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# GOODNESS AND HUMANNES: DISTINGUISHING TRAITS?

JAMES E. MOLITERNO\*

At the ABA Professional Skills Conference in Albuquerque, New Mexico, I observed evidence of a problem that seems endemic to skills teachers: a problem that adversely affects our relationships with other faculty members, our place in legal education, and indeed the quality of legal education that we jointly produce.<sup>1</sup> The problem is indicated by the following questions: (1) what do we call ourselves and how do we distinguish ourselves from the rest of the law school faculty?; and (2) is it fair, true, or productive to distinguish ourselves as skills teachers from the rest of the faculty based on an assertion of our supposed inherently superior moral fabric?

From the beginning of the Conference to the end, distinctions were made between skills teachers and everyone else on the law faculty. And, of course, we must make such distinctions at times to facilitate thoughtful examination of what we do. The distinctions were evidenced by our efforts at finding a name for what we do and our efforts to define what we do as being different from what other law faculty members do. Participants debated whether we teach "skills" (regarded by some as demeaning),<sup>2</sup> whether we teach "lawyering" (regarded by some as too narrow),<sup>3</sup> and whether other law teachers teach "skills." Attempts were made to distinguish skills teachers from the rest of the faculty by use of contrasting labels such as "skills teachers" versus "traditional teachers," "skills teachers" versus "nonskills teachers," "human teachers" (translation, skills teachers) versus who-knows-what, and "good (both morally and technically) teachers" versus you-know-what-teachers.<sup>4</sup> None of these labels or distinctions work because none is based on the true (and I say insignificant) difference between teachers who primarily teach skills and those who do not. Despite skills teachers' emphasis on using different methodologies, I mean to suggest that there

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1. This essay is not meant as a criticism of the Conference generally, as I found it to be full of good ideas and thoughtful new approaches to teaching.

2. These people seemed to prefer "lawyering" as the label for what we teach. It is true, of course, that we teach "skills" that are of an order different from those that might be taught in a welding or plumbing class (two skills, by the way, that I very much wish I possessed but have no desire to teach). I know of no skills teacher, for example, who teaches students how to balance their soon to be overstuffed checkbooks or how to repair their own office equipment. The skills we teach are really modes of thinking. To call what we teach "skills" is not to call the courses we teach "blowtorch law 101."

3. As Dean Kramer explained, "lawyering" may be too narrow a term for what we teach because many of the skills we teach are equally useful to those of our students who choose to pursue careers in business, politics, and other fields. These skills might conceivably even be useful to teachers.

4. For an interesting discussion of the difficulties inherent in label selection in the context of skills teaching, see Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

is no true, all-purpose distinction between skills teachers<sup>5</sup> and the rest of the faculty. This Article is about the dangers in making the kinds of false, misguided distinctions that were made by some at the Conference: the inherent dangers to us and to them in "us-them" thinking.

## I. DISTINCTIONS MADE BETWEEN SKILLS TEACHERS AND THE REST OF THE FACULTY

Distinctions made between "traditional faculty" and "skills faculty" are unsound. The opposite of "traditional" is not "skills." Although a distinction might be made between traditional<sup>6</sup> teachers and innovative teachers, it is simply not true to say that all skills teachers are more innovative than all other law teachers. It takes little more than a glance at a handful of issues of the *Journal of Legal Education* to see as much.<sup>7</sup> The error of this distinction is also evidenced by the number of substantive law faculty and administrators at the Conference:<sup>8</sup> they were not there spying on an enemy camp; they wanted to learn our methodologies and innovations and to expand their own teaching. It is also possible (dare I say this?) that skills teachers could learn some things about innovation from the rest of the faculty, as well.

The second distinction made was between "skills teachers" versus "nonskills teachers." This distinction can only be sound if it is understood as defining the

5. Although I argue that there is no substantive distinction worth making between so-called skills teachers and the rest of the law faculty, for ease of reference I use the term "skills teacher" in this essay. I use it to mean those whose teaching concentration is in clinical courses, trial advocacy, negotiations, writing, and other courses commonly labeled as "skills offerings."

6. I do not use the word "traditional" here in the pejorative way that some at the Conference used it.

7. Each of these articles was written by someone who would not be called a skills teacher based on a fair reading of the author's biographical sketch in the 1987-88 Directory of Law Teachers: Anderson & Kirkwood, *Teaching Civil Procedure With The Aid of Actual Local Tort Litigation*, 37 J. OF LEGAL EDUC. 215 (1987); Baier, *What is the Use of a Law Book Without Pictures or Conversations?* 34 J. OF LEGAL EDUC. 619 (1984); Brown, *Simulation Teaching: A Twenty-Second Semester Report*, 34 J. OF LEGAL EDUC. 638 (1984); Clark, *The Rationale for Computer-Aided Instruction*, 33 J. OF LEGAL EDUC. 459 (1983); Day, *Teaching Constitutional Law: Role Playing the Supreme Court*, 36 J. OF LEGAL EDUC. 268 (1986); Fry, *Simulating Dynamics: Using Role-Playing to Teach the Process of Bankruptcy Reorganization*, 37 J. OF LEGAL EDUC. 253 (1987); Herwitz, *Teaching Skills in a Business Law Setting: A Course in Business Lawyering*, 37 J. OF LEGAL EDUC. 261 (1987); McAninch, *Experiential Learning in a Traditional Classroom*, 36 J. OF LEGAL EDUC. 420 (1986); Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. OF LEGAL EDUC. 189 (1986); Ogden, *The Problem Method in Legal Education*, 34 J. OF LEGAL EDUC. 654 (1984); Zart, *Learning Criminal Law Through the Whole Case Method*, 34 J. OF LEGAL EDUC. 697 (1984).

8. A review of the roster of Conferees combined with fair inferences drawn from a review of each Conferee's biographical sketch in the 1986-87 Directory of Law Teachers indicates the following about the Conferees:

Deans	22 (19%)
Skills teachers (concentration in skills teaching or administration of skills programs)	66 (55%)
Other law faculty (exclusive or nearly exclusive teaching of substantive law or procedure)	22 (19%)
Others (mostly practitioners)	8 (7%)

Interestingly, some 45 percent of the Conferees could not fairly be described as skills teachers.

difference in focus of skills teachers versus all other law teachers. In truth, the only difference between skills teachers and the rest of the faculty is in the subject matter of course offerings and the implications to teaching methodology that go along with that difference in subject matter. All law teachers teach skills. It cannot be wrong to call us skills teachers provided it is understood that we are being called skills teachers not because we are the only law teachers teaching skills but because skills are the subject matter of the courses we teach. It is not demeaning to acknowledge that we teach skills, as some at the Conference suggested.<sup>9</sup> The skills that skills teachers focus on teaching are no less demanding or difficult to master than the skills that the rest of the faculty focus on teaching.<sup>10</sup>

Because we all teach skills of one kind or another, we can only distinguish so-called skills teachers from the rest of the faculty on the basis of the subject matter and focus of the courses offered. When a contracts teacher does his or her job, that teacher conveys, at a minimum, skills of case analysis, doctrinal analysis, and statutory analysis. But the contracts teacher is teaching primarily contracts and secondarily the lawyering skills that must be mastered by first year law students.<sup>11</sup> Skills teachers, on the other hand, have as the subject matter of their courses the skills that are being taught. Thus, the skills taught by the contracts teacher are secondary to the subject matter of the course but are taught nonetheless. The skills teacher, however, teaches substantive law, where necessary, secondarily to the subject matter of his or her course, the skills component. Even those skills teachers who claim to be heavy on substance give skills teaching higher priority in their courses. The heavy emphasis on substance is designed primarily to make the skills learning more effective.

Because the subject matter of our courses is different from that of the contracts or torts teacher, we use different methodologies and we need different teaching skills ourselves to be successful teachers. But these fairly minor differences should not be translated into an "us-them" mentality. (In fact, some of "us" teach contracts or torts, and so on, in addition to our skills teaching, and are therefore both "us" and "them,"—a truly frightening prospect.) Seen for what they really are, the distinctions are not particularly illuminating or helpful. They are only slightly more significant than the distinction between contracts teachers and torts teachers—not a terribly profound or useful distinction for anyone but conference organizers and book publishers' sales staff administering complimentary copy policies.

Simply said, the only distinctions that should be made between so-called skills teachers and other faculty members are those that have some basis in pedagogical philosophy, methodology, and subject matter of the courses that we teach. To my way of thinking, there should be no distinctions at all beyond those that are

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9. See *supra* note 2.

10. "[E]nds-means thinking, information-acquisition analyses, contingency planning, comparative risk evaluation in decisionmaking, and the like . . . [(the skills taught by so-called skills teachers) are] no less conceptual or academically rigorous than case reading and doctrinal analysis." Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. OF LEGAL EDUC. 612, 615 (1984).

11. It might well be argued that the focus of a teacher of a first year, core curriculum course is equally divided between thinking skills and substantive law. Certainly, though, teachers of upper level substantive law courses most often focus on the substantive law and not on the skills incidentally conveyed.

necessary for thoughtful discussion and analysis of what we do. All faculty members are engaged in a joint enterprise called legal education; the fewer distinctions made and drawn between us, the better.<sup>12</sup>

## II. THE DISTINCTION BASED ON GOODNESS

Of course, there are some distinctions that have a basis in pedagogical philosophy and methodology choice and are, therefore, appropriate distinctions to make because they facilitate thoughtful analysis of what we do. Indeed, because I, for example, am not ready as was suggested by Professor Gifford, to "reclaim the legacy of Langdell" for skills teachers,<sup>13</sup> there will likely always be some appropriate distinctions based on differing pedagogical philosophies and methodology choices between most skills teachers and much of the rest of the law faculty. What concerns me most is one particular distinction that I heard drawn several times during the Conference, a distinction potentially most damaging and harmful to legal education; the nature of the distinction is moral. It has as its basis that we skills teachers are good people and, as a sometimes implicit and sometimes explicit otherside, that all other faculty members are bad people.<sup>14</sup> We simply should not be making distinctions that are so charged morally, politically, and personally, and that have no basis in pedagogical philosophy. I

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12. It may be said that this is easy for me to say. I am fortunate to have been associated with two schools at which I have had a status that is no different from any other faculty member. I am regarded no differently from any other faculty member: I have a specialty (skills teaching) just as any number of other faculty members have a specialty. It may be more difficult for other skills teachers to escape the world of making erroneous, unnecessary, and harmful distinctions when they are themselves distinguished from the rest of the faculty at their own schools in many erroneous, unnecessary, and harmful ways. Advancement of our common goals, however, will never occur while we *are also* making the kinds of erroneous, unnecessary, and harmful distinctions discussed in this Article.

The story of this sort of hypocrisy is told well by Dr. Seuss in his story about the Sneetches, like beings that could be distinguished from one another only by the presence or absence of a star on each Sneetch's belly. T. SEUSS GEISEL, *THE SNEETCHES AND OTHER STORIES* (1961). Of course, the group with the stars latched onto this insignificant distinction as the identifying mark of the superior form of Sneetch. Once the Plain-Bellied Sneetches acquired stars, however, the others lamented:

"Good grief!" groaned the ones who had stars at the first.

"We're *still* the best Sneetches and they are the worst.

But, now, how in the world will we know," they all frowned,

"If which kind is what, or the other way round?"

*Id.* at 13. Thereafter, both groups of Sneetches spent considerable time, energy, and money attempting to reestablish the distinction by adding and removing their stars and alternately claiming superiority until no Sneetch knew which group was which. Happily, once sufficiently confused about who was who, the Sneetches were enlightened:

[T]he Sneetches got really quite smart on that day,

The day they decided that Sneetches are Sneetches

And no kind of Sneetch is the best on the beaches.

That day, all the Sneetches forgot about stars

And whether they had one, or not, upon thars.

*Id.* at 24.

The sooner we all realize that law teachers are law teachers, the better we all will be.

13. See Professor Gifford's remarks from the initial panel discussion.

14. Admittedly, some would say that other faculty members are not bad, they are just not as good as we skills teachers are. Interestingly, based upon conversations at the Conference, it appears that some live-client clinicians would also draw this distinction between themselves and simulation skills teachers.

heard such distinctions being made at the Conference, however, particularly during the first day tone-setting remarks.

It would be one thing to say that, based on a difference in pedagogical philosophy, all teachers that use methodologies different from skills teachers are bad teachers, but it is quite another to imply that they are of an ilk of diminished morality. The "bad teacher"<sup>15</sup> claim would be false but would not be of the same destructive order as the diminished morality charge. There is no place for such a distinction in our field both because it is not true and because it is the most harmful of distinctions we could make between skills teachers and other faculty.

While I was warmed by the tone-setting remarks of the first day of the Conference, the days have passed, it seems to me, when skills teachers need emotional pep talks to continue doing high quality work. We need not be rallied to a mission or convinced that what we do is bring goodness to legal education. Of course a goal of skills teachers should be the exposure of students to matters of the heart as well as matters of the mind,<sup>16</sup> but this goal is not ours exclusively. We do not have a monopoly on goodness, humanness, and social conscience, and we hurt ourselves and our students when we claim one.

The subject matter of our courses is not social conscience. It may well be that our courses have a tendency to permit students so inclined to develop a social conscience, but the subject matter of our courses is the skill of lawyering. We are not, it seems to me, on the "front line" of a social movement as was intimated by Justice Wahl and others. I am not suggesting that we should avoid instilling in our students a sense of social conscience, any more than the Professional Responsibility, Constitutional Law, or any other teacher should. The fact that our offerings may lend themselves to permitting students to acquire a sense of social conscience, however, must not be the premise that underlies our claim to a full membership in the curriculum for our courses or on the faculty for ourselves.

Our irrational claim to moral superiority is on some level a reaction to our history of being treated as second class faculty citizens. But it is too late in the day for us to squander our valuable time and energy moaning about past poor treatment. Instead of contributing to the move toward full membership on the faculty for all skills teachers, the claim contains an implicit acknowledgment that skills teachers remain on the fringe of legal education. (It sometimes seems that *we* believe this more deeply than does the rest of the faculty.) Far from indicating that we are a legitimate part of legal education, this claim divides us from the rest of the faculty and detracts from efforts at integrating various teaching methods into a coherent whole that might constitute legal education. We need to act like (not always to be read "be like") full members of the faculty in order to *be* full members of the faculty. By that I mean that we must be willing to engage in self critique and promote our interests by argument that is based on the value of what we do and not our perception of the dark hearts beating within those who have views different from our own. Engaging in moral superiority

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15. For one explanation of what it is like to be a "bad law teacher," see Tushnet, *On Being A Bad Law Teacher*, Newsletter of the Conference on Critical Legal Studies, May 1987, at 22.

16. See Justice Rosalee Wahl's remarks opening the Conference.

rhetoric detracts from our claims to full faculty status. It is time to realize that we have been accepted and live with that fact.<sup>17</sup>

The separation that results from the moral superiority claim is different in kind and quality from that which results from our legitimate pedagogical differences. This claim is not likely to lead to constructive results but is more likely to result in hostility and ruination of working relationships. It will pour cold water on efforts at collaboration that we know are crucial to integration of skills into the three year curriculum. We heard at the Conference of the successful efforts being made in that regard at NYU, Montana, Connecticut, and elsewhere. These efforts could not have begun, let alone have been successful, if one side or the other had charged up to take some supposed moral highground.<sup>18</sup> The fact that we too often resort to condemning those who use different methodologies from us instead of constructing the many legitimate and, I think, irresistible arguments for skills teaching based on its merits sends the most negative of messages about the value of what we do.

By virtue of our sometimes claim to the exclusive possession of the ability to convey humanness, ethics, and professionalism, and by setting ourselves up as adversaries, we tend in that same degree to relieve the rest of the faculty of responsibility in this regard. If we relieve this responsibility, how many students are we as skills teachers affecting? How many students can we reach if we claim to function as lone wolves on our respective faculties? "Our" students are not only the students registered into our skills courses but are all the students of the law school, and until each of us recognizes this simple truth we are not full members of our faculties. By making our claims to being the exclusive purveyors of goodness, humanness, and ethics and implicitly relieving the rest of the faculty of responsibility in that regard, we in fact reduce the level of humanity to which

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17. Dean Vorenberg, for example, identifies the following as among the directions in which legal education is moving: Negotiation, ADR, Pro Se Clinics, Field Based Clinics, Simulation Courses. Vorenberg, *Challenges to Legal Education*, Harvard Gazette (Law School Supp.), April 24, 1987, at 1. Who will fill these slots but people who teach with methodologies similar to those now being used by skills teachers?

The status of skills teachers is improving. Of the skills teachers present at the Conference, for example, the following breakdown of faculty status is indicated:

Assistant Professor	8
Associate Professor	13
Professor	18
Visiting Professor	1
Instructor or Lecturer	5
Other (usually Coordinator or Director of a program)	21

18. As Professor Ruud has correctly pointed out:

[U]nnecessary difficulties . . . have been created by those who have a good idea and want to advocate it who make the case for their reform principally by condemning present arrangements as terrible or worse instead of describing the special contributions to legal education their suggested reform will make . . . . The process of establishing clinical legal education as an important element of any program of sound legal education had too much counterproductive rhetoric. Too often the advocates described the limitations of conventional classroom teaching and attacked its practitioners. Too little attention was given to the very important contribution that sound clinical programs can add to a law student's education. The wrong rhetoric too often divided faculties into two camps.

Executive Director's Report, Newsletter of AALS No. 87-3, June 1987.

our students are exposed; we lessen the breadth of values to which our students might aspire; and we reduce the quality of the education that our students receive. It may be true that we pour ourselves into our students as skills teachers, but we harm our students by allowing the distinctions that we make to discourage other faculty members from doing the same.

The goal of producing law graduates that have been exposed to humanness and the importance of people to the law is one that must be shared by all of the law faculty. Professor Lesnick's criticism of legal education, for example, is not directed at one kind of law teacher or another but at legal education itself.<sup>19</sup> Our legitimate concerns about the lack of humanness that may be perceived in legal education must likewise be directed at all faculty and not only at those who teach subjects different from those that we teach. It is tempting, of course, to point fingers at all others, but an important part of being an academic is *self-critique*.<sup>20</sup> If one of our concerns is a lack of humanness in legal education, then we do nothing to enhance humanness and everything to diminish it by claiming to be unique on the faculty in fostering humanness in our students.

The responsibility for conveying ethics and professionalism falls upon the law school generally.<sup>21</sup> Of course, our offerings are excellent vehicles for conveying ethics and professionalism, but our offerings accomplish many other goals as well; it is counterproductive to attempt to claim to be the exclusive conveyors of ethics and professionalism because we cannot do this job alone. We cannot be effective in promoting these attributes by setting them up as the sole or primary reason for our own existence. Our charge is broader than this and at the same time does not include the exclusive responsibility for conveying these desirable attributes. Our students cannot afford to have us make claims that tend to reduce the rest of the faculty's responsibility in this area.

The responsibility of responding to developing notions of what processes produce the most justice is also a joint undertaking shared by the whole faculty. Although it is certainly true that skills teachers have responded by teaching more and more skills essential to effective alternative dispute resolution practice, for example (and of course this is part of our legacy and our responsibility to legal education),<sup>22</sup> so has much of the rest of the faculty.<sup>23</sup> The faculty should not be encouraged by our false moral claim to look to us to fulfill the teaching profession's full responsibility for responding to such changes.

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19. Lesnick, *Legal Education's Concern with Justice: A Conversation with a Critic*, 35 J. OF LEGAL EDUC. 414 (1985).

20. See Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. OF LEGAL EDUC. 45, 60 (1986) (suggesting that indeed a failing of skills teachers has been their ability or willingness to engage in self-critique).

21. *Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. OF LEGAL EDUC. 155 (1984).

22. Condlin, *supra* note 20.

23. See, e.g., Carrington, *Civil Procedure and Alternative Dispute Resolution*, 34 J. OF LEGAL EDUC. 298 (1984); Galanter, *Worlds of Deals Using Negotiation to Teach about Legal Process*, 34 J. OF LEGAL EDUC. 268 (1984); Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution*, 34 J. OF LEGAL EDUC. 245 (1984); Minow, *Some Thoughts on Dispute Resolution and Civil Procedure*, 34 J. OF LEGAL EDUC. 284 (1984); Moberly, *A Pedagogy for Negotiation*, 34 J. OF LEGAL EDUC. 315 (1984); Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution*, 34 J. OF LEGAL EDUC. 237 (1984).

To the extent that we must draw distinctions between skills teachers and the rest of the faculty for purposes of thoughtful discussion of what we do, those distinctions should have their basis in differences of pedagogical philosophy and methodology choice. They should not be distinctions based on the relative moral worth of one segment of the faculty or of that segment's contribution to legal education. Given that the real distinctions worth discussing are those of subject matter focus and methodology, our time might be better spent distinguishing not persons from persons but teaching focus from teaching focus or methodology from methodology. This would allow us to stop using labels such as "skills teacher" altogether in favor of labels that identify the various functions we perform and methodologies we use instead of the *person* performing the function or using the methodology. Needlessly distinguishing ourselves from the rest of the faculty does nothing to serve the purposes of thoughtful discourse; it does everything to detract from the goal of all faculty members to provide the best possible legal education available to our students and thereby produce the best possible lawyers to serve the society.