

Nova Law Review

Volume 10, Issue 2

1986

Article 14

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The Pedagogy of Community: Trust and Responsibility at CUNY Law School*

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All legal education proceeds from implicit premises. This essay seeks to make ours at CUNY explicit.

The premises of most contemporary law schools (institutions spawned by the Case Method and reared by Legal Realism) implicitly seem to value *instrumentalism* (the notion that lawyers' work consists in getting the job done, using the existing system to achieve the ends our clients desire), *pragmatism* (the notion that the lawyers' professional task takes place in a universe of moral values over which the individual attorney has virtually no control and to which she or he should therefore be resigned), and *relativism* (the notion that questions of principle are internal, that they are personal tastes rather than collective and communal judgments).

* The following essay draws heavily on a range of materials drafted over the last several years. Much of it remains aspirational as we continue to develop this new institution. It is meant to be an interpretation — part metaphor and part theory — of the work we have been doing and the goals we have been trying to achieve. In the text I describe these as collective goals, and I believe them to be such. But one of the things that we continue to work on is the articulation of our otherwise inchoate shared premises. To the extent that I seek to make those implicit premises explicit in this essay, the effort is my own and the execution is shaky at best. The distinction is tricky; this essay is in many senses an individual interpretation of collective premises. If that distinction seems intuitively obvious to you, much of this essay will probably seem belabored.

** This essay, which is about the ideas that seem to me to lie at the heart of my work and my life, is dedicated to the memory of my father (Ladislav Farago) and to the prospect of my children (Max and Sarah and Belle), whose exuberance and sense of the possible continually expand the boundaries of my life. And to Jeanne Martin; beneath her cynical exterior there lies a universe of vision and of wonder.

The implicit premises at CUNY are different, however. We want to teach our students, to the extent that we can teach them at all, that the acid of cynicism gradually eats away at one's own soul unless there is also the balm of idealism. To lawyer well means, for us, to retain sight of a vision of the good that transcends personal preference or taste.¹ Values are not immutable outcrops on the moral landscape; they are choices we make, the specific paths we choose to traverse and create as we travel unceasingly through that terrain.

This seeming paradox — that values can simultaneously be something more durable than individual preference while nevertheless being a function of personal choice — is one of the major obstacles to creating an institution based on shared norms. What does it mean collectively to choose a set of premises, and is this any less relativistic than choosing such a set individually? But if we choose these premises, how can they transcend the notion of choice? In fact, this is no paradox at all, but a function of the definition of morality and the imperfection of our own intellectual tools.²

1. Of course, to do so with humility requires an awareness that others' views of the good may differ from ours. In that sense, it is possible to believe that one's own views are correct without denying others the possibility of believing the same about their own, conflicting, values. This distinction mirrors in some important ways the difference between the economic notions of contract and gift set out by my friend and colleague Dinesh Khosla elsewhere in this Symposium. Contract does not merely capture my respect for you and your values, it says that I believe them to be as good as my own. But it seems inherent in the notion of having values that I don't honestly believe that; what I really believe is that my values are the best ones and all that I am doing when I say that mine are no better than yours is deferring to my own inability to prove their superiority. In effect, I yield my heart to my head, my theology to my pragmatism, I give dispositive weight to the power of reason when I say that because I can't prove the primacy of my values I must therefore somehow undercut my belief in them.

I can, however, also respect your values, while believing you to be wrong. Indeed, the notion of gift seems to me to require that sort of respect. When I give something to you out of care and community and love, even when I think you are wrong, I do so fully respecting who you are and what you believe. This approach has a greater ring of honesty because it does not deny the fact that I believe you to be wrong. Moreover, it has a greater congruence with my own beliefs because it does not require that I subordinate them in order to respect yours.

2. The relation between morality and personal choice is a difficult problem not well captured by the fuzziness of the language we use to discuss moral issues. I try to sort some of this language out in Farago, *My Rights and Your Responsibilities*, in *ETHICAL PRINCIPLES, PRACTICES, AND PROBLEMS IN HIGHER EDUCATION* (R. Stein and C. Baca, eds.; 1983) (see especially, Section III, at 16-18). My former colleague Richard Stith has struggled with a different aspect of this in Stith, *The World as Reality*,

There are two different things we mean when we use the word "choose". Sometimes we mean the process of making a selection, a choice among otherwise equally good alternatives whereby we express our preferences (when we choose sweetbreads over sprouts for dinner, for instance, because we prefer the way they taste). This is the exercise of an option or the expression of a preference, and this sort of choice *is* relativistic and idiosyncratic. But other times we use the word to mean that we make a commitment, that what we do is an expression of our will and not merely an event that happens to us. Choice in this sense is an expression of our own participation in our lives. This second sort of choice is internal and personal in the sense that commitment requires will and is therefore personal,³ but it goes beyond taste to belief and therefore is something that is no longer relativistic (as would be the case were I to prefer sprouts to sweetbreads by reason of my principled vegetarianism).

The confusion arises because we cannot demonstrate the *validity* of our personal moral commitments, and so it may appear that the choice to commit is but a special case of the choice to prefer.⁴ But to accept this notion is to undermine the foundation of belief or commitment, to unmake the choice.

As we seek to articulate shared goals, then, we encounter a series of obstacles each of which may prove insurmountable. First, we must make our individual commitments, we must identify what we as individuals believe in. By no means everyone (and especially not all lawyers) make such a personal commitment to a moral framework, and part of our faculty appointments process (and student admissions process) has involved identifying a group of people whose lives and work (in remarkably diverse ways) embody such a personal commitment to values.

Second, though, the very diversity of our community means that, having made such an initial commitment, we have implicitly (and, to an increasing extent, explicitly) asked that those of us who are here try to identify a shared *core* of commitment while retaining our initial

as Resource, and as Pretense, 20 AM. J. JURIS. 141 (1975). I fear that both of these attempts succeed, to the extent they do at all, only by redefining words in ways that run counter to common usage ("ethics" and "morality" in my article, "values" in Richard's). I discuss other difficulties created by the weakness of our moral antennae in Farago, *Intractable Cases*, 55 N.Y.U. L. REV. 195, 231-39 (1980).

3. See *supra*, note 2. See Farago, *My Rights and Your Responsibilities*, *supra* note 3.

4. See Stith, *A Critique of Fairness*, 16 VAL. U.L. REV. 459, n. 15 (1982).

premises. We try, that is, to articulate a shared vision, to achieve a moral consensus, even as we recognize the importance of holding on to one's own principles. Finally, if such a core can be articulated, we ask ourselves collectively to reassess our individual commitments in light of our shared premises and to engage in a dialectic between personal and institutional values.

Each of these obstacles implies a distinctive risk. If we stop before identifying our own values (or give up along the way), we buy into a corrosive pragmatism that deprives us of a role in our own moral universe. If we stop after identifying our own values but give in to our inability to demonstrate their validity, we may come to view our choices as mere preferences and to view institutional values as illegitimate, thereby buying into a dizzying relativism.⁵ If we move beyond relativism, we are then subject to the potential risks of paternalism, absolutism, and political dissension. The more we commit to the things we believe in, the harder it is to retain a sense of humility and an ability to work together to craft a shared set of premises.⁶ Finally, if we manage to generate a set of shared premises without reexamining our own views in their light, we run the risk that the foundation we have developed will be forged, rather than crafted, that it will emerge from compromise rather than consensus, that it is simply a moral deal not an expression of collective commitment.

More concretely, the hardest task we have faced thus far has been our need to articulate values that the institution, as an institution, respects. Because these premises go beyond the individual, because they are institutional as well as personal, our program involves extensive col-

5. See Bloustein, *Social Responsibility, Public Policy, and the Law Schools*, 55 N.Y.U.L. REV. 385 (1980). This sort of relativism is familiar to those who have studied moral reasoning as an aspect of human development. Thus, Lawrence Kohlberg's schema of moral development includes a stage of pre-principled relativism (the stage he refers to as "4 ½") through which some people pass before fully committing to their own values. L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT*, 411 (1981). Relativism becomes a value in its own right, along the lines of the principle of "prudence" that Anthony Kronman identifies at the heart of Alexander Bickel's work. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

6. The tension between absolutism on the one hand and the desire to fight absolutism absolutely on the other hand is captured with eloquence and beauty in a segment of Jacob Bronowski's television series, *The Ascent of Man* (episode, "Knowledge and Uncertainty"), and is summarized in the chapter of the same title in the book based on the series. Bronowski's skill as an artist (in the television medium) and his complexity as a thinker, are reflected in his ability to capture the problem fully without either resolving the tension at all or becoming stalemated by it.

laboration and widespread integration. We have an inchoate notion of what we are trying to do and we struggle daily to find expression for that notion.

Central to our premises are the twin values of responsibility and trust. Responsibility seeks to capture what we mean when we think about being lawyers who serve human needs. We want to help our students, as they become lawyers, remain accountable to their own aspirations. We want them to see their own actions as means towards moral ends of their own definition.

Trust is central to what we do because we come as individuals to this collective task. That means that we differ in the definition of our task in ways that range from nuance to centrality. If we differ in defining institutional agendas, we must work together, respecting each of our sets of values, while refining the community's ability to articulate its own. This is a task that requires trust (and perhaps naivete). Absent trust, laws become mere rules; with trust they can be expressions of principle.

So, these twin issues — responsibility and trust — keep coming up for us in all the work that we do. Over the years they have had an impact on virtually all aspects of our program, including our approach to the teaching of doctrine, our approach to the teaching of a lawyer's skills, and our approach to the ways in which we work with each other to create and define our own community. This essay seeks to provide something between history and insight about the ways in which we have sought to deal with these three areas of our work.

A. Doctrinal Teaching — The Role of the Courses

1. Courses, Houses, Simulations

We began planning for the Law School with a notion of bringing together theory, practice, and doctrine. As a direct collorary, we structured the program around the seemingly distinct organizations of the Courses and the Houses. Why?

I see us as having set out to create a Pattern for the law, in order that our students, walking along it, can become empowered.⁷ This Pattern is not about content, but about form; it cannot be known, but only

7. The source of this metaphor is, loosely, R. ZELAZNY, *NINCE PRINCES IN AMBER* (1976); see also Ayer, *Isn't There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, 53 N.Y.U. L. REV. 475, 484-7 (1978).

felt, experienced, and embodied; it is the stuff of archetype, not idea.

This is, I think, a qualitatively different sort of thing for a law school to do. Most schools try to give their students the ability to roam their own legal universe, a universe that they come to perceive as the only one. There is a deterministic quality about life in such a legal universe. The law becomes The Law, and lawyers come to see themselves as powerless implementers of its demands. In contrast, I think that we want our students to travel through all of the parallel legal universes, and to feel the ways that those alternatives are tied together and differ from each other.⁸ Why? Certainly *not* for theoretical completeness, or because I would like to tout any particular one of the alternatives as preferable. It is not any one alternative that is better; it is the ability to see oneself as able to select, as having an active rather than a passive role, that makes the qualitative difference. That is what we mean when we say that we want our students to become responsible for their actions as lawyers and as people. That is the link between responsibility and empowerment.

So we want to come up with a Pattern, a path that our students can walk and, in the walking, through the walking, change themselves, enliven themselves, charge themselves, empower themselves. This is not simply a cognitive process, but, of course, cognition is caught up in it. The difference is that cognition, the cognition that counts, comes only after understanding, an awareness *after* understanding that that (whatever "that" is) is what it is all about. Cognition is reflective epiphany. It is not simply a physical or affective exercise. It is a conscious, a *self-conscious*, incorporation of understanding.⁹

I had a teacher once named Marshall Ho. He was an acupuncturist/physician and a Tai Chi master. He taught Tai Chi when I was a student at the California Institute of the Arts. And he said that the two disciplines were essentially one. In fact, he said that going through the full Tai Chi run of exercises was the equivalent of a complete acupuncture once over and rejuvenation. It seems to me that Tai Chi, or any of the martial arts or physical yogas, is basically what I am talking about with respect to walking the Pattern. It is an external path

8. I don't mean this simply in the sense of teaching cross-culturally. There are innumerable alternatives within any one system; we as lawyers are constantly making choices, for better or worse, about clients, about strategies, about career paths, and about role and stance.

9. See Ayer, *Isn't There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, *supra* note 8, at 492-96.

inwards, a pattern of physical acts that comes to have a spiritual, a metaphysical meaning. The moves in Tai Chi are a representation. They have a cognitive meaning, but they are not only about their physical form. Over time, going through the physical aspect of the moves one is encouraged to come to a specific sort of understanding or awareness that is neither physical nor cognitive nor affective, but somehow involves all three. So we are looking, in this sense, for the yoga of the law.

That, for me, is what our pedagogy is all about. It defines the need for the Courses, and the need for the Houses, and the ways in which the two interact. The Courses provide the intellectual form. They are the armature, the content of the Pattern, the intellectual substance that, once one understands, constitutes knowledge. This intellectual structure is vitally important for us, the designers of the Pattern, because it in a very real sense *is* the Pattern.

But it is not the way to walk the Pattern. That is what the Houses and the simulations (which are designed with care to embody certain crucial truths — which in turn are not really truths but fundamental questions — about the law), and by doing so in the company of guides who can offer support for the students in their quest even if they can't directly impart the experience, our students can be encouraged to achieve a responsible sense of their own role.

Thus, our students engage in simulations, the concept of which is determined by (and to some extent determines) the content of the Courses and the experience of which is played out through the Houses. The Courses themselves meet in general as lectures addressed to the entire class. They constitute about eight hours of student time per week. In addition, students spend roughly twice that amount of time in House-based activities structured around the content of the simulations. In House, a student might plan, execute, or reflect on a lawyering activity, either individually or as a member of a group. The activities range from intake interviews, through negotiations and drafting exercises, to mediations and appellate arguments. In all of these the student is encouraged to approach the problem presented by the simulation with the complexity and multiplicity of dimension with which lawyers approach each problem they encounter in their work.

For example, a student may be asked to do an intake interview. The purpose of that interview is to elicit information about the problem, but it also must give the student the range of data needed to inform a judgment about whether or not to accept the client (a judgment that involves important questions about both professional ethics and the

economics of one's practice). It will teach interviewing as a skill, but it will also raise questions about doctrine (what information do I need in order to answer the legal question this client presents?), about legal theory (how many different ways are there to think about the legal issues here?), about strategy (what does the client want; how can I best analyze the legal questions to capture the client's own views of what is important in this matter?), and about professional responsibility (how does this matter, and my potential role in it, comport with my views of what should be and how I view my profession?). In addition, it will give us a chance to work on time management skills and on the importance of striking a balance between collaborative effort (planning, brainstorming, and working together) and independence.

The Courses provide a framework for thinking about the issues raised in the simulations. In the first semester, for example, a problem raised by a proposed house purchase expresses issues that relate to all of the substantive Courses — Law in a Market Economy; Liberty, Equality, Due Process; and Adjudication and Alternatives to Adjudication — as well as to the course that focuses on the role, responsibility, and skills of lawyering — the Work of a Lawyer. Faculty in each of these courses will lecture directly and indirectly about the work being done in the simulation. The ideas laid out in the Courses provide a context for inquiry and reflection in the simulations.

Student work in the Houses takes the content of the Courses and allows students to work with it in the way that lawyers do, reflecting on it in a way that lawyers seldom have an opportunity to. Faculty in the Houses — the House Counselors — provide guidance, feedback, and support and draw students' attention back to the context of inquiry. Student work is evaluated in the Houses, by the House Counselors, and not in the Courses. There are six areas of evaluation: Professional Responsibility, Clinical Judgment, Legal Reasoning, Theoretical Perspective, Communication, and Management of Effort.

The Houses, then, are simulated offices. But they are more than that and different from it. The name comes from Ezra Ehrenkrantz, the architect for the renovation of our permanent facility, who stressed the importance of creating spaces that students could use to help them define the school as their community, a resource that is seldom found in commuter institutions. He proposed a series of small work areas, with student carrels linked to faculty offices, library materials, and other important resources and support facilities through an interior corridor. This basic configuration, which accomodates roughly forty students, three faculty, and a secretary, is replicated eleven times in our building

and, in one way or another, draws on all three years of our curriculum.

So the Houses are spaces that define community, and they are areas in which work gets done. They are part lounge, part homeroom, part office. The nature of our program involves intensity and vulnerability, ideology and emotion. All of these get played out in the Houses and contribute to the special character that each develops almost immediately. Because we begin each year with virtually no centralized rules for House management, the Houses also quickly become individuals in the ways in which they approach such issues as smoking, decoration, maintenance of House resources, creature comfort, and courtesy. Indeed, one of the first things that must be grappled with is the absence of an imposed decision-making paradigm for House governance. And this in turn provides the opportunity for reflection on the nature of rules and rule-making, and the relation between rules and community.

We make significant efforts to model the Houses on work situations. Student fees pay for copying machines, local telephone services, microform copying, and so on, allowing us to do away with coinboxes and many of the distinctions between faculty and student office resources. Even so, the experience of the first year is too intense, the frustrations too great, the demand for collaboration too persistent, the push for reflection and self-scrutiny too relentless to allow them to become typical office environments.

The Courses, the Houses, and the Simulations, then, are not three distinct elements of our program. They are all aspects of a Pattern that we seek to create, each contributing to and influencing the others.

2. The Courses and the Teaching of Doctrine.

The transition *from* the notion that we are trying to develop an approach to the teaching of law that conveys something prior to any single legal system *to* an understanding of the implications this has for the teaching of doctrine is either self-evident or impossible. At the heart of the notion of a Pattern is a sense that there is the teaching of doctrine and there is the teaching of a *relation to* doctrine. The two are tied together; one is impossible without the other. But they are emphatically not the same thing (or at least they are not the same thing from the perspective of the Pattern, a perspective in which there are alternatives and from which it is possible to choose among competing relations to doctrine).

If doctrine just *is*, if it is given and unalterable, then one's relation to it is tremendously limited. There is an important difference, there-

fore, between teaching the substance of the law as an end in itself (“coverage”) and teaching it as a means to the end of responsible lawyering.

Doctrine as a self-validating end mires us in a particular universe. It reifies some specific variation of the Pattern and makes it real. It takes us away from viewing things as versions of the Pattern, and convinces us that this is the only world there is. Doctrine as the stuff of which all possible parallel universes are made, on the other hand, is precisely what the notion of a Pattern is about.

An anecdote:

The first crisis I had to deal with when I became a law school administrator had to do with the labor law curriculum of the school I was teaching at. The faculty member who had taught labor law had just left to return to practice. He had structured the school’s offerings to include a basic course (“Labor Law”), and a course that, in effect, picked up on whatever interested him that semester. At most law schools the second course would have been called something like “Selected Topics in Advanced Labor Law.” But he had chosen, primarily as a marketing technique, to call it “Labor Law II.” When he left, we dropped Labor Law II.

The students went wild. We were depriving them of half of Labor Law. They would go out into the world ill-prepared for (indeed, totally ignorant of) half of the material necessary to any labor lawyer. No amount of explanation could convince them that they had not been ripped off. We had invented a doctrinal myth and had to accept that it had taken on a life and a power of its own. We had reified Labor Law II, and by the connotation of its title convinced our students that they needed that particular course.

The power that doctrine has for students (and for courts and for just about everyone other than clients) comes out in a lot of ways. Students complain about unpublished course materials, materials, that is, that are not adequately reified (it amazes me how important it can be to bind or typeset unpublished materials). Students worry that their courses haven’t covered every topic in the casebook. There are schools in which even multiple section courses are taught by only one faculty member, so the content of the course (and by extension of the legal system) takes on the authority of being The Law, rather than one person’s cut at the law.

Whenever we teach doctrine we teach, implicitly or explicitly, a relation to doctrine. When we teach doctrine as reification, the relation to it we teach is one of subordination, of idolatry, of weakness and

powerlessness. When we teach doctrine as manifestation, that is, as arbitrary (though not random) response to social needs, we empower our students by encouraging them to be aware of options, choices, alternatives.

We cannot, of course, empower someone who doesn't want that burden. But that does not mean that we should let go. Our job is to provide support for work that is difficult, not to facilitate the avoidance of the hard or the painful.

Obviously, the converse is also true: It is impossible to teach a relation to doctrine without teaching doctrine. Responsibility requires competence. The point is that competence taught for its own sake can often provide an alluring substitute for responsibility. Because I am good at what I do I don't have to think about the "what" of what I do, or what impact my doing it well has. With competence can come a false sense of mastery, a mistaken belief that what is done well is well done. With responsibility comes a feeling of humility, a knowledge that shooting an arrow requires *both* the skill to make it land where you want it to go *and* an understanding of where the target is.

One more word on "coverage," lest I seem to be arguing that whatever students happen to pick up will be just fine. I don't mean that. Of course there is a body of nuts and bolts law that they will be called upon to know about. But I don't think that we can teach that sort of doctrine efficiently until *after* they have incorporated a *relation to* doctrine. That is, first people have to become lawyers, which they do in part by working with doctrine (almost any doctrine, chosen at random or by design); *then* (and only then) can they efficiently learn the law. That is not news; traditional law school curricula work that way just as much as ours does. The difference is that we impart a commitment to a different sort of relation to doctrine as our first step, and we do so explicitly, not by default.¹⁰

Once our students become comfortable in relation to doctrine, there are lots of very efficient ways to learn the substance of the law: Lectures (live or on tape), outlines, computer adventures, readings, programmed learning sequences. Students do this all the time. Second

10. Many would say, of course, that traditional first-year courses seek to provide students with the kind of perspective and conceptual limberness that is inherent in much of what I say we value at CUNY. The difference, I think, is that we are institutionally conscious of the fact that doing this is value-laden and that we stress to our students their own responsibility for the choices they make rather than the relativism of values that makes any choice equally palatable.

or third-year students who don't come to traditional classes spend thirty or forty hours reading hornbooks, outlines, and (if they are very sophisticated) journal articles and do just fine on traditional final exams. Graduates take bar review courses that teach them in ten hours of lecture and readings the doctrine that was supposed to be contained in a three-credit course.

It is possible for a law school to handle coverage in the way that students instinctively handle it (though we have yet to fully realize this possibility at CUNY). So I don't think we need to worry about coverage as the backbone of the courses. In fact, I think we can't afford to. Because if we do, then we have adopted the relation to doctrine that the traditional taxonomy of law embodies implicitly.

This is the reason why we teach Law in a Market Economy, rather than Contracts and Property and Corporations and Labor Law. People I talk to about our program often mutter things like, "old wine in new bottles."¹¹ They assume that we are just engaging in an intellectual reorganization, making one arbitrary and neutral selection from a library of potential intellectual organizations of a constant body of doctrine. Our reorganization may seem slightly more elegant, or more contemporary, to us, but in their view it is basically just more of the same sort of thing.

No. That's not what we are trying to do. We are *challenging* that very claim, the claim of asserted neutrality and arbitrariness in making such choices, and we are asserting that the choice one makes runs in, under, and through the way one chooses to be a lawyer.

Again, this is not an intellectual, a theoretical, challenge. Our students don't need to have this pointed out to them; they need not identify themselves by comparison (and in opposition) to a "traditional" approach to lawyering. It is an experiential, visceral, all-encompassing challenge, the challenge that yoga makes to scientism. Our analysis begins with transactions among people, transactions that lead to legal forms. Our analysis stands in opposition to any one that begins with legal forms and imposes those forms on people. And this difference captures, models, patterns a way of relating to legal doctrine that we believe is difficult and challenging, but possible and preferable. The shape of the bottle determines the taste of the wine.

The point is that when we fall back into worrying about coverage

11. I am indebted to my former colleague Alfred W. Meyer of the Valparaiso faculty for being the first person to make this observation to me shortly after I left Valpo to come to CUNY.

we also fall into embracing a relation to doctrine that gives it the upper hand. The embrace becomes a bear hug that crushes the life from the law and the people who work within it.

B. Experiential Learning — The Function of the Houses

Our law school program focuses on encouraging our students to take responsibility for their acts as lawyers. This, in turn, implies a very specific role for the teaching of doctrine as a way to model a relation to doctrine that we believe is empowering. It has similar implications for the ways in which we go about teaching lawyering skills and, by extension, for the ways in which we work together in the Houses as well as the Courses.

1. Teaching and Learning

We are teachers; our students are learners. The process whereby they become responsible lawyers depends on each of us, students and faculty alike, coming to accept these roles not in a hierarchical but in a functional sense. If we are to avoid the false hierarchy of traditional educational roles we must find contexts that respect the *legitimate* inequality between us. On one level, this means that there must be a reason, a good reason, why the students pay and we get paid. On another, less cynical, level, there is complimentary legitimacy in our expertise on the one hand and in their desire to become responsible professionals on the other. We must seek structures that permit us to evidence that expertise while honoring and encouraging student responsibility for learning.¹²

12. There are numerous buzz words in this: “hierarchy,” “inequality,” “responsibility,” “expertise,” for example. It is difficult to speak about things that are central to the Law School’s mission without touching on words like these, precisely because the Law School has a mission. Because we are committed to shared principles, principles that in some sense transcend our individual analyses and priorities, we find ourselves continually looking for words that capture those principles. The principles to which we are committed have to do with a critical analysis of the law, the society, and the role of lawyers, and so we find ourselves talking about hierarchies and inequalities; struggling to sort out the legitimate, functional, essential ones from the far more common limiting, demeaning, illegitimate ones. And our principles have to do with the modeling of a professional role that at its core is about responsibility and choice, so we find ourselves introspectively concerned with our own choices while we seek ways to encourage students to exercise (almost paradoxically) their own choices. The challenge is to find a way of using these words whereby they retain their freshness. These are words that

Teaching — our consciously taking responsibility for the substance that we put out — and learning — our students' coming to take conscious responsibility for their own professional growth — are central to our mission. But there is even more to it than that. In all education this complimentary balance is desirable; for us it is *essential*. It is essential because we are not trying to teach a series of ideas, but rather are trying to help students become good lawyers. And for us that means responsible professionals. The taking of responsibility for one's choices is not simply a matter of educational philosophy for us, *it is the very thing we are trying to capture in the development of our students as professionals*. So it is absolutely essential both that our analyses of the nature of law take into account lawyers' responsibility for the content of the law, and that our school provide contexts that permit the expression of our expertise (teaching, our own taking of responsibility) and of our students' aspirations and principled desires (learning, their taking of responsibility).

2. The Houses as a Context for Learning

The Courses provide a context for teaching. They are the way in which we structure the presentation of material. They are the armatures, the paradigms, the intellectual frameworks whereby we present the substance of the law according to organizational principles that we find to be challenging, fertile, accurate, and complexly interdependent. As teachers, perhaps more importantly as people committed to the importance of ideas and of the development of a critical perspective on the part of our students, the Courses are in many ways in the center of our activity. It is through the Courses that we shape the way in which the content of the law is presented.

The design and teaching of the Courses, then, is the way in which we take conscious responsibility for the material that we put out. In

capture our central ideas, and so they have a special power for us to evoke the stuff around which we have joined. It is always tempting to distance ourselves from that power, either by invoking the words more or less by rote — saying them without listening to them anymore — or by dismissing them as our own sort of jargon. When we do so we give in in tiny ways to the centrifugal force that seeks to tear our shared mission apart and return us to an atomized, individuated approach to teaching. Because I believe that our success will depend on our ability to retain a sense of shared goals despite all of the pressure to dissolve back into a group of dedicated, well-intentioned, but independent individuals, I find myself constantly struggling to hear words like “hierarchy,” “responsibility,” “trust,” and “empowerment” with a feeling of freshness.

doing so, we model a relation to the law — our subject matter — that is deeply professional. We choose not to erect a (misleading) shield of objectivity, but rather acknowledge that the way in which we choose to structure our analysis of the substance of the law (and of its underlying theory) is just that, a *choice*.

The Houses, on the other hand, provide a context for learning. It is in the Houses that we seek to find ways to encourage our students to take responsibility for their own emergence as professionals. Taking that sort of responsibility is often hard. It means taking the chance of associating oneself with the outcomes of one's actions. It means a constant awareness of the consequences of one's actions. And so it is often more comfortable to sink back into being taught rather than to rise to the challenge of learning.

For many of our students this will be especially seductive. They are somewhat older, returning to school, often, from stressful and demanding professional roles. Their expectations, based on their earlier educational experiences, will be that they can relax for three years while we take the responsibility for their education. This is natural and appropriate, and it often lies below the surface. Adult students often assert their independence, their desire to be treated as mature beings, and yet they simultaneously fail to take such responsibility when it is available. They seem to want the power that comes with being adult without the responsibility. Being sensitive to this undertow is central to our role in the Houses, because it is the function of the Houses to make the consequences of student failures to act responsibly more immediately evident, and it is the function of the Houses to provide support whereby students' taking responsibility is made somewhat less threatening.

In particular, there are three issues about learning that can be addressed in the Houses particularly effectively:

i. Responsibility for Learning

The Houses are a context for students coming to learn about what it is to be a lawyer, and so they are the forum for student work on and reflection about the content of the Courses. In this way the Courses and the Houses are linked.

Thus, for example, students seek answers to substantive questions, as though such answers would provide a complete understanding of what it means to function as a lawyer in one of another of the simulations we put out. The crucial thing here is not that all House Counsel-

ors feel a need to have all of the substantive answers at their fingertips. Rather, it is that we all need to retain a sensitivity to the fact that such answers, while important, often deflect attention away from learning about other, riskier lawyering issues.

Similarly, we should be aware that students will come in asking us to treat them as students rather than co-workers. This can come up in an almost infinite number of ways, but, in the context of experiential learning, it is most immediate around substantive legal questions. What is the law here? Does my client have a case? What should I do? They want us to answer these questions about their responsibilities to their clients, and we are tempted to do so. On one level it is fine; it would be unrealistic and unfair to claim that we have no expertise in these areas. But on the other, subtler, hand we must be sensitive to the fact that the form of the questions often makes it difficult for us to transmit that expertise without simultaneously making it easier for students to avoid their own responsibility for their choices in the simulated lawyer/client relationship.

There is reciprocity here. We may find this definition of student and faculty roles as tempting as the students do. It is familiar. It is also often functional. It permits us to avoid reflection on our responsibility at the same time as it does the same for the students, since all we seem to be doing is answering their questions. In this regard, teaching requires us to engage in the same sort of introspection and reflection that we call on our students to do. The responsibility for one's own learning is one that teachers and students share.

ii. Evolving the Learning Context

Just as we can collaborate in avoiding student responsibility, we can also collaborate with students in creating it. The Houses are a context for this as well. They are the way in which students can come to participate as persons in evolving a context for learning. As the issue of responsibility for one's choices (whether in the simulations, around "housekeeping" matters, or with respect to school-wide policy questions) becomes foreground in our work with students it is inevitable that their role in forging the context for their own learning becomes central.

The danger here, I think, is that it is easy to mistake a desire for power for an openness to accepting responsibility. We all often express a desire to determine our own participation in the work we do, but it is much rarer that we are willing to take responsibility for getting it done.

This is central to the evolution of our students as lawyers, because taking on the role of a professional in large measure means accepting responsibility rather than seeking power. The role of the House Counselor here is to maintain the focus on the former, recognizing that the latter (to the extent that it is legitimate) will emerge from it.

Thus, for example, students often have extra time on their hands in the Houses, and come to feel restless when they don't have specific tasks filling the House time. The difficult task for the House Counselor here, however, lies not in trying to find work for idle hands. Rather, it lies in finding ways to encourage the students and the House to consider the consequences of that decision-making, and to come to a decision that is not focused on who has the power to decide, but instead is focused on what is the best, the most functional and responsible decision to make from the perspective of students' responsibilities to themselves (for their learning), their classmates (for their cooperation), and their clients. Other decisions, ranging from allocations of House time within the simulations, through housekeeping tasks such as the reassignment of desks, the management of the House Libraries, or the accommodation of smokers' and non-smokers' preferences provide expressions of this sort of learning opportunity, as do governance issues¹³ (both in-House and school-wide) and quality-of-life questions. The quality of life in particular raises issues in this regard, because so little is done to make the Law School a pleasant place to work unless we and our students individually and collectively take responsibility to make specific things happen.

The most pressing concerns here often revolve around time management questions. "Can I miss Tuesday's House session?" "Wednesday's lecture?" "Where should I be when?" "Why can't I do this stuff at home?" "Why isn't there enough time for meetings?" Of course we have expectations about these sorts of questions, but the way that the questions get put out can undermine our ability to express those expectations while simultaneously encouraging students to take responsibility for their own learning. The twin dangers here are that, on the one hand, we want to yield to the temptation of simply determining the norms, of telling people where they should be at any given moment, of minimizing their time management problems because we view them as casual or less important; while on the other hand we want to yield to requests for democratic decision making. "I think this, but of course it

13. See *infra*, section C.

is up to you.”

Substantively, each of these responses is appropriate at different times and for different people; but the key is that all of these questions have implications, all of the answers have consequences. We seek to retain an ability to put those consequences into the spotlight, to foreground the subtext of the questions and of the decision-making process (and, for that matter, of the decisions themselves).

Encouraging the students' participation in their own learning is a challenge for us in part because it means remaining alert to the implications that lie beneath the surface both in student requests that we make decisions, and in their demands that they be given the power to be self-determining. It is a challenge also because we may often find it easier to yield to those requests and demands.

iii. Reflections on Learning

The Houses provide a natural forum for reflection on the learning that takes place, both in the Courses and in the Houses. It is here that we reflect on and think about the implications of our choices, and it is part of the House Counselors' responsibility to encourage such reflection.

There are somewhat distinct (but clearly related) levels of reflection. On one hand, it makes sense that we seek to encourage an awareness of the sorts of underlying issues that I have been discussing so far. That is not a hidden agenda for us as initiates. It is something that we need to find ways to express and think about things with our students. Their involvement in an emerging and developing acceptance of responsibility for their own learning requires consciousness of that process. So we should seek to find ways to make that issue foreground, to step outside the experiential learning or decision-making tasks that the Houses will be engaged in, and to view those tasks and processes analytically on individual, inter-personal, and collective levels.

By extension, there is an important intellectual component of this sort of reflection. It has much to teach us about individual and social needs and pressures, and as a result it has much to teach about the nature of law, of constitutions, and of rule-making. Student responsibility for learning, and the pressures that lead students and teachers to forego such responsibility, mean that we are constantly engaged in the Houses in the sort of community- and governance- building that can inform at a deeper theoretical level an understanding of the complexities, tensions, and outcomes of the larger society, including the sources,

benefits, pitfalls, and essential incompleteness of law as a response to social needs.

Here again our role is a difficult one, because both sorts of reflection have to vie for time and attention with the content of student work. Thus, there is a strong pull away from focusing on this sort of reflection, because it is difficult to make room for a concern about such seemingly abstract issues when important substantive issues seem to cry out for decision. Somewhat more subtly, when it is most difficult (and most important) for students to take responsibility for their own learning, they often experience a focus on this sort of reflection as unpleasant, irrelevant, and annoying. Our task is to find ways to make the possibility of such reflection always available, to provide opportunities that can be taken (by individuals and by the House and the School as a whole) when people are ready to take them.

Providing continuing support for these three learning issues is a tall order. It is difficult to maintain the overview necessary to fulfill our role as teachers in this context, and it is hard to present the issues with clarity and openness to student involvement. There is a constant pull to cooperate with our students in giving them what they can get at every other school, an infantilized role that denies their own responsibility for their education. Perhaps hardest of all, we often find it difficult to maintain the patience necessary to allow our students to reach readiness for this role, without automatically providing them with the easy fallback role of being subjected to our teaching rather than empowered by their learning.

C. Building Community — Governance and Trust

It must already be evident that we seek almost constantly to operate on several levels at once.¹⁴ In precisely this way, as we try to create our constantly changing community we try to use that process of creation as a way to focus on the content we study — society-formation, rule-formulation, regulation, and the creation of a sense of community that infuses law with meaning. In part for this reason, and in part be-

14. Howard Lesnick once described our task as trying to get someplace in a canoe that we are in the process of building. That is not simply a description of what it is to teach a program at the same time that one is inventing it. It will endure for so long as the program succeeds; it is inherent in the task as we define it. We simultaneously seek to do work and reflect on it, teach students and ask them to hold themselves open to thinking about the process of learning the things we teach.

cause of our commitment to stressing responsibility rather than power (or duty, or rights), we have developed an unusually complex, open, reflective (and some would say masochistic) governance mechanism.

In its simplest form, that mechanism calls for decision making to take place in a series of committees. The broader community is engaged in this process by means of an Assembly, which provides input and which can review Committee decisions. But the Assembly is not a decision-making body. It deliberates, but it cannot act except to send specific decisions back to committee if the Assembly feels that they require further work.

This system is, in many ways, quite simple. But it is also the area of greatest controversy around the Law School, and it provides the forum for a range of feelings to be expressed about disenfranchisement, power, constituency, representation, and role. It was consciously created to come apart (by means of stalemate and the impossibility of action) whenever the experience of community begins to falter. As a result, it constantly feels on the brink of disaster. As we struggle to negotiate the turbulent waters of conflicting values, we find it increasingly difficult to trust each other with the decision-making power we all have. Understanding how this can be involves a closer look at the ways in which trust and responsibility are intertwined.

1. The Role of Trust

To the extent that the Law School manages to capture a special commitment, expressed in part through a special working relationship, that seems to me to be simultaneously important and fragile. It is important because it can make a difference in the way our students become lawyers and the ways in which the faculty and staff live their work lives. And it is important because other law schools looking at what we do may be able to find ways to adapt parts of our own approach to their work.¹⁵ It is fragile because our commitment to shared

15. We have engaged in a rather comprehensive thinking through of all aspects of our curriculum, and in this essay I have presented our work from the perspective of our basic premises, a perspective that inevitably seems most global and intertwined. But much of what we do may hold possibilities for places engaged in far less basic revisions of their curriculum and may have instrumental value beyond the normative values that I attribute to our program here. The Houses, for instance, remake the program in a way that is really quite remarkable and impossible to catalogue, and all they require is space (a tight commodity at many places). Our approach to simulations may also be transferred in part even at schools that choose not to allocate resources in a way

principles in a community that has a constantly changing membership may be like building a sand castle during low tide. What we have done so far to assure a law school that differs from the norm in ways that are significant to us will be first eroded and then overwhelmed as each wave of new people gets closer and closer.

As lawyers we share a belief in the healing power of process. If it looks as though there is a danger ahead, we yearn to make a rule that will exclude the threat we foresee. If the rule seems to permit some new danger, or not fully to avoid the old one, we want to amend it, to get it just right, so that the danger goes away. If we could just get the rule right, everything would be right.

So we as lawyers want to try to devise governance structures for the Law School that simultaneously welcome in each new horde of new people and assure us that our principles will remain at the forefront of what we do. These rules would be democratic, at least in the sense that they would be open to revision once the new group arrives, but we would hope that they would stick for at least a while. We want to communicate the sense that, in essence, since we have been entrusted with the principles on which the institution is based, we, those of us who are already here, should be trusted to implement those principles well.

Rules *are* important. We in fact need a governance structure (though I dislike the word, for reasons that I will try to make clear). But I also think that rules can bear three different sorts of relation to a set of shared principles, and that which one of these relationships we start with makes all the difference in the world.

In one, the one that I find tempting but treacherous, the rules are created in the hope that they will persuade others of the importance and beauty of the principles. The benefits to be had by adhering to the rules will be manifest, and those who do will come to see the wisdom of the rulemakers, acting in a sense as their trustees. If we can make the rules eminently fair, if we can exercise the authority benevolently and altruistically, then either those governed will recognize the rightness of the principles on which the rules are founded, or they will be hopeless ingrates who would have been still more dangerous if their animal urges had been allowed to roam free.

I have problems with this way of doing things, because it just doesn't seem to work. People seem to rebel against rules irrespective of their content. Authority exercised invites resistance. Moreover, the as-

that would permit their full implementation.

sumption that there is a single set of principles, which are generally to be viewed as best by a wide range of well-intentioned people, seems wildly counter-intuitive.

And so, a second possibility seems in order. How can we avoid this resistance to even altruistic governance, except by opening the governance structure to all? How can anyone complain about a system that has been put in place by the governed, about the collective exercise of authority? Let us bring everyone in, set a tentative agenda of subjects that need to be discussed, and create a governance structure together. In all likelihood, the people already in the institution will not retain a central role, but that is the price we must pay for participatory government; perhaps even the principles we had thought so important will turn out to fall short of consensus and other principles will be substituted in their place.

This, it seems to me, is even less satisfactory than the first approach. It requires setting aside our principles as just *ours*, open to compromise or change by majority vote (or some such mechanism). It means that, whatever our intuitions about what is important, we have no right to say any more than, "This is important to *me*," not, "This is important to *the Law School*." And if we really feel, as I do, that we have begun something important but fragile, then subjugating our reason for being to a participatory governance structure is just plain not right.

These two approaches feel like the only alternatives, and it is frustrating to ricochet off one into the other and back again as we seek to come up with a structure that captures our principles while welcoming new colleagues and students. But the point is that they are *not* the only two ways of doing things, and that it may be possible to transcend them and the frustration they seem to entail.

These are, in fact, the two *governance* alternatives, the two ways in which an institution can make claims on individual behavior. The institution can be autocratic, some group can tell everyone else what to do, or it can be democratic, in which everyone tells everyone what to do. The conflict and potential for frustration in this dichotomy are evident as soon as it is played out in practice (as it is now for us at the Law School). Because I don't want to have others tell me what to do (as I am afraid they will do if a majority made up overwhelmingly of students takes control), I prefer a system in which my friends get to tell everyone else what to do. But that justification (the desire to avoid being dictated to) makes its own conclusion (the willingness to dictate to others).

This points the way to what I believe is the central issue: the question of trust. The problem seems to be that what we all really want is a system of trust, a system in which we each presuppose that each of us merits all of our trust. And, desirable as that situation is, it is totally counterintuitive. Not only do we have no reason to trust a bunch of strangers, our experience tells us that these strangers, as newcomers and students, will be in situations that will color their own experience, that will make their involvement at least somewhat subjective, perhaps even though their experience tells them that they are being objective participants.

It is a problem, perhaps *the* problem, because basically what we are saying to newcomers is that *they* should trust *us*, but what we are also saying to them is that *we* don't trust *them*. And that is not a way to engender trust in anyone but small children and some particularly gullible domesticated animals.

The way that most of us work is that trust builds slowly, out of our mutual observations of *trustworthiness*. This process, which is delicate and beautiful and just about the best thing there is, is what friendship and love are about. And the question is, how do we infuse our "governance" structure, immediately, with what is usually a slowly-won end product — trust? It may be a problem without a solution. It is in many ways the central problem with which we as lawyers must deal — why should clients trust us? — and it is the focus of what much of our teaching will inevitably be about.

The answer, if there is one, has to do with responsibility. People who act responsibly are trustworthy, and according others responsibility is a way of making evident our trust in them.

This reveals why I don't like the word "governance." Anything that starts from "governance" — from trying to find a way to minimize the risks inherent in working with other people¹⁶ — closes us off, models a way of being with each other that is simultaneously less risky and less fertile. Avoiding the risks requires that we forego the possibilities.

The alternative is to try maximizing the benefits inherent in working with people, to open outward, to take the risks and reap the opportunities. No one can guarantee that the outcome from this sort of openness will be better; in all likelihood it is as likely to be as much worse as it is to be better. But it is infused with the *possibility* of wild, boundless success, of dreams and aspirations, of becoming and of blos-

16. I try to get at the ways in which government and law are inherently distant from morality in Farago, *My Rights and Your Responsibilities*, *supra* note 2, at 17-18.

soming and of perpetually increasing energy. It is, of course, also infused with the possibility of deep, bottomless failure, and great personal pain. That is why it is hard to go this route, to walk the tightrope without a safety net. And yet it seems to me that it is well worth doing nevertheless. If we start by trying to manifest our own trust of each influx of new students and colleagues, by trying to open ourselves to shared responsibility and shared aspiration, we may find that the new, expanded law school community includes the kind of relationship that we had managed to achieve prior to their arrival.



Breaking down student-faculty barriers

Here is the nub of what I am trying to say: I see these — maximizing our openness to each other and bringing new people into that openness — as the two hardest “governance” tasks, and I think they have to come in that order.

When I used to have a pet fox, I was always awed by his wildness. That quality set him apart from other pets, gave him an independence and an autonomy that seemed very special. But its primary characteristic was an overreaching paranoia, an assumption that the world was nothing but a collection of dangers, threats, and risks. He lost out on a lot this way. He lost many human friends, people who were put off by his snarling or his fear; he flinched too sharply and too quickly. He seemed nervous constantly, and rarely at peace. His metabolism ran at an incredible pace, and he could move from sleep (which always seemed shallow) to vigilance and attack with a suddenness that astounded me. He built trust, but slowly, and generally tentatively. He

was always prepared to be betrayed even by his best friends.

The fox had a solid handle on the traditional governance models. If we want to transcend these, we have to find a way, inside ourselves, to open ourselves to each other and to the newcomers. We have to affirm ourselves in our work and in our structures. It becomes harder and harder to do this as the institution grows, as the incumbents become more defensive and the new people more wary. More than anything else, this concern suggests to me that we must reach out to each other in our work, striving harder as the task becomes more difficult. The assumption we start from must differ from those of the fox. We have to assume the best of each other, not the worst (and not some uncommitted neutrality, biding time until we prove our desert to each other).

This does *not* mean that I am proposing a path of open democracy, it does *not* mean that all members of the community should be identical in decision making. It does mean, though, that all members of the community should start with a premise of openness to each other, from an assumption that all of us are good people, working in good faith, doing the best that we can. This may not always be true, and there are costs to making that assumption, but over the long haul those costs are far smaller than the costs of assuming the opposite.

2. Committee Membership

The tension between the desire to form a governance process that respects a commitment to shared goals on the one hand and one that respects openness and responsiveness on the other can only be resolved by recourse to the notions of responsibility and trust. No formula will balance these scales. Rather, if we can find a way to take some risks and trust each other as we do so, we may be able to achieve something remarkable. To me, this means that the Law School should be moving toward a governance process in which decisions are made by people who are willing to take responsibility for the work involved in making those decisions.¹⁷

17. I write prospectively because, as I put these words on paper, we are in the process of reviewing a number of critical aspects of our governance plan, including how committees should be constituted and how the Assembly should be composed. In all likelihood, by the time this goes to press some of these questions will have been answered; though I would predict that the answers will be subject to new criticisms, in part because we seem to be thinking about the revision as a series of amendments (a legalistic view that has risks detailed at the outset of the preceding section of this essay).

This means to me that all committees should be open to anyone who wants to serve on them. It also means that anyone serving on a committee should be engaged in the committee's work, should respect its process predating that person's joining that committee, and should engage as a full participant in addressing the committee's agenda.

The basic premise is that the people who care about issues enough to try to work out their solutions should be the ones on whom those solutions depend. It is a process that, when it works, is openly inclusive of the participation of all members of the community, while providing significant guidance as to the way in which that participation must be played out. It would require all members of the community to let go of many issues because no one has the time to work on all of them. It would require everyone to give deference to each other's work, while allowing each person to be involved in the matters that concern her or him most. It would involve trust in each other and faith in the process, a faith based not in the hope that the process would work, but in the belief that even if we fail to use this process as a way to govern ourselves efficiently it nevertheless allows us and encourages us to treat each other with the kind of care that each of us deserves.

The important thing is that this sort of incredibly demanding and deeply counterintuitive way of dealing with each other — a presupposition of trust rather than distrust, of openness rather than wariness — is not in itself the answer. It is, if anything, a prerequisite to any sustaining answer, and yet its very openness may well inevitably doom it to no more than short-term viability. It is a commitment that must be repeatedly, almost constantly, renewed and it is a task that is so difficult that it is hard to conceive of a community capable of renewing the commitment over and over again.

As a result, I do not put these premises out because I think they will work in the sense that I think they will create a state of perfect harmony, or even of mutual respect. I put them out because they are the only ones on which I can imagine founding a community I deem to be justifiable in principle (rather than out of necessity). It may be that necessity will drive us to depart from these principles if an institution is to survive in the long haul. The importance of that survival, however, is directly connected to the viability of these principles. When one lets go of principle, survival changes from a question of mission to one of job security. So I think it is worth continuing to try to do it the hard way. And, on balance, it is also possible that doing it the hard way may yield wonderful results. The possibility of those results, and the importance of the attempt in and of itself, should be sufficient motivation to make

the experiment worth trying.

3. The Decision-Making Process

It is virtually implicit in the notion that the committees should be open to everyone that participation in decision making should be based on good faith participation in deliberation and that the decisions themselves should be based on a process typified by consensus. Consensus captures, indeed embodies, the duality of the tension that lies at the heart of this aspiration. It requires each person to listen to and embrace the views of every other person, even as it imposes on each person the responsibility to express his or her own feelings with care, precision, and sensitivity. The potential for stalemate is overwhelming; the potential for success fragile. It is precisely this potential for stalemate that provides a gentle (though at times wildly frustrating) channeling of collective energy towards mutual respect and away from individualistic demands.

It is self-evident, but nevertheless worth noting, that there are twin risks in opening the decision-making process to anyone who cares about the issue being decided. On the one hand, some issues will draw an overwhelming amount of participation. On the other, many more issues will draw too little energy to see them through to conclusion. It would be simple to say that we must discipline ourselves each to take a part of the less exciting work. And it would be true. But I doubt that it would be sufficient. It would be equally simple to suggest that the process is in many ways self-disciplining. Sooner or later work that is avoided becomes an important issue to some people. On the other hand, the cumbersomeness of the process of deciding through consensus difficult and controversial decisions will by itself tend to limit people's participation in some of the more electric issues as time passes.

But these are only partial answers. A central aspect of the process I am discussing involves recognizing that although the process is equally open to everyone, we do not all have an equal claim on it. Some people have work within the institution that involves taking responsibility for specific areas of choice. Thus, for example, I don't mean to suggest that the librarian could decide that library matters were less engaging than other ones and that he or she should therefore be free to allocate time to those areas that were more interesting at the expense of library priorities.

This same sort of thing is true for everyone with respect to the areas in which they work. It is an important and a significant con-

straint that inevitably will have an extensive impact on the way in which this sort of process plays itself out.

Similarly, people who have been working on an area of concern for some time, and therefore have both history and experience in that area, should be accorded a significant measure of deference by people who newly leap into an issue. Similarly again, people who care strongly about an issue inevitably should be accorded deference and concern proportionate to the strength of their feelings. And, finally, people whose lives will be affected by a decision should also be accorded a deference that recognizes the impact the decisions will have on their lives. All of these will act as constraints and filters in the decision-making process.

The decisions at the Law School should be primarily carried on in committees because that best expresses the principles that decisions should be decentralized and rooted in the people who care about the choices. A further reflection of this, and a natural, nonrepresentational basis for constituting the Assembly, would suggest that that body be composed of all the members of the standing committees.

An Assembly made up of committee members would reflect the notion that the Assembly is not a decision-making body and the committees are where decisions are made and actions taken. Furthermore, it would be an Assembly made up entirely of people familiar with the governance process. Finally, everyone in the Assembly would have the twin experience of being both a committee member (and therefore sensitive to the deference that each committee would wish its actions to be granted by the Assembly) and an Assembly member (and therefore sensitive to the accountability and accessibility issues that the Assembly would want them to bear in mind as they did their work on their committees).

4. The Role of Students

I stress again my discomfort with the word "governance." I am talking about the formation of community and the relation between individual commitment and collective action. Taken together, these may have some relationship to notions that we might call "self-governance" but even that term seems somehow internally contradictory. We are not trying to "govern" ourselves, rein ourselves in, but rather to join together and in so doing achieve more, not less, than we could as individuals. The attempt to do this, to structure community, can have a very special role in a law school. Law is after all simply the larger society's

approach to the issues we are trying to deal with here.

Political theory is seldom dealt with in law schools as an important part of the curriculum. That is, I have already suggested that most schools accept a premise of pragmatism, viewing law as a natural artifact, something to be studied, the subject of our science. It is not thought to be the creation of those who work within the legal system or the result of a series of choices made among alternatives. Because we want to take the opposite approach here at CUNY, we have a very special opportunity to use our own process as a basis for a new, phenomenologically-based political theory. Our governance process can be a laboratory in which we experiment with and learn about the nature (and perhaps the inevitable weaknesses) of the attempt to use rules and structures to pattern communities.

There are, therefore, two distinct reasons why the mechanism of our community should be perpetually in a process of re-creation, at least in some ways. First, I have been trying to describe a governance process that requires not merely the consent of the governed but their active affirmation of, and participation in, the collective decision-making process. Second, nothing provides so clear a window on rules, rule-making, and their relation to community as does the process of their formation.

These concerns are addressed in part at the Law School, and consciously so, in the Houses as each new entering class is split into work groups and each of these groups seeks to find its own identity and its government. That newness can be extended more broadly into the student government process, allowing each new class to fashion its own mechanism for participating in school-wide governance issues. Each new cohort could be accorded the remarkable opportunity to recreate the institution as some of us have had the chance to participate in its creation. Each class can be the first class, and can partake of the very special rewards and trials associated with starting from scratch.

Conclusion

These ideas proceed from the notion that we are trying to devise a system in which we are led to trust each other even when trust seems least intuitively to be in order. People with power would have to relinquish it; people who have been at the Law School a comparatively long time would be asked to accord newcomers a significant role in decision making; newcomers with strong feelings about how things should be would be asked to yield with respect to those feelings until they had the

time to immerse themselves in the decision-making process; all of us would depend on each other to act responsibly with respect to the tasks we take on, the work we commit to do, and the way in which we utilize the fragile and powerful instrument of withholding consensus.

I want to close by stressing a point I made relatively early on. The reason to do what we are doing, to reinvest the doctrinal curriculum with a spirit drawn from the twin premises of trust and responsibility, to embrace the House system and to struggle with the formation of community, is not the belief that any of this will “work,” that it will somehow efficiently (or even sloppily) build a successful law school. Rather, my premise is that we should go in this direction because it is right, because it is the way pointed to by our shared sense of what we are trying to do. So if what we want is to build a law school that embodies certain principles, we will surely fail if our internal structures don’t themselves reject those principles. But merely avoiding the necessity of failure is not a guarantee of success.

This has two corollaries. First, making these choices has not been, and probably will not become, easy. That is, they will not be validated by divine revelation or fantastic success; we probably won’t win the educational lottery, we will probably still have to work hard to avoid disaster. All we do as we make these choices is pick which of several hard paths we will walk.

The second corollary is that we cannot assess the rightness of our choices by the success of our venture. If things go wrong, that does not mean that we should rethink our decision, and if they go well we should pause an eternity before becoming smug. We make the choices we have made because we wanted to, not because it makes our lives easier or assures the success of the Law School.

We are led in this direction, then, not by the certainty of success, but by its *possibility*. The premises of trust and responsibility are not rich, but fertile. Like all things worth caring about, they involve risk. And the other side of risk is opportunity.