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The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law

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The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law

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A. Responsibility

I see the primary aim of legal education as enabling students to be responsible in the practice of law. The core meaning of the idea of responsibility is the recognition that the choices one makes as a lawyer have an effect on people's lives. From this recognition flows the realization that our work as lawyers can be an affirmation, or a negation, of our values, of the goals that we want our lives to strengthen. In my view, the first task of a law school is to help students to explore the fuller meaning and implications of responsibility in law practice. This is the "understanding" aspect of learning to be responsible.

In addition, we must give students some of what they need in order to be responsible. Knowledge of legal doctrine and skill at lawyer-

1. I have been working at CUNY since it began to develop a new curriculum designed to educate students to practice with an orientation to the public interest. What follows is an informal sketch of the central premises of the CUNY curriculum. I am grateful to Charles Halpern, Dean of the Law School, for his confidence and support in the effort to develop and implement a thorough examination of the goals, content, and methods of legal education; and to John Farago and Jack Himmelstein, faculty colleagues with whom I worked closely in the initial planning year and whose ideas — and, in many instances, whose language — are as deeply embedded in this essay as they are in the CUNY program.

ing tasks are a crucial part of what one needs to be responsible. Traditional legal education tends to value this skill and knowledge in itself, and they become the goal rather than a means toward reaching the goal. A person needs such qualities as the ability to analyze and synthesize legal principles, a keen sense of relevance and procedure, and the ability to organize and present a coherent and persuasive line of reasoning in speech and writing. A person needs, however, far more than these traditionally valued skills, in order to be a responsible lawyer. The "more" includes the wider range of skills associated with clinical teaching in the narrow sense, such as interviewing prospective clients, examining witnesses, or drafting pleadings or interrogatories, but goes beyond them to include more qualitative skills — listening, exercising judgment, and engaging in moral reasoning are major examples — as well as matters going beyond skill, such as developing knowledge of oneself and of the premises of the legal and the social order.

The CUNY curriculum seeks to implement the emphasis on responsibility in two major ways: first, through the emphasis on lawyering, and on the integration of lawyering with law; second, through the commitment to make explicit the values dimension of law and of lawyering. Through these means, our hope is to enable and encourage students to interact more actively with respect to their own learning, and to their developing identity and evolving choices regarding their work as lawyers. Our aim is to see students as people, and to teach them to see themselves as people. Our admissions process is designed to look for applicants who seem open to engaging in that process, and we endeavor to ask them to ask themselves, throughout the three years, what they want to become as lawyers.

The centrality of responsibility, and its meaning, apply to the School as an institution as much as to the individuals in it. The idea of an "implicit curriculum" is that much of what we teach is transmitted by the attitudes and practices that we model. A lot of this has to do with the way a lawyer treats those over whom he or she has power. This involves such diverse areas as the way that students experience the School in the application process, relations of faculty and students with the non-professional staff, and the way that people in the cases are treated in professorial comments and class discussion.

The responsibility of the School also involves our approach to student "problems" — that is, our willingness to interact with students as people with regard to their entire life situation, not simply the development of their minds in the courses. We have responsibility for consequences, such as those flowing from the cost of tuition and the contours

of the market, even though we do not intend them. The need to provide on-site child care is for me an aspect of this question. The placement process is another example, both our responsibility to aid students to find work consonant with their values, and what we say to students about what a "good" or prestigious job is. It means little to talk about equality and societal needs as values while reinforcing by our conduct the widespread tendency to give people our attention — and our honors (invitations to speak, awards, pictures on the walls) — on the basis of prestige, titles, and authority.

The relevance of the idea of the responsibility of the institution applies to the explicit curriculum as well. It suggests, primarily, the shaping of each course through a commitment to purpose rather than coverage. When I say "rather than," I recognize that there is often a purpose to coverage: Examples are basic literacy regarding legal terms, an awareness of historical development, even particular judges or theories. In each instance, however, material needs to be presented in a context that attempts to make a link to the purpose of the course or of the overall program. The effort should be to overcome two kinds of fragmentation: First, the split of law from thought, that is, seeing law simply as doctrine, the product of reasoning or analysis; this is the emphasis on theory. Second, the split of thought from action, seeing practice simply as rather low-level cognitive or interpersonal skills, divorced from both law and values; this is the emphasis on practice and lawyering.

It is obviously necessary to make choices regarding subject matter and method. In every case, however, it is important to keep asking *why* a certain thing is proposed to be taught, or taught in a certain way, or to a certain extent, or with something else, and then to ask why again about the reason given as an answer. The purpose of asking why is to enable us to become aware of the premises and priorities that trigger our choices, so that we can make responsible decisions about them. That process might change our choice, or shape it in a new way, or lead us to reaffirm it.

Consider, as a subject-matter example, the question whether the lease is a conveyance of an interest in land or is a contract. That can be taught to illustrate the force of history in the evolution of doctrine. It can also be taught to illustrate the instrumental landlholder-orientation of the common law. It can be taught as a lesson in realism, to emphasize that the perception of what a lease "is" is a normative, not a descriptive, process. I find it attractive — and this may be only a further development of the realist purpose — as a way of teaching the legiti-

mating quality of legal concepts: Calling a lease a conveyance, and teaching about it in Property (separate from Contracts), reinforces the idea that it is just for the tenant to bear the risk of loss, since, after all, the subject of the sale, the leasehold, is still the tenant's. The sharp political change that has given rise in many jurisdictions to the "warranty of habitability" is no more a logical result than the former one. Using the term "warranty of habitability" makes the landlord seem like a welsher, for not delivering on a promise, and facilitates the conclusion, which now seems right to many of us, that it is just for the landlord to bear the risk of loss. The function of legal reasoning, therefore, is to make it seem logical and, indeed, inexorable, that one result (or the other) be reached. The existence of choice is unmasked by penetrating the legal concept and seeing it as a construct that facilitates a particular result. For me, teaching the issue for that purpose is particularly salient, for it reinforces the idea of unperceived choice, which is at the core of both legal regulation and law practice.

A similar process applies with respect to methods of teaching. One may favor a problem/simulation/clinical emphasis on the ground that lawyers need to learn the skills of witness preparation, cross examination, and the like. I would then ask why they need to learn it, and learn it in law school, and whether we want at the same time to avoid having them learn other things that go along with learning those skills as skills. That process for me leads to a somewhat broader answer (which still has the acquisition of skills as an important goal): Putting students in role repeatedly is intended to evoke a desire on their part to understand subject matter, including the subject matter of doctrine as much as the subject matter of forensic skills. More broadly, it rests on the notion that application is a critical part of what it means to understand subject matter, that in a real sense one cannot understand law separate from its application. Finally, it rests on the belief that only by experiencing a role can students learn to exercise choice about its place in their practice. These purposes would surely lead one to include a clinical focus, but its content and method would be shaped by one's objectives.

B. The Traditional Consciousness of Law and Lawyering

The foregoing discussion, in my view, illustrates the recurrent need to "step back" from content sufficiently to be able to understand the assumptions underlying that content, and the implications of it. One may step back, as above, in order to look at purpose. Stepping back

also permits a look at an overall framework or consciousness. By the word "consciousness," I mean a set of mutually reinforcing premises, priorities, or perceptions, which are for the most part either implicit or axiomatic.[2]

Many of us experience important dissatisfactions with central aspects of law, lawyering and legal education, and the last two decades have witnessed the emergence of a number of "alternative" structures that tap this dissatisfaction. In practice, the public interest law firm, law collectives, and the practice of mediation are examples; in law, legal realism, law reform, and critical legal theory; in legal education, the clinical education and humanistic education "movements". Each of these responses, while achieving important change, has often succumbed to two related dangers: First, they are marginalized, seen as something apart from the mainstream world of law and law practice. They tell a student, teacher or practitioner that, unless he or she abandons the traditional route entirely — becoming a mediator, public interest lawyer, community organizer, or leaving "the law" entirely — the traditional rules remain in force. Second, there is a strong tendency for alternative structures to pick up the underlying framework, and come more and more to look like what was left behind. The struggle of public interest and legal service lawyers over issues of accountability to clients is an example. My premise is that there *is* a consciousness that underlies the traditional framework and influences our actions, even when they are an explicit expression of dissatisfaction with central aspects of that framework. Unless that consciousness is made explicit, it cannot be made the subject of choice, and choice cannot be exercised at a level sufficiently fundamental to implement the impulse that may have generated it.

The central characteristic of the traditional consciousness of lawyering is the primacy of role, whether it is the role of attorney, student, or teacher.[3] Answers are determined *a priori*, by large categories of situations: "As a lawyer, . . . ;" "as an associate, . . . ;" even "as a radical. . . ." The concept of role is premised on the denial of responsibility; it sees the impact of one's work on people as the responsibility of the system as a whole, and not of the individual lawyer. It is impor-

2. *See* Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 841-43 (1983).

3. Among the many analyses and critiques that have appeared in the past decade, I find most helpful one of the earliest: Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

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tant to recognize and acknowledge that it is often real pressures, real problems, real needs that give rise to the role definition; the answer, however, comes to be taken for granted in new situations without a new connection to the underlying need or function. For example: "As an advocate, I don't worry about what happens to my client's adversary because of his or her lawyer's incompetence." The problem of taking in the "enemy" as a person is an extremely agonizing one in many situations — we could not practice law without some recognition of this message — and the concept of role tells us that we are not involved in that process. In the traditional consciousness, the rightness of the objectification of the adversary is viewed as self-evident, and not to be reappraised in particular cases.[4]

The traditional consciousness sees law as rules promulgated by some accepted source, and applied through a process of reasoning in a general, impersonal, procedurally fair way. The aim is to restrain and regularize power over individuals by defining spheres of rights and duties, within which each of us may pursue his or her own ends. It is for this reason that the emphasis is on adjudication; the determination of fault is the premise of finding that one has invaded another's rights.

The traditional consciousness rests on an underlying value system that shapes and is reinforced by it. First, it manifests a view of the world as one of scarcity, populated by self-aggrandizing, competing individuals, each having subjective and arbitrary desires, and characterized by their awareness of separateness from one another. Second, it emphasizes achievement, energy and mastery. In this value system, government's legitimate concern is with the preservation of peace and order; it is both the primary source of oppression and — through its creature, the law — the primary protection against oppression. Autonomy is equated with "being left alone," and the function of society is seen as to provide a system of mutually beneficial exchanges among individuals. Justice tends to be regarded as the natural product of transactions among individuals (a market or process view of justice), and the dominant social order as legitimate and presumptively just.

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4. A uniquely powerful statement of this phenomenon is Mark Twain's THE WAR PRAYER. See Gary Friedman's and my comments, in E. DVORKIN, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 202-07 (1981) [hereinafter cited as *Becoming a Lawyer*].

Equalitarian work place, respectful of people as individuals

This consciousness embodies much that we value: The notion of the rule of law as a restraint on discretion and a limitation on arbitrary power, the unleashing of individual energy and diversity, the respect for fair procedure as an independent value. The problem is the partial quality of the traditional consciousness. To summarize with egregious brevity: First, procedure is not all that we care about. Second, the certainty and impartiality suggested by the traditional notion has over and over been proven illusory. The legal realist critique made clear long ago that there is choice, most particulary when it is being denied by legal formalism; the clear implication — which there is a strong tendency to shrink from making, or adhering to — is that the attempt to separate law from politics is illusory at best, and a mystification. Third, the illusion of certainty does not simply mean that results are capricious (in the sense suggested by the legendary realist concern over what the judge had for breakfast). The rules transmit existing power arrangements. Rules, language, and the process of fact-finding, are inherently indeterminate, and emotions and values fuel adjudication as well as legislation.

C. Polarities and Synthesis: Approaching an "Alternative Consciousness"

In looking at what an alternative consciousness might be, it is important to begin by considering explicitly the tendency to express a rejection of the traditional in polar terms. What is wrong with the traditional consciousness is that it is incomplete, that it becomes a

caricature of reality, a caricature of the human personality. It seeks to protect certain values that are generally important — individual self-expression, for example — and is unwilling to respect other values out of a fear that that can be done only at the cost of the first set. An example — drawn from legal education rather than lawyering — is the widespread resistance to clinical education based on an asserted fear of an abandonment of "rigor" in intellectual analysis. Upon realizing the limited nature of the traditional consciousness, it is easy to react by becoming caught in its polar opposite, which, although fashioned on opposite values than the traditional, is similarly unidimensional and partial. So, teachers drawn to clinical education often find themselves denying that intellectual rigor has substantial positive value.

A non-polar alternative consciousness seeks to incorporate the traditional in a broader view, holding to what is worth holding to, but insisting on a more situational consideration of consequences and the possibility of respecting the aims of apparently inconsistent values. The hoary academic debate, between rigor and values or intellect and emotion in studying cases, is a classic example of this polarized form of thinking. We are usually required to decide which pole repels us the most, so that we can cling desperately to the opposite one. Rigor and values are conflicting only from a linear perspective; in "rejecting" rigor, we are rejecting only the claim of completeness for it, in order to seek a broader value, one that includes rigor and includes values as well.[5]

An alternative consciousness of lawyering expresses a view that attempts to go beyond both the traditional adversary consciousness and a polar rejection of it. The central theme is not the rejection of role, but a dynamic relation between role and self, which involves an interaction among awareness of choice, responsibility for choice, *and* values.

Legal thinking has barely begun to articulate the content of a genuinely alternative consciousness of law. The prevailing legal responses to date have accepted much of the critique of traditional consciousness, but have refused or failed to follow the implications of that critique. The widespread attempt to discover values that are shared in the community recognizes that it *is* a value system, and not a process of reasoning, that is at work. Yet, following Holmes' example — the true inputs are the "felt necessities of the time" — approaches as disparate as Hart & Sacks in the 1950's, Ronald Dworkin, and much of the Law

5. *See* E. DVORKIN, *supra* note 4, at 159-74.

and Economic movement today, regard the significant values as more or less inherent, whether discoverable through economic analysis, "reasoned elaboration," intuition, or revelation. These approaches are being seriously challenged by critical legal theory, which sees them as legitimation mechanisms, that rationalize and justify domination, in part by hiding it, and that, to a greater or lesser degree, continue to define "societal needs" in a way that is responsive to such values as productivity, hierarchy and the mobility of capital.[6]

The central elements of an alternative consciousness of law seem to me to be: a) seeing law in terms of the values underlying the rule rather than the rule itself — "The letter killeth, but the Spirit giveth life;" b) seeing justice as responsive to human needs, in the sense of the concrete reality of people's lives, to outcomes as well as process; c) seeing human needs in a way that is not fully captured by the notion of rights and duties, that is more interactive. The appropriateness of mediation (rather than adjudication) as a means of processing some important differences among people in this consciousness is simply that it is a procedure that has the potential to respond to what becomes important.

D. The Integration of Responsibility and Values

To teach students what it means to be responsible is to attempt to empower to do so those who would choose to do so. That effort is importantly different from teaching students that they *ought* to be responsible, in a way that bears on the central question whether the emphasis on responsibility has any values implication. To the extent that it does not — that it is simply asking people to act out of authenticity, in congruence with their own values, whatever they may be — it seems woefully incomplete, and oriented only to a narrow form of personal fulfillment. To the extent that there is substantive values content in the idea of responsibility, there is concern, first, that the content is being left unexpressed and, second, that its legitimacy is open to question and that students are being manipulated or indoctrinated in an institutionally determined value orthodoxy.

My hypothesis is that a fully developed concept of responsibility can resolve the dilemma between these two poles, that the idea of re-

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6. *See, e.g.*, Robert Gordon's luminous essay, *New Developments in Legal Theory*, in D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286-90 (1982).

sponsibility is far more demanding than it is often viewed, that it has values content in a way that respects individual choice.

The theoretical framework that supports the effort to find non-polarized ways of thinking about problems is helpful in penetrating the question of the link between responsibility and values. Our tendency is to see the choice as polar. Either responsibility is the key, or values are. Either there is a values content to responsibility, or there is not. In both dilemmas, each pole has serious flaws. Our task is the dual one of continuing to attempt to articulate what a synthesis would look like, and continuing to discern how as teachers we can move and help our students to move toward it. Our students experience the dilemma as we do. Some oscillate between the poles, others hold firmly to one out of fear of falling into the other. The dilemma, and the attempt to move beyond it, mirror that of the traditional and anti-traditional consciousness, including the fact we are only at the beginning of the process of finding meaningful alternatives. Indeed, the polar ways of experiencing values and responsibility is tied up with the pervasive reach and power of the traditional consciousness.[7]

The dilemma is often posed in a static way: Suppose a student tells you that he or she is in law school simply to learn the rules, get the certificate, and head out to become a "happy rich person." Do you kick the student out, write him or her off as free to do it but bound for hell, or adopt some other unhappy variation on either oppression or surrender? My response is that we continually *invite* the student to engage with us over his or her choice, its implications, and the decision to take responsibility for it. If we *continually* ask students to take responsibility, do it over time, ask them to interact with one another and with the question, I believe that the idea of responsibility will be seen as increasingly demanding, in ways that do not simply leave each of us free to pick our own values and tell everyone else to mind their business. As the student (as each of us) does that, we come into touch with our connection with others: not as a role, not as a moral imperative, not as political pressure — and not in the same way for all — but as an authentic part of us. Once that happens to me (as student or teacher), I can choose to put the realization aside, not act on it. However, it is now partly *me* that I am putting aside, and if the question keeps coming up, in an endless variety of ways, it has to be continually put aside.

Once our connection with others is acted on rather than put aside,

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7. *See* Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831 (1978).

even in a minor context, there has been an important shift, which makes new shifts possible. Experiencing choice where it did not seem to exist before makes it more readily seem to exist the next time.[8] This process is not linear, and in some individuals will never take hold. But that is not to say that it does not have enormous significance, looking at a group of 150 people over three years. And overall the shift *has* a values content, it is not simply that each of us becomes more himself or herself, whatever that may happen to be. In our society, there is a systematic strengthening of some parts of the self as we grow up, and a systematic weakening of others, and the process of taking responsibility and becoming more fully oneself strengthens the delegitimated parts. They tend to be the values of the alternative consciousness: the emphasis on equality, on relationship, on caring.

In beginning to explore how to move towards a synthesis between values and responsibility, we need to proceed from the recognition that either divorced from the other becomes empty. The question for us as teachers is how to put out to students what we believe, about values *and* about responsibility. The choice is often expressed in too narrow a way: Do we "come out" with our values or do we keep them to ourselves? The notion of *sharing* our values, rather than imposing them, means for me that we come out, and do it in a way that is inclusive and not hierarchical. A teacher's expression of values can easily be accepted (or rejected) by students more as the result of the teacher-student dynamic than of any sense of the student's evolving sense of self. "Values" can themselves become akin to a role. It is difficult to apply all of this, particularly in a classroom environment where the students are in conflict and tension.[9] Many left-oriented teachers express their values — when they do — in ways that are intended to empower students who feel delegitimated by the prevailing environment. That can succeed, and at the same time disempower others who may disagree, or be frightened of the emotive words used or of the implications for their relations with people they care about.

Responsibility, values, and their interaction obviously involve fundamental concerns and life choices that go beyond the immediate question whether and how as teachers we "cop" to our values. They are present in our approach to placement, in the students' choices of work within any work setting, and in our work together in building the insti-

8. See my comment in E. DVORKIN, *supra* note 4, at 132-133.

9. *See* Lesnick, *Reassessing Law Schooling: The Sterling Forest Group*, 53 N.Y.U. L. REV. 565, 567-69 (1978).

tution of which we are a part. An inclusive way of sharing values is possible, however ably done in the classroom, only in an overall learning context that is egalitarian and honors students as people.