem appraisal from others, including both those concerned with inequalities of bargaining power arising from wealth, power or other resources, and those concerned to focus on the problem itself rather than the personalities of the parties. \textit{See, e.g.,} Fisher & Ury, \textit{supra} note 125, at 17-40 (stressing importance of separating "people from the problem"). Her "argument explores two of the major issues raised by legal negotiations—the problem of unequal power and the personalities of the negotiators—by suggesting that these are part of the problem to be solved." Menkel-Meadow, \textit{supra} note 124, at 841.}
Third, Menkel-Meadow's analysis stresses the centrality of process selection to lawyering strategy. Negotiation of outcomes serves as the primary alternate process to trial decisions. More general "ADR" literature extends this appraisal to other processes: mediation, evaluation, arbitration and other processes on a continuum that includes litigation. The availability of these processes, together with their differing advantages and risks, allow attorneys and clients more methods for appraising and deciding particular disputes.136 These wider appraisals expand the lawyer's role in identifying, evaluating and assessing options for decision. It enriches the lawyer's strategic role.

This expanded role encourages lawyers towards formal consideration of the interests of other participants as part of strategy. The hard-headed focus on others' interests betokens a renewed stress on relational realities in the lawyering process, expanding the relational inquiry beyond the lawyer's relationship with the client to consideration of the client's relations with others. The word "relational" does not denote only "emotional", though it may; the analysis applies equally to money-oriented transactions and to emotion-rich disputes. Lawyering process integrates outside forces with the client's inner motivations and goals, balancing the client's will to fight or to consent against the limits and opportunities in the surrounding world.137

136. See Frank Sander & Stephen Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Process, 10 NEGOTIATION L.J. 49, 50-51 (1994) (introducing various dispute resolution options). For example, in a 1984 article, Sander and Goldberg posed a broad array of factors, both as goals for and barriers to settlement, which might suggest the use of one form of dispute resolution process over another. See id. at 50-60 (explaining extent to which client objectives and impediments to settlement determine most appropriate dispute resolution option). Goals for settlement in this schema included cost minimization, privacy, relational goals, vindication, neutral assessment, desire for precedent and maximizing or minimizing recovery. See id. at 51-54 (describing client goals in dispute resolution context). Barriers to settlement included poor communication, need to express emotions, different views of facts, different views of law, "important principle," constituent pressure, linkage, multiple parties, different lawyer-client interests and the "jackpot syndrome." See id. at 54-61 (explaining barriers to settlement). Sander and Goldberg assigned values to these elements, both positive and negative, and poured them into templates by which lawyers might assess the suitability of particular outcomes. See id. at 53, 55 (assigning values to specific goals and barriers to dispute resolution). The authors acknowledged their schematic version as a radically simplified version of a far more complex legal judgment: when to settle versus when to litigate, whether to use a third party to assist settlement and which kind of adjudicator to use for litigation. See id. at 66 (noting limitations of forum selection analysis).

137. See Menkel-Meadow, supra note 124, at 795-829 (relating that problem-solving process involves identifying client needs and goals and assessing likelihood of meeting them). Menkel-Meadow recognizes that client needs may provide an insufficient (if necessary) focus of negotiation strategy. See id. at 830 (stating that attempt to satisfy needs may hamper problem solving approach). She acknowledges we cannot empirically prove that problem-solving leads to more efficient outcomes or a wider range of resources. See id. at 842 (noting goals of problem-solving model). She focuses more attention on the moral issue: "trying to satisfy
2. Critics

Other lawyers and writers have assessed lawyering more skeptically under the influence of critical legal studies; it is beyond this Article’s scope to assess fully the influence of critical legal studies on our understanding of law, or even of lawyering. However, a literature has emerged, based on the premises of this movement, which challenges and refines much of the foundational model of lawyering.

One strand of critical thought appraises how a lawyer’s identity, including culture, class, gender, race or personal and political commitments, strongly influence both career choice and style of lawyering. In this view, the lawyer cannot free herself from the world-views that she enacts in her practices. Lawyering may thus advance only the lawyer’s values, in ways that can diverge wildly from decisions and realities facing the client’s needs... is not a morally correct measure of our actions.” See id. at 838 (describing limits of needs analysis). Her analysis here concludes ambiguously with a series of observations about ways in which a “need-centered” negotiation strategy might produce incomplete negotiation assessments and non-problem-solving solutions. See id. at 838-40 (explaining limitations in attempting to meet parties’ needs). Yet to acknowledge the insufficiency of client needs suggests recognition of the point that legal negotiation (and lawyering) involves the lawyer in bringing client realities into contact with the other realities, including legal rules, institutional actors and private parties. See id. at 829 (relating lawyer’s role as identifier and advisor regarding collision of goals and reality).


139. See infra Section III.

140. See Jacobs, supra note 102, at 377-84 (explaining impact of lawyer’s cultural background). Recall that Bradway and the client-centered writers deemphasized the lawyer’s subjective realities, while Bellow and Moulton stressed them. See infra note 162 and accompanying text (comparing and contrasting theories of Bradway, Bellow and Moulton). Their texts reveal significantly different pictures of the lawyer. See id. (same). In the latter, the lawyer serves solely as an agent for developing the client’s “maximum satisfaction,” or more concretely as a problem-solver. See Binder et al., supra note 56, at 261 (emphasizing goal of problem resolution as “maximum satisfaction” to client). As noted already, the lawyer had a relatively limited internal life, and relatively few “motivators” or “inhibitors” that might affect their work with clients. See discussion supra Section II.B.3. Bradway stressed neither the relational elements between lawyer and client nor the personal values of the lawyer in his more strongly cognitive and conservative picture of the lawyering process and the lawyering mind. See discussion supra Section II.B.1. Bellow and Moulton give us a richer characterization, suggesting (largely through questions) that the inner life, personal values, and cultural context of the lawyer do play a role in the lawyering process. See discussion supra Section II.B.2; see also Bellow & Moulton, supra note 48, at 966 (describing influences on lawyering and legal education).
Such a divergence, the argument continues, necessarily infects the lawyer's assessments and actions on client decisions. This infection translates into coercion of the client. However well-intentioned this coercion may be, lawyering enforces the lawyer's subjectivity as a form of oppression, through the very behaviors the lawyer means as a service. If we accept the reality of this oppression, we can imagine a few responses. Perhaps we can moderate oppression and coercion through self-awareness and technical skill. Perhaps recognition and integration of other relational, cultural and emotional factors can constrain our oppressive actions, through more broad-gauged assessments of client realities. Finally, perhaps we can transform ourselves and our work with clients through collaborative relationships that enhance the client's power.

141. See Jacobs, supra note 102, at 377-79 ("Lawyers, law students and law professors, like every other member of society, carry with them preconceived notions rooted in the lawyer's own cultural background."); see also Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769, 770-71 (1992) (explaining that concept of disabled is imagined in lawyers' consciousness).

142. See Jacobs, supra note 102, at 378-80 (exploring how lawyer's unconscious racism may impact lawyer's interpretation of client's actions and goals). A logically consistent analysis would question whether the "meaning" behind the "service" is anything more than enforcement of institutional structures from which lawyers draw their power, as well as of the lawyer's own power in relation to her client.

143. This approach forms the heart of the practice ethic of client-centered lawyering, in which the studied neutrality of the lawyer seeks to abate, if not eliminate, any unwarranted influence by the lawyer on the client. See id. at 288 (emphasizing importance of lawyers' neutrality). But see Ellmann, supra note 118, at 740-44 (critiquing client-centered counseling methods as manipulative and coercive in their own right).

144. This approach seems implicit in the literature, which stresses the power of relational factors and emotional content both on the lawyering of decisions and on the lawyer-client relationship. For a discussion, see supra note 140 and accompanying text.

145. See Gerald P. Lopez, Rebellious Lawyering, One Chicano's Vision of Progressive Law Practice 377-78 (1992) (emphasizing coalition between lawyer and subordinated clients). Two strains of "collaborative" lawyering theory exist. Compare id. (focusing on coalition with all clients), with Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility 40-54 (1994) (stressing individual relationship between lawyer and client). The classic statement of the more explicitly political strain originates with Lopez's analysis and also finds voice in the writings of Lucie White and Anthony V. Alfieri, among others. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2118-22 (1991) (examining lawyer-client relations in poverty stricken urban community); Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 Wis. L. Rev. 699, 701-36 (illustrating collaborative relationship between lawyer and client in case study); see also Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 Clinical L. Rev. 427, 457-86 (2000) (performing excellent critical review of these three authors, and of critical response). The second version of "collaborative" lawyering refers more to the individual relationship of lawyer and client in all contexts, and builds on a foundation of ethical and moral theory. See, e.g., Cochran et al., supra note 114, at 176-82 (describing how lawyers should deal with moral issues under collaborative model of lawyering); Shaffer & Cochran, supra at 40-54 (examining role of lawyer as friend). This second tradition differs strongly from the more explicitly political...
This focus on client power marks a broader inquiry into the prominence of power in lawyering, driven at least in part by reexamination of the theory of power. Moreover, collaborative lawyering theorists encourage expanding the actions that lawyers should consider with their clients by seeking broader fora in which client participation can change social, political and cultural systems. Like dispute resolution writers, the expansion of possible paths for action stresses the lawyer's role as strategist in collaboration with clients. The critical lawyering writers focus less on private solutions than public, explicitly political ones.

“Narrative” or story-telling also emerges from the critical literature as a new rhetoric for the lawyering process. Some strains of this literature argue that not only law, but also lawyering consists of narrative and vision of “collaborative” lawyering, and purports to apply to lawyering for any client. See id. at 9 (noting advantages of collaborative model).

146. See White, supra note 145, at 769-66 (explaining importance of client empowerment as means to initiate change); Lucie White, Seeking "... The Faces of Otherness ...", A Response to Professors Sarat, Felstiner, and Cahn, 77 CORNELL L. REV. 1499, 1501-09 (1992) (examining metatheory of power in context of social relations between lawyer and client).

147. See White, supra note 145, at 765-66 (explaining model of lawyering that requires client involvement to create change). This latter strain asks the lawyer to reconceive not only which arguments to make within traditional process, but also whether to use traditional process at all. See id. at 764 ("This image of lawyering bears little resemblance to traditional professional practice."). This requires, to borrow Piomelli's gloss, "re-imagining context" to include "connections to other bodies of knowledge," exploring structural and institutional dimensions of decisions, understanding historical realities, "mapping the web of relationships" and assessing "societal structures of power." See Piomelli, supra note 145, at 488-92 (discussing need for lawyer to place problems in their full context before problem-solving). In this year of Gary Bellow's passing, we should take note of the influence not only of his writing, but also of his law practice on this vision of political lawyering. See Minow, supra note 83, at 289-90 (praising Bellow's attempts to aid farmworkers and poor). Minow eulogized Gary Bellow by praising his: efforts to use law to alter the social and economic conditions of farmworkers and poor urban tenants, and similar struggles to expose and change the abusive practices or police departments, corrections institutions, public schools, welfare offices, and private landlords . . . . In each situation, Gary and his colleagues try to create fora in which his clients could participate, often strengthening and forging coalitions that last beyond a particular lawsuit . . . . For Gary, the process of lawyering affords the chance for solidarity with people who bear the brunt of societal unfairness.

Id. at 289-90. But see Tremblay, supra note 147, at 970 (arguing that poverty lawyers will remain conservative despite calls for mobilization). Tremblay noted that: writers have been imploring poverty lawyers to pursue empowerment and collective mobilization for more than twenty years. Yet rebelliousness remains the exception, and not the norm . . . . Unless and until progressive theorists can counteract the inherent rescue preference in neighborhood legal services offices with something more than exhortation, poverty lawyering will remain more or less conservative.

Id.

story-telling. That lawyers tell stories that are edited subsets of broader collections of facts seems uncontroversial. These writers go farther, suggesting that narrative contains "identity-defining" realities, stories about political and ideological commitments. A lawyer should, in this view, subordinate the lawyer's story to the stories of her clients. More technically, others have sought to integrate narrative as a voicing of client realities into the structure and strategy of particular cases.

Finally, the discussion of gender in lawyering has prompted a strong refinement of our notions of relational realities and emotion. As to the former, Goldfarb writes that "experience generally occurs in an interpersonal setting, and other persons arouse in us both cognitive and affective responses." This stress on relational influences originates in part in theories that women may reason differently about moral and ethical questions than men, working more from concerns for quality and content of the law a narrative? Is all legal argumentation rhetorical? Maybe, but maybe not.


[t]he critical and client-centered movements add to our understanding of the role that client voices can and should play in legal representation. But in the rush to embrace client voice, these scholars have virtually ignored the critical role that case theory can play in linking client stories to the narratives that lawyers tell on behalf of clients.

Id. 151. See, e.g., Goldfarb, A Theory-Practice Spiral, supra note 138, at 1667-69 (discussing feminist methods of education with emphasis on experience); Carrie Menkel-Meadow, Portia Redux: Another Look at Gender, Feminism, and Legal Ethics, 2 VA. J. SOC. POL'Y & L. 75, 87-89 (1994) (hereinafter Menkel-Meadow, Portia Redux] (examining impact of women on legal profession); Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyers Process, 1 BERK. WOMEN'S L.J. 39, 55-58 (1985) [hereinafter Menkel-Meadow, Portia] (discussing impact of feminization on legal practice). In the last article, Phyllis Goldfarb assesses overlap concerns in both lawyering theory and feminist legal scholarship. Goldfarb, A Theory-Practice Spiral, supra note 138, at 1667-74 (emphasizing similarities between feminist and legal theories). These include: the use of experience; the role of affect; the connection between interpersonal dynamics and political content; the interplay between hierarchy and collaboration, with a related focus on power and control; and the use of interdisciplinary inquiry, contextual reasoning and critical inquiry. See id. (relating similar factors in feminism and legal theory).

152. Goldfarb, A Theory-Practice Spiral, supra note 138, at 1669-70.
Menkel-Meadow notes the ambiguity of the relevant empirical results: men and women may not actually diverge in their concern for relationship as much as theory might predict. However, the feminist writing reasserts the significance of relational realities in the thought and behaviors of lawyering.

As to emotion, Goldfarb notes that “because experience contains both cognitive and affective content, exploring an experience fully requires exploring not only its cognitive, but also its affective dimensions.” At times, this “affective dimension” appears to focus exclusively on empathy. Empathy as an interpersonal reality has old roots in the

153. See Menkel-Meadow, Portia Redux, supra note 151, at 78-97 (assessing the development of Carol Gilligan’s thought and the influence of “relational” ideas on law practice, the production of legal knowledge, and ethical and moral decision-making). “Women focus more on the connection to others, on the people and relationships.” Id. at 80.

154. See id. at 87-89 (canvassing studies of differences in ideological commitments, motivation for law study, preferences about how to practice, expectations of practitioners, occupational choice and practice contexts, and concluding that “it may be too early to tell whether there is ‘push’ or ‘pull’ in terms of which directions women or other outsiders in law pursue.”); see also RAND JACK & DANA CROWLEY JACK, MORAL VISIONS AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 6-7, 11-12 (1989) (summarizing Gilligan’s moral theories and assessing their prevalence in study of moral orientations of men and women lawyers in Washington state).

155. See discussion of relational influences as a topic of lawyering infra Section III.C.3; see also discussion of relational assessments in negotiation theory supra Section II.C.1.

156. Goldfarb, A Theory-Practice Spiral, supra note 138, at 1669.

157. See Stephen Ellmann, The Ethic of Care as an Ethic for Lawyers, 81 GEO. L.J. 2665, 2698-702 (1993) (describing empathetic understanding in lawyering); Lynne N. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574, 1575-77 (1987) (describing empathy as critical to understanding legal problems); Peter Margulies, Re-framing Empathy in Clinical Legal Education, 5 CLINICAL L. REV. 605, 605-07 (1999) (emphasizing importance of empathy in clinical legal education); Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?, 87 MICH. L. REV. 2099, 2101-02 (1989) (defining various aspects of empathy in legal context). Margulies notes that the notion of empathy in this literature has two dimensions, a “micro-version . . . which focuses on interpersonal relationships” and a “macro-version . . . which focuses on distributive issues in society.” See Margulies, supra, at 606 (defining macro and micro dimensions of empathy). Margulies goes on to assess the extent to which these micro and macro versions might merge in active practice, and to argue a version of empathy that constitutes a strongly conceived notion of civic engagement. See id. at 614-19 (discussing model of empathetic engagement). Carrie Menkel-Meadow was the first to draw a distinction between macro and micro theories. See Menkel-Meadow, supra note 1, at 556-58 (discussing distinction between macro and micro theories).

Empathy means “the power of projecting one’s personality into (and so fully comprehending) the object of contemplation.” OXFORD ENGLISH DICTIONARY 184 (2d ed. 1989). If (as the literature implies) the lawyer exercises empathy with the client, that means that the lawyer will encounter the client’s emotion as part of broader effort to fully comprehend the client. See Henderson, supra, at 1576 (“[E]mpathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings . . . .”). Empathy may not itself be an emotion. Indeed, if the OED definition makes sense, empathy may produce a
lawyering literature, dating back to and before the inception of client-centered lawyering. Whether or not the lawyer feels or uses empathy in her lawyering, the full range of human emotions come to bear on the lawyering process. In decisions with clients, lawyering will ask us to encounter emotion directly, feeling and accommodating its influence on our appraisals, our decisions and our actions.

3. Lawyering Scientists

Lawyering has also become the focus of empirical study, continuing a central portion of the realist agenda. The modern studies focus on lawyering behavior and thought. This literature is not exclusively empirical; it uses empirical methods to sustain larger propositions about law or legal process. These efforts have constructed a new lawyering science, a subset of the social sciences and radically different than Langdell’s legal science. I stress three themes here: the creation of refined, multi-part

more complex insight into the client’s situation than that situation’s emotional content. See id. at 1578-84 (exploring different depths of emphatic understanding). In any case, even if we consider empathy as restricted to “emotional alertness,” we will still need to know how to understand and incorporate the emotions of which empathy has made us aware. Empathy does not necessarily mean the listener has any emotional presence in the situation of their own, at odds with the other critical accounts of lawyering. See id. at 1578-84 (describing empathy as different from emotion itself).

158. See id. at 1578-87 (discussing early development of empathy in legal system). At least some legal philosophers will lay heavy stress on the centrality of empathy to practical judgment. See infra Section II.C.4.

159. See Goldfarb, A Theory-Practice Spiral, supra note 138, at 1660-65 (explaining in detail how critical emotional understanding of client is to effective lawyering). I return to discussion of emotion below, in discussing Martha Nussbaum, and later, in assessing emotion as a “topic” of lawyering. See infra Section III.C.2.

160. See KRONMAN, supra note 13, at 199-209 (appraising strain of “scientific realism” that, in Kronman’s view, goes beyond purely descriptive endeavor and attempts series of normative propositions about law).

161. See infra notes 162-82 and accompanying text (discussing development of new social science). We can find various labels claimed for this movement, although none seems wholly to occupy the field. One formulation uses the phrase “lawyering theory,” referring to a sweep of empirical efforts, including interpretation theory, literary criticism, sociolinguistics, cognitive psychology and cultural anthropology. See Sherwin, supra note 8, at 33 (leading off symposium issue devoted to empirical assessments of law and lawyering in diverse contexts). A related, partly overlapping formulation uses the phrase “theoretics of practice” to refer to scholarly endeavors that seek to formulate less descriptive, more normative “integration of progressive thought and action.” Symposium, Theoretics of Practice: The Integration of Progressive Thought and Action, 43 Hastings L.J. 717, 721-26 (1992) (referring to relationship between clinical and critical theory as theoretics of practice); see also Robert D. Dinerstein, A Meditation on the Theoretics of Practice, 43 Hastings L.J. 971, 971 (1992) (critiquing “theoretics of practice” movement); Piomelli, supra note 145, at 441 (noting this label as one among many to describe collaborative lawyering, including “critical lawyering theory,” “new poverty law scholarship,” “representational narrative scholarship,” “reconstructive poverty law,” “political lawyering” and “community lawyering”). For a discussion of the various aspects of the critical lawyering theory, see supra Section II.C.2.
descriptions of lawyering process; the scientific assessment of lawyer behavior; and the cognitive description of the lawyering "mind."

As early as Bradway, lawyering was seen as a method focused on decision-making and consisting of dynamically related phases. Yet even this view tended to fractionalize lawyering into constituent tasks. This tendency to list and group related, discrete tasks reached its most influential statement in the MacCrate Report. The Report identified ten different skills and listed subordinate skills or concepts of each of the major skills. "Problem-solving" represented the first and most important, incorporating the strategic content already present in the standard model. For all its complexity, the Report reads like a laundry list of

162. See generally Bradway, How to Practice, supra note 51 (describing phases of client contact). Bradway presents the most compact version of this model, Bellow & Moulton the most encyclopedic. See Bellow & Moulton, supra note 48, at 123 (describing in detail method of lawyering). See generally Bradway, How to Practice, supra note 51 (providing brief description of lawyering process).

163. See generally Bradway, How to Organize, supra note 51 (describing tasks of lawyer). The focus of Binder and Price's book on discrete groupings of tasks (interviewing and counseling) has continued throughout the modern literature. See generally Binder & Price, supra note 54 (describing lawyering as collection of discrete tasks). For a discussion of the risks of fractionalized lawyering, see infra Section III.A and accompanying footnotes. Indeed, after writing the book, one of its co-authors, David Binder teamed with Paul Bergman to create a separate text focused exclusively on factual development. See generally Binder & Bergman, supra note 101 (developing text to assist law students and practitioners with fact gathering in situations where factual scenario is at issue).

164. See generally MacCrate Report, supra note 43 (providing information on skills considered necessary for lawyers).

165. See id. at 138-40 (providing descriptions of distinct lawyering skills). The general listing of primary skills includes: "problem solving;" legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute solution procedures; organization and management of legal work; and recognizing and resolving ethical dilemmas. See id.

166. See id. (listing subordinate skills and concepts). The listing of subordinate skills or concepts reached forty-one. See id. Each subordinate skill or concept was further subdivided into an additional list of more specific skills or concepts. See id. at 141-207 (analyzing skills and values). For example, the general skill of problem solving had five subordinate subcategories: "identifying and diagnosing the problem;" generating alternative solutions and strategies; "developing a plan of action;" "implementing the plan;" "keeping the planning process open to new information and ideas." See id. at 140-48 (describing component concepts of problem-solving). Each of these in turn receives further refinement in a list of twenty-three subordinate areas of skills or concepts. See id. at 141-51 (listing special skills and concepts that are compounds of more general skills and concepts).

167. See id. (discussing strategic content). "This Statement's formulation of the skill of problem solving includes certain other conceptual skills that are crucial for the effective application of virtually all of the skills analyzed in the Statement." Id. at 150. Moreover, the problem-solving skill stresses the integration of legal and non-legal factors, and the presence of practical constraints on problem-solving process. See id. (discussing legal and non-legal factors). "This Statement explicitly calls for a holistic approach to the assessment of a client's situation, considering
competencies, with a heavy stress on cognitive thought and related behavior. 168

Even with its normative bias, 169 the MacCrate Report continues the long effort to assess and describe lawyering behavior using empirical, particularly social scientific methods. 170 This approach uses linguistic analyses of conversations and interactions between lawyers and others in an effort both to describe those interactions and to formulate empirical assumptions from which to critique prevailing lawyering practice. 171 Other

the 'legal, institutional, and interpersonal frameworks in which the problem is set.'" 1d. This section's focus builds on earlier, influential work by Anthony Amsterdam, stressing the importance of the cognitive skills of "ends-means" thinking, "hypothesis formulation and testing," and "decision making" in situations of diverse uncertainties. See Anthony G. Amsterdam, Clinical Legal Education: A 21st Century Perspective, 34 J. LEGAL EDUC. 612, 614 (1984) (itemizing kinds of reasoning not traditionally taught in law school). This stress on the role of lawyer as problem-solver also emerges in the work of the negotiation theorists, particularly Carrie Menkel-Meadow. See supra Section II.C.I (discussing presence of problem-solving lawyer in works by other theorists).

168. See MacCrate Report, supra note 43, at 141-207 (listing necessary lawyering skills); see also Menkel-Meadow, supra note 19, at 601 ("[T]he MacCrate report . . . attempts to classify both skills and values in a taxonomy as detailed as any statement of tort or contract law principles that Langdell would hope to deliver."). While sympathetic to the Report’s effort to encourage the teaching of practice in law school, Menkel-Meadow takes issue with its "'scientistic' deductive description of law and lawyering." See id. at 607-08, 610 (arguing that its "overly abstracted, standardized conception" of skills lends itself to a purely instrumental view of the lawyer’s role). Menkel-Meadow also critiques the Report’s exclusions and assumptions concerning: negotiation, alternative dispute resolution and, most broadly, the mix of mental capacities to which the tasks of lawyering give rise. See id. at 610-22 (analyzing MacCrate Report). She argues for different methods of cognitive handling of the law, for the centrality of experiential learning, for the power of "affective human learning" as part of lawyering and for inclusion of "normative values" in the lawyering picture. See id. at 607-22 (proposing changes to traditional education of lawyers).

169. See Menkel-Meadow, supra note 19, at 607 (noting MacCrate Report’s perpetuation of traditional conception of lawyer representing single client).


methodologies include the use of statistical methods and surveys\textsuperscript{172} and anthropology\textsuperscript{173} to depict lawyering in action. These works combine descriptive and normative purposes. They seek accurate assessment of the behaviors described as a base for critical assessment of law practices.\textsuperscript{174}

\begin{itemize}
  \item [99-124 (1986)] [hereinafter \textit{Law and Strategy}] (listing lawyer/client interaction);
  \item [174. For a discussion of the methodology lawyers use for various studies, see supra notes 172-73 and accompanying text. In this latter sense, the spirit of these analyses merges with the spirit of critical assessment described in the preceding section. See infra Section III.C.2; see also KRONMAN, supra note 15, at 199-209, 240-64 (tracing strand of "scientific realism" from Karl Llewellyn’s early writing, through efforts of Harold Lasswell and Myres McDougal to establish what Kronman describes as “normative science of law on realist assumptions,” to efforts of “critical legal theorists” to establish similar set of normative propositions that center and control legal discourse); Menkel-Meadow, supra note 19, at 601 (critiquing legal education). Menkel-Meadow stated that:
    if Tony Kronman can claim that both law and economics and critical legal studies are derived from the same strand of legal realism, I could add that the particular conception of skills training described in the MacCrate Report could similarly be accused of an effort to develop foundational principles and rigid formulations.
    \textit{Id.}
\end{itemize}
Why focus on behavior when we can look at the mind with the tools of cognitive science? In a thorough review of the potential of this field for the understanding of lawyering, Gary Blasi starts with the now-familiar description of lawyering as problem-solving. For Blasi, the problem-solving task stresses “the importance of the lawyer’s ability to integrate factual and legal knowledge and to exercise good judgment in light of that integrated understanding.” Using a cognitive science paradigm, he

175. See Blasi, supra note 85, at 361-80 (applying cognitive paradigm to law and lawyering).
176. See id. at 327-29 (stating that principal role as lawyer will be to help clients achieve effective solutions to their problems). To support this proposition, Blasi cites an essay by Gerald P. López and work by Binder, Bergman and Price. See, e.g., Binder et al., supra note 56, at 3 (stating that lawyer’s “principal role . . . will almost always be the same — to help clients achieve effective solutions to their problems”); Gerald P. López, Lay Lawyering, 32 UCLA L. Rev. 1, 2 (1984) (stating that lawyering means problem-solving).
177. See Blasi, supra note 85, at 326 (incorporating tools of cognitive science as integral to lawyer’s ability as problem-solver).
178. See id. at 328-29 (recognizing that problem solving is fundamental lawyering skill). While he appraises “decision-theory,” he eventually recommends a “cognitive science paradigm” as a vehicle for understanding the mind of the expert legal problem-solver. See id. at 329 (stating that expertise in problem-solving in cognitivist paradigm entailed best individual decisions). The “decision-theoretic paradigm takes as the central issue the optimal making of individual decisions, some of which may be critical to outcomes in particular problems,” and includes an assessment both of how people make decisions, and of how people deviate from a decision-making model presumed to be rational. See id. (noting differences between decision theoretic paradigm and cognitive science paradigm). By contrast, the “cognitive science paradigm” of problem-solving takes as its focus the entire process of problem-solving, which may include the making of sequences of interrelated decisions, no single one of which is likely to be determinative of the outcome.” Id. Blasi selects the cognitive science paradigm precisely for its focus on an entire process of interrelated decisions, noting in his view that the focus of decision-theorics on single decisions measured against presumed rationality reflects an inadequate definition of legal expertise. See id. at 330-31 (stating that decisional theory neither accurately describes how expert problem-solvers make decisions nor provides a feasible model for problem-solving of complex problems). This preference matches the well-established foundational version of lawyering as a process of decision-making that occurs in a series of closely related stages. See id. at 331 (stating that cognitive science conceives problem-solving as process that entails sequence of decisions).

I would concur in Blasi’s preference for the cognitive model over a decision-theoretical model. The decision-theoretical model assumes notions of rationality that do not incorporate the richer sense of rationality explored in the writings of Anthony Kronman, Martha Nussbaum or the critical lawyers (including hard-to-quantify affective, experiential and contextual elements.) See infra Section II.C.4 (contrasting with accounts by other philosophers of practical wisdom) and Section III.C.5 (contrasting with practical judgment discussion and effects of money by philosophers). Indeed, in my view the pervasiveness of affective and value-oriented content in legal decision-making renders even Blasi’s cognitive model incomplete, unless we are to describe emotion, power, relational realities and personal values as purely cognitive structures—a plausible description, but one that leads to needless complexity in practical application.

Despite its limits, however, the decision-theoretic model does provide useful insights “to practitioners who must decide which cases to accept, whether to settle
describes expert problem solving in various cognitive terms: mental searches along "solution paths;"\textsuperscript{179} pattern recognition and retrieval;\textsuperscript{180} and imaginative replay and comparison of these patterns against the features of the present situation.

These empirical writings offer useful new insight into lawyering. The behavioral insights stress characteristic problems and challenges in lawyering process: distribution of power between lawyer and client, distortion of behavior by lawyer interests and values, and confusion and uncertainty in information acquisition and appraisal. By contrast, the cognitivist insights speak of the lawyer's mind as it responds to the lawyering situation itself.\textsuperscript{181} Neither insight integrates the non-cognitive and non-scientific in-

\textsuperscript{179}. See Blasi, supra note 85, at 330-31 (noting such circumstances when decision-theoretic model is useful); see also Marjorie Anne McDiarmid, \textit{Lawyer Decision Making: The Problem of Prediction}, 1992 Wis. L. Rev. 1847, 1849 (stating that decision theory approach is useful in situations, for instance, where lawyer deciding whether to take on case in uncertain area of law). Russell Korobkin and Chris Guthrie have produced similarly useful studies of settlement decisions in the litigation context. See Russell Korobkin & Chris Guthrie, \textit{Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer}, 76 Tex. L. Rev. 77, 78 (1997) [hereinafter \textit{A New Look}] (discussing traditional law and economics model of litigation); Russell Korobkin & Chris Guthrie, \textit{Psychological Barriers to Litigation Settlement: An Experimental Approach}, 93 Mich. L. Rev. 107, 109 (1994) (hypothesizing psychological barriers to settlement).

\textsuperscript{180}. See Blasi, supra note 85, at 333-34 (reasoning that cognitive science can be applied to problem-solving activity to choose possible solution paths and select those that lead to solutions). This is Amsterdam's ends-means thinking stated more cognitively. See Amsterdam, supra note 167, at 614 (discussing ends-means thinking).

\textsuperscript{181}. As already noted, an earlier draft of this article argued that lawyers possess a distinctive intelligence labeled "decisional intelligence." See supra note 3 and accompanying text. Such a model presents problems. First, an "intelligence" model leads to assumptions about innate talent that proved more distracting than useful. See Blasi, supra note 85, at 329 (noting that innate ability and experiences alone do not produce expertise). Stated baldly, lawyers do not inevitably possess a special intelligence, flowering upon completion of law school and passage of the bar. It seems more plausible to suggest that such special intelligence as lawyers acquire arises from experience of the special features of lawyering decisions.

Second, "decisional intelligence" fits poorly with available psychological models of intelligence. Howard Gardner's discussions of the requirements for intelligence provide a useful summary. See Howard Gardner, \textit{Frames of Mind: The Theory of Multiple Intelligences} 60 (1983) (stating prerequisites of intelligence). In this description, one of the core \textit{measurements} of intelligence, intended to help distinguish between intelligences, was decision-making capacity. See id. at 59-70 (stating that human intellectual competence must entail set of skills of problem solving that enables individual to resolve genuine problem to create effective product). Instead of seeing "decisional intelligence" as itself a separate intelligence, Gardner saw decision-making as one of the core functions of \textit{all} intelligences, however delineated and distinguished. See id. at 60 (same). Nothing in the cognitive
fluences on lawyering nor does either account fully for the humanistic content of lawyering practice. For this, we must refer back to the critics, and next, to philosophers of practical wisdom.

4. Philosophers

Over the last decade, Aristotelian accounts of "practical wisdom" have revived the humanistic focus on decision-making by lawyers. These writers focus on Aristotle's version of practical reason, the capacity to make decisions in the context of practical affairs:

Aristotle tells us that practical reason is reasoning about what should be done on each particular occasion, and involves deliberation, desire, choice, and action. He defines practical wisdom as the virtue of practical reasoning, and maintains that virtue is a state of character that lies in a mean between two extremes. Aristotle tells us that practical wisdom is a virtue of both intellect and character. But how does the person of practical wisdom decide on the appropriate action in a particular situation? . . . . Aristotle's answer is not clear, and literally millennia of reasoned discussion has not resulted in agreement . . . .

In debating these points, their modern exponents offer useful insights into the nature of the lawyer's mental response to the lawyering process. The most influential of these appears in The Lost Lawyer, where Anthony Kronman develops a wide-ranging meditation on practical wisdom. Kronman locates practical wisdom as a central virtue for the "lawyer-statesman". 

In literature summarized and assessed by Blasi conflicts with that view. See Blasi, supra note 85, at 330-31 (stating that "several recent works illustrate the potential value of decision theory to practitioners . . .").

182. See Blasi, supra note 85, at 333 (stating that cognitive science generates testable hypothesis about behavior). Blasi does discuss "the situated nature of cognition," by which he means the differences in cognitive process that result from the different stances of observer and participant in problem-solving: a person with an engaged, active stance and the perspective of a problem-solver inside the problem situation acquires an understanding quite different from that of a person with a passive stance and the perspective of an observer. It is not only that an engaged problem-solver learns more . . . but also that she learns something quite different.

See id. at 359. This perception stresses an important feature of lawyering: that lawyering analysis occurs in action, with the lawyer as a participant. Interestingly, Blasi stresses that the Langdellian case method rests "on firm ground in human cognition and learning," in that it requires students to engage in active processing of legal analysis and doctrinal development. See id. (recognizing that students are affected by perspective). However, he does not discuss other elements which the lawyer might also experience, such as emotional currents, relational influences, power realities and the internal pressures of identity-defining values.


184. See Kronman, supra note 13, at 53-108 (discussing practical wisdom and political fraternity).
man." This is his archetype of good lawyering, but one which, in his view, no longer animates the ambitions of practicing lawyers.185

While Kronman assesses a range of influences on the decline of the ideal,186 he also discusses the content of practical wisdom itself, describing it as a combination of two other attributes: “sympathy” and “detachment.” Together, these permit active engagement in imaginative deliberation, a discipline allowing deep insight into practical choices. With them, the lawyer can both imagine fully the results of choices between incommensurable goals and values and assess the fitness of different paths to achieving them.187 This view articulates judgment from within the lawyer’s mind and describes judgment in literary, subjectively textured language. Moreover, Kronman focuses on a paradigm problem: those choices where values and goals cannot be weighed with a single measure, the ancient problem of incommensurables. This practical wisdom not only eases selection between incommensurable choices, but also summons the will to resist regret, both necessary to durable decisions.188

185. See id. at 11-12 (discussing history of lawyer-statesman in America).

186. See id. at 13 (describing demise of lawyer-statesman). Kronman points to a principal influence on the decline of the lawyer-statesman ideal: the rise of a notion of “scientific law reform.” See id. at 17-18 (noting that this new ideal known as scientific law reform has increasingly differed from clinical ideal of lawyer-statesman). While these reformers sought the public good, Kronman notes that “the appropriate object of the law reformer’s concerns is the structural arrangement of the legal order as a whole and not the resolution of particular disputes of the sort that lawsuits and other concrete controversies typically involve.” Id. at 19 (noting object of those reformers supporting scientific law reform). Moreover, these reformers “enthusiastically proclaimed that the law could be most effectively reformed through the application to it of certain methodical and rigorous techniques.” Id. Elsewhere, Kronman traces the rise of scientific law reform from the “legal science” of Langdell, through the legal realists and into two primary modern strands of legal thought: law and economics; and critical legal studies. See id. at 165-270 (discussing institutions and their cultural dynamics). This Article does not seek to resolve the tension between Kronman’s views and those he criticizes.

187. See id. at 69 (examining role of imagination in deliberative inquiry). This echoes the concerns of the “cognitive” paradigm discussed earlier, in its concern for the fit between decisions and context and its exploration of multiple paths towards achieving goals. See Section II.C.3 (discussing similarity of concerns between cognitive paradigm and deliberative inquiry).

188. See id. at 62-87 (discussing practical wisdom and political fraternity). Other writers have adapted and stressed Kronman’s conception of the subjectivity, complexity and multi-dimensionality of practical wisdom. Mark Aaronson, for example, has noted a number of attributes framing practical judgment, including the distinction between normative and descriptive accounts of wisdom, the interplay of general knowledge and particular circumstances and the inevitable link of deliberation and action inherent in practical judgment. See Mark Neal Aaronson, We Ask You to Consider: Learning About Practical Judgment in Lawyering, 4 CLINICAL L. REV. 247, 255-79 (1998) (discussing multi-sided nature of practical judgment). Aaronson’s discussion draws a particularly useful distinction between judgment as a “moral virtue” and judgment as a “mental faculty.” See id. at 259-61 (explaining distinction within category of forming practical judgment).
Martha Nussbaum further enriches the account of Aristotelian practical wisdom with a discussion of "emotion" and other "irrational" factors in the exercise of judgment. She, like Kronman, accepts the weighing of incommensurable values as the paradigm problem for practical wisdom. But she is more rigorous in her particularity, arguing that no account of practical decision-making can rest solely on comparing of quantified values. In effect, practical judgment occurs in and responds to specific, particular decisions, which we cannot reduce to commensurables.

By faculty, we usually mean an innate, human characteristic. When we say someone is bright or mechanical, we are naming a particular talent of disposition. We are not saying much about its development or its achievement. We mean something in addition when we say someone has judgment or is wise.

Id. at 260. I accept this insight that practical judgment is distinct from, and less normative than, practical wisdom, while diverging from Aaronson's notion of a faculty as something necessarily innate. Rather, I argue that this faculty develops in response to regular, intentional exposure to the decisions and processes of practical life, including lawyering, and that differences in its exercise result from diversities in human talent, background, experience and character. See infra Sections III.D. and III.E.; see also Scharffs, supra note 183, at 138-39 (distinguishing "practical reason" from its principal virtue, "practical wisdom").


190. MARTHA C. NUSBAUM, Plato on Commensurability and Desire, in Love's Knowledge, supra note 189, at 106 (discussing "Plato on Commensurability and Desire").

191. MARTHA C. NUSBAUM, The Discernment of Perception: An Aristotelian Concept of Private and Public Rationality, in Love's Knowledge, supra note 189, at 54, 54-105 (noting that Aristotle does not believe rationality is scientific). This stress on the particular, decision-specific nature of judgment matches both the cognitive account of judgment and Kronman's thinner version, but might disturb those who find the need for distinctive, uniform rules of decision for particular practical situations. Nussbaum notes that, while many situations do prompt a sense of indeterminacy through their particular, non-repeatable features, rules of decision continue to have value:

Aristotle has no objection to the use of general guidelines . . . . They have a useful role to play so long as they keep their place. Rules and general procedures can be aids in moral development . . . . [I]f there is not time to formulate a fully concrete decision in the case at hand, it is better to follow a good summary rule or a standardized decision procedure than to make a hasty and inadequate contextual choice . . . . [I]f we are not confident of our judgment in a given case, if there is reason to believe that bias or interest might distort our particular judgment, rules give us a superior constancy and stability.

Id. at 73. Nussbaum later develops this notion in the context of legal judgment. See id. at 97-101 (discussing "The Perceiver as Leader").

[Good legal judgment is increasingly being seen as Aristotle sees it — as the wise supplementing of the generalities of the written law by a judge who imagines what a person of practical wisdom would say in the situation, bringing to the business of judging the resources of a rich and responsive personality.

Id. at 100. While Nussbaum describes the judgment of judges, this Article focuses on the judgment of lawyers in lawyering. I discuss below both the role of emotion in lawyering judgment, and the power of other constraints on the potential capri-
Nussbaum discerns three mental states in the exercise of practical judgment: "intellect," "imagination" and "emotion," the constituent elements of her Aristotelian practicality. These three together allow perception of the appropriate decision in the situation: "the 'discernment' of the correct choice rests with 'perception' . . . some sort of complex responsiveness to the salient features of one's concrete situation." Is practical judgment a single capacity or a group of related capacities working together dynamically? If lawyers exert practical judgment in lawyering, are they doing one thing or a sequence of different things? As to her three elements, Nussbaum sees "no significant tensions among them, and numerous reasons why the defender of one will wish to defend the others as well. They seem to articulate different aspects of a single idea." This single idea seems chimerical. Even in Nussbaum's account, Aristotle stressed different constituent capacities of practical judgment. Moreover, the division (and connection) between cognitive and affective, intellectual and emotional capacities has long roots in Western culture. For a quite different but useful effort to define a methodology for coping with ethical judgments in situation-specific decisions, see generally Paul R. Tremblay, The New Casuistry, 12 GEO. J. LEGAL ETHICS 489 (1999) (introducing alternative view of ethical choice).

192. See NUSSBAUM, supra note 191, at 82-84 (discussing all three elements together).

Aristotle tells us in no uncertain terms that people of practical wisdom, both in public and in private life, will cultivate emotion and imagination in themselves and in others, and will be very careful not to rely too heavily on technical or purely intellectual theory that might stifle or impede these responses. Id. at 82.

193. See id. at 55 (describing how three mental states interact during decision-making).

194. Kronman's binary description of practical wisdom ("sympathy/detachment") and Nussbaum's triune description ("intellect/imagination/emotion") raise this question in part.

195. NUSSBAUM, supra note 191, at 84.

196. See id. (stating that Western society has dealt with this division between these forms of capacities). Such a division appears in Pascal's Pensées, in which he draws a distinction between the "geometrical" or "mathematical" mind and the "intuitive" mind. See BLAISE PASCAL, PENSEES, Nos. 512-14 (A.J. Krailsheimer trans., Penguin ed. 1966) (noting that mathematical minds become lost in those matters requiring intuition and intuitive minds are unable to comprehend that which they cannot understand). Pascal postulated these two minds at least in part in response to the Cartesian conviction of the primacy and systematizing power of intellect. See JACQUES BARZUN, FROM DAWN TO DECADENCE, 500 YEARS OF WESTERN CULTURAL LIFE: 1500 TO THE PRESENT 216-19 (2000) (noting that scientists had convinced that scientific findings were all that mattered). Pascal did not see these "minds" as irreconcilable, but rather as different parts of any given individual's experience. See PASCAL, supra, at No. 512 (stating that "[u]nsound minds are never either intuitive or mathematical"). Discussing the limitations of the "mathematical" mind, he
We have seen already how different lawyering writers may, at least implicitly, accept a division between cognition and affect. More recent accounts may offer more success in articulating practical reason as a unified thought process. Drawing on Martin Heidegger, Linda Meyer presents complementary versions of thinking as handiwork, perception or language:

So thinking is “practical reason” in the sense that it is not conscious of itself as thought, necessarily relies on a legacy of significance already at work (an established “practice” and language), and cannot be articulated in necessary and sufficient definitions or rules. It is handiwork in the sense of working attentively with the possibilities opened by the past. Above all, thinking is open, ready to receive, and attentive.

notes its weakness in coping with the complexity and diversity of situations calling for intuition:

[B]eing accustomed to the clearcut, obvious principles of mathematics and to draw no conclusions until they have clearly seen and handled their principles, [mathematicians] become lost in matters requiring intuition, whose principles cannot be handled in this way. These principles can hardly be seen, they are perceived instinctively rather than seen . . . These things are so delicate and numerous that it takes a sense of great delicacy and precision to perceive them and judge correctly and accurately from this perception . . . . The thing must be seen all at once, at a glance, and not as a result of progressive reasoning, at least up to a point. 

Id. The notion of “intuition” as a form of perception, responsive to a complex interaction of circumstantial principles, finds strong echoes in Nussbaum’s account of Aristotelian practical wisdom. Cf. Nussbaum, supra note 191, at 82-84 (explaining Aristotle’s approach to wisdom).

Interestingly, Pascal allocated the faculty of judgment not to the combination of the two, but to intuition. Pascal, supra, No. 513 (“For judgment is what goes with instinct, just as knowledge goes with mind. Intuition falls to the lot of judgment, mathematics to that of the mind.”). The distinction between knowledge and judgment arguably has broader implications for the distinction between scientific and humanistic understandings of culture. See Barzun, supra, at 216 (noting that Pascal believed certain things were indefinable not because of incorrect information but because of their nature). Barzun noted that:

[b]y geometrical, Pascal means the mind when it works with exact definitions and abstractions in science or mathematics; by intuitive, the mind when it works with ideas and perceptions not capable of exact definition. A right-angle triangle or gravitation is a perfectly definable idea; poetry or love or good government is not definable. And this lack of definition is not due to lack of correct information; it comes from the very nature of the subject.

Id. Whatever we may think about lawyering as a form of artistry, or of affection, it accomplishes a critical act of government within a system of laws, and thus partakes strongly of Pascal’s “intuition,” or esprit de finesse.

197. See, e.g., Bradway, How To Practice, supra note 51, at 5-8 (contrasting “topical” with “functional” thinking).

198. Linda Ross Meyer, Is Practical Reason Mindless?, 86 Geo. L.J. 647, 662 (1998). Meyer’s appraisal of “practical reason” occurs as she proposes certain ideas about the control of judges and judgments. See id. at 662-67 (discussing practical reason and judgment). Rejecting any approach that seeks too closely to constrain judicial reasoning, she describes a notion of practical reason that accepts
This description of a single mental experience, open and inquiring and responsive to the realities of the situation it encounters, provides a persuasive vision of the core capacity of lawyering, aligned with Nussbaum’s account of Aristotelian perception or with the joint exercise of Pascal’s two minds.\(^{199}\) For purposes of this Article, “practical judgment” is the primary trope for how a lawyer’s mind operates in practice.

**D. Summary**

This section has described the accepted modern model of lawyering. Lawyering is a form of legal decision-making, during which lawyers work with clients on decisions influenced by legal rules. Lawyering asks for both cognitive skill with the conceptual law and a separate ability to assess those influences within other realities. The model delineates a distinctive, broadly accepted method, a lawyering process, and locates that process both in relations between lawyer and client and between lawyers and other parties and adjudicators. The model accommodates two primary practice contexts (dispute resolution and transactional), and posits distinctive lawyering actions, or law jobs: advocacy, negotiation, and planning.

The model stresses conceptual and quantifiable realities alongside affective and incommensurable ones. The former include the content, rituals and likely outcomes of legal rules and processes, along with their consequences in money or other remedies. The latter include emotions and other psychic realities, complex relational influences and the pressure of personal needs, values, goals and other interests. Lawyering explores how these realities intersect, under the shaping influence of the lawyer’s own subjective realities. Finally, the model relies on the lawyer’s capacity for practical judgment: discernment of decisions in response to the lawyering situation. Lawyering entails a complex, rigorous mental process that demands both careful cognitive skill and non-cognitive discipline.

and even celebrates its lack of formal constraints, norms, or even awareness of its own operation. See id. (same). The weight of her argument moves towards reassessing the role of legal theory in jurisprudence, and takes a strong position against an obsession with limiting decision-making authority beyond our capacity to control. See id. at 667-73 (discussing thinking as power and control). But her propositions resonate within the foundational account of lawyering as well: a stress on particularity and responsiveness to unique elements of decisions; an emphasis on the value of habits and practices (“craft”) in shaping the operation of practical reason; and the usefulness but also the insufficiency of legal rules in developing an insight into the required decision. See Bellow & Moulton, supra note 48, at 181-221 (discussing decision-making process for lawyer).

199. See Barzun, supra note 196, at 217-18 (“The two ‘minds’ that Pascal describes do not constitute two species of individuals. They are but two directions that the one human can take . . . . In essence, the human mind remains one, not 2 or 60 different organs.”); see also Bradway, How to Practice, supra note 51, at 5 (“There are at least two sorts of orderly professional thinking. Both are essential for the successful practitioner.”)
III. A MODEL OF PRACTICAL JUDGMENT

This section explores and assesses the modern model of lawyering as practical judgment, collecting and focusing the themes from the sources in Section II. The section describes what lawyers do, and clarifies how the various tasks and behaviors of lawyers fit together, seeking flexible language for what Bellow and Moulton first called "the lawyering process." It assesses the possibilities for a single account of lawyering across disparate practice contexts.

The model articulated here offers both a structure and a language for talk about how lawyers in practice think. It is, in Spiegel language, "an orientation for practical activity." In particular, the model suggests characteristic influences, or "topics," which emerge regularly in practice, including narratives, emotions, relationships, power, money and inter-

200. See Bellow & Moulton, supra note 48, at 11 (stating tasks part of lawyer’s routine, including putting together business transactions, resolving disputes and negotiating). Various authors have criticized, or discussed criticisms of, recent lawyering literature based on the obscurity and complexity of its rhetorical conventions. See Dinerstein, supra note 161, at 984 (providing critique of theoretic writers); Piomelli, supra note 145, at 436-57 (citing to further criticisms).

201. See infra Section III.A (referring to assessment of tasks and behaviors work together in understanding lawyer’s practical judgment). As such, this section presents a theory of lawyering. In the words of Mark Spiegel, a theory is “a set of general propositions used as explanation.” See Spiegel, supra note 12, at 580, 595 (defining theory). Spiegel identifies this explanatory function of theory as a means of connecting “theory with truth.” See id. at 596 (stating that it is not sufficient for theory to be simply general; it must also explain). Spiegel identifies other aspects and requirements for a theory: It must be “sufficiently general to be relevant to more than just particularized situations.” See id. at 580 (stating preliminary definition of term theory). The discussion that follows seeks to satisfy these two basic criteria.

Spiegel discusses without accepting more rigorous, scientific requirements of a theory (a theory must have properties and categories—it must state the relationships between properties and categories, and its propositions must form a deductive system). See id. at 597 (discussing requirements of theory). As already noted above, such a definition may prove impossible for an account of lawyering, which includes so many non-deductive, affective and experiential elements. As if acknowledging this, Spiegel details objections to the rigorous scientific definition of theory (questioning separations “between objective and subjective, fact and truth, particular and general,” with the goal of finding “irrefutable truth”). See id. (stating challenges to scientific definition of theory). He proceeds to note a classical tradition which involves the utility of theory as an “orientation for practical activity.” See id. (comparing classical tradition with scientific definition of theory); see also Menkel-Meadow, supra note 1, at 556-58 (distinguishing macro and micro theories of the law).

This Article presents a predominantly “micro” theory of lawyering, although it will argue that the distinction between them may represent a false dichotomy. See infra Section III.D (discussing interaction between law and other realities encountered in lawyering).

202. See infra Section III.B.

The model discusses the practical interaction between these non-legal topics and legal rules. It assesses how practical constraints limit lawyering, the limits on lawyers' influence on the decisions they shape, and the impact of the lawyer-client relationship on practical judgment. Finally, the model asks how and over what time period a lawyer gains expertise in lawyering. It argues that mastery of lawyering depends as much on development of emotional, relational and political capacities as it does on intellectual skill.

Lawyers and lawyering writers have relied heavily on other disciplines for an understanding of what we do. In this, we act with insecurity about our own premises and a taste for sustenance from other disciplines. Sometimes, we seem to think that other languages and views will help us more than our own language and understanding. I want to explore a language and discipline of lawyering that is useful in practice, conceptually rich and challenging, and aligned with practical realities.

A. Lawyering Process

In the standard model of lawyering, clients come to lawyers for help with hard decisions, particularly those influenced by legal rules. Lawyers respond with a series of interconnected stages of thought and behavior, all of them organized by decision-making. However, nothing assumes that the “decision” happens at a single point in time, or that only one decision exists. Arguably, the lawyer must diversify the client’s decisions into a series of connected sub-decisions and tasks. I group these

204. See infra Section III.C.
205. See infra Section III.D.
206. See infra Section III.E.
207. See infra Section III.F.
208. See infra Section III.G.
209. See infra Section III.H.
210. In this, I side more with Llewellyn than with Frank. See Section II.A.2 (noting implicit difference in approach about role of social sciences as source of understanding of law and lawyering).
211. I discuss later the continuum of influences that law and legal rules may exert on decision-handling, from the broadest field of discretionary decision under open-ended guidelines, to the threat of severe sanctions, including death, under narrowly defined coercive rules. See infra Section III.D.
212. One possible empirical study might trace the influence of attorney case and time management practices on the content of the decisions on which the lawyer works, and of the results a lawyer achieves. By designating the client’s decision as a case, and containing it in a file, the lawyer creates both a physical artifact of process, and a palimpsest for learning, forgetting, and relearning the decision situation each time a deadline or “next action” arises: a layering of decisional remnants with its own special archaeology.
213. For a further discussion on lawyering behaviors, see supra note 122. However, the lawyering texts present different mixes of components; no one description precisely matches any other. Some significant and characteristic groupings and separations recur. Interviewing usually goes with counseling, sometimes with negotiation, and on occasion with fact development. “Litigation” and
subordinate steps into phases of assessment, decision-making and action by lawyer and client. The interlinked, yet separable phases constitute the lawyering process.

Many, if not most, modern lawyering texts separate the lawyering process into components, broadcasting their intentions in their titles or subtitles. The MacCrate Report itself created a detailed taxonomy of lawyering thoughts and behaviors. These approaches stress discrete competencies or skills, giving to each a free-standing discussion designed to prompt mastery. This divide-and-conquer approach has distinct advantages; one could plausibly write a new text that similarly splits lawyering behaviors along the decisional premises of this Article.

Yet this fractionalizing distorts the experience of lawyering. Lawyering as lived experience has a coherence which split-out descriptions of component tasks conveys only poorly. Consider the lawyering process as a (schematic) story:

"interviewing and counseling" typically do not appear together; while "litigation" and "negotiation" sometimes do. Few authors discuss transactional lawyering at any length. See infra Section III.B. The rules of ethics, along with regulation by malpractice liability, may delineate the mandatory components of lawyering; it would be useful to appraise those rules as they create a normative picture of daily practice. Moreover, I will discuss later the more powerful organizing influence of habits. This Article focuses on what actually happens, and not necessarily on what the law of lawyering (including tort law) might require.

214. See generally BASTRESS & HARBAUGH, supra note 114 (focusing on areas of interviewing, counseling and negotiation); KRIEGER ET AL., supra note 76 (presenting interviewing, counseling, negotiation and persuasive fact analysis as essential skills for lawyers).

215. For a discussion of the MacCrate Report, see supra notes 162-69 and accompanying text.

216. In broad outline, such a text would cover:

Assessment, including: interviewing; legal research and analysis; factual investigation; and appraisal, both of legal merit and of the decisional situation.

Decision, including: option generation and evaluation; planning for action (or strategy); the counseling conversation; and making decisions.

Action, covering: the three primary law jobs, advocacy (persuasion of adjudicators, including litigation and other dispute resolution processes); negotiation (consensual decision-making); and transactional planning (structuring future behavior, including drafting, organizational process and group negotiation). Some cross-cutting competencies, such as legal writing, oral communication (both in argument and otherwise), relational skills, and hybrid activities (e.g., lobbying and community organizing) also deserve focus.

The need for such a text remains debatable. Existing texts already contain wonderfully rich descriptions, structures and metaphors for learning lawyering. See generally BELL & MOULTON, supra note 48 (discussing lawyer's craft of learning). For a further discussion on lawyering behaviors, see supra note 122.

217. See BELL & MOULTON, supra note 48, at 35-66 (explaining discussions by lawyer). Many if not all modern texts contain chapters and other interstitial material devoted to the importance of strategic planning in any kind of lawyering, starting notably with Bradway’s work, and continuing not only in Bellow and Moulton and the Client-Centered Project, but also in the other counseling texts described earlier in this Article. See supra Section II.B.3; see also MARILYN BERGER ET
The Lawyer encounters the decision on which she will work with a Client, traditionally in an initial conversation. Here, the Lawyer will and the Client may ask questions, each probing for an initial understanding of possibilities. Having formed a working relationship, the Lawyer develops her understanding. On the one hand, she explores facts in depth, using both formal and informal means, usually through more talk: with witnesses, other parties and other sources. On the other hand, she assesses legal rules: selecting which principles are significant, researching their parameters and analyzing their limitations and boundaries. Fact and law emerge in parallel, dialectical development: progress in one area informs how the lawyer might proceed in the other. This dialectic converges towards two assessments: an appraisal of technical legal merit; and an appraisal of the entire situation, including both legal merit and other non-legal factors that strongly influence the decision.

These assessments bridge over to strategy: imagination of options, and their critical evaluation in light of law, fact, and experience. The twin processes of imagination and critique can work at cross-purposes, but may also complement each other. The tension between them produces possible plans of action, which embody both means (whether and how to use dispute resolution process, when and with what style to pursue settlement, what formal structures to use for transactions) and ends (what remedies to seek, what interests to stress, what relationships to foster and structure).

The Lawyer prepares alternate, often parallel strategies. Once developed, these strategies center the counseling conversation, in which Lawyer and Client discuss what the Lawyer has made of the Client’s request. Lawyer and Client both contribute to the decision to the extent their choice of relationship allows. The Client selects one or more complementary strategies and authorizes the Lawyer either to pursue those strategies or do nothing at all.

The Lawyer then acts, typically with and through other people who have decision-making authority: other parties in negotiation or transactional planning; authoritative decision-makers in dispute resolution; or a mix of parties, authorities and other influential actors in hybrid processes. As action occurs, the Lawyer learns more of the situation, reassesses facts and law, refines options and strategies and seeks further decisions from the client. Eventually, a final result is achieved. The result can take the form of a court decision, a completed document or a negotiated plea or settlement. The lawyering process has ended, at least for now and on this decision.

This schematic narrative presents the phases of lawyering all in a row, assessment first, decision next and action last. But nothing assures that lawyering process or the decisions it shapes occur in linear sequence. In fact, the mental processes of active practice have an intense dynamism and fluidity. Particular situations impose their own demands of timing, information and resources. Moreover, lawyers themselves organize and pursue the process under the influence of their own settled practices. Still, this decisional account of lawyering has strong, simple coherence: gathering and appraising information and rules; generating and critiquing choices and plans; choosing; acting on the choice; and again and again until the client obtains a final resolution.

So described, the mental processes of lawyering include a broad range of psychic endeavors, along diverse continua: from general strategy to specific tactics and back; from relational dynamics to isolated analysis and back; from facts to law and back again; from cognitive appraisal to

221. The variations between traditional, client-centered, or collaborative models suggest three different ways in which lawyer and client in a particular case might establish their working relations, whether consciously or by default. See Binder et al., supra note 56, at 16-24 (detailing various attorney-client relationships); Schaffer & Cochran, supra note 145, at 40-54 (discussing collaborative model). I develop a further refinement of these models. See infra Section III.G.

222. Perhaps more accurately, the demands of discursive analysis require a linear presentation. I cannot sufficiently stress that the linearity of such a picture distorts the reality of law practice; I risk the distortion to avoid the reader’s confusion were I to attempt a more radial, or cyclical presentation in prose.

223. Recognizing the potential fluidity of lawyering process does not mean that lawyers can or should make no efforts to structure the process, or to preserve some sense of organized forward motion towards final decision. There are sound prudential reasons for bringing structure and form to the series of relationships and analyses that constitute the process, not least of which is to preserve the coherence and focus of the client’s chosen plan.
subjective and even pre-conscious engagement; and from sympathy with to
detachment from the decisional situation. Lawyering thus possesses an
enormous depth and richness of psychic and interpersonal engagement.
Lawyers call on a broad range of capacities and strengths in meeting the
demands of decisions.224

Perhaps no single lawyering process exists; perhaps the diversity of law
practice contexts and of legal problems, as well as the wide range of law-
nering behaviors, prevents any coherent account of lawyering. Yet even if
we accept that lawyering is not about decision-making, problem-solving or
about anything in particular, some elements of lawyering are universal.
People come to lawyers to make or solicit decisions using the law because
planning for decisions maximizes the chance of success or, at the least,
minimizes the risk of loss. Even these slight premises lead us to something
very similar to this account of lawyering process: a model useful for instru-
mental, if not purely descriptive reasons.

B. Law Jobs and Practice Contexts

The diversity of law work seems to argue against a single vision of
lawyering process; what do drafting, litigation, negotiation, and planning
really have in common? Practice contexts also diverge, especially between
transactional and litigation practices.225 But a careful assessment of both

224. See infra Sections III.D. & H.
225. See generally BELLOW & MOULTON, supra note 48, (discussing general ex-
periences of being attorney); BRADWAY, HOW TO PRACTICE, supra note 51 (discuss-
ing various facets of general practice of law). Moreover, social, economic and class
stratification within the legal profession itself prompts serious questions about the
utility of any general model of lawyering. Bellow and Moulton’s text raised signifi-
cant questions about the relationship between practice context and professional
identity, questions that apply with equal force to the influence of practice context
on lawyering behavior and process. See BELLOW & MOULTON, supra note 48, at 14-
28 (citing D.C. Lortie, Laymen to Lawmen: Law School, Careers, and Professional Sociali-
zation, 29 Harv. Educ. Rev. 352, 352-69 (1959) for description of earlier studies
regarding professional development of University of Chicago Law Graduates in
1951). A study of “class” divisions between lawyers in the New York City Bar con-
ducted in 1958 and published in 1966 is also included. See id. (citing JEROME CAR-
LIN, LAWYERS ETHICS: A SURVEY OF THE NEW YORK CITY BAR 22-23 (1966)). Carlin
found that 21% of the bar were in large firms, referred to as the “elite;” 64% of the
bar, or the “lowest stratum,” in small firms and individual practice; and the remain-
ing 15%, the “middle stratum” in medium size firms. See CARLIN, supra, at 22-23
(providing statistics of geographic disparity among lawyers). The elite had the
highest average income, represented the most affluent and highest status clients,
and had the most contact with higher levels of the judiciary and government; the
lower classes had less of these commodities. See id. (discussing variations in socio-
economic status of lawyers). Other more recent studies, varying in detail, paint a
largely consistent picture. See JOHN HEINZ & EDWARD O. LAUMANN, CHICAGO LAW-
YERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982) (discussing distinction be-
tween lawyers who represent corporations and those that represent individuals);
John Heinz et al., The Changing Character of Lawyers’ Work: Chicago in 1975 and 1995,
32 LAW & Soc’y REV. 751, 754-60 (1998) (describing studies two decades apart
finding increasing division between “lawyers who represent large organizations

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the "law jobs" and the primary practice contexts shows strong coherence in lawyering process and the practical judgment it prompts.

Consider the distinctions between the law jobs: negotiation, advocacy, planning, and hybrid political processes. These behaviors differ primarily in how they produce conclusive resolutions to decisions. In "advocacy," the lawyer persuades third parties towards decisions on competing claims, neutrals with public authority to enforce finality. In "negotiation," the lawyers persuade the consent of affected parties; finality occurs when all participants accept (and enact) the resolution. In "transactional planning," the lawyer anticipates future conditions, behaviors and decisions; finality occurs not with initiation of the plan, but rather when the actors carry out (or reject) the plan's requirements, in effect, deferred decision-making responsive to future events. In "hybrid" processes, the lawyer may plan, negotiate or even advocate, but may also have to organize or coordinate group or communal decision-making.

(corporations, labor unions, or government) and those who represent individuals.

To the extent that variations in practice context reflect variations in chosen client group, we have already noted the prevalence of literature on lawyering arising out of poverty or public interest law practice. See supra Section II.C.2; see also Gary Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106, 106-08 (1977) (discussing consequences of client class, status, economic capacity, race and cultural identity for lawyering process). The tension in training a model of lawyering equally applicable to those working in the "elite" firms, in poverty law practice, and for any other "intermediate" group represents a major challenge, perhaps the major challenge both of the literature on lawyering and in clinical teaching. Indeed, one contrasting advantage (and risk) of the case method lies in its ostensible, albeit arguable, universality. See Ann Shalleck, Constructions of the Client Within Legal Education, 45 STAN. L. REV. 1731, 1739-40 (1993) (examining ways in which legal education constructs clients).

226. See generally KREIGER ET AL., supra note 76 (describing lawyering challenges of interviewing, counseling and negotiation); BELLOW & MOULTON, supra note 48 (discussing various lawyering problems in differing contexts). In this discussion, I use the term "hybrid" processes to refer both to the kind of lawyering described in the literature on "collaborative" lawyering described in Piomelli, supra note 143, and to the lawyering involved in the lobbying practices engaged in by prominent sections of larger commercial firms. These practices share distinctive commonalties as forms of decision-shaping, however much variations in client group, resource availability, and political tactics may separate them.

227. See generally BELLOW & MOULTON, supra note 48 (comparing lawyer's role as advocate with other functions). That authority can derive either from designation by the state, as with judges or juries, or through private contract, as with arbitrators or other private adjudicators. See id. (discussing varying audiences to argument).

228. See BRADWAY, HOW TO PRACTICE, supra note 51, at chs. VII-X (discussing hybrid of methods lawyers may have to use to close out client's case). A fifth form of "law job" acts more as a strategic baseline: the decision to take no further action by the client, or at least to authorize no further action by the attorney. Accepting of the status quo by the client can reflect as active a response to the decision-making inherent in lawyering as authorizing the lawyer to act. Moreover, imagining what "no action" means during the counseling conversation can serve as a useful gauge for the consequences and acceptability of other, more "lawyer-active" strategies.
Each behavior enacts a form of decision-making. Moreover, each requires assessment of the situation, creation of strategic plans, selection of strategy by the client, and moving those choices to final decision. As different embodiments of the lawyering process, the law jobs translate client goals into conclusive decisions, using both law and lawyering behavior. The mental ability to understand and choose both within and between the law jobs reflects a core element of practical legal judgment.

Practical judgment requires both care and discrimination with these jobs, not least because these behaviors usually occur simultaneously. 229 Litigation and negotiation proceed on parallel tracks, with the lawyer continually assessing and comparing possible outcomes against client goals. Transactional planning also demonstrates parallel process: for anything other than one-party transactions, planning and negotiation occur simultaneously, up to and through the present deal and into the phase of long-term performance.

Differences between dispute resolution and transactional practices do not alter these perceptions. Dispute resolution includes litigation: a search for resolution of conflicts arising out of past behavior, in which conflicting parties present their case to a third party for conclusive resolution. 230 The transactional practices cover a comparably wide range of decisions. A continuum of transactional practice along relational lines might flow from one-party transactions (e.g., personal estate or health-care planning) through contract (involving at least two parties) to the structuring of organizations (and other multiparty activity), the management of commu-

229. See generally Brown & Dauer, supra note 55 (discussing framework for using interpersonal skills in practice of law). For example, most filed litigations settle before decision by an adjudicator. See Miller & Sarat, supra note 128, at 542-45 (noting percentage of disputes that result in court involvement); Trubek et al., supra note 126, at 89 (stating "most cases terminate through settlement negotiations"). We still think of trial litigation as the central, almost exclusive lawyering skill; but litigation is little more than the pursuit of negotiation through other means. Litigators might object to this description, particularly those (such as defense counsel, whether criminal or corporate) forced to accept litigation as the practice context within which their lawyering must occur. Other litigators might find this description naive, idealistic or even cynical, particularly those engaged in the assertion of claims traditionally and universally recognized as "litigation-worthy": plaintiff's attorneys, for example, or poverty lawyers, both seeking to claim the power of a judicial forum, with its formal articulation of rights, on their clients' behalves. See, e.g., Owen Fiss, Against Settlement, 93 Yale L.J. 1073, 1075-78 (1984) (discussing use of settlements as opposed to pure litigation). However, even in all these practices, settlement, with the encouragement of attorneys, dominates the processes by which final decision occurs. See William F. Corne, Jr., The Case for Settlement Counsel, 14 Ohio St. J. on Disp. Resol. 367, 404 (1999) (discussing possibility of having separate counsel to handle settlements because of their importance). See generally Howard F. Chang & Hillary Sigman, Incentives to Settle Under Joint and Several Liability: An Empirical Analysis of Superfund Litigation, 29 J. Legal Stud. 205 (2000) (discussing impact of joint and several liability on encouraging or discouraging settlement).

230. Such a practice includes not only formal litigation, but also administrative hearings, arbitration and private mini-trials.
nities, and the enactment of legislation. Each requires recognition of present opportunities, anticipation of future risks and conflicts, and consent to a structure for future behavior involving incentives or, as necessary, coercion. 231

Litigators and transactional attorneys often stress their differences through pejorative cross-reference; law firms often ratify this division by internally separating litigation groups from transactional groups. 232 Yet the two mindsets strongly interlock, and their practices converge. Litigators often stress the value of strategic planning. 233 Moreover, careful remedial planning entails care for the future: what form of remedy (including, for the defense, the status quo ante) will best accommodate the

231. Modern consensual processes for dispute resolution serve as a bridge between dispute resolution and transactional practices. Negotiation, whether managed by parties alone or by parties with a neutral (as in mediation or neutral evaluation), requires an explicitly binary vision, in which appraisal of conflict over the past interweaves with assessment of prospects for a resolution that might satisfy longer-term concerns and interests.

232. The practices themselves have distinctly different rhythms. Those dispute resolution practices that require neutral third parties, particularly courts, must remain responsive to the docket demands imposed on and by adjudicators, leading quite often to a boom or bust work flow. By contrast, a transactional practice involves a more diverse and complex set of scheduling pressures, including the interests and needs of the parties, the availability of resources, and the complexity of the underlying transaction itself.

Similarly, one can imagine clients seeking attorneys with different attributes when seeking a “litigator” as opposed to a “planner”: for the former, skill in imaginative persuasion and story-telling and demonstrated effectiveness in relations with relevant institutions, including courts and juries; for the latter, foresight, a capacity for anticipation of future risks, costs and benefits and strong skills in drafting operative language that can generate predictable outcomes. However, the disparity in these lawyering attributes may be narrower than these summary descriptions suggest.

233. See Haydock et al., supra note 217, at 12-18 (discussing case preparation and implementation of plan); see also Mauet, Pretrial, supra note 217, at 91 (discussing how to plan successful litigation strategy). Many texts on trial practice stresses the importance of planning all elements in a litigation by reference to a fundamental theory of the case. See, e.g., Berger et al., supra note 217, at 15-62 (providing planning process to help formulation strategy); Brown & Dauer, supra note 55, at 270-73 (noting that planning will help lawyer foresee future problems). See generally Mauet, Pretrial, supra note 217 (describing elements of pretrial planning process). More recent literature has further developed the relationship between litigation case theory and client counseling, stressing the strategic and counseling value of a theory that authentically recreates vital components of the client’s experience of the conflict. See Alex J. Hurder, Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 Buff. L. Rev. 71, 76-88 (1996) (discussing negotiation of attorney-client relationship which will govern decision-making and strategy formation); Miller, supra note 150, at 564-65 (discussing importance of client interaction in formation of trial strategy). For a powerful example of an arguable failure of such strategic planning, see Clark D. Cunningham, A Tale of Two Clients: Thinking About Law as Language, 87 Mich. L. Rev. 2459, 2469-74, 2482-85 (1989) (noting problems of lawyer’s interpretation of client’s story).
interests of the parties at the end of conflict? To the extent that the litigator uses litigation as a prompt to settlement, the effort to reach settlement that satisfies client goals reflects characteristically future oriented, "transactional" thinking. Finally, the modern growth in the availability of different dispute resolution methods and procedures itself poses transactional challenges.

Dispute resolution also penetrates transactional practice. An old tradition describes transactional work as the prevention of litigation. The single available lawyering text devoted to transactional practice, entitled Preventive Law, stresses this avoidance. Litigation avoidance requires an-

234. Of course, the remedial dimensions of different litigation practices offer different scope for this form of "transactional" planning. Compare, for example, the kind of remedial foresight necessary for a major class action or institutional reform litigation with the remedies available and typically sought in a debt collection action or a criminal charge. We might easily construe the latter claims as simple, bipolar remedial challenges, until we consider the debtor's income stream and the creditor's desire for real return; or the different impact of sentencing options on the defendant's future and the credibility of the state's local enforcement efforts.

235. See Coyne, supra note 229, at 388 (noting that hiring attorneys with "litigator image" may aid in settlement). This remains true whether the litigator adopts a "competitive" style of bargaining, seeking to force a resolution that maximizes her client's gain, or a "collaborative" style, seeking to maximize the joint gains of all parties. See Section II.C.1. We can conceive of the former as an effort to impose "one-party" transactional thinking on the dispute, and the later as the recognition of a "multi-party" or "relational" form of transactional thought.

236. See, e.g., Jeffrey Wolfe, Across the Ripple of Time: The Future of Alternative Dispute Resolution, 36 TULSA L.J. 785, 810 (2001) (stating that spectrum of disputes requires various dispute resolution methodologies). Indeed, different processes for dispute resolution pose different kinds of transactional opportunities for strategically-minded litigators. Those processes that encourage formal presentation by professional advocates (including litigation and, increasingly, arbitration) divert the lawyer's transactional thinking in dispute resolution towards remedial planning and negotiation practice. Those forms of dispute resolution, which stress client participation and consensual resolution (including mediation), divert the lawyer's transactional thinking into client counseling and the evaluation of consensual possibilities.

237. See, e.g., Hon. Edward D. Re, The Lawyer as Counselor and the Prevention of Litigation, 31 CATH. U. L. REV. 685, 692 (1982) (stating that lawyers often engage in "preventative law," which minimizes risk of litigation); see also Dennis Stolle et al., Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering, 34 CAL. W. L. REV. 15, 16 (1997) (same). This view of transactional work as involving conflict avoidance dominated the description of transactional lawyering until the middle part of this century; the writings of Judge Frank described earlier in this Article express the dominant view. See Section II.A.2 (discussing views of Jerome Frank).

238. See generally Robert M. Hardaway, Preventive Law: Materials on a Non-Adversarial Legal Process (1997) (describing transactional law as antithesis of litigation). This text remains the sole coherent effort to create a lawyering text devoted to transactional practice; it has an interesting pedigree. While substantially revised in the present form, the text is in fact the second edition of an earlier text on transactional lawyering, written during the 1970s, and explicitly referenced by Bellow and Moulton in their lawyering text. See Bellow & Moulton, supra note 48, at xxvi (limiting the focus of The Lawyering Process to litigation, and recom-
participation of litigated outcomes and assessment of how legal process will resolve contests over alternate written provisions.\textsuperscript{239} Moreover, negotiated dispute resolution process is now standard in commercial practice: some form of dispute resolution clause, particularly arbitration, appears in many, if not most commercial contracts.\textsuperscript{240}

mending Brown and Dauer text for planning and conflict avoidance training); Brown \& Dauer, supra note 55, at 270-73 (discussing role of lawyer to foresee and prevent future problems). Brown and Dauer initiated a self-styled “preventive law” movement and Hardaway credits Brown with the creation of the movement in Brown’s “landmark” 1951 article, The Practice of Preventive Law. See Hardaway, supra, at xxxvii (discussing creation of preventive law movement). In addition to conflict avoidance, characteristic concerns of the preventive law movement include the use of the “legal autopsy” to assess litigations for lessons about planning, the encouragement and formalization of “compliance audits” for purposes of regulatory planning, and exploration of the ethical codes as they apply to transactional practices. See, e.g., Louis Brown, Legal Audit, 38 S. Cal. L. Rev. 431, 436-45 (1965) (laying out legal audit process and procedure).

Few law review articles address the nature or theory of transactional practice, although useful, theoretically and ethically challenging efforts have occurred. See, e.g., Ian Macneil, A Primer of Contract Planning, 48 S. Cal. L. Rev. 627, 641-50 (1975) (integrating theory of contractual relations into pragmatic discussion of mechanics of designing contractual relations under existing legal rules); E. Michelle Rabouin, Walking the Talk: Transforming Law Students into Ethical Transactional Lawyers, 9 DePaul Bus. L.J. 1, 24-33 (1996) (discussing formats for integrating ethical thinking into training of transactional practitioners).

The relative disparity between materials on litigation and dispute resolution process and those on transactional lawyering is puzzling. Over the last decade, some of the “essential skills” and “counseling” texts have sought to rectify the balance by including references and even extended treatment of transactional themes alongside of appraisals of litigation behaviors. See Binder et al., supra note 56, chs. 11, 12 & 22 (discussing techniques for gathering transactional information); Krieger et al., supra note 76, at 227-46 (describing relationship between transactional law and dispute resolution); Haydock et al., supra note 114, at 96-108 (planning transaction side of practice). However, literature on lawyering focuses overwhelmingly on litigation, negotiation or organizing, particularly in the representation of oppressed, economically disadvantaged groups. See Brown \& Dauer, supra note 55, at 151-62 (discussing legal needs of economically disadvantaged groups).

239. See Re, supra note 237, at 697 (noting that realization of law’s aim often takes place in law offices). Karl Llewellyn seems among the first to articulate a different notion at least of commercial transactional practice. See generally Llewellyn, supra note 33 (applying lawyering skills to commercial law and commercial transactions). Llewellyn stressed the planning and structuring dimensions of transactional practice, which would require the attorney to consider how her predictive work might alter and affect management of the business or the flow of commercial dealings. See supra, Section II.A.2. More modern treatments of transactional lawyering have developed Llewellyn’s notions, including an effort to describe in economic terms the extent to which lawyers “create value” for their clients, particularly in the structuring of deals. See generally Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes (2000) (advocating use of problem-solving techniques to turn disputes into deals as better method to solve problems and help client).

240. The advance selection of dispute resolution process requires care not only for the attributes of the selected process, but also thought to the conditions that might give rise to disputes on the merits.
One can overstate these similarities. Litigation and transactional work do differ and the parameters of negotiation in each world prompt very different analyses and stylistic choices. Attorneys habituated to one practice rarely cross over to the other, both out of personal choice and out of the organizational structure of many firms. Yet litigators and planners have a common concern in the quality of decisions made under their influence. Decisions of present conflicts guide future behavior and structured transactions set a path for future conflict. Each decision made with the help of lawyers contains both conflictual and transactional elements. Lawyering requires its practitioners to assess past conflicts in the light of future opportunities, and to choose with care the different processes through which final decisions occur.

C. The Topics of Lawyering

A central premise of the standard model postulates that lawyering involves both legal and non-legal realities. Decisions in the hands of lawyers gain weight and pressure from non-legal realities set against the heft and edge of legal rules. Lawyers must develop a capacity to apprehend, appraise and integrate non-legal realities in the decisions they shape.

Yet remarkably little work has gone into considering what those non-legal realities might be; we have tended to rely on appeals to "context." We can do better than general appeals. A wide range of disciplines, particularly conflict resolution studies, have identified a range of different human realities of categorical relevance to decision-making. Moreover, our account of the sources, foundations and refinement of lawyering theory shows numerous authors who have proposed different elements of decisions. This section gathers some of the elements most commonly stressed by these writers; the section which follows appraises how legal rules influence these elements during lawyered decisions.

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241. Three approaches predominate. In the first, the writer will identify a handful of significant realities, and then seek to integrate them into a more specific role—and rule-based appraisal of lawyering. See Binder et al., supra note 56, at 5-15 (discussing “typical non-legal concerns” or “non-legal dimensions,” including a both “industry knowledge” and a range of “consequences:” economic, social, psychological, moral, political and religious). In the second, the writer will stress a single factor of preeminent significance (emotion, for example) and illustrate its weave with legal realities. See, e.g., Section III.C.2 (discussing treatment of emotion in critical lawyering theory). In the third, the writer will reference all of the non-legal realities in a collective category, referred to as the “context” of the problem. This last makes scant effort at categorizing or grouping the non-legal elements of decisions. Instead, the writer states that the lawyer applies legal rules “in context,” but second that more general statements of recurring features of that context are too difficult. This Article most closely aligns with the first, categorical approach.


243. See infra Section III.D.
Before we start, we should ask what to name these elements. The term “human realities” seems too broad; “non-legal realities” passive and unhelpful; and “elements” useful, but nondescript. Moreover, what exactly are they? On the one hand, they may reflect realities inherent in the situation, a part of the world external to the lawyer at the least, and perhaps to both lawyer and client. On the other hand, as we shall see, they may simultaneously reflect subjective experiences for both lawyer and client. Finally, they may involve no more than constructed “cultural models,” available to decision-makers as they structure decisive discourse.

I choose to call these constructs “topics,” borrowing from Paul Tremblay’s discussion of casuistry. In his usage, topics are “the places where one looks ‘to gather materials with which to construct arguments.’” He also describes “special topics” as “those [topics] which represent the recurrent and invariant features that constitute a particular activity.” Tremblay posits that the topics of a particular activity serve as useful rhetorical constructs, structuring discussion of the activity in context and identifying paradigms and maxims that might further structure decisions. I adopt the notion of topics, partly because the usage allows discursive appraisal of distinct contextual realities, and partly because topics of lawyering has the feel of everyday language.

244. The distinction between subjective and objective is itself suspect. See Section II.C.4. supra (discussing Pascal’s two minds).
245. See, e.g., Geoffrey M. White, Proverbs and Cultural Models: An American Psychology of Problem Solving, in CULTURAL MODELS IN LANGUAGE AND THOUGHT 151-55 (Dorothy Holland & Naomi Quinn eds., 1987) (arguing cultural models and proverbs should be used to bring out society’s moral foundations); see also Blasi, supra note 85, at 380-86 (describing “quasi-universal schemas and paradigms”).
246. See Tremblay, supra note 191, at 523-24 (discussing “topics” as materials and considerations used to formulate arguments).
248. See Tremblay, supra note 191, at 524 (detailing role of various activities in formation of argument). Tremblay notes a distinction between special topics and “common topics”: “the forms of argument that would apply in any reasoning process (causality, analogy, proportion, etc.).” See id. (distinguishing and defining terms “common topics” and “special topics”).
249. See id. (exploring usefulness of topics within broader study of casuistry as paradigm for ethical reasoning). For example, speaking with a high degree of generality, Tremblay suggests that the “special topics” of law “might include informed consent, conflicts of interest, access to justice, and confidentiality.” See id. This list surely refers to the “special topics” of legal ethics, and not to all of the topics of law, or (for our purposes) of lawyering.
250. See, e.g., HOW TO PRACTICE, supra note 5, at 5-8 (distinguishing between topical and functional knowledge). Bradway’s “topical” knowledge referred to
What, then, are the topics of lawyering? I will discuss the following: narrative, emotion, relationship, power, money and other quantities, and interests. A concluding section discusses how lawyers might respond to and work with these topics in their work. I stress from the start that the topics overlap and cross-influence each other. I take up in the next section how the topics affect laws and legal rules during lawyering.

1. Narrative

As a topic of lawyering, narrative has a dense pedigree. One school lays claim to narrative as the vehicle for expressing and understanding traditionally silenced voices, voices of those outside the regnant culture. A closely related school finds in narrative a way to integrate client realities into lawyering action: the use of narrative for both political and ethical purposes. More technically, lawyering trainers advocate narrative as a methodology for trial and transactional strategy. These approaches recommend narrative for prescriptive purposes, as a methodology for accomplishing other goals: political commitments; ethical action in concert with clients; or coherent strategic and behavioral planning. But prescription masks the fact: narrative centers lawyering. Both cognitive and sociolinguistic studies confirm this description. Lawyers working with clients knowledge of substantive law and formal legal process, in all of its categories. See id. at 6 (explaining difference between topical and functional knowledge). The notion of topics used here is wider, including Bradway’s “functional” knowledge, but also including law and legal process. See infra Section III.D.

251. See infra Section III.C.1.
252. See infra Section III.C.2.
253. See infra Section III.C.3.
254. See infra Section III.C.4.
255. See infra Section III.C.5.
256. See infra Section III.C.6.
257. See infra Section III.C.7.
258. See infra Section III.C.8.
259. See, e.g., KRIEGER ET AL., supra note 76, at 137-48 (describing organization of facts using “story model”); see also Miller, supra note 150, at 489-90 (noting that “advocate narratives” were used as teaching tool for clinic students).
and other decision-makers will naturally, probably inevitably use stories in regular practice.\footnote{261}

What functions does narrative serve in lawyering? Narrative certainly provides a cognitive frame for the data which decision-makers (clients or otherwise) need to reach a final decision. Lawyering requires information as a basis for the finality of decisions; and the decision-maker must believe, or at least be willing to accept, that the information is true. Narrative provides a tissue of language through which decision-makers can discern the certainty necessary for decision. More assertively, narrative moves decision-makers towards the actions that will flow from their decisions. The persuasive story-teller arranges known (or assumed) facts to create momentum, in the faith and on the calculation that the momentum will lead the decision-maker to complete the story in her favor.\footnote{262}

Litigators have grasped this function: litigation and advocacy texts uniformly recommend reliance on stories. Yet the cognitive functions of narrative appear throughout the lawyering process, not just in advocacy: the first telling and reconstruction of stories in interviews; the patient, skilled testing of stories through investigation; the stretching and recrea-

and Hastie describe an “episode schema” as a model for narrative, which “includes events that initiate a main character’s psychological states and goals that provide reasons for the character’s subsequent actions resulting in an outcome or consequence.” \textit{Id.} at 243. Moreover, they also develop a theory of the persuasiveness of stories based on “certainty principles:” coverage (the extent to which the story accounts for evidence at trial); coherence (the story’s acceptability to the jury, including components such as its “consistency” with itself, its “plausibility” in light of other assumed truths, and its “completeness” as an episode schema); and finally, its uniqueness (whether the story stands alone in its coverage and coherence, or whether other stories of equal coverage and coherence exist). See \textit{Cognitive Theory}, \textit{supra}, at 527 (describing “structural factors” that determine persuasiveness of witness testimony). Another useful study details the collaboration between lawyers and clients in divorce cases. See Felstiner & Sarat, \textit{supra} note 171, at 1454-55 (noting importance of constructing acceptable version of narrative summary in course of making decisions).

\footnote{261. Indeed, more recent lawyering texts have stressed the importance of stories, and the variability of different models of factual handling, in virtually every aspect of lawyering. See Krieger \textit{et al.}, \textit{supra} note 76, at 111-51 (reviewing notions of “schemas” as cognitive devices for organizing factual data and distinguishing two primary modes of thought in ordering of experience: paradigmatic and narrative). The text continues to explore three parallel, complementary methods for organizing facts: the “legal elements” model (with facts arranged in accordance with the necessary elements of a legal claim); the “chronological” model (with facts arrayed in strict time sequence, which the author’s stress as useful for gaining perspective on causal relations between events); and the “story model” (with facts endowed with specific meaning and articulated for specific purposes). See \textit{id.} (discussing fact organization methods). The sense of narrative used in the principal text refers to the “story model.”}

\footnote{262. In effect, the story-teller relies on Pennington and Hastie’s completeness principle: assuming plausible and consistent known information, the story leaves the decision-maker with few options but to end the story in a particular, and desirable, way. See \textit{Cognitive Theory}, \textit{supra} note 260, at 528 (discussing completeness principle found in story model theory).}
tion that occurs during counseling; and the fluid exchange of stories in negotiation. Indeed, narrative dominates even transactional work, both tactically and strategically. If litigators create fictions of the past through evidence and trial process, transactional lawyers write plays, building plots that future actors will occupy and reinterpret from the original script. Narrative not only moves the present, but patterns the future to its persuasive influence.

So far I have stressed the cognitive value of narrative. Yet narrative depends on other influences for its full vitality. Narrative contains and expresses emotion; clarifies and communicates perspective, stance and world view; and embodies and delineates the consequences of values and morals, private and public. Stories spread out a cognitive surface that reveals other pressures and influences. In this sense, narrative resembles a map of curved space: a regular fabric of close weave, rounded and filled with the mass and gravity of the inner life. Narrative pulls the weight and severity of subjective reality into influence on lawyered decisions.

This expressive function of narrative stresses a separate aspect of decision-making: the need for motive energy to push and justify action. Stories in lawyering merge both the conscious and the unconscious content of decisions, and embody both the cognitive structures of legal rules and their prescriptive force. Yet they also unify that content with emotions, values (commensurable or not), and other influences felt but not necessarily articulated. The whole impact urges the decision-maker towards finality, using all of her available energy and commitments to carry her through to completion. In this sense, narrative serves a function apart

263. The challenge of finding, and of assessing, persuasive information in negotiation has received steady focus, most notably in the long-running debate over lying by negotiators. Compare Gerald Wetlaufer, The Ethics of Lying in Negotiation, 75 Iowa L. Rev. 1219, 1220 (1990) ("If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one’s effectiveness in negotiations depends in part upon one’s willingness to lie."). with James J. White, Machiavelli and the Bar: Ethical Limits on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 926-30 (addressing issue of truthfulness in negotiation). It seems useful to reflect on the context in which narrative occurs during negotiation: no rules of evidence apply directly, nor (absent litigation) do any immediate sanctions control the story-teller's creativity. The risks of accepting inaccurate, distorted information and of preparing to appraise it critically fall squarely (if only initially) on the audience, with the slightest of rule structures for controls. See Mary Jo Eyster, Clinical Teaching, Ethical Negotiation, and Moral Judgment, 75 Neb. L. Rev. 752, 762 (1996) (discussing difficulty of managing information disclosure in negotiation).

264. The professional standard of such a playwright might be the duration of the play's uninterrupted run.


266. See Krieger et al., supra note 76, at 119-26 (presenting "legal elements" model for organizing facts).
even from revealing emotion or cognitive form: it serves as the prod with which practical judgment achieves its potential as an agent for decision.267

Finally, narrative in lawyering assumes a multiplicity of narratives. In any given decision, multiple stories may exist which explain and offer insight into the situation. Multiple stories will justify action along diverging paths. The advocate's task lies in selecting, constructing and delivering the most persuasive of available narratives in designing a plot in which the parties may survive and thrive in a partly predictable future.268 In both situations, the lawyering task involves the assessment of stories for instrumental purposes: in advocacy, to manage the tactics of assertion, rebuttal and defense; in transactions, to manage the tactics of client gain and consensual process. This multiplicity of stories may or may not lead us to the conclusion that all stories are relative and that no one story necessarily fits the demands of the needed decision.269 At the very least, the multiplicity of stories fosters over time a patient skepticism about the weight of a given story. This skepticism serves a vital purpose in discovering, amid the rich contextuality and specificity of lawyered decisions, the story that fits and motivates us to act.

2. Emotion

If narrative conveys the "inner" life of its characters, surely that inner life includes emotion. A broader treatment of the inner life might also

267. See Meyer, supra note 198, at 662-67 (discussing concept of openness in practical reasoning).

268. See Charles Nesson, The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARV. L. REV. 1357, 1363 (1985) (discussing jury's role in projecting verdicts). The judge's (or jury's) task becomes one of discerning which story best justifies the decision, and provides the most persuasive force to encourage voluntary compliance with the judge's orders. See id. at 1366-68 (arguing in part that function of proof at trial proof is to provide for acceptance of trial outcome by parties, particularly by its losers).

269. See NUSSBAUM, supra note 265, at 287 (noting that stories are taught by others but have different impact on each listener). Nussbaum addresses this relativity of stories in another context. See id. at 286 (quoting to SAMUEL BECKET, MOLLOY, MALONE DIES, THE UNNAMABLE (1955)). Having identified narrative structure with the structuring of emotion, and located both as rooted in learned, socially constructed processes, she limits the claims of relativity:

Although this is not often seen by proponents of social constructions views . . . , the diversity of cultural emotion stories in no way implies a complete cultural relativism about the normative values involved in the emotions, any more than in any other case a conflict of beliefs implies the subjectivity of belief. Social construction theory makes us face the question of relativism; it does not, by itself, answer it.

See id. at 295. Elsewhere in the same essay, she notes that stories (and the emotions they construct) are subject to social manipulation: "This, as I said does not imply a relativism in which no construct is better than any other, any more than the fact that different societies teach different beliefs implies that they are all equally true." Id. at 310.
focus on other realities.\textsuperscript{270} However, emotion has received sufficient stress in the modern literature to justify discussion as a separate topic of lawyering.

Long recognized as a component of effective persuasion, the emotional content of decisions has gained increasing attention. Texts from as early as the 1970s acknowledge its presence and influence on decisions. Indeed, one argued that lawyers need professional training in emotion, describing the mechanics of lawyer-client relations in terms similar to psychotherapy.\textsuperscript{271} Both phases of the Client-Centered project identify "psychological consequences" as factors for consideration in lawyering.\textsuperscript{272} As noted earlier, calls for more empathetic lawyering have renewed a stress on emotions in lawyering, primarily within the lawyering relationship, but also as a macro theory of civic engagement.\textsuperscript{273} In articulating and stressing a vision of lawyering founded in an "ethic of care," feminist scholarship has strengthened a focus on emotion, and on what Phyllis Goldfarb identifies as "the role of affect."\textsuperscript{274}

This steady progress towards emotion occurs in opposition to a general critique of subjectivity in legal decision-making. In this version, sub-

\textsuperscript{270} No clear line divides emotion as a topic of lawyering from such other psychic states as risk aversion, spiritual resilience or for that matter client interests. Limitations of space prevent full development of the former two; discussion of client motivations seems so central as a topic of lawyering that it merits separate discussion below. \textit{See infra} Section III.C.6.

\textsuperscript{271} \textit{See} \textit{Watson}, supra note 55, at 7 (discussing lawyers in interviewing and counseling process); \textit{see also} Binder & Price, supra note 54, at 21-37 (discussing active listening from lawyer to client); Binder \textit{et al.}, supra note 56, at 46-49 (same).

\textsuperscript{272} \textit{See Binder} \& Price, supra note 54, at 138-41 (referring to non-legal consequences such as psychological results arising from given choice of action); Binder \textit{et al.}, supra note 56, at 9 (same). In both editions, moreover, the discussion of client motivation addresses the strong emotions which might interfere with or assist the attorney in gathering information. \textit{See} Section II.B.3 (discussing client inhibitors and facilitators).

\textsuperscript{273} \textit{See} Henderson, supra note 157, at 1576 (arguing that empathy for emotional realities offers significant explanatory power in appraising legal rules and legal results); Massaro, supra note 157, at 2101-04 (contrasting and critiquing "empathetic" and "rule of law" explanations for judicial decisions); Margulies, supra note 157, at 607 (reconceptualizing empathy as engagement with political values). Massaro notes that much of the writing on empathy addresses empathy with the emotions prompted by injustice or oppression, and suggests that emotions pervade both sides of a given decision: "[W]hich stories should law privilege? Which stories are profane?" Massaro, supra note 157, at 2110. I would add that stressing "empathy" makes the lawyer's emotion dominant, rather than the range of emotions or on the relational character of emotional discourse.

\textsuperscript{274} \textit{See Theory-Practice Spiral}, supra note 138, at 1699 (examining relationship between theory and practice from vies of feminism and clinical education); \textit{see also} Menkel-Meadow, \textit{Portia Redux}, supra note 151, at 106-12 (applying ethic of care to legal ethics and lawyering behavior); Menkel-Meadow, \textit{Portia}, supra note 151, at 39 (discussing possible transformation of legal profession with presence of women). The phrase, "ethic of care," derives directly from Carol Gilligan, \textit{In a Different Voice} 62-63 (1982).
jective realities serve as overly specific, potentially distorting influences on decisions. The decision-maker's inner life colors and shades that person's reaction to the decision situation. By contrast, conceptual content, particularly articulable rules, better serve the demands of rationality and formal justification. The critique argues that emotion can only inform the single participant's decision. It should thus have no place in a system of decisions that requires more broadly applicable standards. Indeed, since emotion is by definition inner, and very often hidden or inexpressible, it serves to disturb a system of laws that relies on explicit statement of rules in justification for coercive action.

Yet it remains a powerful influence on lawyering. This may arise in part from differences in the nature of judicial or legislative decision-making on the one hand, and decision-making through lawyering on the other. Unlike more public decisional processes, lawyering starts with the particular, a zone more flexible to emotional stresses. Moreover, when lawyering produces consensual results, as it usually does, the demand for public justification is less than with the more public and coercive decisional processes. Even if emotion is irrational, then, we can accept it in lawyering because we accept that individuals can justify consensual results for whichever reasons they choose, including emotional ones. Moreover, this narrow account of emotion comports with the intuition that people rarely engage their own affairs entirely free of emotion. In fact, it seems correct to assert that the capacity to feel and express emotion constitutes a principal source of our sense of uniqueness and identity.

The modern account of lawyering goes well beyond this grudging acceptance of emotion as an influence on private, consensual decisions. It asserts more fundamental dissent: that emotion not only affects, but is a constituent element of practical judgment. Let us assume that most lawyering does not involve completely emotionless actors. Moreover, the breadth of human decisions with which lawyering engages implies similar breadth in the emotions a lawyer might encounter. Emotions vary in intensity, from passions to whims; we should not assume a constancy of strength or influence, even for one person during a single decision. The "role of affect" covers all that a person might feel in subjective engagement with decisions.

Martha Nussbaum argues the broadest view, that emotion is neither distorting nor irrational, but rather a psychic state with conceptual con-

275. In Narrative Emotions: Beckett's Genealogy of Love, Martha Nussbaum discusses the idea of an emotionless person as the outgrowth of a successful Stoic training program. See Nussbaum, supra note 265, at 293 (describing how society can devalue emotion). "If we really get someone to hold the Stoic belief that no external or uncontrolled item was of any value at all, that person would have (as, indeed, the Stoics insisted) no emotional life at all." Id. at 291.

276. See id. at 292 (stating that emotions are built upon beliefs). Emotions "are not simply blind surges of affect, stirrings or sensation that arise from our animal nature and are identified (and distinguished from one another) by their felt quality alone." Id. at 291.
tent central to practical judgment. This content consists of a relatedness between emotion and "beliefs and judgments about the world [such that] the removal of the relevant belief will remove not only the reason for the emotion but also the emotion itself." Nussbaum argues for a strong cognitive view: that "emotion is itself identical with the full acceptance of, or recognition of, a belief." If we accept the relatedness between beliefs and emotions, emotions thus become open to criticism and assessment. "If emotions are not natural stirrings, but constructs, if they rest upon beliefs, then they can be modified by a modification of belief." In fact, the beliefs to which emotions relate fall into a particular category: "beliefs about what is valuable and important."

Emotions in this view are not just an unreliable tool with which to change otherwise reliably cognitive judgments. Emotions and beliefs themselves become the focus of the argument, especially when a belief was "hastily or uncritically" formed or when the story on which the belief rests was false. In this way, awareness and appraisal of emotion forms a natural activity of practical judgment. Faced with situations in which both prin-

277. See id. at 292 (noting how change of beliefs can lead to change in emotional response). Nussbaum locates her account of the cognitive stature of emotion on common ground between cognitive theories of emotion. See id. (explaining method of dealing with emotions). She describes this common ground as emerging "from the ancient Greek thinkers through to today's philosophy of psychology, the more cognitive parts of psychoanalytical thought, and the various forms of "social construction" theory about emotion that prevail in social anthropology and also in radical social history," including the thought of Michel Foucault. Id. at 294 n.16 (citing EXPLAINING EMOTION (Amelie Oksenberg Rorty ed., 1980); THE SOCIAL CONSTRUCTION OF EMOTION (R. Harré ed., 1986)). A more recent cognitive study of the "cognitive philosophy of emotion" confirms some of Nussbaum's central propositions about emotion, particularly in the relationship of emotion to beliefs. See MICK POWER & TIM DALGLEISH, COGNITION AND EMOTION: FROM ORDER TO DISORDER 17-54 (1997) (stating while both emotion and sensation reflect appraisals of particular objects, "in the case of emotions [the object] is always cognitive").

278. See NUSSBAUM, supra note 265, at 292 (discussing view of stoic philosopher Chrysippus on emotion); Martha Nussbaum, The Stoics on the Extirpation of the Passions, 20 APEIRON 129 (1987) (discussing power of emotions and passions and its ordinary conception of "external goods" while continuing to develop Chrysippus' view). She describes the other views of this relatedness of emotion to belief to include: (1) "belief [is] a necessary cause of the emotion but no part of what the emotion is;" (2) belief is "one component part of the emotion, but . . . not, by itself, sufficient for the emotion. (I can believe that I am wronged and yet not be angry);" and (3) belief is "sufficient for the emotion: if I do not get angry, then I do not really truly accept or believe that I have been wronged." NUSSBAUM, supra note 265, at 292. The view of emotion as the "full acceptance" of the related belief presents the strongest of these views; I am angry when I fully accept the belief that I have been wronged. See id. (discussing general cognitive picture of emotion).

279. See NUSSBAUM, supra note 265, at 292 (providing insight on cognitive conceptions of emotions).

280. See id. at 293.

281. See id. at 292. Nussbaum firmly connects this project of creating and critiquing emotion with the task of story construction and deconstruction. See id. at 293-94 (describing how emotions are learned through stories and social interac-
principles and emotions influence our choices, Nussbaum suggests that neither has an inherent priority, but that each might give way to the other on different occasions. Nussbaum also notes that emotions themselves are "responsive and selective elements of the personality [possessing] a high degree of educability and discrimination . . . . Emotion can play a cognitive role, and cognition, if it is to be properly informed, must draw on the work of the emotive elements." 283

Lawyering thus does not just use emotion as a means to manipulate reason, or fear emotion as a distortion of rules, cordonning and sanitizing it within the limits of consensual outcomes. Rather, emotional and conceptual reasoning contain "different sorts of theories or views about life" and each has power as a means of discerning the appropriate resolution of particular decisions. Moreover, lawyering involves decisions that implicate important values or beliefs. If important enough to seek the help of a lawyer, these decisions will often touch on the very values or beliefs that engender emotion. Talk about emotion, or at least alertness to emotion as a defining element of decisions, thus constitutes a key topic of practical judgment.

3. Relationships

Discussing emotion might imply an exclusive focus on individual psychic realities: an almost therapeutic notion that lawyering focuses solely on the emotional state of a single person, to the exclusion of other realities. Yet lawyering also entails relational realities, both in the fabric of
the lawyering process itself and in the content of the decisions with which lawyering deals. I will speak later about the content of the lawyer-client relationship. Here, I ask how relational realities influence practical judgment: relationship as a topic of lawyering.

To notice that lawyering involves relationships seems obvious and uncomplicated. Conflict resolution and planning, two dominant practice contexts, each have distinct relational stamps. In the former, a relationship of conflict exists between two or more individuals; lawyering helps to resolve that conflict. In the latter, a relationship of potential collaboration exists; lawyering helps to complete the collaboration and to realize its opportunities. Negotiation as a law job is preeminently relational and consensual, a social encounter. Despite its adversarial cast, litigation itself has strong social and relational features.

Modern lawyering literature goes beyond these points. Problem-solving theorists view relationships as more than just unavoidable human context. Instead, problem-solving practice carefully considers relationships, particularly the interplay between shared and conflicting interests from which solutions might emerge. Noticing that relationships can operate in this way, these writers argue, allows participants to structure solutions that would not emerge from narrow focus on individual gain. Even the narrowest claims for this perception stress how careful assessment of rel-

Moreover, those beliefs or judgments themselves relate to matters of special value or importance. See id. (describing Aristotelian beliefs about worth of emotions). The "matters" about which we form these beliefs often, and perhaps predominately, include things outside of our control, so that emotion necessarily entails "a complex web of connections between the agent and unstable worldly items such as loved friends, city, possessions, and the conditions of action." Id. at 141 (describing evaluative beliefs on which major emotions rest). To consider emotion in lawyering will thus often involve considering the people about whom clients and other participants form emotions. See generally id. at 147 (using example of painful experiences to imagine emotion pictorially).

286. See infra Section III.3.

287. This focus is distinct from a related, but much broader point: that law itself can arguably be understood as constructed of relationships. "One fundamental point is that the law is intimately involved in the constitution of social relations and the law itself is constituted through social relations. Daily talk about the law by ordinary people contributes to defining what the law is and what it is not." Merry, supra note 173, at 209-10.

288. See id. at 216 (discussing social relation in mediation). One can argue that the rules of procedure and evidence are rules of etiquette, constraining how we act towards each other and what we are permitted to mention.

289. See Menkel-Meadow, supra note 124, at 801-17 (discussing structure of problem solving). See generally BASTRESS & HARBAUCH, supra note 114, at 341-403 (arguing that to effectively act on behalf of clients, lawyers need to master negotiation skills); HARDAY, supra note 238, at 223-48 (commenting on lawyering skills needed during negotiation process); KRIEGER ET AL., supra note 76, at 237-52 (discussing techniques for assessing parties' rights and interests prior to negotiation). This analysis can devolve into an argument that individualistic thinking is bad, and collaborative thinking is "principled." See FISHER & Ury, supra note 125, at xiii (arguing that interest-based, problem-solving negotiation is "principled" negotiation, leaving adversarial bargaining implied alternate label). A more moderate ap-
Relational realities can transform not only the process of settlement, but also the content of decisions themselves.

Relational realities also permeate the writing on strategic judgments. Exhortations to think strategically occur throughout the literature on lawyering, from Bradway on. 290 Considering the "social consequences" of decisions (to use a phrase from the Client-centered project) 291 reflects a key component of that advice. Recent discussion on strategic thinking assumes no particular view of relationships, either adversarial or collaborative. 292 In adversarial process, careful strategy requires understanding the force of the opponent's arguments, anticipation of their likely tactics and planning to prevent the opponent's ability to achieve a decisive event. 293 In transactional settings, strategic thinking anticipates and enables consensus and collaboration, whether in economic, organizational or private relationships. 294

Relational realities have also been described as in severe conflict with legal rules: an intense divergence between rights and care. Responsive to the work of Carol Gilligan, 295 this perception identifies relational values (along with closely related emotional realities) as in tragic, outrageous conflict with legal rules. For example, Phyllis Goldfarb assesses Antigone's approach focuses on the value of relational thinking to problem-solving in specific situations. See Bradway, How To Practice, supra note 51, at 49-55.

290. See Bradway, How To Practice, supra note 51, at 48 (planning how lawyer should determine solution of client's problem); see also Bellow & Moulton, supra note 53, at 998-1018 (discussing framework of solutions to client's problem); Binder et al., supra note 56, at 2-15 (considering legal and non-legal dimensions, including "social consequences . . . those that affect a client's relations with others"). See generally id. at chs. 16-22 (detailing recommendations for strategic planning in both dispute resolution and transactional settings).

291. See Binder et al., supra note 56, at 16-22 (describing system to help lawyers solve their clients' problems).

292. See generally Richard K. Neumann, Jr., On Strategy, 59 Fordham L. Rev. 299 (1990) (exploring process of creating strategy); see also Krieger et al., supra note 76, at 31-44 (stating three types of thinking lawyers engage in includes diagnosing problem, predicting future events and developing strategy).

293. See Krieger et al., supra note 76, at 40 ("The lawyer on the other side will be trying to cause her own decisive event. Your strategy will be incomplete unless it is designed to prevent that."). The advice to know one's opponent and anticipate their strengths, weaknesses and likely actions has ancient roots. See Sun Tzu, The Art of War 168-72 (Thomas Cleary trans., Shambhala 1988) (recommending foreknowledge of the enemy and prizing use of spies).

294. See Krieger, supra note 76, at 42-44 (discussing "The Inclusive Solution"); see also Menkel-Meadow, supra note 124, at 766 (comparing transactional negotiations to dispute negotiations).

295. See Eyster, supra note 263, at 786-87 (quoting Carol Gilligan's work on women expressing "care-related concerns" in their reasoning); Goldfarb, A Theory-Practice Spiral, supra note 138, at 1610 (relating different moralities based on care and rights); Isabel Marcus et al., The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11 (1986) (discussing feminism in legal profession); Portia, supra note 151, at 44 (discussing Carol Gilligan's work on women's development in legal profession).
as an example of such a conflict. Yet Goldfarb also posits an approach that might have reframed that conflict. Relational and empathic realities in the play constitute influences in a deliberative process that considers multiple perspectives, including the claims of rules. This modulated assessment of relational and individualist ethics depicts rights and relationships as standing in restless relation to the other, at times conflicting, at times complementary, and even creative.

Awareness of the presence of relational dynamics in lawyering enriches our sense of practical judgment. Inevitably a part of the lawyer’s work, relational influences offer strategic and creative opportunities. Responding to their pressure poses a potential divergence from a rule-oriented ethic. Learning to speak of relationships as a topic of lawyering ensures an accommodation of both influences within lawyering process.

4. Power

Lawyering both embodies and creates power. The fabric of legal rules, coercive when consensual process fails, forms a backdrop to the work in which lawyers engage. Predicting outcomes and acting on those predictions, lawyers maintain and advance their client’s power: what she can do; what she can make happen; and what she can be forced to do. Power is a fundamental topic of lawyering.

Yet the power of rules occupies only a portion of the power for which lawyering process and practical judgment must account. As to behaviors, the law jobs differ at least partly in the way the lawyer seeks to exert


297. See id. (describing plot of play). Goldfarb identifies these relational values as consisting not solely of a sense of duty to others, but as an emotional response to the perception of need in another. See id. at 1608 n.30 (citing Martha Nussbaum for a comparison of Antigone’s sense of duty with her sister Ismene’s “genuinely felt emotions”).

298. See id. at 1615 (relating clinician’s view of play to feminist’s view). This includes the rights orientation adopted and then transformed by Creon. See id. at 1617 (describing different clinical methods that resemble Greek tragedies). Goldfarb finds support for this richer notion of deliberation that includes consideration of the empathic and relational values of Antigone in Martha Nussbaum’s discussion of the play. See MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 14 (1986) (discussing emotions of Greek tragedy); see also Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7, 9 (1989) (discussing women of color in legal profession).

299. Interestingly, John Bradway employs “relationships” primarily in the context of legal research. See BRADWAY, How to Practice, supra note 51, at 37-43 (describing review of relational connections as vehicle for determining which substantive laws might apply to paradigm relationships in client’s situation).

300. See id. (borrowing phrase from Goldfarb, A Theory-Practice Spiral, supra note 138, at 1660-70, to explain relationship between legal education and feminist jurisprudence).
Moreover, the existence of differing sources of power has a strong influence on decisions reached through lawyering. The diversity of these sources, and the complex modulation of real and apparent power, strongly influences assessment of information, creation and evaluation of options, and selection between possible choices.

Power is a difficult topic of lawyering because of the fluidity of the concept. Lucie White has provided a useful overview of two primary theories. In the first, structural understanding, power "is a thing that people have and wield over others, usually on the basis of their roles in stable institutional hierarchies." Power here is a tool used to coerce results, and a permanent, stable feature of defined relations, derived from dominant hierarchies in socially constructed institutions. In the second, "post-structuralist" understanding, individuals no longer control or wield power, but rather participate in a fluid movement of power within relationships: "we cannot really separate the agents of the movement from the movement itself." White offers neither view as a complete explanation.
of power dynamics. In her view, further work remains to be done to accomplish even a partially satisfying theory of power relations.

Uncertainty in our theories of power renders coherent discussion of power as a topic of lawyering more difficult. But few debate that assessment of power, and skill in exercising such power as the lawyer has, is central to lawyering. Advocates of problem-solving negotiation face a criticism rooted in notions of power: collaborative process may function only where parties have rough equality of bargaining power. Where "one party is so powerful that it will not accede to demands . . . to bargain for joint or mutual gain," the effort at collaboration may give way to more competitive appraisals and styles, and perhaps to more adversarial processes for resolving disputes.307 Assessments of relative power will thus strongly influence lawyering behavior, including choice of negotiating style. Indeed, assumptions about power may well drive the debate between client-centered, lawyer-assertive and collaborative models of lawyering.308

Power analysis also has a critical impact on the evaluation of options for decision, and the creation of alternate plans for solution. We have already noted the primacy of predicting the outcomes of litigation (and other legal process) in assessing a client's power to seek favorable terms. Similar assessments occur with respect to resources, to the intensity of need for a particular outcome, to tolerance for risk, or to emotional exhaustion or resilience: all these carve down options into plans that will produce their intended results. Moreover, these realities do not limit themselves to the client: the attorney's finances and organization, intensity of commitment, risk tolerance and reserves of energy also constrain lawyering strategy.

Power thus emerges not just within legal rules, but also in lawyering behavior and relationships, and within strategic assessments. Lawyers assess and enact the realities of power for and with their clients. It is practi-
5. Money and Other Quantities

Money might seem a sub-topic of power. Conceived broadly (as “resources”), money not only defines what its possessor can do; it may also affect the lawyering the possessor can afford, and thus to some extent the quality of the lawyering she will receive. Although the previous section suggests a more universal view of power, we have grown accustomed to thinking of money as power’s archetypal source.

Viewed from a different angle, however, money has standing as a topic of lawyering in its own right. Money represents a quantifiable measure of the adequacy of outcomes; it takes its place alongside other quantities as a tool for evaluating outcomes and assessing decisional alternatives. In our thinking about remedies, we accept money as a substitute for other goods, taken or claimed; and money is not our only quantifier. Quantification of outcomes, in money or otherwise, serves as a topic of lawyering.

Integrating quantified values into lawyered decisions can create serious dissonance. Consider the decision to settle a lawsuit. In studying this decision, economists have developed a prevailing view: that “litigants will compare the financial value of a settlement offer to the expected financial value of the trial and select the course of action with the highest expected value.” Expected value analysis recognizes deviations, denoted as deviations.

309. See Herbert A. Simon, Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization xxviii-xxx (3d ed. 1996) (introducing concept of “satisficing”); Herbert A. Simon, Rational Choice and the Structure of the Environment, in Models of Man: Social and Rational 261, 270-71 (1957) (“Since the organism ... has neither the senses nor the wits to discover an ‘optimal’ path ... we are concerned only with finding a choice mechanism that will lead it to pursue a ‘satisficing’ path, a path that will permit satisfaction at some specified level of all its needs.”); see also David Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann, 90 Colum. L. Rev. 1004, 1012 & n.32 (1990) (stating that satisficing may require lawyer to participate in “morally dissonant acts”).

310. Other quantifiers include: the length of a prison sentence; the number of weekends per month of visitation; the number of days for each visit; the time periods for tending to procedural tasks in litigation; and even the equation of time to quality in a lawyer’s bill. All these define behaviors, processes, outcomes and decisions throughout the lawyering process. These quantities (of time) may seem clearly inadequate as definitions of the underlying concerns in the case; but that inadequacy operates with equal force when considering money as a quantified substitute for non-quantified emotions and values.

311. A New Look, supra note 178, at 78 (citing George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 12-13 (1984) for what authors believe is “the classic statement of this model”). Korobkin and Guthrie assess the extent to which this model of litigant behavior fully accounts for the decision-making that occurs in settlement, given the number of non-economic influences which might lead litigants to act at variance with the model’s predictions:

Litigants litigate not just for money, but to attain vindication; to establish precedence; “to express their feelings;” to obtain a hearing; and to satisfy
tions from rational behavior. The rhetoric of irrationality may hide dubious assumptions about rationality, but not because quantification of outcomes itself is suspect. Lawyers can, and with experience usually do learn how to specify predictions and quantify risks and gains in ways that give clients useful information.

This debate over irrational principles of decision emerges again in discussions of choice between incommensurable values. Both Anthony Kronman and Martha Nussbaum assume that the paradigm choice for practical judgment involves the choice between incommensurable values. They differ, however, in the role they assign to commensurables in practical judgment. Nussbaum postulates a strong version of particularity, in which no part of the choice can be reduced to any uniform measure of decision. By contrast, Kronman tentatively accepts the idea that we can

sense of entitlement regarding use of the courts, all of which can easily preclude out of court settlement. Moreover, their decisions to settle or litigate may be affected by the context of the choice, the frame in which it is presented, the identity of the person describing the choice, whether the litigants have faced similar choices before, the litigants' self-serving biases concerning the fairness of their position, habit, unyielding conceptions of justice and myriad other factors.

Id. at 79-80 (containing a thorough listing of empirical studies documenting each of these factors). Assuming all of these “non-economic” reasons for refusing settlement, why do high settlement rates continue? Their conclusions focus on the influence of the lawyers’ habitual analytical frame (“expected financial value analysis”) on client decisions, making three points: “lawyers are more likely than litigants to apply an expected financial value analysis to the settlement-versus-trial decision;” “lawyers have the ability—at least in some circumstances—to persuade litigants to approach the settlement-versus-trial decision from the lawyers preferred analytical perspective;” and lastly, “the lawyer who fails to understand the client’s values can promote settlements that give the client an optimal financial return but are nonetheless inefficient because they fail to maximize the client’s expected utility.” Id. at 82 (listing three arguments why lawyers help facilitate settlements in litigation). They recommend that lawyers use a “cognitive error approach,” by which lawyers not only prepare an expected financial value analysis, and correct any cognitive errors in the client’s version of that analysis, but also discern those non-cognitive elements and leave the client free to rely on these elements in reaching the settlement decision. See id. at 129-36 (considering cognitive error approach to client counseling).

312. See Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051, 1064-75, 1104-07 (2000) (describing how choices are made by person’s reference to situation). Only where maximization of gain becomes the dominant decisional value to the exclusion of other factors do questions of rationality or irrationality seem to arise. See id. at 1055 (assessing and critiquing various versions of “rational choice theory,” and developing account of various deviations from “rational choice” to describe decisions that fail to “maximize expected utility,” incorporate decisional heuristics and biases, and respond to influence of series of contextual factors).

313. See NUSBAUM, supra note 190, at 106-24 (presenting Plato’s views on commensurability and human emotions). In this essay, Nussbaum appraises the appeal of commensurability (the notion that important decisions can be reduced to assessment on a single scale) and strongly rejects its claims as an adequate account of rationality. See id. (supporting Aristotle’s theories on vocational choice).
reach some decisions exclusively on quantifiable grounds. Indeed, he notes how quantification can serve a useful purpose, by narrowing "to the greatest extent possible the range of questions for which no rational answer exists." These views help show how quantification can both translate intangible values into concrete form, and can ease the severity of difficult choices.

Consider a different example. Standard intake for at least some law practices involves asking clients for data about income and household resources. Knowledge of client income and resources usually takes on strategic significance, as lawyer and client assess the feasibility of available approaches. Yet I often find students reluctant to ask. These reactions strike deep: our reading of our clients' attitudes towards money and its disclosure reveals at least as much about our own attitudes. They raise the sensitivity of class status in human interactions: how much income defines our class identity, and our position in social and other hierarchies. The human context in which money talk occurs is charged with strongly unquantified energy.

How lawyers and clients talk about money and other quantities merits more extended assessment. The standard model assumes that lawyering has unquantified, affective components, but the rhetoric of quantity offers comparisons and concrete embodiments of value that figure prominently in the decisional field that lawyers encounter. Practical judgment

We need to allow ... works about people who live and value differently, to address us not just in and through the intellect, but by evoking nonintellectual responses that have their own kind of subjectivity and veracity. Any social theory that recommends or uses a quantitative measure of value without first exercising imagination along these lines seems to me to be thoroughly irresponsible.

Id. at 123. Nussbaum doubts that we can ever fully quantify any choice. See id. at 108-13 (suggesting scientific measurement is continuous and there is shift from ordinary to scientific belief).

314. See KRONMAN, supra note 13, at 65 (discussing choices that shape one's life).

315. See id. (creating strategy to narrow decisions). In effect, the severity of the choice can be mitigated by partial quantification:

Despite initial appearances, for example, a problem may turn out to have a computational solution, or to be decidable on grounds of timing and fit ... as a deliberative strategy, it always makes sense to narrow to the greatest extent possible the range of questions for which no rational agreement exists.

Id.

316. Some useful questions for empirical study might include: to what extent does the introduction of quantities into the decision-making process lead to a focus on quantities to the exclusion of other factors? If this reduction of focus does occur, how much do lawyers work against it; and indeed, should they work against it at all? To what extent does talk about quantities both clarify and constrain conversation and speculation about less concrete, more fluid topics of lawyering? Money talk in this sense may advance the finality task of lawyering: the demand of most lawyering to bring decisions to closure within time frames set both by the clients and by others with whom the client must deal. See supra Section III.E (discussing limitation of legal decision-making).
requires careful expression of intangibles in quantified outcomes, sensitive to the quotient of inchoate experience remaining after translation.

6. Interests

Decision-makers arrive at the point of decision with varying goals, preferences, needs and personal values. Practical judgment advances and accommodates these pressures, which I describe generally as "interests." The term appears both in substantive law and in ethical doctrine. Here, I use a more technical lawyering sense: those concerns that shape both intentions and evaluations during decision-making.

In counseling, a concern for "interests" elicits and evaluates options, focuses the counseling conversation, and informs strategic choices. Virtually all the lawyering texts encourage identification and exploration of interests, both through interviewing, and (later and more deeply) in the counseling conversation. Talking and thinking about interests helps the lawyer to enter into the client's world and perspective, and enables a richer sense of how the client will experience the various options. Talking about interests can help bring the client to the point of decisiveness and action.

317. My usage does not seek to build on the language of "best interest" standards in law, such as the "best interest" of the child or of a ward in guardianship. Each standard suggests disparate meanings, which I seek not so much to deny as to defer to other discussions, such as those about protection, compassion, service and (potentially) substituted decision-making, even deprivation of decisional autonomy.

318. Similarly, I do not seek to base this discussion in "best interest" standards of the relevant ethical codes. Here again, the ethical standards suggest similar connotations, concerning protection, service, agency, and substitute decision-making. See generally Model Rules of Prof'l Conduct R. 1.6 (2001) (regarding confidentiality of information); Model Rules of Prof'l Conduct R. 1.7 (2001) (providing general rule for conflicts of interest); Model Rules of Prof'l Conduct R. 1.8 (2001) (describing prohibited transactions resulting in or from conflicts of interest); Model Rules of Prof'l Conduct R. 1.9 (2001) (discussing conflicts of interest arising out of former client); Restatement (Third) of The Law Governing Lawyers §§ 121-35 (1998) (discussing conflicts of interest rules with current, former and institutional clients); L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility (1982) (containing model rules and model code of professional conduct).

319. For a representative sampling, see Bastress & Harbaugh, supra note 114, at 255-82 (outlining methods for reaching decisions and helping client analyze choices); Binder & Price, supra note 54, at 137-56, 183-86 (discussing consequences and alternatives to decisions); Binder et al., supra note 56, at 272-81, 309-15 (suggesting importance of exploring alternatives with client and techniques for counseling unwilling clients); Cochran et al., supra note 114, at 83-88, 150-64 (describing how to elicit more facts from client and how to help make optimal choice); Krieger et al., supra note 76, at 73-75, 195-206 (discussing methods of ascertaining client's goals).

320. See Kronman, supra note 13, at 69-73 (noting usefulness of imagination and entering into client's perspective on given set of decisions).

321. See id. (discussing need for sympathetic deliberation). Kronman's treatment of the phenomenon of "decisional regret" assumes decisions made by indi-
In negotiation, alertness to interests prompts imaginative generation of options, and can shape and make more pragmatic the real options. Shared interests may serve as a field from which solutions emerge, narrowing the zone of conflict and potentially expanding the resources available to enable choice and action. Even where this does not occur, appraisal of conflicting interests in the light of restricted resources clarifies and focuses more adversarial approaches to resolution.

"Interests" as a term covers a multitude of meanings; not surprisingly, the literature uses a similarly imprecise array of meanings. We may have to accept imprecision and ambiguity, but some tentative kinds of interests may include:

Individuals without lawyers, but applies with equal force to the client operating with a lawyer who serves to clarify "interests." See infra Section III.E.

322. See Menkel-Meadow, supra note 124, at 801-17 (depicting structure of problem-solving model of lawyering). Carrie Menkel-Meadow’s classic telling of this story remains a powerful version, but it appears in a wide range of other sources. See, e.g., Fisher & Ury, supra note 125, 40-80 (2d ed. 1991) (describing keys to successful negotiations as recognizing interests and creating options for mutual gain).

323. See Bastress & Harbaugh, supra note 114, at 256-58, 273-76 (referring to meeting “needs and priorities” of clients as major goal of counseling and discussing need to both show empathy and confront client to understand “feelings”); id. at 273 (presenting confrontation as forcing client to recognize inconsistency between “articulated priorities” and conduct); id. at 276 (confronting client allows client to make his “decision with full awareness of it . . . affects [his] values and goals”); id. at 298-303 (discussing conflict between value identification and value conflict and including extended excerpt from M. Smith, A Practical Guide to Value Clarification 7-14 (1977)); Binder & Price, supra note 54, at 148 (noting goal of decision process is to achieve greatest client satisfactions by knowing client’s values); Binder et al., supra note 56, at 272-80, 309-15 (evaluating client’s values and value system as subjective standard); Cochran et al., supra note 114, at 87 (depicting how summarizing client’s story can help realize his or her variety of goals and interests); id. at 150-57 (forming model for choosing opinions based on client’s “values and goals” derived from answers to various questions); Krieger et al., supra note 76, 73-75 (describing client’s wants, needs and goals); id. at 195-97 (“A goal is what the client hired you to get. A preference is something the client would like you to do or not do while pursuing goals.”); see also Kimberly K. Kovach, Mediation Principles and Practice 39, 137-44 (2d ed. 2000) (describing how mediators can use framing and other rhetorical devices to move mediation in tune with participant “issues” and “interests”); Menkel-Meadow, supra note 124, at 801-04 (listing “needs,” “objectives” and “preferences” of client, categorizing them into economic, legal, social, psychological, and ethical and assessing the “weight or value of clients needs or preferences”). Compare Nussbaum, supra note 278, at 144-58 (describing Stoic, and particularly Chriissypian conception of practical knowing as “dynamic conception,” involving oscillation between different, strongly held beliefs, values and judgments), with Kronman, supra note 13, at 69-74 (describing use of imagination in assessing impact of decisions, and in understanding “evaluative outlook” of choice-maker, which includes “future commitments,” “special cares and commitments, attachments and aversions, that give the life of that possible future self its own distinctive shape”).
Preferences: those wishes that the client would like to pursue, but can sacrifice in the face of other, more compelling concerns or of restrictions imposed by other realities, law included.

Needs: those concerns which the client must satisfy. Needs have more decisive influence than preferences; but the dividing line between them is fluid, and may depend on the other topics, particularly the power and resources available to the client.

Values: concerns that shape the way that a client appraises, or "evaluates" the benefits and risks of a decision. By definition, values are more persistent, less dependent on contextual factors than needs (and certainly than preferences); variations in power and resources may also have less impact on the client's values.

In practice, these labels have multiple uses: distinguishing transitory concerns from fundamental goals, for example; discerning interests which the client can consciously address and manage (preferences or needs) from those which the client may have difficulty articulating, much less changing or sacrificing (values); or separating what a client must have (needs) from what a client can sacrifice (preferences).

This weighing and balancing of interests helps focus another central aspect of the lawyering task: the motivational complexity of decision-making. Using the rich terms of the literature, our client will have values, objectives, needs, priorities, goals, feelings, beliefs, judgments, wants, issues and preferences, both immediate and long term, categorized by different concerns, hidden or explicit, and of varying weights or intensities. Even simple decisions can elicit internal conflict, as do the harder choices often faced in lawyering. Decision-makers rarely approach decisions with one "interest" only, but rather with conflicting internal assessments and evaluations, not to mention cross-currents of external influence.

324. I am grateful to my mentor, mediation partner and mediation co-trainer, Suzanne Terry for introducing me to and helping me understand and develop the concepts and language of these particular categories.

325. See supra, note 323.

326. See KRONMAN, supra note 13, at 69-74 (listing various client interests). In particular, to argue that individual choices is always and solely about money seems willfully blind. Clients may on occasion seek solely to maximize economic gain, but this does not mean that the other topics play no role in their decision, or that other goals, preferences or needs cease to operate. See Section III.B.5 (expanding on variable influence of money and other quantities on decisions).

327. See KRONMAN, supra note 13, at 69-74 (listing various lawyer interest). As always, we should take the distinction between external and internal at less than face value. Here particularly, the fabric of deliberation in lawyering may entail a connection between the "world as it is" and the psyche of the decision-maker. See generally William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469, 469-507 (1984) (analyzing lawyers' external and internal interests). Simon has noted that how we view the relationship between external and internal realities may in fact be a matter of opinion . . . two opinions in particular: a traditional view,
How much can lawyers hope to understand of the complexity and diversity of their clients' interests? Two possible answers describe the limits on lawyer's understanding as either tragically limited or incomplete but possible. Some of these limits do arise from external constraints. Others may arise from the assumed incapacity to know another human being fully. One of the earliest arguments in favor of this latter conclusion appears in Client-Centered I. There, the authors took the position that "lawyers cannot know what value clients really place on the various consequences." Later writers have picked up on this suggestion where "both the client's interests and the constraints of the system are seen as constituted prior to the lawyer's activity"; and a post-modernist view (tied to critical legal studies) in which both external constraints and client interests lack determinacy, and stand in fluid relationship both to each other and to the influence of the lawyer. See id. at 469 (contrasting notions of law practice in professional culture with recent critical legal writing). Simon characterizes the former view as "Stoic." See id. (describing professional vision of law practice).

328. See infra Section III.E (discussing practical constraints in lawyering).
329. See Anthony V. Alfieri, Stances, 77 CORNELL L. REV. 1233, 1234 (1992) (arguing that despite excellent craftsmanship, the "good modernist lawyer" will always translate the meanings of the client's experience (the text), resulting in distortion and loss of textual meaning. "This loss is the tragedy of modernist lawyering.").

330. See infra Section III.E (discussing practical constraints in lawyering). Here again, Martha Nussbaum has something to say, if only by analogy. See Martha Nussbaum, Skepticism about Practical Reason in Literature and the Law, 107 HARV. L. REV. 714, 714-16 (1994) (equating stories of Greek philosopher Pyrro to modern skeptical position). Nussbaum traces both ancient and modern strains of skeptical thought, grouping together in her critique writers as diverse as Derrida, Fish, Smith, Posner and Bork. Noting (and accepting as an argument) the skeptical view that absolute agreement on norms of evaluation is impossible, she notes that one can easily go to the other extreme. See id. at 719-23 (showing influence of skeptic over Aristotelism thinker). The collapse of such a "transcendent ground for evaluation . . . seems to entail the collapse of all evaluative argument and inquiry." Id. at 740. However, she notes, if one does not care to reach for such a transcendent ground, its unavailability is untroubling. See id. (reasoning that transcendent ground is irrelevant to human ethics). Similarly, if you believe that you have to know your clients perfectly, the practical impossibility of that goal might lead you to reject the possibility of any client knowledge. See id. at 733 (describing skeptic demands as unrealistic goal). But if we accept the impossibility of absolute knowledge of another, we can then turn to the more practical task of understanding those realities we can and must understand in order to appraise, decide and act in the world.

331. See infra Section III.E (discussing practical constraints in lawyering).
332. See NORMAN MACLEAN, A RIVER RUNS THROUGH IT AND OTHER STORIES 104 (1976) (narrating story of father speaking to his son of their separate efforts to understand another son, whose beauty, intensity and recklessness led him to a young death: "It is those we live with and love and should know who elude us.").

333. See Binder & Price, supra note 54, at 148-49 (discussing uniqueness of client values). From this perception of "lawyers' inability to know what values clients place on various consequences," the authors derived the proposition that lawyers should leave all decisions to the client: q.e.d., client-centeredness. See id. at 148-53 (offering hypothetical involving client-centered approach); see, e.g., William Simon, The Ideology of Advocacy (1977) (unpublished paper), reprinted in part in BELLOW & MOULTON, supra note 48, at 103-08. Simon advances a startlingly similar
tion, including Anthony V. Alfieri, whose work often explores the lawyer’s inability to understand client experience. 334

Other writers express more confidence about the chance for partial understanding between lawyer and client. Lucie White presents a moving example of a lawyer-scholar struggling with this question. In some of her writings, she critiques the ability of poverty lawyers to perceive or communicate client interests; 335 in others, she accepts the prospect for collaboration between lawyer and client. 336 She argues against the skeptic’s demand for total knowledge and identity with another: “we need not know all of the ‘facts’ about the other in order for these moments to occur. Nor need we share all the features of the other’s ‘identity,’ categorically defined.” 337 White offers a sense of promise that efforts towards partial knowledge of another’s experiences and values may produce adequate understanding. We may achieve moments of recognition and understanding that foster further and effective action.

7. **Other Topics**

The topics described above seem the most present in lawyering and have received extensive discussion in lawyering literature. I have not delineated the precise boundaries between or overlap in their content. Instead, I suggest them only as important categories of concern. 338 Just as

perception: “The lawyer . . . has no reliable way of learning the client’s ends on his own. Because these ends are subjective, individual, and arbitrary, the lawyer has no access to them.” 1d. at 104. Placed in the untenable position of not knowing the very ends that should form the basis of her deliberation with the client, the lawyer will (in Simon’s argument) inevitably impute the ends of a “hypothetical” client to the real client. See id. at 106.

334. See Alfieri, supra note 145, at 2111 (arguing that “[l]awyer storytelling falsifies client story when lawyer narratives silence and displace client narratives”); see also Piomelli, supra note 145, at 459-61 (unraveling skein of pessimism about lawyer-client communication in Alfieri’s work).


336. See White, supra note 145, at 723-38 (depicting lawyers involvement in battle against South African government to help village resist removal). Elsewhere, she describes her conversation with a woman of different class, race and experience of life; in appraising this story, White notes how the realities of power (including the divisiveness of domination) may limit the potential of empathy for moments where “the force of one’s own emotions may cast a moment’s light on others’ lives, revealing both irreducible difference and, paradoxically, common ground.” White, supra note 146, at 1508-11 (recounting story illustrating importance in understanding clients’ emotions).

337. See White, supra note 146, at 1511.

338. I do discuss the boundary/overlap question further in the next section, when assessing how legal rules might interact with the other topics. See infra notes 345-72 and accompanying text (analyzing wide range of non-legal realities associated with lawyering).
clearly, the discussion does not contain exhaustive assessment of any given topic; we can and should try to say more about any one of these topics. Finally, this is not an exclusive list; we can and should articulate other topics that influence our work in lawyering.

The notion of “difference” presents one such potential topic. "Difference" signifies disparities in experience of the world that may flow from a person’s race, gender, sexual orientation, class or other personal attribute. Difference may refer to harmless, perhaps even positive realities. But at least as commonly, the disparities lead to inequities in resources, freedoms or other goods available to the different participants. To appraise difference would thus encourage lawyers and clients to discuss the extent to which one party suffers in decision-making from being, or being seen as, different.

However, we can understand difference not as a separate topic, but rather as a composite of other topics. Certainly, the many discussions of difference focus their analyses on how difference entails different narratives, disparities in power, and diverse assumptions about relationships, both within and outside the lawyer-client relationship. “Difference analysis” also encourages understanding how interests can diverge between lawyer and client, or the client and others. Recognition of difference may often occur when unexpected emotion enters our deliberations, feelings other than those we might expect the person to have.


341. See, e.g., Jane Harris Aiken, Striving to Teach “Justice, Fairness, and Morality”, 4 CLINICAL L. REV. 1, 10-22 (1997) (offering section entitled “Developing a Sense of Justice Through Deconstructing Power,” arguing in favor of teaching law students "the ability to deconstruct power, to identify privilege, and to take responsibility for the ways in which the law confers dominance").

342. For a discussion of assessing “difference” in relational context, see Kimberly E. O'Leary, Using “Difference Analysis” to Teach Problem-Solving, 4 CLINICAL L. REV. 65, 82-84 (1997) (providing second step in coherent process of “difference analysis,” encouraging lawyers to “identify actors affected by the legal problem”).

343. See Aiken, supra note 341, at 24-25 (drawing upon learning theory used by Fran Quigley). Aiken, relying on Fran Quigley, refers to such a moment as the "disorienting moment": "when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner's prior understanding . . . of how the world works.” Id. at 24 (quoting Fran Quigley, Seizing the Disorienting Moment, 2 CLINICAL L. REV. 87, 51 (1995)). Aiken's discussion of the “disorienting moment” refers to a wider group of experiences of difference than disparate emotional reactions. See id. at 51-72 (showing clinical legal education as means of learning social justice). Yet her and Quigley's language suggests how difference frequently registers as “disturbing,” connoting, at least partially, an emotional reaction. See id. at 51 (describing unsettling experiences as best means of learning). If we accept Nussbaurn's (and the Stoics') notion of emotion as the acceptance of a belief about the world,
Appraising difference thus requires responsive appraisal of the topics of lawyering: stories, emotions, relational experience, power, quantitative assessments and interests. A lawyer should recognize her differences from her clients and others, and act accordingly, a normative conviction that permeates the work of the difference writers. Yet considering the topics of lawyering rather than the label of differences may bring a stronger sense of the content of decisions than the label alone.344

The topics of lawyering influence most, if not all, decisions with which lawyers work. Moreover, they permeate lawyering process: in assessing facts and law, in helping decisions and in acting. A logical question would ask “when should a lawyer use the topics?” The answer (firmly resistant to normative advice): she always will. The better question may ask “how well can the lawyer understand their influence?” The lawyering literature seeks to prescribe good practice, whether lawyering of a certain quality, or lawyering to a particular end (social justice or profit maximization, for example). Discussing the topics serves neither purpose directly. But how we choose to engage them and whether we can remain alert to their influences, defines our skill and our habits as attorneys, and can shape our moral and political commitments. Responsiveness to the topics does not require a method or a checklist. We can learn the rhetoric of our thought and talk as lawyers as we would any language.

D. The Law as a Topic of Lawyering

Let me summarize the appraisal so far. Lawyering process involves a sequence of mental and relational tasks focused on appraising, making and implementing decisions, between lawyer and client and between them and other decision-makers. Lawyering in this sense occurs in both transactional and dispute resolution contexts. The law jobs of advocacy, negotiation and planning each have distinctive decisional features. Finally, lawyering involves an encounter with a wide range of non-legal realities, which serve as topics for the discussions and decisions that lawyering produces: narrative, emotion, relationship, power, money, and interests.

Where did the law go?

One approach to an answer starts with the primacy, even the dominance of the law; in its purest, most rigid form, the Langdellian model of appreciation of different emotions becomes a pathway for an appreciation of different views, if not of the world, at the very least of the situation in which the decision occurs. See Nussbaum, supra note 330, at 719 (depicting Stoic as believing only one’s own thought has value). Difference in emotional responses thus becomes a path to discerning different ways to reason through the situation; a hallmark of “difference” analysis. For a further discussion of difference analysis, see O’Leary, supra note 342, at 84-85 (encouraging lawyers and law students to research and understand diverse perspectives).

344. Of course, in some situations, the rhetoric of difference plays a strong role in the legal rules which operate in the situation; for a lawyer to ignore this rhetoric, and the power it provides for the client under the law, may constitute malpractice.
lawyering deduces results from legal principles within the confines of narrowly circumscribed sets of facts: "applying the law to the facts." Yet this is too thin an appreciation, not just of facts, but really of law. The topics I have described offer a rich lode of perspectives, beliefs and external constraints; surely the law exerts an equally rich influence.

I suggest that law and legal rules form another topic of lawyering. A regular, mandatory presence, the law pervades our conversations and the decisional tasks that we encounter as lawyers. Karl Llewellyn describes law as "a piece of the environment" which influences but does not control the outcome of decisions.

How does law interact with the other topics? A complete answer would outrun this Article; but some preliminary thoughts are possible. Legal rules have a variably binding influence on decisions in practice, leaving disparate ranges of discretion to individuals as they arrange their behavior and assess possible lawsuits. In some situations, the legal rule will mandate behavior that the parties cannot or will not avoid. If so, law is the dominant topic.

In others, the law creates zones of discretion within which adjudicators and parties can act with less constraint. Some substantive rules create explicitly flexible standards, leaving discretion within which an eventual adjudicator might rule. In transactions, statutes and regulations create both mandatory rules and discretionary guidelines, explicitly barring some behaviors, while remaining silent on others. The intersection between individual discretion and the state's foresight creates room for transactional planning. Finally, many clients question whether to use the law at all; for example, parties might choose not to sue, or not to engage in the regulated behavior, preferring instead to seek consensual, unilateral or even no further action.

345. See Section II.A (offering insight on legal science and realists).
346. See LLEWELLYN, supra note 10, at 14 (noting law has impact on surrounding environment). Llewellyn states that:
[T]he action of the judges past and prospective becomes a piece of [the lawyer's] environment, a condition of [the lawyer] living—like the use of money—with which [the lawyer] must reckon . . . to get where [the lawyer] would go . . . . It will be [the judges'] action and the available means of influencing their action or of arranging . . . affairs with reference to their action which make up the "law" you have to study. And rules . . . are important so far as they help [the lawyer] see or predict what judges will do or so far as they help you get judges to do something. See id.
347. Decisions exist even here. A party can avoid such a mandatory rule, but only if prepared to accept the risk and cost of penalties which may result.
348. Examples include, the "best interest" of a child in a custody case, or rulings on relevance in an evidentiary hearing.
349. See Miller & Sarat, supra note 128, at 532 (describing modern American society as passive due to slow and inefficient institutions for dispute resolution). The authors present the results of a study appraising the incidence with which "grievances" become "claims," claims become "disputes" and disputes turn into court filings. See id. at 537 (providing table of information regarding grievance,
Where the law leaves discretion to decision-makers, it remains influential, but the influence of other topics increases. The broader the discretion and the thinner the guidance provided by law, the richer the influence of the other topics becomes. Writers on lawyering have stressed this fluid interaction between legal rules and the other topics. For example, Binder, Bergman and Price's discussion in *Lawyers as Counselors* presents a standard vision, something close to the received wisdom. Each step of decision-making entails the development of non-legal realities: clarifying objectives, identifying alternatives, identifying consequences and making a decision. The authors present a structured model of dealing with the interaction between legal and non-legal topics that finds echoes in the other lawyering texts.

claim and outcome rates for different types of problems). The study indicates that an overwhelming majority of grievances never becomes disputes which the participants brought to lawyers; on average, only 10.3% of grievances came to lawyers. Of those cases that did come to lawyers, slightly more than 50% (51.5%) did not result in a court filing. The study does specifically address how lawyers handled the "unfiled disputes," i.e., through negotiation, unilateral action or refusal to act. See id. (analyzing success of various actions through "no agreement," "compromise" or "obtaining whole claim"). Note that the authors focused on dispute resolution; we have no comparable studies of the extent to which lawyers screen untenable, unrealistic transactional opportunities from implementation through legal devices such as contracts, transfers, organizational structures or legislation. See id. at 561 (referring to limits on generalizations made from study).

350. See Binder et al., supra note 56, at 32-81 (explaining effective ways of approaching lawyer/client relationship). In Chapter 14, they discuss the allocation of responsibility for final decisions between lawyer and client, arguing strongly for a version of client-centeredness which relies heavily on the decisional prominence of non-legal realities about which clients have the best and most useful knowledge. See id. at 258-86 (discussing counseling and decision-making process). In Chapter 16, they provide a series of considerations and steps in preparing for client decision-making. See id. at 287-308 (discussing implementation of four basic client approach).

351. See id. at 290-92 (providing insight on importance of clarifying objectives); see also id. at 309-15 (offering techniques for clarifying client's objectives in Chapter 17).

352. See id. at 292-93 (describing second step of client approach and introducing techniques for identifying alternatives); see also id. at 316-31 (detailing techniques used to identify alternatives).

353. See id. at 293-308 (introducing step three, identifying consequences, of basic approach); see also id. at 332-46 (detailing step three and providing information on how to identify consequences of legal action).

354. See id. at 308 (introducing information on decision-making); see also id. 347-61 (detailing process of decision-making step found in basic counseling approach).

355. See Bastress & Harbaugh, supra note 114, at 235-54 (describing counseling preparation as including legal research); Bellow & Moulton, supra note 48, at 998-1080 (describing counseling as integrating legal and non-legal factors into practical problem-solving); Cochran et al., supra note 114, at 141-57 (describing counseling as staged series of inquiries into both legal and non-legal matters); Haydock et al., supra note 114, at 28-30 (describing "Smart Preparation" as including both law and other non-legal matters); Krieger et al., supra note 76, at 31-
These texts help us to structure our encounter with the integration of law and other topics, but they tell us little about how the lawyer actually accomplishes this mental feat. The law often presents itself as a series of conceptual, cognitive structures; the non-legal topics often contain concrete, urgent, affective dimensions at variance with the texture of the law. How can we think both conceptually and affectively at the same time?

For this, we have a number of compelling stories, including Anthony Kronman and his lawyer-statesman.356 Yet Kronman centers his story primarily on an oscillation and tension between sympathy and detachment, without developing the richness of the experience. Martha Nussbaum presents the more compelling story.357 Nussbaum stresses the "priority of the particular," frequently noting the relative inadequacy of law or legal rules to deal with non-repeatable elements.358 She stresses the value of

44 (describing lawyering strategy); id. at 195-206 (describing counseling as a staged series of inquiries into both legal and non-legal matters).

356. See KRONMAN, supra note 13, at 54 (describing lawyer-statesman). Kronman's notion of practical judgment entails the balancing of incommensurable ends with the assistance of two characteristic mental activities: compassionate imagination of all of the consequences of a decision; and detached assessment of their competing claims, at the very least to leave some freedom from compassion so as to make the choice. See id. at 66-74 (describing intuition and deliberation as means of observing self). In Kronman's view, this balancing of sympathy and detachment is a "character trait," available naturally only to a few, and replicated only with effort by the rest. See id. (comparing intuition with deliberation). I find Kronman's description of the oscillation between sympathy and detachment, subjective and objective, to be characteristic of the encounter with the mixed texture of the lawyering topics themselves. However, his formulation of the critical mental attribute as a character trait seems unduly restrictive, perhaps elitist. A more accurate assessment would see practical judgment as a mental state that emerges in response to the decisions faced in practice. Why or for what reasons a particular lawyer might exercise that judgment more effectively, or even more wisely than another offers a different set of questions.

357. See Nussbaum, supra note 191, at 54-105 (presenting sympathetic view of Aristotelian conception). She argues closely from the same Aristotelian sources. See id. (discussing Aristotle's arguments against contemporary proposals for rationality). Nussbaum centers her argument around a claim that practical reasoning is not scientific, developing from Aristotle an alternate notion that "the 'discernment' of the correct choice rests with something that he calls 'perception' . . . some sort of complex responsiveness to the salient features of one's concrete situation." See id. at 55. She discusses the same challenge of reaching choice between incommensurables that Kronman addresses, and reaches similar conclusions about the desirability of imagining the feel and singularity of each incommensurable value. See id. 55-66 (contrasting Aristotelian theories with notions used by contemporary social science).

358. See id. at 66-75 (refuting idea that general rules or principles of rational choice can be applied to each case). At one point, Nussbaum posits an Aristotelian view that "the law is authoritative insofar as it is a summary of wise decisions. It is therefore appropriate to supplement it with new wise decisions made on the spot; and it is also appropriate to correct it where it diverges from what a good judge would do in this case." Id. at 69. Elsewhere, she stresses "Aristotle's point in all these cases is that the rule or algorithm represents a falling off from full practical rationality, not its flourishing or completion." Id. at 73. Of course, the circumstances in which lawyering occurs rarely allows for full practical rationality; yet
the imagination and the conceptual weight of emotion in practical reasoning,\(^{359}\) while acknowledging the importance of intellect.\(^{360}\) She suggests that these “three elements fit together to form a coherent picture of practical choice:” “the Aristotelian agent is a person whom we could trust to describe a complex situation with full concreteness of detail and emotional shading, missing nothing of practical relevance.”\(^{361}\)

Of course, lawyering involves more than just description of complex situations, more than just assessment; it involves achieving finality, provisional or permanent, with action on choices within constraints of time, resources and energy.\(^{362}\) Yet Nussbaum’s description of the capacity to perceive resolution in the complex texture of the lawyering topics describes a critical element of practical judgment in lawyering, as a single mental experience of insight or perception.\(^{363}\) Practical judgment accounts for each situation’s uniqueness and challenge, perceiving available

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Nussbaum’s description of the extent to which legal rules only partly occupy the field of effective decisions has a strong resonance for lawyering.

359. See id. at 75-82 (depicting Aristotelian theory as excluding imagination and emotion from rational choice). I have explored these views more fully in discussing emotion and interests as topics. See Section III.C.2 (exploring “emotion” as topic of lawyering).

360. See Nussbaum, supra note 191, at 80 (explaining that “the inclusive view of perception . . . has emotional and imaginative, as well as intellectual, components”). She does express concern about the risks of overstress on intellect in the process of practical judgment:

[F]requently a reliance on the powers of the intellect can actually become an impediment to true ethical perception . . . It frequently happens that theoretical people, proud of their intellectual abilities and confident in their possession of techniques for the solution of practical problems, are led by their theoretical commitments to become inattentive to the concrete responses of emotion and imagination that would be essential constituents of correct perception . . . [S]uch a person cannot have any knowledge of the people and events around him. His sort of incomplete perception can never reach the subject matter or engage with it in a significant way. So the Aristotelian position does not simply inform us that theorizing needs to be completed with intuitive and emotional responses; it warns us of the ways in which theorizing can impede vision.

Id. at 81.

361. See id. at 84 (describing Aristotelian agent).

362. See infra Section III.E (offering discussion of practical limitations facing lawyers while making decisions). Nussbaum does relate her vision of practical reasoning to the concrete demands of legal judgment, although her discussion diverges toward an assessment of adjudication and the judgments required of political leaders. See Nussbaum, supra note 191, at 97-101 (stressing importance of perception and judgment).

363. See id. at 100 (summarizing that good legal judgment includes “rich and responsive personality”). It also echoes the complex responsiveness of judges described by Llewellyn, as quoted by Kronman. See Kronman, supra note 13, at 198-99 (describing Llewellyn’s science of law). It comport as well with a view of practical reasoning in adjudication as a form of complex, preconscious responsiveness to the lived experience of a situation, described by Linda Meyer in developing certain perceptions by Heidegger. See Meyer, supra note 198, 652-54 (describing Heidegger’s distinction between “present-at-hand” and “ready-at-hand”).
choices and decisions in part by relaxing the decision-maker's mind away from the cognitive surfaces of rules, and into their active, persuasive content. 364

If Nussbaum's account of practical judgment is right, we need to ask whether law as enacted by lawyers in lawyering bears any resemblance to the legal rules that judges and legislators so carefully construct. Her account also contradicts the consistency and regularity with which lawyering produces similar results in analogous situations, given the arguably chaotic, non-repeatable specificity of the lawyering process.

At least one tenable explanation focuses on the powerful organizing influence of lawyering habits. Anthony Kronman stresses Llewellyn's views on the "craft tradition" in adjudication, what Kronman describes as "a connected body of habits acquired through experience." 365 In The Common Law Tradition, Llewellyn says:

One of the most obvious and obstinate facts about human beings is that they operate in and respond to traditions, and especially to such traditions as are offered to them by the crafts that they follow. Tradition grips them, shapes them, limits them, guides them; nor for nothing do we speak of ingrained ways of work or thought, ... [or] of habits of mind. 366

Kronman in turn stresses a particular feature of judicial habits: how to choose which doctrinal area fits the facts from which the dispute has emerged. 367 Again quoting Llewellyn, Kronman notes the enormous flu-

364. See Nussbaum, supra note 191, at 97-101 (stressing importance of judgment). This language sounds close to prescription, a statement of how lawyers should practice, or how good lawyers practice. See Kronman, supra note 13, at 109-61 (describing ideals associated with lawyer's professional life). But the description here remains description only; in my view, all lawyers encounter the topics of lawyering in engaging the decisions they face in practice. A lawyer can respond to these dimensions intentionally and with care, or carelessly and by default; but the engagement occurs, even in ignorance or rejection of a given topic. I am ready to suggest that greater awareness of these topics, and greater care in accounting for the uniqueness of situations, in all of their elements, does constitute "good" practical judgment. But the suggestion takes me beyond the scope of this Article.

365. See Kronman, supra note 13, at 215 (discussing human element of craft tradition).


367. See Kronman, supra note 13, at 216 (discussing implications of judge's habits on their decision making). Kronman stresses this latter point:

Llewellyn claims that even at the most basic level of case-construction—where irrelevant facts are distinguished from relevant ones and the latter organized into a controversy with a recognizable legal shape—widely shared professional habits incline judges not merely to think alike, but to see alike, and thus to concur in their perceptual judgments. Id. Kronman also notes another, related set of habits: how to develop and articulate the law once a doctrinal area has been chosen that fits the situation. See id. at 209-25 (analyzing effects of judge's habits on their decision making ability).
idity of mind involved in assessing facts against the structured background of doctrine:

As he meets the facts of a fresh case, or, once the facts are semiclear, as he approaches an authority for guidance toward decision, he is engaged in human questing for a diagnosis and an organization of the problem, and in lawyer questing for a legal way to see and to pose the issue, and for a legal line along which to puzzle . . . . The mind therefore sorts, arranges, turns, rearranges the facts in one tryout after another, in search for some firm shape that fits, that poses and sharpens a problem, perhaps even suggests a solution. The mind thus almost of itself spots and highlights in an authority the available facet which feels as if it may give a lead. 368

Substitute lawyering topics for the word facts, and we have an accurate description of how lawyers use legal rules in the context of practical judgment.

This description stresses a cardinal intent of lawyering: to find a legal frame for decisions. 369 Lacking that intention, we lack a defining characteristic of lawyering as an activity; its presence guarantees consistency at least of analytical intention from lawyer to lawyer. Second, the description allows us to see the mind of the lawyer as it searches to perceive resolutions within legal rules themselves: "the mind . . . spots and highlights in an authority the available facet which feels as if it may give a lead." 370 The lawyer searches for and finds in the law itself a way to organize and integrate the other topics of lawyering.

The lawyer's own analytical habits thus constrain his flexibility with particular decisions. 371 The experience from which these habits emerge is

368. Id. at 216 (quoting LLEWELLYN, supra note 366, at 119).
369. See id. Not surprisingly, such an intention is reinforced by provisions of the applicable codes of ethics, by provisions against unauthorized practice of law and by the promise of malpractice liability for failure to find and integrate the law into lawyering decisions. For relevant ethical provisions, see, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001) (stating that lawyer shall provide competent representation); MODEL RULES OF PROF'L CONDUCT R. 1.2 (2001) (describing scope of lawyer's representation); MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 (1980) (defining competent representation, including obligation to keep abreast of law); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) (advocating zealous representation within bounds of law, including obligations to assess the merit of client goals under the law, to disclose what the law requires the lawyer to disclose, and to inform a tribunal of legal authority (but not factual information) harmful to her client).
370. See LLEWELLYN, supra note 366, at 119 (discussing human element of appellate judges' decisions).
371. See KRONMAN, supra note 13, at 217 (discussing lawyers' analytical habits). Kronman locates the genesis of these habits of mind in experience; "no amount of abstract theorizing can ever be a substitute for them." See id. (explaining judges' habits are created by experiences). This usage of "habits" relates directly to the cognitive optimism of John Bradway, and refers to any model of lawyering behav-
precisely the experience under discussion: the experience of lawyering, which includes the experiences of assessing the shape and content of legal rules. Different lawyers will have differing habits in using law as a topic, and in assessing whether law is primary, dominating other topical influences. Indeed, the very fluidity and variability of many of the topics, as well as the unbounded nature of negotiation, call out for routinized habits, and encourage development of expertise in a substantive field.

The law as a topic of lawyering does not just structure the other, more inchoate topics. A richer view sees law as the conduit through which broad, public allocations of the lawyering topics flow into and shape specific, local decisions. The law defines relationships, allocates power, quantifies outcomes, and helps structure goals and interests. Lawyering merges

ior offered to law students as a template from which they might develop their own lawyering style. See BRADWAY, HOW TO PRACTICE, supra note 51, at 5-8 (discussing thinking skills needed by lawyers). Bradway, at least, was quite specific about the ultimate utility and limitations of the lawyering "habits" he described:

In this book we supply the reader with a series of these basic legal patterns and administrative check lists. The man who memorizes or uses them without any imagination will not profit very much. Anyone who employs them as a point of departure for the development of a somewhat similar set of patterns suited to his own individual needs will find them of greater value. Those needs may be determined by a frank and thorough self-appraisal. The persistence essential in acquiring sound professional habits is a personal affair.

Id. at 5.

372. See generally KRONMAN, supra note 13 (proposing lawyer-statesman model of attorney as ideal and warning that intellectual and institutional forces are aligned against this model). "By the time they are appointed to the bench, most judges, in the Anglo-American system at least, have already had extensive professional experience and possess the habits of mind that Llewellyn describes." Id. at 217.

373. See Eyster, supra note 263, at 762-63 (discussing challenge of teaching effective and ethical negotiations). I stress negotiation for reasons suggested by Mary Jo Eyster in her description of the structural features of negotiation: "1) negotiation is a largely visible, undocumented, and unreviewable process; 2) negotiation is a wholly informal process ungoverned by any codified procedural rules; and 3) negotiation practices are not specially addressed, except in the most general way by [available codes of ethics]." Id. at 762-63 (analyzing components of negotiation). I would add to this list three other characteristics of negotiated decision-making that enhance (or aggravate) its fluidity as a decisional context. Negotiation lacks any formal rules for assessing the quality and reliability of information; there are no negotiation rules of evidence. Except for very broad parameters, negotiators have a broader range of remedies from which to select, many unavailable through formal judicial or regulatory process. Finally, negotiation is decision-making in an explicitly relational context; one must persuade someone at the very time one is subject to persuasion by that person, a unique intersection of expressive, coercive and deliberative experiences.

374. See Blasi, supra note 85, at 335 (comparing recognition and retrieval to researching). Indeed, Gary Blasi has provided an excellent cognitivist description of the pattern recognition and neural networking characteristic of familiarity with the multiple contexts that can intersect in a particular lawyering task. See id. at 335-42 (discussing problem-solving through pattern recognition and various mental and situational models).
deliberation over these public topics into private, or at least situation-specific, deliberation. The habits of mind that lawyers develop serve to structure and guide deliberations, as does the basic intention to use law alongside the other topics. Consciously or not, the lawyer considers public and private, general and contextual realities in the decisions they reach, advise, negotiate or persuade. Whether she asserts, acquiesces in or rebels against the law's pre-arrangements of topics, every lawyer is a public interest lawyer.

E. Practical Limits

The story of the perfect "Aristotelian agent," fully responsive to the particularity of each individual decision, does not fully describe the daily practices of lawyers. Indeed, for practitioners, the ideal feels unreal, not responsive to lived experience. In this hard-headed view, the true Aristotelian agent lives in a world with limitless capacity for good decision-making: the world of fiction.

Lawyering happens in non-fiction, with intractable constraints and persistent limitations, most of them well-recognized, and few if any subject to editing by the stroke of pen or the press of a key. Decisions must usually occur within set times: the deadlines of litigation and docket control; or the half-life of opportunity in a negotiated deal. Moreover, situations without resource constraints or transaction costs seem rare, particularly in litigation, with its commitment of public judicial resources. Finally, the personal and spiritual energy available to lawyers and clients is a wasting asset. Except perhaps in disputes affecting life-defining values, including those of personal liberty, attentions can stray, opportunities stale, and lawyer or client both move on.

375. See William R. Bishin & Christopher D. Stone, Law, Language, and Ethics: An Introduction to Law and Legal Method vii (1972) (listing various skills lawyers must possess). Such a rejection misses real opportunity for the practitioner. "[A]lthough the lawyer may not always be aware of it, in his day-to-day tasks of counseling, planning and contending, he is engaged in activities that philosophy—as well as such related disciplines as psychology and sociology—has long sought to analyze and illuminate . . . ." Goldfarb, Beyond Cut Flowers, supra note 138, at 719 (quoting Bishin & Stone, supra, at vii).

376. See Nussbaum, supra note 191, at 84-93 (illustrating and persuading reader with extended quote and careful assessment of scene and decision from Henry James' The Golden Bowl). Nussbaum goes on to discuss the practical judgment required of judges and legislators, without extended discussion of how constraints on decision-making might affect those judgments. See id. at 97-104 (contrasting public and private choice).


378. Fighting over justice, particularly with stakes that affect survival needs or personal freedoms, can encourage a resiliency of spirit, or at least a persistence of...
Other limitations appear in the process of assessing, making and acting on decisions themselves. Decisions require information; yet the flow of information in lawyered decisions has notorious limits. Resources often control both the amount and the quality of the information that the lawyer can acquire. Moreover, her information is of suspect quality. Whatever we say about formal proof, the information base in negotiation, particularly transactional lawyering, where most lawyering occurs, requires careful handling and an ingrained skepticism. Moreover, reliable information emerges not in the isolation of scholarship, but in active relational dynamics, the interpersonal communication of stories and counter-stories, requiring assessments in the midst of active, often urgent relational pressures. Finally, the topics of lawyering themselves produce information of diverse, even divergent psychic texture: the hardness of quantitative values, the concreteness of physical objects, the sharp sur-

379. See generally Bastress & Harbaugh, supra note 114 (defining and emphasizing importance of information in its relation to legal negotiation). A litigator can plausibly argue that they are better off in this regard, since they have a story provable under formal rules of evidence as a check against the indeterminacy and inclusiveness of a negotiator’s story-construction. Of course, both sides in such a dispute have a provable story, conflicting in key respects.

380. See generally Eyster, supra note 263 (discussing lack of procedural guidelines to govern negotiation process). A rich literature exists on the strategic value of accurate information and the difficulties of accurate assessment in negotiation. Full review of that literature is beyond the scope of this Article. For an interesting perspective on strategy, see for example, Donald L. Harnett & Larry L. Cummings, Bargaining Behavior 164-65 (1980) (studying whether possessing more information in negotiation may disadvantage possessor where norms of fairness are in operation). For a description of the difficulties and cognitive distortions imposed by lawyers on information, see, for example, George Loewenstein et al., Self-Serving Assessments of Fairness and Pretrial Bargaining, 22 J. Legal Stud. 135, 138 (1993) (assessing phenomenon of “selective perception” and its influence on lawyer’s perceptions of value in negotiations); Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in BARRIERS TO CONFLICT Resolution (Kenneth J. Arrow ed., 1995) (describing variety of evaluative habits in negotiations, including discounting unknown facts in favor of known facts, and phenomenon of “loss aversion,” through which negotiators assign greater values to prospective losses than to prospective gains of equivalent size and likelihood of occurrence). Moreover, a separate, and equally expansive literature focuses on the problems of conscious misrepresentation and lying in negotiation. See generally Wetlaufer, supra note 263 (identifying types of lies that are told in negotiations and effects of those lies in various circumstances); White, supra note 263 (discussing ethical limitations on lying in negotiation and difficulty of establishing and accepting rules concerning truthfulness).

381. See generally Goldfarb, Beyond Cut Flowers, supra note 138 (examining relationship between clinical legal education and critical legal studies and tracing both to roots of legal realism). One interesting suggestion on clinical lawyering theory posits that it inherits a portion of the legal realist tradition, labeled “fact skepticism,” which “refers to the idea that the legal system is incapable of reconstructing the complexity of past events with enough accuracy to afford certainty to decision makers or observers about what has occurred and what should occur.” Id. at 718-19 (citing Jerome Frank, LAW AND THE MODERN MIND xi-xiii (1949)).
faces of rules, the suggestive resonance of memory, the inchoate urgency and immediacy of interests and emotions. Shaping this experience to useable form severely constrains fully contextual decisions.

Moreover, lawyering embodies an imperative for action. Lawyered decisions lead directly to action, the intended result of the choice. Decisions in counseling become tasks and results, which in turn become further decisions: by consensus in negotiation, by a neutral in advocacy or by future actors in transactions. Lawyers thus do more than assess or describe, they act on what they assess. The relation between assessment, decision and action is neither one-way nor static. The imperative of action generates personal responsibility, both through influence on decisive events, and through accountability for outcomes, ethical and legal. 382

Taken together, these constraints may lead us to ask, "how can lawyers engage in any practical judgment under these conditions?" The brusque, if oblique answer: "all the time." For decisions do occur in lawyering, on a regular basis. The severity of these constraints does not prevent practical judgment; rather, it affects the quality and acceptability of the results it produces. How far do constraints on decision-making allow a lawyer to fall away from perfectly responsive, contextualized judgment? For if we accept the limiting force of time, resources, energy, information, and action, only a bare minimum of engagement may suffice.

382. See generally Goldfarb, A Theory-Practice Spiral, supra note 138 (examining relationship between clinical education and feminist jurisprudence with focus on ethical importance of theory-practice relationships). Here again, Phyllis Goldfarb has pointed to a valuable theme in lawyering theory, by noting a significant difference between clinical teaching and other forms of learning legal rules and professional roles, the student's personal accountability for the impact of their learning practice on another:

A person's response to a question about what she would do if she were responsible in a hypothetical situation is different from being responsible for acting in a real situation; not only because the latter situation engages a person at a more intense, purposeful, and consequential level. A person addressing a hypothetical description, even a highly particularized one, cannot fully grasp what "drives" the event and is missing "the thousand intangibles" about the people and the events involved that establish the conditions for, and the constraints on, ethical judgment. Id. at 1663-64.

In my view, her discussion of teaching method overstates the case, assuming the best and the worst of the alternatives. Compelling teachers in all formats, including the Socratic method, can bring home personal accountability for student analyses with remarkable power. Moreover, one can certainly (if unpleasantly) imagine clinical supervision that fails to develop the students' sense of responsibility, by failing to put them in situations of accountability, and by rescuing them without reflection from the consequences of their actions. I do accept a milder version of her comment, that certain teaching environments may on average and in competent hands communicate personal responsibility more reliably than others.

Her point about lawyering remains valid: lawyers experience accountability for the consequences of their lawyering actions that will emerge (consciously or not) either from personal commitment, external regulation, or market discipline. See generally id. (discussing clinical methods and clinical theory regarding lawyers' responsibility).
Ethical and malpractice rules may create normative minima, but decision-making itself sets a functional minimum: the demand for finality. Clients may come to lawyers for the best decision, but they certainly come for a final one. Lawyers work towards conclusion, bringing decisions to closure and enabling the client to move on. Conclusive action can occur through judicial decision; but far more commonly, it happens through client consent: either plea or settlement in litigation; negotiated transactions; or even the choice to go no farther (at least with the lawyer). The imperative of finality sharpens the question of how fully the lawyer must assess a decisional situation. The answer becomes: enough to allow the client to make a final choice.

How much certainty must a client attain to make such a choice? Anthony Kronman's account of "regret" provides a useful start towards an answer. The act of choice requires an exercise of will in two ways, one immediate, the other long-term. First, the client selects and commits to act on one of the choices produced by the lawyer's assessment; this commitment continues until circumstances require reappraisal. Second, the client must develop enough understanding to resist regret for the options not selected. Since regret may not emerge until after the chosen path plays out, the client needs enough strength of mind and will to persist into the future, perhaps even permanently.

Kronman describes the kinds of judgments which both enable action and allay regret as the product of "practical wisdom." But, the norms of

383. Assume for a moment that a lawyer has assessed a client's situation, and identified with the client a range of possible plans of action. Each of these plans (if successful) would accomplish some, but not all, of the client's interests and goals. The lawyer's work structures the choices clearly, and achieves some degree of predictive certainty about likely outcomes. Since no choice fully satisfies all goals, the client will have to choose between different configurations of the values that each plan advances; in effect, the client faces a choice between interests, which the particular decision has rendered conflicting.

384. See Kronman, supra note 13, at 74-87 (discussing regret's impact on person's habits).

385. See id. at 128 (discussing lawyers' choice to serve client). In Kronman's account, not only does choice involve the selection of the most desired option by the decision-maker, here assumed to be a client. See id. at 68 (stating "one of the advantages of informed decision making is that it increases the chances of identifying the superior alternative"). It also entails the rejection of other choices, nearly as desirable, but not selected. See id. (discussing how informed choice maximizes one's ability to understand alternatives). If the decision-maker knows or has imagined little about the alternatives, she becomes subject to persistent regret, a regret that can undermine the firmness of will necessary to hold to the chosen course. But if on her own initiative, or with the assistance of a counselor, she does assess the consequences of each path in adequate detail, the risk of regret reduces. She has greater reason to understand why she accepted the loss of the rejected benefits, and more reason and incentive to engage in the option she did select. See id. at 84 (stating importance of detachment to prevail with present choices).

386. See id. at 86 (discussing necessity of foresight in deliberation). This is a normative construct: it includes assumptions both about durability and about peace of mind. "Peace of mind," or more technically, acceptability of outcome,
wisdom aside, practical judgment must produce enough certainty to allow the client to commit to action and resist doubt. In requiring this much, the expectation of finality becomes in effect another constraint on practical judgment. Lawyers cannot assure perfect Aristotelian deliberation; nor can they assure complete freedom from regret. But the lawyer must still produce for the client sufficient insight and understanding to move to the next step, and then to finality, and then to a life without the lawyer.

This account may seem cramped and cautious compared to a more expansive vision of wisdom for lawyers; but it has its comforts. First, it matches the consistent cognitive advice of most if not all of the lawyering texts: assess the information, include the non-legal topics, generate options that respond to the mix of legal and non-legal topics, discuss those options as fully as possible with the client and decisions will follow. Second, it matches a strong intuition of what happens with decisions in the other law jobs: in negotiation, sufficient joint insight to justify consent; in advocacy, sufficiently persuasive stories to move the adjudicator to a desired result; and in planning, sufficient insight and narrative power to keep future actors in a transaction working with the same script. The rigor of lawyering, and of practical judgment, consists in meeting the demands of finality within other constraints, while striving for full insight into the decision.

F. Lawyers and Final Decisions

Lawyers do not usually make final decisions, despite even the most detailed and responsive of assessments. We assume that clients serve as

refers to those outcomes with which the client can live without bitterness; those that the client might assume voluntarily, in the absence of coercion. "Durability" requires more than anticipating remorse or bitterness. It also calls for anticipating alteration and change through chance and circumstance, for arranging present action to minimize disruption by contingencies, and for planning later response to those risks. Wisdom involves a particularly effective form of judgment, and produces results that are proof not only to client regret, but also to changes in circumstance.

These twin values, desirable in themselves, assume clients are free from oppression. Consider how little control over circumstances many clients have, facing powers that force their decisions without regard to their animating values. See Dinerstein, supra note 100, at 506 (analyzing traditional legal counseling where clients are passive and delegate decision-making to lawyer). For these clients, practical wisdom veers dangerously towards acceptance, in the sense of capitulation; wisdom departs from justice. "Durability of outcome" and "peace of mind" are most available to those who control their world, and least to those who cannot.

387. For examples see Bastress & Harbaugh, supra note 114, at 235-54 (describing counseling preparation); Bellow & Moulton, supra note 48, at 998-1080 (describing counseling as integrating legal and non-legal factors into practical problem-solving); Cochran et al., supra note 114, at 141-57 (describing counseling as staged series of inquiries into both legal and non-legal matters); Haydock et al., supra note 114, at 29-30 (noting preparation includes analyzing legal and non-legal matters); Krieger et al., supra note 76, at 195-206 (describing counseling as staged series of inquiries into both legal and non-legal matters).
primary decision-makers. In negotiation, clients on all sides approve settlements; in advocacy, the judge or jury decides; while in planning, finality rests on the actors’ interpretations of their roles in the plan. Broadly accepted practice allows lawyers to move clients towards finality, so that the lawyer can either act further, or not act at all. But the lawyer herself does not make finality happen; others do.

Yet even a careful lawyer might conclude that her decisions do carry weight and that she can will the decision as she wants. The complexity and discipline of practical judgment may so immerse a lawyer in the decisional situation (with or without personal values at play) that they come to see the decision as their own. The more responsive her judgment, the stronger the illusion becomes that she controls the final decisions, despite very good reason to know otherwise. This disparity between expectation and reality leads us to a distinctive kind of lawyering anxiety.

I discuss anxiety hesitantly, since we may prefer to speak with certainty and confidence of law and lawyering. Moreover, as a psychological term, “anxiety” implies dysfunction, unjustified by external causes, and unprovoked by external stimulus, with potential to cause irrational and even damaging responses. This cuts against the sense of lawyers as normal (albeit intense) professionals, with a firm grasp on the boundaries between client decisions and their own. But these bounds are not always clear; lawyering does involve imaginative projection into a situation not the lawyer’s own. She constructs the decision situation as if she were the client, but then sheds this persona and assumes another, for other decisions and other clients.

The anxiety of not having final say in legal decisions takes at least three forms in lawyering, most explicitly and obviously as an anxiety of

388. See Dinerstein, Client-Centered Counseling, supra note 102, at 507 (discussing goal of client-centered counseling as enhancing client participation in decision-making and increasing likelihood that decisions are truly client’s intentions). One could usefully assess whether this element of coercion in the lawyer-client relationship presents ethical difficulties. See id. at 384 (discussing unpersuasive ethical arguments for client-centered approach to lawyering). Moreover, it may overstate this influence to describe it as coercion. We might safely assume that the client is at least as eager as the lawyer to end her encounter with the law and with lawyers. I do think it useful to notice this as a form of pressure exerted by the lawyer on the client, pressure arising out of the lawyer’s characteristic response to the demands of practical judgment. We might easily confuse this with the pressures so richly described in the debate over “client-centeredness.”

389. See OXFORD ENGLISH DICTIONARY 538 (2d ed. 1989) (“A morbid state of mind characterized by unjustified or excessive anxiety, which may be generalized or attached to particular situations.”). It is worth noting that psychiatry has co-opted the meaning of anxiety from an alternative, less dysfunction-oriented meaning: “the quality or state of being anxious; uneasiness or trouble of mind about some uncertain event; solicitude, concern.” Id. “Anxious” is defined as: “troubled or uneasy in mind about some uncertain event; being in painful or disturbing suspense . . . full of desire and endeavor; solicitous; earnestly desirous (to effect some purpose).” Id. at 538-39. These more assertive, less pathological definitions come closer to the sense in which I use the term.
advocacy. The lawyer prepares for trial with zeal and professional skill, aware that in the end she will transfer decisive responsibility to the judge or the jury. This shift of control occurs in negotiation as well, leaving the client and the other(s) to the final say.

A second anxiety occurs in transactions, an anxiety of planning. Here the lawyer constructs a thorough picture of the present situation, assessing the relevant dimensions of the deal or plan. She looks to the future risks, predicting not only likely legal outcomes in the event of conflict, but also those situational factors that might lead to conflict or profitable engagement. She drafts a script to constrain those risks, and encourage those benefits. At some point the document passes from her hands and into the hands of the parties who will live out its intentions; she can only watch as opportunities occur in their lives, not hers.

A third anxiety appears in the lawyer-client relationship, an anxiety of agency. The lawyer assumes the client’s primacy in decisions, despite the intensity, immersion and hard work of constructing a useful set of options. At the end of the counseling decision, the client makes fundamental decisions, using the lawyer’s work. The lawyer is separate from the product of her practical judgment, and must accept the client’s definition and resolution of the problem.

390. The exact ethical line between “fundamental” decisions reserved exclusively to clients and “tactical” decisions within the lawyer’s zone of autonomy remains a subject of some controversy. Compare Model Code of Prof’l Responsibility DR 7-101(A) & (B) (1980) (stating that in representation of client, lawyer may exercise professional judgment to waive right or position of his client); Model Code of Prof’l Responsibility EC 7-7 (1980) (stating lawyer is entitled to make decisions that will not prejudice rights of client but ultimate decision authority rests with client); Model Code of Prof’l Responsibility EC 7-8 (1980) (stating lawyer should assist his client in making morally and legally permissible decisions), with Model Rules of Prof’l Conduct R 1.2 (2001) (discussing lawyer’s duty to abide by client’s decisions concerning objectives of representation); Model Rules of Prof’l Conduct R 1.3 (2001) (requiring lawyer to act with reasonable diligence and promptness in representing client). For a useful review of the support or opposition these rules provide for a “client-centered” model of decision-making, see Dinerstein, supra note 100, at 534-38 (discussing ethical components of professional responsibility and conduct); see also Restatement (Third) of the Law Governing Lawyers §§ 20-24 (Proposed Final Draft No. 1 1996) (discussing allocation between client and lawyer of authority to make decisions concerning representation).

391. See Binder & Price, supra note 51, at 149 (noting that ultimate decision should be based on which alternative is likely to bring “greatest client satisfaction”). Finality in counseling may not occur at the time when lawyer and client reach a consensus. Many times lawyering will produce decisions which lay everything to rest; dispute between strangers over one time conflicts, for example. Yet even there, and certainly elsewhere, the influences that shape the decision remain in play for some time after the choice. See id. at 146 (identifying possible legal consequences of decision that lawyer must predict in advance). Even where a lawyer chooses to coerce a client decision, the decision remains subject to revision by the client after the counseling session and even the lawyering relationship. The lawyer leaves the choice behind, while the client lives it out. Finality from the lawyer’s perspective may thus happen far earlier than from the client’s. The extent
These anxieties differ little from the normal anxiety a client feels at turning the case over to a judge or a jury, negotiating outcomes, or waiting for the deal to play out. But the lawyer assumes their anxiety professionally, and thus intentionally. It marks the center of her mental landscape. The lawyer may believe in the central metaphor, and presume the same degree of control as the real decision-maker. As an advocate, this belief may enhance her motivation and her performance; as a counselor or a planner, it may deepen her understanding of the decision and its potential. But it may also result in pervasive miscalculation of strategic choices, either as to merit or tactics. It may push her to override her client’s choices. It may (if repeated and not unlearned) corrode the lawyer’s attitude towards the system, and towards the lawyering process.

Even a lawyer with a clear sense of the limits of her control may suffer from the anxieties. Practical judgment can create a psychic momentum, a conviction that the decisional situation has come into focus and presents problems which can or should be solved. But the client may disagree, or judge or jury may find otherwise, or plans go astray, and the lawyer may discount the outcome as error by the decision-maker, failing to explore gaps or weaknesses in her judgment. Even more harmfully, an attorney conscious of the limits of her influence may consciously choose to overstep them: over-influencing clients, over-planning transactions, over-plotting stories in advocacy, and overreacting in negotiation. Finally, the knowledge that she cannot control the decision may leave the belief that no one can: overstating the claims of practical legal judgment as the sole source of resolution for the client.

The anxieties cut to the heart of the lawyer’s sense of role. Lawyering is a rich and satisfying discipline, with a complexity and a humanity that satisfies diverse minds and spirits. But these satisfactions start with clarity: about the relative roles of lawyers and clients; about the limits of the lawyer’s influence and control over decisions; and indeed about limits of anyone’s control, which depend so heavily on contingencies and the motives of other actors. The pull of the lawyering anxieties can detach lawyers from their calling. Believing that they have more final power than they do, or frustrated by their acknowledged separation from control, they may turn away from a career in the law to other, more decisive pursuits. Conversely, those who stay risk doing so from a taste for power unmatched by

and frequency of later client action reforming lawyered decisions would pose an interesting area for empirical study.

392. See id. at 191 (discussing temptation to interpose lawyer’s solution). For a committed client-centered counselor, this particular response could create serious cognitive dissonance, with unpredictable consequences. See generally Dinerstein, *Client-Centered Counseling*, supra note 102, at 538 (discussing psychological benefits of client-centered counseling where free choice diminishes lawyer’s tendencies to act paternalistically). Even if the attorney successfully sustained her client-centered ethic, she would have to have absorbed the frustration of herself not being heard, and of believing that the client did not get what the attorney’s professional skills had led her to believe to be true.
an appreciation of its limits. Practical judgment in lawyering requires a balance between the lawyer's lack of control and her still quite powerful influence on lawyered decisions.

G. The Lawyer/Client Relationship

Although lawyering responds to a range of relationships, the relationship of client and lawyer remains at the center. Many descriptions of this relationship exist. In a "traditional" model, the client makes fundamental choices on goals, but permits (or is subject to) the lawyer's advice and even decisions about plans. In a "client-centered" model, the lawyer presents decisions neutrally and the client chooses among the plans based on her own values and understandings. In a "collaborative" model, the lawyer works jointly with the client, providing the same assessments, but also engaging in active discourse over goals and even moral consequences with the client.

These models instruct us on central concerns: how to develop good habits of practice as attorneys; how to foster good values in the lawyer-client relationship; perhaps even how to achieve better decisions. But the normative debate leaves some oddly fundamental questions unasked. Instead of asking what impact the lawyer should have on the client, we might ask instead: how does the lawyer-client relationship affect practical judgment?

It would be a fair test of the ideas in this Article to use the topics of lawyering themselves to assess the influence of this relationship. This assessment would review the relationship's central stories and their variants; its emotional content; its relational dynamics; the power wielded by the parties; the influence of money and other quantities; the interests of lawyer and client; and finally, the legal rules that apply. All of these influences play a distinctive role in understanding the ways that lawyers and clients relate, and more particularly in the kind of practical judgment that

393. See Binder et al., supra note 56, at 16-19 (comparing client-centered model with traditional conceptions of clients and problems); Cochran et al., supra note 114, at 170-73 (discussing "The Lawyer as Godfather" through dialogue); Shaffer & Cochran, supra note 145, at 5-13, 30-39 (comparing "The Lawyer as Godfather" with "The Lawyer as Guru").

394. See Binder et al., supra note 56, at 16-24 (presenting client-centered approach); Dinerstein, Client-Centered Counseling, supra note 102, at 507-11 (discussing Binder and Price's counseling model). Compare Shaffer & Cochran, supra note 145, at 15-29 (comparing lawyer as hired gun), with Cochran et al., supra note 114, at 173-76 (discussing "The Lawyer as Hired Gun" in reference to client-centered counselors).

395. See Cochran et al., supra note 114, at 176-87 (discussing "The lawyer as Friend" in reference to collaborative lawyers); Krieger et al., supra note 76, at 22-24 (describing clients as colleagues and collaborators in legal process); Shaffer & Cochran, supra note 145, at 40-54 (discussing job of lawyer to be friend to client).

396. See Section III.C.1-6 (discussing topics of lawyering and their effects on lawyer's everyday practice).
emerges from that relationship. I do not make that assessment here; but I do offer some preliminary predictions about its outcome.

The lawyer-client relationship entails a negotiation of extraordinary fluidity and depth.397 We do not have to, nor can we assume, collaboration, or even friendliness between lawyer and client; we need only assume joint decision-making.398 Jointness only assumes that client and lawyer find reason to accomplish a task together, the making of and acting on a decision that faces the client. In most cases, lawyer and client presume the decision will be subject to legal influence, justifying the lawyer's presence and distinctive voice.

In negotiation with their clients, lawyers encounter enormous variability in the power bases, relational expectations and practices, emotional commitments, narratives and narrative abilities, quantified desires, and interests and values of their clients. This variability holds good even within narrow practice contexts, and even when the client is largely imaginary.399 Differences in all these influences alter the way in which lawyer and client work together. If so, the variability in client realities should produce an enormous variability in the way that lawyer and client together produce practical judgments.

This assessment of the topics within the lawyer-client relationship may help explain a disturbing observation first offered by Felstiner and Sarat: that control of decisions between lawyer and client shifts during the relationship, and that large stretches of time occur without either party being in control of the decision.400 These gaps in control do not mean that the

397. See generally Felstiner & Sarat, supra note 171 (illustrating enactment of power between lawyer and client in "negotiation of realists" and "negotiation of responsibility"); Sarat & Felstiner, Law and Strategy, supra note 171 (listing lawyer/client interaction); Sarat & Felstiner, Law and Social Relations, supra note 171 (describing lawyer/client conversations in terms of past, present and future); Sarat & Felstiner, Lawyers and Legal Consciousness, supra note 171 (characterizing lawyer's descriptions of legal process to clients). Felstiner and Sarat's provocative analysis of the lawyer/client interaction provides powerful empirical support for such a model. See Felstiner & Sarat, supra note 171, at 1450 (discussing contrasting views of power). Their analysis has been acknowledged and developed in other writing. See, e.g., Hurder, supra note 233, at 80 (drawing on Felstiner and Sarat's research in discussing negotiation realities of lawyer/client relationship).

398. See generally Menkel-Meadow, supra note 124 (describing negotiation and dispute resolution framework); see also Russell Korobkin, A Positive Theory of Legal Negotiation, 88 Geo. L.J. 1789 (2000) (creating and advocating new "zone definition/surplus allocation" dichotomy). Indeed, negotiation theory generally provides very different descriptions of the degree of cooperation as opposed to competition which can (or should) exist in negotiation. See id. at 1790 (discussing competitive/cooperative dichotomy as related to negotiation).

399. Consider as examples of imaginary clients those lawyers who represent the public (e.g., prosecutors, government agency attorneys) or the public interest (e.g., class action litigators, legislative lobbyists). In each case, the lawyer has some discretion to imagine what her client (the public or its "interest") might decide to do in particular cases, and to act on that imagined conversation.

400. See generally Felstiner & Sarat, supra note 171 (discussing views of power in lawyer-client relations with emphasis on responsibility during negotiation pro-
negotiation has spun out of control. Forward motion and intent may have submerged, or become tentative and testing. The influences of the topics on lawyering do not remain static, but shift both as events shift and as lawyer and client perceive them differently. But the urge for finality that lies at the core of lawyering process continues to operate, and the lawyer and client can, and usually do, jointly find ways to influence each other enough to reach a decision.

I say jointly again; in my view, practical judgment in lawyering invariably emerges from relational decision-making. Both lawyer and client contribute to the decisions reached through lawyering, however we wish to model the lawyer’s behavior towards the client. Indeed, any model or theory of lawyer-client relationship seeks to justify patterns of relationship that the lawyer always applies in context. Some writers have acknowledged either that the methodology and approach of client-centered practice may be more or less desirable in some contexts, or that lawyers may need to modify it to suit the demands of clients who suffer a distinctive oppression. Felstiner and Sarat focus their appraisal of this phenomenon on the shifting nature of power. See id. at 1498 (discussing complex relationship between lawyer and client). I do not adopt their assessment of cause (“power”) for these shifts, not because I believe power to be insignificant, but because we can also explain those shifts in “power” in terms of other factors, the other lawyering topics. See infra note 401 (outlining factors other than powers). I am unwilling to accept an account of human relationships dominated solely by power analysis. See generally White, supra note 145 (examining efforts of outsiders in resisting South African government’s attempt to destroy black South African village).

Still, their point is fundamentally, creatively unsettling. How can any of the prevailing models of lawyer-client relationship (traditional, client-centered or collaborative) survive the perception that lawyer and client usually let control slip and wander around? The models lead us to think we can structure our relationship and hold to the plan; Felstiner and Sarat tell us that we probably cannot. See generally Felstiner & Sarat, supra note 171 (discussing instability of power in lawyer-client relationship and nature of power to change with time). I argue my own interpretation of their proposition in the text; but any universal model has a tough time surviving their description.

401. See generally Dinerstein, Client-Centered Counseling, supra note 102 (analyzing client-centered decision-making in light of traditional lawyer-dominated model of counseling). In his careful review of the history and limitations of “client-centeredness,” Robert Dinerstein appraises a variety of factors that might influence the lawyer’s decision whether to use a “client-centered” approach. See id. at 584-89 (presenting arguments for and against client-centeredness). These factors include: the lawyer’s own commitment to client autonomy (introducing the lawyer’s “interests” and “values” into the negotiating relationship); the nature of the power brought by the client to the relationship with the lawyer; the extent to which the political empowerment seems both desirable and possible by using “client-centeredness” with a particular population; and other psychological factors. See generally id. (noting variety of circumstances where client-centered relationship is most beneficial). He also describes a series of contexts in which, in his view, “the case for client-centeredness is most compelling.” See id. at 585-86 (discussing advantages of supportive relationships between lawyers and clients). Dinerstein assumes that a lawyer faces choices about how to act in and contribute to her negotiation with her client; that these choices will vary depending on the lawyer’s understanding of the factors he has described; and that in some situations, the same lawyer might act very differently in negotiating with a client than in negotiat-
sion. Similar conclusions seem logical for all lawyering: the lawyer-client relationship requires the lawyer to exert practical judgment about how to engage with the client.

The negotiation of lawyer and client thus produces and requires practical judgment; the relationship enacts the same influence that affects the tasked decisions. Selecting between models of lawyering for the particular task requires judgment from both lawyer and client about the relationship. As to lawyers, they not only assess and act on the decisions they and their clients reach. They also choose how, for their part, they want practical judgment to emerge from their relationship with the client, subject of course to the client's intentions. The simultaneity of practical judgment about the relationship and about the underlying decision ining with others. See id. at 584-97 (refining client-centeredness approach to include various factors).

402. See id. at 522 (discussing origins of client-centered counseling being restricted to poor). Similarly, Ann Shalleck has presented a careful review of approaches to representing “battered women,” which synthesizes various models of lawyering from the shape and cultural content of legal rules on domestic violence, from shared and divergent interests between lawyer and client, and from recognition and responsiveness to strong emotional content. See Ann Shalleck, Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused, 64 TENN. L. REV. 1019, 1029-37 (1997) (analyzing theories of representation for women who have been abused). Shalleck's vision incorporates a distinctive perception: that the very content of the law with which the lawyer will handle in the process of lawyering can (and in her analysis should) also affect the lawyer’s choice of approach to the client. See id. at 1027 (discussing models for lawyering battered women in effort to obtain greater understanding of abuse as well as strengthen lawyer-client relationship).

403. See Shalleck, supra note 402, at 1035 (describing lawyer’s ability to act effectively for client as being dependent upon relationship in which both lawyer and client are jointly involved). I will continue to talk only of the lawyer’s choices; we do not yet provide separate training for clients on how to deal with their lawyers.

404. See generally BELLOW & MOULTON, supra note 48 (analyzing different perspectives to develop good lawyer-client interpersonal relations). Gary Bellow and Bea Moulton present a characteristically clear-eyed and assertive version of this same perception:

In a sense we have here not a model of the lawyer-client relationship, but a framework for working through, with our clients and among ourselves, what relations with those who come to us for legal help might be. Such possibilities depend on particular social circumstances. But whatever the setting:

The relationship between lawyer and client can be a source of security and autonomy, but it can also generate dependence and subordination. It can focus or diffuse, enlarge or narrow the pattern of grievances that clients experience in an unjust social order . . . All legal assistance . . . is potentially a powerful system of social control, capable of defining and legitimizing particular grievances and . . . ignoring others.

Id. at 995 (quoting Bellow, supra note 225, at 122). Bellow's stress on the political dimension of choices about how to work with clients has strong resonance, applying equally whether the client is a victim or the beneficiary of societal injustice. See generally id. (discussing important social implications in providing legal services to poor).
presents a distinctive feature of practical judgment in lawyering. This judgment, in turn, rests on assessments by both lawyer and client of the power, emotions, relational context, money, and personal interests that influence their approach to each other.\(^405\)

This understanding might seem to eliminate the values advanced by more structured models of lawyer-client relationship: autonomy, avoidance of coercion, informed consent, client empowerment, recognition of third parties and the communication of moral perspectives. It leaves lawyers and clients confronting an open field within which to determine their relationship and accomplish their work.\(^406\) Yet even the field of this relationship is not unbounded. Broad legal and ethical parameters constrain it, and practitioner habits constrain it still further. These habits in turn

\(^{405}\) One can describe the phenomenon of lawyer-client negotiation using entirely different and more high-spirited language, as a process of deliberation. Indeed, deliberation is a constitutive feature of Kronman’s vision of the lawyer-statesman. See, e.g., Kronman, \textit{supra} note 13, at 132-35 (discussing lawyer’s responsibility to deliberate with client about client’s goals). Working from and expanding Kronman’s notion, Amy Gutmann places a similar stress on the value of deliberation. See Amy Gutmann, \textit{Can Virtue Be Taught to Lawyers?}, 45 \textit{Stan. L. Rev.} 1759, 1770-71 (1993) (explaining that deliberation has been neglected in legal practice). She accepts Kronman’s view of practical wisdom as including the exercise both of “affective dispositions” and of “intellectual powers.” See id. at 1768 (discussing rewards of practicing law). She also critiques Kronman’s vision of deliberation as too one-sided, involving the delivery of practical wisdom from lawyer to client, with no cross-influence. See id. at 1768-69 (discussing limitations of Kronman’s analysis). “The element that I think is missing from this understanding of practical judgment is the disposition of lawyers to deliberate, to engage with their clients in the mutual interchange of information and understanding, rather than the one-way flow that Kronman’s description recommends, his Aristotelian sympathies notwithstanding.” Id. Using this conception of mutual interchange, Gutmann asserts that deliberation itself not only has valuable political and cultural consequences, but may also enhance the experience of lawyering for both lawyer and client: “The exercise of practical judgment in the law can be all the more rewarding when it issues in deliberation by both lawyers and clients.” See id. at 1769 (adding collaboration to Kronman’s analysis). I agree with Gutmann’s assertion, even though my textual discussion uses “negotiation” to characterize the relationship of lawyer and client and its influence of the judgments reached between them.

\(^{406}\) See generally Binder & Price, \textit{supra} note 54 (explaining various factors to aid in develop strong lawyer-client relationship based on client-centered approach). I use the term “field” consciously. Its standard meanings include “\[a\]n area or sphere of action, operation, or investigation; a (wider or narrower) range of opportunities, or of objects, for labour, study, or contemplation.” \textsc{Oxford English Dictionary} 883 (2d ed. 1989). A more specific psychological description states “an environment or situation regarded as a system of psychological forces with which an individual interacts.” Id. Other meanings reinforce the sense of enclosure and limitation; if a field exists, we infer limits on the energy within that field. In the lawyer-client negotiation, the sphere of consideration consists of the various lawyering topics; some of these, especially the force of legal, ethical and procedural rules, further constrain or limit the boundaries of the field. The models of lawyer-client relationship constrain it still further and perhaps too far. See William Simon, \textit{Ethical Discretion in Lawyering}, 101 \textit{Harv. L. Rev.} 1083, 1086 (1988) (distinguishing between two models of lawyer-client relationships in which shared similarity is restrictive reasoning).
emerge from and respond to the lawyer's repeated exposure to negotiations with clients. The models of counseling provide templates for lawyer habits with clients, useful in many circumstances, expressive and encouraging of the values they assume.

But if we want to pursue those values, we must not confuse compliance with a model with the exercise of practical judgment. Mary Jo Eyster argues persuasively that good judgment in negotiation consists (at least in part) of decisions informed by the lawyer's commitments to her own values, political, moral and otherwise.\(^{407}\) Similarly, the practical judgments required by lawyering process include the values and moral commitments, the "interests", of all of the participants, including the lawyer. Each lawyer brings her own interests to each client, interests both coherent and contradictory.\(^{408}\) Practical judgment responds to the complexities of the field between lawyer and client. Both helpful and harmful values reside in the lawyer's choices, often simultaneously. We should encourage awareness of these values not just for their own sake, but also because the complexity will exist and the lawyer's values operate, even if we choose not to pay attention. If we seek a vision of good negotiation between lawyers and clients, we should stress the lawyer's discernment of how to engage with different clients in different situations, fully responsive to the influences and values she encounters in that relationship.

H. Developing Lawyers

The premise of this Article is descriptive: practical legal judgment is a mental response to the characteristic features of lawyering process, and particularly to the decision-making that occurs in lawyering. That premise leads to the conclusion that whatever and however a lawyer thinks in re-

\(^{407}\) See generally Eyster, supra note 263 (discussing need to focus legal education efforts on moral character to improve ethical conduct of legal profession). She describes negotiation as a behavior largely unconstrained by applicable rules; given this, she argues that we can only expect to train good negotiation judgment in individual lawyers. See id. at 780 (discussing lawyers' discretionary judgments). Eyster develops this view in response to views of William Simon on "ethical discretion," views that "would permit or require the attorney as negotiator (and in other contexts as well) to factor into her decision-making and conduct her personal and professional ethics." Id. (discussing Simon, supra note 406).

\(^{408}\) See Dinerstein, Client-Centered Counseling, supra note 102, at 552 (stating "lawyers have several interest that are potentially implicated in the lawyer-client relationship"). These interests might clearly include selfish, even unethical concerns: desire for personal gain or power, and accommodation of people or pressures other than the client. We trust the rules of ethics to regulate abuses resulting from these interests. However, this discussion should also make clear that our concerns as lawyers for client autonomy, moral decision-making, the interests of third parties, or even social and political justice represent our interests as well. We develop these interests in developing our professional persona, and we bring them with us, as tools or as weapons, into our relationships with our clients. We cannot help doing this, unless we, like the Stoics, seek to extirpate our own most personal attachments to the world.
response to her work constitutes practical legal judgment; and, as circular as it sounds, I would have to agree that this is, in fact, what I am saying.

But variations do exist in how different attorneys exercise practical judgment. We could, with time and great patience, develop some normative language for those differences, encouraging some, discouraging or even disciplining others. For present purposes, a much quieter question seems more useful: does an attorney's exercise of practical judgment develop over time? If so, how does a more experienced attorney do so? And finally, how can a young attorney go about strengthening her own practical judgment? As a summary of this section, and a preface to tentative answers, let me describe the expert attorney as she exercises practical judgment.

The experienced attorney manages an extraordinarily rich body of habits and knowledge. She will have a firm grasp of lawyering process, not just aggregating unrelated skills, but engaging them as coherent phases of decision-making, with dynamically related phases of assessment, decision-making and action. She will have an appreciation of the special features of her practice context, including the distinctive mix of law jobs that are called for in her practice context. She will sense and make use of the convergence of dispute resolution and transactional thinking, of past conflict and future opportunity that lawyered decisions can prompt.

She will respond with care to all the dimensions of those decisions. She will recognize the primary narratives of her practice, and will skillfully spin variations of those stories. She will remain alert to the emotional and relational dimensions of the decisions which face her client, other affected people, and herself. She will know when to resist and when to embrace the beliefs and influences of the inner life. She will recognize different sources of power, sensing and integrating the fluid influence of personal power with the dense, hard push of societal structures. She will understand money as power, and will recognize it (and other quantities) as a source of insight into decisions. She will understand the interests of cli-

409. See Eyster, supra note 263, at 752 (distinguishing between need to change legal rules as secondary to fundamental legal education in ethics). We may already have done so, in the rules of ethics. It would be an excellent project to identify the assumptions about practical judgment contained in the various codes of ethics, to determine the normative vision they embody about the operation of judgment in practice.

410. See id. at 761 ("In the absence of concrete guidance on ethics or procedure, practitioners rely heavily on experience, common sense, and instinct."). This discussion owes a great deal to Gary Blasi's path-breaking work in search of a cognitive model of legal problem-solving. See Blasi, supra note 85, at 314 (applying cognitive science development to analysis of lawyering knowledge). The arguments in this Article are not intended as propositions of cognitive science. But Blasi's distinction between experts and novices, and his stress on the distinctive mental process associated with expert lawyering match and have inspired the tone and stress of this subsection, and of this Article. For a general discussion of the expert/novice dichotomy, see supra note 409 and accompanying text; see also infra notes 411-16.
ents and decision-makers, carefully distinguishing and scouring them for possible resolutions, whether by consent or by coercion. She will handle legal rules not only in the ambiguity and strength of their cognitive surfaces, but also for the power of their political, cultural and social messages. She will keep her balance within the cross-tides of legal rules and contextual realities.

She will gather these influences, in the diversity of their psychic textures, into focused multivalent insight, carefully accounting for the dimensions of the decisions brought to her for work. She will know the constraints on her judgment: the limits of time and resources, the incompleteness and unreliability of information and the imperative that thought occur simultaneously with action. She will know how to act, and how to exert her will to move others to action; but she will recognize the limits on the finality of her own judgments, and will have accepted that others do make final decisions, over which she has limited control. Finally, she will have refined her part of the joint decision-making with clients, exerting influence and enacting her values in thoughtful deference to a core reality: that the decision and its consequences will persist for her clients long after her work has ended.

How does someone acquire these habits, capacities, talents and insights? A full exploration of how expertise in lawyering develops over time would benefit from further study; here, I offer only preliminary thoughts. First, conscious exercise of practical judgment avoids neither conceptual realities nor other experience. Both require development and practice, and a special rigor. As Gary Blasi has persuasively suggested, lawyering expertise in "problem-solving" involves rapid insight into and application of complex intersecting patterns of information and prior insight. Some of this information is conceptual; our formal access to law occurs through language, the cognitive disciplines of reading and interpretation, and the relational practices of rhetoric and argument. Practical judgment requires full development of these cognitive skills.

Yet it also requires the development of our affective capacities: our responsiveness to emotion; our sense of relational influence; our voice for narrative; our will to exert and accommodate power; our handling of money; our translations of intangibles into quantities; and our discernment of interests and values. Some of this will come to us as we age, provided we remain fully open to our experiences. But all these occur in action; such concepts as we do use emerge from what we have done and from what we have learned. Concepts may help us organize the material, once we have a sense of it. But intellect without the test of decision and

411. See Eyster, supra note 263, at 768 (discussing clinical teaching of lawyering in negotiation contexts as essential in preparing novice attorneys for future experiences). A closely related question to ask is: "How can one teach practical judgment to attorneys?" The latter question requires separate treatment.

412. See Blasi, supra note 85, at 342-61 (analyzing lawyers' problem-solving skills and methods).
action counts for little in the practical world. Practical judgment requires us to learn the rigor as well as the fluidity of the heart’s realities.413

Not everyone will exert practical judgment in the same way; but we need not be lawyer-statesmen to learn its disciplines. I have already suggested that Kronman’s concern for wisdom, for good decisions, may be too normative and elitist a vision. This Article rests on the notion that practical judgment can be learned, if not completely taught, and that its use does not require any specific set of character traits. It does require patience, a willingness to engage the tasks and processes of lawyering and lawyered decision-making, and an openness to learn from experience. Its habits develop unevenly and differently in different lawyers. But it can develop from a variety of seeds, out of the common ground of lawyering.

I suspect that we may not be able to teach practical judgment, at least not fully, although we can talk about it, and suggest ways to guide what we do when we exercise it. This learning would ask the student to exert self-direction and responsibility for her own learning: an adult model of education.414 Not all young people are suited to this discipline from the start; some have noted the difficulties and complexity of training law students in good, or ethical, or even just practical judgment. Linda Morton, Janet Weinstein and Mark Weinstein describe an externship program in which they conclude that students show no more than a partial taste for self-directed learning.415 Mary Jo Eyster has described the components of a curriculum on negotiation judgment that uses widely disparate teaching modalities.416 Each of these efforts seeks to do no more than to provide a

413. “The heart has its reasons of which reason knows nothing . . . .” PASCAL, supra note 196, No. 423. I have come to understand Pascal’s perception not as an invitation to free and unconstrained emotion, or as a description of the wildness and irrationality of emotion. The paradox implicit in the statement moves us towards careful exploration of the heart’s reasons: its methods; its characteristic logic; and its internal coherence. I would suggest that such a study requires a rigor of comparable severity to the rigors of conceptual thought, and benefits only in part from conceptual facility. I would also suggest that lawyering provides one of the richest disciplines in which to exercise and explore that rigor.


415. See id. at 505-19 (concluding that various approaches to learning are required).

416. See Eyster, supra note 263, at 796-800 (teaching methods include direct experience with clients, classroom lecture, discussion of hypotheticals, enactment of simulations, and strong personal relationships with supervisors). Eyster relies heavily on theories of moral development advanced by Lawrence Kohlberg and Carol Gilligan as a partial context for the challenges faced in teaching students negotiation judgment. See id. at 784-89 (discussing feminist perspective on moral development). Paul Wangerin has provided a thorough overview of theories of moral and psychological development in adults and has related these theories to the development of law students. See Paul T. Wangerin, Objective, Multiplicitic, and Relative Truth in Developmental Psychology and Legal Education, 62 TUL. L. REV. 1237, 1273-99 (1988) (exploring theories of moral development and developmental psychology and how these theories impact law school professors).
starting point for a new attorney’s encounter with the psychic demands of practical judgment.

To the extent we do try to teach it, we need to recognize the qualities which it requires: awareness of the dimensions of our own inner life, and of the lives of our clients and others; an appreciation of the limitations on our power and influence; care and planning in assessing and integrating opportunities and goals; alertness to differences of experience, perception and value; skepticism coupled with a willingness to act on incomplete, even unreliable information; recognition and creative acceptance of practical constraints; combined respect and suspicion of the power of law; and balancing of personal values and professional restraint.

These qualities require perennial gardening, even for the best, and certainly for the rest of us. In teaching them, we teach not just how to be a lawyer, but also how to live a fuller, more challenging life, perhaps even a better life. But there are limits on what we can say, and to the insight we can provide, during the brief months we have with our students.

IV. CONCLUSION

This account of the lawyering process and the practical judgment it prompts started as an effort to answer questions about what lawyers do and how they think. In attempting an answer, other potential uses have emerged. Two require only slight mention, and will benefit from further discussion elsewhere. First, the model may contribute to the developing pedagogy of lawyering process and practical judgment that reaches law students and young practitioners, and marks a pathway for their own development as attorneys. Second, the discussion in this Article has already suggested further opportunities for empirical research; it can only help to subject our stories to systematic, skeptical evaluation.

Another useful byproduct arises from one of its more unsettling conclusions: that legal rules may not dominate the lawyering of decisions, and that lawyers respond strongly to other, non-legal realities as they work towards decisions. For some, this perception may doom the entire endeavor; how can we trust a process which produces so little determinacy, such slight predictability from case to case? Yet what seems like uncertainty may, by refocusing the mind towards practical judgment, look more like simple complexity and opportunity. We might find not the absence of predictable outcomes, not chaos; but rather the presence of influences and of a practical logic which offer the chance for satisfying, durable, and even just resolutions for our clients.

It does not denigrate, but rather makes more compelling the conceptual study of the law, to stress its variable role in influencing the particular decisions of clients with their lawyers. To see the influence of stories, emotions, relationships, power, resources, and client interests may help us appreciate what happens when lawyers (to whom judges at times must listen and respond) bend and reshape the law for their clients' causes, under the
pressure of practical judgment. Insight into our topics of lawyering may help us to see into the heart of the law, and to assess its messages more fully. Such an account can throw into useful relief the fuller accounts of decision-making through adjudication and legislation.

Another by-product addresses the behavior of attorneys. This Article weaves together two normative threads: a concern for good lawyering and the imperatives of ethical practice. These two intertwine. Ethical rules set high aspirations, as well as disciplinary minimums. Questions of good practice occupy the middle ground, influenced by the habits of practitioners and the discipline of the market. The study of practical judgment in lawyering process can inform all three inquiries. That study can help to articulate approaches to practice; to persuade about our aspirations; and to justify our discipline. Practical judgment asks for significant intuitive, emotional and moral capacities; and it is debatable whether we can give ourselves more of these than what we have. But we can point to ways in which lawyering moves us to develop these capacities, and thus allow a more conscious path of professional development.

If I mean to do anything, I mean to encourage a continuation of the half-century conversation about what the topics, processes and scope of the lawyering judgment are and what they ask of lawyers. This conversation already occurs between practitioners, between lawyers and clients, and between teachers and students. It fills the conversations between young attorneys and their mentors, and already helps scholars to assess the theoretical and policy dimensions of legal rules within the hard, relational and fluid realities of lawyering. The more we talk about practical judgment, the more we can know of its operation, and the closer we can come to a sense of good judgment, and perhaps, tentatively, to wisdom.