The Moral Imagination and the Legal Life: Beyond Text in Legal Education, Bankowski & Del Mar, eds.* Chapter 7

Twyla Tharp Goes to Law School: On the Use of the Visual and Performing Arts in Professional Education

Thomas Wm. Mayo

Everything is raw material. Everything is relevant. Everything is usable.

(Tharp 2003: 10)

Introduction

It was the beginning of our first class on euthanasia in my fall-semester ‘Bioethics and Law’ class, and I had passed out ‘My Death’, an arresting poem by Raymond Carver (Carver 1998: 122), as a discussion-starter. A third-year law student who had recently completed a summer clerkship with a small firm in Dallas spoke up: ‘I get this whole “medicine is both an art and a science” thing, but what does art have to do with law? I’ve seen the practice of law: it’s just plumbing.’

Setting aside the question of whether the student was being unfair to plumbers, his comment seemed to embody a dramatic failure – on his part or that of his teachers (or both) – a failure to understand the creative demands and possibilities within the practice of law. The same might be said about the teaching of it, as well, that the legal academy typically defines the enterprise in an excessively narrow and instrumentalist fashion that too often overlooks or diminishes the art of the practice of law.

My personal response to this perceived deficiency was to create a course that is currently taught under the title of ‘Law, Literature, and Medicine’. It is designed for third-year law students and fourth-year medical students in their last semester of professional training. The course consists of 14 weeks of reading novels, plays, shorts stories and lots of poems. It concludes with the students creating works

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1 I owe special thanks to Maksymilian Del Mar, Zenon Bańkowski and all the participants in the various workshops whose enthusiasm for the ‘Beyond Text in Legal Education’ project inspired me to probe the theoretical assumptions implicit in my teaching. I am also indebted to the research support of three law students at the SMU/Dedman School of Law: Virginia Welch ’11, Jessica Edwards ’12 and Meg Friess ’12. I also thank the Drexel Law Review for their permission to use my description of an earlier version of ‘Law, Literature and Medicine’ as the basis for the description of the 2012 edition that appears here (Bard, Mayo and Tovino 2009).

*Ashgate, 2013
of art for their final projects. This chapter is an attempt to describe exactly what we do in the course and, more importantly, why reading Shakespeare, Dickinson and Irving may make them better, more effective and happier lawyers (and physicians).

Two disclaimers are necessary at the outset. ‘Beyond Text’ may seem precisely the wrong rubric under which to consider a course that consists of almost nothing but texts, to which I offer two responses. My reading of ‘Beyond Text’ comes somewhat closer to ‘Beyond [Traditional Legal] Text[s]’, which opens up a world of fiction and poetry for our consideration. Moreover, the final projects that are described in greater detail below typically include, in addition to texts, paintings, sculptures, mosaics, weavings, photography, music and dance. These projects are not merely the last activities of the semester for these students; they are, for reasons I hope to make clear, the most important ones.

In addition, my reasons for offering such a course as ‘Law, Literature and Medicine’ do not rest upon assumptions as to whether any law-school or medical-school course is capable of improving the moral capabilities of their students. There is deep scepticism within the academy (and possibly in the world at large) that any such thing is possible, although developments in the field of moral psychology may provide a basis for some hope (Hamilton and Monson 2011). This is not a debate that will soon be resolved, and any claim that literature specifically or the arts in general can be useful in this regard adds a degree of difficulty that will make resolution in our lifetime even less likely.

Instead, the learning that occurs in ‘Law, Literature and Medicine’, and possibly beyond the course into the students’ practising careers, turns on the importance of empathy in the learning and practice of law.2 Exactly what I mean by this will take some development, but, as will become clear, my use of the word is an admittedly broad one. In brief outline, my theory for this course rests upon three propositions:

1. Empathy, broadly construed, is an important professional trait.
2. Law students, through their encounters with literature and the arts, can learn to model empathy.
3. Through an iterative process of encountering the arts in a professionally significant context, the empathic abilities of law students can be enhanced.

In the following section, I describe the ‘Law, Literature and Medicine’ course in some detail, with commentary on some of the more valuable aspects of various assigned readings. I will then go on to discuss the three propositions above, with particular emphasis being placed upon the broad range of artistic endeavours represented by the students’ final projects.

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2 I believe the same claim may be made for medical students and their development as practitioners after their formal training is over, but considering the focus of the larger work of which this chapter is a part, and for the sake of simplicity, the theory and claims that follow focus on the learning and practice of law.

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Law, Literature and Medicine

‘Law, Literature and Medicine’ is advertised although from the course ‘Prospectus’ (fig) focus is considerably broader than the tr ‘professional responsibility’, ‘medical jur

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  - to give each group a chance to gain taking a look at another profession;
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    of master story-tellers;
  - to underline the importance of a historical and outlook – to develop students’ professional lives;
  - to introduce students to the notion that in their professional lives is organize
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  - to introduce students to a form of casuistry (as distinct from principles (deontology), consider strengths and weaknesses of this a 

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more than the traditional professional/school courses in
professional responsibility’, ‘medical jurisprudence’ or ‘medical ethics’:

- As much as anything, this course is about professionalism. Students will learn some
  important things about professionalism and about the profession they are about to
  enter. More specifically, the goals of this course include:
  - to give future lawyers and doctors some insight into one another’s profession, as
    well as to give them a chance to develop their own ways of talking to one another;
  - to give each group a chance to gain insight into their own profession’s values by
    taking a look at another profession;
  - to introduce students to the study of literature as a way of gaining exposure to
    human experience and the ethical dilemmas of daily practice through the writings
    of master story-tellers;
  - to underline the importance of a humane and humanistic professional education
    and outlook – to develop students’ sensitivity to the human dimension of their
    professional lives;
  - to introduce students to the notion that most of the information they will deal with
    in their professional lives is organized and transmitted in narrative form – judicial
    opinions, client and patient stories (in the form of complaints, histories, etc.), and
    practical clinical information (what worked the last time it was tried – in court
    or with a type of patient). In that vein, it is useful for students to sharpen their narrative
    skills by reading and discussing great stories; and
  - to introduce students to a form of professional, case-based moral reasoning that
    resembles casuistry (as distinct from the dominant traditions of reasoning from first
    principles (deontology), consequentialism, and virtue ethics). We will consider the
    strengths and weaknesses of this approach through a variety of literary sources.

Mechanics

The hand-shake Each class begins with everyone walking around the seminar
room, shaking everyone else’s hand and exchanging greetings. Early in the
semester, names are recalled. The past week may be briefly reviewed, or the next
week previewed. I believe in the power of personal touch. It helps to break down
barriers and facilitate mutual respect. It burns a few minutes of precious class
time, but if it is good enough for the justices of the Supreme Court of the United
States, it is good enough for the participants in ‘Law, Literature and Medicine’.

3 ‘Five minutes before conference time, 09:30 A.M. or 10:00 A.M., the Justices are
summoned. They exchange ritual handshakes and settle down at the long table’ (Supreme
Court Historical Society 2012).
So far, no one has objected on the grounds that it is also an effective vector for the spreading of infectious disease.

**Law-medical student pairings** Throughout the semester, students choose readings for which they volunteer to lead one hour of class discussion. For most assignments, this means reading a 40-to-50-page segment from one of our anthologies and selecting five or six readings for class discussion. On the first day of class, the students are asked to volunteer for two or three such assignments. One medical student pairs with one law student and every effort is made to avoid pairing the same students twice. The result of this requirement is that law and medical students spend hours outside of class discussing the readings for their weeks, expressing their preferences and smoothing out their differences. If they are doing this right, they work out goals for the class and strategies for achieving those goals that are mutually acceptable. Then, of course, they get to lead the discussion as a team. They will be working in teams for the rest of their lives, some as small as the two-person student pairs, some as large as the 20-student seminar. For our 14 weeks together, the students have many opportunities to deal with group dynamics.

**Journals** Most years, students are required to keep a weekly journal. They can write about anything that relates to the course: the readings, the class discussion, or something that happened in the ambulatory-care or criminal-defence clinic that made them think of William Carlos Williams or Harper Lee. The content is not important. The goal here is to extend the readings and class discussion beyond the four walls of the classroom and to connect them with the students’ ‘real’ lives. As much as we talk about making that connection in class, it is much more powerful when the students have to make the connection on a personal level. I collect the journals at the end of the semester simply to make sure they were kept. Everyone who turns in a journal passes this portion of the course. The journals are then returned to the students or destroyed in accordance with their instructions.

**Writing assignments** Students are given creative-writing assignments at approximately four-week intervals: a poem, a second poem and a set of three dramatic monologues. All of the assignments deal with some aspect of the course. At the end of the course, I collect all the writings in a single volume that each student receives at the class dinner.

For the poems, I give the students suggestions to get them started. None of the prompts are substantive in nature, but instead each one poses a writerly task and invites the students to come up with a writerly solution. For example:

- Write a short poem that begins and ends differently about the line the second doctor. Do not mention lawyers or doctors.

Why do this? It is not to turn the students into poets. During the first semester, the class talks about craft, about the importance of honing one’s skills and one’s work, so competence, I say, quoting from a long poem by a famous poet. We try to put craft and competence in context: they living with their hands. The tools can be general and specific. The poet who can write a poem is a different person than the poet who can write a short story. The poet who can write a short story is a different person than the poet who can write a novel.

The central challenge of the course, which adapted from White 1973: 34–7) is a case in which the student is required to write about their own personal experience. Here’s how I explain it to the students. They are to find a story about a person in their own life, someone they know, and write a short story based on that character. Then they are to rewrite the story using a different voice and perspective. Finally, they are to rewrite the story using a different genre.

**Readings**

The course readings have changed over the years. The Cider House Rules, which has been used in the first, embryonic year of this course. Yet another version of ‘Law, Literature and Medicine’ makes the different pieces work in situ.

**First class** The readings are three essays, which I find that they help me to focus on the distinction between fiction and non-fiction. For the first class, however, there is no essay. I begin by discussing some essays.

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4 Many of these prompts were generated by my students. When I could remember them, I hereby thank the unnamed contributors to ‘Law, Literature and Medicine’.
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- Write a short poem that begins and ends with the same line. The reader should feel
differently about the line the second time he or she encounters it because of what
happened in the poem.
- Describe a pair of shoes in such a way that a reader will think of a lawyer or a
doctor. Do not mention lawyers or doctors in the poem.” (Mayo 2012a, 2012b)

Why do this? It is not to turn the students into competent poets. Throughout the
semester, the class talks about craft, about respecting the tools of one’s trade and
the importance of honing one’s skills across an entire career. ‘The first kindness is
competence’, I say, quoting from a long-lost poem by Dr David Scheidermayer.
We try to put craft and competence in context. Doctors, lawyers and poets all earn
their living with their hands. The tools of their professions vary, but the need to
master the tools is universal. The poetry assignments are intended to instill some
respect for the craft of poetry.

The central challenge of the monologue assignment (which was minimally
adapted from White 1973: 34–7) is simply to produce three narratives, one of
which is by a doctor or lawyer, about a death (Mayo 2012c). The death can be one
we read about in class, one that is plucked from the pages of a daily newspaper or
one that is imagined. What matters is that the speaker in each monologue should
be identifiable from his or her own words – vocabulary, syntax, diction, etc. In
this exercise, the students have an opportunity to consider how language shapes
identity and vice versa, as well as the impact of language upon the listener. The
assignment gives students an opportunity to develop their ‘narrative competency’
and to consider the impact of language and perspective upon the narratives that are
constructed around a single event.

Readings

The course readings have changed over time, with the exception of John Irving’s
The Cider House Rules, which has been the sole constant since 1986, the very
first, embryonic year of this course. What follows is the reading list for the 2012
version of ‘Law, Literature and Medicine’, with some commentary about the way
the different pieces work in situ.

First class The readings are three essays and three poems. The course generally
shies away from essays out of what may be an excessive fussiness about the
distinction between fiction and non-fiction, especially didactic non-fiction pieces.
For the first class, however, there are some specific reasons for reading and
discussing some essays.

4 Many of these prompts were taken or adapted from poetry workshops and
workbooks. When I could remember the source, I have acknowledged my debt. In all
other cases, I hereby thank the unnamed poetry workshop directors and poets for their
contributions to ‘Law, Literature and Medicine’.
We begin with Dr Rita Charon’s ‘Narrative and Medicine’ (Charon 2004). This is the most eloquent and efficient exposition of ‘narrative competencies’ I have found. Dr Charon makes the case for attention to language (both the patient’s and the clinician’s), the inevitability of narrative-construction (for good or for ill) and the use of stories in medicine.

Next comes an excerpt from James Boyd White’s essay ‘Legal knowledge’ (White 2002: 1396–402). This piece gives medical students an insider’s view of what the law attempts to achieve (truth: not necessarily; justice: yes). For both sets of students, it seems helpful to expose them to White’s distinctive approach to rhetoric and law. In what sense are lawyers storytellers? How does ‘narrative competency’ fit into the skill set of the lawyer or the judge? How is an opinion like a poem?

The first two pieces are offered to make the case to both the law students and the medical students that exposure to literature just might have some relevance to the practice of their chosen professions. The third essay is Benjamin DeMott’s ‘English and the promise of happiness’ (DeMott 1991), which serves a quite different purpose. I am not a literary scholar, but this is a class that is built around literature. Therefore, in addition to my medico-legal goals for the course, I have certain literary goals as well. The classroom should be one where students understand their obligation to move their reactions to a piece of writing from the internal, personal sphere and into the classroom through participation in class discussion. Students should be willing to step outside of their carefully constructed professional personae and encounter the works we read in the spirit of honesty, openness and generosity. Their willingness to do this depends upon my ability to create a safe space in which students can let their guard down. DeMott addresses all of these issues in his essay and it has always seemed a good idea to put them on the table early on so that my expectations of the students (and their expectations of me) are explicit.

We finish this first class with three poems. Poetry plays a large role in ‘Law, Literature and Medicine’. A few of the reasons for this are practical. More than half of the readings in the medical anthology we use are poems, undoubtedly because one of the editors – the cardiologist John Stone, MD – was a wonderful poet in his own right. Most of our poems are short (two pages or less), which allows us to read each poem out loud and to cover a wide range of subjects very efficiently.

In addition, there are few things on this planet more likely to strike fear into the hearts of most medical and law students than a poem. Faced with the task of leading a discussion of a poem, the students shed their veneer of professional competence and immediately look around the table for help. It has never been easier to create a collaborative learning environment than by throwing a poem into the middle of the room and watching the students reach out for assistance.

Almost any poem will do for this first class, but I have settled on these three: ‘Introduction to poetry’ by US Poet Laureate Billy Collins (Collins 2001), John Stone’s ‘The truck’ (Stone 1980) and the classic ‘The lawyers know too much’ by Carl Sandburg (Sandburg 1922). Collins invites readers to play with a poem, to look at it from various angles and perspectives to ‘tie the poem to a chair with rope. The poem is a slightly challenging read (in places) and it is about a serious topic (the trustworthiness of lawyers) and it is a winning combination. We use ‘works’ as a technical matter and the poem about the difference between poetry and prose is a chestnut (‘tell me why a hearse horse is a bad example of a lawyer joke that is good to talk about what life would be like if we didn’t have lawyers’).

The rest of the semester The Cider House Rules readings are necessarily limited. The Cider House Rules has always been one of my favorite books to read aloud at any time soon. In addition to being a deeply moral purpose through its multiple layers at a time when abortions were illegal, we write for public consumption – I [of the cider house] if you’ve been there (272) – almost every one of which is charged by which we actually lead our lives. Someone (the young orphan, Homer Smith) has an obligation to violate the law as legal prohibition, are scarce, expensive, and predictably resist the logic of Dr Lister. Until abortions are legal, safe, and easily available, a need to provide abortions that are legal, safe, and easy to access is an in-class discussion of the prohibition (except in Washington D.C. – Quill has argued, to abandonment – the moral obligation to disobey the law and one with a unique relationship to the

On Doctoring (Stone 2001) is a text on various aspects of being a physician readings for class discussion from for them to enjoy the experience of the student’s inevitable relation to the regulatory process. No effort to clamp down or efforts to work through the ‘morale training. Despite the medical focus
look at it from various angles and perspectives, and gently chides those who want to ‘tie the poem to a chair with rope and torture a confession out of it’. Stone’s poem is a slightly challenging read (no punctuation and irregular spacing within lines) and it is about a serious topic (death), but its conversational tone and final joke are a winning combination. We spend some time considering how the poem ‘works’ as a technical matter and the poem also gives us a chance to think out loud about the differences between poetry and prose. Class ends with Sandburg’s old chestnut (‘tell me why a hearse horse snickers hauling a lawyer’s bones’), an early example of a lawyer joke that is good as far as it goes and gives the class a chance to talk about what life would be like if all lawyers and the rule of law disappeared.

_The rest of the semester_  
_The Cider House Rules_ (Irving 1985). None of the remaining readings is necessarily a permanent part of the course, although _The Cider House Rules_ has always been on the list and I see no reason to drop it any time soon. In addition to being a glorious piece of writing, the novel has a deeply moral purpose through its multi-faceted exploration of life in America at a time when abortions were illegal. On one level, John Irving shows us the rules we write for public consumption – for example, ‘Please don’t go up on the roof of the cider house’ if you’ve been drinking – especially at night’ (Irving 1985: 272) – almost every one of which is repeatedly broken, as opposed to the rules by which we actually lead our lives. The book also poses the question of whether someone (the young orphan, Homer Wells) with special skills (abortionist) has an obligation to violate the law as long as his services are needed and, because of legal prohibition, are scarce, expensive and dangerous to obtain. The students predictably resist the logic of Dr Larch’s argument, which is far from foolproof, that until abortions are legal, safe and affordable, Homer has no choice but to provide abortions that are illegal, safe and affordable. Larch’s argument provides a prelude to an in-class discussion of his argument in the context of the current prohibition (except in Washington, Oregon and Montana) against physician-assisted suicide. When, if ever, does a physician have an obligation to assist a terminally ill patient who wants to commit suicide? In states where it is still illegal, is refusal to assist a patient in such an endeavor tantamount, as Timothy Quill has argued, to abandonment (Quill 1991)? More generally, is there ever a moral obligation to disobey the law, and how should a professional – especially one with a unique relationship to the law – respond to the assertion of such a duty?

_On Doctoring_ (Stone 2001) is a strong collection of stories, poems and essays on various aspects of being a physician. Each week, a pair of students picks the readings for class discussion from a 40- to 50-page block of material. I am eager for them to enjoy the experience of reading great literature for its own sake, but the students inevitably relate to the readings through their own experiences. I make no serious effort to clamp down on the sidebar discussions, many of which are attempts to work through the ‘moral distress’ they have experienced during their training. Despite the medical focus, law students find much here to which they
can relate based upon experiences in the classroom, live client clinic or summer clerkships.

Literature and the Law (Morawetz 2007). After years of assembling and copying law-related readings, I have started to rely increasingly upon anthologies. Literature and the Law is my current choice, but many other equally attractive options are available. The goal for these readings is to devote as much class time to issues of legal professionalism as we do to the medical side. For example, we compare the closing arguments of the lawyers in To Kill a Mockingbird and Ernest J. Gaines’ A Lesson Before Dying. Both raise important issues of race, justice and law, as well as the impact of personal morality on an attorney’s duty of zealous advocacy. In an ideal world, the legal anthology would touch regularly upon medical topics as well as thorny legal issues. I have found only one book that does this (and does it brilliantly) – Norval Morris’ Brothel Boy and Other Parables of the Law – but the students seem eventually to tire of the historical and social milieu in which the stories are set (pre-independence Burma), notwithstanding the thoroughly modern concepts and dilemmas that are delivered through Morris’ pitch-perfect personification of Eric Blair (whose writings later became famous under his nom de plume, George Orwell).

Wit (Edson 1999). When I first heard of Margaret Edson’s off-Broadway play about a John Donne scholar dying of metastatic ovarian cancer, I could not resist. With the help of the author (who later was awarded the Pulitzer Prize for Drama for this, her first play), I obtained the script and fell in love with the story. Eventually, the script was published in book form and, a few years ago, Mike Nichols and Emma Thompson adapted it for an HBO production. The play is useful for a number of discussion points, not all of which arise each year. End-of-life decision-making is a key plot point, of course, primarily in connection with the patient’s decision to agree to a Do Not Resuscitate (DNR) order. The ‘therapeutic misconception’ is also relevant (and not a concept with which most law students are familiar), and that leads to a discussion of informed consent (which the play portrays in woefully inadequate terms). There are few doctrinal points beyond these, but the play still works extremely well in a course that is equally concerned with developing sensitivity to the shared experiences of patients and co-workers. In some years, we have watched the film in class and discussed it in the half-hour that remains, while in other years we have conducted a table-reading or simply discussed the moments that seemed the most salient for future professionals.

Whose Life Is It, Anyway? (Clark 1980). Brian Clark’s play about a patient who has suffered a high-cervical-spine transection and wants to leave the hospital to die in peace was one of the earliest works with a ‘right to die’ theme at its core. It first appeared as a television play for the BBC in 1972, approximately four years before the New Jersey Supreme Court’s landmark decision in the Karen Ann Quinlan case (In re Quinlan (1976)). It was later a hit on the London stage and in 1979 on Broadway as well. It is easy to dismiss Ken Harrison, would satisfy anyone’s we have long since settled the legal an right to refuse even life-saving and continues to serve a number of useful the basics of the right to die. Second, and patients working through a medic ways. And, finally, despite all of the leg type of case represented by Ken Harr difficult and perplexing encountered the problem is usually the worry that the decision-making capacity to refuse discussion of different types of depre patients to make certain kinds of deci

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The remainder of the readings ‘ Two recurring titles are particularly good thing’ (Carver 2009), a short s a car and eventually dies in the hos Women’s Children (Klass 1990) (at write a DNR order on a five-year-c field trip each semester: a walkabo at the Children’s Medical Center. B families and providers in extreme the students a chance to experience hand, making the gravity of the w and real. The walkabout ends with ethical, social, financial, political a we have just visited.
Broadway as well. It is easy to dismiss this play as a relic. The central character, Ken Harrison, would satisfy anyone’s criteria for decision-making capacity, and we have long since settled the legal and ethical question of a competent patient’s right to refuse even life-saving and life-sustaining treatments. Yet the play continues to serve a number of useful purposes. First, it allows the class to cover the basics of the right to die. Second, the play shows lawyers, judges, physicians, and patients working through a medico-legal dilemma in their own characteristic ways. And, finally, despite all of the legal and ethical developments since 1972, the type of case represented by Ken Harrison’s request to die is still one of the most difficult and perplexing encountered by hospital ethics committees. The crux of the problem is usually the worry that the patient is depressed and therefore lacks the decision-making capacity to refuse treatment. This leads to a generally useful discussion of different types of depression and the standards by which we allow patients to make certain kinds of decisions.

Limitations (Turow 2006). Scott Turow originally produced this slender novel for the New York Times and he was obviously aiming for something more substantial than another literary legal thriller. Although mysteries (legal and otherwise) abound, Turow offers contemplation on the subjects of lawyering, judging and the legal system, most especially on the flawed human vessels whose subjective experiences and realities inevitably shape fact-finding, doctrinal development and litigation in general.

David Kader and Michael Stanford have co-edited an excellent collection of poems about law and legal topics, Poetry of the Law: From Chaucer to the Present (2010). This anthology lifts the genre of law poetry considerably above the lofty and saccharine tradition of Law Day exhortations in which it has long been mired. Poems by some of the best writers of the past century are particularly thought-provoking.

The remainder of the readings varies rather significantly from year to year. Two recurring titles are particularly worthy of note: Raymond Carver’s ‘A Small Good Thing’ (Carver 2009), a short story about a couple whose child is injured by a car and eventually dies in the hospital, and an excerpt from Perri Klass’ Other Women’s Children (Klass 1990) (about the medico-legal debate over whether to write a DNR order on a five-year-old AIDS patient) in connection with our one field trip each semester: a walkabout in the paediatric Intensive Care Unit (ICU) at the Children’s Medical Center. Both authors expertly describe the struggles of families and providers in extreme medical circumstances. The walkabout gives the students a chance to experience the sights, sounds and smells of the ICU firsthand, making the gravity of the work that goes on there even more immediate and real. The walkabout ends with a classroom discussion of the medical, legal, ethical, social, financial, political and emotional aspects of caring for the patients we have just visited.
Final Projects

The students are required to create a final project. They are discouraged from writing traditional research papers or, indeed, any papers at all. Instead, they are expected to create some kind of artwork. The projects have been astonishing in their range, including a French horn concerto (composed and performed) on the five stages of grief; an interpretive tap dance (also on the five stages of grief); collections of poems, short stories, and one-act plays; children’s books (written and illustrated) on death and loss; a crazy quilt, with an annotated ‘reader’s guide’ to the various design elements, appliqués and the like; oil paintings; mosaics; sculptures; and a memorable symphonic representation (recorded on a Moog synthesizer) of a myocardial infarction from the initial onset of symptoms to the patient’s death after attempted resuscitation.

Final projects are presented at the class dinner, traditionally held on the evening of the last class, with readings, demonstrations and performances by the student-artists. Some are quite remarkable, while others are a little less so. All are greeted with applause and cheers, and warm feelings abound.

The point of the final projects is obviously not to turn medical and law students into accomplished artists. Some have amazing talents, while others are dipping their toes into artistic expression for literally the first (and possibly the last) time in their lives. In any event, I am not qualified to judge the artistic merit of such a diverse collection of projects. The grading criteria have mostly to do with effort, thoughtfulness, originality and the connection to themes explored in the course. I also look for some indication that the student has respected the ‘craft’ elements of creation, that is, used the materials and media creatively, thoughtfully and attentively.

What Works and Why

‘Law, Literature and Medicine’ is of interest primarily because it joins two well-established pedagogies – ‘Law and Literature’ and ‘Medicine and Literature’ – that have not (to my knowledge) been joined before. In so doing, the course explores some of the commonalities and disjunctions between these two professions. The shared space where all of this takes place is defined by the subject of ‘professionalism’. The tools are those involved in the writing and reading of narratives of many different kinds. For the most part, this is not new, except perhaps for the joinder, which was based upon the hunch that the comparisons and contrasts between the two professions would be of great interest and, it is to be hoped, of some value to both types of students. Exactly what that value is may be controversial and is certainly difficult to prove, but neither controversy nor questions of confirmability can be addressed without a theory, and I have one to propose.

At first blush, such a course would developments in American legal educ movement towards a curriculum that tea practice – memo-writing, advocacy, clien Association 1992; Sullivan et al. 2007) recently reported, the ‘eminent lawyer together to serve as the UC Berkeley Sc Board’ had a distinctly different wish li

First, law students need to learn to re stories and desired outcomes. The clien to-determine facts, legal and nonlegal that may differently serve one or ma Second, law students should acquire sense of lawyers’ varied roles in relati institutional, and in society at large ... the confidence and judgment that exp

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Empathy and the Practice of Law

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project. They are discouraged from l, any papers at all. Instead, they are two projects have been astonishing in o (composed and performed) on the c (also on the five stages of grief); -act plays; children’s books (written it, with an annotated ‘reader’s guide’ and the like; oil paintings; mosaics; erepresentation (recorded on a Moog the initial onset of symptoms to the inner, traditionally held on the evening ons and performances by the student- hers are a little less so. All are greeted s abound.

to turn medical and law students zing talents, while others are dipping y the first (and possibly the last) time ed to judge the artistic merit of such a criteria have mostly to do with effort, ion to themes explored in the course. dent has respected the ‘craft’ elements d media creatively, thoughtfully and

At first blush, such a course would seem to cut against the grain of recent developments in American legal education. Increasingly, there are calls for movement towards a curriculum that teaches students the skills they will need in practice – memo-writing, advocacy, client interviewing and the like (American Bar Association 1992; Sullivan et al. 2007) And yet, as Professor Kristen Holmquist recently reported, the ‘eminent lawyers, judges and mediators who had come together to serve as the UC Berkeley School of Law Professional Skills Advisory Board’ had a distinctly different wish list:

First, law students need to learn to recognize the complexity of their clients’ stories and desired outcomes. The clients’ problems may be messy, with difficult-to-determine facts, legal and nonlegal aspects, and multiple potential outcomes that may differently serve one or many of the clients’ goals and aspirations. Second, law students should acquire a broad historical and contemporary sense of lawyers’ varied roles in relationship to their clients, within and among institutional, and in society at large … Finally, students need to begin to develop the confidence and judgment that experience brings. (Holmquist 2012: 353–4)

‘Experience’ – even during the three short years of law school – goes beyond what a course like ‘Law, Literature and Medicine’ can realistically hope to accomplish. On the other hand, learning how to deal with clients’ stories and desires, as well as developing a rich appreciation for the varied roles of lawyers within society and over time, are not just possible in a law-school literature course; they are at the heart of such a course.

An arts-based course, however, can do more. It can situate empathy within the tradition of professionalism in the practice of law and it can provide an opportunity for the empathic abilities of law students to develop and improve. If I am correct in this, that may explain why practising attorneys (and physicians) who are graduates of this course report back that ‘Law, Literature and Medicine’ was the most practical course they had in law (and medical) school. Understanding why this might be so is the burden of the remainder of this chapter.

Empathy and the Practice of Law

As Robin West has observed, empathy has recently received a bum rap (West 2011). President Barack Obama’s statement that Judge Sonia Sotomayor’s ‘empathy’ was one of the reasons he nominated her for a seat on the Supreme Court produced howls of protest that were strong enough to lead her to publicly renounce empathy as a judicial trait. Solicitor General Elena Kagan followed suit in her confirmation hearings as well (West 2011: 5). It is possible that anti-empathy senators and others equated empathy with sympathy and sympathy with bias, a distinctly unjustifiable trait.

As Professor West observes, however, ‘Empathy tells us, perhaps, something about what others are feeling, or at least gives us a hint of its feel. It is a source of
information. Sympathy, by contrast, is the moral sentiment that aligns our interest with that of another in pain' (West 2011: 7). It is an alignment of interests that tends a judge toward bias, but that is not the result of empathy, properly understood, but of sympathy.

The utility of information provided by empathy is not limited to the judicial sphere. An empathetic lawyer is one who at least attempts to see (and, one hopes, succeeds in seeing) a situation as her client does. This requires an understanding of the client's key relationships as well as his own goals, fears, understandings, misunderstandings and the like. It also requires insight into the professional relationship between lawyer and client as it is unfolding in real time. In turn, this requires that rarest of empathic skills, the ability to hear and see oneself as others do and not only as we wish ourselves to be heard and seen. The lawyer's wardrobe, demeanour, choice of words, tone of voice, timing of silences and the like all play out in a certain way and are received by different clients in different ways. These are the things that trust is built on, and they create the pathways for communication and, with luck, understanding.

Jurors, judges, opposing counsel and opposing parties all encounter a lawyer in these same ways, but the empathetic turn is not limited to the courtroom. The act of writing assumes a purpose (presumably to educate and ultimately to persuade), whether the product is a brief, a memorandum of law or a term sheet for a corporate transaction. Encountering a legal document for the first time, a reader requires a frame of reference, and within that frame, the reader looks for content that, again, builds trust, educates and persuades. The legal writer who lacks the ability to see the written product as a first-time reader runs a significant risk of failure.

Similarly, the lawyer as a skillful, effective reader, no less than as a writer, summons her empathic abilities in order to situate the writing - a judicial opinion, a statute, a regulation, a contract - within a framework and, within that frame, looks for significance and for meaning. The telling detail may be the key to an argument (whether present or absent). The empathetic reader finds within a particular legal rule the more general problem that the rule seeks to address, but the search for significance may not end there. What human situation gave rise to the general problem addressed by this statute or regulation? What are the circumstances that create this human situation? How general or specific are those circumstances, and how unique orrepeatable?

In all of these professional settings, the lawyer is aided, even sustained, by empathy. As Professor Rosenberg has described it:

Empathy involves some cognitive functioning, in that it requires a person to 'understand' the world in some way, but even that understanding is quite different from what we think of as the type of cognition we teach [in law school]. Empathizing with another person requires me to 'understand' the world as the other person understands it - to 'see' the world through the other's eyes and to experience the world as the other experiences it ... Empathy, in other words, is simply the sense, emotional and cognitive, other at a particular point in time. (Rose

Is it too much to claim that empathy, per se, is the most important skill or trait that a lawyer should possess? Nor do I maintain that empathy is either essential or sufficient. Empathy is, however, a skill that is tool well or at least at the highest level of excellence.

Modelling Empathy

Perhaps empathy can be taught (Rosenberg 2002: 635), but, for example, Professor Montgomery has argued that empathy can be conceptualized, noting that people who are empathetic display 'two elements, insufficient respect for another person, and an insufficient empathy'. The cure lies in one that 'include[s] empathetic under[standing] of another person's mind in addition to competency' (Montgomery 2008: 335). This new understanding of professional ethics requires empathy in addition to competency (Montgomery 2008: 335). The same point (Rosenberg 2002: 636).

If Rosenberg and Montgomery are right, empathy can be taught, but how. Sure that the least effective way to teach empathy to law students is to ask them to write a list of 100 words that they think of when they think of empathy (Montgomery 2008: 335). Rosenberg, however, 'doubt[s] at that than we are at convincing sb (Rosenberg 2002: 636–7).

Lecture, then, is not enough. F aerial, first by the faculty member, then by the students, is a crucial part of Rosenberg's class, 'Interpersonal Dy'. Through class exercises in which students are asked to explore the emotions and interest of others, highly interactive and has as its goal the experience of empathizing' (Rose

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other at a particular point in time. (Rosenberg 2002: 632)

Is it too much to claim that empathy, properly understood, pervades and informs every aspect of the practice of law? In doing so, I do not mean to suggest that it is the most important skill or trait that a lawyer brings to her professional activities. Nor do I maintain that empathy is either necessary or sufficient for a lawyer to function. Empathy is, however, a skill that may be necessary for a lawyer to function well or at least at the highest level of one's capabilities.

Modelling Empathy

Perhaps empathy can be taught (Rosenberg 2002; Montgomery 2008). For example, Professor Montgomery has argued forcefully that professionalism needs to be reconceptualized, noting that professionalism is most commonly undermined by 'two elements, insufficient respect for others and insufficient public interest commitment.' (Montgomery 2008: 335). At the root of both problems, he argues, is 'excessive self-interest', which 'can be described by a term uncommon to law, insufficient empathy'. The cure lies in a new understanding of professionalism, one that 'include[s] empathetic understanding'. He continues: 'Stated differently, professionalism requires empathetic understanding of the interests of others, in addition to competency' (Montgomery 2008: 336). He believes quite sincerely that this new understanding of professionalism needs to be incorporated into the law school curriculum (Montgomery 2008: 352) and Professor Rosenberg makes much the same point (Rosenberg 2002: 636–52).

If Rosenberg and Montgomery are right, the question may not be whether empathy can be taught, but how. Surely Rosenberg is correct when he observes that the least effective way to teach empathy is probably the teaching methodology law schools do best: lecture, a bit of Socratic dialogue, assiduous note-taking on notebook computers and recapitulation by the students 'both that the teacher thinks empathy is important, and why the teacher thinks so' (Rosenberg 2002: 636). Rosenberg, however, 'doubt[s] that any teacher would be more successful at that than we are at convincing students generally to adopt our own values' (Rosenberg 2002: 636–7).

Lecture, then, is not enough. For the lesson to take, empathy must be modelled, first by the faculty member and then by the students. 'Modelling' is an activity that includes or crucially turns upon empathy. For example, in Professor Rosenberg's class, 'Interpersonal Dynamics for Lawyers', the modelling occurs through classroom exercises in which students engage in conversations designed to explore the emotions and interests of the other. The classroom experience is highly interactive and has as its goals '(1) learning to empathize, and (2) valuing the experience of empathizing' (Rosenberg 2002: 649).

In 'Law, Literature and Medicine', all of the participants in the room learn from one another on a dizzying array of topics, from the legal status of advance
directives and in-hospital DNRs to the professional traps of representing a criminal defendant you believe to be guilty, from the law and ethics of closing arguments to legal status of abortion rights and physician-assisted suicide. All of this and much more comes as a byproduct of reading the poems, short stories, plays and novels of some of the best writers of the past 400 years. Along the way, quick points are made about the artistry and craft of a particular piece. Pieces are understood as made things that mediate and transform the space between the person behind them (the artist) and the person in front (the reader, viewer, listener, etc.).

This last point is essential. Understanding that there is a space that is meant to be transformed means that, at some level, empathy is also a byproduct of the class. All of the texts demand attention to the same sets of core questions. Who is the speaker? Who is the intended audience? What has happened to provoke this writing (or passage or choice of word)? What was the author's response to that event? What type of reaction is the author trying to evoke in the reader? In the first two weeks of the course, the instructors lead the discussion with these and similar questions. The students are pushed to not be content with getting at the author's meaning, at the "take-away" of the piece, and instead are encouraged to try to dig out the human moment that lies at the heart of a particular moment in the reading. Empathy is modelled, and more empathy is the result.

As the discussions progress, the students probe their own responses to the readings, as well as those of their classmates. It's not enough not to like a piece or to admire a particular character in a story. Sooner or later, students are expected to come to a deeper understanding of the range of reactions to a piece, including their own, and the lived experiences behind those reactions. Empathy is modelled, and more empathy is the result.

The class is a seminar, and group work makes its own demands for empathic engagement. Pairs of students select most of the anthology pieces we discuss, a process by which preferences are presented and negotiated into a set of readings for discussion that satisfies the interests and goals of each student. In-class discussion is more complex, with 15-20 students interacting for two hours. It takes an appreciation for group dynamics, including an understanding of one's own ability to contribute to the functioning of the group for the benefit of the entire class. One of my goals is to create a safe environment, but this does not mean that individual students are not challenged in many ways, both explicitly and implicitly. After a while, if the process works, students begin to learn what works and doesn't work both for them and for the group. Empathy is modelled, and more empathy is the result.

Experiencing the Arts in a Professional Context: More Empathy Results

After 14 weeks of reading non-legal, non-traditional texts, we reach the final event: final projects. As described earlier, students have considerable discretion in their choice of medium and message. The result has included musical compositions, photo-essays, dioramas, collections of poetry, short stories and novellas, one-act plays, paintings, sculptures and quilts (reader's guide to the quilt), among others.

I reserve the right to veto, which I had legal counsel, when the student proposed sculpture would be revealed after the conclusion of the class. I advise the class to restrict (other than the rule against self-plagiarism) students to make a project that must relate to the subject of the class. Generally, my session with the student in order to do this restriction (other than the rule against plagiarism) students to make a project that must relate to the subject of the class. In the first two weeks of class, the instructors guide the discussion with these and similar questions. The students are pushed to not be content with getting at the author's meaning, at the "take-away" of the piece, and instead are encouraged to try to dig out the human moment that lies at the heart of a particular moment in the reading. Empathy is modelled, and more empathy is the result.

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Beyond the substantive content, however, I was concerned about how those students interested and engaged with the technical ability, that is, what the authors' contribution to the functioning of the group for the benefit of the entire class. One of my goals is to create a safe environment, but this does not mean that individual students are not challenged in many ways, both explicitly and implicitly. After a while, if the process works, students begin to learn what works and doesn't work both for them and for the group. Empathy is modelled, and more empathy is the result.

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I reserve the right to veto, which I have done only once, on advice of university legal counsel, when the student proposed a ‘revealed sculpture’, in which an inner sculpture would be revealed after the outer sculpture was blown up. Apparently our insurance policy did not cover intentional detonations of explosive material in or near a classroom. Generally my consultation consists of a brainstorming session with the student in order to encourage maximum creativity. The only restriction (other than the rule against pyrotechnics) is the requirement that the final project must relate to the subject matter of the course. For reasons that follow, and because of the breadth of a course that covers both medical and legal topics throughout the ages, this is no restriction at all, but rather an invitation to think deeply about what the course was about.

One of the most memorable final projects was the choreographing and performing of an interpretive tap on ‘the five stages of grief’. I approved the project despite misgivings that it could possibly be done, let alone done well.

As a subject, it seemed appropriate for a law student who was exposed, possibly for the first time, to Kübler-Ross’ model for grieving. We had encountered the model when we read Linda Pastan’s poem ‘The five stages of grief’. The medical students had helped with their discussion of current understandings and critiques of the model. All of this seemed potentially useful to future lawyers, many of whom (depending upon the nature of their practice) would have to deal with a client or other person processing their own grief.

Beyond the substantive connection to something lawyers should know about, however, I was concerned about the tap itself. On one level, I was needlessly concerned with the technical ability of the student to pull off the performance. Yet I need not have been, because the student had years of experience in a dance troupe before he started law school. On another level, I did not know if it was possible to convey the appropriate depth of meaning through a medium that I associated with vaudeville and the music of Tin Pan Alley.

My misgivings betrayed an abysmal ignorance of the nature of dance and of the way an audience responds to dance. Twyla Tharp would undoubtedly have avoided this trap, but I needed an education. My student provided that education with a brilliant performance of a dance that showed the artistic possibilities of tap and, more importantly, communicated a real depth of understanding and emotion about grief.

After the fact, the question that haunted me was, apart from the student’s technical skill and creativity, why did the dance work as well as it did? Exploring the answer to that question informed me about how dance is experienced, how art is experienced, how art is created and how all of this promotes empathy in law students.

One key to understanding came from Maxine Sheets’ The Phenomenology of Dance (Sheets 1966). Her description of a viewer’s experience of dance rang true:
The meaning of any dance comes alive for us only as we ourselves have a lived experience of the dance, and is not the result of either prior knowledge of dance or of any later reflective efforts. If we reflect upon the dance after it has been presented in the hope of discovering its meaning, we can only arrive at its significance from a distance. Such a meaning is akin to a lifeless fact, a second-hand piece of information, devoid of felt, lived-through experience... It is the lived experience which is of paramount significance. (Sheets 1966: 4)

Dance – motion through time and space – may be uniquely kinesthetic, but all art seems to reveal itself through an audience’s ‘lived experience’, whether the revelatory experience unfolds through our reading of a text, listening to a musical composition or ‘reading’ of a supposedly static sculpture or painting. All art, it would seem, invites the same ‘lived experience’. Robert Rauschenberg seemed to be getting at this when he wrote: ‘Painting relates both to art and life. Neither can be made. (I try to act in that gap between the two)’ (Kowal 2010: 151).

For the audience (the viewer, reader, listener, etc.), the challenge is to experience art of any type ‘in the moment’. The traffic snarl on the way to the museum, the fight with the managing partner over mounting expenses in a contingent-fees case, all distractions need to be quieted. So, too, should our presuppositions about a particular medium, artist, performance or composition. Our goal should be to explore the space between art and life in which the artist has ‘acted’. This is an experiential encounter, one that builds upon all of our life experiences and lessons, but it is also an encounter that transcends the search for meaning or significance by first drawing us into the world it creates.

I assume that all artists, regardless of their chosen medium, anticipate the ‘lived experience’ their art will provoke in their audience. They must imagine some reader or listener who encounters their creation for the first time. The piece unfolds through words, images, sounds or motion over time. The encounter will be ineluctably subjective and to that extent unpredictable, but the ‘lived experience’ will be common to all such encounters if the artist has successfully negotiated the gap between art and life. In short, the creation of art, no less than the experience of it, requires empathy, an appreciation of the experience of ‘the other’.

Students in ‘Law, Literature and Medicine’ are not expected to attain the artistic heights of a Tharp or a Rauschenberg. A few students come to law school with advanced artistic skills, often rusty after three years of disuse, but most do not. For all of them, however, the challenge is the same. They need to explore Rauschenberg’s gap between life as we have encountered it in class (law and medicine, life and death, rejection and desire, altruism and greed) and art. More specifically, the law students need to imagine how their classmates will approach, encounter and experience the product of their artistic efforts. The creation of a final project requires one last empathic leap into the imagined experience of others.

One last question deserves some attention: why art? Why not attempt to develop the empathetic abilities of students through more professionally grounded and appropriate activities, such as brief-writing, mock trials, and negotiation and counselling exercises? My first response is not the only way, nor is it necessarily the best way. Empathy in law school. It is simply one of the many alternative skills courses, providing students’ empathetic skills. All law teachers try to provide their students’ empathic skills. All law teachers try to provide their students with opportunities into their courses. Our better for the effort.

Fiction and poetry, however, of traditional law-school vehicles may not be as effective. Fiction and poetry, however, of traditional law-school vehicles may not be as effective. Literature, on the other hand, is at least through the eyes of ‘the other’ who is present in projects give the students an opportunity to use the senses and reactions of an imaginary other.

In addition, the literature we read helps set the stage for lecture hall and courtroom legal education: edited cases, snippet law review articles. The familiar “Law” contributes to the success expectations in traditional law-school into patterns and routines that seem to suggest ‘lived experience’. The students’ encounter with literature studies and routines, and poses fresh challenges.

The ultimate test of this approach and other arts is whether there is a real difference. Does it change the way they read or write? Do they judge and other counsel? In a sense, this question requires a leap of faith as well. And one of the occasional reports from former practitioners, who say that ‘Law, Literature’ course they had in school. There are a few such a thing, including that they believe the course had a particularity important effect on their development. If the students gave some thought to the course, I would deem the course a success: empathy.
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: why art? Why not attempt to through more professionally grounded t, mock trials, and negotiation and counselleing exercises? My first response is that ‘Law, Literature and Medicine’ is not the only way, nor is it necessarily the best way, to promote the growth of empathy in law students. It is simply my way, although I believe it has certain advantages over many of the alternatives. Most, if not all, law-school activities, particularly skills courses, provide valuable opportunities for developing students’ empathic skills. All law teachers should consider ways to build such opportunities into their courses. Our students and our profession would all be better for the effort.

Fiction and poetry, however, offer some unique opportunities that more traditional law-school vehicles may not. As traditionally taught and learned, law-school skills courses tend to focus primarily on technique and substantive content, with little time or effort devoted to the development of interpersonal skills. Legal clinics may be the most conspicuous exception, but only if the instructor’s inclination and the time available permit the development of empathy in any focused manner. Literature, on the other hand, is all about ‘lived experience’ and seeing the world through the eyes of ‘the other’ who is represented on the page. Similarly, the final projects give the students an opportunity to try to see their own creations through the senses and reactions of an imagined ‘other’, their audience.

In addition, the literature we read tends to pull the students out of the familiar setting of lecture hall and courtroom and away from the traditional materials of legal education: edited cases, snippets of statutes and regulations, and condensed law review articles. The unfamiliarity of the materials in ‘Law, Literature and Medicine’ contributes to the success of the course. To some extent, the students’ expectations in traditional law-school courses, and our expectations of them, fall into patterns and routines that seem, without extraordinary effort, to resist any suggestion of ‘lived experience’. This is not universally true, of course, but the students’ encounter with literature strips away those settled expectations, patterns and routines, and poses fresh challenges of reading and experiencing law-related stories of others in a new way.

The ultimate test of this approach to developing empathy through literature and other arts is whether there is a recursive effect on the students as practitioners. Does it change the way they read cases and statutes, brief cases, engage clients, judges and other counsel? In a sense, the empathic leap at the heart of this course requires a leap of faith as well. And yet there is some evidence for the success of this leap. The students are certainly energized, and their course evaluations reflect their sense that they have learned something new. More significant are the occasional reports from former students, now in practice (as well as medical practitioners), who say that ‘Law, Literature and Medicine’ was the most practical course they had in school. There are many reasons for a former student to say such a thing, including that they believe it. It is not a reaction I expected or even particularly sought, certainly not at the beginning of this decades-long journey. If the students gave some thought as to how their words might affect me, I will deem the course a success: empathy is modelled, and more empathy is the result.
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