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The Habit of Success

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Law students and their professors create the climate and the relative success of their law schools. A good law school prepares its students to analyze and to solve problems, to resolve ethical questions, and to work for reform. Whether a law school succeeds in dealing with these three areas depends primarily on what the students and their teachers do on a day-to-day basis; that is, law school success is based primarily on habits.

Solving Problems

Lawyers are problem solvers. People do not come to us as lawyers in the same vein that they go to a dance teacher or a professor of philosophy or French. From the lawyer they want only one thing — a solution to a current legal problem or question. The primary task of the law professor is to help his or her students prepare for that role.[1]

A good friend remarked that "The trouble with your profession is that you can never isolate problems; one thing always leads to another." The complexity that he observed haunts lawyers. And it is something that the good lawyer must master. His clients do not want to know all the ifs, ands, and buts of the case or situation.[2] They are interested in the results, the resolution. If a case is argued on the law and

1. Teaching problem solving is, I believe, the primary task of a law professor. People become law students for a variety of motivations, and they differ in value orientations. The single common denominator is the willingness to become a legal problem solver.

2. Sometimes the client is interested in something other than the bottom line of a case. For example, the litigants in a school desegregation case are often interested in exactly what the judge says and the points of view that are considered in the case, as well as in the final judgment itself.

motion calendar or in a court of appeal, the client is usually interested in the meaning of a very few small words at the end of the court's opinion: "granted," "denied," "affirmed," or "reversed."

The complexity problem that the lawyer must master is made up of several components:

Facts. The lawyer must often sift through a patchwork of transactions and partial impressions of events in order to isolate the important facts to be considered. Sometimes the lawyer will have difficulty even identifying the problem to be solved.

Authority. The United States law is basically of three types; statutory (including regulations and ordinances), common law, and constitutional law. This is further complicated by the existence of a federal system which raises questions of differing rules in different states, and issues of federal preemption. It should also be noted that international law and the law of other nations plays an increasing role in the ordering of United States legal arrangements. The lawyer needs to identify the law that governs his case and interpret its application to the situation at hand. Even if his or her practice is confined to a specialty, like tax or domestic relations, there is a need to be alert to other areas of law that may have an impact on a given situation.

Compound Problems. As my friend observed, one line of legal inquiry or argument may lead to another. A software licensing arrangement may call for attention to problems of copyright, to issues of allocation of development responsibilities, to possible antitrust considerations, and to enforcement arrangements.

Choices. Usually client choices are involved. The lawyer must simplify the components of the problem so that the client can choose effectively. For example, a contract dispute may be resolved by renegotiation of the contract or by litigation.

Actions and Procedures. Finally, the lawyer must choose the best vehicle for action. He must decide whether to file in the federal or in state court. She must exhaust her administrative remedies first. He must decide if it is better to demur or raise the matter first at the trial. He must assess the risks of waiver. He must decide whether out of court procedures are best for this case.

As a professor, my job is straightforward; I want to place my student in the best position I can so he is prepared to clarify and resolve these problems. This requires a very delicate touch. Here are some of the critical items I must bear in mind and act upon:

Student uncertainty. In general, my students want to know what it is that they are supposed to do. They want to learn to do their job as

lawyers. In my experience, it is sometimes very difficult to inspire in students the confidence or willingness to take charge of providing the solutions themselves. Many law students confuse the need for them to provide solutions with finding out *the* answer to a specific problem.[3]

This desire to know "the answer" is strictly counterproductive to the student. Each lawyer who practices must take responsibility for the answer that he *provides*. The law student does not need to learn certain prefabricated answers from his or her professor or from hornbooks.[4] Instead, the law student must learn how to find and articulate answers himself.

The uncertainty of law students is buttressed by many aspects of our general environment and of the law school environment.[5] Subject matter outlines written by outstanding legal authorities abound. These outlines tend to reaffirm that there is an answer, rather than a series of defendable conclusions to be argued from authority. The prospect of the bar exam tends to make students feel that they simply want to get through school and pass the bar. The attitude of some professors contributes, too — they are apologetic and affirm that the real world is somewhere out there in practice.[6] The real world is very much in law school where one can learn the habits of good legal analysis. The other real world of practice is built on law school habits. It is often too late to try to learn good habits in practice because the telephone, the calendar, and other business demands make the opportunity to reflect a rare commodity.

Finding the Law. Let us consider briefly one classical problem of legal education, the problem of authority in a common law system. This has been a unifying theme of law school and a fascination for lawyers and scholars for decades at least: "What does the case hold?"

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3. This phenomenon is so widespread among my students that it might be accurate to say that law students in general make this confusion.

4. Sometimes I have remarked to my students: "Think of it this way — assume that someone is actually seeking legal advice. If I provide the answer, I send the bill!"

5. I think many people — professors and students — have taken the parody in *Paper Chase* too seriously. A proper role for a professor is to challenge the students with questions.

6. Sometimes professors "hide the ball." I am not sure exactly what that phrase means, but often I think it refers to the professor posing a question to which he or she has only one set of answers which is sought. That kind of ball hiding should be avoided. It is better for the professor to ask questions that do have a variety of acceptable responses. Where a specific point should be elucidated, the professor should state it, not ask a rhetorical question.

Lawyers in a common law system are in a somewhat unique and challenging situation, because the system of precedent invites them to decide for themselves what the law is.[7] Indeed, the system compels it. Thus, whether the prior precedent is a narrow one deciding a procedural issue,[8] or a broad constitutional decision declaring the contours of first amendment
protection,[9] the student must learn to handle various aspects of the case as a source of defendable answers. The student must be prepared to consider a host of variables within the case itself: facts, issue, holding, dictum, rationale, related issues, jurisdictional questions, separate bases for a decision, and the impact of statutes.

At this point, I would like to state one basic guideline for legal education:

GUIDELINE # 1. The student must be helped to assume the responsibility for providing solutions to problems.

In the law school, it is the initial task of the professor to set the process of providing solutions into motion. In this sense, it is the professor who bears the primary responsibility for legal education. The professor needs to develop his own techniques of presentation that encourage student responsibility. If the grain of our times runs in favor of *Gilberts Outlines*, the summary of the latest case, and apprehensions concerning the bar exam, then the teacher must be willing to cut against the grain. The success of his students, including success on the bar exam, depends on it.

Assuming responsibility for solutions is closely linked to confidence. The student who is unsure will shy away from responsibility. Teachers can help students develop confidence. Sometimes it is a friendly word. Offering a solution to a problem posed allows the student to compare his work. Nevertheless, as much as I want to encourage my students, I am left with the realization that there is only so much I can do for them and no more. I can initiate the process of inquiry and show the path of assuming responsibility, but ultimately the students themselves must seize the initiative. It is also helpful to bear in mind that people such as Abraham Lincoln and Justice Robert Jackson learned to become problem solvers without going to law

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7. K. LLEWELLYN, THE BRAMBLEBUSH (1960).

8. Adams v. Superior Court, 226 Cal. App. 2d 365, 38 Cal. Rptr. 164 (1964) (order denying motion for change of venue is not an appealable order).

9. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981). I have commented on the speech/other conduct problem of this case in 5 *Comm/ent* 627, 631.

school.[10]

In addition to developing student responsibility and confidence, the teacher needs to guide the student in learning a body of law. We professors must organize material, suggest solutions, pose questions, answer questions, analyze, and synthesize. In this area a good law school will encourage a wide range of approaches based on the different personalities and orientations of its professors. Even though diversity is a desirable norm in teaching techniques, there are some basic approaches that deserve attention. These include:

1. *Outlining.* I believe that it is important for a professor to clarify and state certain guiding principles of any given subject matter. This serves two purposes: it helps the student to learn a common set of necessary principles, and it exposes the student to the teacher's method of analysis as an example. However, the teacher must be alert to the prospect that outlining may tend to undermine the encouragement of student responsibility. To avoid this danger, I urge that the professors' outlines emphasize major principles and their sources. For example, in Constitutional Law, I emphasize that the "rational basis test" of equal protection is a major accepted norm of constitutional law. The source of that generalization is in the structure of the Constitution and in case authority.[11] This method encourages the student to challenge or affirm my generalization and to test it against its sources. By contrast, I try to avoid too much detailed outlining of a subject matter. Those details are the responsibility of the actual problem solver in a given case, that is, a lawyer handling a case, or a student handling a research problem or an assigned case for class. I may summarize the details of a constitutional case or a torts case from time to time, but I want the student himself to assume responsibility for expressing the meaning of those more detailed elements in most instances. The process of presenting general principles differs from class to class depending on the subject matter, the number of students, and the format (lecture class vs. practical seminar).

Recently I have adopted the use of a general outline of material to

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10. J.P. FRANK, LINCOLN AS A LAWYER 11 (1961) (Lincoln lacked formal legal education). EUGENE C. GERHARD, AMERICA'S ADVOCATE: ROBERT H. JACKSON (1961). Jackson entered Albany Law School on September 11, 1911 and did two years of work in one year. Albany Law School granted him a certificate rather than a degree in 1912 (Degree awarded 1947). At time of admission to the bar, he listed his education as, one year Albany Law School; two years, two months, law clerk. He was admitted to the bar on November 24, 1913.

11. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

be covered in one particular course.[12] That course is a three-hour evening lecture class in constitutional law. It is taught to a group of approximately 120 students. In these circumstances, it makes sense to me to distribute a one-page outline at the beginning of each three-hour class. This outline serves several purposes: it reminds the students what has been in the reading assignment; it helps the student to get oriented when his or her attention wanders during a long evening; it allows me to raise questions or pursue dialogue without losing certain members of the class; it helps to keep me on the track of what should be covered so

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12.
CONSTITUTIONAL LAW II - 200.50 SEPTEMBER 23, 1985
PROFESSOR ANAWALT
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AFFIRMATIVE ACTION

I. *Review equal protection concepts*:
Principle of equality used to attack legislation.
General problem: Judicial determination of validity of legislation.
Usual approach: rational basis.
Obtaining higher levels of review:
Race
Alienage
Sex
Fundamental rights
Plyler
Countervailing government arguments:
No reason to apply higher scrutiny.
The role of Congress - *Rostker*, *Fullilove*.
Structuring society - *Ambach*.
Fiscal organization alone - *Rodriguez*.
Other approaches - e.g. Justice Marshall in *Rodriguez*.

II. *Affirmative action.*
1. General problem of equality — for example, a deaf person in the classroom.
2. Reasons for suspect classification or archaic classification approach.
3. Sex and racial discrimination.
4. *Bakke*, p. 745. 16 special admittees restricted to minority groups.
5. *Fullilove*, p. 769. Again, identified groups and an allocation to them. This time held to be valid. Why?
Congressional action
Money alone.

III. As the affirmative action problem shows, problems of equality are interesting and critical to society. In your opinion, how should progress or justice be evaluated? Reconsider *Korematsu*, p. 624 and *Bakke*, p. 745.

we do not fall behind. This particular approach is useful for that one long, large class. I would not likely adopt it for other types of classes.

2. *Questions and problems.* It is essential for the professor to pose questions and problems. Some questions should be aimed at resolving practical problems, such as the hypothetical variation of a case. Other questions should probe the reasoning of a decision, the implications of a statute, the consistency of a line of argument, and so forth. The approach to raising and resolving actions will vary from class to class. In large classes it is usually necessary for me to guide the class through my solution more than it is in a small class.

3. *Justice.* I believe it is very important that students continue to develop an approach or philosophy of justice. It is rare indeed if a student does not have a philosophy of some sort upon entering law school. The classroom and other law school activities should encourage the student to continue to develop, refine, and confirm or change his or her own ideas of that kind. To summarize, here is a second guideline for developing law school habits of success:

GUIDELINE # 2. The professor should firmly guide the student in the substance and application of the law, while reminding the student of his ongoing responsibility to provide solutions.

There are some additional items which should be mentioned concerning problem solving. One is writing. The foundation of legal skill is the English language. The student must bring his or her skills in this area up to par and beyond if possible. It is also important for the professor to continue to develop his or her skills. Professors should demand of themselves some performance that involves discipline and hard effort beyond the classroom. This may take various forms, scholarly writing, some aspect of law practice, or some demanding public service. Whatever the vehicle, the professor should find periodic projects that demand the use of writing and oral advocacy skills.

Ethical Questions

Lawyers are generally called upon for two types of services. The first is the setting up of arrangements through the writing of wills, the negotiating and preparing contracts, or the drafting legislation. The second type is participating in resolution of conflicts among people. All of these activities are concerned with people and their motivations. Most often they involve people who have differing, often conflicting interests. Law schools should teach students about practical ethical problems, such as conflicts of interest, throughout the curriculum. Pro-

fessional ethics courses are valuable, but the budding lawyer needs to be alerted to the existence and resolution of difficulties in the variety of contexts in which they arise. Lawyers have a bad reputation in the United States. Sadly, much of has been earned by the profession itself.

Let us start with conflict of interest. This is one of the most important areas of ethics. Students and lawyers need to understand the underpinnings of rules that require disclosure of representation and avoidance of conflicts. In our system, the lawyer is an advocate. The recipient of information deserves to know when he or she is being persuaded. Consider any example that might concern yourself. Suppose an acquaintance tells you that buying certain land or buying a particular brand of fire extinguisher is a very good thing. You might be angered to learn *after* you have made a purchase that your acquaintance has earned a free lot or a large commission by your purchase. His objectivity may have been clouded by his interest, and you were kept in the dark about that interest. The rules of ethics requiring disclosure of representation, loyalty to one's client, and avoidance of conflict of interest are founded on similar common concerns of protecting individuals from being harmed by other people's self interest.[13]

There is much in our society that reinforces the notion that "good guys finish last."[14] Lawyers often indulge in this idea, and prospective

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13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected, and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Final Draft 1983).

14. By and large, the televising of professional athletic events provides excellent examples of men and women achieving excellence. However, coverage is also marred by outstanding examples of individuals who use behavior and tactics which are completely outside of the rules of the game in order to obtain some advantage. This has been the case in recent years with one or two top tennis players. These men, who were endowed with skill and have achieved excellence, have nevertheless resorted to delaying

lawyers are often prone to believe that it is the unwritten rule to success in law. I do not believe it. It is certainly true that often a lawyer who uses what are called "sharp practices" wins a case or makes a lot of money. That, however, does not prove much. First of all, there is a great deal more to the profession than cheap wins. Secondly, lawyers who practice with integrity, honesty, and courtesy create certain advantages for themselves and their cases.

Being honest in representing facts is not only required by the rules of ethics, it instills confidence. People are impressed by truth and efforts to be truthful. I was once in a seminar with Albert Ehrenzweig. Before coming to the United States, Professor Ehrenzweig had been a judge in Austria. During the seminar Ehrenzweig was asked, "How can you tell whether your client has a good case?" Ehrenzweig replied without hesitation — "See if he seems like a crook." His response was a shorthand. Ehrenzweig was drawing on his practical experience as a judge. If the client appears to be a "crook," people, judge, jury, or whatever, will tend to view him and his case as crooked. An effort to be careful with the facts and accurate with the use of law is worth it.

Ethical problems can be spotted and discussed in class. They need to be. They include:

1. Conflict of interest, including attorney's potential conflict with his or her own client.
2. Truthful representation of facts.
3. Accurate reference to law.
4. Fee arrangements, including unconscionable fees.[15]
5. Tension between the loyalty to client and general demands of justice.

The aim is to develop a habit of identifying ethical concerns. A lawyer who learns to comfortably meet the demands of ethics will practice more effectively as a result.

GUIDELINE # 3. Law School should cultivate the habit of recognizing and resolving ethical problems by including them in courses and other activities.

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and berating tactics which are disconcerting to their opponents and all concerned. Unfortunately, the sports commentators often refuse to call this behavior what it is, but subside into a flaccid acceptance of it as being somehow "part of the game."

15. *See, e.g.*, Dixon v. State Bar of Calif., 216 Cal. Rptr. 432 (1985).

Justice and Reform

An attorney's work is very likely to involve some element of reform or change of law, as he or she is called upon to argue for new interpretations or rulings for his or her client. Law schools should address this aspect of a student's preparation. In general, law schools probably do pay sufficient attention to this element of legal education. Law schools should go beyond this somewhat narrow consideration of reform, however, because they are institutions that necessarily present a broad picture of this nation's laws. Law schools should be frankly concerned with questions of justice.

Questions of values, or broader questions of justice are present in the law school whether we choose to address them directly or not. The United States legal system is abundant with basic premises and implicit assumptions about what makes a good society. Law study can ignore, but it cannot conceal pictures of justice.

Here is a brief sample of problems of justice that arise in law schools:

Procedure. Today it is extremely expensive to seek resolution of controversies in court. Four years ago a friend in private practice told me that he felt he must advise his clients in the construction business that any breach of contract claim worth less than $90,000 was not worth pursuing.[16] Procedural arrangements and log jams are directly related to the quality of justice in the United States. Discovery, hailed 25 years ago as an improvement in civil justice, has become a monster of delay and expense.[17] One could offer complete abolition of discovery

16. My friend then practiced in a large San Francisco firm, and his remark reflected the level of billing of such a practice. Nevertheless, similar impacts of legal fees and costs are felt in smaller firms in other locales.

17. California adopted its current discovery rules in 1957. CAL. CIV. PROC. CODE § 2016 *et. seq.* (Deering 1973) "Based in part upon an excellent report by a 1952-1954 Conference committee (Paul S. Jordan, chairman), the proposed act represents a comprehensive effort to bring to state practice modern discovery techniques, exemplified by the practice now in effect in the federal courts and an increasing number of states." Committee Report on Administration of Justice, *Discovery*, 31 CAL. ST. B.J. 204 (1956). (This report was adopted by the Legislature.)

> The new system, as was the federal system, was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except

as a reasonable step of reform.

There are other troubling aspects of procedure. Litigation in California superior courts is encumbered by numerous steps that are very hard to explain to a client; multiple appearances for motions, *pro forma* appearances for pre-arbitration settings[18] or settlement conferences and trial dates that are certain only in one aspect, that it is unlikely that trial will occur on that day. Questions of fairness of procedure need to be raised in law school so that lawyers do not become so inured to the system that they simply accept it.[19]

Substantive premises of American law. Value judgments or value positions have an important role in shaping our laws. Some of the substantive values of American law are encountered in the law school curriculum. These include: the notion that private rights to property (no matter how extensive) are essential, that procedure must delay actions and provide for very careful examination of the facts in order to render justice, and that legislatures must be restrained by judges. These are

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> with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and (9) to expedite and facilitate both preparation and trial.

Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 376, 15 Cal. Rptr. 90, 99, 364 P.2d 266, 275 (1961).

Unfortunately, discovery has been used to cause unnecessary delay and expense of litigation. For criticism of discovery rules, see Maher, *Discovery Abuse*, CALIF. LAW June 1984, at 44.

Recent legislative reforms include §§ 90-100 added in 1982 to restrict discovery, declaring that "that is a compelling state interest in the development of pleading, pretrial and trial procedures which will reduce the expense of litigation to the litigants in cases involving less than $15,000." CAL. CIV. PROC. CODE §§ 90-100 (Deering Supp. 1985). *See also* CAL. CIV. PROC. CODE § 128.5 (Deering Supp. 1985) (gives trial court power to order payment of expenses attributable to delaying tactics); § 33 (sets time limits on discovery); § 339 (provides sanctions for unnecessary delay); § 341 (sets out duties of counsel in discovery motions).

18. SAN FRANCISCO SUPER. CT. R. 7.4.

19. One further comment about procedure; lawyers are at their peak form with procedural issues. Procedure is the surgery of law. As previously observed, the core of legal skill is English language skill. The heart of law is organization of human activity by procedure and rule. Resolving procedural questions combines these two elements: skill at logic and language, plus attention to the detail of the organizing features of law. This is reflected in certain attitudes towards justice as well. Consider for example Justice Frankfurther's comment: "[T]he history of liberty has largely been the history of the observance of procedural safeguards." McNab v. United States, 318 U.S. 332 at 347 (1943).

values or norms which I believe have become implicit in our legal system. These values are often brought forward in discussions in law school; however, I believe that the reasons underlying the choice of these values are rarely examined in law school context.[20]

In short, I find that the value premises of American law are indeed often well-concealed. This is true in law school discussions, in judicial opinions, and in much of the scholarly writing. One might ask, "So what?" There are several reasons "so what." The most important is the pressure for change within modern society. We live in a world of change. The world population has grown in enormous proportions in recent decades. The pressure of an anthill society must cause us to rethink our basic commitments. Technology adds further pressures. We need to be able to deal effectively with our scientific and technical advances. If we prefer that they serve us and our concepts of justice, we must be clear about the meaning of our concepts of justice and the effect of the institutions we employ. Finally, on a very pragmatic level, the lawyer who better understands the underpinnings of the values which he or she argues, is better equipped to make effective and persuasive arguments.

The Adversary Process. The adversary process is coming under closer examination in the United States. It has its advantages and its disadvantages.[21] I would like to focus here on one aspect of the adversary process; that is, its function as a force preserving the status quo. In many respects the adversary system hinders social change and impedes routine realization of justice.

The adversary process by its very nature sets people off against each other. Parties to a legal controversy are already at odds with one

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20. Consider the three values which are mentioned in the text. The reasons for giving great protection to the institution of private property is to my knowledge rarely examined. The penchant for judicial review of legislation is also rarely analyzed and explained. Gerald Gunther's 11th edition of his constitutional law book continues to present approximately 10 pages of excellent material on the underpinnings of constitutional judicial review. *See* GUNTHER, CONSTITUTIONAL LAW 21 (11th ed. 1984).

Unfortunately, professors and students often feel constrained to rush past such discussions as unnecessary philosophizing. The underlying rationale for the third area which was mentioned, notions of procedural due process, is somewhat carefully examined in law schools. Even in this case, however, is it fair to ask for more? Why is procedure so important? Is there something fundamental in human history or experience that demands careful procedure? To what extent is delay a major foe of fairness?

21. I am somewhat hooked on the adversary process myself. It has some very strong merits and is probably essential in certain circumstances.

another, but once they enter the adversary system, the lines of their controversy are functionally hardened. This hardening of positions is ameliorated only by such things as negotiation and the efforts of individuals who wish to de-escalate the adversary process.

In the adversary process, no one is intentionally seeking justice. Instead, the parties are seeking vindication of rights. It may be objected that this is an overstatement, since the judge is an arbiter. Yes, there is some overstatement, but in fact the judge's role is more often to select between positions (hopefully very well presented) and to choose one or the other. Furthermore, the judge is one whose attitudes and techniques have been honed by the adversary process.[22]

Learn to listen

In law schools, we reinforce the adversary tradition through our study of cases, through our examination of policy arguments for one side or the other, through our questioning of the arguments presented by one side or the other, through our acceptance of the judicial decision as a resolution of the controversy between the two parties, and through the absence of examination of non-adversary procedures. It should be recognized that most of this emphasis is necessary in law school. For one thing, these methods are necessary to the development of problem-solving skills considered earlier in this article. However, there are still

22. I have a hunch that a more active role for the neutral third party would be helpful to our system of justice. This is present in the civil law tradition which we tend to denigrate as inquisitorial.

serious questions presented concerning the adversary process and our implicit justifications. To what extent are our methods rationalizing or endorsing the adversary system? Is this endorsement uncritical? Are we contributing to social or individual justice by allowing it to occur?

Overcommitment to an adversary system is an obstacle to social change in several respects. Adversary procedures are often meticulous and careful, but they tend to get bogged down by details. By their nature, they are inhibited from considering broader questions of social good or necessity. Reliance on adversary procedures deflects public attention from basic policy debates. To a large extent, people and their legislatures are encouraged to believe that somehow the courts will solve it. Adversary procedures also tend very strongly to favor parties who have access to high levels of legal expertise. This, in most instances, creates a bias in favor of political forces which are already well-established or well-defended either economically or politically.

Critical thought which is rigorous, but not probing. I prefer to ask students tough questions.[23] The general tone of such questions is often along the following lines: How does the authority which you have studied support your position? What are the distinguishing facts or factors in the authority? What is the underlying reason? What are the critical facts in the example or hypothetical chosen? Sometimes I engage in this process with great vigor, believing that sharp, critical thinking is essential. Such a critical capacity is essential for the lawyer as a problem solver and leader.

Probably most law schools *do* succeed in varying degrees in teaching critical thinking. Nevertheless, our schools fall short; we teach critical thinking which is rigorous, but not probing. While we teach examination of our existing order, we do not provide a sufficient basis for questioning the origins or legitimacy of that order. For example, in constitutional law we rarely (almost never) question constitutional values themselves.[24] As a partial explanation of my own reticence, I must ad-

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23. I have the impression that to some extent the environment of questioning in law schools has deteriorated over the last decade and a half. I believe that often the professor resorts to posing questions and then simply answering them himself. I also have the impression that there is some degree of change afoot, that is, once again students may be inclined to tackle and answer those questions themselves.

24. Once again, this observation is merely an impression of my own. It is based on my own experience with students and my colleagues. I do not claim to have surveyed the courses or approaches of other law schools. Undoubtedly, there are teachers and constitutional law courses which do, in fact, investigate the constitutional values themselves.

mit that I feel somewhat out of place when I do interject such probing.[25] My realization that my students must become good-problem solvers tends to overshadow my understanding that we should investigate underlying values from time to time. We should conduct that investigation in a fashion that probes more deeply than a mere recitation of policies and traditions. This is important enough to constitute another guideline for our schools:

GUIDELINE # 4. Some portion of our coursework should be devoted to probing the underlying reasons for basic norms and basic institutions that prevail in the given subject matter.

The problem of how best to address questions of values is not confined to law schools. This is a problem which runs across the range of subjects covered in higher education. For instance, I prepared a one-page handout on values for a general seminar of all departments of our own university.[26]

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25. I would like to suggest two examples of authoritative sources for questioning the particular commitments of our own Constitution. The International Covenant on Civil and Political Rights challenges our notion of freedom of communication by requiring that propaganda for war and advocacy of national, racial or religious hatred shall be prohibited by law. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, articles 19 and 20. All three major international declarations and covenants of human rights recognize freedom from fear and want as fundamental.

26.

CAN YOU BE VALUE NEUTRAL?

I would like to propose to you, my colleagues, the following questions and resolutions regarding values in the classroom. My resolutions to these problems are definite, but not set in concrete. I may just change my mind on one or more of them this afternoon, based on our discussion.

1. *Can one be value neutral*? Absolutely not. This applies no matter what the subject matter. For example, one may present a fair case that in science or mathematics one may teach without dealing with social, political, or personal values. While it is true that these may not be "on the line" as in philosophy, history, or political science, they are nevertheless present. The purely technocratic attitude says implicitly (or explicitly) that these considerations don't count. Perhaps a typical scientific attitude is that the search for facts is in itself the end sought. This tends to argue for a value that one need not act to impose human values on the world as it is.

2. *"Therefore, the teacher must inject value questions into the classroom."* No. I do not agree with that. I don't think the teacher is obliged to get on a soapbox, either. I do believe that the pretense of complete value neutrality is dangerous.

3. *What values are important in law school*? I would like to refer to my own discipline as a case in point. To a certain extent law school has a claim on neutrality. By and large we examine the system as it is. We also

Conclusion

The success of our law schools depends on us. It is not so much the building, the classrooms, or even the size or organization of the library. These are important, but what is more important is the way that we use our resources. Professors should lead the way in building the habit of success. That habit is a pattern of behavior which includes problem solving, attention to ethical concerns, intellectual honesty, and a genuine and continuing interest in questions of justice. It is an attractive habit. It carries many of its own rewards. Legal problems are interesting problems, and law practice can be an interesting occupation. It is a privilege to be able to practice a profession. The habit of pursuing excellence in these areas makes both law school and the use of one's legal talents after law school all the more enjoyable. Professors help point the way, but students must create the habit of success.

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try to debate "both sides" of the issue. There you go — we are caught right there. We have assumed that there are only two sides. Further, we may assume that both sides can be and are represented by good legal advisors. Other implicit assumptions in law school: that the adversary process allows or brings about progress, that our line of questioning or examining things probes underlying issues of justice, that the Constitution does not promote a certain economic philosophy, that our Constitution is an impeccable statement of human rights . . .

4. *How neutral are you folks in other schools and departments*?

5. *What is a good stance to take on values questions*? I think it is appropriate to recognize that value problems exist, and that they may have some place either in one's subject or the life which one leads. I prefer not to be preachy. In some courses values need to be pursued with vigor. In others, like many law courses, it is not so clear that values lie at the core. In these cases it is important not to create the pretense of neutrality.