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## The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves

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## Comment

### THE BOUNDS OF PROFESSIONALISM: CHALLENGING OUR STUDENTS; CHALLENGING OURSELVES

BEVERLY BALOS\*

Professor Aiken, in her article *Striving to Teach "Justice, Fairness, and Morality,"* recognizes the importance of integrating the "analysis of difference into traditional courses to ensure that students begin the life-long process of examining their exercise of privilege and develop an appreciation of the professional value of striving for justice, fairness, and morality."<sup>1</sup> Her article sets out a pedagogical approach to legal education with the goal of constructing a learning experience that maximizes reflection and unmasking privilege. Aiken's article raises important issues for all of us concerned with legal education and the competent representation of clients.

Focusing first on the clinical setting, Aiken analyzes her students' experiences and how they affect client representation. She relies on the diverse realities that contribute to the social construction of knowledge to show how students' experiences affect their values and how these experiences and values in turn affect the students' assessment of the law. She explores the constraints that students' assumptions and attitudes impose upon their ability to assess the law and the ways in which they view the facts of a case and the merits of a client's claims.<sup>2</sup> Aiken then describes the opportunities for clinical students to

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<sup>1</sup> Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLIN. L. REV. 1, 63 (1997). It is important to acknowledge that law students will be situated within different social categories and that we must be careful not to make assumptions about the class, race, sexual orientation, ethnicity, or ability of our students. Students will have a dominant position with respect to some categories and a subordinate position with respect to other categories. The social categories of race, gender, sexual orientation, and class that are the primary focus of Aiken's article operate simultaneously as interlocking systems of oppression. Patricia Hill Collins has analyzed what she terms the matrix of domination to explain that all groups possess varying amounts of penalty and privilege. An individual may be privileged with respect to one category and penalized with respect to another. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990).

<sup>2</sup> A number of legal educators attempt to illustrate this point for their students by showing a film titled *A JURY OF HER PEERS* (Texture Films, 1981). The film is based on a short story written by Susan Glaspell in 1916. A play version titled *TRIFLES* was also written at the same time. The film illustrates the limitations in perception and vision of officials

begin to recognize that their assumptions about the legal system may not in fact apply to everyone. She explains how "clinical legal education increases the possibility for disorienting moments."<sup>3</sup> Aiken would have students adopt a framework of analysis that questions beliefs and assumptions. Additionally, Aiken would have the students be mindful that they always are operating from a position of limited knowledge.

Aiken goes on to describe the difficulties encountered in teaching about justice in the traditional classroom.<sup>4</sup> While recognizing the obstacles encountered in the traditional classroom, she urges us to use innovative teaching techniques to maximize the possibility that students will begin to understand that "unexamined perspective reinforces the status quo at the expense of many people."<sup>5</sup>

Aiken's work allows us to reflect further on the structure of legal education and its deficiencies in training students in the legal profession. One set of questions prompted by Aiken's analysis of both clinical and nonclinical teaching approaches is: How do we break down the clinical/nonclinical dichotomy? What do clinicians and nonclinicians have at stake in keeping that dichotomy and what effect does it have on our students, legal education, and the legal profession? If one seeks, as Aiken does, to help students develop the skills and values needed to become effective lawyers, one must consider whether this goal is attainable within a structure of legal education that perpetuates the clinical/nonclinical dichotomy.

A related issue that is kindled by Aiken's article is how the boundaries that define the differences between clinical and nonclinical education and between professional and nonprofessional are symptomatic of the larger problem of how the legal profession defines itself. Aiken demonstrates how our own experiences limit what we can know. The recognition that our knowledge is limited, partial, and contingent contradicts the prevailing "myth" of the lawyer as expert "who can and should determine, in a detached and rational manner, and with minimal client input, what solution is best."<sup>6</sup> Thus we are left with a tension within legal education and lawyering that may be unresolvable. Aiken's piece is a challenge to us to reimagine the legal profession and our identity as lawyers. Only if we are able to accept

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investigating the murder of an abusive husband allegedly committed by his wife. The limitations portrayed in the film are due to the officials' biases and preconceived assumptions about what is important, what constitutes facts, and what might serve as evidence.

<sup>3</sup> Aiken, *supra* note 1, at 37.

<sup>4</sup> *Id.* at 47.

<sup>5</sup> *Id.* at 48.

<sup>6</sup> DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS* 17-18 (1991).

that challenge is it going to be possible to restructure and rethink the way each of us approaches legal education.

### *Lawyers and Clients*

The legal profession is a relational one. Obligation to others is a dominant feature of legal practice. The lawyer is both "other-regarding and self-regarding". . . .<sup>7</sup> The "others" who give rise to this obligation are diverse and have multiple roles in the legal system. They may include clients, opposing counsel, judges, and third parties. There may also be obligations to the broader concept of the administration of justice and society in general.

For the vast majority of students who go on to practice law after graduation, the lawyer/client relationship is central to lawyering and their identity as lawyers. It is clear, however, that the lawyer/client relationship is fraught with ambiguities and tension because the lawyer is operating under the "myth" of expert but in fact has limited knowledge. These relational complexities go beyond what may be legally required by codes or rules of professional conduct. An examination of the models developed in the legal literature to describe the lawyer/client relationship reveals conflicting views and norms that embody tensions and contradictions within the boundaries that frame the construction of lawyers' professional identity.

The most prevalently taught model in clinical education is termed *client-centered*. In this model, the clients are urged to participate as "partners" with the lawyer in the resolution of their legal problems. The client also is encouraged to be the decision maker because the lawyer recognizes that the client is in the best position to evaluate the risks and benefits of any particular course of action and is in fact the one who will enjoy or suffer the results of whatever action is chosen.<sup>8</sup> One goal of the client-centered model is to maximize client autonomy. This model contrasts with a more traditional one frequently found in practice. The traditional model views the lawyer as the *expert* with obscure knowledge that is neither accessible nor understandable to the client. The expert model views clients as lacking sophistication, too emotional, and unable to assess adequately the potential long-

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<sup>7</sup> Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 280 (1994) (noting that professionalism requires lawyers to view others in relational terms and that to be a lawyer is by definition to be an instrumentality of society with obligations to someone, and usually to more than one); see also Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L. J. 1, 36 n.155 (1990) (stating that conflicting interests with which a lawyer must be concerned can be external and other-regarding, or personal and self-regarding).

<sup>8</sup> BINDER ET AL., *supra* note 6, at 20-21.

term effects of decisions.<sup>9</sup> That view logically leads to the conclusion that decision making is best left to the expert—the lawyer.<sup>10</sup>

That law students assimilate and are more comfortable with the traditional all-knowing, expert model was illustrated starkly in a clinic class I recently observed. The class examined the lawyer's role in counseling a client. The reading material for the class consisted of excerpts from the widely used book, *Lawyers as Counselors* by David A. Binder, Paul Bergman, and Susan C. Price, which adopts a client-centered approach to interviewing and counseling. The clinical faculty teaching the class suggested to the students multiple goals for a counseling session. They also described the lawyer's multiple functions in counseling clients, including identifying the objectives of the client, identifying and discussing with the client various options that will lead to the achievement of the client's objectives, and engaging in a dialogue with the client regarding the consequences of those options so that the client can reach a decision as to how to proceed in the case. The students were then presented with a written transcript of a lawyer/client counseling session. The transcript is a scene from the movie *The Good Mother*, although in the transcript the names of the characters were changed so that the gender of the characters is not obvious.<sup>11</sup> The following is the transcript given to the students. I have included specific pronouns so that the gender of the character in the transcript is consistent with the gender of the character portrayed in the film.

This is a custody case. The client has custody of Molly, an eight year old girl. Lee is the client's lover who has been living with the client and Molly for the past month. Molly found a magazine in the house which had nude pictures of men and women in it. Molly showed the magazine to Lee (the client was not at home at the time) who responded to various anatomical questions that Molly asked. Molly's other parent, Sandy, was told of this "incident" by Molly and immediately filed a petition for custody. The attorney has heard these basic facts and is now discussing the case with the client—Molly's

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<sup>9</sup> *Id.* at 18.

<sup>10</sup> Duncan Kennedy, in an essay about the role of legal education and its contribution to the reproduction of hierarchies both in the legal profession and in society suggests that: [T]here are different patterns of domination, mainly involving lawyers making decisions for clients, where the client was perfectly capable of deciding on his own or her own, in ways that make things easy for the lawyer, or profitable, or correspond to the lawyer's own morality or preferences. As in corporate law, the whole thing is based on excluding clients from knowledge they would need to decide on their own, while at the same time mystifying that knowledge.

DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 40-41 (1983).

<sup>11</sup> *THE GOOD MOTHER* (Touchstone Pictures, 1988).

custodial parent, against whom the petition was brought.

A: Well, anything you want to tell me about your friend, Lee? Any doubts about Lee? Any signs of aberrant behavior?

C: No. No, I mean—he's not a very conventional person, but I trust Lee with Molly.

A: And so, it's just in *this* case, that you were misunderstood.

C: No, Lee was doing what he thought was right.

A: In what sense do you mean?

C: Look. I have tried to raise Molly freely. I didn't want her to be ashamed of her body or think that it was something she had to hide. I think Lee was just trying to honor that.

A: Well, I believe that, but I think we're going to have to down-pedal this permissive business. I know, I mean, we both know that it's probably healthier for a kid to be open about sexual stuff, but I don't think it makes much sense to try to educate the judge about it.

C: But if we explain how it happened, if we explain the context in which it . . .

A: Right. Well, we'll *do* that, we'll *do* that. But these judges are very conservative. What they hear all day long is terrible stuff—child abuse, rape, child molestation. After a while they lump everything together in their minds. I mean, I can understand how it happened and you can understand. But I can also tell you how their attorney is going to present it and it's not going to sound good.

C: So what are you suggesting we do?

A: I think we should focus on how happy she was with you, how responsible you were. Sandy [the other parent] is a bit of a workaholic. So it's pretty much a choice between a loving parent and a paid baby sitter. And we'll let them bring up the sexual stuff with your friend, but we're not going to defend it or tie it into the idea of sexual openness or anything. It's just going to be a mistake your friend made . . . Well, sound reasonable?

C: Yeah—you mean, blame my friend. Right?

A: That's the strategy.

C: Oh, well that's pretty convenient, isn't it. We just find somebody to sacrifice—yeah.

A: Do you see it another way?

C: I don't see how Sandy has the right to do this. I don't see how he has the right to sit in judgment of my life like this. He doesn't know Lee. He doesn't know how we live.

A: Well, I'm telling you how it's going to be.

C: So what if we told the truth? How about the truth?

A: Which is?

C: The truth is that . . . Lee never hurt Molly. That Molly wasn't hurt. Lee may have made a mistake, but he was just trying to do

what he thought I wanted. It's Sandy who's got this all wrong. It's Sandy who's got this all twisted around. And now you're trying to make it sound like there's something wrong with Lee. Something wrong with us!

A: I'll represent you in any way you like. But I think the point here is to get Molly back and not to enlighten the judge on sexual morality.

C: Oh, yeah . . . yeah

A: Are we in agreement on that?

C: Yeah, mmmmm.

The students were asked their reactions to the transcript including their evaluation of the lawyer's interaction with the client. A few students were somewhat critical of the lawyer's style in expressing his viewpoint. A number of students, however, clearly expressed the view that the lawyer was right in his conclusions and directions to the client. One student went on to say that the transcript illustrated why people go to lawyers, reasoning that otherwise what is the point of going to someone who has been through three years of law school. Eventually, through the guidance of the clinical faculty, the class reached a more nuanced and multidimensional view of counseling and client decision making. In the course of that discussion, however, a substantial number of students expressed the view that the lawyer knew both what was best and what was in the client's best interests. They also indicated that they felt it was appropriate for the lawyer to communicate those views to the client and direct the course of future action. There was very little questioning by the students as to how a lawyer would know what was best and more particularly how a lawyer would know what was in the best interests of this particular client. In fact, there was an unquestioned assumption by at least some of the students that he would and did know.<sup>12</sup> We can only speculate to what degree their assumptions and acquiescence in the lawyer's expertise was affected by the students' general agreement with the lawyer's judgment and evaluation of the client portrayed in the transcript. We can also only speculate about the extent to which the unquestioned assumptions made by the students regarding the client's objectives and the validity of the lawyer's decision making as to the best course of action were driven by their own established frames of reference and patterns of thinking.<sup>13</sup>

Another lawyer/client model looks to not only the client's interests but society's interests as well. In one variation of this model, lawyers rely on their own moral values to determine society's interest. In

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<sup>12</sup> Observation of counseling class, Legal Aid I, Cornell Law School (Sept. 15, 1997).

<sup>13</sup> Aiken, *supra* note 1, at 23.

another variation, the lens through which society's interests are assessed and weighed is the clients' own values. In the latter model, lawyers help their clients consider how the resolution of legal issues will affect the interests of others.<sup>14</sup>

The different models underscore the tension within the relation of lawyers to their clients. Although they may vary in emphasis and role, all the models are based on the expertise of the lawyer. They all reflect a fundamental assumption that it is the lawyer who has both the knowledge and power to determine the nature of the lawyer/client relationship.<sup>15</sup> Understanding that lawyering is relational and that the nature of the lawyer/client relationship is a core element in defining lawyer identity makes it critical to recognize that the lawyer's view of the client and the subsequent adoption of a particular model is influenced by assumptions, biases, and stereotypes—whether conscious or not. As Aiken tells us, patterns of thought control the way we interpret perceptions and construe experience.<sup>16</sup> The law school norm of competitive striving for expertise and the classroom norm of professor as all-knowing reinforce the acceptance of lawyers as experts in relationship to their clients.<sup>17</sup> The prevailing norms within legal education are inconsistent with students learning that the limited nature of their perspectives constrains their ability to represent clients in a fully competent manner.

### *Law Schools and Clients*

We have seen how nonclinical and clinical education merge for students around the issue of lawyer as expert and how that is part of a

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<sup>14</sup> See THOMAS L. SHAFFER & ROBERT E. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* 116-29 (1994). Shaffer and Cochran analyze the way lawyers approach moral issues with clients by asking two questions: (1) Who controls the representation? and (2) Are the interests of those other than the client important? They identify four approaches to moral choices confronted in the lawyer/client relationship: lawyer as godfather—where the lawyer makes choices for the client that the lawyer thinks will serve the interests of the client without regard for the interests of others; lawyer as hired gun—where the client controls the choices and the lawyer accepts no responsibility for injury to others; lawyer as guru—where the lawyer makes the choices for the client with consideration for others and concern that the client do the right thing; and finally lawyer as friend—where the lawyer and client struggle together and resolve the issues such that the concerns of the client as well as others are taken into account and the client becomes a better person. *Id.* at 3-4.

<sup>15</sup> It is important to keep in mind that just as lawyers and law students differ with regard to their relative positions in society with respect to exercising privilege and power, see Aiken, *supra* note 1, clients too may differ in regard to their exercise of power within the lawyer/client relationship. The president or chief executive officer of a multi-billion dollar corporation is not in the same relational position toward her/his lawyer as the person of limited economic means.

<sup>16</sup> Aiken, *supra* note 1, at 23.

<sup>17</sup> See *infra* pp. 139-41.



broader issue of the relationship between lawyer and client. These two issues are made even more complex when we consider the relationship of clients to the law school. In the clinical setting, the client is viewed as not only the client of the student but also the client of the clinical faculty or supervising attorney. Both student and clinical faculty have the obligation to serve the client and engage in lawyering to resolve problems. Although the roles of student and clinical faculty differ, both recognize their ultimate obligation to the client. I would venture to say that this is a typical view of the client's relationships within the law school clinical setting.

What is missing from this model, however, is the law school's obligation to the clients we invite to come through our doors. The relationships created are not so confined as the predominant law school structure would have us assume. By inviting clients into the institution to both be served by the clinic and serve as a learning opportunity for students, the law school—as an educational institution—takes on an obligation to the client. Would embracing, rather than ignoring, this relationship change the nature of legal education? If the client were explicitly seen as the client of the law school, the institution's responsibility to ensure competent, skillful and ethical representation by students through its classroom and clinical teaching would be unavoidable. Both curricular decisions and course content would be enhanced as well as constrained by an understanding that a law school cannot meet its obligation exclusively through the hiring and retention of high-quality clinical teachers, but must hold all persons in the law school community accountable for the delivery of high-quality legal services to its clients.

Historically clinical programs have not been fully integrated into the law school and this is still the case at many law schools. Currently, the relationship between clinical and nonclinical faculty varies considerably from school to school. At some schools the faculty are fully integrated; at others, the relationship ranges from collegial to uneasy to problematic. One obvious symbol of the relationship between clinical and nonclinical programs is their physical locations. Many clinical programs are physically separate from the classrooms and the offices of nonclinical faculty. In some cases, the clinical programs are separated to the point of being located in an entirely different building and sometimes off campus.<sup>18</sup> Not to carry architectural design too far, the physical boundaries between nonclinic and clinic do seem to reflect the reluctance of law schools to embrace the clinic fully and to appreciate the complexities of lawyer/client relationships.

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<sup>18</sup> One argument in favor of separate facilities might be ease of access for clients in terms of building architecture as well as physical location of the building.

What accounts for this reluctance? Would the resistance to integrating fully clinical programs both physically within the law school and pedagogically within the curriculum be as strong if the clients of the clinic were not persons with little social or economic status? The resistance to seeing clients of the clinics as clients of the law school may be reinforced by the stigma and stereotypes attached to the poor.<sup>19</sup> It is an interesting question to ask whether that resistance would be as robust if the clinical programs served a different client population that more closely embodied the hierarchy of representation in the profession.

The existing dichotomy of clinic/nonclinic reinforces the ability of law schools to refrain from admitting an institutional responsibility to clients. By isolating and separating that part of the educational program that serves clients from the rest of the institution, a boundary is created that few feel the need to cross. By constructing this boundary, the institution is safely separated from an obligation to clients which might disrupt the clinic/nonclinic dichotomy.

There is also, arguably, an interest on the part of the clinical programs and faculty in maintaining this dichotomy. Separation, even if imposed by others, need not be exclusively subordinating. It can also create the space for a degree of independence from the dominant culture that allows for creativity and resistance. If the clinic/nonclinic dichotomy were eliminated, clinics might have to share their particularized pedagogical place and function.

Although recognizing that the clinic has a particular role in the curriculum because it is the only place in the law school where students come into contact with clients, we must also admit that the clinical program is not the only place in the law school where critical reflection and analysis of the relational nature of lawyering and the law can take place. One view of teaching is that it is part of the academic enterprise of knowledge creation—both in what the teacher brings into the classroom and in the dialogic act of teaching itself. Recently, a whole new, critical scholarship in law has developed. This scholarship reveals that abilities, class, ethnicity, gender, race, and sexual orientation are not natural or biological categories that are unchanging over time and across cultures. Rather, these categories are socially constructed: they arise and are transformed in history.<sup>20</sup> One aspect of critical theory that affects the creation of knowledge is labeled standpoint theory—a view that “knowledge is and should be

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<sup>19</sup> See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

<sup>20</sup> TERESA L. AMOTT & JULIE A. MATTHAEI, RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 12 (1991).

situated in people's diverse social locations. As such, all knowledge is affected by the social conditions under which it is produced; it is grounded in both the social location and social biography of the observer and the observed."<sup>21</sup>

The theoretical developments that have occurred and that continue to evolve in critiques of the law and legal practice are rich sources of insight and knowledge to be discussed with students. These critiques of the law have profound implications for reflecting upon lawyer/client relationships and they suggest innovative analyses of legal issues and possible remedies.<sup>22</sup> These shifts in legal perspective that are developed and described in critical legal scholarship mean that the educational enterprise offers a wealth of learning opportunities for students to examine carefully the role of attorneys in relationship to clients, the limitations of one's own perceptions and knowledge in assessing cases and facts, and the possibility of expanding the boundaries of what it means to be a professional providing legal services and embracing the identity of lawyer.

The clinic is both in the academy and in the profession. By viewing the law school as an institution with clients so that it too would be an institution that is of the academy as well as of the profession, the structural barriers to teaching students about the rich complexities of the lawyer/client relationship would diminish. It would not be solely the clinics that have the responsibility to engage in this educational enterprise but the entire curriculum. If such a responsibility were embraced, the clinic/nonclinic dichotomy would dissolve to the benefit of students, faculty, and clients.

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<sup>21</sup> Susan A. Mann & Lori R. Kelley, *Standing at the Crossroads of Modernist Thought*, 11 GENDER & SOC'Y 391, 392 (1997). It is important to note that standpoint theories take a variety of forms. Patricia Hill Collins sees standpoint theory as an interpretive framework useful in explaining how knowledge remains central to maintaining and changing unjust systems of power. She argues that standpoint theory "places less emphasis on individual experiences within socially constructed groups than on the social conditions that construct such groups." Patricia Hill Collins, *Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Where's the Power?*, 22 SIGNS 375, 377 (1997). A second important feature of standpoint theory for Collins concerns the commonality of experiences arising from groups that are differently situated within hierarchical power relations. She suggests that "groups who share common placement in hierarchical power relations also share common experiences in such power relations. Such shared angles of vision lead those in similar social locations to be predisposed to interpret these experiences in a comparable fashion." *Id.*

<sup>22</sup> See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 CAL. L. REV. 2129 (1992); Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

### *Law School and Professionalism*

The issue of how to teach the complexities of the lawyer/client relationship implicates the broader subject of how the law school teaches students the values of the profession. Law school inculcates the culture, attitudes, behavior, and values of the legal profession.<sup>23</sup> It may be the first contact students have with the myriad roles of the lawyer and the values of the legal profession. The law school experience has a "profound influence on [students'] professional values and their understanding of the practice of law and the role of lawyers in our society."<sup>24</sup>

Recently there have been numerous books, articles, and bar association reports examining what is viewed as a decline in professionalism.<sup>25</sup> The attributes advanced for the successful lawyer in the profession mirror those characteristics fostered in the law school classroom: adversariness, argumentativeness, zealotry, and a view that "lawyers are the only means through which clients accomplish their ends—what is 'right' is whatever works for this particular client or this particular case."<sup>26</sup> These characteristics frame a series of dichotomies that construct the identity of lawyer within the profession. The traditional concept of lawyer conduct includes the following: lawyers are adversarial rather than collegial, competitive rather than cooperative, rational rather than emotional, focused on winning rather than problem solving, and perform as amoral technicians utilizing their legal skills to achieve their clients' goals. One side of these dichotomous traits define what being a lawyer is; the other side defines what a lawyer is not. These characteristics construct a boundary around the legal

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<sup>23</sup> The values communicated to students are not random but rather express a particularized view of law and society. See KENNEDY, *supra* note 10, at 14 ("[A] lot of what happens is the inculcation through the formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession. . . . Then there is a complicated set of institutional practices that orient students to willing participation in the specialized hierarchical roles of lawyers.").

<sup>24</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, PROFESSIONALISM COMMITTEE, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter PROFESSIONALISM COMMITTEE]; see also Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994).

<sup>25</sup> See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995); Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573 (1994); Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L. J. 1239 (1991); Re, *supra* note 24; AMERICAN BAR ASSOCIATION, REPORT OF COMM'N ON PROFESSIONALISM, 112 F.R.D. 243 (1986).

<sup>26</sup> Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7 (1991); see also Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1996).

profession and define who is in the profession and who is not.

Law school education contributes to the making of professional identity and to the making of the boundaries that define that identity. The culture and values inculcated within the law school do not support a vision of lawyering that takes into account that lawyering involves responsibility to and relationships with others.<sup>27</sup> The hierarchy constructed in the classroom of the all-knowing, all-powerful professor in control of the students and in control of the transmission of knowledge in the classroom is a model that is replicated in practice in the lawyer/client relationship.<sup>28</sup> Needless to say, this model leaves no room for standpoint theory. The acknowledgment of the tentative nature of knowledge and the limitations inherent in the development of patterns of thought that produce unexamined assumptions that Aiken depicts is contrary to the model of omniscience that law students experience in law school and that traditionally define a lawyer's professional identity.

One aspect of lawyering and the concept of professionalism that has received considerable attention as a source of dissatisfaction both within the profession and from the public is the nature of the adversary system and the abuse of that system by the legal profession.<sup>29</sup> Sometimes referred to as the "Rambo" style of litigation, it is characterized by contentiousness, hostility toward opponents and witnesses, incivility, and a view of litigation as a game.<sup>30</sup> One might ask whether these characteristics are fostered in the work setting and practice rather than the law school. Although it is true that the norms of practice influence methods of practice and litigation, it is also true that the law school curriculum focuses on the adversary system. Trained to "think like a lawyer" through the medium of appellate cases early in their law school careers, students are imbued with the notion that litigation is the primary method of resolving disputes. Litigation and a winning result are the marks of the successful lawyer. Many scholars have commented that the law school curriculum and the culture created in the traditional classroom support and encourage adversariness, competition, and argumentativeness.<sup>31</sup> Further, the professional identity constructed as part of law school culture teaches students that

lawyers constitute an ethical community of autonomous experts who contribute to the maintenance of a rational social order. This

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<sup>27</sup> Menkel-Meadow, *supra* note 26, at 7.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> See Re, *supra* note 24, at 91.

<sup>30</sup> *Id.*; see also Schechter, *supra* note 26, at 379.

<sup>31</sup> Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); Menkel-Meadow, *supra* note 26; Re, *supra* note 24; Schechter, *supra* note 26.

conventional view of lawyering assumes that professionals are independent specialists who stand above or apart from the competing social, economic and political bases of power in society.<sup>32</sup>

The legal culture, constituted within the boundaries of the accepted values of legal practice, helps construct professional identity.

The boundaries marking off who has the privilege to adopt this professional identity and who does not have the privilege are policed in various ways within the law school setting. Content and pedagogy within traditional classroom settings play a major role in regulating the boundaries that create professional identity. In a study conducted at Harvard Law School in the mid-eighties with a follow-up study conducted in 1993, Robert Granfield found that one of the ways the boundaries of professional identity are maintained is through the chastising comments of professors to students who make political, ethical, or passionate statements in class.<sup>33</sup> The professor's dismissal of such a comment tells the students that they have attempted to transgress the boundary. Even when professors are not overtly derisive, the mere fact that the professor ignored a student's comment and failed to validate it sends a message that the comment is inappropriate and does not belong in law school discussions. As Granfield explains, "[S]uch practices constitute a degradation process by which law professors attempt to strip students of 'non-professional' conceptions of the social world. Alternative paradigms are challenged as impracticable since they would violate the ideology of professionalism."<sup>34</sup> In most classroom settings legal issues are presented in an abstract way divorced from history and context. Legal pedagogy concentrates on teaching the application of so-called neutral and objective rules and principles. Questions of justice and ethics are frequently excluded from law school classes.<sup>35</sup> One aspect of the legal professional's skills is the ability to utilize technical expertise in the service of the client. In order to satisfy this professional standard, the students must learn to divorce their personal values from professional ones. The law becomes something apart and detached from the rest of life. This abstraction and neutrality are central to the building of professional identity.

Granfield's study also shows that much of the policing of the boundaries takes place by students.<sup>36</sup> Students who tried to expand the boundaries of the legal discourse were ridiculed by fellow students

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<sup>32</sup> Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 REV. L. & WOMEN'S STUD. 53, 54 (1994).

<sup>33</sup> *Id.* at 61.

<sup>34</sup> *Id.* at 62.

<sup>35</sup> Cramton, *supra* note 31, at 249.

<sup>36</sup> Granfield, *supra* note 32, at 64.

for being naive, emotional, or silly.<sup>37</sup> Such ridicule and disdain from fellow students not only kept the boundaries in place but chilled any further expression by students to challenge the boundaries. Within this social dynamic, the legal issue—defined within a very narrow frame—becomes the only legitimate topic for discussion.

Most of the law students Granfield studied internalized a perspective of detached cynicism.<sup>38</sup> The students embraced the cynicism by equating it with intellectual development. The detachment felt by the students is one of the central attributes of legal professional identity and so was viewed positively by the students.

However, students' detached cynicism comes at a price. Detachment reinforces the inability to recognize one's own limited perspective and biases. Cynicism does not facilitate self-awareness or self-reflection so that students will come to an understanding of how their own values and assumptions are operating to the detriment of others. It is hard to reconcile detachment, cynicism, and professed neutrality with a commitment to social justice. The promotion of detached cynicism is contrary to the need to develop and maintain passionate, normative values in the pursuit of social justice through the law.

For most of the students Granfield studied who were still concerned with issues of social justice, the decision to enter large firm practice presented them with conflicts and dissonance. Although they still professed an adherence to their previous ideals, their career choices presented them with contradictions that necessitated a reconstruction and reinterpretation of the implications of their choice of a career in corporate law.<sup>39</sup> According to Granfield, this was accomplished by denigrating those students who actively and affirmatively chose to serve corporate clients. By defining themselves as "not those students," some students were able to reconcile their corporate career choice with their ideals.

Granfield reported on a number of other rationalizations that the students embraced in order to resolve the contradictions they felt. One justification used to rationalize a corporate career choice was the burden of student loans.<sup>40</sup> According to Granfield, while debt was a factor in influencing the student's choice of corporate practice over public interest work, the possibility of leading an affluent life was also appealing to the students.<sup>41</sup>

Another rationalization the students used to justify their job deci-

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 68.

<sup>39</sup> *Id.* at 73.

<sup>40</sup> *Id.* at 74.

<sup>41</sup> *Id.*

sions was the assertion that they could be more effective in doing public interest work within a large private firm.<sup>42</sup> Granfield reports that although a number of first-year law students rejected this view, by the time they became third-year students they had accommodated this shift in thinking. Part of the shift involved a redefinition of public interest law. The notion of public interest law became broader for these students, expanding from a poverty law/public defense framework to include large firms that occasionally handled discrimination or employment cases.<sup>43</sup>

Another influence on students' career choices is the overwhelming preference for large firm practice implicit in many schools' placement activities. Most law school placement operations emphasize on-campus interviews with large firms. In addition, the hierarchy within the profession, which is reinforced in the law school, is that prestige attaches to those who work in business and commercial law with its concomitant monetary reward. One need only look at most law schools' curricula to see that the second—and third—year course offerings stress commercial and business law rather than public interest law.<sup>44</sup> The strands of curriculum, attachment of prestige to large firm practice, and ease of access as a result of placement resources being directed to commercial and corporate firms are interwoven into a dominant pattern that directs students to stay within the prevailing boundaries of the profession. To do otherwise, a student must overcome many social and economic obstacles.

It is important to note that much of the research regarding law school values and how students create their identities as lawyers and develop their beliefs about legal practice are based on studies of the Harvard Law School and its students and graduates.<sup>45</sup> Although each law school is different, it seems clear that many of the values and cultural norms identified in these studies—*e.g.*, narrow methodology of legal instruction that replicates adversariness, focus of the curriculum on business and commercial practice, emphasis by placement offices on providing students access to employment opportunities with large firms—are present at most law schools. Statistics show that the decline in graduates choosing public interest practice is similar across many schools.<sup>46</sup>

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<sup>42</sup> *Id.* at 76.

<sup>43</sup> *Id.* at 77.

<sup>44</sup> RICHARD D. KAHLENBERG, *BROKEN CONTRACT* (1992); David W. Raack, *Law School and the Erosion of Student Idealism*, 41 J. LEGAL EDUC. 121, 129 (1991) (book review); Schechter, *supra* note 26, at 386.

<sup>45</sup> ROBERT GRANFIELD, *MAKING ELITE LAWYERS* (1992); KAHLENBERG, *supra* note 44; Granfield, *supra* note 32.

<sup>46</sup> GRANFIELD, *supra* note 45, at 5.



As we examine and reflect on the culture and values of the profession that are constructed and reinforced in law school, we should not be surprised that there has been a steady decline in the number of law graduates pursuing public interest careers.<sup>47</sup> Admittedly there is no single cause for this decline. An individual's motivation and decision making process are complex and can reflect inconsistencies and ambivalence. This decision making takes place, however, within a system that supports a prevailing, traditional framework of lawyer professionalism. The boundaries are marked and students are taught that a price will be paid if they try to expand or transgress them. The boundaries are enforced by faculty, other students, the structure of the curriculum, and the hierarchical nature of the profession.

The values and norms that the majority of law students apparently have accepted reinforce the separation of law from the full range of human experiences and activity. These norms that frame the boundaries of the legal profession lead to the adoption of a professional identity that becomes more narrow as lawyering serves ever more narrow ends. The notion of the neutrality of the law allows students to rationalize away their complicity in furthering the status quo at the cost of economic exploitation and subordination of those persons whom legal rules render invisible. The narrow framework within which professional identity resides means that representation will not take into account a multiplicity of viewpoints. The value of pursuing social justice is shifted from the core of professional identity to, at best, the margin.

### *Professionalism Revisited*

As concerns about the values and norms of the profession have multiplied, the call for a renewed commitment to professionalism has grown within the legal profession itself. This has led to an examination of the elements that should comprise a definition of professionalism and professional identity. In its latest study of professionalism, the American Bar Association has defined a professional lawyer as follows: "A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good."<sup>48</sup> The ABA report goes on to list the essential characteristics of the professional lawyer, which include "dedication to justice and the public good."<sup>49</sup> Although justice is not further defined, and

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<sup>47</sup> *Id.*; see also ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (Howard S. Erlanger ed., 1989).

<sup>48</sup> PROFESSIONALISM COMMITTEE, *supra* note 24, at 6.

<sup>49</sup> *Id.* at 7.

although promoting justice is only an aspirational goal of the profession, the report attempts to reinforce an ideal of lawyer behavior that many feel has been undermined by the increasing commodification of practice and pervasive cynicism.

In an earlier report by the American Bar Association's Task Force on Law Schools and the Profession (commonly known as the "MacCrate Report"), similar normative goals are set forth as part of the Statement of Skills and Values.<sup>50</sup> The Statement identifies the obligation to promote justice, fairness, and morality as a fundamental value of the profession.<sup>51</sup> I think it is fair to say that the MacCrate Report has generated considerable discussion in the profession and in the academy.<sup>52</sup> It is also fair to say, however, that the predominant focus of that discussion has been the skills section of the Statement of Skills and Values rather than its values portion.<sup>53</sup> It is worth noting that the Report itself urges law schools to recognize the obligation to teach skills and to stress the importance<sup>54</sup> of the values of the profession as expressed in the Report.

The Report also asserts that the promotion of justice, fairness, and morality requires no resources and no institutional changes within law schools although it does require commitment.<sup>54</sup> It would seem that the Report's exhortation for law schools to adhere to and convey the importance of promoting justice within legal practice is a rather modest—if not illusory—appeal if at the same time the Report declares that no reconfiguration of resources or institutional change is necessary. The limited nature of the language expressed in the MacCrate Report may be understandable given the complexity and wide scope of the task and the breadth of recommendations made by the Task Force. The limited nature of the appeal to promote justice expressed in the Report, however, is emblematic of the tension between the values and norms set out as constitutive of professional identity and the normative goal of promoting justice.

Even this modest appeal has not generated the kind of dialogue and debate engendered by the Report's call to teach the fundamental

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<sup>50</sup> AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 135-221 (1992) [hereinafter MACCRATE REPORT].

<sup>51</sup> *Id.* at 140.

<sup>52</sup> See generally Symposium, *The 21<sup>st</sup> Century Lawyer: Is There a Gap to be Narrowed?*, 69 WASH. L. REV. 505 (1994); Symposium on the MacCrate Report: Papers from the Midwest Clinical Teachers' Conference, 1 CLIN. L. REV. 349 (1994); THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM, CONFERENCE PROCEEDINGS 2 (Joan Howland & William H. Lindberg eds., 1994).

<sup>53</sup> See sources cited in note 52 *supra*.

<sup>54</sup> MACCRATE REPORT, *supra* note 50, at 236.

lawyering skills needed for competent representation. Fundamental change would have to occur in order to meet the MacCrate Report's entreaty to elevate the level of professionalism through a recommitment to the value of promoting justice. I would argue that the reluctance to engage the call for promoting justice is itself evidence of what all of us in the legal profession know is at stake—our identity as lawyers. The resistance to such change is not surprising because it entails a redefinition of professional identity and a remaking of the boundaries that constitute legal practice and being a lawyer.

### *Conclusion*

The systemic nature of the forces that hold in place the traditional values of the legal profession makes the prospect of a fundamental restructuring of legal education a daunting one. Both legal education and the profession are embedded in values and cultural norms that will not be disrupted easily. Given the structure of the traditional law school curriculum, pedagogical method, and culture, all of which construct the prevailing boundaries in service to the status quo, the question to be asked is whether one can create a "professional" school that disrupts the predominant construction of lawyer identity and the framework within which professionalism is defined.

It should not be assumed that clinicians, by virtue of being clinicians, are free of the constructed boundaries. Clinical faculty are not outside the profession and they are products of the predominant mode of legal education as well as the prevailing values of the profession. Acknowledging the difficulties posed by interlocking systems that reinforce the dominant construction of legal practice is not, however, cause for pessimism. Rather it is the first step in a reflective process that will allow us to embark on an effort to reconfigure those boundaries and reconstruct professional identity. It is also the first step in teaching our students, both in clinic and nonclinic settings, to be aware of each person's limited perspective and each person's experience of both privilege and penalty.<sup>55</sup> The act of maximizing disorienting moments described by Aiken is part of the process of disrupting the paradigm of lawyer as expert. It is only by destabilizing the predominant norms and dichotomies of clinical/nonclinical and professional/nonprofessional that we will begin to expand narrow boundaries and reconstruct lawyer identity. Perhaps then all of us in the law school and legal community can begin efforts to engage collaboratively in the pursuit of justice as constitutive of professional identity.

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<sup>55</sup> COLLINS, *supra* note 1.