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IN MEMORIAM: Martin A. Feinrider

TRANSFORMING LEGAL EDUCATION:
A SYMPOSIUM OF PROVOCATIVE THOUGHT
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The Habit of Success

Howard C. Anawalt

Howard Anawalt has taught at University of Santa Clara School of Law for 10 years. Currently he is teaching Constitutional Law, Computer Law and Torts, handling cases in the computer licensing field, and pursuing his interests in intellectual property and freedom of speech matters.

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

Solving Problems

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

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

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

². Sometimes the client is interested in something other than the bottom line of a case. For example, the litigants in a school desegregation case are often interested in exactly what the judge says and the points of view that are considered in the case, as well as in the final judgment itself.
motion calendar or in a court of appeal, the client is usually interested
in the meaning of a very few small words at the end of the court's
opinion: "granted," "denied," "affirmed," or "reversed."

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

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

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

**Compound Problems.** As my friend observed, one line of legal in-
quiry or argument may lead to another. A software licensing arrange-
ment may call for attention to problems of copyright, to issues of allo-
cation of development responsibilities, to possible antitrust
considerations, and to enforcement arrangements.

**Choices.** Usually client choices are involved. The lawyer must sim-
plify the components of the problem so that the client can choose effec-
tively. For example, a contract dispute may be resolved by renegoti-
ation of the contract or by litigation.

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

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

**Student uncertainty.** In general, my students want to know what it
is that they are supposed to do. They want to learn to do their job as
lawyers. In my experience, it is sometimes very difficult to inspire in students the confidence or willingness to take charge of providing the solutions themselves. Many law students confuse the need for them to provide solutions with finding out the answer to a specific problem.³

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

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

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

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

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

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

6. Sometimes professors "hide the ball." I am not sure exactly what that phrase means, but often I think it refers to the professor posing a question to which he or she has only one set of answers which is sought. That kind of ball hiding should be avoided. It is better for the professor to ask questions that do have a variety of acceptable responses. Where a specific point should be elucidated, the professor should state it, not ask a rhetorical question.
Lawyers in a common law system are in a somewhat unique and challenging situation, because the system of precedent invites them to decide for themselves what the law is. Indeed, the system compels it. Thus, whether the prior precedent is a narrow one deciding a procedural issue, or a broad constitutional decision declaring the contours of first amendment protection, the student must learn to handle various aspects of the case as a source of defendable answers. The student must be prepared to consider a host of variables within the case itself: facts, issue, holding, dictum, rationale, related issues, jurisdictional questions, separate bases for a decision, and the impact of statutes.

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

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

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

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

school. 10

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

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

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

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

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

12.

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

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

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

III. As the affirmative action problem shows, problems of equality are interesting and critical to society. In your opinion, how should progress or justice be evaluated? Reconsider Korematsu, p. 624 and Bakke, p. 745.
we do not fall behind. This particular approach is useful for that one long, large class. I would not likely adopt it for other types of classes.

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

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

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

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

**Ethical Questions**

Lawyers are generally called upon for two types of services. The first is the setting up of arrangements through the writing of wills, the negotiating and preparing contracts, or the drafting legislation. The second type is participating in resolution of conflicts among people. All of these activities are concerned with people and their motivations. Most often they involve people who have differing, often conflicting interests. Law schools should teach students about practical ethical problems, such as conflicts of interest, throughout the curriculum.
Professional ethics courses are valuable, but the budding lawyer needs to be alerted to the existence and resolution of difficulties in the variety of contexts in which they arise. Lawyers have a bad reputation in the United States. Sadly, much of has been earned by the profession itself.

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

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

13. **Model Rules of Professional Conduct** Rule 1.7 provides:
   (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
      (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
      (2) each client consents after consultation
   (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
      (1) the lawyer reasonably believes the representation will not be adversely affected, and
      (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**Model Rules of Professional Conduct** Rule 1.7 (Final Draft 1983).

14. By and large, the televising of professional athletic events provides excellent examples of men and women achieving excellence. However, coverage is also marred by outstanding examples of individuals who use behavior and tactics which are completely outside of the rules of the game in order to obtain some advantage. This has been the case in recent years with one or two top tennis players. These men, who were endowed with skill and have achieved excellence, have nevertheless resorted to delaying
lawyers are often prone to believe that it is the unwritten rule to success in law. I do not believe it. It is certainly true that often a lawyer who uses what are called “sharp practices” wins a case or makes a lot of money. That, however, does not prove much. First of all, there is a great deal more to the profession than cheap wins. Secondly, lawyers who practice with integrity, honesty, and courtesy create certain advantages for themselves and their cases.

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

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

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

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

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

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

Justice and Reform

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

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

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

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

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

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

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

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

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

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


Unfortunately, discovery has been used to cause unnecessary delay and expense of litigation. For criticism of discovery rules, see _Maher, Discovery Abuse_, _CALIF. LAW_ June 1984, at 44.

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

18. _SAN FRANCISCO SUPER. CT. R. 7.4._

19. One further comment about procedure; lawyers are at their peak form with procedural issues. Procedure is the surgery of law. As previously observed, the core of legal skill is English language skill. The heart of law is organization of human activity by procedure and rule. Resolving procedural questions combines these two elements: skill at logic and language, plus attention to the detail of the organizing features of law. This is reflected in certain attitudes towards justice as well. Consider for example Justice Frankfurter's comment: "[T]he history of liberty has largely been the history of the observance of procedural safeguards." _McNab v. United States_, 318 U.S. 332 at 347 (1943).
values or norms which I believe have become implicit in our legal system. These values are often brought forward in discussions in law school; however, I believe that the reasons underlying the choice of these values are rarely examined in law school context.20

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

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

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

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

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

21. I am somewhat hooked on the adversary process myself. It has some very strong merits and is probably essential in certain circumstances.
another, but once they enter the adversary system, the lines of their controversy are functionally hardened. This hardening of positions is ameliorated only by such things as negotiation and the efforts of individuals who wish to de-escalate the adversary process.

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

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

\textsuperscript{22} I have a hunch that a more active role for the neutral third party would be helpful to our system of justice. This is present in the civil law tradition which we tend to denigrate as inquisitorial.
serious questions presented concerning the adversary process and our implicit justifications. To what extent are our methods rationalizing or endorsing the adversary system? Is this endorsement uncritical? Are we contributing to social or individual justice by allowing it to occur?

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

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

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

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

24. Once again, this observation is merely an impression of my own. It is based on my own experience with students and my colleagues. I do not claim to have surveyed the courses or approaches of other law schools. Undoubtedly, there are teachers and constitutional law courses which do, in fact, investigate the constitutional values themselves.
mit that I feel somewhat out of place when I do interject such pro-
ing. My realization that my students must become good-problem solv-
ers tends to overshadow my understanding that we should investigate
underlying values from time to time. We should conduct that investiga-
tion in a fashion that probes more deeply than a mere recitation of
policies and traditions. This is important enough to constitute another
guideline for our schools:

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

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

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

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

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

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

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

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

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

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

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

Alison Grey Anderson

Alison Anderson has been a professor since 1972 at UCLA School of Law, where she is presently teaching Torts, Corporations and Fact Investigation. Her attention has been focused primarily on the development of the first-year curriculum, especially the writing program and the utilization of teaching assistants.

The law school calls this course “Torts” (or “Contracts”, or “Property” — my advice is not course-specific), but a more accurate name might be “An Introduction to Torts, Lawyering and the Legal System.” Although we will study the substantive law of torts — that body of law which provides remedies for civil wrongs not arising from contract — we will also explore the larger legal culture that provides the context for the tort system’s operation. Our central concern will not be “What is the law of torts?” but rather “What is it that lawyers do about problems involving tort law?” In addressing that question, we will necessarily talk in a general way about the problem-solving activities of lawyers and about the legal culture in which they function.

If we think of the legal culture as a foreign culture, then torts is a subculture of that foreign culture. When we ask “What do lawyers do about tort problems (and other kinds of legal problems),” we may be pursuing either of two concerns. Our question can reflect either the detached scholarly inquiry of an anthropologist or the intensely personal curiosity of a potential member of the culture. I will assume throughout this course that most of you are driven by a desire to become members of the tribe rather than anthropologists. The emphasis of the course, therefore, will be on helping you translate your existing problem-solving skills into those necessary for survival and success in the legal culture.

The emphasis on learning how to function as a lawyer should not

*I wish to thank my former colleague, Jerry Lopez, for all that I learned from him about teaching and storytelling in our many discussions and varied teaching enterprises.
distract you from the recognition that you will also be learning about this new culture as a critical observer. That is, in order to be a good lawyer and intelligent critic of the legal system, you must not only learn to operate within the system (become a member of the tribe), but you must be able simultaneously to function as an anthropologist — to view the system analytically and critically from the outside. Because lawyers constantly move back and forth between the legal culture and the larger society and because much of their work involves explanation of the legal culture to those outside the tribe, they must retain an ability to see the legal culture as an intelligent outsider would see it. Some of you may decide in the end to become only anthropologists or critics of the legal system and decline membership in the tribe. All of you, I hope, will retain throughout your lives some anthropological curiosity — some interest in the legal system as a complicated and fascinating aspect of human existence — beyond any immediate professional concerns. To that end, you should view your legal education as a continuation of your prior general education, and not just as professional training.

I. The Lawyer as Storyteller

I have stated that our emphasis in this course will be on exploring what it is that lawyers do when they represent clients. Lawyers are essentially problem-solvers; they are simply problem-solvers who have unique access to a special culture — the legal culture. During the next several years, you will learn a lot about the legal culture generally and about what lawyers do within that culture. You will, I hope, eventually develop your own framework for thinking about law and lawyers. For the moment, however, most of you know very little about the legal culture and do not have a clear picture of exactly what lawyers do. Let me suggest one way of thinking about what your new tribe does that may help you connect your new professional identity with all that you already know about the world.

A lawyer is a storyteller.¹ To be sure, he is an instrumental story-

¹ For a full account of the lawyer as storyteller, see Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984). The storyteller metaphor emphasizes the persuasive and interpersonal aspects of a lawyer's work; some may see it as excessively downplaying both the view of law as formal rules and the lawyer's need for technical accuracy and expertise. I believe that the doctrinal and technical aspects of lawyering are already over-emphasized both in students' minds and in legal education generally, and I therefore deliberately chose a metaphor which both describes law as involving persuasion rather
teller — he wants something from his audience. But every storyteller wants something from his audience — attention certainly, but also a reaction — laughter, tears, shock, joy, perhaps even financial rewards. Lawyers want attention from their audience, too, but usually in order to obtain legal remedies or non-legal solutions for their clients. They must, therefore, learn to tell a story that will elicit the desired reaction. They must persuade the audience, whether judge, jury, opposing party, government official, or other person in control of the desired remedy, to grant whatever it is the client desires or needs. The story may be a simple one — “X was careless, X hurt my client, X must pay the damage” — or a much more complicated one — “The language in this agreement may appear to mean X, but once I tell you about the context of the agreement, the expectations of the parties, the customs of the trade, the nature of the technology involved, and the consequences of a literal interpretation, you will see that the language can only mean Y” — but it must make sense as a story. That is, in both human terms and legal terms, the story told by the lawyer must develop a narrative or paint a picture that is plausible and that suggests to the audience some obvious, indeed necessary conclusion — what the client wants.

The lawyer’s job, then, is to “make sense” out of the client’s problem, first to his own satisfaction, and then in a way which will persuade the relevant audience to grant the desired remedy. How does he do that? Most likely by asking himself a series of questions. First, do I really understand what happened, or is happening, or is about to happen in my client’s world? Do I understand why whatever is happening is a “problem” for my client? Do I understand as well as possible the identity and motives of the other people involved? These questions all have two aspects: do I have whatever information is available, and can I make sense out of whatever is going on in my client’s situation? Making sense out of the client’s human story requires no special legal expertise, but it is in many ways the most important part of what a lawyer does.

As the lawyer works himself into the client’s world and tries to understand the client’s situation and concerns, he must also, of course, “make sense” out of the client’s story in legal terms. Several legal stories may fit the client’s situation, and each story will have a different plot and different ending. The legal story which appears to fit the facts best may, from the client’s point of view, have an unhappy ending. The
lawyer must then find or develop a more promising story. He may do so by thinking about the facts in a different way, investigating previously unexplored aspects of the situation, or perhaps rewriting one or more legal stories to satisfy the conventions of legal narrative but provide a happier ending for his client.

Finally, the lawyer in developing his human and legal story must also keep his various possible audiences in mind. A judge will typically need to hear a rather highly-structured, tightly-crafted, conventionally-acceptable legal story before he can grant the desired remedy; the other party to a negotiation may find a more free-wheeling, open-ended narrative more appealing. In each case, however, the audience must hear a story which not only moves but compels the audience to end the story in a particular way — by granting the desired remedy.

As the storytelling metaphor suggests, your task during the first year of law school has several aspects. You presumably come equipped with a basic understanding of human stories — the psychology, history, politics and philosophy of the human race generally, and of American culture particularly. The more you know about human behavior and culture, the better storyteller you will be. You must now learn about the structure and values of the legal culture and you must become familiar with a few basic legal stories that underlie much legal storytelling. You must come to understand the role and nature of a special audience — the court. Finally, you must begin to identify and practice, over and over, the basic skills you need as a legal storyteller.

II. Legal Stories and the Legal Audience

A lawyer's primary task is translating human stories into legal stories and retranslating legal story endings into solutions to human problems. For our present purposes, we can define a legal story as any story that can be told to the specialized audience that we call a court. Individual courts, however, are not generally permitted to decide what stories they will hear; they are required to listen to all proper legal stories and are barred from listening to stories not in the existing legal repertoire.²

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2. My colleague Stephen Yeazell has previously noted the highly constrained nature of the legal story:

As readers, all of us sort narratives for sheer convenience; we can more readily follow, think and concentrate less, as soon as we recognize a familiar pattern. At its simplest, sorting complaints into contract, negligence,
Legal stories have both procedural and substantive elements. Not only must a client's story indicate that the client has come to the right court at the right time, but the narrative itself must satisfy some rather rigid requirements of plot and character. If the story told does not resemble some previously approved legal narrative, the court will not hear it. If the lawyer says to the court, "I am going to tell you a story about a person whose immoral conduct offends my client's moral sensibilities, and I want you to enjoin that person's conduct or make him pay damages to my client," the court will say, "I am sorry; I am not going to listen to your story — there is no story about moral offense in my approved catalog and I cannot grant you legal relief." In other words, the client may have a problem, but it is not one the court can do anything about. On the other hand, if the lawyer says to the court, "I am going to tell you a story about my client's neighbor, who is producing sulphur dioxide in his back yard, thus offending my client's nose," then the court will say, "Aha! The nuisance story! That is a story I can listen to — tell me all about it."

The first story, if presented in a complaint filed to commence a lawsuit, would be vulnerable to a demurrer: the other party to the suit could get the lawsuit dismissed without the client's story ever gaining an audience. The second story would survive a demurrer, and the client would have a chance to tell his entire story to a judge or jury. Of course, he would not necessarily win in court; the other side might tell a better story. But he would at least have gotten the court's attention, and he would have an opportunity to try to persuade the judge or jury — at some length — that his version of the world was accurate and that the desired remedy should be granted.

Before a lawyer can analyze his client's problem, predict legal outcomes, or suggest solutions, he must translate the client's situation into one or more legal stories. Since every client's problem is unique, the lawyer can only give legal advice if he can transform the client's unique situation into a recognizable legal story that has an established plot and

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ending. While legal stories come in variant forms and sometimes have multiple endings, it is only the lawyer's ability to see how unique, idiosyncratic human situations can be recharacterized to fit a much smaller set of acceptable legal narratives that enables him to give legal advice, make legal arguments, and otherwise function as a lawyer.

The lawyer may sometimes conclude that there is no legal story that even remotely resembles the client's situation; some human stories cannot be told in the legal culture. In other cases, translation into a legal story may so distort a human story that the client abandons any attempt at a legal solution. But the story form does allow many of the idiosyncratic elements of human stories to be preserved in the translation process, and legal narratives often communicate meanings that would be legally taboo if explicitly argued to a legal audience. Indeed, one aspect of legal change is the gradual incorporation of formerly taboo human stories into the legal repertoire.

The transformation of human stories into legal stories commences with the initial client interview and, in the litigation context, concludes with the rendering of a final, written decision by an appellate court. It is usually a long way (both chronologically and conceptually) from the first conversation with a client to the commencement of a lawsuit and usually even longer to the final decision by an appellate court. At the time of the initial interview, however, a good lawyer is already likely to be considering, in the back of her mind, both what the complaint might look like if the lawsuit were ever filed, and what the ultimate outcome might be in an appellate court. In other words, while both lawyer and client will typically want to and should try to solve the client's problem without litigation, legal problems and their possible solutions are typically analyzed, bargained over and disposed of in the shadow of a single question, "What is a court likely to do if this dispute is ever litigated?" From the initial interview forward, the lawyer will have at least two audiences in mind, the court and whatever more immediate audience might solve the client's problem without litigation.

The legal stories with which you will become familiar are, thus,  

3. This account of the lawyer as storyteller focuses on litigation because the course setting is Torts. The lawyer as planner and counselor is equally concerned with the outcome of legal stories even though her goal is to plan and advise so as to avoid any legal disputes. What a court would do if a deal did give rise to dispute significantly frames the way the deal will be structured, and the risks of adverse legal outcomes have an important impact on the perceived value of a deal or proposed legal arrangement.
built around a single requirement — what does a court as audience need to see in order to grant a particular remedy? Or, in the client's terms, what is the likely ending of the legal story or stories that we might tell in this case? While most of you, no doubt, have some sense of what makes a good story in human terms, you are probably not yet familiar with the catalogue of accepted legal stories in various areas of the law. One of your primary tasks in law school is to learn the legal stories that are acceptable and persuasive in various legal subcultures, and to practice translating a variety of human problems into standardized legal narratives. While our particular focus will be legal stories in the torts subculture, we will also consider the general problems involved in the translation process.

III. Legal Stories and Legal Cases

The translation of human to legal stories typically takes place for lawyers in the context of a particular case. "Case" has two meanings for lawyers. It means, first, the problem-solving task associated with a particular individual who has sought help from a lawyer. Thus, when we talk about the "Howard case," we mean to refer to whatever it is that brought Mr. or Ms. Howard to see a lawyer in the first place. "Case" in this sense is client-oriented and calls to mind an individual and his or her worries, goals and situation. A case is, in other words, a human story.

In its second meaning, "case" refers to the published opinion of a court rendering a decision in a particular litigated dispute. Palsgraf v. Long Island R.R. Co. is a case in this second sense. When we refer to the Palsgraf case, we are usually focusing not on the problems of poor Helen Palsgraf, but rather on the decision and reasoning of the court as reflected in its published opinion and its significance for other similar cases which we might have as lawyers. "Case" in this sense is doctrinally-oriented and calls to mind the substantive standards and institutional constraints affecting a particular audience — the judge — whose response is crucial to lawyers. A case is, thus, a legal story.

Since lawyers cannot function without clients, the importance of

5. Helen Palsgraf's individual situation is described at some length in "The Passengers of Palsgraf," in J. NOONAN, PERSONS AND MASKS OF THE LAW 111-51 (1976), which I assign to my Torts students to help convey the distance between a human "case" and a legal "case."
individual client cases is self-evident. The discussion of storytelling above suggests why published cases are so central to a lawyer's problem-solving activities. Cases (in the second sense) record the stories that have been told in the past, with sad or happy endings, and they thus represent the limits on and the possibilities for the stories that lawyers can tell to future audiences. It is important, however, to understand what cases are and are for, not only as a future lawyer, but as a present law student. Cases have a central role in legal education as well as in the legal profession. The "case method" has been a fundamental element of legal education for at least 80 years, and your ability to participate fully in your own education depends on your understanding the use of cases in the classroom.

IV. Storytelling and the Classroom

Many law students initially find law school studies and classroom discussions somewhat mysterious. They are asked to read numerous published cases and are expected to analyze and discuss those cases intelligently in the classroom, but their assigned reading typically does not provide an overall framework for the individual cases, and the purpose of the ongoing class discussions is rarely explicitly explained. There have been surprisingly few attempts to articulate what it is we are trying to do in law school classes, particularly in the traditional first-year courses. If asked, many first-year teachers would say something like, "Oh, we are trying to teach them the basics of tort (property, contract, criminal) law, and, more importantly, we are trying to teach them to think like lawyers." If one then asks, "How, exactly, do lawyers think, and what is the connection between reading contracts cases and learning to think like a lawyer," one frequently gets no answer at all. While the task of explaining legal pedagogy is not an easy one, I think it is possible to be more explicit than we have traditionally been about the purpose of assigning and discussing cases.

As I have stated, I believe that the purpose of legal education is to introduce you to the legal culture generally, to provide you with a basic repertoire of accepted legal stories, and to train you in the art of legal storytelling. Our use of legal cases serves all three purposes, in ways that I think can be articulated much more than is done at present.

A. Learning the Legal Stories

Most new law students focus almost exclusively on the second pur-
pose stated above — learning specific legal stories. They come to law school to learn legal rules, and when they take Torts, they expect to learn the rules of torts. When they read torts cases, they assume they are expected to derive one or more rules of tort law from the case. When they find that reading cases is an inefficient or frustrating way of learning rules, they turn to Gilbert's, Emmanuel's, or Sum and Substance. Their view that rules are very important is to a large extent confirmed by their initial experience of law school exams. Although much time in class is spent exploring the legal culture and discussing or practicing the art of legal storytelling, first-year exams typically test almost exclusively the student's familiarity with basic legal stories in the course area. The skill of translating human to legal stories is tested somewhat by the need to recognize legal issues in very brief and artificially preprocessed fact situations which bear little resemblance to real human stories. The art of storytelling is hardly tested at all; most faculty members grade primarily on the skills of issue-spotting and making a few basic arguments, not on the overall quality of factual and legal argument or on highly persuasive presentation of coherent legal stories. Overall familiarity with the legal culture and its values is not explicity tested in most exams. (For a more thorough discussion of the failings of — and proposals for — the law school examination process, see Janet Motley's article, p. 723.)

For exam-taking purposes, student focus on mastering the basic legal stories in the required course areas is sensible. Most students do come to understand that learning rules in the abstract does not give them good control over tort law or contract law, and that it is necessary to learn to recognize the recurring fact patterns which are merely summarized by doctrinal labels. They come to see that minor variations in legal stories can produce different endings and that no set of formal rules can capture completely the factual distinctions that compel those

6. This conclusion is based on years of going over exam results with students and conferring with colleagues. See also Kelso, The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal, 32 J. LEGAL EDUC. 616, 636 (1982):

Whit Gray and I remarked that, while professors attending an ETS-sponsored conference on grading Contracts papers said they did quite different things when grading exams, statistics indicated that they were doing pretty much the same thing. An analysis of that "thing" by Fred Hart, Steve Klein, and Bob Linn said that it was grading for discovery of issues and for arguing both ways on those issues while driving toward a conclusion. Id., citing Linn, Klein & Hart, The Nature and Correlates of Law School Grades, 2 REPORTS OF LSAC-SPONSORED RESEARCH 32 (1970-74).
different endings. In the end, only practiced story-sense can help distinguish mistakes which excuse contractual performance from mistakes which don’t count, or distinguish between negligent conduct which proximately causes harm and conduct which is “too remote”.

Because most students understand that they are reading cases to master the basic legal stories, and that some discussion of those cases is necessary if they are to move beyond memorizing rules to developing the required “story-sense”, this aspect of case use in legal education is usually understood by students and is the aspect of class discussion most likely to be explicitly discussed by faculty.

B. Exploring the Legal Culture

In addition to illustrating the basic repertoire of legal stories in contract or tort law, published cases provide general information about the legal culture. Cases tell much about the history and functions of legal stories and institutions, and provide substantial insights into behavior of clients, legal storytellers, and legally-relevant audiences. Although we could provide this information more directly by assigning texts and other secondary works, and we do so to some extent, most of the information you acquire about the legal system during your first year will come from cases and class discussion.

Thus, reading and discussing published cases, you are not only learning specific legal stories but are also exploring the legal culture of which such cases are artifacts. You might usefully think of yourselves as novice anthropologists, told to look at several dusty shards of pottery or the lower jaw of some indeterminate primate and asked to speculate about the entire culture behind the physical object you are examining. Published cases are just such dusty shards and remnants of complex, intractable, ambiguous human stories which have been filtered through a highly-constraining set of conceptual and institutional forms to appear as formal judicial opinions. Our exploration of the general legal culture will involve learning about the kinds of stories, roles and institutions which make up that culture, and, most importantly, exploring over and over again in different settings the interaction of highly-varied human stories with a relatively limited set of legal stories which both transform and are transformed by the human stories they are meant to reflect and resolve. Only by connecting the special concerns and values of the legal culture with the basic human concerns which they reflect can you fully understand the relationship between the legal culture and the larger society of which it is a part.
The use of cases to inform you about the larger legal culture is intended, therefore, both to provide you with information about the history and functioning of the legal system and to encourage you to identify the psychological, philosophical, historical, social and political components of legal stories. Some of the questions we ask during class discussion of particular cases reflect this general cultural perspective. What is the human story here? How did this problem come to be seen as one to be dealt with by the legal culture? What impact did the nature of the particular audience have on the way the story was told? What constraints affect the ability of specialized audiences like judges and juries to grant remedies, and are such constraints founded in history or in notions of institutional competence? Why are the legal stories that can be told about this case so limited? Why are they shaped the way they are? What do the legal stories that apply to this problem tell us about the society that produced these stories? Can we make up new stories? Who creates the legal stories for a particular society? Who can change them and when? We might ask these and similar questions about a single published opinion, and in discussing these questions we are exploring the entire landscape of the legal culture.

As suggested earlier, you should be interested in the general legal culture from two perspectives. Many of you have a substantial anthropological interest in law; your interest in the subject is a function of your general intellectual curiosity and your interest in continuing your education about the world. Most of you presumably have a more immediate need to become familiar with legal culture, since you aspire to membership in the legal tribe. Responding to your presumed desires, we introduce you to the legal culture primarily through cases because we are more concerned with immersing you in the ongoing activity of the legal culture than with providing you a good opportunity to stand back and see the culture whole from an anthropologist’s point of view. Some law professors clearly see themselves more as anthropologists than as members of the tribe, and in their courses you may spend relatively more time developing critical and theoretical perspectives on the legal culture as a whole and relatively less time becoming familiar with the legal culture as if you planned to live there. Both perspectives are valuable, but unless you focus on their dual aspect, some class discussion may appear confusing or irrelevant.

C. Learning the Art of Storytelling

When we use case materials to teach you basic legal stories and to
explore the legal culture, we are using cases primarily for informational purposes; that is, we are assigning the cases so that you can learn and understand and think about the doctrinal and cultural information they contain. As the storyteller metaphor suggests, however, law is not a collection of definitions and rules to be memorized and applied, but a culture consisting of storytellers, audiences, a set of standard stories, and a variety of conventions about the practice of the storytelling art. Law, in other words, is not something you simply learn about, but something you also learn how to do. In order to transform human stories effectively and persuasively into legal stories, you must not only learn about the conventions and values of the legal culture, you must internalize them and make them habitual. You must add to the human intuitions, which guide you through your everyday existence, a set of specialized legal intuitions that can guide you and your clients effectively through the legal culture when explicit signposts are few and far between. You must be able to speculate intelligently about all the possible meanings in legal stories and use those meanings to persuade different audiences to see the world as you want it seen. These are qualities which require not only intelligence and memorization of rules, but the acquisition and constant practice of a variety of skills.

Case materials not only provide information about legal stories and the legal culture, they provide the occasion for practicing the varied skills which are crucial to the legal storyteller. As indicated earlier, a legal storyteller must be able to make sense out of human stories which are confused, complex, incomplete, and therefore ambiguous. She must then be able to translate those stories into one or more legal stories that not only match her client's human story but have a happy ending. She must be able to identify what particular audiences need to hear and she must be able artfully to combine human and legal stories so that her particular audience will be moved to provide the happy ending she seeks. By reading and thinking about cases, discussing their underlying human stories, and listening to and telling a range of legal stories about a given situation, you are constantly practicing skills which will be important to you as a lawyer.

Before discussing the specific skills which you will practice by doing your class assignments and participating in class discussions, let me emphasize the difference between understanding law school as a place to acquire information and seeing it as a place to practice skills. First-year law school classes are more like practice sessions than were most of the classes you attended in college or graduate school. Although, as I have indicated above, you are learning a lot of new information in your
courses, they also contain a substantial component of skill acquisition and refinement. Reading, listening to and telling stories is intended to be an active, not a passive endeavor. You should be learning not only the content of the legal stories, but new ways of reading, and new ways of listening to and telling stories. In other words, class discussion is, in many ways, more like hitting a tennis ball against a backboard or practicing free throws than like reading or talking about tennis or basketball. Viewing class solely as a means of acquiring information about the legal culture is likely to lead to a high degree of frustration and hostility; an awareness that we are practicing lawyering skills by discussing cases may make class discussions more comprehensible.

I am sure that different law teachers implicitly emphasize different skills in the way they orchestrate class discussion. I will discuss briefly below the skills that I believe most faculty would agree are important, whether or not they have made a conscious decision to encourage the practice of those skills in their classes.

Lawyering as story telling

Making sense out of human stories. The cases in your torts book illustrate the spectrum of human stories with which lawyers deal in the area of torts, from simple auto accidents and slip-and-fall cases to professional malpractice, environmental pollution, and the complicated mass torts generated by modern pharmaceutical and high technology products. By exploring these stories in class, you become familiar with the range of problems which clients bring to lawyers rather than to other kinds of professional problem-solvers. Although it would be peda-
gogically more effective to provide live clients for this purpose, the practical and ethical problems of doing so appear insurmountable in the first year of law school. Clinical courses do provide you with the opportunity to interact with live clients later in law school, and limited role-playing exercises can be provided even in the traditional first-year classroom. For most first-year students, however, published cases provide the only client situations they confront.

Thus, published cases provide a range of specific fact situations to discuss during class in order to understand client problems and to explore possible solutions. They are simulated client problems with which we can practice problem diagnosis and client counseling and through which we can explore legal, ethical, and practical constraints on our problem-solving abilities. Since published cases are a pale substitute for the rich factual situations provided by live clients, we must use our imaginations and knowledge of the world to provide what is lacking. As we speculate in class about the human stories behind the brief fact statements in the cases, we find that different students and faculty members may have very different perceptions of any given fact situation. The need to use our imaginations to fill out the client stories behind the cases thus makes us sensitive to the ambiguities of a given set of facts, and we learn that every client situation can be approached in many different ways, with very different results. We also have a chance to explore what it means to be professional storytellers and try to identify some of the limits on our ability to tell other people’s stories.

Making sense out of legal stories. One of the major skills taught during the first year of law school is how to read legal cases both accurately and creatively. In order to read cases intelligently, you must not only be able to understand the relationship between the human and legal stories involved, you must also be able to predict fairly accurately how other individuals, particularly other lawyers and judges, might read the same case. You can only learn this effectively by listening to other people, with values and perceptions different from yours, discussing the same cases which you have read. Why does a story which seems to you clearly to lead to one right conclusion seem so difficult or wrong to another person? What differences in experiences or values lead to the different perception, interpretation, or choice of outcomes? Class discussion allows you to listen to other intelligent people trying to read cases intelligently and exposes you dramatically to the variety of readings possible from a single case. As your reading and listening progress, you also begin to see that the traditional legal culture systematically favors certain kinds of interpretations and disfavors others.
The art of storytelling. Class discussion not only involves exploring the potential meanings of assigned cases, it also involves trying to tell persuasive legal stories about problems or hypothetical cases different from the assigned cases. In other words, we will practice using our understanding of decided cases to tell legal stories about cases not yet decided. Listen to your classmates. Do you find their suggested stories persuasive? If so, why? If not, why not? Why would another intelligent person who has read the same cases you have think this story persuasive? Again, different readings of the same cases, different values, different goals and experiences will produce different stories. Listening in class gives you a chance to speculate about why different people find different stories persuasive.

Because there are so many of you, you will spend much more time listening to other people tell stories than telling them yourself. But you need to practice telling legal stories. You speculate about a story which you think might be persuasive. Is it? If you don’t have a chance to tell it in class, tell it out of class, to me or to your classmates. Does it work? Does it work better than other stories? If so, why? If not, why not? Why does it persuade one classmate but not another? As you listen in class, try to imagine the stories you would tell, as well as evaluate the stories told by others.

Because class discussion is frequently so disjointed, you will often hear and tell not entire stories, but little bits of stories. In order to really practice listening to and telling legal stories, you need to have an opportunity to put the pieces together in a coherent whole. During the semester, I will ask you to carry out several oral and written exercises in which you have to create an entire legal story or stories for a given audience. As with the case of live clients, it would be preferable for you to have numerous occasions to do this, but the few exercises we are able to do will, at least, give you a sense of what it means to put a coherent story together.

Storytelling and legal argument. When we discuss creating whole stories, we will address two questions. What makes a good legal story? What makes a good torts story? That is, we will consider not only what stories are persuasive in particular contexts, but also what characterizes persuasive legal stories generally. In that connection, we will necessarily consider the relationship between effective storytelling and traditional forms of legal argument. Cases are traditionally presented not as human and legal stories, but as tripartite constructs of facts, rules and argument, or facts, holding and reasoning. The notion of legal storytelling implicitly calls into question more traditional notions of case
analysis, but storytelling is not at all inconsistent with placing a heavy emphasis on forms of legal argument. Argument makes explicit the meaning of stories, forcing us to distinguish between meanings that are legally acceptable (the poor old man should win because he was defrauded) and meanings that are legally taboo (the poor old man should win because he is poor). Effective legal arguments about particular human and legal stories underline those meanings in the story which are both acceptable and persuasive in particular legal contexts. Part of the art of storytelling is knowing which meanings of a story can be articulated explicitly in formal legal argument and which meanings are partially or completely taboo in the legal culture and must be communicated to the audience only in narrative form if they are to be communicated at all.

Much of what you will learn in the first year consists of becoming familiar with a rather small number of kinds of argument which recurs in varied forms throughout all areas of law. You will practice making arguments based on logic, on history, on specific policy concerns, on notions of institutional competence and jurisdiction, on efficiency and administrability, and you will develop a sense of what categories of argument are appropriate and persuasive in what settings. This involves your learning to distinguish arguments persuasive in the legal culture from those different, although frequently overlapping, arguments you already know to be persuasive in the larger human culture. It also involves learning to distinguish between arguments which are persuasive in the torts subculture and, for example, those which are more persuasive in the contracts or criminal law subcultures.

As the above discussion suggests, in the classroom we will use cases to not only learn about, but continually practice, the art of legal storytelling. We will work with the facts of particular cases, expanding our understanding of the various human stories lawyers often confront. We will practice using the basic repertoire of legal stories in our area of the law and explore their relationship to the underlying human stories they reflect. We will examine the relationship between storytelling and legal argument, learning to distinguish those meanings of a story that are persuasive from those that are barely acceptable or even taboo in particular legal settings and subcultures. We will explore the nature of particular audiences and identify what judges, juries, legislatures, officials, and individual parties need to hear in order to grant some desired remedy.
V. Storytelling as a Social Enterprise

As the storyteller metaphor suggests, lawyering is a social enterprise. It is impossible to be a lawyer without clients, other lawyers, judges and other participants in the legal culture. You need them and they need you. It is impossible to learn to be a good lawyer without participating in a common enterprise with your fellow students and teachers. You need each other as an audience for your storytelling and as intelligent readers and listeners who can show each other the many meanings of a legal story. The art of storytelling cannot be either learned or practiced in isolation.

Our joint enterprise in the classroom will prosper and we will all share equally in the prosperity to the extent that we all try our best to share our insights with each other and to instruct each other in the ways of storytelling. We need not all agree — it is our different values and experiences which make us most helpful to each other in exploring the legal culture — but we do need to recognize that we have a common interest in producing the richest possible classroom experience.

In an attempt to demonstrate to you the educational values of cooperation and communication with each other, I will ask you to do several of your assigned oral and written exercises in teams. I will assign you to teams rather than let you choose your teammates so that you will be required to work with classmates you do not know and perhaps would not normally choose to know. By being curious about each other, while being patient and tolerant of differences, you can learn a great deal by listening to each other and by attempting to teach each other what you know. You will also see that there are many ways to approach client problems and lawyering tasks. Whether or not you find that your own views and attitudes change as a result of working with others, you will at least learn in a more vivid way that every individual is living in a slightly different world and that only if you always have those many possible worlds in mind will you be an effective lawyer.

VI. Conclusion

I have attempted to explain briefly to you how I see the first year of law school and what I think we are trying to do in the classroom. Because there are so many of you, I cannot know exactly what each of you needs to become a good storyteller. Some of you are already masters of the storytelling art, but may find the legal culture and its special stories alien and distressing. Some of you will find technical legal argument congenial but will be uneasy at the lurking ambiguities in most
legal stories. Some of you will find upsetting the fact that others disagree with your perceptions of human and legal stories. As I help you learn what I think you need to know, you must tell me what you are learning successfully and what remains obscure. Each of you will have to master the storytelling art in your own way, and, while I can help, I cannot do it for you. As with any beginning endeavor, you will have to use trial and error and be willing to make mistakes in order to learn what you need. No one becomes a good storyteller by simply memorizing the stories of others. You must be able to tell your own stories, and you must learn to tell them in your own way.
A Second Chance: Learning What Law School Never Taught Me

Harry Lee Anstead

Harry Anstead has been a judge on the Fourth District Court of Appeal for the State of Florida since 1977, during which time he has served as chief judge and has been nominated for a vacancy on the Florida Supreme Court. He has devoted considerable time and energy to studying and proposing reforms for the Florida judiciary and, as an experienced trial lawyer, has served on the Board of Editors for various Florida Bar publications.

If the New York Times is to be believed, this country’s law schools have been under constant criticism for many years for the “narrowness of their focus and the tedium of their teaching methods.”1 Law school enrollment has dropped for the third year in a row. In schools such as Harvard and Stanford, class attendance, participation and interest are reputed to be at a low ebb. Indeed, the prestigious law schools have been described as merely conduits for students to lucrative positions with large law firms rather than institutions for learning where the important issues of law and justice are debated. Mark Kelman, a faculty member at Stanford, is quoted as saying:

For most students, nothing that goes on in law school matters — it’s simply a credential. The most common student here is getting none of the real new clinical training, none of the new, financially sophisticated courses, no law and economics, no nothing. What this place offers is a ritzy degree, and there’s a legal requirement that you spend three years here to get it.²

Critics have questioned the case law and Socratic methods of teaching, and suggested that the program be cut from three years to two, or that the European system of university education combined with a lengthy internship be substituted (see David Applebaum’s arti-

2. Id.
cle, p. 297). Yet the criticism has resulted in little change. To be certain, there has been an increase in clinical programs, an injection of economic theory into the law school curriculum, and some controversial challenges to the traditional foundations of the law and legal education as a means of maintaining the status quo, but the traditional law school program has pretty much remained intact for the last fifty years. In the face of such widespread criticism and radical proposals for reform, it is tempting to get out one's own meat axe. But lack of knowledge of the system precludes me from venturing so far. Instead, I offer some personal observations and concerns about the system that have come to trouble me over the years, along with a modest proposal for reevaluation.

When I interview prospective law clerks, I find that the required curriculum at the vast majority of law schools is largely unchanged from my own day, and not varied to any great degree from one law school to the next. The present system of legal education consists of three years of study, including one year of required courses and two years of electives. Required courses are scheduled the first year and usually include real property, contracts, torts, criminal law, civil procedure and legal research and writing. On the other hand, students are free to choose courses during their second and third years among a wide selection of electives. Courses on topics expected to be encountered on the bar examinations are usually favored. Contrary to the claims of many members of the practicing bar that the law schools do not produce graduates with any practical lawyering skills, a good argument could be made that the standard curriculum was especially designed to produce (in one year's time) a general practitioner who could draft a contract, close a property sale, prosecute a personal injury case, and defend a person accused of a crime. It appears that the standard curriculum was developed about the same time that society viewed the typical doctor and lawyer as a general practitioner who could handle the most common problems of the community. As someone who grew to adulthood in the late fifties, I can easily visualize a Norman Rockwell-type image of these characters, the "family" doctor or lawyer.

3. Today, our justice system is also under constant attack. If the quality of medical care in this country were challenged, it would seem appropriate to look to the medical schools for some of the answers. Similarly, should we not start looking at the law schools as a part of both the problem and the solution to many of the issues facing our legal system?
It is difficult to catalog the tremendous changes that have taken place in our society over the last two decades: the size and impact of the government; the size and mobility of our population; the increase in authority and in reliance upon the courts; the decreasing reliance on churches, school, family and community; the rise in crime and the institutionalization of the criminal defense bar; the impact of technology; and on and on and on. All of these changes have brought about a different demand for legal services. And, of course, the shape of the legal community has changed drastically in response to changing demands. Large law firms and specialization are the hallmarks of the day. With all these changes, the role of the general practitioner has declined dramatically.

Of course, law schools have reacted to these changes. Significantly, over the last 10 years or so, there has been a dramatic rise in the number of clinical programs offered at law schools. Many of these programs have resulted from demands by the practicing bar or judges, such as Chief Justice Warren Burger, for more law school training in practical lawyering skills. Law school faculties have gradually, and in some instances, grudgingly, given in to demands initially perceived, perhaps, as anti-intellectual intrusions on faculty control over curriculum. In any case, the scope and variety of elective law school courses have mushroomed. Students have courses available in economics, medical malpractice, products liability, condominium law, multi-national corporations, and dozens of other subjects reflecting current problems or experiences in society. Unfortunately, however, as Professor Kelman notes, it is doubtful whether the average law student is exposed to the updated materials which are offered almost exclusively in elective courses during the second and third years. Most students have little idea of what specific shape their legal careers will take. Yet they are left to choose among the dozens of elective courses offered by most law schools during their second and third years, and the mandatory curriculum remains unchanged. The danger is that students can load up on courses narrowly tailored to particular subjects and come away from law school minimally equipped even to be a "50's-style" general practitioner.

My primary concern is whether the mandatory curriculum, which has remained unchanged for so long, is fundamentally sound. I would submit that it is not and that the required curriculum needs to be reshaped and expanded. In addition, more guidance should be available in the selection of elective courses, with the elective program primarily reserved to serve the special emphasis of a particular school or special
interest of a particular student. By limiting the required curriculum to the first year, the schools have, in effect, established a basic educational standard for a lawyer entering the profession. With students free to choose their courses the last two years, minimum requirements have been transformed into maximum standards for the average student. My suggestion for reform is two-fold: first, there should be a reevaluation of the required curriculum and the development of a modern consensus as to what basic legal knowledge every member of the legal profession should possess; secondly, courses that are designed to transmit that knowledge should be developed and made mandatory during the first two years. The values that our society treasures about its legal system need to be identified more precisely, and, along with the duties and responsibilities of the various roles to be played in the legal community, emphasized in a structured, mandatory law school program.

In constructing the mandatory curriculum, we are not only setting standards, but also controlling a person’s initial impression of our legal system. The first impression is critical. In my view, students of the law should be provided with a thorough and comprehensive overview and history of our legal system and its foundations before receiving instruction in more narrow legal subjects such as property or contracts. For example, our legal system is unique and inextricably bound up in our widely respected constitutional system of government. First-year law
students should be required to study the Constitution, the magical doc-
ument that serves as the fountainhead for our legal system and the
focus of the work of the highest court of the land. Other such funda-
mental subjects should be identified and required. Many are already in
place. When I was a law student, courses in jurisprudence, legal history
and philosophy, comparative law and such were regarded as "soft" sub-
jects that would be of little "hard" practical value in the practice of
law. Now, after struggling for years with my responsibilities as a law-
yer and judge, I have a totally different view of the importance of those
topics. These subjects deal with the basic foundation of our legal sys-
tem. Knowledge and understanding of these subjects is essential to un-
derstanding our legal system. It is ironic that the law school, which so
jealously guards its obligation to educate rather than "train," would
fail to require such fundamental courses.

We do have a definable legal system in this country. Moreover, we
have an adversary system of justice that is not only unique and com-
plex, but that relies almost entirely on the assumption that the advoca-
tes for both sides in a legal dispute fully understand their responsibil-
ities and carry them out in an equally superior manner. Is it too
apparent to be seen that persons who are to be deemed qualified to play
important roles in our legal system ought to be required to learn about
their responsibilities in that system? In addition to teaching the funda-
mentals of our system, this should be the foremost obligation of the law
schools. Law students should be directly taught the duties and responsi-
bilities of the judges, prosecutors, lawyers and others who operate the
system. The present teaching method of touching on the lawyer's vari-
ous roles incidental to every legal topic taught is simply not doing the
job. If anything, this method covers too much territory too thinly, and
suffers for lack of focus on role-responsibility. Nowhere else in the
world are lawyers and judges vested with such great authority and re-
sponsibility and called upon to play such important problem-solving
roles. Yet in Europe, for example, much greater emphasis is placed on
role-responsibility through the requirement of an extensive two and
one-half year externship during which students, in successive six-month
periods, work and study under a judge, prosecutor, defense lawyer, or
office lawyer before becoming eligible for admission to the bar. There is
no reason why many of the fundamental courses, such as criminal law,
cannot be reshaped to provide greater emphasis on the prosecutor's and
defense lawyer's responsibilities, or why other courses, such as one in
the judicial process, cannot be made mandatory, to better prepare law-
yers for their responsibilities in the legal community.
I would compare the scope of the problem of developing a mandatory curriculum to that of writing an introductory treatise on the law. For instance, in the preface to his work "The Law," Rene Wormser writes:

This book was born of a suggestion once made by Wendell Wilkie. He felt the need for a book — written by lawyers — which would give some idea of how the law which governs us today came into being: how it had its beginning in ancient civilizations, how it developed, what great personalities helped give it shape and substance; and some of its major past and present problems.

I soon found that the greatest difficulty in organizing such a project was the selection of material. The law spreads out into all sorts of fields (philosophy, history, anthropology, religion, ethics, and many others), and the volume of written material is staggering. So I have selected as I thought best, and I undoubtedly should tender apologies to many jurists, statesmen, and writers who have been excluded because some others seemed more vital to the story.4

Indeed, many law schools define their missions in similar terms but fail to deliver in their curriculums:

The primary goal of . . . [law school] is to produce graduates who are skilled and knowledgeable masters of legal doctrines and procedures. In addition, they must have the capacity to perform as counselor and advocate, social engineer, educator, leader, humanist, protector, and creator of basic human rights. Thus, the . . . [law school] attempts to impart not only an appreciation of what the law is and its function in society, but also a sense of what is good law. We believe that the ideal lawyer should possess a keen sensitivity to ethical concerns and an appreciation of the basic values of the western world's traditions and those of the legal profession. He should know where the law has been, where it is going, and how that movement is influenced. She must possess an exceptional sense of relevance, analytical skills, and facilities for written and oral expression. His perspective must be future oriented, but soundly supported by an appreciation of the past, so that in solving problems he can devise prophylactic solutions that will direct society's efforts and resources in constructive channels.5

I admire this highly aspirational statement but I question whether it is a realistic assessment of today's standard law school curriculum. Most of us view this sort of statement as "puffing." Shouldn't the law schools be held accountable for not coming closer to hitting the mark?

The need for reshaping the mandatory curriculum is critical. Repeatedly I see lawyers and judges who have little understanding of their duties and responsibilities as prosecutors, civil trial lawyers, family lawyers, criminal defense lawyers, appellate lawyers, or trial judges. The prevalence of a mentality of "win at any cost" reflects a basic problem that needs to be addressed at the earliest opportunity in the lawyer's training. I have observed too many lawyers whose respect for their work and their clients was much less than their respect for the dollar or prestige. I have attended conventions of prosecutors where speakers have appeared as if cheerleaders in an adversarial forum, and have been certain that I have heard ghostly cries from the audience of "kill, kill, kill." The "defendant" is the enemy, and anyone who gets in the way of destroying that enemy, including judges and defense lawyers, becomes the enemy. There is a similar problem at the opposite table. I have heard criminal defense groups struggle with the question of how best to serve clients who have conceded some misconduct, or the issue of what to do when a client tells them he is going to take the stand and lie (see Paul Savoy's article, p. 801). Virtually every criminal case tried is now subject to a second trial on the issue of competency of counsel. On my own side of the bar, I have heard some judges say that under the adversarial system they have no responsibility to see that "justice" was done other than to enforce the various rules of procedure. Other, so-called activist judges see themselves as having a greater role and responsibility. Finally, I have known few who would claim that they could adequately define "justice" under our adversarial system. In my view, the prevalence and nature of these problems reflects a serious defect in our legal education system rather than individual problems with a particular person's character or educational experience. The law schools may not have all the solutions to these concerns, but they should darn sure be posing such basic questions to themselves and their students.

The title to this piece refers to a unique opportunity I had to return to law school after I had become a judge to participate in a master's degree program in the judicial process. Surprisingly, perhaps,

the program focused on many of the areas that I now find lacking in the required curriculum of the law schools: legal history and philosophy, the relationships between law and economics and the other social sciences, comparative legal studies, federalism, administrative law, and law and medicine. I am indebted to the program and the University of Virginia for a second chance at my formal legal education, and I would encourage others to return to law school and take another crack at some of the subjects that hindsight has made more attractive. I do not feel that I received the maximum benefit of my initial law school experience. Of course, my own ignorance and lack of judgment were partially to blame. But those that went before me, and subsequently laid down a course to follow, also must share the responsibility, just as we must share the responsibility for those who follow us. Most do not get a second chance, and, indeed, with appropriate course of study, most should not need it.
Cogestion And Beyond: Change And Continuity In Modern French Legal Education — A Design For U.S. Law Schools*

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I. Introduction

Contemporary French legal education is largely uncharted territory for most Americans. On-going efforts to reform legal education in France are ignored almost completely in the United States. Yet, if there ever was a time when one could disregard the French system of legal training and French reform programs without suffering any significant ill effects, that day has passed. Moreover, recent French curriculum raises a series of crucial questions about American legal education.

The questions which will be raised by, through and after presentation of the French design for learning are as follows: Is French legal education, designed for a unitary code law system, applicable to America’s common law federal/state system of justice? Would it be wise to establish separate career tracks for individuals who want to be judges, prosecutors or court administrators? Do we need to modify the breadth and depth of current legal education and include courses in the human sciences? Can we develop a synthetic pedagogy which provides both vertical and horizontal integration of the curriculum? Is it possible to have both a universal program of learning and, at the same time, guarantee a place for individual work and creativity? Should we provide economic stability and security for our students? Is it time to es-

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tablish post-graduate learning tracks which reflect discrete and differ-
ing career patterns and a changed division of labor in the legal
industry?

II. Background And Overview

After the birth of the Fifth French Republic in 1958, a new sys-
tem of legal education was established in France. More than twenty
African states — mostly former French colonies with a history of inclu-
sion in the French legal system — sent students to France for their
training as magistrates. More recently, African students have gone to a
school in Morocco which is almost identical to the French École Na-
tionale de la Magistrature. In addition, Egypt, Haiti, Syria, Vietnam,
Venezuela and, most importantly, the People's Republic of China, have
adopted, adapted or participated directly in the French system of legal
training for magistrates. (It is the plan of training 70,000 magistrates
and 3,000,000 conciliators in China, using the French model, coupled
with the strategic socio-economic links between the United States and
China that makes the Chinese future most important.)

Since 1958 the French design for learning has enjoyed ever-in-
creasing use and global applications. Emulation in the United States
would not be without a frame of reference for cross-national transfer of
the French pedagogy. It would be the first transfer from a code law
system to a common law system. However, given recent trends at the
federal and state levels of government, the historical boundaries be-
tween code law and common law are not as rigid as they were in the
past. For those who work with code law in this country as well as for
those who anticipate the rise and spread of alternative fora for dispute
resolution which are similar to the French, the need to understand
French legal training has become increasingly important. At the same
time, modern French legal education also offers a valuable cross-na-
tional perspective for evaluating American legal education. In particu-
lar, comparing key differences between French and American institu-
tions and groups helps to clarify options and choices in both legal
worlds.¹

¹ Information about the international scope of French legal education was taken
from an interview with M. Henri Desclaux, Directeur des Études of the École Nation-
ale de la Magistrature. In addition, M. Desclaux provided copies of materials circu-
lated in Bordeaux for faculty and students from which this author quotes extensively in
this article.
There are two interrelated aspects of French legal education which will be used to develop proposals for reform in contemporary American legal education. The first is the École Nationale de la Magistrature, a core institution in modern French legal education. The E.N.M. has a monopoly on the training and placement of magistrates in France. The word "magistrates", in terms of E.N.M. curriculum refers to a) tenured judges, b) state prosecutors and c) civil servants in the ministry of justice.

The second aspect of research is a set of criticisms of the E.N.M. curriculum developed by the Syndicat de la Magistrature in the late 1960s. The Syndicat is a labor union of magistrates founded in 1968. It combines the radical legal praxis orientation of the National Lawyers Guild with theoretical critiques of justice similar to analyses developed by the Conference Group on Critical Legal Studies. In addition, the union employs some of the humanistic social-psychological tools of the Center for Law and Human Values. The two components of French legal education are linked by correlating the union critique of 1968 with the E.N.M. curriculum of the 1980's. This article raises questions about American legal education and, in turn, offers some suggestions about cross-cultural applications of the French model of legal education in the United States of America.

Under the Constitution of the Fifth French Republic, the judicial power in France, one of three branches of government under the Fourth French Republic, became the judicial authority. The difference between power and authority came in the subordination of courts and magistrates within the political system. On December 22, 1958 the "loi organique sur le statut de la Magistrature" created the Centre Nationale d'Études Judiciaires. The moving force behind the foundation of the school was Michel Debre. He used the École National d'Administration as the model for the Centre. Unlike the other "great schools" in the galaxy of prestige institutions in France, the Centre was not placed in Paris, but rather in Bordeaux. A branch campus with

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2. According to the union, the term magistrates is a compound term made up of two other words: "magi," derived from magician, and "strate," which is taken from castrate. SYNDICAT DE LA MAGISTRATURE, AU NOM DU PEUPLE FRANCAIS 274 (1974). "The Castrated Magician," an annotated bibliography on the French school and union prepared following the 1985 research trip, is available from this author upon request.

limited facilities, however, was established in the capitol. In 1970, the name of the school was changed to École Nationale de la Magistrature.

The training of magistrates in France is divided into two parts. The first is formation initiale and refers to a period of formal education called scolarité. The second part is formation permanente and refers to the post-graduate lifelong learning which is required of all magistrates. In most cases, the decision to become a magistrate is made at around the age of 22 and separates one from those who make the decision to become licenses en droit through study at a university in a Faculté de Droit.

Following successful completion of the E.N.M. program, there is a post-graduate probation period lasting four years. During that time magistrates are required to develop studies in their chosen occupational specializations. They must spend at least four months in study devoted to the research work.

The educational division at the post-baccalaureate level of legal studies in France yields a division of occupations in the legal industry. (It should be noted that the baccalaureate degree in France comes at the end of Lycée training and is, therefore, different from the B.A. degree in the American system.) This split marks a profound difference between the Anglo-American and French development of legal occupations. It is difficult for Americans to imagine that the knowledge and skills required of one set of legal careers are discrete, separate and non-transferable to other judicial careers. It is equally difficult for the French to think that the roles of lawyer and advocate are appropriate preparation for the roles of judge and prosecutor. This is the most fundamental difference between the two systems of legal education and careers. This division also raises the most fundamental question which contemporary American legal educators can derive from study of the French system. Can or should we create separate curricula for these different legal career tracks?

III. Admissions

Admission to the E.N.M. is based upon competitive examinations called concours. The system of giving national examinations can be

4. ÉCOLE NATIONALE DE LA MAGISTRATURE, Livret d'accueil (1982).
5. In 1981 the Socialist government of Francois Mitterand issued a new set of ten tests designed for preparation for the E.N.M. entrance examination. The GUIDE
traced back to the civil service exams for judges introduced under the Third French Republic in order to avoid partisanship, graft and corruption. There is a *concours externe* which is open to French citizens. The exam is open to individuals who have a *diplôme du second cycle d'études supérieures* or an equivalent diploma and are less than 27 years old. The American parallel to the French *concours* would be the L.S.A.T. However, the French examination is not a short-answer machine-gradeable test. There is also a *concours interne* which does not require a diploma and is designed for civil servants, under the age of 40, with at least four years of service. Mothers as well as military draftees (as opposed to those who opt for alternative national service) can obtain exemptions from the age limits. The admissions policy on age is designed to develop a group with a lifetime dedication to a judicial career.

In special cases, called *recrutement sur titre*, it is possible to gain admission to the *E.N.M.* without taking an examination. French citizens who have law degrees, i.e. *licences en droit* and belong to specified occupations — e.g. notaries, court clerks and bailiffs — can submit their credentials for review. Individuals accepted in these special cases spend less time in school at Bordeaux and pass directly to state office upon graduation. It is also still possible to be recruited directly into the corps of magistrates. The pattern of personal apprenticeship and direct recruitment is a hold-over from the pre-1958 system of training magistrates. In all cases of direct recruitment, either to the *E.N.M.* or to the magistracy itself, approval by an independent commission of the Ministry of Justice is required.

During the period when students are enrolled in the program at Bordeaux they are called *auditerus de justice*. They receive a salary and can also receive additional payments based upon need. There are approximately 200 places in the *E.N.M.* each year. The number of openings is correlated with the projected number of vacancies in the judicial order. The long-term risk of a "glut" of legal professionals is reduced significantly by the planning process. Moreover, French students when starting out on a life-cycle of work are not pressed by short-run debts and overwhelming financial concerns. The *auditerus* enjoy relative economic stability and security. This system of payment allows a degree of freedom in the pursuit of knowledge often beyond the reach of American law students who are pressed to find the ways and means

*Pratique de la Justice* 33-37 (1984) has a concise section on "How to Become a Magistrate".

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to sustain themselves at similar stages in their careers. Based upon the French experience, we must ask ourselves whether 1) the number of admissions to our pluralistic, profit-making private and non-profit public law schools should be correlated to projected expansion and contraction of the legal marketplace, and 2) whether students should receive salaries and living allowances while attending law school.

IV. Critique And Crisis

A. Structural Reform

During the 1960s and 1970s there was a "crisis of recruitment" for the E.N.M.6 In 1973, for example, there were 441 posts for 180 students graduating from the Bordeaux school; in 1974 there were 581 posts for 197 graduates. Moreover, in the period from 1970 to 1980, over half of the French magistrates retired and had to be replaced. Government proposals to return to a system of direct appointment to the magistracy were fought by the union. The student/union "bottoms-up" challenge to legal education thus coincided with a moment in history when the students had increased labor power.

In 1969 the Syndicat de la Magistrature issued a "White Paper" on formation initiale.7 The group within the union which issued the study focused on the need for cogestion (co-management) in pedagogy. The union proposal occurred in the context of the May-June uprising of 1968 and the efforts to reform higher education in general. (It is worth noting that the authoritarian and repressive pedagogy of the E.N.M. was common to faculty-student relationships throughout France and that the intensity of the problems was a factor in developing the thoroughness and thoughtfulness of the union response to the concerns and issues raised by E.N.M. students.) The concept of cogestion was introduced with the following thought: "It is impossible, in effect, to introduce a definitive pedagogy into any structure whatsoever. The one (pedagogy) and the other (structure) are intimately linked and interac-

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tive with one another." In other words, curriculum reform based on the concept of cogestion worked in a contingent and relative fashion rather than in an indeterminate and absolute one. One did not begin with a tabula rasa, either for the individual or for the institution. The initial meaning as well as the ultimate success of a new pedagogy required an understanding of the history and realities of professional legal education prior to 1968. It is important to note that school structure was regarded as a significant factor because it was not a static entity in legal education. The view that structure is a process and relationship and not a thing is critical to understanding the proposals developed by the union.

At the time the union issued its white paper, students admitted to the E.N.M. came into a hierarchically-structured world. In some cases the hierarchically-controlled curriculum took them backwards in shaping the form and content of learning. Following the May-June uprising of 1968, students could work on independent study programs. After exercising some control in their curriculum at the second-cycle level, the student faced a loss of control upon entry to the E.N.M. in Bordeaux.

The situation facing the French student was analogous to the situation of a first-year law student in the United States. As a college senior, one can conduct independent research, but then must swallow a fixed menu of introductory law courses where it is impossible to exercise any individual choice or control. The denial of the possibility to critically question and modify the form or content of required courses undermines student confidence and trivializes critical thinking at the beginning stages of professional training. Can students shift gears at later stages and revive their capacities to question and challenge powerful people or powerful ideas? Can the pedagogy be changed without disrupting the subsequent incremental learning in which there is some limited opportunity to engage in individual and critical studies?

The hierarchy of the E.N.M. was intimately linked to the hierarchy in the world of French magistrates. For example, the school had a conseil d'administration made up of 16 members. They were chosen for six-year renewable terms. The council included the president of the Cour de cassation (the highest French appeals court), the procureur-general of the same court, two administrative directors from the ministry of Justice, five tenured magistrates — at least one from the Cour de cassation, one from the cour d'appel de Paris (the largest and most

8. Id. at 16.
powerful regional court of appeals), one from another cour d'appel, one from a tribunal d'instance de Paris, and one from another tribunal d'instance.

The council's powers included approval of courses as well as the appointment of faculty in Bordeaux. The council had to work in conjunction with the directeur of the school and had the ability to recommend the removal of the director. The power of the administrative council was comparable to the power of a board of trustees in an American public institution.

Unlike an American public university's board of trustees, however, there were on-going post-graduate and professional connections between council members and students at the E.N.M. Students who graduated from the E.N.M. would be working for a state administration in which council members exercised power. The counselors would control the ebb and flow of the student careers long after they have finished their period of training in Bordeaux. Thus, the risks and dangers of challenging the hierarchy were profound.

Student power in french legal education

The E.N.M. also had a comité des études. This curriculum committee was made up of the director of the school and six others: two chosen from among the teaching personnel, two magistrates and "two personalities who had competency." The meaning of "competency" was vague and allowed for political interpretations from Parisian-based officials. Students in each class, i.e. promotion, were represented by délégués de la promotion. Two of these individuals were elected and
one was the oldest member of the class. The role of the representatives was limited to transmitting requests and complaints made by fellow students. The school also had a conseil de discipline made up of one member of the cour de cassation, a member of the conseil d'administration, the directeur of the school, two members of the teaching staff, and two of the students elected as representatives. A student brought up for disciplinary actions had the opportunity to "provide explanations."

Critical analysis of governing structures was the starting point for the Syndicat in the development of an alternative pedagogy. Co-management/co-determination was a way to resolve a series of problems associated with education at the E.N.M. Syndicat members regarded the traditional pedagogical structure of 1968 as forcing a return to infancy and/or irresponsible minority status and a "sure means to turn many away from judicial careers and, therefore, aggravate recruitment problems."

The first reason for adopting co-management was to increase the quality and quantity of applicants to the E.N.M. Secondly, co-management would provide a climate in which personal responsibility could be nurtured. Thirdly, co-management was viewed as a prerequisite for working in groups. The third reason was tied to an ideal of ending professional isolation among judges and prosecutors. The union plan called for retention of the power of the council and for changes in the selection process and representation. One third of the group (six people) was to be made up of four magistrates: Two former E.N.M. students in Bordeaux, the director of judicial services of the ministry of justice and a representative from the "economic and social world." (No specific rules on the other two magistrates were fixed.) Another third of the group was to be drawn from the school itself: three directors — directeur, directeur adjoint, directeur des études — two representatives of the full-time teaching staff and one director of an institute for judicial studies. A final third of the council was to be students who represented the cohorts in attendance at Bordeaux. The council would elect a president from among the four magistrates. There would be meetings every three months and upon request. Deliberations required that a quorum of fifteen be present in order to make valid decisions. Majority vote was required and the president was the tie-breaker. Although not mentioned in the white paper, the plan was a way for young

9. Id. at 19.
radicals to share power with the traditional elite of the French judiciary.

The union proposed changes in the two other governing bodies of the E.N.M. They linked their demands to the demands of the “fédération des grandes écoles” (the student alliance of prestige elite institutions). In administrative matters, i.e. budget, management of the center, and recruitment of faculty, the directors of the school would exercise power. In pedagogical matters, the three directors and three students would share decision-making power. The two groups would define a unit called the “college” and under the presidency of the head of the administrative council, they would perform all disciplinary functions of the school and make recommendations to the justice department.

Under the union plan, the division of labor and power carved out a space for the retention of some administrative power, creation of a new hierarchy and a sharing of student and professional control of the training. Demands for financial power-sharing or participation in personnel decisions were notably absent from the proposals. The ability to influence the shape of course content contained in the union plan, indirectly, would be a factor in the selection of staff.

Student participation in the institutional structures of the E.N.M. was regarded as fundamental and necessary for other changes to take place. “The modalities of this participation will furnish the means to establish dialogues built upon indispensable and sure bases with their predecessors as well as with those who do not leave the E.N.M.”10 The bottom line in the argument of the union was that atomization and isolation — as reflected in the theory and practice of individualized and de-personalized decision-making on the bench or in prosecutions — was in conflict with the development of equitable and harmonious judicial decision-making. The proposed change was designed to establish a pattern of continuity for the future and, at the same time, insure that the “bottoms-up” pressure for change would always have a place in future development of the institution.

Subsequent national meetings of the union would amplify distress over personal alienation and opposition to social insularity in the day-to-day work of magistrates. The idea that the pattern of social interaction was a replication of the social relations of administrative hierarchy and classroom hierarchies in Bordeaux remained a crucial element in

10.  Id.
the critique of “pre-cogestion” learning. The proposed cure was an alteration in the membership, powers and processes of the ruling bodies of the E.N.M. Structural reform was both a first, as well as a necessary step if other changes in the pedagogy were to take hold and become effective. The core of the change was built into the curriculum proposed by the union.

B. Curriculum Reform

Before the crisis of 1968, students at the E.N.M. followed a program divided into three discrete phases. According to the union white paper, the phases had to be understood in order to develop a plan for reform which would be both practical and meaningful.

During the first phase of work, students spent one year in Bordeaux. The curriculum was designed to give a general introduction to legal practice. In addition, beginning students engaged in clinical para-legal work with active, auxiliary legal professionals. Seminars, directed studies, conferences and “groups of reflection” were all included as methods of pre-reform teaching.

During the second stage of study, students spent fourteen months in a French appeals court (institutions with jurisdiction over several French departments [states] and the full range of courts, judicial services and activities). In this period of work, students’ activities became focused on the principal sectors of French jurisdictions; e.g. family court, probation, parole, supervised education and prisons. Students also spent two-months in Paris during the second phase of training. They were sent either to special sections of the Ministry of Justice or to special court institutions unique to the Paris jurisdiction.

Following the exit exam, each student went through a two-month stage de preaffectation. This third and final phase of training was a transition to full-time professional work. In sum, the three stages of formation initiale lasted for 28 months. Under the pre-1968 system, job placement followed graduation.

Of the three phases of “traditional” education at the E.N.M., the union regarded only the first phase as fundamentally flawed. The core problem in the Bordeaux curriculum was the “insidious risk of only forming good little technicians who would not individually or collectively have sufficient stature to face the problems of justice in future years.” According to the union, transition from valued skill to min-
dless mechanistic work developed when "the possibility and habit of critical reflection on the functions and problematics of justice" were absent from the curriculum.\textsuperscript{12} The goal of the union and its proposed task for the curriculum of cogestion was to rationally organize and combine the two, i.e. critical reflection with technical proficiency. The idea of making an "either/or" choice and the alternative of balancing the one (technical proficiency) with the other (critical reflection) were rejected.

According to the white paper, there would be two principal objectives of the new pedagogy of the \textit{E.N.M}. The first objective would "intensify judicial understanding which is often poorly developed in the faculty while at the same time providing a training which includes understanding of the uses and the results of related fields necessary for the exercise of justice."\textsuperscript{13} The fields mentioned were criminology, human sciences (the French combination of our social sciences and humanities), legal medicine, and related sciences. The second objective would include "acquisition of professional competency making it easy to do the work of a magistrate after leaving the center."\textsuperscript{14}

In order to develop these two goals, the white paper recommended several steps which had to be taken before the changes could take place. First, undergraduates should be encouraged to follow the curriculum of the \textit{instituts d'études judiciaires}, which were subdivisions of \textit{faculté des droits} at French universities. Alternatively, the union also proposed the practice of \textit{recrutement sur titre} and direct recruitment as noted in the earlier sections on current admissions policies.

The white paper tackled the thorny question of whether or not a reverse in the sequence from classroom to clinical studies was desirable. On the basis of survey research conducted among two groups — active magistrates and students in school at Bordeaux — the decision to retain the classroom-work to clinical-work pattern was retained. The primary reason for keeping the sequence was to foster group solidarity among the students before they experienced the isolation of work in the countryside. (It should be noted that in subsequent studies the \textit{Syndicat} was careful to reject the use of survey research and polling as the basis for making policy recommendations.) Survey research was regarded as the way to identify mentalities and perspectives, yet merely a starting point for intelligent debate and discussion.

\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textit{Id.} at 34.
\textsuperscript{14} \textit{Id.}
A curriculum designed to intensify legal understanding was elaborated upon after the decision to maintain the sequence in the phases of study. The key element was individualized tutorials in which each student would be required to create a "menu à la carte". Working with a maître des conférences in the planning and execution of a program was part of the union proposal. This plan was linked to the development of a stable, full-time faculty. The union wanted teachers who could systematically supervise student development over a 28-month period. The plan of co-management in the learning supported by the union was not intellectual anarchy or "do your own thing"; it was a rigorous form of interpersonal dialogue in which faculty and students would engage in critical analytical work. In many ways, the plan resembled the contemporary American system of dissertation advisors in academic disciplines.

The faculty-student mentor plan advocated by the reformers was associated with an all-out attack upon the system of grading and ranking students. Under the old regime, bi-weekly examinations which were "objective" and allowed no space for creative critical thought were the norm. Class ranks were used as the key determinant of job placements upon completion of the exit examination. The union attacked the system as antithetical to the professional knowledge and critical thinking which were the true marks of excellence. The union also advocated the consideration of personal factors in the assignment of work.

In the final analysis, the arguments against "objective" examinations and grading succeeded. (The Reglement intérieur: Application des disposition du decret numero 72-355 du 4 mai 1972 provides the details on the changed structure and the complex system of student evaluations employed by the E.N.M.). Students were regularly informed about their progress. There was an end to the examination system which contradicted the aims and objectives of critical thinking about social justice. New students were assigned in groups of fifteen which allowed them to create a humanistic climate in the classroom. The curriculum of the 1980s reflects the programs, goals and values advocated in the student/union movement of the late 1960s and early 1970s. In addition, a humanized system of placements, incorporating student participation in the process, was ultimately developed. In fact, much of the agenda set up in 1969 became reality by the 1980s. The reasons to engage in union activities and radical politics tended to decrease as the program of cogestion was put in place. At the unions peak in the early 1970s, more than half of the students at the E.N.M. were members belonging to the local chapter of the union. By the early
1980s membership fell to less than a fourth of the students.

V. Current Curriculum

A student entering the E.N.M. in 1982 was required to take courses in three categories. The first category was called "études fonctionnelles" (functional studies). These courses were the "indispensable apprenticeship of the judicial practices and techniques" and would yield "necessary reflection on the outcomes of the actions of a magistrate." In these courses, students would gather in small groups and receive instruction in specialized functions, e.g. juge du Tribunal de Grande Instance, juge des enfants. Several of the functional studies were "devoted to the examination and study of general problems encountered in diverse or complimentary aspects of the different functions of magistrates." Courses on general themes were to be team-taught and focused on key questions for multiple functions.

The second category of courses was devoted to studies designated as "peri-judiciaires". The subjects identified were as follows: "legal medicine, psychiatry, information on the administration of jurisdictions, judicial data and management, European law, statutes on magistrates and professional ethics, political criminality in matters of economic and financial delinquency (graft and corruption)."

The third category of courses was a series of electives designed to deepen the students' knowledge developed in required courses. The student could work to increase knowledge of technical skills and judicial practices. Courses were listed in the following fields: "psychiatry, human sciences, the administration of jurisdictions, judicial data, European law, accountability (in relation to criminal law), criminal law, the rights of consumers and the rights of work."

From the beginning of their stay in Bordeaux, while they were enrolled in classes, students were required to conduct independent research. Student projects continued until the time of graduation. Individual research efforts bridged learning in Bordeaux with required work at the regional courts and in Paris. Topics included the following: Justice and Consumption; Studies of Judicial Unionism, Protection of Reproductive Rights, Reflections on the Social Evolution of the Role of

16. Id.
17. Id.
18. Id. at 20.
the Judge, Architecture, and Reform of the Law of 1838. The capstone of the student project, which was guided by a *maître de conférence*, was a written or audio-visual "document of synthesis." Independent research was designed to provide a path on an incremental sequence of learning which transcended the spatial and temporal breaks in the training program.

Students who enrolled in the class of 1982 could anticipate four days of general discussion on the following themes: Defense, Problems of Childhood, Police, and Prisons. During the period of study, students were expected to organize roundtable discussion on "essential problems related to the activities and actualities of the judiciary." The topics suggested in the orientation handbook for new students were Justice and the Press, and Drug Addiction.

The program of study for students enrolled during the 1984-86 period contained both open days as well as independent research. The curriculum also introduced a program called "opening toward the city." Students were to work in four key sectors in Bordeaux: Courts (*Tribunal de Commerce, Tribunal Administratif, Conseil des Prud'hommes*); Administration (*Services prefectoraux, Conseil Régional, Conseil Général, Communauté Urbaine de Bordeaux, Mairie de Bordeaux, etc.*); Economy (*Chambre de Commerce, Secteur des Entreprises Industrielles et Commercial*); and Social (*Centrales syndicales, Association de Consommateurs, Youth and Family Services*). One goal of the program was a "true exchange with the city" in which the "interpenetration enriched the students." The program was enhanced by linking each student's community work with his/her individual research project.

The 1984-86 curriculum for all students is divided into six parts: General Education on the Economic and Social World, Human Sciences, Introduction to Information Sciences, Administration of Courts, European Law and Statutes and Judicial Deontology.

After the first phase of classroom work on the economic and social world, students had a day of meeting and exchanges with businesses in Bordeaux and the Bordeaux region. Themes for roundtable discussion included: "the management of a business, social relations within the business, businesses in trouble and the responsibilities of the head of an

19. *Id.*
21. *Id.*
enterprise.” 22 Finally, the maitres des conferences presented case materials highlighting certain problem areas in order to provide students with an understanding of the breadth of factors to take into consideration. The underlying goal of the broad scope of required knowledge was to stimulate the “need to deepen understanding.” 23

Work in the human sciences requires students to give a lecture. With the help of one social scientist and one legal practitioner, the individual must provide evidence about psychological and sociological factors and their interpenetration in the field of decision-making. Students also must elaborate upon the psychological and sociological impact and responses which one could anticipate from either litigants or social groups. The purpose of this work is to encourage students to pursue follow-up studies at an advanced level rather than to give an exhaustive curriculum in the fields. Two phenomena analyzed in detail by French social-psychologists which “a magistrate would confront directly” are also included in this part of general education: communication in the contemporary world and groups in the contemporary world. Specialists from other schools were called in to provide this part of the learning. (It is interesting to note that the Syndicat de la Magistrature employed social-psychologists to assist at sessions in the early 1970s. At meetings in Goutelas, outside Lyon, the union employed analysts to facilitate discussions and to elaborate on social-psychological perspectives and problems at the personal and professional level.)

Student work in information sciences includes “the discovery of the computer and initiation to programming.” 24 Practical applications of word processing are also included in the curriculum. The theoretical and practical applications of computer sciences include debates with participants invited from the Commission Informatique du Ministere de la Justice and a member of the Commission Nationale de l'information et des libertés. Finally, special study of the computerization in the Bordeaux court region is included in the work.

Administration of courts, the fourth area of required general education, focuses attention on the difficulties of day-to-day work in court regions and the orientation of judicial politics which might resolve these problems.

The subject of European Law is designed to teach about European institutions, i.e. Cour de Justice des Communautés Europeennes de

22. Id. at 14.
23. Id.
24. Id. at 16.
Luxembourg and Cour Europeenne des Droits de l'Homme de Strasbourg. The principles of the European Convention on the Rights of Man concerning individual liberties and the penetration of Common Market law in national law are included in the curriculum.

The final field of general studies is legal statutes and ethics (deontologie). The plan for study has three key parts: historical analysis and discovery of foreign systems, perspectives of professional organizations, and positive law and perspectives on reform.

The advanced elective studies open to the 1984 cohort are divided into three areas. The first area is the economic and social world, the second area is the human sciences, and the third area is the management and administration of jurisdictions. In cases when enough students (approximately 25) express interest, new courses can be developed and offered. There is, thus, always a place for student-generated courses to be taught for credit. Ten half-days are devoted to free elective work and they are scheduled so that a student can follow two of the three areas of upper division study. Tracks within the three areas are identified. Curriculum modifications derived from students suggestions are solicited.

Students enrolled at the E.N.M. also work at the Bureau d'Information du Justiciable in Bordeaux. In addition, 16 municipalities in the Bordeaux region provide this legal service in cooperation with the E.N.M. The pragmatic learning obtained by students in interchanges with citizens is organized in conjunction with the local bar. Along with humanizing the meaning of the exercise of justice, another goal of public interest legal service work is developing constructive collaboration between future magistrates and active lawyers. In 1983, more than 1,000 citizens took advantage of the B.I.J. option.

The program of the E.N.M. includes exchanges with other professional schools responsible for the formation of groups in fields connected to the administration of justice, e.g. social workers, parole officers, prison guards and police. The seeds of the inter-school connections in the 1980s were sewn in the initiatives taken by the Syndicat de la Magistrature during the late 1960s and early 1970s. In the first struggle with the government, the union created a coalition of labor unions representing most of the specialized occupational and educational groups linked to the E.N.M. in the 1980s program.

Students at the E.N.M. are encouraged to develop their abilities in foreign languages. Each week professors of English and German are available for a two-hour period. In addition, there is provision made for students wishing to develop knowledge of other languages.
Throughout the period of professional legal training, the representatives of the students and of their unions — by the 1980s there were two labor unions representing magistrates around the country and at the E.N.M. — are able to participate in shaping the development of their education.

The two ultimate goals of this formal legal training are as follows: "to favor the acquisition of technical competency" and "to develop reflexivity in each student and the capacity to adapt to the evolution of problems in the contemporary world through the exceptional openness that the school offers." These purposes are more than just words put on paper. They are values expressed by simple acts of welcome to the E.N.M. in Bordeaux and by thoughtful answers to complex questions which were posed to the directeur during research conducted in the Spring of 1985.

VI. Reform Proposals

With the exception of Louisiana, United States law students are seldom exposed to either the modalitites or processes of a code law justice system. Research which shows the significance of case law within the French code law is still unpublished as are findings which challenge the dichotomy of case law/common law categories for professional training and critical analysis. Nevertheless, the years have revealed that there are blurred boundaries and similarities as well as differences between code law and common law systems. Attorneys who work in the military, with social security, or under state family and labor relations codes can easily attest to the arrival of code law in our justice system. In addition, studies of alternative dispute fora and the politics of informal justice have revealed multiple and overlapping legal systems, jurisdictions and codes. Thus, the first and most essential reform would be to escape from the fantasy that lawyers do not need to learn about or understand unitary or code law relations and justice. (It would be of equal benefit for the French to recognize that the codes do not eliminate key elements of the common law experience.) In other words, I

25. *Id.* at 20. I have appropriated the term "reflexivity" from a conference on "Reflexive Law and Regulatory Crisis" sponsored by the Disputes Processing Research Program of the University of Wisconsin-Madison Law School in 1983. The complex idea of reflexive law, as elaborated by Gunther Teubner, is, in my mind, linked to the French idea of *reflexion* and the early-1970s movement of educational reform. In my view, Teubner's "codetermination" is reflexively related to the *Syndicat de la Magistrature*’s "cogestion."
believe that the need to transfer knowledge and understanding of code law processes, methods and education to our common law system is long overdue.

The most radical shift in accomplishing the first reform would be to develop a modified form of separate learning tracks or schools (based upon the French model) for judges, prosecutors and lawyers. Core reasons for such a division would be a) documentation of the existence of different as well as unique needs for training or knowledge in discrete legal careers, b) evidence that the mixing of career groups at the initial phase of training undermines development in separate occupations, and c) proof that a division in training enhances the ability to give justice in a uniform, fair and equitable fashion.

The application of the French system to the American pluralistic system has a contingent and relative value and meaning rather than either an absolute or indeterminate value and meaning. The contingencies are a function of the complexity of multiple and overlapping jurisdictions and a function of the conflicts between different groups and individuals who wish to keep power and control in legal education. At this stage in the history of American legal education, it is doubtful that state-controlled public-interest non-profit justice — factors of crucial significance in the successful development of the French method of training magistrates — would take hold. In turn, the American adaptation of specialized learning tracks would, of necessity, be very different from the French separation. In order to test the theory that the benefits of special and separate education for magistrates outweigh the costs, it is necessary to identify the problems of obtaining justice in contemporary America. Nevertheless, we can focus our efforts on the short-run task of finding a method to determine if the French curriculum would reduce or resolve problems faced by Americans in obtaining simple justice.

The capacity of the École Nationale de la Magistrature pedagogy to be transferred and applied with legitimacy outside France offers proof that it is not a culturally-specific program. (M. Desclaux had just returned from Cairo when I interviewed him. He was sensitive to the needs and problems associated with the interplay among traditional, Islamic Law, Egyptian Code law and French E.N.M. pedagogy.) The problems experienced by the Egyptians and the Chinese will be of help in anticipating problems in the United States. There will be new and different problems given the significant differences between French and American legal cultures.

Co-management as updated and amplified through the A.I.R. pro-
gram offers an opportunity for the American law student to knit together otherwise fragmented pieces of legal learning. A "menu a la carte" would give the student the chance to set up horizontal as well as vertical links among core courses. The successes of undergraduate Integrated Liberal Studies at the University of Wisconsin suggests the positive value to be found in perfecting such synthetic skills. The aim of developing the ability to think in holistic analytical ways about the judicial process and judicial products — means and ends — and their ongoing relationships would be served with the addition of shared-management learning. The idea of a personalized guide through the years of study of the law, in place of the impersonal and dehumanized pattern which seems to dominate much of contemporary law schooling, could help humanize the courts and the law as well as the experience of legal education. The tendencies of reification which are built into contemporary pedagogy could be reduced if the pattern of training was altered along these lines.

If law students are to produce a work of synthesis like a thesis, then growth of the curriculum in the human sciences — that special combination of our humanities and social sciences which has developed in France — becomes more necessary than ever. Some faculty may argue that French students are merely developing skills which American students bring with them from undergraduate training. The main goal in proposing the reform is to create non-legalistic moments in what is otherwise a frequently mechanistic professional training experience. The purpose is to have sustained reflection upon the human sciences which will lead to the kinds of probing questions and research developed by French magistrates as part of their formation permanente. For such work to progress, we need regular, rigorous and systematic interchanges between law faculty and human scientists. Exchanges between institutions and groups responsible for training other members of the legal industry — parole officers, police and paralegals — should also become a part of the expansion of the scope of American legal training. Training in languages — foreign and computer — must become a part of the law school curriculum as soon as possible. Failure to include both kinds of language skills training results in the

26. My first college teaching experience was in the Department of Integrated Liberal Studies and arose from my pre-college training in "core curriculum" in the New York City Public Schools. The interdisciplinary linkages which were critical in my formative years remain a source of enjoyment as does my intense work in educational politics.
inability to function at the global level. Failure to alter the breadth and depth of law school curriculum leads to professional ossification and a paralysis of justice. The legitimacy and the capacity of the American legal system will be undermined, if not thoroughly discredited.

As are French students, our students enrolled in legal training programs should be compensated for their work. It is time to regard study and scholarship as legitimate and socially-valuable uses of human labor power. Otherwise, we will continue to denigrate and devalue critical thinking in legal education. The analytical reflection required of the student must be materially compensated if post-graduate activity is to place full value upon contemplation and thought. In turn, legal educators will be able to turn their attention to the dynamics of formation permanente — the professional post-graduate study required of public servants in the judicial order in France. The modalities of applying for and receiving support can and should be linked to a period of required public service in research and litigation. Such a requirement will go against the current trends of disbanding fundamental legal services and making justice a function of material power. The new requirement could also be applied to the development of lifelong learning and teaching which are essential to the effort to obtain justice.

Inspired by the French program of “opening toward the city,” law students would benefit from planned interaction between school and community, executed in a way that connects a cohort of individuals to historical realities. Such work provides a structure which lends itself to synthetic thinking. More importantly, the contact allows for a clearer understanding of the interactions between institutions, people and things. Absent such a connection, the tendencies of reification will persist and continue to bias legal education. In other words, intensive exposure to current social realities in France, generates an engagement in legal studies which is worthy of emulation.

VII. Conclusion

The ideal of passionate concern for humane justice is served by the pattern of training which is open to French auditeurs de justice. There is no ironclad guarantee that the graduate, either French or American, will be critical, analytical or compassionate. However, the French model provides a structure (as an interactive process) which limits the number of contingent possibilities in a desirable way. The transformation of American student culture in legal education, in the final analysis, comes into conflict with the mainstream culture of the contempo-
rary legal world. In time, the value conflicts between individual and social experience will force a clarification in the purposes and associated values built into the learning process. Over time, we can hope that those trained in the traditional legal system will develop the engagement that comes with changed social relations in learning. As the classroom preparation for the courts changes, the courts can become a classroom for changed social relations.
Application Of The “Tipping Point” Principle To Law Faculty Hiring Policies

Derrick A. Bell, Jr.

Derrick Bell is a professor and former dean at University of Oregon School of Law. Previously he taught at Harvard Law School for ten years. An experienced civil rights litigator, he has taught and written extensively in the areas of civil rights and constitutional law.

The cry of the harassed supervisor — “Dammit, don't just stand there; do something, even if it is wrong!” — is a desperation-born admonition that could well be the anguished plea of black and other teachers of color, called out from increasingly tenuous positions on the faculties in America's mainly white law schools. Consider the facts. The modest but measureable growth in the number of black and brown teachers on the faculties of white schools that climbed from almost none to '200 in the last 15 years has stagnated and is now in decline. Moreover, a conference of Minority Law Teachers held at the University of San Francisco Law School in October, 1985, found teachers of color suffering the same debilitating work tensions, isolation and alienation reported by their predecessors in the early 1970s. The SAL...
port describes them as “token presences on their campuses, assuming the multiple burdens of counselor to minority students, liaison to the minority community, and consultant on race to administration and colleagues, while working to establish themselves as effective teachers, productive scholars and congenial colleagues.”

Those of us who accepted teaching positions in white law schools back in the early 1970's, saw ourselves as pioneers, creating exciting new careers for ourselves, and opening up previously closed opportunities for other black and brown lawyers who followed us. We realized that the challenges would be great, the chances for failure numerous, and the strain and stress enormous. But we had been chosen, and we were determined to overcome.

Now, we realize that the initiation period never ended. Minority teachers entering the profession today are able to testify from personal experience as they agree with the complaint of a black teacher who reported a decade ago:

[You cannot get away from the fact that there is a presumption that a minority is incompetent. The minute you walk into a classroom the question is asked, ‘Why are you there?’ The reason you are in a law school is because of an affirmative action program. An affirmative action program has been defined as ‘lowering the standards to allow us in’. Therefore, you have a burden and you cannot get away from it.]

Of course, the sense of many in the law school community that teachers of color gained their jobs by virtue of affirmative action policies rather than by meeting traditional measures of merit does not deter assignment of every imaginable representational role. “We knew you would want to serve on this committee, work with the minority students on their annual conference, speak to this black student who is having trouble with torts, and mediate the differences between the minority students and Professor X who inadvertently told a racist joke in class.”

The list is endless and would easily occupy the fulltime of an assistant dean. And yet such extracurricular duties are seen as part of the minority teacher’s job . . . until, of course, the time arrives to evaluate

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Minority Law Conference); Bell, The Black Lawyer as Law Teacher, Minority Opportunities in Law for Blacks, Puerto Ricans & Chicanos 63 (1974).

4. Supra note 2 at 1.

the teacher for promotion and tenure. Then, the entire focus of review is on the quality of the teaching and writing. Either no allowances are made for the compromises to scholarly activity resulting from time devoted to racial representational roles, or the estimates made for such activity wholly underestimate both the time and energy expended in trying to compensate single-handedly for the school's inability to create a decent learning environment for students who for so many years were entirely excluded or admitted under the token policies now utilized to hire black and brown faculty.

And yet the value of racial and ethnic diversity in law teaching has not diminished. Given the increased racial tensions in the nation and around the world, the need for the special expertise and the hard-earned perspective of black, Hispanic, Asian, and Indian law teachers has increased as their representation declines. Clearly, we need to do something even if at first glance it seems unrealistic and unorthodox.

Let us examine the problem closely. First, most law school deans and faculty concede the inadequacy of the token one or two minorities on their faculties, but claim they simply cannot find qualified minority candidates. It does take earnest effort to find minority candidates with teaching potential, but the record too clearly shows that most law schools do not aggressively search for minority candidates until pressure from minority students and liberal white students and faculty makes such a search politic if not essential. When undertaken with vigorous commitment, able persons are located, recruited, and hired.

Probably with this experience in mind, the SALT report urged law schools to hold "designated positions open until they are filled by high caliber minority faculty." The response from law school administrators was predictably negative. Critics viewed the recommendation as unproductive given the small pool of qualified minority candidates, impolitic given the current opposition to affirmative action policies, and possibly unconstitutional given the likely view of a Supreme Court majority about the validity of building specific racial quotas into a graduate school's admissions policies.

The counter-arguments seem sufficient to those deans and faculty members whose interest in an enhanced minority presence has been di-


7. Id.

luted in recent years by tightened budgets and declining student enrollments. Students, black and white, are less willing to risk their academic class standing to engage in prolonged campaigns for minority faculty. Resistance to the hire-someone-or-else tactics have tightened, and even successful drives sometimes result in pyrrhic victories when newly-appointed minority faculty members announce that since they were "hired on their merits" they owe no special obligation to administer to the needs of minority students.

It is clear. A continued reliance on pragmatic considerations in the current, conservative, political environment will reduce the number of minority teachers coming into legal education to a barely discernible trickle. In addition, it will tighten the pressures on existing teachers of color with the predictable result that each year their numbers will decrease. One of the most painful aspects of this decline is the realization by those holding positions that their very presence on the faculty constitutes a barrier to hiring other black or brown teachers, undermining even their most strenuous minority-hiring efforts.

It is not easy to describe the feeling of despair when the faculty rejects a qualified teacher of color who you know full well they would quickly hire were you to suffer a heart attack and drop dead. "Is it," the minority teacher wonders, "that I am doing such a good job that they see no need to hire others like myself? Or is it, rather, that my performance is so poor that they refuse to hire anyone else for fear of making another serious mistake?"
Whatever conclusion the teacher of color reaches, it is unavoidable that he or she is less a pioneer blazing a trail for those who follow than an involuntary barrier whose token presence has removed whatever onus is borne by an all-white institution. Actually, and paradoxically, if the first minority teacher's performance is very good, it will be harder rather than easier to convince the faculty to hire a second nonwhite teacher. Even this “let's not test our luck” attitude is condescending and far from a compliment.

In a recent law review article, I examined the fantasy inherent in American racial issues. The piece relies heavily on fiction and uses a narrative style throughout most of its length. In one allegorical story, *The Chronicle of the DeVine Gift*, a lone, black teacher in a prestigious law school is weary from overwork, and frustrated at her inability to find other teachers of color with qualifications acceptable to the faculty. But with recruiting help from a secret foundation, she is able to produce five highly-qualified black, Hispanic, and Asian candidates. When it appears the minority teachers may reach 25 percent of the faculty, the school calls a halt and refuses to hire an outstanding black applicant.

The ensuing discussion reviews arguments the law school might use to defend its refusal to hire the minority candidate in the unlikely event that a court found the candidate of color more qualified than his white counterpart. Among these, the school argues that it has a larger percentage of minority faculty than any of its competitors, that an even greater number will alter the school's image and jeopardize its recruitment of students, faculty, and its alumni support. In effect, the law school argues, “our record of minority hiring is the best in the country and we should not be required to do more until other institutions do as much.”

Public housing authorities and private apartment developers offer quite similar justifications for limiting the percentage of minorities permitted to rent or purchase housing in a particular residential area or apartment complex. Housing people's fear to exceed this percentage will convince whites that the neighborhood is “turning” or “tipping” from white to black or Hispanic. Action based on this conviction turns a fear into a self-fulfilling prophesy. “The tipping theory,” according to one review of the phenomenon, “posits that every community has a

‘tipping point,’ a specifiable numerical ratio of blacks to whites beyond which the rate of white migration out of a transitional area will increase rapidly, eventually yielding a predominantly black community.” Courts have approved the policy on the grounds that it furthers the national goal of integrated housing. And several legal commentators have expressed support for “tipping” policies because they would “effectively prevent resegregation by keeping the number of blacks just below the point at which mass exodus is expected to occur.”

Anthony Downs explains the tipping point phenomenon as a desire by whites for middle-class dominance. White people tend to confuse ethnic and socioeconomic status because a high proportion of minorities are low-income persons. But basically, according to Downs, the middle-class wishes to “protect the quality of life it has won for itself through past striving and effort.” In his view, the middle-class dominance goal of whites can be achieved without completely excluding minorities because “white insistence on what amounts to ‘neighborhood racial dominance’ does not bar the establishment of stable racially integrated areas.”

The parallels are not exact, but it is clear that something other than a total commitment to merit motivates law faculties when they hire and promote. Merit and tenure are contradictions. Tenure serves many functions deemed worthwhile by most teachers, but merit is hardly one of them. Any rational commitment to fielding the best possible faculty would use selection processes that involved frequent evaluations and comparisons with all who sought the positions of those holding them.

11. See, e.g., Otero v. New York City Hous. Auth., 484 F.2d 1122, 1140 (2d Cir. 1973) (limitation on number of minorities permitted to rent apartments approved on finding that the action “is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.”) Litigation over the validity of a “benign quota” limiting minorities to 36 percent of a 5,881-unit, 46-building rental project in Arthur v. Starrett City Assocs., 79 Civ. 3096 (ERN) (E.D.N.Y. Apr. 2, 1985), was settled under a consent decree requiring defendants to provide an additional 175 apartments for minorities over five years.


14. Id. at 2976.

Determining the best teacher for each position would be a very difficult task. Agreement on what standards should be used in a free-for-all academic competition could take years. Perhaps during the long struggle to identify and agree on appropriate evaluation instruments, defenders of the current system would come to concede that an individual's performance can vary because of a myriad of factors and conditions that receive little attention under current selection procedures that place high priority on the applicant's law school grades and the prestige of that law school.

Proponents of the status quo might well maintain that no quality lawyer would sacrifice opportunities in practice to teach law if his career were subject to frequent review and the possibility of interruption by a competitor found more qualified. This is a strange position coming from those who teach and often espouse the efficiencies of a free enterprise economic system. And yet it is an argument likely to prove convincing to many.

Stability and job security are strong attractions to lawyers who enter law teaching, regardless of their color. And it is not necessary to restructure the profession in order to improve the current crisis in the status of minority-race faculty members. What is essential is that faculties of mainly-white schools be honest, for the facts are:

- Traditional qualifications are useful but do not enable accurate predictions about the performance of law teaching candidates. Many highly regarded law professors, including most in this group who are not white, did not graduate from one of the top schools or did not earn the highest grades in their schools.

- Adherence to traditional qualifications, and the refusal to consider success in practice and qualities of maturity, commitment and judgment, will limit the number of teachers of color in most law schools with the now predictable adverse consequences on the teaching performance, scholarly production, and eventually the teaching longevity of such teachers.

- Qualifications aside, law school faculty (other than those on the four traditional black schools) consider their schools as "white schools" and would resist hiring beyond a certain number of even the most qualified teachers of color.

Given these conditions, there is only one alternative to the current counter-productive policies of tokenism in minority hiring. Law faculties must sit down, determine just how many teachers of color they and their schools can accept or tolerate, and then work out a time schedule that calls for locating and recruiting that number of minority teachers.
in the shortest period that budgets will permit. Those who respond that
such a procedure would constitute an unconscionable stigmatizing of
non-white faculty of a character as shameful as the use of “tipping
points” to determine the percentage of integration of a residential com-

munity are absolutely correct. But just as policies of controlled racial
occupancy enabled a degree of housing integration in areas that other-
wise would have remained all-white or become all-black, so adopting
similar procedures in legal education, could result in a much-needed
increase in the number of truly integrated law faculties, and a far more
productive and humane career for all teachers of color.

I am ever grateful to Professor Paul Freund who lent his name and
considerable prestige to a statement about the positive value on the law
of efforts by blacks to achieve their rights. 16 Every student of American
race relations knows his statement is true. Professor Freund observed
that “[t]he frontiers of the law have been pushed back by the civil
rights movement in many sectors that are far broader than the interests
of the movement itself.” 17 And I am convinced that law schools willing
and able to move beyond destructive tokenism in minority hiring to a
truly representative percentage of teachers of color, will benefit in both
the short and the long run.

In the short run, schools (there will not be many) willing to play
pioneering roles in minority hiring policies will receive quite positive
public attention even during this era of conservatism on civil rights.
When I was named dean of the University of Oregon Law School, the
school received far more commendation than criticism from both the
media and the community. In the next few years, we were able to inter-
est white faculty candidates with offers from other schools far above
what we could afford because they viewed Oregon as a progressive
school, one willing to take risks and break new ground. Any number of
white students have told me they chose Oregon for similar reasons.

Admittedly, the parallels are not precise. I left Harvard Law
School to become the dean at Oregon. Even on traditional criteria, I
was as qualified as the other candidates. But the benefits of my pres-
ence at Oregon were not in the main based on my reputation, but on
the fact that I was black and Oregon had hired me as dean. Schools
will gain similar benefits if they hire a truly representative number of
teachers of color with experience and potential that will be enhanced

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17. Id. at 364.
by the opportunity to work in a more supportive atmosphere than now exists. Affirmative action issues may be raised, but the judicial deference traditionally accorded university faculty hiring and promotion decisions\textsuperscript{18} should insulate the school from successful litigation as long as no specific number of faculty slots are definitely set aside on the basis of race.\textsuperscript{19}

In the long run, both the law school and the society will benefit from the perspective that many teachers of color have gained the hard way. As racial turbulence in our society increases, as more and more of the nation’s income goes to fewer and fewer families, the need increases for new initiatives in using law to effect social reform. We simply cannot permit W. E. B. Du Bois’ 1903 prediction, that the problem of the twentieth century would be the color line,\textsuperscript{20} to retain its validity into the twenty-first century.

The presence of a nucleus of able teachers of color — black, Hispanic, Asian and Indian — working within the structure of established, main-line institutions of legal education, receiving help, support, and comment from white colleagues, could make a major difference in avoiding the domestic catastrophe that looms as large as that of a nuclear holocaust. And if, in the end, it fails, those who tried will at least have the satisfaction of having seen a new vision, taken risks to realize it, and failed, yet moved forward.

\textsuperscript{18} See Bartholet, \textit{Application of Title VII to Jobs in High Places}, 95 \textit{Harv. L. Rev.} 945 (1982).
Anyway, we've got a lot of ground to cover, so I strongly recommend that you not make the mistake of falling behind in the reading.

That goes for you ladies too! I hope you don't think I'm going to be any less tough on you just because you're women.

Remember, girls - if you can't stand the heat, get out of the kitchen! Ha, ha! Ha, ha, ha!

Haw, haw! Haw!

He's a riot.

Better get used to it, honey...
The Law School As A Model For Community*

Michael Burns

Michael Burns is a professor at Nova Law Center, having also taught at the Santa Clara, Golden Gate and John F. Kennedy schools of law. His fields of interest include constitutional law, sex discrimination, family law and torts. He and the law review editors have produced this symposium.

My approaching fortieth birthday may render this endeavor my final opportunity to espouse views which will be benignly regarded as youthful idealism rather than the foolish babbling of one who should know better. Unless I hastily disavow this article in the coming months, it shall be assumed that gray hair is rapidly replacing gray matter. With advancing age, one should at least gain a deeper perspective on the passions of youth. Pathetic is the sight of a 60's child who is unable to accept the compromises and responsibilities of adulthood and whose entrepreneurial potential has been lost, sad to say, amidst the misguided meanderings of the brain that has turned to mush.

Hogwash. “Some of my best friends” who are 40-plus, with brains relatively intact, lead principled lives in which the personal is very much political and in which hearts are valued as much as minds. But our voices must be heard, lest we all fall victim to the “upscale renova-

* I would like to thank my colleagues around the country who took the time to read earlier drafts of this article and who cared enough to offer specific, constructive and occasionally painful criticism — Barbara Bezdek, Cynthia Epstein, Nancy Erickson, John Flackett, Janet Motley, Carol Sanger, Paul Savoy and Matt Wilkes.

1. Old friends have reminded me that I felt this way approaching my thirtieth birthday as well.

2. During recent “debate” tours, there were still a few cheers and some laughter for Abbie Hoffman, not Jerry Rubin, for Benjamin Spock, not Sam Hayakawa. At one Hoffman-Rubin event, stockbroker Jerry “came on stage in neat suit, neat tie, neat shirt, carrying two big bottles of Perrier. He made a pitch for ‘entrepreneurial capitalism’ and ‘changing the system from within’ at which Abbie held his stomach and grimaced . . . , then whooped ‘Know how a Yuppie spells relief? R-O-L-E-X!’ He then threw a watch into a Cuisinart along with the keys to a Porsche, a handful of microchips and the intestines of a Cabbage Patch doll. He brewed this into a ‘Yuppie Stew.’” Herb Caen, San Francisco Chronicle (1984).
tion" of liberal thinking. In particular, we as legal educators must speak up. Day in and day out we are training the next generation of lawyers, men and women who will constitute the profession which, for better or for worse, remains the most powerful in our nation. How we serve as models and how we develop and administer our training grounds have enormous implications. How we conduct ourselves and how we maintain our own backyards — to what extent we practice what we preach — will determine the success of our efforts toward broad-based social change. As academics, we fall too easily into the role of critical theorist and observer, offering "the system" insightful free advice as to how it might better operate. Yet, as Robert Pirsig explains, "that kind of approach starts it at the end and presumes the end is the beginning . . . The social values are right only if the individual values are right." Radical social change will not occur unless it is embodied in individuals whose lives are the message. What counts are the choices we make for ourselves, including the ways in which we structure our immediate environments, i.e. the law schools, where we devote our working lives.

For those of us still clinging to the notion that our legal system can serve as an effective vehicle for freeing people to realize their potential and for reducing the disparity of income and opportunity, the continuing presence of hierarchy within the law school environment constitutes a formidable stumbling block. Law students, who are trained in schools where roles are strictly defined and where power and decision-making lie with the tribal elders, are likely to reproduce such hierarchy upon graduation in the context of law practice, business and other endeavors. Yet many of us remain ineffectual hypocrites to the extent that we are silent while the institutions which support us, to which we devote much of our lives, perpetuate the status quo. The law school community, where students spend three intense and formative years, must serve as a model for the kinds of societal institutions we hope to create. To do less in the interest of "neutral principles" is to abandon our cause.

3. I recently met a man my age who patted me on the shoulder, acknowledged that he, too, was once a "60's dreamer", and explained that he was now "into environmental real estate," "renovating" small shopping complexes in "upscale" neighborhoods with "food boutiques" for the "former flower children who are now making things happen."


As I struggle to develop some kind of blueprint for law schools as models for community, I find myself at one of life’s junctures when everything appears to be related; in the words of John Muir, “When we try to pick out anything by itself, we find it hitched to everything else in the universe.” The points of commonality appear with greater frequency. Lessons once learned while organizing communities around issues of civil rights reappear when developing goals and programs for the law school. The experiences of intentional communities — whether founded upon a common spiritual belief, socialist principles, or a liking for vegetables — have relevance to the law school family. Humanistic psychology and the understanding of self and of personal relationships become invaluable in the teaching of law. Learning to care for one’s self in a holistic fashion — honoring the connectedness of mind, body and spirit — has importance for lawyers in the way we lead our lives, address our clients’ problems and shape the body of law.

Finally, the women’s movement and developing feminist theory have served to tie together for me these influences of civil rights, collectivism and humanism. Feminism makes its greatest contribution, in fact, by recognizing the interrelatedness of so many social issues of our time — by promoting coalition politics as a matter of substantive doctrine, not just political expediency. The theoretical underpinnings of feminism necessarily seek to promote the contribution of other disenfranchised groups — racial and ethnic minorities, the elderly, children and gays, for example — of the environmental defense movement and of the peace movement. Thus, feminism, in this most inclusive sense, becomes an essential — and heretofore missing — component of my model law school.

In Part I of this article, I will offer the following thesis: As a result, at least in part, of child-rearing and socialization practices, white, middle-class American women develop different attitudes and social perspectives than do their male counterparts. Although we are all composites, in varying degrees, of “masculine” and “feminine” qualities, generalizations can be drawn based upon contemporary theories of gender psychology and ancient Eastern philosophy. For example, separation, autonomy and individual rights orientation may be regarded as

6. The women’s movement has traditionally supported other causes and has recognized the bond among oppressed people. See, e.g., K. MELDER, BEGINNING OF SISTERSHOOD: THE AMERICAN WOMAN’S RIGHTS MOVEMENT, 1800-1850 (1977) (describing the women’s movement’s involvement in the issue of slavery and civil rights for Black people, prohibition, educational reform, health reform and the peace movement).
"masculine", while connectedness, cooperation and inclusion are "feminine." An ideal world would reflect a dynamic balance of these qualities, yet the public sphere, especially legal institutions, has been male-dominated and, thus, overwhelmingly reflects "male" values. Correcting this imbalance will go far, I suggest, toward helping us, as lawyers, resolve human problems and maintain social order. Believing that our training grounds necessarily reflect our values and ideals, I will address in Part II various aspects of the law school environment, proposing a number of reforms which manifest this masculine-feminine fusion.

We have the opportunity to diversify and liberate legal education, a process which entails, first, "looking closely at ourselves, at our own qualities, and seeing what we want more of and what we want less of in our gender-differentiated behavior and values;"9 and second, looking outward at the institutions we inhabit to see how they "permit, encourage or inhibit the full expression of our values"9 and ourselves. Sadly, our culture has required us — men and women — to assume such deep disguises, to lead needlessly circumscribed lives. Yet by developing the repertoire of masculine and feminine qualities within us all, we can one day achieve that graceful integration which is "the partnership of our humanity."10

One final caveat: Like any theory of human psychology, the ideas

7. I do not mean to suggest a biological or psychological deterministic view of gender. Strictly dichotomous thinking vis-a-vis gender distinctions may rightly be regarded as a political rationalization for maintaining power differentials. As Cynthia Epstein notes, "The ability to appreciate complexity and ambiguity — to reason in terms of ranges and dimensions, rather than discrete qualities — is more appropriate to today's world." Epstein, *Ideal Roles and Real Roles or the Fallacy of the Misplaced Dichotomy*, 4 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 35 (1985).

For purposes of this article, it is not necessary to take sides on, much less resolve, the "nature-nurture" debate, which continues to draw such attention in feminist circles. Nor need the reader accept any of the gender distinctions offered in Part I in order to support the specific proposals for legal education offered in Part II. I might have avoided "masculine" and "feminine" labels altogether and simply advocated the infusion of certain values which have been largely ignored in the field of law. Yet, in my experience, the gender distinctions discussed in Part I contain more than a grain of truth, and I offer them for your consideration.


9. *Id.*

10. *Id.*
which follow in Part I are not carved in stone. Acknowledging this un-
certainty, I offer them as a possible context for addressing human
problems, which is, ultimately, the business of law. As you consider the
masculine-feminine distinctions which I will draw, and as you relate
them to your own experience, do not take my attributions too literally
(or personally). Just as the “reasonable man standard” is a fiction, no
one is all-masculine or all-feminine, although certain qualities are
found more generally in one sex than the other.

Nor are my proposals for legal education in Part II entirely novel.
Some may be hauntingly familiar and will serve as a nudging reminder
of what we once set out to do; and other proposals are, in fact, well in
place in certain schools and deserve wider attention. None of my sug-
gestions is offered with dogmatic cock-surity. With experience, I find
that I have fewer definitive answers and more expansive questions. The
“shoulds” and “musts” contained throughout this paper reflect the
heartfelt urgency of my concern for legal educaton, not any brash
claim to the mantle of moral legitimacy. This “model” is a beginning,
not an end — a “first draft” awaiting your collaborative efforts.
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I. Some Thoughts on Men, Women, and Synthesis

A. From Childhood to Adulthood

1. Separation and Relationship

In white, middle-class America, women usually have been the primary child rearers, at least during those “tender years”; gender identity has been a significant part of self-identity; and, thus, the process of self-identification has been significantly different for girls than for boys. Mothers and daughters view themselves as alike, as “continuous” with one another (which does not preclude women, on a less fundamental level, from finding their mothers to be negative role models or from “liking” their fathers more), and the female process of assimilation and identification is smooth and “natural”; “girls emerge from this period with a basis for empathy built into their primary definition of self.”

Boys, on the other hand, experience their mothers as different. In “defining themselves as masculine, boys must separate their mothers...
from themselves, thus curtailing their primary love and sense of em-
pathic tie.”16 Boys must work at “achieving” masculinity, and, among
their peers, this struggle takes the form of intense competition in highly
individualistic and hierarchical activities.17 “The little boy learns,” says
Margaret Mead, “that he must act like a boy, do things, prove that he
is a boy, and prove it over and over again, while the little girl learns
that she is a girl, and all she has to do is refrain from acting like a
boy.”18

Differences between male and female models of dispute resolution
have been traced to early gender-identified patterns. In a study of ele-
mental school children, Janet Lever found that, among boys, disputes
would arise frequently, engaging nearly all the players in vociferous
exchanges, but the rules would be quickly clarified and enforced so that
the game could continue.19 Girls, on the other hand, were less bound by
rules, more willing to make exceptions; “girls subordinated the continu-
ation of the game to the continuation of relationships.”20 Rules would
never take precedence over the individual.21

2. Concepts of Morality

Utilizing a familiar hypothetical moral dilemma devised by Law-
rence Kohlberg,22 Carol Gilligan interviewed two eleven-year-olds, a
boy and a girl. The “fact pattern” involved a man who must decide
whether or not to steal from a pharmacist a drug which he could not
afford to buy in order to save his wife’s life. Regarding this dilemma as

16. Id.
17. Karst at 453.
18. M. Mead, Male and Female 175 (1949).
19. J. Lever, Sex Differences in the Games Children Play, SOCIAL PROBLEMS
482 (1976). Citing Lever and Jean Piaget, Gilligan states: “In fact, it seemed that the
boys enjoyed the legal debates as much as they did the game itself . . . [and were]
fascinated with the legal elaboration of rules and the development of fair procedures
for adjudicating conflicts, a fascination that . . . does not hold for girls.” Id. at 9-10.
21. Male obsession with rules, often exaggerated in adulthood, ultimately and
ironically forces the individual to serve the system. Rules take precedence over the
individual, and one might well ask, “Who’s running whom?” Rule obsession only
makes sense, it seems to me, if people are regarded as inherently evil, self-centered and
needing to be controlled. In turn, this kind of paranoid, us-them philosophy becomes
self-fulfilling.
22. Gilligan at 25, referring to L. Kohlberg, THE PHILOSOPHY OF MORAL DE-
"sort of like a math problem with humans," the boy accorded to life greater value than to property and logically concluded that permitting the theft was the correct answer. The girl, on the other hand, responded contextually rather than categorically, sought to avoid giving a definitive answer and suggested discussing the situation with the pharmacist so as to work out some arrangement. She was sensitive to the needs of all three parties and sought to “sustain rather than sever connection.” For her, the parties were not “opponents in a contest of rights,” but “members of a network of relationships on whose continuation they all depend.” Ultimately, she decided that the man should steal the drug, not because of any contractual agreement, marital or otherwise, but because of a natural bond to every other human being — simply “by virtue of being another person.” “In a way,” said the girl, “it’s like loving your right hand; it is part of you.”

Responding to the problem with a hierarchy of values, the boy is able to cast the dilemma as “an impersonal conflict of claims,” thereby avoiding the interpersonal situation. In contrast, the girl approaches the dilemma not as a win-lose situation, but as a win-win situation in which the emphasis on inclusion is central. He “thinks about what goes first,” while she “focuses on who is left out.”

As boys approach adulthood, becoming men is largely a process of differentiating from Woman. Because a man’s sense of self is at

23. Id. at 26.
24. Id. at 28.
25. Id. at 30.
26. Id.
27. Id. at 57.
28. Id.
29. Id. at 32.
30. Id. at 33.
31. Id. Further interview questions addressing the children’s concepts of responsibility produced equally striking differences. Gilligan describes the boy’s response:

   Beginning with his responsibility to himself, a responsibility that he takes for granted, he then considers the extent to which he is responsible to others as well. Proceeding from a premise of separation but recognizing that 'you have to live with other people', he seeks rules to limit interference and thus to minimize hurt. Responsibility in his construction pertains to a limitation of action, a restraint of aggression ... Thus rules, by limiting interference, make life in communities safe, protecting autonomy through reciprocity, extending the same consideration to others and self.

   Id. at 37-38.
32. Karst at 453.
stake, he must create an image of Woman which he can play off of, from which he can plainly, demonstrably, overtly distinguish himself. Man — and, I repeat, neither you nor I, not most men, nor particular men, but all of us in varying, partial degrees — he must objectify Woman and attribute to her qualities which he must desperately avoid possessing himself: delicacy, timidity, domesticity, passivity, dependency.33 “Hence man needs woman — not individual women, who differ from each other in the same way that men do, but this construct of the mind called woman — to define himself.”34 That is the process of objectification.

With respect to patterns of adult behavior, this male need to objectify has produced among men a more highly developed sense of separate identity that is individualistic and competitive, often isolated and lonely. For women, the definition of self is more inclusive. Women’s lives and their hopes for the world are founded, it seems, in relationships.

These contrasting masculine and feminine approaches are confirmed by the responses of a man and a woman, each twenty-five years old, to questions involving the meaning of morality. The man believes that morality means not interfering with the rights of other individuals: “Act as fairly as you would have them treat you.”35 The woman, on the other hand, speaks of mutual dependency, “that a person’s life is enriched by cooperating with other people and striving to live in harmony . . . .”36 She pays attention to what people share in common and has “a very strong sense of being responsible to the world.”37 While the young man “worries about interfering with each other’s rights,”38 the young woman “worries about the possibility of omission, of your not helping others when you could help them.”39

For men, maturity means autonomy and individual achievement; for women, it is responsibility and care. Men tend to seek solutions to

33. Id.
34. Id. at 453-454. A goal for many men today is to learn to be less reactive to women — whether he be the “tough guy” who fears women and his own dependency and, thus, demonstrates control by “keeping her in her place,” or the “nice guy” who chooses behavior which he thinks will endear him to women. Learning not to be reactive does not mean being insensitive, but, rather, learning to appreciate one’s self.
35. Gilligan at 19.
36. Id. at 20.
37. Id. at 21.
38. Id.
39. Id.
problems of morality and justice in a hierarchy of abstract rules, while women decry this laissez-faire approach because of "its potential justification of indifference and unconcern."\textsuperscript{40} Instead, women "seek to widen the range of inquiry in the hope of finding solutions that preserve human relationships."\textsuperscript{41} Thus, the morality of rights differs from the morality of responsibility in its emphasis on separation rather than connection, in its primary consideration of the individual rather than the relationship.\textsuperscript{42}

B. Yin and Yang

1. \textit{The Dynamic Balance}

This distinction between separation and connection is reflected in the Chinese concept of yin and yang. While yin action is conscious of the environment, yang is conscious of the self.\textsuperscript{43} Most important, however, is the understanding that "what is good is not yin or yang but the dynamic balance between the two; what is bad or harmful is imbalance."\textsuperscript{44} This ideal balance is reflected in modern systems theory:

Systems theory looks at the world in terms of the inter-relat-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 22. If women tend to be deferential to other's judgments, that deference is not just the product of social subordination; it also springs from a healthy moral concern for others, growing out of an inclusive sense of self. Furthermore, the "male" severing of an existing, natural connection may well be the origin of aggression. An overemphasis on autonomy and hierarchy, like computerized war-making, makes it easier to do "violence" to our fellow human beings when we do not have to witness the damage caused by our indifference.
\item Karst at 484.
\item Concluding her chapter entitled \textit{Images of Relationships}, Gilligan contrasts the "hierarchy of rights" with the "web of connection," which, in turn, produce differing perceptions of danger. By and large, men perceive danger in intimacy while women perceive danger in impersonal achievement situations. Men fear entrapment, women fear isolation.

Thus the images of hierarchy and web form different modes of assertion and response: the wish to be alone at the top and the consequent fear that others will get too close; the wish to be at the center of connection and the consequent fear of being too far out on the edge. These disparate fears of being stranded and being caught give rise to different portrayals of achievement and affiliation, leading to different modes of action, different ways of assessing the consequences of choice. \textit{Gilligan} at 62.
\item Capra at 38. One might call the former "eco-action," the latter "ego-action."
\item Id.
\item Id. at 36.
\end{enumerate}
\end{footnotesize}
edness and inter-dependence of all phenomena, and in this framework an integrated whole whose properties cannot be reduced to those of its parts is called a system . . . All . . . entities — from molecules to human beings, and on to social systems — can be regarded as whole in the sense of being integrated structures and also as parts of larger wholes at higher levels of complexity.48

Arthur Koestler has coined the word “holons” for these subsystems which are both wholes and parts. Each holon has two opposite, but complementary tendencies: “an integrative tendency to function as part of the larger whole, and a self-assertive tendency to preserve its individual autonomy.”48 In a healthy system — an individual, a society, or an eco-system — there is a balance between integration (yin) and self-assertion (yang).

What is truly good is the “synthesis of binary values,”47 yet what passes for good in our culture are one-dimensional values.

Courage with a capital C, Toughness, Loyalty, Individualism, Tenacity . . . Each one-dimensional value represses its oppositional virtue, e.g. caution, tenderness, rebellion, cooperation, etc. and regards these as vices, thus dooming our culture to a virulent ecological lopsidedness, and turning moral arguments into shouting matches.48

When we afford ourselves the opportunity to step out of our daily roles and are able, in those rarest of moments, to observe our lives from the vantage point of the mountain top, with wondrous eyes we see “the relativity and polar relationship of all opposites.”49

From the earliest times in Chinese culture, yin was associated with the feminine and yang with the masculine.50 From his research, Fritjof Capra is able to make the following associations:51

45. Id. at 43.
46. Id.
48. Id.
50. Capra at 36.
51. Id.
<table>
<thead>
<tr>
<th>YIN</th>
<th>YANG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feminine</td>
<td>Masculine</td>
</tr>
<tr>
<td>Contractive</td>
<td>Expansive</td>
</tr>
<tr>
<td>Conservative</td>
<td>Demanding</td>
</tr>
<tr>
<td>Responsive</td>
<td>Aggressive</td>
</tr>
<tr>
<td>Cooperative</td>
<td>Competitive</td>
</tr>
<tr>
<td>Intuitive</td>
<td>Rational</td>
</tr>
<tr>
<td>Synthesizing</td>
<td>Analytic</td>
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</tbody>
</table>

Just as in human biology, where masculine and feminine characteristics are "not deeply separated but occur in varying proportions in both sexes," the Chinese believed that all people, men and women, go through yin and yang phases. This view of human nature is in "sharp contrast to that of our patriarchal culture, which has established a rigid order in which all men are supposed to be masculine and all women feminine, and has distorted the meaning of those terms by giving men the leading roles and most of society's privileges." 53

52. Id.

53. Id. Both yin and yang, integrative and self-assertive tendencies, are "necessary for harmonious and social and ecological relationships." Id. at 44. They are also necessary for the balanced development of each individual, male or female. Yet in our society, we have created a gender-based division of labor: when the ambitious, goal-oriented individuals need rest and revival through sympathetic support, human contact and times of carefree spontaneity and relaxation, women are expected, often coerced, to fulfill these needs. They are the secretaries, receptionists, hostesses, nurses and homemakers who perform the services that make life more comfortable and create the atmosphere in which the competitors can succeed. They cheer up their bosses, help smooth out conflicts in the office, and are the first to receive visitors, entertaining them with small talk. At home, they handle affairs so as to minimize the male's distractions from his worldly pursuits, protecting him from the trivial problems of family life. Women carry the emotional baggage, running "back and forth explaining the children and their father to each other." Beverly Stephen, SAN FRANCISCO CHRONICLE, June 10, 1985, at 17, quoting M. MCGILL, THE MCGILL REPORT ON MALE INTIMACY (1985). All these services involve yin or integrative activities, and "since they rank lower in our value system than the yang, or self-assertive activities, those who perform them get paid less. Indeed, many of them, such as mothers and housewives, are not paid at all." Capra at 45.

In fact, because the Female System (using Anne Wilson Schaef's terminology) "perceives differences as opportunities for stimulation and growth," it has been "nearly eaten up by the White Male System." Schaef at 145. As women have recognized the White Male System as different from their own and sought to learn from it, their "genuine curiosity and interest — not to mention [their] need to survive — has backfired." Schaef at 145. While the "subordinate" people have, in large part, em-
The frequent association of yin with passivity and receptivity, and yang with activity and creativity, is also a modern Western interpretation which does not reflect the original meaning of the Chinese terms.54 Our contemporary imagery goes back to the Age of Pericles, that famous era in classical Athens which Professor Eva Keuls has labeled "The Reign of the Phallus."55 Aristotle's theory of sexuality has been used to this day, writes Capra, as a "scientific" rationale for keeping women in a subordinate role, subservient to men.56 Yet in the original, Chinese view, expansion and contraction (both of which are "activities") are equally "valuable," complementary and — the bottom line — inevitable. The extent to which we can accept this inevitability determines whether we act "in harmony with nature or against the natural flow of things."57

2. The Rational and the Intuitive

There are also "two modes of consciousness,"58 two complementary ways in which the human mind functions: the intuitive and the rational.59 Traditionally, the former has been associated with religion or mysticism, the latter with science. Rational thinking is "linear, fo-

54. Id. at 37.
56. Capra at 37.
57. Id.
58. Id. at 38.
59. These two modes of mental functioning are what modern science, and now popular culture, refers to as left-brain and right-brain thinking. Schaeff explains that left-brain thinking, which is attributed to men more often than to women, involves taking in information "through the sense organs in the head. It is then sent to the brain, where conclusions and decisions are made, and the brain in turn transmits these conclusions and decisions to the rest of the body for action." Capra at 131. Right-brain activity, on the other hand, involves taking in information through one's solar plexus, where "[i]t is received and processed . . . before being sent to the right brain, then to the left brain, and then back into the body for action." Id. at 132. Described by Schaeff as "Female System processing," it is very difficult to support with logical statements and, thus, receives little support in the dominant culture and, most particularly, in legal institutions. Often all one can do to explain the process is to say, "I just feel it," which, of course, prompts the left-brain thinker to respond, "What do feelings have to do with thinking — especially with 'thinking like a lawyer'?" Id. at 132.
cused, and analytic," belonging to the "realm of the intellect, whose function it is to discriminate, measure, and categorize." The rational thinker needs to "explain the world" and does so "by taking the whole, breaking it down into its component parts, and defining each of these parts in turn." Thus, rational knowledge tends to be fragmented, and linear thinking, though efficient in the short run, is not especially creative. "Because it refuses to see the words and meanings inherent in differences and perceives them as threats to be overcome," the linear system — what Anne Wilson Schaef labels the White Male System — "is a closed system. It stifles creativity and devours itself from within."

Intuitive knowledge, on the other hand, is multivariant and multidimensional (what traditional male researchers have described as "scattered"). It is based on "a direct, nonintellectual experience of reality" and tends to be "synthesizing, holistic, and nonlinear." Multivariant thinking may take "more time and makes use of more data, some of which — like feelings, intuitions, and process awareness — may seem irrelevant on the surface," especially in the traditional law school classroom. Yet somehow we "just know" that decisions reached by linear thinking, unlike multivariant thinking, are not always right — sometimes they just don't "feel right" — and, thus, they "seldom hold or have the full support of the group concerned."

All too often I have heard thoughtful and sensitive law students complain that the treatment of a case was "hollow," that the discussion of remedies seemed "too mechanical." When these students dared to contribute to class discussions, their comments were frequently regarded as "off the mark," "irrelevant" — even "scattered." Our task, then, is to recognize that neither way of thinking is necessarily right; both can contribute to data processing and decision-making. The law functions best, I believe, when it uses both multivariant and linear thinking processes. Rational knowledge is likely to generate self-cen-

60. Capra at 38.
61. Id.
62. Schaef at 144.
63. Id.
64. Id.
65. Id.
66. Capra at 38.
67. Id.
68. Schaef at 130.
69. Id.
tered, or yang, activity, whereas intuitive wisdom is the basis of ecological, or yin, activity. Our society has reflected domination of the yang over the yin — "rational knowledge over intuitive wisdom, science over religion, competition over cooperation, exploitation of natural resources over conservation." None of the values pursued by our culture, and particularly by our profession, are intrinsically bad, but "by isolating them from their polar opposites, by focusing on the yang and investing it with moral virtue and political power, we have brought about the current sad state of affairs." The cultivation of that which honors the natural balance of cycles and fluctuations and the marvelous interplay of the whole organism has been largely neglected. Our progress has been a rational and intellectual affair, and "this one-sided evolution has now reached a highly alarming stage, a situation so paradoxical that it borders insanity" — for the individual as well as for the culture. Charlie Reich writes of his days with a Washington D.C. law firm:

[M]y real self was driven far inside. This destruction of

70. Capra at 38.
71. Id. at 39.
72. Id. The emphasis on rational thought in our culture is epitomized, in Capra's view, by Descartes' celebrated statement, "Cogito ergo sum" ("I think, therefore, I exist") which "forcefully encouraged Western individuals to equate their identity with their rational mind rather than with their whole organism . . . [W]e have forgotten how to . . . our bodies . . . as agents of knowing. In doing so we have also cut ourselves off from our natural environment and have forgotten how to commune and cooperate with its rich variety of living organisms" — including one another. Capra at 140. Capra states:

Exploitation of nature has gone hand-in-hand with that of women who have been identified with nature throughout the ages. From the earliest times, nature — and especially the earth — was seen as kind of a nurturing mother, but also as a wild uncontrollable female. In pre-patriarchal eras, her many aspects were identified with numerous manifestations of the Goddess. Under patriarchy, the benign image of nature changed into one of passivity, whereas the view of nature as wild and dangerous gave rise to the idea that she was to be dominated by man.

Id. at 140.

Finally, with the rise of Newtonian science, nature finally became a mechanical system which, like woman, could be manipulated and exploited — or so it was hoped. This ancient association of woman and nature thus links women's history and the history of the environment, and is "the source of a natural kinship between feminism and ecology," which is manifesting itself increasingly today. Id. at 140.

73. Id. at 42.
thought and feeling plus the repressed anger that went with it made it impossible for me to regain any sense of self when the working day was over. You cannot strike your head all day with a hammer and expect that the person within will want to come out when you get home.\footnote{C. Reich, The Sorcerer of Bolinas Reef 30-31 (1976).}

Such are the results of over-emphasizing our yang, or masculine side — rational knowledge, analysis, expansion — and neglecting our yin or feminine side — intuitive wisdom, synthesis, and ecological awareness. And, not surprisingly, this intensely cerebral pattern is equally prevalent in law schools, which have been described as “too single-mindedly absorbed in the affairs of the head and too inattentive to — indeed, rejecting of — matters of the heart.”\footnote{Schaef at 2. [Emphasis added.]}  

Although the public sphere — and, in particular, legal institutions — has manifested these masculine characteristics, this “White Male System” is just one system: “We all live in it, but it is not reality. It is not the way the world is [or must be]. Unfortunately, some of us do not recognize that it is [merely] a system and think it is [the ultimate] reality.”\footnote{Id. at 12. Of course, not all men strive for immortality or dream of being Rocky or Rambo, or even enjoy this game of one-up-manship. These men don’t necessarily want to be one-up, but they surely want to avoid being one-down. And given those as the only perceived options in the system, survival precludes escape from the}

As men, and often as women in the masculine world of law, we aspire and believe it possible to be totally logical, rational and objective. In the process, of course, we must constantly do battle with the way in which we are not all of these things. We must continually deny and attempt to overcome any tendencies toward illogical, irrational, subjective or intuitive behavior.

Like a square peg being forced repeatedly and unsuccessfully into a round hole, our dualistic thinking can never blend comfortably or work efficiently in a world which is far more complex and multi-dimensional. Things have to be either this way or that, better or worse, superior or inferior. “What horrible and debilitating options! How limiting and exhausting to always have to be one-up so as not to be one-down.”\footnote{Id. at 12. Of course, not all men strive for immortality or dream of being Rocky or Rambo, or even enjoy this game of one-up-manship. These men don’t necessarily want to be one-up, but they surely want to avoid being one-down. And given those as the only perceived options in the system, survival precludes escape from the}
controlling, objectifying and staying on top of a hierarchy is a desper-
ate, rather paranoid and ultimately fatal venture. For part of being
locked into this mythology is believing that it is possible to achieve
Godhood. If we can know and understand everything and if we can be
totally logical, rational and objective, then we can be God — at least
the kind of God who is controlling, who is outside the self, rather than
a constantly evolving process within.\textsuperscript{78}

As such, man actually believes that he can \textit{control} the universe! While other cultures, notably the Native Americans, attempt to com-
prehend the universe so as to learn to live within it, the White Male
System seeks total mastery over the universe through technology —
what Erich Fromm has labeled “technocratic fascism.”\textsuperscript{79} The great
bulk of our life energy, our study and our research, is devoted to this
goal of control; “we have embraced the scientific method and distorted
it till it has become a way to achieve Godhood.”\textsuperscript{80} Would that we con-
centrate our efforts on becoming “attuned to the processes, cycles and
seasons of the earth — to live and move in harmony with them rather
than to control them.”\textsuperscript{81}

In Schaefer’s Female System — which she applies to “women who
feel clear and strong and have come to know and trust their own sys-
tem”\textsuperscript{82} and to men who have come to acknowledge and accept their
feminine side — a greater range of options are deemed possible. Each
relationship is presumed to be one of peers, of equals, unless and until
it develops otherwise; one is not necessarily superior or inferior, and,
thus, a wider range of interactive behavior is available.\textsuperscript{83}

3. \textit{Balancing Work and Relationships}

Another difference in the male and female systems is the role
which relationships play in our lives. As noted above, our feminine side

\textsuperscript{78} \textit{Id.} at 15.
\textsuperscript{79} E. FROMM, \textit{To Have or To Be?} 180 (1976).
\textsuperscript{80} \textit{Schaef} at 17. Consider Schaefer’s example, the climate-controlled shopping
malls, which are built “after measuring populations, buying habits, income and the
like” and where one “can spend hours . . . without ever being aware of changes in
temperature, humidity or time of day.” \textit{Id.} at 17. So, too, with our climate-controlled
homes, automobiles and offices; and, in the works now, controlling the weather itself.
\textsuperscript{81} \textit{Id.} at 139.
\textsuperscript{82} \textit{Id.} at 105.
\textsuperscript{83} \textit{Id.}

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finds much of life's meaning in relationships, and work becomes a vehicle for our need and desire to interact and connect with the world. When our "masculine" side dominates, work becomes an autonomous endeavor measured by individual achievement, and our lives become compartmentalized into "work" and "personal relationships". More often than not, the self and our work are the center of our universe; relationships, like hobbies, become secondary.

For women who learn to make room for themselves in their lives, to honor and nurture their own growth, "work" becomes an avenue for exploration.

Work becomes more than something one does to earn money; it becomes a 'life work'. It is what we need to do with our life. It means making a contribution which complements the other aspects of our lives. It is not profit- and power-oriented; instead, it takes its meaning from creativity, bonding, humaneness, and service.\textsuperscript{84}

Creative work — the kind of work to which we aspire, work which makes a difference in the world — evolves only and necessarily from a blending of the masculine and the feminine, from the "graceful integration"\textsuperscript{85} of humility and pride. Abraham Maslow explains that, to be creative and inventive, we must have both the "arrogance of creativity"\textsuperscript{86} and humility. We must be aware of our "Godlike" possibilities while simultanously laughing at ourselves ("at the worm trying to be a god")\textsuperscript{87} and at all human pretentions.

One who attains the wisdom to lead a creative and integrated life is likely, one day, to reminisce with words such as these:

\begin{itemize}
  \item \textsuperscript{84} Id. at 113.
  \item \textsuperscript{85} A. Maslow, \textit{The Jonah Complex, Humanitas, Journal from the Institute of Man}, vol. III, no. 2 (Fall 1967).
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. Maslow continues:
    \begin{quote}
      Aldous Huxley . . . was able to accept his talents and use them to the full. He managed it by perpetually marvelling at how interesting and fascinating everything was, by wondering like a youngster at how miraculous things are, by saying frequently, "Extraordinary! Extraordinary!". He can look out at the world with wide eyes, with unabashed innocence, awe, and fascination, which is the kind of admission in smallness, a form of humility, and then proceed calmly and unafraid to the great task he set for himself.
    \end{quote}
  \item \textit{Id.}
\end{itemize}
Lying on my deathbed, I look back on the relationships I have had and the connections I have made — with myself, my work, with people, with my community. Relationships which evolve and change, constantly in process. These will be the things I consider the most important. It will not matter whether I have earned six figures, won big cases, written books or had a chair named after me. I will cherish the lives I have touched and those persons whose lives have touched mine.88

In other words, no one ever said, believing death near, “I wish I had spent more time at the office.”

4. **Notions of Power and Leadership**

Resistance to the democratic re-distribution of power in society and in the law school is rooted, I believe, in the masculine conception of power as a “zero-sum” commodity, i.e., as based on the scarcity model. The more one shares or gives up to others, the less one has for oneself. There is only so much available, and one had better scramble for it and hoard it. Schaef cites the example of a woman who had apparently bought into the White Male System of power: “‘I want to be the best-known feminist in town, and the only way for me to do that is to get rid of so-and-so’ (another prominent feminist) . . . She had become convinced that there was only so much influence to go around.”89

Feminine values remind us, however, that power, like love, is limitless; when it is shared, it regenerates and expands. It only increases when it is given away. So too with ideas.90 If we try to “own” and hold on to ideas, they stagnate. But if they are allowed to move about and breathe, to be freely given and exchanged, they expand and change constantly, remaining fresh and alive.91

Likewise, the masculine concept of leadership reflects linear relationships and dualistic thinking, while promoting isolation and hierarchy. If leading means “being out front at all times, having all the answers, and presenting a strong, powerful and all-knowing image,”92 it is

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88. *Schaef* at 113.
89. *Id.* at 125.
90. And this, I suspect, is why I have never been able to grasp wholeheartedly the principles of patents and copyrights! Also, recall the Hamilton cartoon: “Of course, I'm not telling you. Information is power.”
91. *Schaef* at 125.
92. *Id.* at 128.
no surprise that we lawyers look so silly striving to be God-like and that many of us drop dead from the effort. A healthier approach might require us to regard leadership as a means to facilitate, to enable others to make their contributions while simultaneously making one's own. 93 A leader's job would include delegating responsibility, nudging people from behind rather than leading them from ahead, encouraging others to discover and develop their own capabilities. 94 It is those qualities we would do well to look for in a law school dean, a professor, a student leader or a meeting chairperson.

C. The Challenge for Society: Fusing the Ladder and the Web

This heavy emphasis on individual achievement and "masculine" values is manifest in our capitalist society through the promotion of competitive behavior over cooperation and through a Social Darwinist view of nature which continues to prevail today. Competition has been seen as the driving force of the economy and, as reflected in our adversary system, of our judicial process as well. Karst contends that the ladder of hierarchy, which reflects a morality centered on individual rights and noninterference, has provided the framework for our legal system.

The men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men. The framework inherited a body of thought that saw man as an 'atom of self-interest', saw the struggle for power as a zero-sum game in which one person's gain was another's loss, and was suspicious of man's insatiable appetite for power . . . The Bill of Rights, like the original Constitution, defined zones of autonomy, of non-interference . . . [and was] an institutional reflection of the view from the ladder; safety from aggression was to be found not in connection with others but in rules reinforcing separation and non-interference. 95

Valuing freedom and autonomy, the American male has regarded himself primarily as an independent atom, going it alone, always moving and always looking over his shoulders with a careful eye for strangers bearing gifts. We have pursued our self-interests in personal rela-

93. Id.
94. Id.
95. Karst at 486.
tionships and at work and have been wary of involvement in community life. Gone, or at least in hibernation, has been that commitment to community which once provided a balance to the radical individualism that so worried Alexis de Tocqueville when he first examined American life in the 1830's. The average American male has seen the world outside the home as a "Hobbesian rat race"\footnote{Butler, \textit{In Search of the Moral Path, Review}, San Francisco Chron., May 12, 1985, at 11.} where we have no control over the bigger picture — over whether our "corporate employers produce nuclear triggers or make up."\footnote{Id.} Addressing (even listening to) other people's problems is a dangerous distraction from the pursuit of one's own survival. Few among us have been willing to "speak truth to power,"\footnote{R. \textsc{Bellah}, R. \textsc{Madsen}, W. \textsc{Sullivan}, A. \textsc{Swidler}, S. \textsc{Tipton}, \textit{Habits of the Heart: Individualism and Commitment in American Life} (1985) [hereinafter cited as Bellah].} based on moral convictions and a concern for the civic good.

Yet, today, there is hope. As the Chinese text says, "The yang, having reached its climax, retreats in favor of the yin."\footnote{Capra at 45.} Louder is the call for a renewal of "habits of the heart"\footnote{A. \textsc{de Tocqueville}, \textit{Democracy in America} 282 (1969).} to temper competitive individualism. The shallowness of narcissistic pursuits has left us with Peggy Lee's refrain "Is that all there is?" In this search for greater meaning in our lives comes the recognition that there is value in connectedness and responsibility to others.

We are a part of a tremendous evolutionary movement with deeply buried roots. For some, Jefferson's ideal of the virtuous, involved citizen provides inspiration; for others, it is the Judeo-Christian tradition of justice and social responsibility. Still others are discovering that "our lives make sense in a thousand ways, most of which we are unaware of because of traditions that are centuries if not millennia old."\footnote{Bellah at 282.} The process of re-establishing long-severed connections with our pasts and with others, now and before, takes numerous forms and labels, including Jung's collective unconscious, spiritual quests, ritual and ceremony, and psychic research.

There is a cultural movement afoot, which has begun to be reflected, as well, in the law — an attempt to re-establish a balance between the masculine and feminine sides of human nature. As legal edu-

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\footnotesize{96. Butler, \textit{In Search of the Moral Path, Review}, San Francisco Chron., May 12, 1985, at 11.}

\footnotesize{97. Id.}

\footnotesize{98. R. \textsc{Bellah}, R. \textsc{Madsen}, W. \textsc{Sullivan}, A. \textsc{Swidler}, S. \textsc{Tipton}, \textit{Habits of the Heart: Individualism and Commitment in American Life} (1985) [hereinafter cited as \textsc{Bellah}].}

\footnotesize{99. Capra at 45.}

\footnotesize{100. A. \textsc{de Tocqueville}, \textit{Democracy in America} 282 (1969).}

\footnotesize{101. \textsc{Bellah} at 282.}
cators, we must seek to fuse the ladder of hierarchy with the web of
collection, thereby expanding our vision of justice to incorporate af-
firmative principles of inclusion and community. “The jurisprudence
and rhetoric of rights,” says Karst, “is the law of the ladder.”102 In a
heterogeneous society, there is safety in clinging to inanimate rules and
neutral principles; but the passivity and preservationist influence of a
obsessive rule-orientation has been an effective neutralizing weapon for
protecting “them that got.” We must promote a view of the human
community as one “characterized by concern,”103 and a view of justice
that values not only autonomy but “interdependence and care about
real harms to real people.”104

No longer need legal education epitomize “the schism between the
disembodied intellect and our whole humanity.”105 No longer need we
live in the anterooms of our lives. With eloquent simplicity, one stu-
dent-turned-professor states her resolve in this new age of lawyering:

I’ve come to believe that my feelings and intuitions are some-
times wiser than my mind, which is something I did not know
before . . . This is not to say that I value intellectual skills less;
rather, I have moved from regarding my mind as the one ‘real’ tool
with which to do my work. So, I put aside the rule of the professors
that feelings will only interfere with legal analysis, and instead I
use my judgment as to what combination of all my powers are
needed in each situation . . . It’s a struggle to do it continuously,
and I often fail. Still, it is clear to me that people can help each
other to do their own valuing and follow what is right for them, in
lawyering as in life.106

II. Creating the Model

How, then, can we transform our law schools into models for the
kind of society that we would like to live in — a “world in which we
nurture in people the capacity for self-governance and self-fulfill-
ment”?107 Will we practice what we preach? Can we turn an onanistic

102. Karst at 475.
103. Id.
104. Id.
105. Id.
106. Bellah, The New Religious Consciousness and the Secular University, in
Daedalus 115 (Fall 1974).
past-time for ivory-tower academics into a practical experiential model for community? How do we incorporate the “feminine” into a “masculine” world without simply having women exchange “a place in the web for a step on the ladder?” How do we create that “dynamic balance” of yin and yang? In short, what will our model look like? Let us first examine the composition of our law school community, beginning with the faculty, staff and students.

A. The Component Parts

1. Faculty Hiring: Integration, First and Foremost

As law professors, we are regarded as holding powerful and prestigious positions. If we are truly committed to creating a society in which power can be shared, where power is no longer a “zero-sum” commodity, we must begin by opening the doors of our profession. If we truly seek to expand our vision of justice so as to incorporate affirmative principles of inclusion and community, we must re-evaluate the narrow, self-serving hiring criteria which prevail in our law schools.

a. By Race and Ethnicity

Racial and ethnic integration of the faculty is an essential prerequisite to the fulfillment of the mission of the law school. Minorities constitute just five to seven percent of all law professors. One-third of the accredited law schools in the United States have no minorities on their full-time faculties, and another third have only one. Excluding the two historically Black schools, only fourteen schools have more than two minority faculty members. “Without the diversity of experience, knowledge, insight and interest, provided by colleagues who have been subjected to racial [and gender] discrimination within our society, we cannot fulfill our mission of providing all of our students with an edu-
cation which will best serve the needs of that society.” Students, as well as faculty members, need role models, and as long as law faculties are composed overwhelmingly of white males, an integrated student body remains rhetoric, not reality.

Conventional recruitment attempts have involved “an excess of deliberation and a minimum of speed.” Most minority faculty members have remained “isolated token presences” on their law school campuses. And the problem with tokenism is not merely the paucity of numbers; these token few must assume “the multiple burdens of counselors to minority students, liaison to the minority community, and consultants on race to administration and colleagues, all working to establish themselves as effective teachers, productive scholars and congenial colleagues.”

I do not believe that continued segregation in the academy is caused by intentional, or at least conscious, racial discrimination. Rather, it is a result of policies, practices and values which comprise the “normal” hiring process. Prefacing their remarks and their votes with a statement of “good intentions,” most faculty members proceed to make choices based on “neutral criteria which have an inevitable exclusionary impact.” Even if a job offer is made, we readily absolve ourselves of responsibility should a minority candidate decline to accept our invitation to become a token representative in a virtually all-white law school and, perhaps, in an inhospitable community at large. These innocent patterns are “the substance of institutional discrimination, a malady that can only be cured by institutional reform.”

Goals must be set commensurate with local, state or national population figures. If a law school operates in a community with a particularly high percentage of the underserved — the poor, minorities — goals for faculty hiring should reflect the ethnic makeup of the local population. For other law schools, state and national population figures may be more appropriate.

To achieve these goals, overt quotas must be utilized. A policy might be adopted, for example, that no position, visiting or tenured, be offered to white candidates unless at least two slots have been filled by

112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 3.
117. Id.
minority professors. Alternatively, we might require that two of every three new hirees reflect groups heretofore under-represented. To avoid problems of tokenism, hiring in blocks should be preferred.

All of us who have served on faculty recruitment committees know how difficult minority hiring has been. Our abysmal failure is, however, ultimately a question of priorities. It may be necessary, for instance, to select two professors as minority faculty recruiters and afford them one-half compensation time for two years and a suitable travel budget (and that the rest of us pitch in to pick up the academic slack where necessary). They should be encouraged to join with an expanded committee to interview as many minority candidates as possible from the AALS registry at the annual Chicago hiring conference. In addition, the recruiters should seek referrals by contacting minority bar associations, community leaders and minority law professors nationwide. Minority members of the practicing bar should be approached and asked to consider teaching at least in a visiting capacity, perhaps as part of a “practitioners in residence” and/or law firm sabbatical program. Then, after two years, the entire faculty should evaluate the progress which has been made, e.g. actual minority hiring, contacts which have been established, networks which are in place, and decide whether continued compensation time is required.

Whatever means we select, our affirmative action plans must be definitive and uncompromising. In its “Statement on Minority Hiring,” the Society of American Law Teachers concludes that, “despite our

119. The SALT Statement explores other alternatives to the traditional ways in which faculty have been recruited and selected:

The recruitment net can be cast more widely by aggressively seeking candidates not just from clerkships and prestige firms, but from all segments of the bar. Good minority students can be actively encouraged to pursue a teaching career while they are not the top students. More weight can be given to professional performance subsequent to law school that indicates potential for success as a teacher and scholar. Good teachers can be hired without reference to curricular needs and these needs met by reassignment within existing faculty. The advice and recommendations of minority colleagues can be sought out and relied upon. We can examine our notions of what constitutes important quality scholarship, encouraging diversity of perspective in style as well as diversity in skin color.

Id. at 3.
best intentions, law school faculties will remain virtually all white unless we impose clear, unalterable obligations upon ourselves by holding designated positions open until they are filled by high caliber minority faculty. We recognize that this is a radical remedy, but are convinced of its necessity."

b. By Discipline

The hiring of teachers trained in other disciplines is also long overdue (and is a need which has merited the attention of several writers in this symposium). As lawyers, we have an enormously chauvinistic and provincial approach to solving individual and social problems. As part of the training we impart to would-be professionals who will be faced with the full range of human pain and conflict, we must incorporate the lessons of history, sociology, psychology, medicine, economics and other disciplines.

Teachers trained in these areas, whether or not they possess a law degree, are invaluable resources and should be hired as full-time members of law school faculties. When our students enter practice, they will take a more holistic approach to problem-analysis and problem-solving. They will be better able and more inclined to produce effective Brandeis briefs and to guide the court with respect to the social consequences of certain policy choices. In addition, students may recognize the value of developing their practices in close consultation with, for example, psychologists, physicians, accountants and economists.

2. Staff Hiring: Integration Again

Integration of the staff by gender and by ethnic background is as essential to our mission as faculty integration. Secretaries and other "support" staff — so labeled, one assumes, to convey secondary importance — are, of course, overwhelmingly female and work "for" a predominately male faculty. (While minority representation on a given law school staff may not reflect population figures, it is, at least, usually greater than minority representation on the faculty). Day after day faculty members experience women primarily in subservient roles. More disturbingly, students observe this relationship, often participate in it when they are given access to staff assistance for special projects, and are inclined to reproduce that hierarchy when they enter practice.

120. SALT Statement at 1.
or other professional activities.

Again, goals and quotas, set according to population figures, are essential.

3. Student Admissions: The Search for Hearts as Well as Minds

Integration of the student body by ethnic background, gender, and class is the third essential ingredient in the composition of our law school community. Racial integration, in particular, is acknowledged to be long overdue yet seemingly impossible to achieve. And so, we turn out yet another generation of lawyers, arguably our nation's most powerful profession, that is virtually all white. While the minority community remains grossly under-represented, another class of law students learns about racial problems needing legal redress from a white professor teaching in a white ghetto. Lawyers serving all segments of society should reflect that broad base, yet legal training, both by tradition and as dictated by today's economy, has been a privilege reserved largely for the aristocracy. With little or no exposure to classmates and colleagues from disadvantaged communities, our graduates are unlikely to develop an interest in serving those communities.

If we expect our graduates to serve working-class and minority clients with any understanding and sensitivity, if not empathy, and if we would like other institutions to open their doors of opportunity, we must take the lead. Goals and quotas, once again, are necessary. As with faculty recruitment, student recruitment requires a significant commitment of resources. The admissions committee — comprised of faculty, staff and students — should be expanded from the norm to include, perhaps, eight to ten members. Student committee members

121. In 1983-84, 9.4% of all law students were minorities, yet the percentage of minorities in our national population was nearly three times that figure. D. Kaplan, Hard Times for Minority Professors, NAT'L. LAW J., Dec. 10, 1984, at 1.

122. Washington Monthly editor Walter Shapiro tells his favorite the-rich-are-different story about a friend who was negotiating with a senior partner at an old New York City law firm: "When my friend accidentally dropped a subway token on the rug, the [partner] said, in total seriousness, 'What is that? A foreign coin? Have you been abroad lately?'" Shapiro, Craving in Manhattan, This World, San Francisco Chron. May 5, 1985, at 10.

123. I recall having been told that Florynce Kennedy, a leading civil rights lawyer and a founder of NOW, once commented that "trying to help an oppressed person is like trying to put your arm around somebody with a sunburn."
(and possibly staff members, as well) should be remunerated, as with any other campus job, in wages or, if appropriate, in credit hours as part of a research project, for example, on law school admissions. Lastly, a healthy travel and support budget is required.

We must begin to develop meaningful admissions criteria and to thoughtfully consider each applicant. All too often under the present system we rely heavily on LSAT and GPA figures (largely "masculine," left-brain measurements), quickly scan personal data and statements, and discourage or outright refuse personal interviews. I have come to believe that this so-called "objective" process reflects not so much a commitment to fairness as institutional apathy and lethargy. The pendulum has swung too far toward anonymity. Personal interviews should be available, at least for that great "middle range" of applicants, on campus or at convenient locations throughout the country, examining, in particular, the applicants' commitment to representing the under-served and the public interest.124

Age and life experiences should weigh more heavily in the selection process. While there is an arguable correlation between LSAT/GPA figures, law school grades and bar passage rates, I am not sure that we are producing as many of the kind of human beings/lawyers as we might by searching deeply into personal and sociological histories. Furthermore, age itself, irrespective of individual backgrounds, seems to me a relevant factor. I cringe, frankly, at the thought of a twenty-five year-old law graduate wielding the power of an attorney in a world s/he has had little time to grasp. Older students, who have raised families and/or pursued other careers, are usually marvelous students, serious about the endeavor and mature in their perspective.

Those of us who have served on admissions committees of private law schools are well aware of the frustration of competing for minority and working class applicants with state schools charging relatively low tuition. Fundraising for scholarships and loans for these students must become a top priority, integrated into a sliding-scale tuition program for all students. Students paying full fare should know that they are subsidizing low-income students and that their own education will benefit by virtue of integration.

Finally, we must clarify our mission — or redefine it if necessary

124. Encouraging students to serve the under-served upon graduation through tuition rebates and other incentives would provide some students with a legal education which they could not otherwise afford and would be a tangible expression of our commitment to public service. (See Jan Costello's fine proposal herein at 431.)
— so that our primary purpose is not simply to train practicing lawyers. We must emphasize to law school applicants that legal education can be invaluable in and of itself, not simply as a means to an end. In fact, the means is the end, and we would do well to pay attention to the process of growing and becoming, not merely to the content of what a “professional” is imagined to be. And surely we should not promote the expectation that legal education is simply training for the practice of law. All too often students feel obliged to enter practice after investing so much into law school or somehow feel as if they have failed if they do not readily find a position with a reputable law firm. As career counselors for our students, we must make it “okay” for them to pursue other callings, invariably enriched by their understanding of the legal system. Each year I can expect to learn from several of my most energetic and creative third-year students that they are not the least bit sure that they want to spend most of their working hours in a law office. “What I would really like to be is a community activist organizing tenants or workers or single parents, or a union business agent promoting workers’ rights — and, in the process, demystify the law. Is that okay?” they ask.

So, as we articulate the mission of our law school in our catalogues and in interviews with prospective students, we must emphasize that while we provide excellent training for the practice of law, including skills courses for those who so choose, our greater goal is to help develop renaissance men and women who will actively participate in their communities.

4. Choosing a Dean: An Opportunity to Examine Our Values and Goals

All too often the academic life leads to “masculine”-type isolation. With the prestige of a professorship, to say nothing of tenure, comes the freedom to ignore the difficult (albeit rewarding) tasks of collective enterprise, institutional governance and community involvement. With but six hours per week in the classroom, there is danger in becoming independent atoms of self-interest, only peripherally aware of our colleagues’ endeavors and of broader institutional needs. It is here that the dean (and the dean search process) can draw us back to our collective mission, helping to fuse that web of connection through the rungs of our individual ladders. In holonic fashion, the dean “integrates” into the faculty, while also, as the law school’s representative, “self-asserting” into the larger community.
The dean search process is becoming increasingly commonplace at law schools across the country, what with the average deanship lasting but a few years. These searches, enormously time-consuming for the designated “search committee” and for the faculty generally, can make us feel anxious and uncomfortable as we contemplate an ambiguous future, a ship without direction. Often we hasten the process of selection because asking our self tough questions of purposes and priorities, strengths and weaknesses, makes us squirm. Yet the dean search process can be an extremely effective vehicle for focusing our attention on the values and goals which we have for ourselves and which we bring to legal education. It allows each of us to re-examine his/her visions for a law school, sources of inspiration, and practical and programmatic priorities.

Energy, excitement, innovation — these are contagious qualities. A new dean should have vision, should stimulate us, should be provocative. He or she need not serve as dean forever; perhaps a three- or five-year contract will afford him or her enough time to accomplish a few specific goals and to set a few fires. Like a great teacher, the dean will demand more of us, will make us “stretch.” In turn, we must be sincerely willing to accept criticism, the risks and ambiguities of new approaches, and — at least for a while — more work. Invariably, changes and experimentation will infringe on certain fiefdoms or “pet programs” which we took for granted under a previous administration. Yet loosening our grip on comfort and privilege may have long-term benefits.

A willingness to admit institutional shortcomings need not suggest a mediocre self-image, so long as we dare to experiment with new solutions. A first-rate law school, it seems to me, is one which has the self-confidence, for example, to accept unconventional articles in its law review or to admit unique, but “risky” students. (To paraphrase Colette, we may, on occasion, do foolish things, but we will do them with enthusiasm!)

In some circles, it has been suggested that quantification and cost/benefit analysis are the answers to most of our problems. Rather, I would suggest, vision and imagination should be our first priorities; a leader with these qualities can then tap resources within the community, the school governing board, and within his or her own administration so as to effectuate policy. With the dean as spokesperson, each law school can develop a particular, unique vision for itself. Lord knows, our country does not need just another law school (anymore than each of us needs an epitaph which reads “just another law professor”).
doubt a number of seeds already planted could benefit from some concentrated nurturing. For example, an existing public interest law program could be expanded and publicized so as to attract students, staff and faculty members particularly interested in these fields. Alternatively, international programs could be funded and expanded to reach a majority of the student body, not just the few who can afford them, and thereby establish a school as the place to go for international studies. Then again, developing a high technology/computer program could become a school’s unique mission which would set it apart.

The mission of the law school, and of the dean who represents it, may not fall along particular programmatic lines. We might gear our admissions and financial aid programs toward those who will commit themselves to serving the under-served; or to Hispanics, or to Asians, depending upon our geographic location; or to custodial parents or to older students who have pursued other callings. Our vision might have to do with the way we teach, developed from concentrated research into learning techniques and dependent upon a coherent, sophisticated program of teacher development. Each of us might increase our contact hours, and the school might commit itself to limiting each and every class to, say, fifty students.

There is a lot to be said, of course, for offering a smorgasboard of teaching approaches and course offerings and for encouraging applications from all types of students; in the tradition of academic freedom and the liberal arts, most law schools have always done this. Yet today there is a need in most law schools to develop a focus that will inspire us, something that will excite prospective students, that will make a mark. As a practical matter, we cannot be all things to all people; we can, however, make some choices and earn a reputation for excellence in those “specialties”.

Fundraising, an important priority for most every dean, can be a successful endeavor to the extent that we capture the imagination of potential donors by our unique and provocative work. Someone who might not give to a library fund might contribute to a special collection. I, for one, am more inclined to give to my alma mater — or to any institution extending its hand — when it stands for something unique and/or when I can earmark my donation for something related to my own societal concerns and priorities. Corporate donors are no different.

In sum, we should embark upon the dean search process as a welcome opportunity to examine our personal and professional values and, in turn, our institutional goals. And we should ultimately select a dean
who will effectively promote our unique aspirations.

5. **Children on Campus: A Statement of Priorities**

Following the lead of progressive corporations, hospitals, law firms, and university communities, each and every law school should provide a child care center (see Patty Rauch’s “dream,” page 793). The availability of child care will improve the quality and diversity of the student body — and, in turn, of everyone’s law school experience — by facilitating the enrollment of older students who have children, of single parents, and of low- and moderate-income parents. Parents — and I direct this to fathers, in particular — will have a much greater opportunity during their school-day schedules to become involved with their children if there is a child care center on campus.

As noted in Part I, our “masculine” tendencies seek to control nature and aspire to Godhood through the logical ordering of our environment. Because babies don’t always share the same agenda, they teach us to take our projects and ourselves less seriously. Marilyn French (and Simone de Beauvoir before her) has written of the “male disdain for the everyday realm,” the male perception that women are in a state of “mere being, as opposed to male transcendence,” and that the “smell of sweat, excrement, urine, farts, baby spit-up must be banished.” Poet Robert Bly speaks of the importance of “learning to live with the wet and the moist.” He asks, how can men “stop being at 10,000 feet? Put your hands in baby shit!”

A child care center is a statement that we are committed to developing holistic lives involving a balance of family and professional pursuits. And to the extent that we encourage parent-child conduct in and about the work place, our graduates will influence the policies of law firms, which largely remain entrenched in the self-serving male paradigm of separating the public and private spheres.

6. **Physical Environment: One-Dimensional “Men”?**

Through new admissions and hiring processes and a child care center...
center, we are attempting to create a community which is populated by both sexes, various ethnic groups and all ages. Our physical environment, as well, should manifest our commitment to integration and synthesis by reflecting our interests and activities as whole persons. As professional educators, we must learn how architectural and interior design choices affect human relations, “team” development, morale and productivity; we must appreciate the effect which space and design have on classroom dynamics and learning effectiveness.

I also wonder sometimes whether lawyers as a breed are peculiarly inept at, or simply insensitive to, landscaping and interior decoration, as if it were an obligatory concession to our feminine side. Law school buildings are notoriously dreary, and faculty offices are designed and decorated as if we were reluctant to reveal our various and multi-faceted selves. I recall vividly as a law student visiting faculty offices furnished with a government-issue style metal desk and file cabinet, two marginally functional chairs, shelves of books on law but little else, fluorescent lighting, and, of course, the family photograph. No texture, no color, no warmth, no flowers, no soul. Our classrooms convey a similar message: often windowless, devoid of color and art work, lest the world outside distract students from their linear pursuit of intellectual achievement.

If “professional appearance” means one-dimensional sterility, let us break the mold. Our offices can be a place for individual artistic expression, our common areas and classrooms a place for murals and other art work and our outdoor grounds a place for creative landscaping and gardening (as well as an additional opportunity for student employment). We have the opportunity to interact with the community — and with other university departments, from which the law school has tended to remain aloof — by displaying the work of local artists and/or by borrowing art work from the university’s art and photography departments or from the local museum.

None of us, really, is as one-dimensional as we might appear.

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With the law school’s population and facility in place, let me offer a number of proposals relative to the functioning of each group and to their inter-relationships.
B. Campus Life

1. Law School Constitution and Code of Conduct: Democratic Governance and the Administration of Justice

How might the law school’s constitution and code of conduct and the work of the school’s court of justice reflect Carol Gilligan’s “web of connection”? Fundamentally, the constitution and code of conduct should apply to all members of the community, i.e. faculty, staff and students, and the court of justice should be comprised of representatives from all three groups. Likewise, constitutional provisions for governance, including all committee assignments, should include student and staff representation. Thus, faculty and staff members would be subject, for example, to provisions of the code of conduct, and students and staff would serve, for example, on faculty hiring and student admissions committees.

Why is community-wide participation so important? My vision of our role as legal educators includes more than teaching legal analysis, legal research, written and oral expression, substantive law and other identifiable legal skills. I seek to be part of an institution which can serve as a model for the community-at-large. In part, this involves creation of a learning model for participation in decision-making and dispute resolution. More fundamentally, the model necessarily reflects the degree of respect we afford one another, the sense of community we wish to develop and the kinds of values we wish to encourage in our students.

Over the years, we all have heard from numerous students and alumnae/i who have expressed a real sadness, sometimes resentment, arising from their sense of isolation and alienation during their law school experience. Likewise, staff members often speak of their jobs as boring and uninspiring, according them little respect, low pay, minimal flexibility and virtually no opportunity for advancement (see section 2 below). By precluding students and staff members from full participation in community governance, the message which we convey is that we do not value their contribution and that we do not trust their judgment. It is no wonder that students, in particular, become alienated, want to escape from the institution as quickly as possible and become uninvolved alumnae/i with no sense of every having been appreciated by the institution. We cannot expect a commitment to the institution, as students or alumnae/i, if we do not convey that we value their participation. “Pride of ownership” invariably deepens one’s emotional investment, which manifests in a renewed vigor in the classroom or on
the job, in school activities and, down the line, in alumnae/i support.

It seems that often we do not afford students and staff members the respect that they deserve. By virtue of nothing more than their chronological age, students deserve not to be casually labeled as "kids," or the staff members as "girls". At times we generalize that students and/or staff members are "mediocre" and "unsophisticated"; we then "confirm" that notion by discovering that when we treat them that way, they fulfill our expectations. On the other hand, when we challenge them and work every bit as hard as we expect them to, we are rarely disappointed.

We should tap the extraordinary wealth of experiences and diversity of backgrounds which our students bring to the educational setting. Educators, doctors, nurses, business persons, government officials, personnel directors, accountants, psychologists, scientists, paralegals, sales persons, social workers, construction workers, secretaries, law enforcement personnel — and all under one roof. These fellow adults are here to gain the benefit of our expertise in a particular field of law. While we were pursuing our own careers in law, many students were pursuing other endeavors which now add to the richness of their collective experience here at the law school and from which we ourselves can learn.

Students and staff members are far more likely to act responsibly when we given them responsibility. The governance process will benefit from the contribution of their viewpoints, the institution will benefit from an increased level of participation in and commitment to the law
school experience, and the student and staff representatives will benefit from working intimately with lawyers/educators in the process of making difficult decisions.

a. Committee Composition

Those who would object to meaningful, not mere token, representation of students and staff on core committees usually contend that 1) they lack experience, 2) they are transient and have only a passing investment in the law school, and 3) their presence will inhibit committee discussion (alternatively stated, students and staff are not trustworthy with regard to respecting confidences). Using, for example, the work of a typical admissions committee, I would dispute these conclusions.

1) It is alleged that student and staff representatives are unable to render sound judgments with respect to applicants’ qualifications for entering law school and the legal profession. Two of the primary factors to be considered are, of course, each applicant’s Law School Admissions Test (LSAT) score and grade point average (GPA). We are all capable of digesting these figures. Of course, we may have different views as to how much weight to give these factors, i.e. whether other factors, such as work experience and extra-curricular activities, should weigh more heavily, but there is no reason to believe that these differences necessarily fall along student-faculty-staff lines.

Situations may well arise when a certain faculty member can offer some unusual expertise with regard to a particular candidate or a particular aspect of a candidate’s file. I recall, for example, that during faculty recruitment committee deliberations, occasions have arisen when other committee members have had information about a certain law firm for whom a candidate had worked or about a certain graduate program in which the candidate had participated. If I had no information of my own, I would defer to the judgment of my colleagues; likewise, I would expect that each of us on the committee, including the student and staff representatives, would have the wisdom to defer to our colleagues when they have particular knowledge or expertise pertaining to a given subject. Such is the nature of genuine authority, which is based on competence and which helps the person who leans on it to grow, as opposed to raw power, which serves to exploit the person subjected to it.

Finally, I believe that the student and staff representatives may well offer a different and valuable perspective on candidates and their
qualifications and, in some cases, offer greater expertise than our own. An older student or staff member might bring his or her training in other disciplines and general life experiences to the assessment of individuals, their motivations, and their capabilities. A recent college graduate might have a greater understanding of his or her peers and might be more attuned to today's undergraduate campus life and the relative value of certain courses and extra-curricular activities.

2) It is said that students and staff members are transient and have only a passing investment in the law school. Few propositions can develop into self-fulfilling prophesies as quickly as this one, and, by promoting this attitude, we perform a great disservice to the law school.

In my experience, turnover among staff members is not significantly greater than turnover among faculty members, notwithstanding the lack of job security and opportunity for advancement for staff members. And in most law schools, the employees who have given the most years of loyal service include staff members as well as faculty. Yes, students are enrolled for only three or four years (though many faculty members do not remain at one school for much longer), but we hope that their support for and involvement in the law school will continue for a lifetime. That depends in large part on the degree and quality of participation and fulfillment which they acquire during their law school years. If we promote the view that their participation should be restricted because they are only transient members of the community, we sow the seeds of our own destruction. It is no wonder that we have problems of morale and of wide-spread apathy and that so many students regard the law school experience as nothing more than a means to an end.

3) It is said that the presence of students or staff members at committee meetings will inhibit discussion. The admissions process involves, among other things, reading and commenting upon personal information in an applicant's file. In addition, comments may be offered regarding members of the student body who attended an applicant's school or who share certain similar qualifications. Apparently, some faculty members who serve on admissions committees would be reluctant to talk openly in front of students and/or staff representatives for fear that they would breach the confidentiality of the admissions process. Of course, by creating this "us/them" distinction, we foster distrust, alienation and an adversary relationship. But if we treat with respect our adult colleagues, who happen to be law students or staff members at this point in their lives, they will, in turn, respect the insti-
tution and the confidential process of which they are an integral part. Faculty members, I suggest, do not have a monopoly on integrity.

b. Law School Constitution

While democratic governance is an essential element of "process" under a model law school constitution, substantive law, as written in the constitution and as interpreted by the court of justice must also reflect this ethic of care and community responsibility. If society's duty to its members is not limited to respecting their zones of non-interference, but extends to the responsibility for preventing or at least alleviating harms that are dehumanizing, we should adopt an equal protection jurisprudence for the law school community which is more inclusive than that which presently prevails at the federal level. Applying Ken Karst's suggestions to the law school environment, I agree that we should 1) abandon the intent requirement, 2) abandon or at least liberalize the state action requirement, and 3) recognize poverty as a suspect class.

Societal discrimination is perpetuated, in large part, because the judiciary has stripped the equal protection clause of its potential to be a useful tool in combating subtle, albeit pervasive forms of discrimination. Lest we produce this pattern in our model community, we must recognize that discriminatory intent is well nigh impossible to prove — and "overwhelming impact" but hollow words — and that, more importantly, the doctrine misdirects attention from the plight of the victim to the actor's state of mind. If we are to value connectedness as much as autonomy — if truly your pain is mine, if we all suffer when one amongst us goes hungry — we must focus on who is "left out". Obsessive preoccupation with proximate cause and assigning blame has produced little progress. Thus, for example, claims by law students that the value of their legal education has been diminished because of institutional segregation could not be successfully deflected by an institution which would seek to pass the buck by pinning the blame on amorphous, unidentifiable social forces. Likewise, comparable worth claims asserted by female staff members could not be repelled on the basis of "God-given" market economics.

The state action doctrine, as reflected in contemporary case law,

130. Karst at 494.
131. Id. at 493.
also serves to perpetuate the exclusion of historically disenfranchised groups from full participation in our law schools, especially those deemed to be “private”. Yet, as Karst notes, two exceptional cases—Shelley v. Kraemer\(^{133}\) and Reitman v. Mulkey\(^{134}\)—which the present court has so narrowly construed as to be virtually useless, “would rest comfortably on a doctrine recognizing a state’s affirmative obligation to protect against private racial discrimination.”\(^{135}\) By abandoning or, at least, by vastly liberalizing the state action doctrine in the law school’s constitution, heretofore autonomous student organizations and clubs, for example, would be subject to discrimination prohibitions and affirmative action obligations. Furthermore, as I discussed several years ago in the context of prestigious men’s clubs, the abandonment of traditional state action limitations would not imply “wholesale judicial intrusion”\(^{136}\) into intimate groups, families and other purely social entities.

Thirdly, we should recognize poverty as a suspect class and, in the process, reject the underlying philosophy which apparently prevails on today’s Court: that rich and poor alike are entitled to sleep under bridges, that one may simply pull oneself up by one’s bootstrap in this land of equal opportunity, and that a free market economy is somehow constitutionally mandated. If we are to accept an affirmative responsibility to prevent the kinds of harms, i.e. severe poverty, which effectively precludes people from participating in our society—if we are to do more than simply respect zones of non-interference — discrimination against the poor deserves the strictest scrutiny. Thus, in our model law school community, tuition, books, cafeteria food, summer programs abroad—whatever we deem important in the educational process—would be priced according to one’s ability to pay.

In sum, equal citizenship means more than non-interference, but inclusion as well. We need, in Karst’s words, a “jurisprudence of interdependence.”\(^{137}\)

c. Judicial Review

As noted in these proceeding paragraphs, democratic governance

\(^{133}\) 334 U.S. 1 (1948).
\(^{134}\) 387 U.S. 369 (1967).
\(^{135}\) Karst at 493.
\(^{136}\) Id.
\(^{137}\) Id. at 495.
and substantive constitutional protection are essential ingredients in our law school community. In addition, I would propose an active system of judicial review, one which openly and purposefully invokes the emotional as well as the cognitive, when cases involving conduct violations are appealed within the law school's judicial system.

The more conservative view of the judiciary's role, whether it be a state or federal bench or the law school's honor court, is that it should avoid value choices and policy making, properly the domain of the legislature, which reflects the political market place. Judicial review is regarded as a narrow, infrequent undertaking, confined to statutory interpretation, leaving to the lawmakers the business of defining substantive rights which (in a masculine, capitalist model) lie within "assigned zones of non-interference."138 Under this view, members of the law school's court of justice would simply interpret and apply the law school's constitution and other governing rules to a given fact situation; thus, the task of a judge entails "no personal responsibility to do justice, has nothing to do with the effectuation of substantive values, [and] is unconcerned with the building of a [community], except as those goals were embodied in the specifically defined or clearly understood original intentions of the framers."139

Active judicial review, on the other hand, would draw from the morality of both the ladder and the web, seeking especially to preserve relationships, given the ongoing context of the law school experience for those of us who are employed here and for those who are students-soon-to-be alumnac/i. Focusing on the real effects on real people, a vital judiciary would "bring into the masculine citadel of justice the feminine plea for mercy."140 This is not to say that the principle of uniform rule enforcement is to be ignored, simply that it need not be the ultimate measure of a successful society. Karst explains:

Value choices made by the market or imposed by legislative bargaining are worthy of respect, but if they seriously damage the web of connection, they should not be allowed to stand. Judicial review, far from being an aberration, is what lends legitimacy to the legislature's normal pursuit of self-interest, that is, the interests of those constituents who are able to influence legislators' behavior. In this view, the separation of powers is not a principle commanding wholly independent branches of government, but a system of

138. Id. at 501.
139. Id. at 502.
140. Gilligan at 105.
interaction, of checks and balances. Judges are 'sentient actors', with their own responsibilities to real people and with the more general responsibility to contribute to the maintenance of a community; no one should be left out . . . 141

2. Democratizing the Work Place: Staff Salaries, Job Definitions and Working Conditions

If our institution is to serve as a model for a world in which each person's contribution to the collective good is valued and in which hierarchy is minimized in deference to connection, we must redefine staff roles and transform the relationship of faculty and staff. One observant student has written about how students are influenced by patterns of faculty/staff interaction:

The traditional legal hierarchy, that is, the structure of secretary, clerk, associate, junior partner, and senior partner, is initially perpetuated through the law school hierarchy among student, staff and faculty. First-year students are introduced to the structure immediately upon entering the traditional law school. They notice the differences the administration accords professors and secretaries. The professors have quiet, private offices, while secretaries are usually relegated to a noisy 'pool'. The secretaries screen calls for their 'bosses' as opposed to individualized phone answering. Professors rarely make their own xerox copies nor do any typing. In short, the division of labor is rigid. Secretaries perform the necessary administrative tasks, which often include making coffee, taking and relaying personal messages, and perhaps even running personal errands for their 'superiors'. Law professors and their brother lawyers treat 'the girls' as their functionaries who exist solely for the fulfillment of their professional needs. Lawyers-to-be watch all of this and learn. 142

Hierarchy takes many forms. With a few exceptions, faculty salaries are anywhere from two to six times staff salaries. As professors, we receive prestige, perquisites and ego satisfaction and enjoy our work far more than do most other members of the law school staff. As pleasant and generous as we may be, we spend our days in the safety and comfort of a power relationship over staff and students. While secretaries

142. Cathy Lindsay, Nova '84, unpublished manuscript on file with author.
are confined to their cubicles from nine to five, we enjoy extraordinary flexibility, working virtually any hours we choose, at home, in our private offices, or on the road. Our work need never become dull and routine with the continual flow of new students, new courses and new projects. We are entitled to attend conferences, accept visitorships, take sabbaticals and seek tenure. We have a realistic opportunity for professional advancement.

Faculty members and secretaries should be working together as a team, intimately aware of each other’s work habits and schedules, getting to know each other as colleagues and meeting together periodically to discuss our working relationships. Given our faculty status, our salaries and flexible hours, such hierarchy and isolation fosters, from a values standpoint, elitism and, from a practical productivity standpoint, mediocrity.

Elimination of institutional hierarchy encompasses reduction of salary disparity among all employees, flexibility and interchanging of roles, and shared decision-making powers. Such a transformation has been effected by various law firm collectives which necessarily attract individuals who are as committed to the democratic operation and goals of the firm as to the compensation provided by the firm. For example, at the Community Law Office in San Francisco, staff members and attorneys receive equal pay. Everyone who has worked with the collective for at least two years has an equal voice in decision-making, a process of consensus which addresses such issues as hiring, firing, budget, work hours, holidays, and case selection. Role interchanging and the division of labor have evolved through the years according to individual skills and interests. Legal workers without law degrees have been trained to do intake and conduct investigations in addition to performing most of the clerical duties. One of the founding attorneys, Paul Harris, has expressed the underlying rationale of a more egalitarian workplace, explaining that the possession of a law degree does not impute more value to that person than to one who, for example, has spent ten years actively involved in the community.

The legal profession has maintained a well-kept secret. For years, women secretaries have been writing basic civil complaints and doing much of the legal work in probate, bankruptcy, marital dissolution, welfare and unemployment cases, while the lawyer

143. Personal conversation with Paul Harris, founding member of the Community Law Office.
meets with the client, goes to court, takes a vastly unequal share of the fee and takes all the credit. It is a goal of law collectives to pierce this veil of elitism and mysticism and to redistribute the profits.\textsuperscript{144}

Harris further notes that, while attorneys' receive ego gratification as an added bonus for handling cases, legal workers do not. To address this inequity, the Community Law Office has developed other ways to "build the skills, confidence and power of the legal workers."\textsuperscript{145} They go to court on many of the cases on which they are working; they take responsibility for chairing weekly office meetings to develop public speaking experience and the confidence to speak their minds; and they often represent the office at conferences and at law school seminars. Although these activities have been time-consuming and, at least in the short-run, hardly cost-efficient, "the end result has been a more politically effective and more human law collective."\textsuperscript{146}

Invoking democratic principles into the operation of our model law school may not require that salary discrepancies be eliminated altogether. People with families, for instance, may require more income than a person without dependents. As a result, a more sophisticated process of salary determination may be instituted, as at New College of Law in San Francisco, which incorporates criteria such as number of dependents, personal wealth, and individual needs.

Some discrepancies within staff and faculty salaries may be regarded as a product of legitimate hierarchy. Degrees earned and seniority, for example, may provide the bases for salary gradation. At Antioch Law School in Washington, D.C., where the faculty is unionized, the root of the faculty salary scale is the date of graduation from law school — the greater the experience in teaching or in practice, the larger the salary. A similar scale could be devised to include staff members as well.

Job definitions and working conditions for the law school staff must undergo a major transformation. Divisions of labor can be reduced "by adding functions within existing job classifications and reducing the total number of kinds of jobs."\textsuperscript{147} Providing opportunities to

\begin{itemize}
\item \textsuperscript{144} Harris, \textit{Law Collectives}, \textit{People's L. Rev.} 174 (1983).
\item \textsuperscript{145} P. Harris, \textit{The San Francisco Community Law Collective}, at 174.
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} Kennedy, \textit{Legal Education and the Reproduction of Hierarchy}, 32 J. \textit{Legal Educ.} 591, 615 (1982) [hereinafter cited as \textit{Kennedy}].
\end{itemize}
learn and perform other jobs will reduce boredom, increase productivity and promote individual growth; nor need these new opportunities be defined in the traditional, hierarchial language of the “lateral transfer” or “vertical promotion”.

One small way to afford secretaries some control over their work environment is to abandon the practice of “assigning” secretaries to certain professors, and to provide that the secretaries, among themselves, select the professors with whom they will work. In time, this selection process might become a joint faculty-secretary effort, but for the time being, a wholesale shift in power on this small matter seems appropriate.

Faculty members and administrators should encourage staff members to enroll without charge in law school courses, thereby deepening staff members’ understanding and appreciation of the law school’s purpose and of the experience of the law student, as well as furthering their own personal development. Additionally, we should invite staff members to attend faculty forums where colleagues regularly discuss their works in progress, thereby lending context and meaning to an otherwise impersonal typing assignment.

Flexible time schedules should be initiated so as to accommodate personal needs and schedules as much as possible. If institutional efficiency and faculty productivity are said to be harmed, perhaps faculty “flex-time” ought to be reduced and personal schedules revised.

Exchange programs with other law schools should be developed, modeled after the faculty visitorship system. Exposure to the secretarial or library systems, for example, at other law schools would provide us all with fresh approaches and would provide the individuals involved with new scenery and new ideas. Sabbaticals should be available for staff members as they are for faculty members; where a system of tenure or long-term contracts is available to faculty members, so should it be for staff members.

Finally, in the spirit of interchanging roles among the staff, students and faculty, staff members should be hired to teach, co-teach or guest lecture in courses in their areas of expertise. Experienced librarians, paralegals and legal secretaries, for example, may be well qualified to contribute to the research and writing programs. Certain individuals may have previous experience or academic training in other fields which bear upon certain courses in the curriculum.

A note of caution: Reluctance on the part of staff members to accept new job definitions and to heartily embrace a more egalitarian faculty-staff relationship should not be invoked as an argument for pre-
serving the status quo. Staff members have been conditioned within a system of hierarchy as much as we have. They may be less psychologically able to afford to contemplate new paradigms for working relationships, and they may be understandably suspicious of benevolent plantation owners bearing promises of equality.

3. Faculty: Improving Teaching and Reducing Hierarchy

I offer several proposals designed to improve the quality of teaching and to transform the hierarchical relationships among faculty members, staff and students.

Because teaching is a “feminine” skill involving “relationship,” it has been accorded little attention in the male world of law. Emphasis has traditionally been placed on content, not process, on the mere transmitting of accurate, up-to-date information. Perhaps because most of us regard ourselves as lawyers (or scholars) first and teachers second, our commitment to teacher training is minimal. We are lawyers, so we assume that we can teach law. Rarely do we seek guidance or participation from trained educators, much less from psychologists, choreographers and other experts in “unrelated” fields.

Formal teacher training programs — such as certain LL.M. programs or graduate education programs — can be very beneficial, but may not be suitable or necessary for all of us. Periodic A.A.L.S. teaching conferences have been excellent, yet their greatest value is in inspiring on-going teaching seminars back on our law school campuses. In-school seminars, for veterans and novice teachers alike, cannot help but improve individual effectiveness and increase a sense of shared purpose. Discussion among ourselves and with outside experts, addressing teaching techniques and the psychology of learning theory, might well include the relative advantages of various teaching methods, the dynamics of class size and seating arrangements, modes of active and passive learning, the use of audio-visual equipment and computers, and the processes of feedback and evaluation.

Regular class visitations by a colleague can be of great benefit to both the teacher and the visitor. Every other semester, perhaps, each of us should visit a colleague’s class on a weekly basis to offer guidance as well as to pick up pointers for our own teaching. Sporadic class visitations on the eve of retention and promotion decisions — as is the general practice these days — are of marginal value, are likely to produce distorted characterizations, and underscore our lack of concern for institutional teaching standards, for our own professional development.
and for that of our colleagues.

Once every three years, each of us might enroll as a student in a law school course. The advantages are at least four-fold. First, we would increase our own knowledge of various subject areas; there are numerous areas of the law about which I, for one, am hopelessly ignorant or, at least, know little of recent developments. Second, we would have a greater understanding of the substantive and pedagogical problems pertaining to our colleague’s area of expertise. How often, for instance, can we offer helpful comments to our colleagues regarding prerequisites, credit allotment, and syllabus development in subject areas which are foreign to us? Third, by participating fully — attending, reading, studying and being examined — we could offer meaningful feedback on our colleague’s performance as a teacher. Finally, enrolling in a course every three years will give us an appreciation of the students’ perspectives, which, in turn, will vastly improve our teaching. For most of us, our student days are a distant memory, and we have little experiential appreciation for the psychology of learning theory. What better way to see if (or what) we are actually communicating than to move to the other side of the podium.

Becoming stale, provincial, and narrow-minded are hazards of our profession — and, perhaps, of growing older. How easily we fall into the comfortable routine of teaching the same material year after year and of addressing matters of school policy from an increasingly predictable, “knee-jerk” frame of reference. There are countless ways to keep fresh, but we must encourage one another. Teach new courses every few years (see Lucy McGough’s comments, page 671). Engage in scholarly research and writing. Roger Cramton reminds us that we are fooling ourselves if we believe that we “can maintain freshness, depth, and interests through a lifetime of law teaching without engaging in the discipline and creative effort of scholarship. The wells will run dry, the message will become jaded, the stimulating younger teacher of thirty-five will become the old bore of fifty-five.”148 Write about things we deeply care about, “for it is the passion of the scholar that makes for truly great scholarship.”149 “Caring,” writes Barbara Bezdek, “is what commits the whole of me to what I am doing; care is what taps into my most effective energy.”150 Legal scholarship need not be a

150. Dvorkin at 40, quoting Barbara Bezdek.
waste of time. Scholarship can probe and explain social problems and offer solutions which go beyond case analysis and statutory interpretation. It can open up a whole new network of academic colleagues, lawyers, politicians, and community activists, providing new ideas and new perspectives. Scholarship can integrate our personal and political concerns, while bringing definition and groundedness to our dreams of a better world. And sometimes we have an impact, we produce results. Best of all, perhaps, the "energy that flows from the integration of the legal, personal, and political"\(^\text{151}\) nurtures our selves and is highly contagious, as well.

Some simple adjustments in our work lives can make a real difference. Vary committee assignments, even vary office assignments, to get a new "view" on the world. Accept visitorships periodically to see firsthand how things are done at other law schools. Take the kinds of risks, experience the kind of exposure which we demand of our students. And, when the pressure mounts, take a sabbatical break or a leave of absence. Sylvia Law observes:

Successfully advancing on today's tenure track demands devotion of a substantial portion of our lives to meeting other people's expectations. Students expect us to be simultaneously authoritative and entertaining. Colleagues expect us to produce scholarship, meeting standards of excellence that are both rigid and elusive. After decades of meeting the expectations of others, it is very difficult to know what we want, who we are, and what we think . . . We need to cultivate tomatoes and relationships with people we respect and enjoy. Friends help us know who we are and what we believe.\(^\text{152}\)

In short, sabbaticals are a key to mental health.

To avoid "brain death," tenure should be replaced with long-term, albeit renewable contracts. We might consider, for example, limiting one's service to an institution to seven or eight years, or at least requiring between contract periods a two- or three-year hiatus devoted to teaching elsewhere, practicing law again in one's area of academic expertise, or pursuing another calling.

As indicated above, salary ranges ought to be standardized according to an objective formula. Upon review and evaluation by the dean,

\(^{151}\) S. Law, Professor Worries About Death After Tenure, Syllabus, ABA Section of Legal Education and Admissions to the Bar 5 (March 1985).

\(^{152}\) Id. at 1.
other professors, staff, and students, meritorious service above that which is normally expected should be rewarded with file letters, recommendations, honorary grants and awards, or if need be, a promotion in rank. Ranking, however, seems unnecessarily divisive, drawing distinctions of questionable validity and encouraging misdirected attention. It is another manifestation of obsessive fragmentation and compartmentalization within the institution. Nor does it serve a healthy purpose by promoting our individuated, "ladder" orientation to professional success. Furthermore, decisions to promote are based primarily on one's publishing record — largely an intellectual, individually-oriented endeavor — rather than on one's teaching record — an other-directed, relationship-based activity. Teaching effectiveness defies objective measurement, so it is said, and thus is accorded less attention and less weight in the evaluation process. In addition, ranking may convey a misimpression to the student body. When preparing to register for classes, would students be correct in assuming that "full" professors are better teachers than "associate" professors? Not in my experience.

Finally, I would suggest a practice which is central to the life of intentional communities throughout the world, communities committed to democratic values and mutual understanding — that is, interchanging roles within the community. For one month each year, for example, faculty members might perform clerical duties (typing, copying, filing, answering phones), assist in the library, do grounds keeping or janitorial services or work in the day care center. As Paul Harris noted in the context of law collectives, any short-term efficiency loss is well-compensated for in long-term "holistic" gain.

4. Students: Transcending Role

We have discussed the importance of a heterogenous student body, integrated by race, gender and class, of a sliding-scale tuition, and of student participation in the governance of the law school. In addition, as part of our web-like model, we must creatively devise ways in which students are able to transcend their student status within and beyond the law school. Part-time employment as staff members and as teachers should be encouraged. Not only can students fill library positions and do clerical work, they can tutor and teach in various capacities. Many students today are embarking on law as a second career and have a wealth of experience which can be integrated into the curriculum. For

153. See also Kennedy at 615.
example, English teachers, writers and editors can assist in the writing program and paralegals in the research program; doctors and nurses can offer lectures in worker's compensation and medical malpractice seminars; law enforcement personnel in the criminal law courses; union members and officials in labor law courses; business persons in contracts and corporations; social workers, therapists and parents in the family law tract; and government officials in their particular areas of expertise. Once students are admitted to law school, their backgrounds should be reviewed again for an eye for potential curricular contributions. An energetic commitment to using these resources within the student body will go far towards eliminating illegitimate hierarchy, transforming law school into a process of adult education rather than of regression to childhood, and helping individual students defray educational costs.

5. The Classroom: The Importance of Context, Caring and the Human Scale.

a. Context

All too often I have taught cases with such a singular focus on uncovering legal principles that I have stripped the event of any human dimension. Who among us does not hear a familiar ring as we read William McAninch's honest account of his early teaching days?

The quest for the rationally relevant dominated my classroom. The personal experience, the curiosity about what happened on remand after the appellate opinion we were studying — these and like concerns were rewarded with the demeaning phrase, 'That's irrelevant,' and sometimes with the condescending explanation that we were there to master principles of law and to develop dexterity in manipulating them.154

Rather than teaching countless cases bereft of facts, we need to devote some attention to teaching cases in context. Furthermore, legal realism demands that we not deceive ourselves about the purity of legal rules and the consistency of their application. Contextual morality can be translated into law without violating the "rule of law." Notwithstanding the traditional wisdom of law school case book editors, the facts of each case (including the identities and backgrounds of the par-

154. Dvorkin at 50, quoting William McAninch.
ties and the judges) *do* make a difference. Says Karst, "[T]here is no escape from contextual judgment if the judge wants to do a decent job."158 Contextual facts may be "legally irrelevant [but they are] morally central"159 if we are to avoid the tunnel vision and amorality of the hired gun.

As teachers, we must approach our course content as well as our students from a perspective which honors the "feminine" web of connection as well as the "masculine" ladder of hierarchy. Those who insist on the need to appreciate the whole context in which moral issues arise are driven "to widen inquiries, to redefine issues, to expand the range of possible solutions."157 We can attempt to address problems or cases from an integrated, multi-disciplinary perspective. Categorizing problems in an obsessively fragmented fashion (for example, "Is this a contracts, tort or constitutional law problem?") is becoming an increasingly unrealistic and misdirected endeavor as we recognize the inherent inter-relatedness of human problems and problem-solving.158 Rather, we need to examine the impact on the parties involved from a psychological, sociological and economic point of view; so, too, with solutions which are proposed (see Joe Grodin's comments, page 547).

b. Ambiguity and Paradox

Tolerating ambiguities and accepting paradox — the co-existence, the "truth" of polar opposites — reflect a wisdom which, more often than not, has eluded me. Yet I am convinced that, in the words of E. F. Schumacher, "society's health depends on the simultaneous pursuit of mutually opposed activities or aims — stability and change, tradition and innovation, public interest and private interest, planning and laissez-faire . . . growth and decay."159 In the field of law, we experience the competitive tugs, for example, of freedom and order, individualism

155. *Karst* at 497.
156. *Id.* at 499.
157. *Id.*
158. See Jay Feinman and Marc Feldman's description of their "pedagogically and conceptually innovative course in contracts, torts, and legal research and writing — 'Contorts',' Feinman and Feldman, *Pedagogy and Politics, 73 GEO. L.J. 875* (1985). See also, the experimental first-year section of "coordinated teaching" at Harvard Law School, described by Todd D. Rakoff, *A Great Experiment, HARVARD LAW SCHOOL BULLETIN, 22* (Winter/Spring 1985), and the CUNY Law School at Queens curriculum described in Charlie Halpern's article herein.
and equality, the uniform application of law and its subjective application in particular contexts, honoring and dishonoring precedent. Rules preserve order, while exceptions preserve our humanity.

As teachers, we must do our best to impart the wisdom of accepting ambiguity and paradox. In many ways, our students' happiness and success in life depends on it. I recall a conversation with a nurse while I was donating blood. As she inserted the needle into my arm, she commented that her daughter was about to enter law school and would be "a great lawyer because she was so good with numbers and rules." Under the circumstances, I nodded politely but was saddened by the reminder of this misperception, both within and without our profession, of what it takes to be a good lawyer.

We must continually remind ourselves and our students that there are no "right" answers, only arguments more or less persuasive. Our obsession with the minutiae of particular cases and with finding "black letters" (and then often forcing them to fit like a frustrated jig-saw puzzler) reveals our reluctance to acknowledge that the world is not a perfect fit, that the world cannot be compartmentalized through the omnipotence of logic. As one student has commented, there is "an overwhelming desire for control, order and certainty manifested in our method of solving problems. We lawyers and students help create so much particularistic garbage we can't see the forest anymore." 160

\[\text{c. Class Size}\]

Creative and effective teaching is dependent, in part, upon manageable class sizes. Filling large lecture halls and generating additional tuition smacks of consumer fraud. No law school which portrays itself as a "teaching" institution can maintain class sizes of seventy-five to 150 students in most required and highly recommended courses. Class size does, in fact, affect learning; a class of 130 students is different from a class of 100, from one of 70, from one of 40 (although the increments reflect differences in different ways).

For too many students, their experience of law school has been anonymous and impersonal. Citing a 1975 study of higher education, Roger Cramton notes that "student-faculty relationships are more impersonal in American law schools then in any other field of graduate and professional education." 161 The students' perception of distance

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160. Dworkin at 170, quoting Marcia Eisenberg.
and distrust is reflected in faculty attitudes, where fully "fifty-five percent of the law faculty . . . felt that a teacher could be effective without personal involvement with students." 162 "Law classes are too big and the student-faculty ratio too unfavorable for us to know, even casually, the vast majority of our students," 163 writes another. When we fail to identify and respond to individual needs and modes of learning, we turn out large numbers of uninspired graduates whose potentials were never fully tapped.

Sound pedagogy demands that we drastically reduce class sizes. As educators first and lawyers second, we must be more aggressive in creating an environment which promotes active, not passive, learning and which recognizes the value of individual and small-group attention. How about a "real graduate school with a student-faculty ratio of 10-1?" 164 If budgetary constraints preclude any immediate reduction, we must at least 1) more evenly distribute among faculty members the number of students taught each semester, and 2) teach two sections of at least one of our courses each semester, i.e. what is measured as seven and one-half units (assuming three-unit courses), instead of the standard six-unit semester load.

d. Coercion and Choice

The experience of passive, nearly lifeless class sessions is more familiar than any of us would like to admit. The prevailing cause of this condition, I suggest, is the students' perception of coercion — that she/he is in law school in the first place to fulfill others' expectations, that the course is required, that class attendance is required, or perhaps that she/he is called on to answer questions in class. These perceptions create easy ways for students (and faculty) to avoid responsibility. On the other hand, if a student chooses to enroll and be present, she/he feels able to participate, to take risks, to develop and learn; "those . . . choosing to attend may well find themselves free of the deadening passivity that the victim psychology engenders in the classroom." 165 As a teacher, I must acknowledge that external requirements do, in fact, exist for students, and I must be absolutely clear in each course how

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162. Id.
164. Id.
165. Dworkin at 140, quoting Howard Lesnick.
much student choice I am permitting — required enrollment? attendance? preparation? participation? For sound pedagogical reasons, I may impose various course requirements, but I should know that the trade-off for reducing choice is increased passivity.

It is my experience that developing among students a sense of individual choice and responsibility to one another will dramatically increase attendance and class participation. One of my most rewarding teaching experiences occurred three years ago, when, with the good counsel of my colleague Dinesh Khosla, I relinquished to my seminar students control over course requirements. Although it was an elective seminar with only twenty students, the lessons learned were not without value. Perhaps because I was a known (and trusted?) quantity, the class, after three hours of animated discussion, ultimately deferred to my expertise in choosing course materials, while suggesting a preference for certain subject areas. We settled on reasonable assignment lengths and a course requirement of several papers and an optional exam. Most importantly, the students believed that preparation and attendance were extremely important and constituted a mutual obligation which each student shared with the others. Devising sanctions, they felt, was unnecessary, but the sense of responsibility was overwhelmingly clear. At the semester’s end, one student had missed one class.

e. Caring and Cooperation

The extraordinary pressures of the law school curriculum have fostered, generally speaking, an individually-oriented, highly competitive attitude among students. Even the apparent collective efforts, such as “study groups” and law review, are utilized by most students as a practical means to further individual, not collective success. There is danger in over-emphasizing the values of individual achievement in relation to community responsibility. In terms of substantive law, for example, it has been said that “teachers teach students that limited interference with the market makes sense and is as authoritatively grounded in the statutes as the ground rules of laissez-faire are grounded in natural law.” Similarily, in the process of traditional law school teaching, we convey an “every man for himself” philosophy which, in turn, will produce the kind of individuated, isolated and imbalanced lawyer for which our society has become infamous.

In light of this prevailing ethic, we should seek to instill a sense of

166. Kennedy at 597.
caring and mutual responsibility among students. We can encourage first-year students to “look to the right and look to the left” and make a commitment to pull each other through.167 Recognizing that no man is an island, even in the macho world of law practice, we must regularly and consciously assign group projects as part of course work and encourage other collective endeavors. Perhaps we should require second and third year students to tutor first year students, as is the practice at People’s College of Law in Los Angeles.

Finally, we must pay careful attention to the kind of messages we are conveying to our students with regard to good lawyering. Curtis Berger is concerned about “the mind-set and the heart-set into which we mold our students: that it is better to be smart than passionate; that people that who feel too deeply tend not to think too clearly; that a fine intellect can rationalize any position or state of affairs, no matter how outrageous or indecent or unjust.”168 Consider the kinds of questions we ask, the verbal and non-verbal responses we give, and the style and content of our exams (or of other student evaluation techniques). Are we forcing students, as Scott Turow recalls, “to substitute dry reason for emotion, to cultivate opinions which [are] rational but which [have] no roots in experience”?169 Are students “being cut away from themselves”?170 We must train our students to deal with other human beings, to understand that when a client comes into a lawyer’s office he is often in pain, to appreciate that very often what is presented as a legal problem has its roots in deep-seated personal and social problems. Above all, we as teachers must let our students know that we value them, and not only for their intellectual abilities. For unless we, as lawyers, acknowledge and value the compassionate qualities within ourselves, we will be incapable of caring about the human needs of others.

f. Nurturing Idealism

Hollow is the education bereft of dreams and ideals. Roger Cramton reminds us that “[t]he aim of all education, even in a law school, is to encourage a process of continuous self-learning that involves the

167. Recently, I heard about a track meet in which a runner who was in first place stopped to help her friend who had fallen. Although she lost the race as a result, her coach “doubted that she even cares because she is having the time of her life.” But then, this was a Special Olympic Meet for mentally handicapped athletes.
168. See Berger quoted in Dvorkin, supra note 75, at 34.
170. Id. at 86.
mind, spirit, and body of the whole person. This cannot be done unless larger questions of truth and meaning are directly faced.\textsuperscript{171} We must continually encourage students to clarify and develop their plans and hopes for a better society. And not as I did for many years, by withholding my own, personal views, in the interest of avoiding undue influence, while asking students to reveal theirs. (One can share values and exchange ideas, I believe, rather than impose them, thereby treating others as whole persons worthy of respect (note Howard Lesnick's comments, page 633). Whether or not students ultimately share our particular views, we should set an example by paying continual attention to these kinds of issues and by acting on the basis of deeply-held beliefs.

Of course, we must first teach students basic technical competency, thereby reducing student anxieties about their own capabilities, about bar exam results and about job prospects. Jim Elkins has observed that "before he can direct any effort toward the ideals which he hopes to express in a life in law, the student must become convinced of his ability to survive;"\textsuperscript{172} that is to say, our basic needs must be met before higher ideals can be pursued.\textsuperscript{173} Yet we must be wary of "developing the technician at the cost of the whole [person]."\textsuperscript{174} We must resist tailoring our entire curriculum for the practical wo/man who wants his/her "career ticket punched" with nuts-and-bolts courses on how to run a law office, file papers, and draft documents. "With the denouncement of theory comes the masking of ideals,"\textsuperscript{175} a way to avoid addressing our higher possibilities. Speaking to a group of law students late in his life, Benjamin Cardozo observed, "You may find in the end . . . that instead of it being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else."\textsuperscript{176}

6. Evaluating Students: Neither Rhyme Nor Reason

Grading students on the basis of a single exam at the end of the

\textsuperscript{171} R. Cramton, 19 J. LEGAL EDUC. 147, 161-163 (1978).
\textsuperscript{172} Elkins, The Paradox of a Life in Law, 40 U. PIT. L. REV. (1979) [hereinafter cited as Elkins].
\textsuperscript{173} I recall being told that Billie Holiday once said, in a vastly different context, "You've got to have something to eat and a little love in your life before you can hold still for any damn body's sermon on how to behave."
\textsuperscript{174} K. Llewellyn, The Bramble Bush 124 (1960).
\textsuperscript{175} Elkins, supra note 172.
\textsuperscript{176} Id.
semester (or at the end of the entire year) strikes me as pedagogically unsound — yet I have been doing it for seven years. As presently devised, law school exams test a narrow range of “masculine” skills — “cognitive skill in recognizing legal issues and applying legal doctrine to a set of assumed facts” — while failing to measure the attainment of skills for holistic problem-solving. Not surprisingly, there is a high correlation between law school grades and LSAT scores and bar pass rates, yet there is no demonstrated correlation to the range of talents that make good lawyers, e.g., oral communication, counseling, interpersonal relations, and negotiation skills, as well as reflective and creative problem-solving which does not involve excessive time pressure. (For a much more thorough and persuasive discussion of this entire exam problem, see Janet Motley’s article, page 723.)

Furthermore, the present system tends to produce a false hierarchy based on grades. Upon the release of first-term grades, “the pecking order of law school is recast overnight and the underlying message is that the objective meritocracy of the grading system is the appropriate (as well as the controlling) determinant of student merit.” Depending upon their exam performances, some students emerge, others retreat. Students treat one another differently, and faculty members treat students differently. While regarding grades as enormously important, most students also recognize the narrowness and arbitrariness of these exams as evaluative tools. As a result, even those who fare well become cynical and resentful toward the process. One student comments:

The exams themselves upset me deeply. I could do them, but they were boring. I left them feeling empty and I realize they existed only to help someone judge me — not for me to learn. My trust was shaken. I had turned over my life, hopes and dreams to the law school and I received in return some grades that had little meaning to me and no connection to the four months I lived through. I had done well in the law school grading system and for the first time some teachers recognized my existence. That recognition only made me feel angry.

These problems are compounded by the “front-end loading” of the evaluation process. “The incentive and reward mechanism of law

178. Id.
179. Dworkin at 93, quoting Marcia Eisenberg.
school,” writes Roger Cramton, “turns almost entirely on first-year performance, which controls the distribution of goodies: honors, law review, job placement and, because of the undue emphasis placed on grades by the law school culture, even the student’s sense of personal worth.”\footnote{180} In addition, front-end loading has a disproportionate and not incidental effect, I suspect, on those less comfortable with “masculine,” linear thinking — that is, on minorities and women.

I propose, as others before me have, the following reforms:

a. We should utilize a wider range of evaluation techniques to test the varied skills and talents required of our graduates, as noted above.

b. We should evaluate students on a more frequent basis and provide personalized, detailed feedback so that the exams are, in fact, a learning tool which will improve future performance. In large enrollment classes, the use of teaching assistants would be essential. “Experience in other disciplines suggests that a well-designed test, in which the teacher has prepared model answers, can be fairly graded by teaching assistants . . . [and can provide] students with better feedback. . . .”\footnote{181}

c. The awarding of a single, abstract grade should be replaced by thoughtful, written evaluations of individual student’s work over the length of the course. Often we rationalize our present system as a “quick-reference” service to employers, yet many employers now give primary emphasis to interviews, letters of recommendation, and previous clerkship experience. CUNY Law School reported that detailed, informative reports of a student’s skills are well received by employers, who know from experience the limited value of letter grades as an indicator of one’s potential success in the practice of law.

d. Finally, I propose that we consider using a pass-fail system in all first-year courses. (A less radical alternative has been suggested which would “weight second-and-third year grades more heavily than first-year performance.”\footnote{182}) The advantages — for students and teachers, as well as for employers — would be significant: a) with “a longer period to adjust to legal reasoning,”\footnote{183} students would approach their education more thoughtfully, rather than engaging in a panicky search for short cuts and black letters because of the all-too-important, and entirely premature, first-year exams; b) students would have “an in-

\footnote{180. See R. Cramton supra note 177.}
\footnote{181. See R. Cramton supra note 177, at 2.}
\footnote{182. Id.}
\footnote{183. Id.}
creased incentive to apply themselves in the upper-class years . . . [while] the excitement and intensity of the first year would [still] in-
sure ample student enthusiasm and effort;" 184 and c) academic records,
including admissions to honor societies, are more meaningful if they
reflect development and achievement "over three years rather than
weighting initial efforts so heavily." 185


Law reviews, as presently constituted, tend to foster many of the
values most destructive to a balanced enterprise of "masculine" and
"feminine" influences. As such, law reviews fall far short of their po-
tential to be cooperative enterprises making important contributions to
the literature of law.

First, hierarchy in the selection process and in the governing pro-
cess remains the rule, not the exception. Second, students who are se-
lected on the basis of first-year performance do not necessarily possess
the best writing and editorial skills; thus, all of us become party to a
selection process utilizing standards which are not job-related. Third,
law reviews attract students who, though exceedingly bright and hard-
working, are primarily concerned with enhancing their individual re-
sumes as a competitive advantage in the marketplace; few students ac-
cept law review positions because of a burning interest in legal scholar-
ship or because of an urgent desire to tell the world about an egregious
issue of law and injustice. Fourth, many fine student writers are dis-
couraged from participation because they are unwilling to make this
intensely cerebral and often isolated endeavor such an overwhelming
priority in their lives. 186

184. Id.
185. Id.
186. One former law review editor says it all:

Each Sunday from early spring to early fall, hundreds of young peo-
ple gather in the . . . Commons. It is a varied group in appearance and
mood . . . A band plays; there is some marijuana; sailing frisbees define
the parameter of the group. Here in [the law review offices] . . . work
proceeds as usual. An editor and an author dispute the most effective way
of countering a troublesome argument: drop it to a note or meet it head on
in the text? A quick glance at the Sunday TIMES; a cold Pepsi at eleven in
the morning; a glance out the window into the Commons. And back to
work. [These] Sundays are a plain metaphor of the gulf between law and
life which deeply disturbs many of us. The eight to ten years in which a
young person attends law school and makes his way into the partnership

https://nsuworks.nova.edu/nlr/vol10/iss2/1
Finally, the extraordinary proliferation of law reviews, "most containing a few nuggets along with much dross," has had harmful effects on the quality of legal scholarship. Following our example, most student editors prefer pieces that recite prior developments in the law and that contain voluminous citations which are of little value to most readers. (Cite-itis, a disease of epidemic proportions in our profession and from which I continue to suffer, is the product of an overly "masculine" mind which measures the worth of ideas by the number of authorities cited. Cite-itis discourages non-linear, intuitive thought processes, as well as the expression of creative and experimental propositions which may be labeled as "impressionistic" or "unsubstantiated". Fearing an ambush should an idea — God forbid, a feeling — stand alone, exposed and "unsupported," we retreat to the safety of convention and moderation.)

If each and every law school continues to feel a need to provide a quarterly forum for faculty publishing, faculty members should participate in the solicitation and selection of articles. Student editors at the vast majority of law schools will readily admit that they are hardly in a position to effectively solicit articles from distinguished scholars, nor do they always have the expertise to make scholarly judgments on the contents of submitted pieces. Again, Roger Cramton states:

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ranks of a firm have heretofore been years of intense and virtually exclusive involvement in acquiring the lawyer's skills of rationality and judgment... But the sacrifices inherent in a diligent apprenticeship grow increasingly difficult to make. Few of us know where we are headed, and even fewer believe that the slow seepage of personal vibrancy which follows from single-minded devotion to legal studies is worth whatever additional skills may be exercisable upon "arrival" at the unknown point of aspiration... [W]e also wonder whether it will ever by possible fully to re-awaken our esthetic and emotional dimensions after they have fallen into disuse during the long period of legal development... The gulf between law and life cannot be cured by sprinkling an appealing modern seasoning into the law school curriculum, so long as total devotion to things legal and analytical are the stuff around which even the newer courses are built. More flexible selection processes for legal journals will not explain to newly chosen editors why they must become library fixtures at the age of twenty-two.


The pretense that law students are able to evaluate and edit legal scholarship... is an absurd proposition in today's world of highly specialized, theoretical, and inter-disciplinary legal scholarship. Only peer review by faculty who are expert in the same fields can do the job... The educational benefits to students of writing and editing student work can be preserved without placing so many important judgments about... scholarly contributions in the hands of such inexperienced editors.\textsuperscript{189}

Legal education, for students and scholars alike, would be better served if law review publications would simply reflect the best student writing from seminars during a given year, supplemented by a few faculty pieces. Perhaps a seminar on legal research, writing and editing could be offered for students interested in working for legal publishing houses or in academia, and those students and interested faculty members could edit the law review issues. In any event, law review participation and publication should have no correlation to grades in other courses.

8. \textit{Law School Meetings: Goals and Process}

In his cogent essay entitled \textit{The Politics of Meeting} (page 517), Peter Gabel notes that our obsession with promptly "resolving" matters through voting seriously hampers the development of community. My experience in faculty meetings suggests that voting as a form of "efficient" decision-making and our preference for hasty adjournments reflect our discomfort with ambiguity (and, perhaps, with intimacy). It also raises, once again, the distinction between "masculine" and "feminine" processes. Anne Wilson Schaef explains:

\begin{quote}
The White Male System has a product-goal orientation. The ends almost always justify the means, and it does not matter how the goal is achieved just so long as it is. What counts are outcomes. Men are constantly arranging their lives into a series of goals. The Female System has a process orientation. A goal is less important than the process used to reach it.\textsuperscript{190}
\end{quote}

Schaef tells the story of a couple hiking together:

\begin{quote}
190. \textit{Schaef} at 138.
\end{quote}
The man sets a goal for the hike — such as getting to the end of a trail or to the top of a hill — and focuses all of his energies on reaching that goal. Once he does, he considers the hike over; the return is simply a ‘loose end’ that needs tying up. The woman, on the other hand, sees the hike as a process. She likes to stop along with way; at times she meanders, at times she hikes briskly. Each cramps the other's style, blaming the other for not knowing 'how' to hike, and neither sees the valued and legitimate differences in their approaches.\textsuperscript{191}

Each year I have reminded my first-year students that law school need not be a mere means to an end. If that is all it is, it inevitably becomes a dreary, frustrating and painful process. So, too, with faculty (or general school) meetings. If the sole purpose is to complete the agenda and reach final votes in as little time as possible, getting there is pure hell. By revising and clarifying our purposes and goals, and re-orienting our frame of mind, we can maximize our returns while enjoying the ride. Having acquired the appropriate professional traits of cynicism and self-importance, we must learn anew (with the freshness and wide-eyes of days gone by) to actually look forward to law school meetings as a time for stimulating thought and developing community.

In our profession, which values intellectual achievement above all else, there is the trap of feeling that we must always have an answer. Whether it be in the classroom, where we think that they think that we know (or should know) everything, or in faculty meetings, where we want to appear brilliant and definitive, we lock ourselves into positions which isolate us and which ultimately inhibit personal or institutional development. Defending one pole by attacking the other (an aspect of linear thinking) inevitably hardens our "opponent's" position, implies an either-or resolution and necessarily produces a zero-sum game.\textsuperscript{192} "Having" an opinion implies owning a possession. Yet, as Erich Fromm explains, if we can abandon our notion of conversation as "an exchange of commodities (information, knowledge, status)"\textsuperscript{193} and create "a dia-

\textsuperscript{191} Id.
\textsuperscript{192} Anne Wilson Schaef offers an interesting theory:

Men will fight tenaciously for their ideas. In fact, men defend their ideas like a lioness defends her cubs. Men's ideas really are their offspring. Perhaps, then, it is easier for a woman to part with her ideas because she has a capacity to produce human offspring, while a man's major production is his ideas.

\textsuperscript{193} E. FROMM, \textit{supra} note 79, at 23.
logue in which it does not matter anymore who is right, [t]he duelists [can] begin to dance together.\textsuperscript{194} Clinging to positions for the sake of "winning" is, of course, an exhausting and misdirected endeavor. "Truth will appear," says the zen master, "only when we cease to cherish opinions." But to the extent that we let this opinion-bound approach dominate our interactions with the world about us, we will be always swimming upstream.

Faculty meetings, like law practice, like law itself, is a process of negotiation. How we define "negotiation" for ourselves (and how we aid our students in this effort) will greatly determine how well we will exist in community. In Anne Schaef's White Male System, "negotiation is seen as a way of manipulating others. The goal is to insist on more than one really wants or expects, then bluff, and end up with something close to what one wants. The fun is not in the process itself, but in winning."\textsuperscript{195} In Schaef's Female System, on the other hand, "negotiation is a process that allows one to clarify his or her wants, present them clearly, and willingly listen to what other people want before coming to a mutual agreement." The goal is for everyone to realize as many of his or her wants as possible. Negotiation is fun because it stimulates creativity and imagination that can then be used to reach solutions that will be good for everyone concerned\textsuperscript{196} — creating a win-win situation, if you will, which synthesizes the polarities and where "opposites cease to be opposites [and] lie down together peacefully."\textsuperscript{197}

We do violence to one another — in meetings as well as in the classroom — with our addiction to talking rather than listening, with our authoritarian and bludgeoning attachment to maintaining "battle" positions and holding opinions. Peace activist Barbara Deming, who has consistently reminded us that non-violence must become a personal way of life before it will ever become public policy, offers guidance:

\[\text{[T]he longer we listen to one another — with real attention — the more commonality we will find in all our lives. That is, if we are careful to exchange with one another light stories and not simply opinions . . . [T]ake turns speaking, speak from experience, don't interrupt, and don't deliver judgments upon one another. This mode of relating can work a kind of magic.}\textsuperscript{198}\]

\textsuperscript{194} Id.
\textsuperscript{195} Schae at 135.
\textsuperscript{196} Id.
\textsuperscript{197} C.F. SCHUMACHER, supra note 159, at 126.
\textsuperscript{198} B. DEMING, WE ARE ALL PART OF EACH OTHER 291 (1973).
In a humorous, perhaps all-too-accurate description of how most of us listen, Paul Nash notes that polite behavior requires that we:

give the other person his share of air time even though we know his views are of trifling importance compared with our own nuggets of golden wisdom. We ... await our turn to speak, adopting the well-learned manners and body language of the person ‘listening’ ... [T]he customary way to pass the time is to prepare our next remark, perhaps picking up a ... weakness in the other’s argument, which we can ... correct or refute, using our correction as a launching pad for our next demonstration of forensic brilliance.^

Real listening — and, in turn, real dialogue — requires a genuine openness to the possibility that the other person “may be in touch with insights that are not apparent to me” and which might change or persuade me. By loosening our grip on goals and answers and positions and “winning” — and by negotiating and listening with an open mind — law school meetings can, once again, be worth our while.

C. Looking Outward

1. Job Placement: Hearing the Heartbeat

Beginning with our statement of institutional purpose, and continuing with our daily teaching and career counseling, we must be clear in our intention to help students retain and clarify their larger goals in life. All too often, students approaching graduation are distressed by not knowing what they want to do, having been stripped of their dreams and ideals. We can learn from the experience of a student who found the way back to her chosen path:

[T]he focus is always on the jobs that exist out there and whether we'll be judged suitable for them. In that atmosphere it is easy to forget to look inside ourselves, decide what we want, and then look for a job to match ... When I began remembering and focusing on what had attracted me to law in the first place, I finally realized how positive my feelings were ... I could use my legal and non-legal talents to help others and myself gain more control over our lives, using law in a broader context than a particular law-

200. Id. at 186.
suit . . . For the first time since I started job-hunting, I feel focused and the focus is positive . . . I feel much more in control, and I am excited knowing that I can do something with my skills that will be useful and satisfying for me . . . 201

With considerable wisdom, another student comments that it "was my heart that brought me here, and that, I found, doesn't make for a linear approach to my life and lawyering. And it is through my heart that I will find work that is consistent with what I value in lawyering." 202

I see so many of our best and brightest graduates dissatisfied with their jobs — jobs which they had accepted unconsciously because it seemed the thing to do or out of fear that nothing better would come by or out of perceived financial necessity. When a professional career counselor reports that "lawyers are the most dissatisfied professional group," 203 we should stop and take notice. By paying attention to our hearts as well as to our minds, we and our students can begin to identify the kind of work which brings meaning into our lives. What brings me joy, what makes me feel proud, what challenges me, what fills my life with love? What are the moments in my days that I remember with pleasure? These are the kinds of questions which we might address with our students during their tenure at law school.

We must also take responsibility for the social impact of our placement efforts. In his article "Law Placement and Social Justice," Douglas Phelps explains the importance of our task:

The passage from law student to lawyer, a transition mediated by the law school placement office, is immensely important to both the students and society. Personal decisions are made during this period, sometimes unconsciously, that shape the student's future career as well as her or her professional identity. Taken collectively, these decisions determine the distribution of lawyers in our society and the character of the legal profession. Since law schools are deeply involved with this transitional process and necessarily concerned about its impact, law placement deserves a good deal more attention than it receives. 204

201. Id. at 89-90, quoting Marcia Eisenberg.
202. Id. at 109, quoting Barbara Bezdek.
Having sought to define a unique mission for the law school, as discussed above, our placement efforts should be channeled to reflect our institutional goals. We might concentrate, for example, on facilitating our "graduates' involvement with combating social injustice."\(^{205}\) The ultimate choice of a job would remain, of course, with the student, but the placement office's point of departure would shift "from existing jobs toward legal needs."\(^{206}\)

Many of us still have hopes for the law as a vehicle for social change, yet we must concede that, for the most part, we are perpetuating the status quo when the vast majority of students whom we have trained choose to represent powerful interests who can pay well for their services. Faculty members must get involved in the placement process by contacting friends and colleagues doing public interest work, by organizing seminars and conferences, by helping our graduates "create" rewarding jobs. If we fail to ensure that our placement efforts reflect our values and goals, the laissez-faire marketplace will continue to prevail. Most of our efforts as teachers will be in vain if we do not help students find ways to practice what we have preached from within our ivory tower.

2. The Law School as Holon: Integration into the Larger Community

Recalling Arthur Koestler's term "holon," referred to in Part I above,\(^ {207}\) we can envision the law school not only as an autonomous entity, but as a subsystem with "an integrative tendency to function as part of the larger whole."\(^ {208}\) Law schools have traditionally displayed this tendency by becoming involved in their local communities, in state and national issues, and often in international programs. Although some schools experience town-and-gown conflicts, and other schools make overtures to the "world outside" simply as a public relations gesture, community involvement is becoming increasingly commonplace. Community leaders serve on school governing boards; local courts "sit" in campus courtrooms; members of the practicing bar — and alumnae/i, in particular — recognize their special duty to hire and to meaningfully train law students as clerks; schools open their doors to the com-

\(^{205}\) Id. at 665.
\(^{206}\) Id.
\(^{207}\) See supra text accompanying note 46.
\(^{208}\) Capra at 43.
munity for lecture series and other special programs addressing topical issues; and schools loan meeting rooms and other facilities for community use. These kinds of integration are exceedingly important and should be continually developed. In addition, there are three activities which have not always received the attention and whole-hearted support they deserve:

a. The law school should operate a law firm on campus, "modeled after a university teaching hospital,"209 which would focus primarily on providing free legal services for poor people and public interest groups. Other clients, within and without the law school, would be charged according to their ability to pay or at a rate equivalent to their own hourly earnings. All professors would be expected to contribute some of their time to the law firm each year, the amount depending upon their interests and expertise. Much of the discontent which some professors express regarding clinical programs would vanish, I believe, with first-hand exposure and participation in the operation of such a law firm.

b. Through the on-campus law firm, a "street law" program and other outreach services, and various law school publications, we should manifest our commitment to demystify the law for the general public. As one very exceptional law school dean has written to prospective students, "part of your work . . . will be not only to study law, but to divest it of everything that is abstract, impersonal, pretentious, and perplexing; to disclose its meaning in words of one syllable."210 By explaining to the public how the law works, by sharing rather than hoarding our knowledge and our professional language, we help community members exercise some control over their own lives. As any teacher knows, in the process of explaining and translating from legalese into understandable English, we and our students really learn the material. Seminars and publications designed for the layperson might address issues such as marital dissolution, worker's rights, welfare and unemployment benefits, and tenant's rights.

c. The law school should commit itself to socially responsible investing, including investments in the local community. Students enrolled in courses addressing issues of tax, corporations, and non-profit entities, employment and environmental law, and students participating in public interest law organizations might provide the nucleus of a com-


community-wide advisory group on institutional investments — the Law School Investment Advisory Committee, if you will.

No longer need institutional investors choose between earning a healthy return and being socially responsible. There are, in fact, stock portfolios of promise, profit and propriety. In recent years, a number of mutual funds\textsuperscript{211} and money market funds\textsuperscript{212} have received wide-spread attention for their superior financial track records. The various investment criteria developed by these kinds of funds reflect the social concerns which most of us share personally and which, I believe, should be manifested through the institutions that support us. Generally, socially responsible funds are concerned with some or all of the following: 1) product purity; 2) fair employment practices ("providing opportunities for women, disadvantaged minorities, and others for whom equal opportunity has often been denied"\textsuperscript{213}), including safe working conditions and, perhaps, employee ownership; 3) environmental concerns, conservation and alternative energy development; 4) marketing practices; 5) long-range economic impact; 6) community involvement, including short-term government securities that promote local investment; and 7) corporate giving. San Francisco's Working Assets, for example, chooses securities that "finance housing, renewable energy, small businesses, higher education and family farms."\textsuperscript{214} These funds avoid investments in nuclear energy, in the manufacture of weapons of war, and/or in repressive regimes, including South Africa.

The law school's portfolio, like our student placement efforts, is not only a conscious way of interacting with the larger community, but is a tangible reflection of our institutional values and goals. An urban law school, for example, might choose to invest in federally-subsidized low-income housing programs or urban revitalization projects dedicated to historic preservation. A law school with a strong labor law commit-

\begin{itemize}
  \item \textsuperscript{211} Calvert Managed Growth Portfolio, Calvert Social Investment Fund, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, (800)368-2748; Pax World Fund, Inc., 224 State Street, Portsmouth, NH 03801, (603) 431-8022; Dreyfus Third Century Fund, 666 Old County Road, Garden City, NY 11530, (800) 645-6561; New Alternatives Fund, Inc. 195 Northern Blvd., Suite 300, Great Neck, NY 11021, (516) 466-0808; Parnassus Fund, 1427 Shrader Street, San Francisco, CA 94117, (415) 664-6812.
  \item \textsuperscript{212} Calvert Money Market Portfolio (see Calvert Social Investment Fund, \textit{supra} note 211); Working Assets Money Fund, 230 California Street, San Francisco, CA 94111, (800) 543-8800.
  \item \textsuperscript{213} Calvert Social Investment Fund brochure, at 2.
  \item \textsuperscript{214} Working Assets Money Fund brochure, at 2.
\end{itemize}
ment could choose to promote fair employment practices in the local community by investing in those companies with good track records, which might well include the fair treatment of members of the law school community and their families.

A law school investment advisory committee would do well to consult the various periodicals\(^{215}\) which address themselves to socially responsible investing and which provide social and financial profiles of companies. In addition, there are conferences taking place throughout the country on a periodic basis, designed to help us keep our investments consistent with our politics.

3. Utopian Thinking: Identifying and Fulfilling Our Dreams

As lawyers, we are widely regarded as narrowly-focused, sharp-minded workaholics, swelling with self-importance and material success. We are skilled in sophisticated reparte and verbal gamesmanship and charmed by our own quick wit and oratorial brilliance. As law professors, we are deemed the cream of the crop, meaning that we possess all of the above plus some intellectual acumen. In short, we are over-developed above the neck; we are top-heavy and out of balance, tilting severely to one side by virtue of left-brain imbalance.

Our story-telling, our compulsive need to record and report, abruptly destroys our experience of life’s events. Through the very act of verbalizing, of putting pen to paper (or more literally, of word processing), we memorialize the story and lose the experience. When we talk about something, we pretend we are making the experience real, yet we are effectively erasing it.\(^{216}\) This pattern is not surprising when we con-


Periodicals include: GOOD MONEY, published bimonthly by The Center for Economic Revitalization, Inc. (Box 363, Calais Stage Rd., Worcester, VT 05682); INSIGHT, published quarterly by Franklin Research and Development Corp. (111 Lewis Wharf, Boston, MA 02110); RENEWABLE RESOURCE AND CONSERVATION REPORT, published bimonthly (311 Miramar Rd., Rochester, NY 14624); THE CLEAN YIELD, published monthly by Fried and Fleer Investment Services, Ltd. (Box 1880, Greensboro Bend, VT 05842); THE CORPORATE EXAMINER, published monthly by the Interfaith Center for Corporate Responsibility (475 Riverside Dr., New York, NY 10115).

\(^{216}\) Recall Jung’s oft-repeated observation that American mainstream religions
sider that the experiential approach to learning can be frightening with its potential for uncovering the ghoulish delights of disorder, emotions and complex variables which defy our attempts at control. Likewise, periods of reflection and introspection can be disturbing with their potential for disrupting safe and familiar work patterns, career choices and personal priorities. And so many of us avoid time alone, defer sabbatical leaves, and avoid discussion and other pursuits which may not produce tangible, measurable results.

For ourselves and for our students, we would do well to take the time to reflect on some of the larger issues of law and life. In an environment of kindred souls, with similar aspirations and similar doubts, our students would learn the value of stepping back from the minutiae of everyday pursuits to gain a wider perspective on the filmstrip of our lives. By choosing not to repress this kind of reflection, our students are more likely to make satisfying career choices initially and to avoid traumatic mid-life crises in the future.

I propose that each member of the law school community — faculty, staff and students — be part of a small-group seminar (twelve persons or less), meeting once each month for the duration of his or her tenure at the school, entitled Utopian Thinking: Identifying and Fulfilling our Dreams. These on-going groups would develop, in the process of addressing “meaning of life”-type questions, images of the ideal legal system, the ideal law firm, and — of most immediate concern — the ideal law school. Attention would focus on the creative and positive, rather than on judgments and critiques. The late philosopher and theologian, Alan Watts, commented that everyone seems to know “what they are against, but no one knows what they are for.” He suggested that all entering college students write an essay describing “their ideas of heaven on earth.” And they must be “absolutely specific” in their description, he said. If a “wonderful spouse” was part of the picture, specifics of character, appearance, values and such must be included; if a “beautiful home” was desired, very specific architectural features must be included. Of course, continued Watts, this would re-

218. Id.
219. Id.
220. Id.
221. Id.
quire the study of architecture, among other things, and soon the project would evolve into the student’s doctoral thesis. For law students, a first-year essay and a third-year thesis describing the “ideal” legal system or lawyering process, evolving out of their ongoing seminars, would serve an equally valuable purpose.

Conclusion

For law students, staff and faculty members alike, life has arrived. We are, in fact, living life, not just preparing for it. This is all there is. The law school experience is not just a means to an end, not simply a stepping stone to the future. Yet by denying the importance of “now,” we justify our compromises and procrastinations. If we are merely preparing for our lives and for the world we want, we cannot be held responsible for present conditions.

For those of us who have spent much of our lives in schools, escaping this future orientation is doubly difficult because “education” has become widely regarded as a synonym for “preparation,” not an end in itself. From elementary school through college, we aimed at the next preparatory hurdle. Once enrolled in law school, many sought to make law review, to become an officer, to obtain a clerkship. Upon passing the bar, the next step was establishing a practice, making partner or earning tenure. And, still, the “here and now” just around the next corner remains elusive — prestigious appointments, more money, always something structuring our lives. The familiar pattern is that:

... what we ‘really’ want to do is for the moment not feasible and must responsibly be postponed until one more bit of preparation can be laid carefully in place...

We vainly romanticize about a free future life and dismiss as impractical ... any who attempt to live their present lives according to their true values and priorities.

Yet, as Howard Lesnick so aptly observes, that is “the only cold-eyed practical thing we can do, given the eloquent testimony of the wrecks of so many plans deferred in search of that elusive next ‘something’ that will make true freedom to live possible.”

Well, talk is cheap. Now is the time to create the kind of coopera-

222. Id.
223. Dworkin at 88-89.
224. Id. at 89.
tive environment in which we want to work, to fuse the ladder of hierarchy with the web of connection, to achieve the dynamic balance of the feminine and the masculine in legal education. Perhaps by incorporating aspects of this model law school into our institutions, we can begin to transform our dreams and our rhetoric into bricks and mortar.

My friend and student, Robin Richards, also the articles editor for this symposium, tells me that I am an "idealist," the implication being, of course, that some of my proposals may be impractical. And, in fact, with respect to the proposals I offer in this article, I have not always addressed the difficulties of implementation which are real and significant. Perhaps this is a shortcoming, but it is a conscious choice, for I believe that what we need most is to be reminded of our hopes and dreams. The greatest barrier to transforming legal education is not the reasoned objections of the logical mind, but rather our inability to transcend the logical mind. In our attempts to create order in the universe, we have built a cage around ourselves, severely limiting our view of the world as well as our human potential. What we have to fear is, like dreamless sleep, the lethargy of spirit which accompanies middle-age spread.

Let us try to remember the hopes and dreams which nourished us when we first embarked on careers in law. My dreams may not be exactly your dreams, but why quibble, for it is the renewed pursuit of dreams, not the content of specific dreams, which will begin to dissolve the cage.
What Should a Law Teacher Believe?

Anthony Chase

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"In legal writing, of course, it is always said that ambiguity is to be avoided, since people's rights and duties so often arise out of language and depend upon its meanings. But every natural language is to some extent ambiguous. Unlike languages of mathematical logic, which are designed for almost no purpose but to avoid ambiguity, ordinary languages have other jobs to do. . . ."—Arthur Allen Leff*

I.

Who can forget the sequence in Ingmar Bergman's Winter Light1 (Bergman's own favorite among his films) where the distraught parishioner, played by Ingrid Thulin, seeks immediate intervention by the local priest (Gunnar Bjornstrand) to aid her husband whom she fears may commit suicide. In a stunning admission, the priest reveals to Ingrid that he does not himself feel certain of God's love or even existence and can provide her husband no assurance. The husband (Max von Sydow), whose existential panic has been touched off by reading in a newspaper that the Chinese would soon have nuclear weapons and thus it was "only a matter of time," drives a short distance out of town and kills himself with a shotgun as the frigid winter afternoon turns into night.

Is this, basically, what is happening to American legal education today, thanks to the spread of Critical Legal Studies (CLS)2 activists

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2. The best discussion of the genesis and early development of Critical Legal
throughout the few remaining tenure-track teaching posts in America's law schools? Like Bergman's priest without religion, are the CLS professors essentially "law teachers without law" who are precipitating the same, potentially suicidal, crisis of faith within the secular world of legal professionalism and systematic training in the law? Is the Harvard Law School the first victim of such self-laceration? According to a growing number of law professors on American campuses, the threat posed by CLS is not an imaginary one.

Professor Paul Carrington, Dean of the School of Law at Duke, has been one of those most concerned about CLS. In his now widely-read manifesto of the anti-CLS movement, initially delivered at the San Francisco AALS meeting in December, 1983, Carrington argues that the relation between law and politics has led some professors to lose their faith in the law. Citing the use of law against the socially powerless as one example, Carrington suggests that:

Faced with such impediments to belief in law, who can fail to have doubts about the validity of their professionalism as lawyers? Such disbelief threatens competence. More than a few lawyers lack competence because they have lost, or never acquired, the needed confidence that law matters. Moreover, there is dread in disbelief. A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which the only right is might. Such a fright can sustain belief in many that law is at least possible and must matter.

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5. Carrington, supra note 4 at 227. For an assessment of the direction in which Carrington's views were leading him prior to the publication of his critique of nihilist
This is a dramatic analysis which can be approached from several different, equally intriguing, angles. First, from the historical perspective (to which we shall return at greater length in Part III of this article), Carrington's comments can be usefully compared with the critique which orthodox legal scholars directed against American Legal Realism in the period at the end of the 1930's. It is odd that the remarkable similarity between Carrington's critique of CLS and the orthodox hostility to Legal Realism fifty years ago has gone almost entirely without comment from any quarter in the current debate.

Second, in spite of Carrington's obvious concern over the implications (as he sees them) of the CLS critique (which he seems to designate as simply "nihilist") he does not actually engage in a historical or empirical discussion of whether or not the critique is true. He focuses, rather, upon the intellectual and psychological effects of our thinking it is an accurate description of law and politics. Carrington is thus more concerned with the implications of our "contemplating" the spectre of "government by cunning" than with the implications of actually having to live in a society so governed.

Nor is there any evidence for the proposition that Carrington dismisses the possibility that ours is a "government of cunning." Indeed, how could he? Many of America's finest journalists, international legal scholars, novelists, and critical intellectuals spend much of their


7. Carrington, supra note 4 at 227, citing Roberto Unger, one of the most controversial figures within CLS, as well as authors of some recent work published in the HARVARD LAW REVIEW. See Carrington, Paul D. Carrington to Robert W. Gordon 35 J. LEGAL EDUC. 9, 10 (1985):

I am certainly aware that my concern is not appropriate with respect to all the persons having some sympathy or connection with CLS; it is for that reason that I tried to avoid referring to CLS as a corporate body, and chose to comment instead on Legal Nihilism, a phrase which I thought likely to claim [sic] for their banner, but which may nevertheless apply to some. [Emphasis added.]


11. See, e.g., Chomsky, "Intervention in Vietnam and Central America: Parallels
lives systematically documenting the way that the American government operates through "cunning" or deceit. The U.S. government often relies on the rationale that within the "hardball" politics of late twentieth-century internecine competition between the Free World and the Soviet Imperium, "might" often has to take precedence over legalistic conceptions of "right" unless we genuinely wish to see the Russians ruling the Rockies.¹² Americas Watch Spokesperson Aryeh Neier, who


12. For the record on American subordination of right to might, see Frappier, Above the Law: Violations of International Law By the U.S. Government from Truman to Reagan, 21-22 CRIME AND SOCIAL JUSTICE 1 (1984). For an important, though disturbing, example of U.S. opposition even to minimal programs for certification of legal recognition of human rights, see comments by former U.S. Assistant Secretary of State for Human Rights, Elliott Abrams, in ABC NEWS NIGHTLINE SHOW #670 (Dec. 2, 1983) at 9:

That certification asked all the wrong questions. Mr. Ford [brother of American nun slain in El Salvador by government troops] himself just asked a few wrong questions and left out some important ones like, what's human rights in El Salvador going to be like if the guerrillas win because we cut off our aid? Is that the future we want for El Salvador — no election ever? A Communist government to take over El Salvador? That's the kind of question that is not asked in the certification.

Indeed that question is not asked either in certification or in law. In the most general terms, the question for the lawyer or judge is this: Does the governmental conduct in question conform to the requirements of domestic and international law? On the other hand, for politicians like Kissinger, Reagan, and Abrams, the question frequently is: How will this effect the relative strength of Communist forces in the area? Thus, our government resorts to tortured distinctions between "totalitarian" (communist) and merely "authoritarian" (fascist) governments. Thus is right subordinated to might, law manipulated in behalf of a politics of cunning. See, e.g., J. McMAHAN, REAGAN AND THE WORLD: IMPERIAL POLICY IN THE NEW COLD WAR (1985).

On the generation of public fear that the Russians will eventually invade the United States, see the recent motion picture RED DAWN (1984); cf., "Details At 11 O'Clock" THE NATION 361 (Oct. 19, 1985):

[A]BC is now shooting a kind of antidote to [The Day After]. 'AMERIKA', a $40 million, sixteen-hour miniseries, is supposed to stick it to the nuclear crybabies who think it's better to be Red than dead. It will docudramatize a bombless, bloodless Soviet takeover of America, by unspecified means, and show Americans what it is like to live under a totalitarian regime.

Thus ABC's entertainment division, exploiting an anti-Russian sentiment already explicitly if innocuously deployed in professional wrestling and installments of the film, Rocky, will attempt to accomplish the same sort of task (bringing home the fear of communism) pursued by Assistant Secretary of State Elliott Abrams, as described
is surely as committed as Paul Carrington to holding legal rights superior to political conflicts and is widely respected for his devotion to the "rule of law" values defended by the American Civil Liberties Union, is compelled to report that in today's world:

The Reagan Administration holds law, and particularly international law, in low regard, as it has demonstrated on a number of occasions, from its objection to U.S. ratification of the 1977 Protocols to the Geneva Convention to its effort to sabotage the World Court. Nowhere has this been more evident than in the way the White House has dealt with terrorism.

Obviously, "sabotaging the World Court" when international law might obstruct our military and economic foreign policy is precisely what Carrington must mean by governmental cunning and subordination of law to politics. Thus the world which frightens him, the one whose very "contemplation" Carrington warns law teachers against, is already upon us. The sort of contemplation which understandably fills the Dean of Duke's School of Law with "dread" forms part of what most Americans have to face each morning on their "toasters with pictures" (televisions) when they get up and make breakfast. That Carrington above, on ABC's "news program", Nightline.


The [F.C.C.'s] engaging chair, Mark S. Fowler, is a former lawyer for broadcasters who can expect to resume this lucrative practice when he leaves government. In a recent address to radio and television executives in New York City, Fowler described his revolution with disarming candor: "It was time to move away from thinking about broadcasters as trustees. It was time to treat them the way almost everyone else in society does — that is, as businesses." After all, he said on another occasion, "television is just another appliance. It's a toaster with pictures."
rington is able to lament the critique of law's subordination to politics while avoiding acknowledgment of the critique's sad application to the way the world has rapidly become, remains one of the great mysteries of his article.

Third, there is an uncanny similarity between Carrington's plea for courage in the face of dreaded unbelief and the crisis of religious faith represented by the priest's apostasy in Bergman's *Winter Light*. It is almost as if Carrington regarded belief in law as a kind of residue of the spirit which once provided such a warm glow to the candle of religious faith — almost as if, for Carrington, the values of the rule of law are propped up (like those of religion) by nothing more substantial than a tissue-paper-thin leap into the dark and that our fragile faith in the law itself could be swept away as one cynic after another rapidly succumbs to a seemingly irresistible heresy: belief that law is a hoax. Can totalitarianism of one form or another be far behind such a collapse? "Teaching cynicism may," at any rate, argues Carrington, "and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation." 17 What, according to Carrington, is the appropriate remedy? "[T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy." 18

It apparently did not occur to Carrington that his suggestion some CLS professors should not be in legal education would strike a few professors at national law schools as a potential threat to academic freedom and the intellectual independence of American law teachers. 19 Even after the development of sharp criticism of Carrington's commentary regarding limits to what a law teacher should be allowed to believe, 20 the Dean wrote to readers of the *Duke Law Magazine*: "I hope

18. *Id.*

The committee received an inquiry from Professor Paul Brest of the School of Law, Stanford University, concerning an article by Dean Paul Carrington of the Duke Law School dealing with the 'critical legal studies' movement in legal education. Professor Brest inquired as to the Association's position on issues of academic freedom raised by a seeming predisposition against the appointment of law professors who espouse what Dean Carrington termed 'nihilistic' views . . . We hope to produce a statement...
you will agree that my words did no harm save that perhaps of uttering an unwelcome truth." Carrington’s placement of the consequences of his conduct in the past (i.e., "did no harm") is not the only aspect of the Dean’s judgment that is now being questioned.

II.

Before returning to a historical perspective on the relation between anti-CLS critique in the 1980’s and anti-Legal Realism prior to the Second World War, it may be helpful to take a brief look at what CLS, the object of Carrington’s concern, is all about.

Though the fact is not often enough acknowledged, there are at least four approaches to or versions of CLS. First, CLS has been holding national meetings for about seven years in cities such as Boston, Madison, Minneapolis, Camden, San Francisco, and Washington, D.C. In a sense, the best description of CLS is simply the values and views of all the lawyers, law students, law professors, social scientists, and other interested parties, who have come together for these national meetings and everything which has come out of that mutual association and activity. Virtually no one ever tries to talk about CLS in these terms and that is a pity.

A second version of "what CLS stands for" can be based upon the material included in "A Bibliography of Critical Legal Studies" published by the Yale Law Journal in 1984. Such a reading (and it be-

that will at least explain the difficulties in the question and will not be entirely platitudinous.


22. See, e.g., Gordon, Robert W. Gordon to Paul D. Carrington 35 J. LEGAL EDUC. 13 (1985); Finman, Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River, 35 J. LEGAL EDUC. 180 (1985); and Gary Minda’s article, herein at 705.

23. There is no history or even summary of these meetings in existence, to my knowledge, yet (again) Schlegel’s comments are illuminating. See Schlegel, supra note 2.

comes in this approach just that, a reading of CLS) eliminates the values and perspectives of those who do not publish books or articles yet have participated in the experience (or “happening” in Edward Thompson’s reference) of CLS as a form of social praxis. Even this truncated version of CLS, however, is virtually never what writers have in mind when they refer to “what CLS says” about this or that.

Next, there are third and fourth versions of CLS which involve a paring down of the massive CLS bibliography (as of 1984) into just forty or fifty “key works” and then cataloging those between one of two categories to which I refer as CLS3 and CLS4.

CLS3 represents, more or less, legal education’s (belated) version of American left academia. Although the Accuracy in Academia estimate that there are 10,000 Marxist college and university professors in America is, I imagine, outrageously high, there are Marxist, socialist, anarchist, radical feminist or otherwise left-wing teachers and scholars in most university disciplines in the United States today. The “work” of CLS3 stands in direct relation to the scholarship produced by other American left-wing professors, particularly those in such fields as sociology, history, and political science. Premier examples of CLS3 scholars include Richard Abel at UCLA, Morton Horwitz at Harvard, and David Trubek at Wisconsin. CLS3 writing also has an important and interesting relation to the work of legal historians and sociologists not involved with CLS, such as Lawrence Friedman at Stanford, Willard Hurst at Wisconsin, and Stanley Katz at Princeton. Stated in the


27. See Benjamin, supra note 20.


29. Although Abel and Trubek, for example, can be regarded as empirical sociologists, the split between “empirical” and “theoretical” work is not at all what I have in mind when distinguishing CLS3 from CLS4. The sort of work characterized here as CLS3 shares with the work of other left academicians both an empirical and a theoretical capacity.

30. For brief but representative recent examples of each author’s general approach to legal history or sociology, see Friedman, AMERICAN LEGAL HISTORY: PAST AND PRESENT, 34 J. LEGAL EDUC. 563 (1984); Hurst, RESPONSE, 1985 AM.BAR FOUND. RES. J. 138 (1985); Katz, “AN HISTORICAL PERSPECTIVE ON CRIZES IN CIVIL LIBERTIES” OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY 311 (N. Dorsen,
simplest possible way, CLS3 is engaged in the analysis of historical, political, and socio-economic causes and consequences of the operation of the American legal system, broadly understood. It is rarely, however, CLS3 research perspectives which are referred to when people (both in and out of CLS generally) talk about “the CLS argument.”

CLS4, however, from closed meetings of tenured faculty to the pages of *Time* magazine, is precisely at the heart of things whenever CLS as a whole is supposed to be under discussion. Rejecting “evolutionary functionalist” explanations (whether of Marxian or liberal origin), CLS4 asserts that the primary (or even exclusive) importance of law derives from its “superstructural” role in society. Or if one rejects the “base/superstructure” nomenclature itself — which seems inevitably to end up artificially separating “ideas” from “forces of production” — it can be argued that what is unique about CLS4 is its emphasis upon the significance of law as a form of “ideology,” as a means of providing “legitimation” for the way things already are. The law-as-ideology approach sees the mental structure of legal reasoning as a framework within which individuals come to know and understand themselves and their world. 31

This conclusion by CLS4 is derived from two essential analyses, to which I refer as the critique of indeterminacy and the critique of pervasiveness. First, the critique of indeterminacy is what we normally conceive to be the cutting edge or “avant-garde moment” of American Legal Realism: 32 the assertion that law is not, like the mountain, *there* ed. 1984).

31. *See, e.g.*, Friedman, *supra* note 30 at 571:
If there is one single idea that underlies the Critical school, or the intellectual historians, or the neo-doctrinalists, it is that law *matters* in society, and matters a great deal. The new legal historians are sure that law is significant, because it provides a legitimating myth for society. The key element of law is not what it actually does, but what it means. What could be more important, more fundamental, than a legitimating myth? Ideologies provide meaning for the lives people live; they are pillars that buttress social structure and hold society in place. A cynic might point out that this approach has the virtue of legitimating, not the legal system, not capitalism or socialism, but the practice of sitting in a law library reading appellate cases and legal treaties.


but — on the contrary — law is an open-textured and infinitely “manipulable” system (at least at the level of language and the understood meanings of words) whereby virtually any judicial result can be “logically justified” on any given set of facts. Thus law cannot be explained simply in terms of reasoning from precedent or *stare decisis* or logical analysis of statutory or common law rules. Rather than constituting some sort of revolutionary philosophy, however, this critique (in and of itself) frequently amounts to little more than the argument for inclusion of “and materials” in the titles of West or Foundation casebooks published since the Second World War.

At some prestige law schools (though not, apparently, Dean Carrington’s) Legal Realist skepticism has become the dominant emphasis within parts of the first-year curriculum. The degree to which a law school relies upon such an assiduous approach to teaching first-year subjects (or upon the class assignment of such supplementary texts in the first-year as Grant Gilmore’s “nihilist” works) is probably one of the best indexes of where a particular school ranks in the national law school “pecking order.” One way of interpreting Paul Carrington’s critique of “nihilism” in law teaching would, in fact, suggest that he is mounting a challenge to the current “top ten” law schools in the United States (according to contemporary orthodoxy) and proposing alternative criteria (e.g. the absence of CLS teachers) for determining exactly which schools should be ranked at the apex of national hierarchy.

It is the second aspect of CLS4, however, referred to here as the critique of pervasiveness, which carries this version of CLS beyond Legal Realism. On the one hand, the critique of indeterminacy unlocks how the mechanics of liberal legalism work: results which are, in fact, politically contingent — inevitably dependent upon circumstances (and not just ‘economic’ ones, of course) outside of legal reasoning — are made to seem above politics (the identities of the contending parties or interests, the relative power of particular lawyers, judges, legislative lobbies, the ‘larger’ social tensions and conflicts of the day) and thus appear reasonably neutral. On the other hand, the critique of pervasiveness.

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35. Compare, address by Duncan Kennedy to the 29th National Conference of Law Reviews (March 24, 1983).
ness unlocks *why* liberal legalism is important, why it is significant that
the process works the way it does: "By inducing us to believe that ex-
isting institutions and patterns of social thought are natural, rational,
or necessary, legal discourse inhibits our ability to perceive the contin-
gency of present arrangements — the extent to which they are created
and sustained by human choice."36
Thus the *how* of liberal legalism's self-effacement added to its *why*
— its naturalization of social institutions throughout a society which
identifies itself (at least within CLS4 theory) as *legitimated* through
the rule of law — equals the target of CLS4 critique: the ideology of
liberal legalism and of the American legal system. As Bill Nichols sug-
gests in a different but parallel context:

All human activity that involves communication and exchange,
whether it is the economic production of an automobile or the artist-
ic production of a painting, produces meaning. The elements of
this production that represent the needs of the dominant class order
are ideological elements. We need to be able to identify these ideo-
logical elements, to discover the aspects of representation that em-
body them, to understand the place set out for us within such
processes. One crucial aspect of this place is that it proposes a way
of seeing invested with meanings that naturalize themselves as
timeless, objective, obvious. What remains hidden is the process of
representation itself, the investment of meanings as a material so-
cial process. Ideology appears to produce not itself, but the world.
It proposes obviousness, a sense of 'the way things are,' within
which our sense of place and self emerges as an equally self-evident
proposition.37

I have quoted Nichols here at some length since his observations
seem to explicate the CLS4 critique: in the determinate or Classical38
game plan (serving the dominant order), liberal legalism presents a
world where law produces not itself but, rather, appears to produce the
world. That is what ideology, according to CLS4 (and much recent
Marxist theory, incidently)39 is all about.

36. Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal
38. See Mench, "The History of Mainstream Legal Thought" THE POLITICS
   OF LAW 18 (D. Kairys, ed. 1982).
39. See, e.g., L. Althusser, "Ideology and Ideological State Apparatuses" LENIN
   AND PHILOSOPHY AND OTHER ESSAYS 127 (1970). For a general discussion of legal or
I find it hard to disagree with the first component of CLS4 — the
critique of indeterminacy; neither would many of the original Legal
Realists in their best, most iconoclastic, moments. But I question the
second component or prong of the CLS4 analysis: the critique of pervasiveness.40 In his essay herein, Harvard Professor Duncan Kennedy ar-

gues persuasively (it seems to me) in defense of one conception of perva-

siveness.41 He suggests that for radical law teachers there is a severe

price to pay for abandoning the “real system” or “the basic, the hard
curriculum” to those who would teach these courses from a Classical or

“Willistonian” perspective while “left-liberal types” gravitate toward
the seemingly more “value oriented” courses such as Constitutional
Law, Civil Rights and Liberties, or Poverty Law (is this course still
taught?). The latter variety of “soft” course (in terms of student per-
ception) remains important, asserts Kennedy, but it is more significant
for CLS4 professors to meet the challenge of the “hard/soft model” by
demonstrating systematically the parallel “indeterminacy” of “hard or

‘black letter’ ” courses, such as Property, Contracts, Torts, substantive
Criminal Law, Corporations and Tax. 42

Indeed, I cannot imagine a “critique of indeterminacy” worth its
salt which could not demonstrate the inherent, “across the board” am-

biguity of legal language, irrespective of the particular field of law
which happens to be covered by a specific case or statute. Indetermi-

nacy is built into the law as a structure just as the unconscious is built
into human mental life as a structure; these are not introduced from
the “outside” (by the “Realist” law professor in the first instance, by
the psychoanalyst, for example, in the second)43 but rather are con-

other ideologies, some of it sharply critical of recent exaggeration of the importance of
ideology in determining social development or change, see LEGALITY, IDEOLOGY AND
THE STATE (D. Sugarman, ed. 1983); C. SUMNER, READING IDEOLOGIES: AN INVESTI-
GATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW (1979); J. McCARNEY,
THE REAL WORLD OF IDEOLOGY (1980); P. HIRST, ON LAW AND IDEOLOGY (1979); G.
THERBORN, THE IDEOLOGY OF POWER AND THE POWER OF IDEOLOGY (1980); N. ABER-
ERCROMBIE, S. HILL, AND B. TURNER, THE DOMINANT IDEOLOGY THESIS (1980); M.
CAIN & A. HUNT, MARX AND ENGELS ON LAW (1979). By far, the briefest and most
persuasive contribution to this debate is J.G. MERQUIOR, THE VEIL AND THE MASK:
ESSAYS ON CULTURE AND IDEOLOGY (1979).

40. For extended discussion of this point of disagreement, see Chase, Toward a
42. Id. at 611.
43. See Chase, Jerome Frank and American Psychoanalytic Jurisprudence, 2
stituitive of the structures in question themselves. Kennedy is right to argue that it is precisely in the universe of the apparently iron-clad, common sense/common law first-year curriculum where the Legal Realist critique must be refought, year in and year out, if it is to succeed.

But there is all the difference in the world between successfully demonstrating that indeterminacy is pervasive throughout the law school curriculum (as Kennedy does) and demonstrating that the ideological consequences of the gambit which the critique of indeterminacy seeks to reveal are pervasive throughout American social life. One cannot even try to argue, in fact, that the ideology of "liberal legalism" or of the American law school has managed to permeate the consciousness of different social classes or groups in the United States and thus has changed American politics and history, without abandoning the American law school library altogether and engaging in the kind of sociological, historical, or anthropological research which is sometimes attempted within CLS3 and is commonly the center of American left academic scholarship.

Rather than questioning the centrality of legal ideology in social history, however, CLS's conservative critics have confined themselves to an attack on the first prong or component of CLS4 analysis: the critique of indeterminacy which directly relates CLS4, as even its champions usually acknowledge, to the American Legal Realist movement. Here, then, it is useful to return to our promised sketch of the relation between anti-Legal Realism and contemporary hostility to CLS.

"What should a law-teacher believe?"

44. See Singer, supra note 33.
III.

Current opponents of CLS often profess an at least “arm’s length” appreciation of or respect for the critical analysis of law generated by American Legal Realists during the period between the two great world wars. But the comparison I wish to draw is between the current hostility to CLS and the specific opposition with which Legal Realism was confronted during the rise of totalitarian governments in the 1930’s. Like so many other iconoclastic or modernist movements of this century, Legal Realism has become a great deal more acceptable to the orthodox after its initial challenge has been absorbed and/or deflected.45

Paul Carrington, in his critique of CLS, indicates that “[t]he professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic.”46 The distinction deployed here by Carrington to “save” Legal Realism from being subject to his critique of nihilism — the effort to distinguish between who decides matters/who decides is everything — turns out, in my view, to be a hopeless contrivance when actually applied to specific Legal Realist and CLS doctrinal analyses. Not only is it impossible to determine whether some sliding scale of percentage cosmetic reveals Jerome Frank or Karl Llewellyn or Thurman Arnold to be 96% skeptical of a particular appellate judicial rationale for a legal decision (as opposed to the presumed CLS score of full “tens” from all three judges!) but, further, simple common sense tells us that if the opinion for the court had been written by one of the dissenters instead of one of the majority (indicating the balance had shifted the other way in a particular judicial appeal) then who decided was (in a sense) “everything”. To provide another example, consider the opinion of Realist-fellow traveller, Benjamin N. Cardozo, in the famous case of MacPherson v. Buick Motor Co.47 In justifying the result which he reached in MacPherson (defendant motor company liable for negligent failure to inspect for safety prior to sale), was Cardozo’s dramatic extention of

45. Of course Legal Realism has never been accepted as the general organizing theory for either mainstream legal education or legal scholarship in the United States. For a much fuller discussion, see Chase, American Legal Education Since 1885: The Case of the Missing Modern, 30 N.Y.L. SCH. L. REV. 519 (1985).
46. Carrington, supra note 4 at 227.
"the principle of Thomas v. Winchester" nothing but cosmetic (as Carrington would have it), thus moving him into Carrington's "nihilist" category? Or was Cardozo's manipulation of the earlier legal principle only 9/10's cosmetic? Is that even a distinction worth trying to make? Is my attempt here to, perhaps, obscure the distinction between two different meanings of the word "principle" (the way Carrington meant it and the way Cardozo used it in MacPherson) itself a form of "cosmetics"? Am I therefore a "nihilist"? What, precisely, is the difference between Carrington's "nihilism" and Francis Wellman's "art of advocacy"? If there is no significant difference between the central argument of Legal Realism, the first prong of CLS4 critique, and the essential dynamic of an adversary judicial system, then are not all legal professionals likely to end up branded as "nihilists" within Carrington's system of thought?

I have suggested, however, that there seems to me to be an even more fundamental argument which can be made with regard to contemporary anti-CLS posture, an argument which links it to the anti-Legal Realist critique advanced during the latter part of the 1930's. Historian Edward Purcell has written of the increasingly bitter reception Realism received as the Second World War loomed:

In the context of the late thirties the logical implications of realism, morally and politically, seemed too apparent and too frightening. Much of its work had slighted the importance of ethical theory. Its philosophical assumptions had undermined the concept of a rationally knowable moral standard. Its apparent ethical relativism seemed to mean that no Nazi barbarity could be justly branded as an evil, while its identification of law with the actions of government officials gave even the most offensive Nazi edict the sanction of true law. Juxtaposing that logic to the actions of the totalitarian states, the critics painted realism in the most ominous and shocking colors.

49. There is an interesting parallel between the hostility to CLS within the academy and hostility to zealous advocacy by the defense bar in criminal cases. In both instances, the targets of criticism are assailed for having gone as far as possible (within the rules) toward revealing the "open texture" of legal language and legal process. See, e.g., M. Freedman, Lawyers' Ethics in an Adversary System (1975). And in both instances, it is almost a regime of proper etiquette or inarticulate but consensual norms of decency which are allegedly transgressed.
50. Purcell, supra note 6 at 172; cf , J. P. Diggins, Mussolini and Fascism: The View from America (1972) (a far superior historical account but which does not
Purcell's deft presentation of the anti-Legal Realist mood which developed as the War approached is equalled only by his curious unwillingness or inability to respond to the kind of critique which was launched against the fatal vulnerability to totalitarian misuse to which Realism, according to its critics, had lent itself. Moreover, this attack upon Legal Realism is one to which I have found many contemporary law professors unable to respond other than in terms such as, "any system of ideas can be used by the wrong people," etcetera.

Thus, to the extent that a distrust of the political implications of contemporary CLS inconclasm can be seen as analogous to the fear of Legal Realist "moral relativism" of the 1930's, the current critics of CLS as a potentially dangerous intellectual force seem to me to have a strategic argument against CLS which may appeal to both liberal and conservative law professors.51

It is also an argument which I think can be readily smashed. First, we might ask if there are any direct links between the work of the American Legal Realists and right-wing or authoritarian political developments subsequent to Realism's impact on American law and jurisprudence. No one, to my knowledge, has argued that specific fascist or Nazi leaders during the 1930's or 1940's were familiar with or utilized in their political theories the work of American Legal Realists. Nor, to my knowledge, has anyone argued that, within the American political context, leaders such as President Richard Nixon or Henry Kissinger have relied upon the Realist critique of indeterminacy in law to justify their conduct in violation of law, whether we are referring to domestic espionage and neglect of civil rights and liberties, the Watergate conspiracy, the overthrow of democratically-elected leaders of foreign

51. It is relatively easy to juxtapose quotations from Paul Carrington's critique of CLS, for example, with references from 1930's critique of Legal Realism. See, e.g., Purcell, supra note 6 at 159-160:

The forerunners - scholars such as Holmes, Pound, and John Chipman Gray - had always had their critics, but they had seemed to represent an ever-strengthening force in an old and slowly changing discipline. . . [.] By the late thirties criticism turned into a direct frontal assault on realism as a form of skepticism, nihilism, and moral relativism that was helping to destroy American civilization.

In a sense, the transformation of CLS's institutional reception has duplicated that of Legal Realism but in less than half the time. See A Discussion on Critical Legal Studies, supra note 3; A Symposium on Legal Culture: Legal Education and the Spirit of Contemporary American Law, 8 HARV. J. LAW & PUBLIC POLICY 225-358 (1985); Critical Legal Studies Symposium, 36 STAN. L. REV. 1-674 (1984).
countries, or the illegal bombing of Cambodia which cost thousands of human lives. Just as President Nixon probably had little familiarity with the work of Karl Llewellyn and presumably was not persuaded to authorize payment of funds to silence Watergate conspirators by certain passages in the Uniform Commercial Code (one of Realism’s greatest “achievements”), President Ronald Reagan probably did not have recourse to the works of Roberto Unger or Duncan Kennedy in deciding to invade Grenada, back Central American anti-communist “contras”, pull out of World Court jurisdiction, or approve Central Intelligence Agency terrorist activity.

Thus, there would appear to be, in retrospect, little direct evidence for the 1930’s contention that promotion of an “indeterminacy critique” of judicial reasoning somehow led to the rise of Nazi and fascist, right-wing or neoconservative political regimes.

Second, Purcell observes that Realism’s “apparent ethical relativism seemed to mean that no Nazi barbarity could be justly branded as an evil. . . .” Again, this seems to me an argument which can easily be defeated. Significantly, it was responded to at the time and from the left. In his great work on the rise of the Nazi social, economic, and legal system, Franz Neumann observed that “[i]f we agree with a recent American work that holds [wiping out the boundary between ethics and law] to be progress, then we can refute the National Socialists in political or ethical terms, not in terms of law.”

For Neumann, a socialist, the idea that one’s moral, ethical, and political stance in the world could be collapsed into any sort of exclusive reliance upon legal philosophy was absurd. One could oppose fascism from the left not because it violated some particular canon of legalism but, rather, because it was fascist. To be sure, this

52. See supra note 55.


54. F. Neumann, supra note 53 at 153 [emphasis added]. It is amazing that this point of view seems invisible to Purcell, supra note 6, and that Purcell thus fails to frame his book in terms of why so many American law professors appear to have ridiculously overestimated the capacity of law, standing alone, to prevent the rise of fascism or anything else.

55. For arguments why one should oppose fascism, irrespective of one’s personal jurisprudential preference, see, e.g., F. Neumann, supra note 53; R. Palme Dutt, Fascism and Social Revolution (1934); D. Guerin, Fascism and Big Business (1936);
circumstance may present a certain perplexity for those not on the left who, stripped of their jurisprudential position, may be without any clear answer why a capitalist should oppose fascism.56

I realize that many CLS supporters today have responded, like some Legal Realists of the past, to assertions that they are “moral relativists” or “nihilists” by arguing that, on the contrary, they have strong moral values which are not undercut in their view by recognition of the “indeterminacy critique” (prong one, it will be recalled, of CLS4 analysis)57 and that they hardly perceive their work as somehow making the American legal system increasingly vulnerable to right-wing or neoconservative demagogic appeals. I am sure that, in many cases, this reflects the most appropriate and honest response to the growing hostility directed toward CLS.

Yet there seems to me to be great value in following the approach of Nation magazine journalist Alex Cockburn: that is, contest the op-

56. See, e.g., J. Borkin, supra note 55 at 139-140:

   By the time the prosecution of the I.G. officials began in 1947, a new
   element had been added to the objections of war crimes trials. The cold
   war had begun. Germany, the wartime enemy, had become a sought after
   ally; the U.S.S.R., the former ally, was now regarded as the enemy. Con-
   gressman John E. Rankin of Mississippi declared on the floor of the House
   of Representatives: “What is taking place in Nuremberg, Germany, is a
   disgrace to the United States. Every other country now has washed its
   hands and withdrawn from the saturnalia of persecution. But a racial mi-
   nority, two and a half years after the war closed, are in Nuremberg not
   only hanging German soldiers but trying German businessmen in the name
   of the United States.”

See also L. Goldmann, The Philosophy of the Enlightenment 28-29 (1973):

   It must be constantly stressed that the fundamental moral neutrality
   of the individualist approach refers only to values of content, to relations
   of love, hate or indifference to others. In contrast to these are the formal
   values already listed — freedom, equality, toleration — and the concept of
   justice, which, as will be seen, is closely linked with them. In history these
   are intimately bound up with individualism, and, so long as they can be
   realized without difficulty, still retain their dominant position in western
   capitalist society. But, just because individualism in the last resort is mor-
   ally neutral, there is always the danger that in a serious crisis they may be
   displaced by the opposite values. National Socialism in Germany was the
   greatest and most frightening instance of this, but unfortunately not the
   only one.

57. See supra notes 31-44 and accompanying text.
position in terms of their most basic conceptions of the terrain of debate. In other words, what exactly is wrong with a person (including a law professor) being a nihilist if he or she wishes to be? Where, for example, is the evidence that even naked nihilist values lead to the rise of fascist social movements?

One way of briefly approaching this issue is to observe the way the "David Abraham affair" has helped sort out two basic views or positions with respect to the origins of German Nazism and, to a lesser degree, other European varieties of fascism. On the one hand, we can identify those theorists who characterize Nazi Germany as a specific form of and moment within the development of European capitalism during the first half of the twentieth-century. Summarizing Abraham's thesis itself, Richard Evans writes that:

[T]he bourgeoisie, weakened and divided by the Weimar Republic and confronted by a strongly organized working class, was plunged into a deep crisis by the Depression. Fascism, as a result, came to power not just because of the struggle between labour and capital, nor because of any kind of equilibrium between the two, but also because of 'the inability of fragmented dominant groups to organize and unify their interests'... The only way for industrialists and landed estate owners to protect their social dominance in these circumstances was to join forces to bring an end to the Weimar Republic. In this way, the political system could be reshaped to remove the political impediments to class unity and destroy the obstacle that organized labour posed to the accumulation of capital. 59

On the other hand, we can identify those theorists who reject such "Marxist" or "materialist" emphasis and whose "revision" of the initial, post-War scholarly view produced a new generation (including David Abraham) of "counter-revisionist" scholars on the left. Prior to the recent outbreak of this intellectual "civil war" between revisionists (eclectic) and counter-revisionists (neo-Marxist), one of the most widely respected historians of fascism, Stanley Payne of the University of Wisconsin, seemed to come down on the side of one of David Abraham's current adversaries — at least on the issue of the role played by

58. See, e.g., The David Abraham Case: Ten Comments From Historians, 32 Radical History Rev. 75-96 (1985).
finance capital in the rise of Nazism: "[Henry] Turner is evidently cor-
rect that the right authoritarians, not the Nazis, were the main party of
big business, and the counter-revisionists have failed to prove that big
business 'bought' Hitler. . . ." Given Payne's apparent location on
the "right" or "anti-vulgar Marxist" side of this fault line running
through contemporary fascist historiography, and with specific relation
to the current hostility to the "indeterminacy critique" in legal studies
and its "nihilist" overtones, it is fascinating to record this observation
by Payne:

The Hitler regime was so bewildering in its methods and goals
that interpretation has frequently given up altogether and fallen
back on sheer negatives for understanding — the 'revolution of ni-
hilism' or the overriding motivation of 'antimodernism'. Hitler and
his crew, however repellant, were not nihilists but held tenaciously
to firm and evil values. Nihilism is more nearly what came after
Hitler, unless sheer hedonism is considered a value rather than
the absence of values. 61

One wonders if those current guardians of the integrity of Ameri-
can legal education who feel so strongly about "nihilists" on law school
faculties need to be told precisely what Payne means by nihilism, what
he means by the phrase, "what came after Hitler". What came after
Hitler, of course, was the world of Adenauer's capitalist, "hedonist",
American-sponsored "economic miracle", the desultory consumer soci-

60. S. PAYNE, FASCISM: COMPARISON AND DEFINITION 58 (1980).
61. Id. at 96 [emphasis added]. For the Italian case, see id. at 183.

[A.] James Gregor in his The Ideology of Fascism . . . argues that
Italian Fascism developed a coherent ideology that was not the product of
nihilistic collapse but rather the consequence of specific new cultural, political,
and sociological ideas developed in western and central Europe during
the late nineteenth and early twentieth centuries.

Payne adds that:

Eugene Weber suggested that fascism was a unique and specific revo-
lutionary project in its own right, while George Mosse, the leading histo-
rian of Nazi and pre-Nazi culture, interprets fascism as a revolution of the
right with transcendental goals of its own and specific, not merely reactive
or opportunistic, cultural and ideological content.

Id. at 183-184.

How many law professors, including those who have waded into the debate over
"nihilism" in legal education, have even heard of Payne, Weber, Mosse, the wonderful
scholar Richard Hamilton, or any of the other premier American historians and soci-
ologists of Nazi or Fascist culture and society?

https://nsuworks.nova.edu/nlr/vol10/iss2/1
ety of glass shopping malls and Autobahn pictured in boring instructional films I viewed in German language classes in the 1960’s (complete with grotesque muzak sound-track apparently designed to encourage us to mark down Berlin on our world shopping list). It is precisely the directionlessness of this post-War German culture which has been savaged by artists like Heinrich Böll, Peter Handke, and Rainer Werner Fassbinder, whose film, The Marriage of Maria Braun, like Reagan’s homage to Bitburg, reveals with great clarity the true implications of Paul Carrington’s misreading of the socio-economic conditions of nihilist culture.

IV.

On the first of June, 1927, as part of an exchange which included discussion of the relative merits of socialism, Mr. Justice Holmes wrote his friend and correspondent, Fabian socialist Harold J. Laski, the following:

You put well a philosophic rather than economic difference between us. I do accept ‘a rough equation between isness and ought-ness,’ or rather I don’t know anything about oughtness except Cromwell’s — a few poor gentlemen have put their lives upon it. You respect the rights of man — I don’t, except those things a given crowd will fight for — which vary from religion to the price of a glass of beer. I also would fight for some things — but instead of saying that they ought to be I merely say they are part of the kind of world that I like — or should like. You put your ideals or prophecies with the slight superior smile of the man who is sure

62. See Observations on ‘The Spiritual Situation of the Age’ (J. Habermas, ed. 1984); and Special Issue on Heimat, 36 New German Critique (Fall 1985).
64. See Cockburn, “Springtime for Hitler” The Nation 518 (May 4, 1985):
   The point of Reagan's impending trip to West Germany is to drive home a single message to the network audience: in World War II the peoples of the free world, mostly Americans, British and Germans, fought shoulder-to-shoulder against Soviet totalitarianism. Since there is no internationally recognized border in the President's mind between fantasy and fact, this is the history in which he now believes and thus it is perfectly natural for him to stand in silent appreciation over the bones of an S.S. man, foe of Bolshevism and, like the Nicaraguan contras, the moral equivalent of the Founding Fathers.
that he has the future — (I have seen it before in the past from the abolitionists to Christian Science) and it may be so. I can only say that the reasoning seems to me inadequate and if it comes to force I should put my [illegible] on the other side.65

This seems to me a classic example of modern, anti-socialist argument, directed here against the left-wing philosophy of Harold Laski, revealing a long list of powerfully skeptical notions which can be utilized in debate against a broad range of utopian political views.

What is amusing, of course, is the way that Holmes used an orthodox variety of liberal "nihilism" or "moral skepticism" against the left, whereas today, the ultimate inheritors of much of Holmes’ skepticism, the CLS teachers and scholars on the left, are criticized precisely for being what Laski was not: more skeptical about value assumptions; i.e., more "nihilistic" like the healthy, analytical liberal. In other words, as far as left-wing approaches to law and legal education in America are concerned, it seems to be a case of "heads you lose, tails I win" where the left is constantly cast as marginal, unprofessional, even unethical, for being either nihilistic or not nihilistic enough, depending upon the mood of orthodox intellectual bureaucrats, those to whom Paul Nizan referred, only a few years after Holmes’ letter to Laski, as "les Chiens de garde".66

The Play's The Thing . . . .

Jonathon Chase

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To use a metaphor, there are in law critics, playwrights and actors. What I have found most fascinating is that law schools have been and continue to be dominated by critics, those who for one reason or another have turned away from that which the vast majority of their students seek to learn and to be.

Further, not until recently did the better law schools do anything for these aspiring playwrights and actors but teach them how to be critics. That, fortunately, has changed dramatically (I am permitted at least one bad pun) in the past few years, and we have witnessed a burgeoning of clinical and trial practice offerings in law school curriculums. Students are being introduced to the skills of the actor.

To clarify, lawyers need first to understand the law, which, as we realize, is not a body of information, but is a process, an evolving enlightenment, a movement towards understanding fundamental first principles through analysis. All lawyers must be critics. But lawyers are not usually hired to be critics; they are hired to solve problems and resolve disputes. It is with respect to the latter function, dispute resolution, that what I have referred to as the skills of the actor come into play (I could not resist it). These are generally communication skills, the art of personal manipulation (not necessarily a pejorative term) in interviewing, counseling, negotiation, mediation, and trying cases. It is these skills which law schools are finally beginning to teach\(^1\) — as well

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1. Although I had hoped to avoid footnotes altogether, a few are necessary. How else could I cite my forthcoming article in the Vermont Law Review? See note 4, infra. There has been much written recently summarizing, reviewing, and further exploring recent developments in legal education. See, e.g., R. Stevens, Law School: Legal Education In America from the 1950s to the 1980s (1983); Feinman and Feld-
they should.

But law schools do not do enough to teach the playwright. By that, I mean the creative problem solver, the planner, the builder, the drafter, the large case litigator (as distinguished from the trial lawyer). The manipulation of rules and principles (as distinguished from people) to solve problems is what I have found most exciting professionally. Further, as one who is by nature combative, problems presented by litigation have been for me the most exhilarating. But planning an estate, a business venture, drafting a contract, a statute, a consent decree are all places where theory and practice converge, and problem solving generally is what I would like to see us do more of in legal education.

There are two immediate changes in how law schools traditionally do business that I think are needed. First, we need more diversity in our faculties so that there is a mix of critics, actors and playwrights. Second, there needs to be respect and appreciation for what each does and should do.

Unlike other disciplines, such as history, philosophy or mathematics, I have never yet met a law professor who chose her graduate training as a path to the academy. People go to law school, by and large, to become lawyers or, at least, to keep options open. But they do not, again by and large, do so to become law professors. The appeal of teaching comes later and, usually, as a result of disaffection with the world of practice. That disaffection is too often reflected in a negative attitude towards and disdain for the practice and practitioners that is projected on to students and that perpetuates an unhealthy distance between those who practice and those who teach.

It is also my experience that most law professors do not have the temperament or inclination for creative problem solving. We are adept at taking a court’s opinion apart, but less so in seeing how it might be used as part of the lawyer’s arsenal. We can identify weaknesses in an idea or proposed solution but do not often help in suggesting improvements or solutions themselves. We can tell you well why not, but not often how to. We are critics. What we do is important, but it is not

enough.

In order to prepare our graduates to be creative problem solvers (and I think we can), we need more creative problem solvers on our law school faculties. We need more people who are actively engaged in creating. How is it we are so remarkably different from medical schools? Is there anyone anywhere teaching cardiology who does not practice cardiology?

I do not mean that we need necessarily to add more experienced practitioners to our faculties, though it would be good to have a few such persons. Even younger people with little practice experience can be encouraged through consulting to remain actively engaged at the frontiers of the practice. I do not suggest that such people spend their valuable time with the mundane or the routine but that they be a resource to the bar to assist with the complex and with first impressions. Further, they should engage their students in the process.

Although it may be conceit, I think my students in the constitutional law courses I teach understand the subject better by my relating to them how developments in constitutional law can be exploited in the solution of a client’s problem. Reading Great Atlantic & Pacific Tea Co. v. Cottrell as just one of the Commerce Clause cases in a constitutional law casebook is not nearly so interesting as seeing how that case can be used to challenge the constitutionality of requiring mutual reciprocity in professional licensing. It brings the case alive and helps students to learn to think prospectively, creatively.

I also alluded above to the need for greater respect for what a diverse faculty does and should do. What we do now is absurd. Almost the exclusive route to tenure at law schools is through traditional law review publication. That is the coin of the realm. Even if a particular school were enlightened enough to recognize other forms of contribution, a young professor hoping to build a reputation in the academic world generally would be ill-advised not to give serious consideration to building currency with universal exchange value.

We do need traditional scholarship. But we do not need it exclusively from everyone. Just as artists-in-residence at large universities are expected to create, so also should we expect and value the same from some of our colleagues. It is a waste of very limited resources to

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2. There are also revenue producing opportunities in such arrangements.
have everyone all the time doing the same thing — and not usually in such a way as to make a significant contribution. If we are to bring playwrights and actors on to our faculties, we should value them as playwrights and actors.

I certainly believe that all members of a law school faculty, in addition to doing fine work in the classroom, should engage in some professional activity which brings recognition to themselves and to their law school. But professional recognition should not be limited to that from within the academy only; it should extend to the legal world at large. Thus, being recognized as an expert in a particular field of practice should also be encouraged and valued.

All members of the legal academy should do some traditional, scholarly work. It is demanding and satisfying. But other work of excellence should also be recognized. Litigating a case of first impression, drafting new legislation, creating new forms of property, developing new trial or dispute resolution techniques or new approaches to legal education are of equal value and should be equally rewarded. Anything new, shared and related to law should qualify as scholarship under traditional requirements for tenure. What weight such work should be given can depend upon a number of variables.

I value excellence and care greatly about seeing things done well and properly. I also have an academic love for the law and take great pleasure in discussing recent developments in the law with my colleagues. I am not suggesting for a moment that standards be compro-
mised or lowered. But I also love being a lawyer, testing ideas in the laboratory of the legal world in which our graduates are to function.

Law schools have become divorced from the profession their students seek to join. It is not at all clear how that was permitted to happen. Perhaps it is attributable to elitism. Law school professors, by and large, tend to be graduates of the most prestigious law schools and tend to replicate their own law school experience. That experience may well be adequate (although I have serious doubts) for the top graduates of those schools, who will receive postgraduate education in large firms; thus, the system tends to perpetuate itself. Even students going into large firms, however, do not need three years of rigorous casebook exercise honing analytical skills. All students training to be lawyers need exposure to the profession itself. That is most certainly true of the vast majority of law school graduates embarking on a general practice in a small-to-medium-sized law firm in which there is an immediate expectation of client and courtroom responsibility.

It is time for the chasm between the academy and the practice to close and for the critics to make room for and welcome the playwrights and the actors.
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Training Lawyers for the Powerless: What Law Schools Should Do to Develop Public Interest Lawyers

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I. Introduction

In the spring of 1976, I graduated from law school — one of a class of 165. Of that number, approximately six took jobs with one of the following: public defender office, legal aid or legal services office, non-profit civil rights organization, legislative counsel. I was one of the six, having accepted a position as staff attorney with the Mental Patients Advocacy Project of Western Massachusetts Legal Services. All the others (except for a few who were destined from the outset to go into law teaching) entered private practice or government work, either immediately or after a year or more of clerkship. That was in the tail-end of the “liberal” Sixties and early Seventies. Now, after eight years of public interest law practice, I teach law students full-time. As the official “public interest” counselor on the faculty for students who think they might be interested in such work, I’m in a good position to identify my counterparts in the not-so-liberal Eighties. Judging from the numbers of students who undertake clinical placements or volunteer jobs with public interest employers, or who apply for one of the summer grants my law school makes available, the percentage of “public interest” law students remains about as small as it was during my stu-

* I wish to thank Nancy M. Shea, Therese Maynard, Stanley A. Goldman, Jesse M. Jauregui and Christopher M. Crain for their comments and suggestions.
dent days.

That's not surprising. Law students' attitudes often change toward conservatism during the course of three or four years of legal studies. Practical factors, like timing of employment decisions and access to employers, also should not be underestimated; when the big firms make their hiring decisions in November and the local legal aid office won't even know if it has funding for a new staff attorney until the following May, prudence dictates accepting the private firm's offer.

Of the not so prudent students who seek me out, a few are self-identified radicals or feminists or otherwise "politically active" students. They appear to be already committed to public interest law. Most, however, have not made a clear career choice; they want to do something "humanistic" but aren't sure what, or come from a social service background (teaching, social work, mental health) and wonder if they can integrate their experience with law practice.

I encourage them all. I hand out lists of possible employers, I help arrange conferences about alternative law practice. I get together with the financial aid people and the placement people and try to work out academic credit or work-study arrangements. Last year, for the first time, I administered a program of summer grants to enable a small number of students to undertake public interest jobs. As a result of my experience, I believe: that more students would like to do public interest work than eventually do; that law school experiences — both in the classroom and in clinical programs — significantly influence whether students go into public interest law; and that law schools can and should do more to make public interest law a real option for law students and law graduates.

Even as a recent law graduate, I knew that I had been lucky to have come into contact with the clients I wanted to serve and to have had previous work experience which helped me understand what legal advocacy for the clients would be like. Especially important had been a semester's externship with a public interest law project.¹ Working with an attorney after whom I could model myself, I could "see myself" doing the same kind of work he did, once graduation and the bar exam were behind me. I think that many of my classmates who did not choose public interest law were not less idealistic, or politically-oriented, or altruistic than I — they were simply less lucky. Yet some-

¹. From September 1975 to January 1976 I worked as an extern at the Mental Health Law Project, then affiliated with the Center for Law and Social Policy, Washington, D.C.
thing as important as the development of lawyers for the public interest should not be left to luck. Or, at any rate, the odds should be a little greater in favor of public interest law.

This article is about weighting the odds. First, I will offer a definition of what “public interest law” is. Next, I will analyze the factors that influence a decision to become a public interest lawyer, and explain why the law schools’ and my efforts, though well-motivated, do not make such a choice possible for most students. Finally, I will propose ways in which the traditional law curriculum could be revised to enable more students to choose public interest law.

II. What is “Public Interest” Law?

A commonly heard definition is that public interest practice is dedicated to representing a point of view that otherwise would go without an advocate. That category embraces organizations such as the American Civil Liberties Union, while rejecting self-described public interest organizations such as the Pacific Legal Foundation, whose position of environmental issues is widely identified with corporate and industrial interests which also retain private counsel to advocate their views. But what of organizations like Mexican American Legal Defense and Education Fund (MALDEF) or both my former employers, Mental Patients Advocacy Project and Youth Law Center? Don’t they advocate a particular point of view or advance the goals of a defined interest group which could also retain private counsel? Of course, the argument can be made that it is in the public interest for diverse points of view to be asserted and for justice in the criminal courts, for example, to be worked out through the adversarial system. Hence, both prosecutor and public defender serve the public interest, but so does the private defense lawyer who specializes in “white collar” crime. Nevertheless, students who come to see me about “public interest” law usually don’t have in mind making a good living defending wealthy clients accused of international drug smuggling — and I confess I’d be reluctant to give them “public interest” funds to intern in such a practice. But why? Are the students and I just hopelessly narrow-minded?

When I was a “public interest” lawyer, I spent a lot of time doing things which, at least in the opinion of much of the general public, did not advance the public interest. If I succeeded in winning release of a chronically mentally ill person who took up residence in a public park, arguably I had served the client’s interest — but not the interest of the members of the public who would call the police with requests to re-
move the crazy man from their picnic grounds. If I devoted years to a
class-action lawsuit designed to force the state to develop a range of
community-based services for the crazy man and others so that more
clients could be released from mental hospitals and have access to good
after-care, some of my clients were happy and some were angry (those
who declined mental health care services). Much of the rest of the
"public," however, who wanted cut-backs in taxes and had decided that
a reduction in publicly-funded mental health services was a small price
to pay, were unequivocally opposed.

Nevertheless, over the years, as I struggled for a way to explain
my work, I noticed an interesting thing: even though many members of
"the public" objected to my success in releasing crazy people or im-
proving treatment of juvenile delinquents, very few of them objected to
my trying. In general, people agreed that my clients should have a
lawyer, that their point of view should be heard; the only objection
came when the clients actually got what they wanted.

I have decided that “public interest” lawyering is really about em-
powerment. A lawyer who is a real advocate for his/her client is a law-
ner who, however fleetingly, gives that client greater power. A lawyer
who shows up in juvenile court or at a commitment hearing, stipulates
to everything, waives cross-examination, and collects his/her fee for
fulfilling the appearance of “due process” requirements, is the friend of
the status quo — and of the “general public.” The attorney who gives
the individual client’s rights meaning by using all his/her skills to re-
quire the state to prove its case, empowers that client — and usually
annoys the public. The passive attorney may be accepted by the public;
the active advocate is likely to be resented.

Empowering the powerless one at a time is much less inimical to
the public interest than permitting the kind of “public interest law”
which is aimed at large-scale social reform. Individual representation of
fifty welfare mothers may result in some of them receiving benefits they
would not otherwise have received; a class action suit on behalf of
5,000 welfare mothers which results in the eligibility guidelines being
changed and thus in many more people receiving benefits, is against the
public’s interest. 2

2. This is why in recent years opponents of the Legal Services Corporation have
attempted to restrict its offices from undertaking class action suits, client organizing or
lobbying efforts. These are all lawyering tactics in which the powerful hire advocates to
use for them; they are successful methods of empowerment, which is precisely why they
are denied the powerless.
Therefore, the "public interest" program in a law school should be devoted to training students to do for powerless people all the things that lawyers do for the powerful. Of course powerlessness is a relative term, so as a working definition I offer the following: the powerless are people who cannot afford lawyers and for whom having access to legal assistance would enable them to assert their rights, individually or collectively, more effectively.

It is sometimes argued that lawyering for the powerless is really "social work," and hence that a curriculum designed to train such lawyers would be less rigorous and intellectually demanding than the traditional one. I disagree. The skills needed for representing both groups are exactly the same: the bag lady and the mega-corporation president both want results, not just a warm heart. Similarly, the mega-corporation president and the bag lady both prefer an attorney who acknowledges and responds to their needs as human beings. So the public interest lawyer needs to learn interviewing, client counseling, issue spotting, research, analysis, brief writing, oral argument, negotiation — oh yes, and ethics: all the things law schools teach.

So why not just keep on doing more of what we do, which is to offer the traditional law curriculum and let students choose, upon graduating, whether to represent the powerful or the powerless? Why not just remain "neutral"? The answer is that the traditional law school experience is not "neutral"; it effectively encourages students to choose the powerful.

III. How Law Students Choose Their Client Group

From the employers who come on-campus to the content of the casebooks, the message most law students get is that most lawyering involves clients who can afford to pay. That's perfectly accurate. It's also true today that, if you can't afford a lawyer, you are powerless. Students who enter law school intending to be "public interest" lawyers because they wish to advocate their particular political points of view may not be dissuaded from pursuing that career by this message. But for most students, law school is a place to decide to which clients one will market one's skills; upon entering law school, they have not de-

3. Obviously there has to be agreement between employer and prospective employee here; if student A wants to work for only 1 or 2 law firms and they decline the honor, there is a problem. But in order to pay off his/her law school loans, student A will eventually find an employer — and will prefer the one with which he/she feels "at
decided whether to pursue a "public interest" career.

Law school is supposed to teach a student to be able to argue equally well either side of any case. From a purely intellectual point of view, that is a desirable goal; it promotes analysis of the issues and enables the advocate to anticipate his/her opponent's argument or defense. I don't believe, however, that lawyers can remain indifferent to which side of a real-life case they argue. Despite their avowed pride in being "hired guns," lawyers who habitually represent a certain group of people develop an identification with that group. We have all had the experience of meeting again with a former classmate who took a job representing a group he/she avowedly despised and of discovering that the classmate's perspective has dramatically changed: "You know, there's something to be said for the point of view of corporations . . . [or landlords or nuclear power plant operators or the state welfare agency] . . ." If this happens at one end of the lawyering spectrum, it happens at the other. I can't be the only knee-jerk moderate who went to work in a legal services office and found myself becoming more radicalized as I came to share something of my clients' perspective. The jump from simply presenting an argument to identifying with the client — and often accepting the client's argument — is what makes a lawyer zealous and effective. It is also what keeps "public interest" lawyers working despite lower pay and less respect† than they would receive working "for the other side."

Not all lawyers who work with a client group identify with that group. Some find that they cannot identify with the group, and, to relieve the resulting discomfort, go into a different specialty or start working "for the other side." Prosecutors become public defenders; in-house counsel make the move to government regulatory agencies; personal injury litigators leave the "plaintiffs' firm" to work in insurance defense. This is a natural and sensible adjustment to a human reality: people have greater job satisfaction when they believe in what they do.

This phenomenon is just as true within "public interest" law as within the world of private practice. A standing joke at legal services conferences is that you can tell which lawyers represent tenants, which specialize in public benefits, and which, like me, represent the deviant institutionalized clients. Of course, lawyers who work for neighborhood

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4. This phenomenon is called identification of lawyer with client; if your client is treated badly, you will be treated only a little better. If your client is treated well, you will be treated equally well.
poverty law offices will take on a variety of cases, but it’s amazing how often a specialty area develops. Some lawyers simply identify with bag ladies, and some with migrant workers. What’s more, the bonding works in two ways: certain clients respond to certain lawyers. I can have all the intellectual understanding and political solidarity in the world with a welfare mothers’ coalition, but I’m certain that we won’t have the immediate bond and sense of trust that I usually experience with a coalition of ex-mental patients or a frightened hostile juvenile delinquent. Clients and attorneys identify with each other, a process which takes place quite early in an attorney’s career — often during law school.

Former students who decided to go into public interest work are all people who have identified with their clients. A judicial externship which required helping people fill out pro se complaints, or a volunteer stint in a hospital emergency room, enabled them not just to observe the powerless, but to serve them. Common remarks are: “I never knew those kind of people existed” or “I never really understood it from the poor person’s point of view before.” These students are not blind to the unpleasant aspects of the work: “Sometimes I have to sit across the table a few feet away when a client smells really bad. But you know, I’ve gotten used to it. And let me tell you about this one smelly cli-

Revealing to be part of the powerful class
Most law students, however, will only have the opportunity to identify with powerful clients — and with those who serve them. Although law students come from a variety of social and economic backgrounds, the vast majority are from middle class or upper-middle class backgrounds, either from educated families or with a strong “white collar” identification. Before law school they probably have had very little contact with powerless people. If they are not encouraged to pursue that contact during law school, it is not surprising that they will choose to work for a client group with whom they are more familiar, more comfortable — with whom they share a common identity.

IV. What Can and Should Law Schools Do to Promote the Choice for Public Interest Law?

So, how do we get students to identify with clients to whom they were turned off at first glance? Easy. We require the students to spend time with the clients, to assist someone else in advocating for the clients, and finally, to do that advocating themselves. I concede arguendo that perhaps 75% of all law students were born to bond with business executives or corrections officers and will never identify with the powerless. However, my proposed program is not intended to graduate an entire law class of public interest lawyers. Rather, it is designed to substantially increase the likelihood that a student with the potential for a public interest law career will discover that vocation.

There are some law schools which have developed nontraditional curricula and have sought specifically to prepare public interest lawyers (CUNY at Queens, Antioch and Northeastern, for example). While some students who are firmly committed to public interest law will choose to attend those schools, most students may be geographically or financially precluded from doing so or may choose to attend a “traditional” school for other reasons. During the usual law school experience, the student who is uncertain is more likely to drift away from public interest law than to make a commitment to it. My proposal is designed to check that tendency, so that we lose fewer potential attorneys for the powerless.

V. Overview of the Proposal

The proposed program is designed to give law students (1) an opportunity to identify with powerless clients, (2) experience in the role of
an attorney representing the powerless, (3) a realistic possibility of job placement after law school, and (4) temporary financial assistance to pursue their choice of a public interest law career.

The program would require for first-year students, and encourage for upper-level students, supervised work experience in public interest law. Because this will mean a substantial increase in the number of students participating in public interest placements, the law school should have standing arrangements with designated public interest offices which provide direct services to individual clients: neighborhood legal services offices, for example, or projects doing outreach to mobile populations such as the homeless or migrant workers. Law school clinics usually can take only a small percentage of students, and they are expensive to run because of the low faculty-student ratio they require for supervision. But the law school should consider operating on-campus clinics that would meet special needs for legal services in the local community not being addressed by existing offices, e.g. a domestic violence clinic or a handicapped law center. In so doing, the law school could most closely connect a clinical experience with the academic curriculum and also fulfill a duty to the community.

Public interest offices have limited use for untrained students, so the law school must insure that students are committed to a regular work schedule and are closely supervised by the law school faculty and more experienced students. The law schools themselves are concerned about the consistency and uniformity of clinical experiences, the “tie-in” to the academic curriculum and the cost of such programs.

My proposal responds to these concerns. It would assure direct services offices a consistent, well-supervised student work force and would give law schools a procedure to place students in settings where they will develop legal skills.

The problems of cost and supervisor-student ratio would be addressed by creating a hierarchy for supervision and by using task specialization. Task specialization will contribute to consistency of experience; supervision will advance quality control. Supervision of less experienced law students by upper level students will not adversely affect the quality of work so long as the staff attorneys and faculty with ultimate authority take their responsibility seriously and give adequate direction to case supervisors and to the students doing client representation.5

5. I have trained college students and paralegal advocates for mental patients using a similar system; paralegals with one year’s training were able to function as
The proposed public interest curriculum would look like this:

**Stage 1 (First Year)**

*(Fall Semester)*  
Buddy System

*(Spring Semester)*  
Intake and other client/contact work

**Stage 2 (Second Year)**

*(Fall or Spring Semester)*  
Intake supervision  
Case representation

**Stage 3 (Third and Fourth Year)**  
Case supervision  
Case representation

**Stage 4 (Post Graduation)**  
Supervising Staff Attorneys

**Stage One**

The goal is to give first-year students the opportunity to identify with powerless people. At this stage, they do not have sufficient skills to provide legal advice to the client, but if we postpone the opportunity until the following summer or the second year, it may be too late. Therefore, my proposed curriculum would require all first-year, first-semester students to be matched as “buddies” with powerless individuals who are clients at public interest law offices. Each student would accompany the client, for example, to an interview with a welfare worker, to a meeting with the landlord, to stand in line at the unemployment office, to ask for an extension of time on credit at a finance company — you name it. As a “buddy,” the student is forbidden to wear a suit, to identify him/herself as a law student, or to do anything that would “pull rank” and indicate that he/she is one of the powerful class. The role is “buddy.”

Each student would then sit in on a follow-up meeting with the client and his/her public interest lawyer to observe how the attorney
effective case supervisors. In fact, I found that paralegal case supervisors, perhaps because they were not so far removed from the first-year experience, did a better job than staff attorneys in explaining assignments to trainees and in giving feedback to them.

6. I am indebted for this idea to Nancy M. Shea, Staff Attorney, Mental Health Advocacy Services, Los Angeles; it's a training device used for their paralegals.
and client interact. Is it different from how the client and welfare worker interacted? How did the client experience the earlier interaction? Were his/her reactions the same as the student's? Finally, the student should be "debriefed" by a supervising, third-year student (see Stage Three, below). During the semester, all the students should meet to compare "buddy" experiences. They should also be given follow-up assignments to research the law involved in the client's case and to develop an advocacy strategy which would make the client more powerful in the particular situation. For example, a student could research landlord-tenant law and find out whether knowledge of his/her rights would have made a difference to the client in the meeting over rent dispute.

In the spring semester of first year, I would require all students to do two unit's worth of work at a designated public interest office which will involve direct client contact. This experience will enable the student to begin to understand what the services of a lawyer can (and can't) do for the client. The student will have responsibility to do intake for a given number of hours each week. Intake supervisors who are second-year students (see Stage Two, below) will review the intake forms and show first-year students how the information is used in follow-up interviews with clients. Students should be given a range of tasks common to public interest offices which will increase identification with the client interviewing witnesses and clients' family members, facilitating client organization meetings, or any work involving direct client contact.

Tuition credit or outright grants should be available to enable students to work in public interest offices during the summer following the first year of law school. During the summer, placement should be permitted in both direct services offices and "back-up centers" or "law reform projects" (offices which do test-case litigation, legislative advocacy and law reform work, rather than the individual client representation characteristic of direct-services offices). Students who are attracted by public interest law, but who would enjoy undertaking complex litigation or legislative lobbying rather than direct-services work, should have a chance to experience both types of public interest work.

Public interest employers, like other employers, tend to prefer more experienced, second-year students; however, if the first-year student is subsidized, his/her marketability increases. An additional incentive to students would be to make public interest summer employment experience a preferred qualification in choosing some second-year students to be case supervisors, a position carrying academic credit and/or a salary.
Stage Two

Second-year students often are required to take legal ethics or legal skills courses. My own law school requires a course in ethics, counseling and negotiations which covers basic lawyering skills as well as ethics. Skills courses which rely on simulations rather than live clients can be very valuable and make it easier for teachers to standardize the classroom experience. However, simulation does not substitute for the experience of seeing how lawyering makes a difference for real clients. I would give students the option of satisfying the lawyering skills requirement by doing a public interest clinical placement. To reach the students who do take the skills courses, the simulations should use low-income clients as often as other types of clients. I would also require at least one experience in live-client representation as part of every skills course.

Ideally, the grade should rest in substantial part on how the student performs with the real client. Because experience with powerless clients would likely improve interviewing and representation skills, students would have a further incentive to undertake a public interest placement.

Finally, second-year students could obtain academic credit for supervising intake and handling cases under supervision at designated public interest law offices or at the law school clinic.

During the summer following the second year, the same arrangement as during the first summer should prevail. Funding preference should be given to students who have not previously been given a grant so as to maximize the number of students who have a public interest job experience.

Stage Three

If students haven't chosen public interest law by the summer of their second year, it's unlikely that they will. My goal at this stage is to reinforce those students who have made that choice but who need economic or other support to continue as public interest lawyers.

Certified third-year students should be afforded the option to work/study for two years and to earn tuition credit or a salary for supervising first and second-year students in designated placements. By working in designated offices for an extended period of time, these students would be in a favored position for the limited available public interest law jobs upon graduation. As certified law students, however, they will still need to be supervised by faculty members and practicing
public interest lawyers with several years of experience. To encourage the work of these supervising lawyers, I propose Stage Four.

Stage Four

I would establish a loan forgiveness program for up to five years if a student upon graduation takes a job in a public interest law office. If the graduate supervises law students, the law school could directly arrange loan forgiveness. If he/she practices public interest law, but is not involved in supervising students, the law school might still forgive the loans or other funding should be sought.

Funding

New ways must be found of subsidizing direct-service as well as back-up or law reform advocacy centers for the powerless. There should be a federal government loan forgiveness program, as is done with doctors who undertake practice in under-served areas. But because the federal government may not support this proposal, the law schools should seek support from the bar or from private foundations or donors.

Ideally, law schools in one geographic region could develop and obtain funding for a public interest foundation. The foundation would subsidize summer law student employment, pay tuition costs or salaries for case supervisors or attorney-supervisors, and pay the operating costs of law school clinics. In addition, law schools or the public interest foundation should annually organize and fund a public interest job fair to bring students and potential public interest employers together. Public interest offices rarely can afford, as can private law firms, to send a representative to a law school for on-campus interviewing or to pay travel expenses to enable candidates to be interviewed at the employer's locale. A public interest law fair, to which all public interest employers would be invited, would rectify this disparity in resources. In the unusual circumstance where a student was under consideration for a public interest position, and the employer was located too far away to attend the job fair, the law school or public interest foundation could reimburse the student's travel expense, just as is commonly done to enable a student to attend an interview for a prestigious clerkship or fellowship.

Why Should Law Schools Offer this Program?

Because the powerless need lawyers.
Because law school graduates need jobs.
Because law schools exist to train members of a “profession,” who have a special role and social status and who are well paid for their services.
Because professionals should pay a price for their privileged position.
Because law schools should exemplify the best ideals of the profession.
Because it is just.
Preparation of Lawyers In England and the United States: A Comparative Glimpse

Roger C. Cramton

American lawyers and judges frequently cast admiring glances across the Atlantic when bemoaning one or another of our current problems: concerns, on the one hand, that the United States lawyers are not sufficiently competent, public-spirited, or civil; or that, on the other hand, they are unduly aggressive, litigious and commercial in orientation. Invariably the contrast is drawn to the English barrister, who is portrayed in wig and gown presenting his cause with great skill, elegance, wit, and circumspection before adjourning for a companionable meal at one of the Inns of Court. The implicit (and sometimes explicit) message is: why can’t we do it the same way?

A full-scale comparison of the functions, behavior and ideology of English and American lawyers would be an undertaking beyond the scope of this short comment. It would require an intensive exploration of such matters as the vast difference in the size and homogeneity of the English and American professions (some 30,000 English lawyers, generally drawn from the same social background and heavily concentrated in London, as contrasted with some 650,000 geographically and socially diverse American lawyers); the different roles of lawyers in the two societies (American lawyers participate in a broader range of business and social affairs, practice in more diverse contexts, and utilize a wider range of skills); and many similar matters. Here I plan only to sketch some of the fundamental differences in preparation for the profession: the methods used to insure that lawyers are competent and to protect clients if they are not. The English model is quite different from our own in this as well as other respects.

In making this comparison, the American lawyer is contrasted to the English solicitor, not to the English barrister. Simplicity of presen-
tation urges this course, but, in addition, it is more consistent with the bulk of lawyering activities. Most lawyering in the United States and England involves giving advice and counsel to clients rather than courtroom advocacy. In addition, competence problems are primarily of concern as they relate to clients. In England, only solicitors deal directly with clients; barristers deal with them indirectly through solicitors.

The current American system of training lawyers is very recent. It emerged less than one hundred years ago, developed slowing during the first half of this century, and became the sole gateway to the profession only after World War II. It is a very recent social innovation. Although recent in origin, we take it for granted because we went through it — it is how we prepared for a legal career.

Consider the basic elements of the current system: A high school graduate of age 18 wants to become a lawyer in the United States. The first step is a college degree which is acquired four years later at age 22, followed by three years of study at one of the 174 ABA-approved law schools, resulting in the J.D. degree at age 25. (My example assumes a person who does not delay college or undertake other activities before law school, as do perhaps one-fourth of current law students.) After a few weeks of study in a commercial bar review course, the law graduate takes a state bar examination, usually including the multi-state bar examination as an important component. At age 25, after completing successfully the bar admission process, including the character and fitness inquiry, he or she is legally entitled to undertake virtually any legal matter for any client. The educational requirements, seven years of higher education in all, have filtered out those who lack intellectual prowess and academic staying power, as well as those who are unwilling to invest or to borrow the large amounts required to finance this extended period of study.

The selection for law school, at least during the last 25 years, has been so competitive that it has insured that American lawyers, in terms of academic credentials and basic intelligence, are drawn from at least the top one-half, and a very large portion from the top one-fourth, of United States college graduates. Knowledge of the basic rudiments of law and cognitive ability in manipulating legal doctrine are insured by legal education and by the bar examination as presently constituted.

In short, the new entrants are generally smart and have acquired some basic knowledge of legal institutions and doctrine along with some basic training in legal reasoning. They know very little — some might say nothing, — however, about the day-to-day practice of law, except as special experience in clinical courses, part-time work during
law school, or summer clerkships have conveyed such knowledge or understanding. They learn the vocational aspects of lawyering on the job after admission. The American rule, one might say, is: “Client, beware! Your new lawyer is smart, facile, inexperienced, ambitious, and eager for the higher standard of living that has been postponed during the long period of academic preparation. Engage him or her at your own risk.” We don’t tell prospective clients that, of course, but that is the American rule.

Most clients, given a choice, will not entrust their affairs to inexperienced lawyers; and a growing fraction of newly-admitted lawyers begin practice in the employment of more experienced lawyers. That has always been the case, and the fraction entering employment under other lawyers is increasing over time. But nothing requires that this be the case; and a significant portion of new entrants, perhaps as many as one third, begin law practice on their own, without supervision by an experienced member of the bar.

Professional discipline and malpractice liability are the principal institutional measures that seek to protect American clients from careless or irresponsible lawyers. As a practical matter, both flow from client initiative and complaint. Very few disciplinary proceedings are brought in the absence of a client complaint; and malpractice actions are always brought by aggrieved clients. For a substantial portion of American lawyers, perhaps as high as fifty percent, the malpractice remedy may be totally illusory because there is generally no require-
ment in the United States that lawyers carry malpractice insurance. A very large proportion of lawyers, and especially those who have limited personal resources that could pay a malpractice award, do not purchase malpractice coverage.

The English model differs in substantial respects. First, the period of required academic preparation in England is much shorter, three years rather than seven. Second, although the total length of the preparation period is about the same — seven in the United States, six in England — half of the six years in England (a total of three years) must be spent in practical study or in acquiring experience under supervision. After three years of academic preparation, a prospective solicitor must devote one year to vocational study in a program run by the Law Society, followed by two years of articling as a clerk to a solicitor. Third, even after this initial preparation and tutelage, the new entrant is not free to practice alone. For three additional years the new solicitor must work for an experienced solicitor. During this same period, attendance at certain CLE courses is required. Fourth, even after full qualification, which would normally come at age 27 in England for the student who has passed his “A examination” at age 18, additional protections are provided to clients. Malpractice insurance is compulsory and annual relicensing requires an accountant’s certificate that client funds have been properly handled.

The English model, it is clear, puts less emphasis on academic preparation and more on apprenticeship, is much more under the control of practicing lawyers, and involves more continuing regulation of the profession. Whether these differences make a difference in terms of lawyer performance for clients, or the cost of legal services, I cannot say. Perhaps both work well in cultural milieus that are more different than our common use of the English language may sometimes lead us to believe.
Reworking the Latent Agenda of Legal Education

Cynthia Fuchs Epstein

Cynthia Epstein is a Resident Scholar at Russell Sage Foundation in New York City and a professor of sociology at the Graduate Center at City University of New York. For her highly acclaimed book WOMEN IN LAW, she received the 1982 Scribes Award and a 1982 American Bar Association Certificate of Merit.

Today, as critical attention has turned to the ideological underpinnings of the law and its structure, it is also useful to consider legal education in this light. I ended my own brief law school education in the late 1950's as a result of personally experiencing the alienating mode of teaching, the competitive atmosphere, and most important to me, my intellectual disdain for what seemed to be a context-free analysis of legal subject matter. The explanation for the mode of teaching and for the atmosphere was the development of adversary skills. The same explanation was given for the inattention to historical context, an insistence on the autonomy of the law, separate from other scholarly disciplines and from other professions and institutions of society.

Although my school, the University of Chicago, was known to be different from other great law schools of the time for possessing a somewhat more “liberal” perspective on such matters, and was even the site of a famous study of the jury system, as a first year student I was only exposed to the standard required curriculum of property, civil procedure, torts, contracts, and criminal law. I found it grueling, not only because of the workload, but because I felt intellectually and morally adrift. The rule of reason used in the legal precedents seemed arbitrary and far from reality, and the precedents themselves appeared mired in particular social circumstances no longer relevant.

I have since learned more about the dynamics of legal change and have gained a certain respect for the use of precedent, but having become a social scientist, I am no less appalled by the implicit (and sometimes explicit) notions about human nature in the law and the role of law in setting parameters for our thinking about the human condition. Further, I have become more sensitive to the ways in which law not only reflects common misunderstandings about human character and social behavior, but also leads the way in characterizing perspectives on
such issues as normality and deviance, reifies stereotypes about sex and age, and is the instrument used to generate and maintain inequality (as well as the instrument used to achieve equality). Examples abound in legal literature about the ways in which the courts have used the measure of the “rational man” or the mentally functional or ill person in their judgments about civil or criminal responsibility which have not been consonant with the informed contemporary views of psychologists and sociologists. A dramatic illustration is the way nineteenth century law has defined women as not falling under the category of persons allowed to practice law (In re Lockwood, 1894), and later, in defining them as in special need of protection (Muller v. Oregon, 1908). Not until recently has there been an attempt to go beyond judgments based on stereotypical assessments of women’s and men’s “human” nature to a more rigorous assessment of all people’s capacities. Furthermore, as Hunt (1985) points out, law also transforms human subjects into legal subjects so that “law influences the way in which participants experience and perceive their relations with others.” For example, the law defines a minor and thus restricts people of certain ages from making choices while it permits others to control their own lives. Another illustration of this point would be when the law defines some groups of people as corporations or partnerships, exempting them from obligations which for individuals or other social groups would be considered questionable.

In the legal distinctions between private and public areas, the law has allowed the possibility for such problems as unrestrained violence in the family by defining the family as a sphere governed by different laws and standards from other groups (or individuals) engaging in the same activities, such as assault, outside the home (Taub and Schneider, 1982). The extent to which the law reflects social organization and hierarchies, or determines social relations, is a topic of some interest today. However, although legal scholars (Hunt, 1985 & Kairys, 1982) and practicing lawyers and judges wrestle with these issues, the debates in which they engage are not evident in the initiation of law students to the law. Only some students are ever exposed to the analysis of legal doctrine, and for those who are, it comes late in the process. Rather, law school initiates most typically face a set of legal givens, are afforded little time to reflect on the meaning, virtues and costs to justice and humanity of the legal process, and are even discouraged from asking the kinds of searching questions about the profession that might later move them to challenge the status quo. Like recruits in the army whose hair is cut short and to whom uniforms are assigned, law school
recruits are shorn of their prior opinions and sentiments, to be indoctrinated in a mode of thought regarded as the *sine qua non* of legal thinking. The first year of law school is oriented to ridding the fledgling student of prior ideological commitments — a process which is itself profoundly ideological in character.

Of course, the designers of any curriculum must always deal with the tension between the need to convey the received knowledge in a field and the need to address the challenges to it. Professors in any discipline must teach the basics which set the agenda for subsequent debates, but there is disagreement as to what the basics ought to be. In law, unlike science, there are no sets of relationships between various factors that are predictable and explanatory. In short, there are no objectively determined facts. Basics in law refer to the practices and attitudes of former law makers. Students need to know them to learn their craft but, unlike scientists, cannot objectively determine whether they are wrong or right. The realm of the legal is the realm of values. Each generation is encouraged to bring its values into line with the values of the generations that have gone before, and then to reinterpret them in such a way as to make them resonate with the contemporary scene, or rather, a particular segment of the contemporary scene. Legal educators are faced with a perplexing problem: how to create a useful sense of objectivity in the pursuit of craft.

The particular relationship between the crafting of law and interpretation of law, and the social context in which they are accomplished,
is rarely focused upon in legal education. Thus, attention to the consequences is minimized not only for individuals, but for social groups as well. In my view, this creates a professional class which tends toward ethically and politically sterilized concerns which ultimately lean toward the preferences and interests of the most powerful in the system. As is well known, a good proportion of legal talent goes to the large firms which defend the interests of the rich and powerful, while relatively few law graduates are attracted to spheres of law which serve the public interest (or the interests of the less-endowed). Some of the "blame" for this must be placed on the law schools, which better prepare students for the corporate world than for alternatives in law. Thus, the legal structure, as it is linked to the structure of society, can embody a value structure determined not by referendum, but by the manipulation and coercion of those with entrenched interests.

Up until the past few years, law school also served the profession and its powerful client group by carefully selecting recruits through both direct and subtle modes of gatekeeping. Those most blatantly excluded were blacks and women. For the few who succeeded in penetrating the barriers, their experience in law school was unpleasant and alienating. (My own research on women lawyers (Epstein, 1981) uncovered institutionalized practices of humiliation such as "ladies' days" when only women were called upon, or separate sections for women.) After a period of activity outside the profession, and by small pressure groups within, the profession has become more hospitable to women and minorities. Their inclusion has had real consequences for the legal profession beyond merely diminishing the injustice of keeping out people who were not regarded as like-minded. It has made legal educators more aware of the sexist and racist content in legal casebooks, as well as changing the interviewing procedures for jobs, the assumptions regarding competence, and many other latent policies and behavior which reinforced prejudice far beyond the walls of the law schools.

Furthermore, men and women as law professors and students who were drawn to law in the 1970's, because they saw it as a tool for social change, helped loosen the hierarchical and oppressive atmosphere in law schools, and encouraged the kind of thinking that explored the underlying ideologies implicit in law and legal education.

But there has not been a significant change in the profile of legal educators. The number of blacks and women who have become law professors, for example, has remained small and is not well distributed across the profession. Of all full time tenure-track professors, only 6.65 percent are minorities (of any kind). Of all full-time law teachers, 4.7
percent are black, but in addition to tenure-track professors, this figure
also includes those who have one or two year appointments, or are in-
structors in clinical or legal writing programs.\textsuperscript{1} Although an attempt
was made to bring women and blacks onto law school faculties in the
late 1960's and 1970's because of the pressure of law students and mi-
nority caucuses within the profession, the momentum has slowed con-
siderably. Law school efforts to hire women for tenure-track positions
began to lag significantly in the legal profession according to a study by
Donna Fossum (\textit{cited in LAUTER, 1984}) who also predicted that the
trend may well worsen over the next several years. The research
showed that the gap between the proportion of women in the profession
and the proportion on law school faculties began to widen in the late
1970's and has increased steadily since then.\textsuperscript{6}

Furthermore, law schools remain insular. For example, although
the courts use social science data more and more as a source of evi-
dence, there is little attempt to bring in experts from the social sciences

\textsuperscript{1} The following are the most recently available statistics (1984) on the composi-
tion of law professors (as reported by Kathleen Grove, American Bar Association, Of-
face of the Consultant on Legal Education). The total number of full-time, tenure-track
law professors is 4,461. Of this total, 754 (or 16.9 percent) are women; 297 (6.65
percent) are minorities of both sexes. The total number of full-time law teachers
(which includes clinical instructors, legal writing instructors, and those teaching on one
and two-year appointments) is 4,783. Of this total, 224 (or 4.68 percent) are black men
and women.

In addition, information obtained from the AMERICAN ASSOCIATION OF LAW
SCHOOLS 1984-85 STATISTICAL ANALYSIS OF LAW TEACHERS shows for the year 1984 a
breakdown by race of newly-hired full-time law teaching faculty. For males these
figures are: Puerto Rican, 3; Other Hispanic American, 2; Asian American, 4; Black,
15; White, 374 (or 93.9 percent). For women, the figures are: Puerto Rican, 2; Other
Hispanic American, 1; Asian American, 1; Chicano, 2; American Indian, 2; Black, 12;
White, 228 (or 91.2 percent). The AALS states that the total number of minority law
professors nationally is 381; however, they offer no total of all law professors nationally.

\textsuperscript{2} Of course, the proportion has improved steadily from 1970 when 65 percent of
all law schools had no women on their faculty. By 1983, only two percent had no
women on their faculties and 17 percent had as many as six. Although women and men
law teachers have virtually similar backgrounds, most women faculty members are un-
tenured and most men are tenured. The slowdown in promotion of women is attributed
by some to budget cuts. Higher percentages of women also resigned from law schools,
partially because they went on to the judiciary and executive branch appointments dur-
ing the Carter administration. But complacency is given as another reason; the heat is
simply off the law schools and they are not as actively recruiting women. And there
remains the problem of law schools, like law firms, being small cultures which seek to
perpetuate themselves with the entry of people who are most similar to themselves,
both in looks and perspective.
to inform law students about the use (and abuse) of social science findings. Lawyers are consumers of social research even if they are not producers and they need to be capable of using empirical means in conjunction with legal skills as an intellectual tool for analyzing issues of legal policy. The call for this kind of knowledge harkens back to Justice Holmes, who in 1897 wrote “For the rational study of the law, the black-letterman may be the man of the present, but the man of the future is the man of statistics and the master of economics” — these disciplines being the “social sciences of the day” as Wallace D. Loh (1984) pointed out in his reference to Justice Holmes’ remarks. There is agreement among some contemporary legal scholars, such as Priest (1983), who has pointed out that the “law student of the future will be... out-of-place without an education of increasingly greater sophistication in social science.”

Some years ago, Bruce Ackerman of the Columbia Law School, in his Storrs Lectures at Harvard (1984), spoke of the need to educate lawyers in economic analysis and in the use of computer sciences to understand the data and the consequences of legal interventions. Ackerman did not emphasize the need for education in the social sciences with the aim of educating lawyers to evaluate sociological and psychological studies. However, not only statistics, but also the findings of studies — the interpretations of which are disputed in the social sciences — find their way into court cases and can thus be a problematic source of evidence.

Legal decisions could be so much better informed by understanding that goes beyond the use of expert witnesses. Outstanding advances in civil rights have been made in our society because of the use of social science data in Supreme Court cases — Brown v. Board of Education is the most obvious, but one might also include the important cases on sex discrimination arising out of the passage of the Civil Rights Act of 1964, such as the 1973 American Telephone and Telegraph Company (AT&T) consent decree. We can only reflect on how other important cases could have been decided if lawyers and judges had been sophisticated in the use of social science data.

Insularity would also be diminished if there were more exposure of students (and faculty) to the creators of law — legislators and other policy makers. Although there is merit in separating the executive, legislative and judicial branches of government on some levels, there is no merit in limiting knowledge about the context in which decisions are made and about the political forces working on them. Law students ought to become familiar with the political process that creates the
Epstein

laws which they must administer, as they will also be required to ascertain the intent of those laws and the interests that are represented in them. It is too much to ask students to educate themselves about the political process in this age of specialization, particularly in light of the grueling work load to which students must submit in law school and in their first jobs. If law students were exposed to policy makers in schools and had an opportunity to interact with them, their understanding of the legislative process would have greater dimension. In short, law students should get a dose of political science in their education, and beyond that, exposure to legislators would also provide the opportunity for discourse about the responsibilities of each sector of the law community.

Legal educators aim to create practitioners of craft and they do well at the task. That these practitioners also become conveyers of values is incidental. The process should be reversed. Craft should follow and be an instrument for the larger concerns of social values and policy. A more reflexive view ought to be part of a new agenda of legal education.
LET ME PUT IT TO YOU ALL, THEN—WHAT SHOULD A KNOWLEDGE OF THE LAW TEMPERED WITH A SENSE OF MORALITY PRODUCE?

WHY, JUSTICE, OF COURSE!

WILL THAT BE ON THE EXAM? NO, OF COURSE NOT.
Legal Education: The Last Academic Bastion of Sex Bias?

Nancy S. Erickson

Nancy Erickson, currently a professor of law at Ohio State University College of Law, specializes in sex-based discrimination and has a particular interest in women's legal history. As described in this article, she is directing a research project examining possible sex bias in the teaching of the first-year criminal law course. Currently, she is on a leave of absence in New York City, where she is the Richard J. Hughes distinguished visiting Professor of Law at Seton Hall University School of Law.

Traditional legal education, as exemplified in the legal education I experienced as a student in the early 1970's, exhibited blatant sex bias in teaching methods, in casebooks and other materials used, and in the doctrinal law itself. With regard to the teaching of law, for example, women were rarely called upon for any cases other than rape and other sexual assault cases or "sexy" cases, except for "ladies day" when only women were called upon.1 The professor often "played to the male audience" by making jokes at the expense of women.2 When hypotheticals were presented in class, women were generally portrayed in traditional roles (e.g., secretaries, waitresses, housewives, librarians, elementary school teachers) and were completely absent from roles within the judicial system such as judge or attorney.

Casebooks and other materials also evidenced sex bias. "Playing to the male audience" was as prevalent in casebooks as it was in classroom teaching. Torts casebooks quoted Herbert's comment on the "reasonable man” standard: "In all that mass of authorities which bears upon this branch of the law, there is no single mention of the reasonable woman.”3 A property casebook stated: "[F]or, after all, land, like

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3. A. HERBERT, MISLEADING CASES IN THE COMMON LAW 16 (1930), quoted in
woman, was meant to be possessed.” Adult women were often referred to as “girls,” particularly in sexual assault cases (a phenomenon that can profitably be compared with the use of the term “boy” for adult Black males), and “sexy” cases were chosen for inclusion in casebooks when non-“sexy” cases would do just as well.

A more subtle type of sex bias evidenced in traditional casebooks is failure to include, or superficial coverage of, issues of particular concern to women, such as marital property regimes in the property course or domestic violence in the criminal law course. Lack of coverage is more difficult to recognize and criticize than biased coverage, especially when casebook authors can always rationalize lack of coverage on various grounds, particularly space limitations.

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Ginsburg, supra note 2, at 482, who points out that it was quoted in W. Prosser, Torts 154 (3d ed. 1964) and C. Gregory & H. Kalven, Cases and Materials on Torts 101 (2d ed. 1969).

4. C. Berger, Land Ownership and Use (1968), quoted in Ginsburg, supra note 2, at 481.

5. See, e.g., W. LaFave & A. Scott, Handbook on Criminal Law 558, n. 68 (1972), referring to the murder and attempted rape victim in People v. Goodridge, 70 Cal. 2d 824 (1969) as a “girl”; id. at 358, referring to an attempted rape victim in U.S. v. Short, 4 U.S.C.M.A. 437 (1954) as a “girl.” In Short, the court itself often referred to the victim as a “girl,” but a casebook author should not trust the labels used by judges, especially when the case is not recent, and should look for evidence of the female’s age, and when in doubt should use the word “woman” or “young woman.” In Short, for example, the woman was employed (in a shop near where the incident took place), and there was no mention of statutory rape as opposed to forcible rape.

6. See just about any casebook, especially torts and criminal law.

7. In 1973, Professor Judith Younger wrote:

This subject [community property] and the larger subject of which it is a part — marital property systems and their relation to the status of women — are generally slighted in standard property casebooks. The material they offer may be so salted with jokes that it is trivialized or so general that it is inaccurate.


Coverage of marital property in current casebooks may be an improvement over the coverage in 1973. Professor Joan Williams reports that all eighteen property casebooks currently in use cover marital property, although seven appear to do so superficially. She states, for example, the Dukeminier and Krier property casebook (1981) spends about sixty pages on marital property, including cases, notes, questions and problems.

Preliminary research for my criminal law project (see infra text accompanying notes 26-28) reveals that five out of seven major criminal law casebooks contain no materials on domestic violence.
With regard to sexism in the law itself, case law prior to Reed,8 Frontiero,9 Craig,10 and other important United States Supreme Court equal protection cases was often clearly sex discriminatory. For example, some state statutes mandated different penalties for male and female defendants for the same crimes,11 provided that husbands could recover for loss of consortium while wives could not,12 and prohibited women from exhibiting the behavior of a "common scold," while the same behavior by a male was not penalized.13 Casebooks and law teachers rarely questioned the validity of these laws.

The effects on women law students of sex bias in legal education are devastating but difficult to quantify. Words like anger, alienation and humiliation can give some idea of the reactions of women students but cannot tell us how many were deterred from going to law school, flunked out, dropped out, or were psychologically scarred by the experience.14 The experience of being a woman law student was especially difficult when she was the only woman or one of a small handful. Her ability to eliminate sex bias in legal education or even to criticize it was limited.

As women began to go to law school in significant numbers in the early 1970's, however, attempts were made to correct the sex bias inherent in the traditional law school curriculum. In a panel discussion on treatment of women by the law, held at the annual meeting of the Association of American Law Schools on December 27, 1970, Ruth Bader Ginsburg, then a professor at Rutgers (Newark) Law School, gave a blueprint for needed changes in law schools:

Two jobs merit immediate attention: 1) the elimination from law school texts and classroom presentations of attempts at comic relief via stereotyped characterizations of women; 2) the infusion

into standard curricular offerings of material on sex-based discrimination. The second is the major assignment; the first is already under way as a result of sensitivity training given to law school professors by the increasing number of female students attending their classes and reading their materials.\textsuperscript{15}

In her discussion of “the major assignment,” she suggested “new infusions” into the traditional courses such as Constitutional Law, Tax, and Conflict of Laws, as well as the newer offerings such as Environmental Law and clinical courses.\textsuperscript{16}

Efforts such as those of Professor Ginsburg led to the \textit{Symposium on the Law School Curriculum and the Legal Rights of Women}, held at N.Y.U. Law School on October 21, 1972, under A.A.L.S. sponsorship. In its preliminary announcement of the \textit{Symposium}, the A.A.L.S. urged that the teaching of sex-based discrimination not be confined to special courses but be diffused throughout the whole curriculum:

Basic substantive courses in the law school curriculum traditionally have omitted materials respecting the legal status of women. Students are informed that the Married Woman’s Property Acts ended the common law submergence of a woman’s legal existence into that of her husband’s, but are not shown how the courts interpreted those Acts (and other laws) to perpetuate a state of second-class citizenship for women. It is not surprising that many law students erroneously assume that men and women are treated equally by the law. The fledgling lawyer, whether male or female, comes out of law school unprepared to grapple with problems of sex discrimination in the law or even to recognize them.

In law schools around the country, small groups of students and dedicated faculty members have developed Women and the Law courses to teach students who have a special interest in the subject of women’s rights the ways in which the law affects women. But such courses reach only a small minority of law students. Unless information on the legal rights and disabilities of women is included in the most basic law school courses, the nation’s law school graduates will continue to have scant understanding of the legal restrictions under which 53 percent of the population lives.\textsuperscript{17}

\textsuperscript{15} Ginsburg, supra note 2, at 481. Ginsburg is now a judge on the D.C. Circuit Court.
\textsuperscript{16} Id. at 482-87.
At the Symposium, legal scholars in the fields of property, tax, criminal law and criminal procedure, employment discrimination law, family law, and constitutional law made presentations and distributed papers concerning sex bias in their fields and suggesting how to incorporate previously omitted topics into the curriculum.

Some changes in the law and legal education were made. Following the Supreme Court precedents referred to above, many sex-based laws were made sex-neutral. More women were hired on law school faculties, much sex bias in the teaching of law was eliminated or toned down, many schools introduced elective courses, seminars and clinics in sex-based discrimination to address topics omitted from the traditional curriculum, and some modifications were made in standard courses. However, more than a decade later, little is known about the extent to which efforts like the A.A.L.S. Symposium have affected the traditional law school curriculum. Have the topics omitted from the traditional curriculum been incorporated into the appropriate courses? Are newly surfacing gender-related issues being integrated into the curriculum in an ongoing fashion? Is material covered in a non-biased way?

It is ironic that sex bias in legal education has not been addressed when sex bias in almost every other discipline in the university has been investigated. Studies on sex bias in philosophy, psychology, history, English, sociology, anthropology, the arts, and the natural sciences abound. Why have these studies not served as catalysts for sim-
lar studies of the law school curriculum? Are the law schools, as professional schools, so isolated from the university that these concerns have not touched us? Do law school professors and administrators assume that the courses in sex-based discrimination will suffice to address the issues? Do they assume that sex bias will wither away as time goes on, without directed attention to the issue? Or do they think that no problem of sex bias continues to exist?

The answer is probably a little bit of all of the above. I am sure that law school professors and administrators do not wish to condone or encourage sex bias in legal education. But neither have they been trained to recognize or to eliminate sex bias where it continues to exist. The typical law professor is busy with teaching, writing, and community service and has little time to make a thorough investigation of possible sex bias in his or her subject matter. It is a difficult and time-consuming inquiry, especially because there is not even a consensus as to what constitutes sex bias. Therefore, one investigating sex bias in the law school curriculum must to a certain extent be tentative about conclusions. Yet certain language usage and teaching methods are sex-biased under any definition. For example, the use of the generic “he” gives the impression that the whole legal system is still all male; no footnote or preface at the beginning of a law school casebook can modify the impression made over 500 or more pages of text. Likewise, “sexy” examples and cases used to “liven up the materials” are just as offensive now as they were in 1970 (this is not to say that these “sexy” materials are consciously used for that purpose; some cases and materials, in fact, have become “traditional,” and casebook authors probably use them without thinking of their possible offensiveness). More difficult are the issues of how teachers and casebooks should deal with sex bias in legal doctrines and how traditionally-omitted topics should be incorporated in the law school courses in which they belong.

Two current projects are directed toward improving legal education by identifying and correcting sex bias in the law school curriculum. These projects deserve the respect and assistance of all thoughtful and concerned law professors. Identifying sex bias in the law school curriculum.


26. My criminal law project, described in text accompanying notes 27-28 infra, is seeking to identify such materials.
curriculum will not accomplish anything unless individual law professors seek to use the results of these projects to improve their courses.

The first project is the Women and the Law Project of Washington College of Law, American University, headed by Ann Shalleck. This project held a Conference on Women's Rights and the Law School Curriculum on January 4, 1985, in conjunction with the AALS Annual Meeting, directed primarily toward teachers of sex-based discrimination courses. A second conference, held one year later, examined the integration of women's rights issues into the standard courses in the law school curriculum.

Treatment of domestic violence

I am the director of the second project, funded by an Ohio State University Affirmative Action award. It is entitled "Sex Bias in the Criminal Law Course: Bringing the Law School Curriculum into the 1980's." With the assistance of Professor Nadine Taub of Rutgers Law School (Newark) as primary consultant, in addition to law students and experts in sex discrimination law and criminal law, I am examining whether, and, if so, the extent to which gender-related issues have become an integral part of the traditional first-year criminal law course as it is taught throughout the country. The study is designed to serve as a model for a comprehensive study involving the entire law school curriculum. Studies of torts, property, civil procedure, and contracts are already in the planning stages.27

27. Lists of interested teachers of these courses (and others) are being compiled,
The criminal law project is proceeding in three steps: a review of casebooks now being used in the first-year criminal law course; a survey of all law professors currently teaching the course; and a bibliography and a compilation of supplementary materials that may be of assistance to authors of criminal law casebooks when they are writing new editions of their books and to professors of criminal law who wish to compensate for inadequacies in traditional teaching materials. Included in the supplementary materials are materials that demonstrate how areas of importance to women can be used to illustrate significant concepts in criminal law generally.28

Progress so far on the criminal law project has revealed that eliminating sex bias in the law school curriculum will not be a quick and easy task. The process of investigating sex bias in the law school curriculum is not a superficial undertaking; it is one that requires wrestling with some of the most fundamental issues of all legal systems. It also promises to illuminate some of those fundamental issues in ways that will have a broad impact on legal education and the ways that we view the legal system.

and some of these teachers are already beginning studies in their fields. For torts, contact Prof. Delores Donovan, San Francisco School of Law; for property, contact Prof. Joan Williams, Washington College of Law, American U.; for civil procedure, contact Prof. Elizabeth Schneider, Brooklyn Law School; for contracts, contact Prof. Mary Joe Frug, New England School of Law; and for all others, contact the author.

28. For a summary of the final report on the project, contact the author. For budget reasons, we will probably not be able to distribute copies of the full final report, bibliography, and supplementary materials free of charge; we will probably have to charge for the cost of printing. For the summary and a price list, send a stamped, self-addressed business-size envelope to the author at Ohio State University College of Law, 1659 North High Street, Columbus Ohio, 43210; Attn: Criminal Law Study.
The Pedagogy of Community: Trust and Responsibility at CUNY Law School*

John M. Farago**

John Farago is a founding member of the CUNY Law School faculty, having served as associate dean and now as a professor. He has also taught and administered at Valparaiso University School of Law. His primary teaching and scholarly interests are jurisprudence and professional responsibility.

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 (Ladislas 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 subjugate 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, 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. 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

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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).


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. If we move beyond relativism, we are then subject to the potential risks of paternalism, absolutism, and political disension. 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. 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 corollary, 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

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. 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

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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.

Farago

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 accommodates 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.” 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

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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
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 issues\(^{13}\) (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. 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. 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-
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.

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 cumbersoness 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.
The Use of Appellate Case Report Analysis In Modern Legal Education: How Much Is Too Much?

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A Thursday, October 1985. A discussion between two people, "Z" and "T."

I.

Z: The integral role played by appellate case report analysis in modern legal education reminds me of a bumper sticker I saw recently: "United States Get Out of North America."

T: How is that slogan analogous to the role played by appellate case report analysis in legal education?

Z: It's almost as difficult to imagine a legal education without appellate case report analysis — or even reduced amounts of such analysis — as it is to imagine North America without the United States. Perhaps it is time, however, to begin picturing an alternative to legal education orthodoxy.¹

T: Why?

Z: Because the excessive reliance on appellate case report analysis in traditional legal education fails to provide students with enough of the individual skills necessary for good lawyering or an appropriate understanding of what is supposed to be accomplished through the legal education process.² Students do not learn during their education how the

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¹ "[L]egal education orthodoxy" refers to the dominant modern system of legal education in the United States which relies on appellate case report analysis — and, specifically, doctrinal analysis — as its centerpiece.

² "A consensus is emerging that law schools must equip their graduates with more of the skills they will need in practice and impart to them a broader perspective
different things they do in school — from case analysis to clinical training to simulation — relate to each other or to actual lawyering. Among the more significant consequences of the over-reliance on appellate case report analysis are: the neglect of important lawyering skills such as listening, legal writing, and fact arrangement; the misleading inference to students that case analysis dominates lawyering in the same way it dominates legal education; the omission of a more accurate on the important role they are to play in society." "Academic Planning Project: Interim Report," UNIVERSITY OF MONTANA SCHOOL OF LAW, 3 (1983) [hereinafter cited as Montana Report]. "Surveys of recent law graduates and current law students indicate that both agree on the desirability of greater law school emphasis on various skills important to the practicing lawyer. [However, the law students exhibit] great confusion about precisely what training is practical." "Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, American Bar Association Section of Legal Education and Admissions to the Bar," at 14, n. 4 and 5 (1979) [hereinafter cited as ABA Report].

The contemporary crisis in American legal education is that "[w]e are unable to identify a common purpose other than training in the kind of 'knowledge, analytical skills, and insight' that are needed to perform effectively, as lawyers." Berman, The Crisis of Legal Education in America, 24 B.C.L. REV. 347, 350 (1985) [hereinafter cited as Berman].

3. The skill of listening is a necessary prerequisite to the exercise of many other lawyering skills and therefore should receive much more attention than it does.

4. "Law schools should provide every student [with] at least one rigorous writing experience in each year of law study." ABA Report at 3.

5. Law schools should provide instruction in those fundamental skills critical to lawyer competence. In addition to being able to analyze legal problems and do legal research, a competent lawyer must be able effectively to write, communicate orally, gather facts, interview, counsel and negotiate. Instruction in such areas need not and should not be approached less rigorously than those traditionally emphasized in law schools, nor should they be viewed as 'training' that is somehow detached from the research and academic mission of the school.

Id. at 3, 16.

6. [The invention of appellate case report analysis] is responsible for confining legal education in a strait mold which was to dissociate it from the living context of the world about it. Disregarded were the broad premises for the study of law . . . unrecognized was the fact that prospective lawyers needed training in various areas of learning and skill.


"[C]ase instruction, by focusing on the abstract legal principles propounded by the highest courts, distorts and falsifies what it teaches by ignoring the significance of the
multi-dimensional conception of law, legal problems and legal analysis; the inability of too many students to overcome attention to minutiae in cases and to see the forest for the trees; and the effective discouragement of students engaged in case analysis from playing an active, involved role in their education. I would propose, therefore, that case analysis generally, and doctrinal analysis specifically, be deemphasized.

T: What would you offer in its place?
Z: I would propose an alternative model of legal education that includes case analysis, but which focuses on an array of specific lawyering skills such as listening, fact gathering, issue formulation, and effective communication, as well as a better integration of the different layers or perspectives of the law. The model promotes the direct practice of these skills both inside and outside the classroom. It promotes skills learning primarily by switching the emphasis from case analysis to legal problem solving. The problem solving approach, rather than being derived from predominantly "prepared" appellate cases, more closely parallels cases as they might actually be presented by clients. The heart of these problems are unprocessed — or minimally processed — facts.

Through the second significant characteristic of the model, approaching legal problems from different perspectives, students are taught to recognize and understand the various dimensions of legal analysis within a single legal problem — the ethical, moral, political, advocacy and doctrinal dimensions, among others. In addition to teaching students about what the different dimensions of a problem are, students should also be shown how the various dimensions of a legal problem, and even an entire legal education — doctrines, themes, and courses — fit together.

This new model affords students the opportunity not only to learn and practice fundamental lawyering skills, but to obtain a broader un-


"[The case method's] emphasis upon rigorous doctrinal analysis set constricting limits . . . . Preparing students only for mastery of judge-made law, it deluded practitioners into believing that law was a science, not policy, and that other scholarly disciplines, and even practical experience had nothing to offer." J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, 79, 80 (1976).

7. "From [the students'] point of view, close reading of cases seems inefficient and pointless, and they resist it." Montana Report at 6.
derstanding, or "big picture", of the legal education process and of lawyering while still in school. By permitting students to observe the nexus between lawyering, legal training and the rationales underlying the educational methods used, by providing students with a general roadmap of an effective education, and by promoting more active student involvement in the educational process, the new model should avoid many of the deficiencies caused by an over-reliance on case report analysis in legal education orthodoxy.

II.

T: Why do you have such a concern?
Z: There are three reasons — the responsibility of law schools to the students, to the profession, and to the public. For the students, law schools take three years of their lives. Schools owe them something for that. Schools then send their graduating students off to become members of the legal profession, sometimes for life. Schools owe the profession something for that. And schools can influence the way students practice law on behalf of clients. So schools owe the public as well. The real problem, therefore, is not whether the quality of legal education is important, but how to improve that quality.

T: Before you suggest how to improve the quality of legal education today, could you state why the modern legal education needs changing?
Z: Let me present my case. A good place to begin is with the historical antecedents of the case analysis method of legal instruction. For that, we must journey back to the colonial era. At that time, the dominant form of a lawyer's education was the apprenticeship. Generally, an apprentice learned through the observation of an experienced lawyer or through practice. Some books were used in the apprentice's education,

8. "In the Seventeenth and first half of the Eighteenth Century prospective lawyers lacked the funds to finance a trip to England [to study in the inns of court]. Consequently they either studied on their own or with a practitioner." McKirdy, The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts, Readings in the History of the American Legal Profession, 198 (Nolan ed. 1980) [hereinafter cited as McKirdy]. A. Chroust, 2, The Rise of the Legal Profession in America 173 (1965).

9. A prospective lawyer would enter the office of a bar member and absorb the law "by study, observation and occasionally by direct teaching from his senior." C. Warren, 1 History of the Harvard Law School and of Early Legal Conditions in America, 132 (1970) [hereinafter cited as Warren].
but the scarcity of books served as a built-in limitation.\textsuperscript{10}

Soon after the Revolutionary War, law schools and organized legal instruction became more common.\textsuperscript{11} The instruction generally consisted of veteran lawyers dispensing their collected wisdom to eager students.\textsuperscript{12}

In the early 1800's, students received their legal training at inns of court, at the offices of practicing attorneys, and at law schools.\textsuperscript{19} The quality and quantity of education varied considerably.\textsuperscript{14} In 1871, a revolution of sorts occurred. Christopher Columbus Langdell, then a professor at the Harvard Law School,\textsuperscript{16} published a landmark book evidencing a radical new perspective on the methodology of legal instruction.\textsuperscript{16} In his book, \textit{A Selection of Cases on the Law of Contracts},\textsuperscript{17} appellate case reports were gathered under one cover for the purpose of systematic study.\textsuperscript{18}

The impact of the book was both immediate and controversial. The book generated supporters who felt that Langdell's selection of appellate case reports created "consistency out of what seemed a chaos of conflicting actions."\textsuperscript{19} Detractors, however, concluded that:

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10. "Acquisition of the law is difficult without ready means of access to the books of the law and these were sadly lacking in the American Provinces." Prior to 1776, only thirty-three law books including at least eight repeated editions were even printed in America, most of which were manuals and treatises. \textit{Warren} at 126, n. 1.

11. "Formalized apprenticeship, together with the severing of ties with England, also led to the establishment of private law school." \textit{R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s}, 3, n. 7 (1970) [hereinafter cited as \textit{Stevens}]. "With the close of the Revolutionary War there began a new era in legal education. [T]he first American law professorship was founded . . . in 1779." \textit{Warren} at 165, 169.

12. "[The newly established law schools] were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular as teachers." \textit{Stevens} at 3, n. 7.


14. "[Students'] individual experiences were as varied as the men who trained them." \textit{McKirdy} at 202.

15. Christopher Columbus Langdell began his professorship at Harvard Law School on February 21, 1870. On September 27, 1870 the law school's faculty elected Langdell to be the law school's first dean. Langdell retired in 1895. \textit{Seligman} at 32, 42.

16. Langdell changed the way law was taught with the invention of the casebook in 1871. \textit{See id.} at 33, 45.

17. \textit{Harno} at 218.


There is just as much sense in endeavoring to instruct students in the principles of law by the exclusive reading of cases as there would be in endeavoring to instruct the students of West Point Military Academy in the art of war by compelling them to read the official reports of all the leading battles which have been fought in the world's history.20

Langdell's case method approach to legal instruction provided great impetus to the view of law as a pure academic science.21 Stated one observer: "The very heart of the case method was the assumption that the cases, once they were sorted out and properly classified, would themselves fall into patterns suggesting the true underlying principles."22 The cases were "the data from which the true legal principles could be derived."23 Langdell strongly agreed with this view. He stated, for example, that:

Law, considered as a science, consists of certain principles or doctrines . . . the growth [of which] is to be traced in the main through a series of cases; and much the shortest if not the best, if not the only, way of mastering the doctrine effectively is by studying the cases in which it is embodied.24

This view of the law and the accompanying case method eventually spread throughout the legal education community by the second decade of the twentieth century.25 The influence of Langdellian ortho-

20. Id. at 551.


22. Id.

23. Id.


25. "By the early twentieth century, Langdell's casebook approach to teaching law was well established." Seligman at 45.

In those days [1890] at least, it was not obvious that Langdell's law school would sweep the country . . . the ultimate triumph of that system, even in the narrow world of the university—affiliated day law school, was not apparent until at least 1910 when the West Publishing Company thought that the market was large enough to support an entire series of case books.


See also Feinman & Feldman, Pedagogy and Politics, 73 GEO. L.J. 875, 882
doxy grew to the extent that law school appeared to be a “three year graduate program of ‘pure law’ taught from cases.”

T: But that was long ago. A lot has changed over the years.
Z: True. But the significance of the Langdellian case method approach to legal education lies in its imprimateur on modern legal education orthodoxy. Langdell’s case method approach has transcended generations of lawyers and law teachers. In many law classes, the study of appellate case reports has become the sole pedagogical tool, and students as well as teachers have come to believe that the only resource necessary for an adequate legal education is a bound volume of appellate case reports. As a by-product of this emphasis, however, social context has been given less than adequate attention, as have political overtones, ideologies, and for the most part, competing methods of instruction.

T: The case analysis method and its “law-as-science” underpinnings did have some opposition; didn’t they?
Z: Yes. A prime illustration was the movement known as legal realism, which occurred after World War I. This movement rejected the

(1985); Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940, 3 Res. in L. Soc. 3 (1980); R. Unger, Law in Modern Society (1977).

27. In the next seven decades, Langdell’s model of legal education would spread from Harvard Law School and become the model for virtually every American law school. After Langdell’s retirement, the spread of the case method quickened. By 1902, 12 of the 98 law schools had unequivocally accepted the case system; by 1908, over 30.
Seligman at 42, 43.
28. “The trouble is not with the students. The trouble is with the educational process, its materials and the environment where law school law is pronounced. Law school ‘law’ is the law pronounced in the courtroom by an appellate court.” Brown, The Trouble With Law School Education: A Consultation As A Microcosm, 18 Creighton L. Rev. 1343, 1347 (1985). “Law teachers and law students of 1984 are more one-sided, and more mistaken in their view of the nature of law than were their predecessors in any other period of American history.” Berman at 348.
“The near universal emulation of Harvard Law School’[s] [use of appellate case reports as the sole teaching tool] has limited the emergence of rival theories of legal education.” Seligman at 201.
However, other forms of instruction such as lectures did persist. See Ronefsky at 833, 837.
29. “Legal realism” is a philosophy essentially founded in the late 1920’s by a group of legal scholars who believed that “law is, basically, an argumentative tech-
view of law as a science. This movement attempted to reconnect law to the social sciences, and to debunk the legal scientists' narrow conception of law as a self-informing group of principles found in appellate case reports. The legal realist critique, while focused primarily on judicial decision-making, spilled over to the methods used in legal instruction. Professor Leon Green, for example, reacted to the traditional organization of casebooks by legal concepts by organizing his 1965 torts casebook, The Judicial Process in Torts Cases, functionally by subject matter — such as automobile accidents. “Green seemed to be saying that the participants in a case, the atmosphere it created, and the interests at stake were what determined its outcome, quite independent of rules and principles.” Karl Llewellyn’s The Bramble Bush further illustrates this position.

T: How?
Z: Llewellyn wrote:

So of the cases. Put yourself into them; dig beneath the surface, make your experience count, bring out the story, and you have here dramatic tales that stir, that make the cases stick, that weld your law into the whole of culture. These are the parties. There are, as well, the judges: working out, shaping the law to human needs. In every case the drama of society unrolls before you — in all its grandeur, in all its humor, in all its futility, in the eternal wonder of the coral reef. . . . Humanity and law — not two, but one.

Thus, to Llewellyn and other realists, the doctrinal synthesis of the rule of law constituted an artificial “laboratory” far-removed from real-nique. The judge, it is thought, decides on the basis of his political, economic, or psychological prejudices; legal reasons are merely rationalization.” Berman at 349; Seligman at 50.

30. One commentator stated: “The major tenet of the functional [realist] approach which they have so vigorously espoused, is that law is instrumental only, a means to an end, and is to be appraised only in light of the end it achieves.” McDougall, Fuller v. the American Legal Realist: An Intervention, 50 Yale L. J. 8027, 8034-35 (1941); Woodard at 717.


35. Id. at 127-128.

https://nsuworks.nova.edu/nlr/vol10/iss2/1 252
ity that did not reflect the true nature of the politics of law. A legal education methodology based on doctrinal synthesis of the rule of law, moreover, was equally suspect.

T: Have there been any recent critiques of legal education?
Z: Yes, there have been several recent strains of attack on legal education orthodoxy. The recent attacks range from disagreements with the law-as-science underpinnings of doctrinal analysis, — including the

36. Several strains of this attack have been labeled for convenience as one group — critical legal studies. See Gordon, Legal Historiographies, 36 Stan. L. Rev. 199 (1984). According to some critical legal scholars, legal reasoning and law are indeterminate. This means that legal decision-making can only be explained “by reference to criteria outside the scope of the judge’s formal justifications.” Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L. J. 1, 19-20 (1984). The critical legal theorists also take issue with much of the realist dogma. “However, the thrust of Realist Scholarship was essentially negative and inconoclastic; it lacked any unifying thread or positive political program. Thus while the Realists accepted the indeterminacy of legal reasoning, they remained firmly committed to liberalism.” Hutchinson at 204. The movement shares with the realists, however, a disdain for the science of law approach: “Legal reasoning is not distinct, as a method of reaching correct results, from ethical, and political discourse in general (i.e., from policy analysis) . . . Put another way, everything taught, except the formal rules themselves and the argumentative techniques for manipulating them, is policy and nothing more.” D. Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System 20-22 (1983).

In addition,

Several observers of critical legal scholars have concluded that: “Like traditional jurists, the Critical scholars are obsessed with the judicial function and its alleged central importance for an understanding of law in society. Yet while they share this infatuation, they adopt a radically different view of the judicial process: All the Critical scholars unite in denying the rational determinacy of legal reasoning. Their basic credo neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.

Hutchinson at 206.

Recently, two law professors wrote that:

[O]ur unease about our graduates as lawyers is not a unique product of our situation at a regional nonelite law school. Professors at elite law schools may have more confidence in the prospects of their graduates. If they do, however, it is because their students arrive at law school with many of the qualities that make success more likely.

Feinman and Feldman at 880. These professors have created a course which focuses on the overlap between contracts and torts. This course, which they call “contorts,” accepts the premise that the “traditional organizing categories — contract and torts — fail to provide meaningful distinctions.” Id. at 887. This leads them to consciously attempt to prepare students for the “inherent ambiguity in . . . legal discourse.” Id.
premise that judicial decision-making is largely determinate — to the view that the skewed forms of the dominant vision have minimized the interpersonal "humanistic" aspect of law and lawyering.37

37. This group, which has been labeled the "humanists," are perhaps best represented by E. Dvoorkin, J. Himmelsmith, H. Lesnick, Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism (1981) and the program adopted at C.U.N.Y. Law School at Queens College. The "humanities" have been defined as "the system of values, traditions and customs with which we live and which we may wish to change." Byman, Humanities and the Law School Experience, 35 J. Legal Ed. 76 (1985). The humanists' stated purpose is to broaden the scope of traditional education to include a focus upon the persons of teachers and students, the human dimensions underlying the subject matter, and the experience of learning." Id. The goal of this approach, however, "is not to replace the traditional strengths of the profession, but to include them in a larger context." Id.

The humanists also reject the conception of law as a laboratory science to be gleamed from and understood through appellate case reports. They seek in legal education to reunite efforts at technical proficiency and other aspects of human life. Similarly, they believe the professionalization process of law school has profound consequences for students and, after graduation, the community-at-large. Thus, the humanists abandon the narrow goal of orthodox legal education — to teach students to 'think like a lawyer' — in favor of a broader notion of professional responsibility.

Humanists adopt a radical restructuring of the goals of legal education and of the means used to achieve those goals. Several law schools have adopted some of these humanist principles in implementing new approaches to legal education. The C.U.N.Y. Law School was conceived and staffed by several of the leading humanist scholars. The University of Montana School of Law, established in 1911, revised its first year curriculum in 1984 after an extensive reevaluation. The predecessor to these schools was Antioch Law School, which integrated clinical and substantive law training in an effort to train lawyers in large part for public interest and poverty law careers.

The University of Montana's criticisms of the orthodox method of instruction are particularly interesting because the University's changes came on the heels of a lengthy tradition. The faculty committee assigned to analyze the first-year curriculum complained that the appellate case method approach had too narrow a focus, was the wrong end of the judicial process to show students first, encourages passive learning, becomes redundant, does not provide adequate skills training, and omits the necessary social science context by continuing to voice a "science of law" ideology. Montana Report at 6-7.

An additional recent critique was offered by Professor Warren Schwartz of Georgetown University Law Center. Professor Schwartz proposed curriculum reform based on the assumption that "the two objectives of legal education are to improve our understanding of how governments function and how they ought to function." Schwartz, The Failure of Economics in Legal Education: The Prospects For a New Model Curriculum, 33 J. Legal Ed. 314 (1983). The courses Schwartz proposed were: "(1) Government Coercion and the Allocation of Resources, (2) Government Coercion and the Just Distribution of Social Products, (3) Government Process, (4) Empirical Methodology and (5) Law and Culture." Id. at 316.
T: Your historical analysis, however, certainly indicates that the orthodox model has been extremely durable and adaptable. And looking at the success of the students who have been taught under the orthodox case-oriented approach, it also appears that the model is effective. Perhaps there are good reasons for the model's success?

For example, legal education orthodoxy divides up the substantive areas of law into manageable components that are recognized in the practice of law. These components include labor law, taxation, commercial law, and the like. In the first year, students are thoroughly schooled in the fundamentals of private law, from torts to contracts.\textsuperscript{38} They are also taught a whole new style of analysis endemic to the legal profession. This analysis teaches them to "think like lawyers."\textsuperscript{39} The study of appellate cases "works the mind," challenging the intellectual capacities of the students. Through a careful analysis of the cases, students truly learn about doctrines of law, and the policies underlying those doctrines. When students read appellate case reports, they gain insights into judicial decision-making and the application of legal principles. Thus, it's reasonable to believe that the only raw materials a law student truly requires for a proper legal education are a pen, paper, and a casebook containing appellate case reports.

\textsuperscript{38} A typical first-year program for law students includes courses in legal writing, civil procedure, torts, contracts, property and criminal law. The orientation of these courses, with the possible exception of contracts, and its study of the Uniform Commercial Code, and criminal law and the analysis of the Model Penal Code, is on the common law.

The argument that the dominance of case analysis has excluded all other forms of legal education, moreover, is simply inaccurate. In the second and third years of study, students at most schools have the option of participating in a clinical program, or interning with practicing attorneys. The division of academic and clinical training in this manner is similar to the formats used in other graduate programs, such as medical training. Saving clinical programs for a later point in a student’s education permits a student to apply the academic classroom learning of the first two years of school. The argument that legal education has an insufficient nexus to lawyering, moreover, is specious. Students take a course in legal writing and have the opportunity to practice their appellate advocacy, in addition to whatever clinical or simulation courses they may choose to attend.

The orthodox case-oriented method, moreover, is not confined to the study of core courses such as contracts, torts, constitutional law, property and the like. Students also are schooled in legal ethics, and may learn about the relationship of law to other disciplines in courses specifically devoted to the interaction of law with the social sciences.

Besides, don’t you miss the mark when you attack the Socratic method? That method involves posing a series of thought-provoking questions to students about a case, forcing students to think about the cases and actively piece together applicable rules and principles. While the method may cause students to struggle to understand concepts, it is precisely this struggle that permits students to learn to think like a lawyer.

40. “It is primarily the failure of American law schools to graduate attorneys competent in lawyering skills that has buoyed the movement for clinical law school training.” Seligman at 160.

A broadly-defined clinical program may be run by the school or may consist of an “externship” with a state or local agency, or even a private law firm. The student in a clinical program generally has a participatory role, from assisting on written memoranda to the court, to actually trying cases as a student-prosecutor.

41. The legal writing course in most schools is generally a one-credit or two-credit course in the first year. The course is often pass/fail, and may be combined with legal research and ethics.

42. This generally occurs in the first-year moot court competition.

43. The Socratic method, as it is called, generally is considered to be a teaching technique in which a series of questions are put to students. By tying together the series of questions and answers, a new insight or point is illuminated. Interestingly, the Socratic method as it is practiced in law schools today is likely much different than the teaching technique applied by Socrates, after whom the method was named. See Brown, V Perspect 6 (1981) [hereinafter cited as Brown].
Z: If I may now interrupt; I really must disagree with your assertion that I am attacking what is called the Socratic method. While I personally am not a proponent of that method, I strongly believe that academic freedom protects the many different styles of law teachers. This would include the Socratic style. The Socratic method is swept into the critique of appellate case report analysis only incidentally, since the Socratic method often occurs in the context of case analysis.

T: And you ask whether this system works? One need only look as far as the nearest bright and successful lawyer — of which there are thousands.

Z: Contrary to your assumption, I do not view the "success" of law graduates as a measure of the orthodox model's vitality. Students may succeed despite their law school education, not because of it. The relevant issue is whether legal education orthodoxy can improve its design and delivery of legal instruction.

III.

T: Well, what exactly is it about case analysis that has you reconsidering its utility?

Z: To best answer your question, perhaps it would be helpful if I first state my assumptions. I presume that effective lawyering involves a series of processes extending far beyond the intellectual sifting of appellate case reports. For a lawyer to solve a problem or complete a task, she must generally first listen to the statement of the problem, sort out or separate the information received, analyze the information — arranging the facts, identifying the applicable law, and then applying the law to the facts — and finally communicate the processed information to others.44 An effective training would include rigorous and direct attention to each of these phases of lawyering.

Case analysis, however, fails to undertake such rigorous skills training. Within case analysis, general skills such as listening are likely to be completely overlooked, and law-specific skills such as fact arrangement or development are probably confronted only incidentally. Consequently, students graduate without understanding or practicing

44. The skill of communication is touched upon briefly in law school in appellate advocacy. The consideration, however is only peripheral. The focus of the oral advocacy program is primarily upon oral legal analysis. The skill of communication should be a more direct focus of legal education. Students need to learn to speak precisely and clearly; this requires practice of the type not generally offered in law school today.
significant aspects of lawyers, and are forced to obtain many of these skills from on-the-job training.

This defect in appellate case analysis is partially built-in. Opinions at the appellate stage of a proceeding present the reader with "prepackaged" facts and issues. This affords students little opportunity to identify and practice those skills. 45

T: Are there any other deficiencies?
Z: The analysis of appellate case reports is also deficient because the appellate phase of a case is not representative of the entire judicial process. Appellate case reports do not provide students with sufficient exposure to the trial stage of a case, where a careful crafting of facts often determines success, or to the pre-trial stage of a case, where strategy, development of facts, and negotiation with opposing counsel often are dispositive. 46 For example, students do not often use documents during the educational process, and generally do not know how to deal with them upon entering practice. Students are often equally unfamiliar with complaints, motions, transcripts of trials and the like, 47 except for those students who take upper level clinic, intern or simulation classes. 48

A corollary problem to the lack of attention paid to different phases of the judicial process is the misleading implication to students. Students end up believing that the trial and pre-trial stages of litigation, and lawyerly functions like document analysis, are distinct from and even secondary to "pure" legal analysis.

A further deficiency occurs from the focus of orthodox case analy-

45. The report of an appellate case . . . only presents those facts which have already been determined to be legally relevant. Most of the analysis has already been done sub silentio in the process of formulating a single narrow issue which alone remains for determination. The remaining issue, however, is often highly obtuse and arises out of an untypical fact situation, otherwise there would hardly be an appealable issue. Montana Report at 7.

46. "The trouble is that the mindset of the students is on litigation and litigation only. There was not in their thinking process negotiation, settlement, compromise, collaboration or deal-making." Brown at 1345.

47. "After a year of traditional instruction reading appellate cases, students usually have not seen a complaint, an answer . . . The raw materials of appellate cases remain abstractions." Montana Report at 6.

48. These include "in-school" clinical courses and extern programs whereby students participate in community legal programs, as well as certain simulation courses such as pre-trial practice.
sis on private law, particularly in the first year of school when courses such as torts, contracts and property are common fare. As a result of this private law orientation, the study of other sources of law, particularly legislation or administrative regulations, have been effectively restricted to the second and third years of school. This suggests to students that the primary source of law today is the common law. While this may or may not have been historically correct, a strong case certainly can be made that prolific legislatures have increased codification of common law rules to meet the demands of an increasingly technological society, thus shifting the primary source of law from the common law to the legislative and administrative areas. The excessive focus of case analysis on private law in the first year of instruction thus not only misleads students about the relative importance of statutory law, but also fails to supply students with a sufficient ability to understand and interpret statutes or administrative regulations.

On a different level, the repetitive study of appellate case reports and case components often has a negative impact on students, creating what I call a "blinders" effect. This effect occurs when students are overwhelmed by the mass of minutiae in the cases, causing them to lose sight of the forest because they are concentrating too hard on the trees.

Similarly, the case method fails to accurately and adequately convey to students how legal doctrine ties into legal ethics, economics, the promotion of different values, or other dimensions of lawyering. The traditional law curriculum separates cases and courses by legal concepts without generally providing the linkage between cases or subjects.

T: Does your critique extend to casebooks?

Z: Very much so. The use of casebooks as the conduit of appellate case analysis perpetuates and further limits the orthodox methodology. The reliance on casebooks is by no means unexpected. In an educational process dominated by the case method, it is almost a matter of course.

49. "Private" law generally means the common law. In comparison, "public" law is generally composed of statutes or administrative regulations.

50. [R]ead ing appellate cases . . . fails to provide the students with a systematic overview of the legal system as a whole, its origins, its current features, and its operation. This approach also creates an early impression that appellate cases are the primary source of law and minimizes the importance of legislation and administrative rules.


51. "Case" books are textbooks that primarily contain edited versions of important appellate case reports as well as comments and questions about the cases.
that textbooks contain mostly appellate case reports.

Extreme reliance on these books, though, has several drawbacks. Since casebooks generally omit the briefs and oral arguments of the parties, students do not observe how lawyers present their case — how the arguments are emphasized or arranged, or how the facts are presented. Even when dissenting opinions are included in the text, all of the views presented to the students are from a judicial perspective. This perspective, while useful, may likely not be a complete substitute in educational value for the arguments and issue formulations of the parties.

The editing of cases also creates problems. A heavily-edited case makes it difficult for the student to visualize the full range of considerations presented by the facts and legal arguments. Students often are not exposed to how a case originated, what its specific facts are, and how those facts gave rise to the issues, among other things. A casebook may utilize only that portion of a case report that pertains to a solitary issue within the case. Although this may be readily justifiable on efficiency grounds, a pigeonholing of cases by issue further distorts the student perspective of the propositions for which important cases stand, and deprives students of the opportunity to practice identifying and separating the various issues that are being confronted within a legal problem.

The use of casebooks, combined with the underlying belief that the law is derived from cases, also serves to limit the flexibility of the educational process. The settled expectations of teacher and student often are such that the substantive materials in the casebook are not only expected to define the coverage of the course but to provide the priorities of the course as well. Unless the teacher provides a significant group of supplementary materials, the course is constrained by the adopted textbook. If the teacher does provide supplementary materials, there is a natural and perhaps reasonable assumption by students that those materials are less important than the text.

Finally, I come to the defects of the methodology of case analysis itself. The case analysis method is inductive, leaving for students the derivation of the parameters of rules and principles. Unfortunately, stu-

52. The word “substantive” refers to cases specifically and doctrines generally.
53. Some teachers end up structuring an entire course around supplementary materials.
54. “Inductive” reasoning means to generate general principles from specific examples.
Friedland

Students often are not provided with sufficient feedback about whether the framework of analysis they construct is an appropriate one. This is not to suggest that students should be “fed” answers, but to say that the rudiments of analysis should be better communicated during instruction so that students will have the tools by which to capably resolve legal problems. For example, it may be important in a statute-based course for the teacher to emphasize that in resolving legal problems the initial reference for the student is to the statute itself. An attempt to convey this information indirectly through case analysis will likely be a less than adequate substitute.

The analysis of appellate case reports, moreover, has additional deficiencies. Case analysis often sends students confusing messages, if only because several messages are in fact being sent in close proximity. Cases are often analyzed for distinct reasons. Within the broad umbrella of doctrinal analysis, the focus may be on the judicial decision-making process, or on the application of the rules and principles derived from cases to different fact patterns. Since the dominant case method accepts that students are not supposed to be expressly told what exactly they should learn from reading a case and why they are to learn it, students are often fog-bound as to the real reasons cases are being discussed, and what they are supposed to look for in them. One need only ask students what they look for when reading a case, or what they are supposed to learn from it, to see the extent of the confusion surrounding the orthodox methodology. The confusion, or to be more accurate, the lack of understanding about the purpose of the methodology, even extends to second and third year students as well as to those in their first year.

This failure to specifically illuminate the purpose and content of doctrinal analysis often prevents students from enhancing their understanding of case analysis on their own during the three years of law school, and may sap students of the motivation to improve their skills during the course of a semester. While the stagnation of second and

55. The bewilderment of legal education is caused by “using cases as the primary material of instruction, but we hardly ever teach the doctrine of precedent. We go on offering basic courses in contracts and torts in the first year, but many teachers of these subjects spend a good deal of time proving that there really is no such thing as ‘law of contracts’ or ‘law of torts.’” Berman at 350.

56. For example, students in a second-year law school class were asked why they read cases, and what they looked for when reading them. The responses varied, but indicated that students really did not have a firm grasp as to what methodology was being used and why it was being used to train them.
third year students is not excused by this observation, it perhaps explains in part why students rapidly become disinterested in the repetitive review of cases in the second and third years of school. 57

The lack of a particularized definition of doctrinal analysis, 58 and consequently the lack of an understanding of how to do it correctly, spawns a related problem. Students who are expected to learn the law through the inductive case method but apparently do not, as evidenced by an unsatisfactory course grade, often feel dejected and lose motivation to improve. The commonly voiced lament is that the student is a “C” student regardless of the effort he or she puts in. The student may attribute the lack of success to the failure to understand case analysis. Yet students often literally only have a series of oblique clues about how to do case analysis, and the grade received may be attributable to any one of a number of variables.

The lack of a clear understanding of what constitutes doctrinal analysis also has a significant impact on students who aspire to a successful academic performance. These students, unclear about the purpose and content of the methodology, turn to what they perceive the teacher “wants,” and how the teacher “thinks” — instead of taking the initiative to learn what the law is, how it was formulated, or what its significance is. The result all too often is unnecessary disillusionment, and the perpetuation of passive, reactive students who do not play an active role in the learning process.

Perhaps the greatest failing of the case method is, in fact, its tendency to foster a passive/dependent approach by students to their legal education. The socialization of students weaned on the case method leads them to become dependent upon the teachers — the questions they pose, the comments they make about the cases — and on the casebooks. Independent questioning and thought is not sufficiently encouraged or facilitated by case analysis for the average student. 59 The lack of a directed framework of analysis and the absence of stated goals in reading cases may lead students to read cases for substantive content and not much more. Even when dissenting opinions are in-

57. Students often may be heard to complain about the repetition of case analysis.

58. Doctrinal analysis, in the way it is generally practiced, has no substantive meaning for students. (Even exams don’t bring doctrinal analysis in focus, since most exams use “issue-spotting” fact patterns.)

59. “Most students rapidly concluded that the study of law is the study of rules.” Montana Report at 6.
cluded in the text, for example, students may take advantage of their inclusion by relying on them as a crutch instead of formulating counter-arguments on their own. While this passivity may in part be attributed to several factors, such as the existence of one set of exams at the end of each semester and the lack of feedback during the semester, the stated design of the case method — to provoke questioning on the part of the students — simply doesn’t work well enough.

IV.

T: How would you implement your model?
Z: The model posits that training, whether it be athletic, vocational, or professional of any kind, involves breaking down aggregate activities into fundamental skills. Thus, a similar division and identification of fundamental skills should occur in the legal education process. Specific skills, such as listening, fact analysis, issue formulation, identifying, extending and comparing holdings of cases, statutory analysis, regulatory analysis, and clear and concise communication, should receive direct attention in class. For example, students may practice listening skills by having questions put to them as to what they heard other students say. The questioned student can be asked to reformulate or clarify the original speaker’s expression. In all likelihood, students do not listen carefully enough to what other students say in class and do not practice reformulating or simplifying concepts and expressions.

Direct attention may also be given in class to improving students’ advocacy skills. Students may be taught to identify and manipulate forms of argument. Case reports or briefs of the parties may be used to help identify and counter different types of arguments. Students may learn, for example, whether the court declined to resolve an issue as a matter of judicial competence, or to label the type of argument made by the proponent of a right. Thus, by giving models of argument direct attention, students should be better able to respond to arguments presented by other lawyers, or to formulate ones of their own.

T: But aren’t you simply advocating spoon-feeding?
Z: Not by any means. I agree that students will not actively learn material, and more importantly, really understand that material if they are simply fed information by a teacher. Rather, “hiding the ball” to encourage inquisitiveness has appeal. But under the orthodox model, it is unclear what is being hidden and why. I just don’t see how the kind of confusion the orthodox model generates serves as a helpful means or end to the legal process. Instead, to maximize the efficiency of the prac-
tice of fundamentals, students should be expressly told what is being practiced, why it is being practiced, and how that skill fits into the overall schematic. While students are therefore assisted by the teachers in developing a framework of analysis, they are still left to implement the framework on their own and to refine the identified skills.

Students can play a more active role in their education by participating in more simulations in basic courses, in more individualized classroom exercises, or, on a different level, by formulating and refining a series of general questions that they ask themselves when analyzing a legal problem. Students can and should be directly taught to structure their own questioning processes in reading cases and attacking legal problems throughout the semester, not just when preparing for finals. Class time can be specifically set aside to erect a framework or frameworks of analysis and to discuss the questions students are asking themselves.

T: Isn't this more spoon-feeding?
Z: No, because the framework of analysis is only a necessary first step students must take. Students are still left to probe and sift through the facts, issues, arguments and values, determining what's important and what's not. Students are simply being shown the importance of such frameworks.

Significantly, the practice of "framework development" and other skills can readily occur outside of class. For example, students could practice issue formulation and fact arrangement through periodic take-home assignments involving unedited fact patterns. These assignments could range from drafting motions to responding to a court's question at trial.

T: Doesn't your model have a second major component?
Z: The second component of the new model involves a multi-dimensional approach to legal problem solving. As part of this approach, appellate case analysis plays less than an all-encompassing role in a well-rounded legal education. Thus, students must be shown different parts of the process such as the trial and pretrial stages, and receive an integrated view of the different layers of legal problems. So, for example, a question of ethics can be discussed in conjunction with a problem about the rules governing the filing of an answer in federal court, or the resolution at a case can be discussed in terms of its economy or political expediency. In essence, student awareness of the roles played by politics, judicial values, interviewing skills, fact gathering and the many other dimensions of legal problems, and of the relationship of these dimensions to the entire process, should paint a more realistic and use-
ful picture for the student.

T: What about feedback?

Z: This model relies on the systematic and regular distribution of feedback to students. Without that, their skills would not improve efficiently, and students also would have less impetus to better those skills. Feedback can take the form of a series of short written assignments during the semester which are reviewed by the professor, or even pass/fail oral examinations. An oral examination, for example, can serve several purposes, not the least of which is immediate feedback from the professor. The professor can also learn from such an examination how effectively concepts and points are being communicated to the students. While oral examinations would obviously require a teacher to devote more time to the educational development of students, even ten minutes spent with students in small groups or on an individual basis may prove more productive overall than several large class meetings.

T: Does the new model necessitate modifying the traditional law school curriculum?

Z: To a certain extent, I suppose so. The curriculum should reflect and emphasize the specific skills used in lawyering and provide the students with an accurate “big picture” of law and lawyering. Thus, for example, I would advocate a three-year writing program, integrated with the substantive courses. I would also support a greater emphasis on statutory and regulatory law in the first year, more simulation or clinical experiences at an earlier time, and the integration of ethics and the social sciences into the mainstream of legal education. I would also contemplate a reorganization of some course content on a functional basis. Perhaps “wrongs to others” could be taught as one course, or public law as another. It is not so much the restructuring of the traditional curriculum that is required for the new model to be effective, but rather the de-emphasis of case analysis in, and the adoption of a skills/multi-dimensional and integrated approach to, legal instruction.

V.

T: It is getting late. Any concluding remarks?

Z: The traditional model of legal education provides deficient training

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60. Oral examinations have been tried by law teachers in different circumstances. The advantages of pass/fail exams as a supplement to written course requirements are many. Students often find oral examinations in which there is instantaneous feedback and commentary from the professor to be especially productive.
for law students because it over-emphasizes the doctrinal analysis of appellate case reports. A new model, focusing on specific lawyering skills and a multi-dimensional approach to law and legal problem solving would overcome many of the orthodox model's deficiencies. The Langdellian era of case analysis may indeed have been the "Glory Days" of legal education, but maybe it's time to "stop sitting back trying to recapture a little of the glory of." 61

The Politics of Meeting

Peter Gabel

A woman on a plane said to me recently, "Never say anything you don’t want to create." The deep point of this to me is that the way I manifest myself to you determines to some important extent what you can feel is real or possible, and that the way you manifest yourself to me constricts or expands my horizon in the same way. In relation to each other we each become “one of the others,” and in so doing we shape each other's experience. This leads to some perceptions about the reality we create at law school meetings.

The Problem of Collective Denial

We are all frightened of groups larger than five people. This may be because our conditioning has been so isolating and our experience of community so rare. In a society where common trust is only taken as a given among families of blood relatives (and then usually in a distorted form), we each instinctively respond to public gatherings by trying to protect ourselves against an expected rejection by others. We do this by denying others access to our real selves, through various forms of withdrawal (for example, silence or speech-making). But in denying others access to ourselves, each of us becomes one of the rejecting others to the others. The circle of collective denial is that each of us, in our capacity as “one of the others,” creates the fearful group of others that each of us is afraid of.

The way to combat this collective flight is to refuse to help to create it.
Us-Them Thinking

Us-Them thinking consists of perpetually inventing a "them" to blame for the group's paralysis — "the deans," or "the students," for example. The argument always comes down to "we can't do anything because of 'them'." And the effect of this is to prevent anything very real from happening out of fear of "them," or worse, out of fear of being found out as "one of them." People become very careful about what they say and this creates the impression that one should be very careful about what one says.

Like "the Russians," "they" do not exist as a "them" unless everyone agrees to give everyone else the impression that they do. And this goes for the "sacred thems," too: racists, sexists, homophobics. The key is to not want to take isolated remarks as signs of a "them" that isn't there because this is what leads to our recurring vision of Armageddon: reciprocally projected us-them fantasies followed by hallucinatory them-wars.

Compulsion to vote

Obsession with Procedure

Obsession with procedure is designed to block the flow of group feeling by claiming the group isn't properly constituted. Behind these procedural debates one can usually find two main ideas, both of which are based on us-them thinking.

One idea is that the group exists in order to reach a series of dis-
crete decisions. These decisions are reached by breaking up into a series of isolated individuals and voting. The second idea is that each subgrouping that defines itself through its difference from everyone else in the school must be “represented” by an exact number of voting units. Taken together, the two ideas reflect an expectation of “showdowns” and so help to create them.

Groups are not really collections of isolated individuals. Each has its own distinct social reality. One such reality is the group whose members experience themselves as isolated individuals and who reinforce their common solitude through the circle of collective denial. But we can create more relaxed groups in which people feel more connected to each other through working on common projects. Obsession with procedure is mainly intended, unconsciously, to cope with the risk of non-connection by making sure that the attempt is not made.

The real work of committees is not to vote on a series of discrete issues, but to develop this common feeling through interesting, non-paranoid discussions and through taking common action to affect the school environment for the better. For this to really happen, it’s important to involve different groups who may not fully trust each other or understand each other’s experience and needs. The objective should be to overcome existing antagonisms and not to maintain them, as us-them thinking tries to do. Voting once in a while is okay, but an excessive focus on voting, “representation,” and “protecting everyone’s rights” only reinforces the impression that the differences among us are fixed.

The Role of the Chair

Overcoming all this takes discipline and practice. It requires becoming aware of how your behavior affects everyone else and then not wanting to do it anymore and then, eventually, not doing it. Since it takes a while to even become conscious of how each of us becomes an other for each other, much less for this awareness to ricochet into a critical mass that can dissolve collective denial, the chairperson must perpetually prevent the group from snowballing into general panic. His or her role should be something like a conscience.

This means: a) ordering and moving the agenda so as to maximize discussion on interesting issues; b) intervening to bring the ground into focus whenever anxiety starts to get out of hand; c) allowing a mix of spontaneous exchanges and calling on people who have raised their hands; and d) helping tentative people to speak and people who speak
too much to quiet down. It's not so much a matter of learning a set of skills as it is of keeping a pulse.

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Finding Peace Law and Teaching It*

Ann Fagan Ginger

Upon earning her LL.M. degree from UC Berkeley School of Law in 1960, Ann Ginger founded the Meiklejohn Civil Liberties Institute, which she continues to direct. She has published widely in the field of civil rights, civil liberties and has taught at Hastings, Santa Clara, San Francisco, Puget Sound and New College law schools. Ann serves on the editorial boards of National Lawyers Guild Practitioner and International Review of Contemporary Law and is the Vice-President for North America of the American Association of Jurists.

[Although lawyers comprise the most politically influential profession in our land, legal educators have been slow to respond when society — and, ultimately our legal system — is faced with problems which do not fit neatly into the existing curriculum. For example, the subjects of race and sex discrimination, environmental damage, and computerized invasions of privacy were addressed in other university departments and in the popular press long before we assumed our responsibility for training new lawyers to take the lead in solving these monumental problems. The danger of nuclear war is, perhaps, the severest threat to society and the greatest challenge to our profession.

On a practical level, approval of a new course addressing a societal problem requires that we convince our colleagues (and especially the curriculum committee!) that the problem deserves serious attention and that legal issues are necessarily implicated. Ann Ginger takes this first, important step in her article which follows.] — Burns, editor.

I. The Events of 1945

Something new happened in 1945. Now, forty years later, it is appropriate to discuss what that new thing was and to assess its signifi-
cance. And it is necessary to make this assessment if we are to survive another forty years.

In fact, three new things happened in 1945. That is such a large statement it is likely not to be believed. But our failure to believe it, to understand it, and to integrate it into our daily lives may doom us as a people and may doom the law and the concept of law as a method of settling disputes.

It is a very large statement to say that something new happened when we all know that very few things are new under the sun. But by now it is agreed that the dropping of the atomic bomb on the city of Hiroshima on August 6, 1945 was a new event in the history of the world. Of course, a bomb had been exploded previously as an experiment in a desert in the United States. And, of course, the atomic bomb was based on work that had been done by militarists since the beginning of time, and by physicists, chemists and technicians for several decades. Nonetheless, both the development of the atomic bomb and the dropping of the atomic bomb were new events in the history of the world.

This particular bomb was a military weapon of value in destroying civilization, not simply military targets. The atomic bomb was designed to destroy the lives of people, both soldiers and civilians, the houses in which they lived, the markets in which they bought their food, the factories in which they produced goods and the very land on which they would grow food. This fact was well known by the scientists who developed the bomb and who participated in the decision to drop it. Yet even they did not comprehend the extent of the devastation one atomic bomb would create or the duration of this devastation.

In the forty years since the dropping of the bomb on Hiroshima and Nagasaki, ordinary people all over the world have come to understand the significance of these events, even if they do not understand the scientific laws behind the bomb or the scientific and engineering techniques that made it possible.

Two other new things happened in 1945. These events are of equal significance in the history of the world if their meaning is grasped as fully as the meaning of the development and dropping of the bomb at Hiroshima. One of these new things was the signing of the United Nations Charter in San Francisco on June 26, 1945 and its ratification and coming into force on October 24, 1945. It could be argued that this was not a new event, that several times in the history of the world, the leading powers had come together to carve up the power spheres into geographic divisions and had signed pieces of paper recording these di-
visions, swearing to keep the peace through a system of alliances. Cynics could say that none of these agreements was worth the paper on which it was written because it lasted such a short time.

These cynics should study the language of the United Nations Charter and read the record of the debates that led to the signing. They would discover here something new in the history of the world — imperfect, yes, but, like the atomic bomb, growing out of previous efforts, most recently the League of Nations. But the new features were numerous and significant. For one, the United Nations was to be an expanding organization, welcoming new nations as they broke imperial ties to some of the great powers. One of the fundamental purposes of the United Nations, clearly expressed in its language, was assistance to nations emerging from colonialism. The formation of the United Nations marked a stage in the end of the previous international power system marked by what were known as “mother countries” and “colonies.” This purpose of the United Nations has been carried out consistently in the 40 years since the Charter was signed. Many nations have emerged, each an independent, sovereign power in law, recognized as such in the United Nations building in New York, and treated as such in the General Assembly, if not by some of the commercial and financial institutions around the world or by the foreign affairs departments of some of the larger and more powerful nations. The UN has grown from 51 to 159 members in its first forty years, to encompass 98% of the world’s population.

It is probable that most people in the United States did not understand this purpose at the time, or its full significance, since we had won our independence from Mother England long ago and are not famous for our attachment to history. Perhaps this explains, in part, why we in the United States are not more positive about the success of the UN.

The United Nations began with a second change from previous international arrangements. The UN began, as did the United States, by recognizing that change is good and necessary. Our ancestors put that concept into the first amendment, guaranteeing the right to petition the government for a redress of grievances — an admission that people would have grievances against the new government, although they built it with the best materials available at the time (except for slavery), and according to the most modern design. The Founders accepted the reality of governance by the will of the people, rather than the ideal of a perfect, static republic, or the divine and unchanging rights of kings. The founders of the UN put that same concept into the provisions for the expansion of the membership of the organization as
the sun set on the British Empire. They also embedded the potential for change by provisions rotating the membership in the permanent Security Council, so that today, delegates to the Council include representatives of nations that had not come into being as independent states when the UN was born, in addition to the permanent members: the United States, the Soviet Union, France, Britain and China.

The United Nations also provided a significant role for non-governmental organizations to make proposals to UN agencies and to participate in UN agency hearings in constructive ways. Article 71 of the Charter opened the way for continuing change in UN policies and practices as changes are perceived by the people of the world, working through their organizations. The UN Charter also set minimum standards for the conduct of nations, established procedures for reporting the existence of disputes that were bound to arise, and established the basis for settling these disputes peacefully.

Were I simply to cite the Articles of the Charter setting forth these minimum standards and reporting requirements and procedures, this would be a very dry article. But when our President, in his official capacity, tells his constituents that it is his goal to make the people of another sovereign nation “Cry Uncle!,” and this goal is also heard by the peoples of all nations through modern methods of communication, then the Articles of the United Nations Charter leap from the printed page. They become front page news and the necessary subject of rhetorical concern, because this simple, homely statement by a man who prides himself on being The Great Communicator is an offense under existing law, against the concept of law, against the law of nations mentioned in our Constitution. It specifically violates agreements written in San Francisco in the treaty known as the United Nations Charter, duly ratified by the United States Senate and part of the law which each U.S. President since 1945 has sworn to uphold.

The UN Charter changed the law of the United States in a few very significant ways. It made illegal the Monroe Doctrine of U.S. domination of Central and South America. It forever put an end to the Teddy Roosevelt syndrome: “Walk quietly and carry a big stick.” How? By putting into treaty language international law that had developed over centuries:

“The organization is based on the principle of the sovereign equality of all its members.”

"All members shall settle their international disputes by peaceful means in such a manner that international peace, and security, and justice, are not endangered." Article 2, section 3.

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state, or in any other manner inconsistent with the purposes of the United Nations." 3

The UN Charter is clearly a descendant of the U.S. Constitution. But it is much more than that — as it must be, because it was drafted by leaders of many nations with different governmental, economic, social, and cultural systems, at different stages of development, and it must govern their relations.

The third new thing that happened in 1945 was the enunciation of the Nuremberg Principles and the agreement to try as criminals the defeated leaders of the fascist powers. Again, this was not entirely new. The allied powers had come to an agreement during the war and announced their intention to punish "major war criminals" when Roosevelt, Stalin and Churchill signed the Declaration of Moscow on November 1, 1943. The London Agreement and Charter was signed August 8, 1945 and provided that major war criminals would be tried by an International Military Tribunal. Justice Robert Jackson of the United States Supreme Court represented the U.S. in the negotiations at London. He pointed out that, between World War I and the time Germany commenced its aggressive actions, international law had established the principle that aggressive war is a crime. 4

Nonetheless, the actual agreement between the United States, the Soviet Union, England and France to try as criminals the defeated powers was a new act in 1945. The old arguments about whether the trials of the Nazi leaders at Nuremberg were unfair are not significant in 1986. It does not matter in terms of the future of the world whether the trials involved ex post facto laws; nor does it matter for our purposes whether an impartial body should have determined whether the Allies had committed crimes under international law and should have been tried. These issues do not matter because we are discussing the prospective application of the Nuremberg Principles here, and we know now that there will be no trials of war criminals after the first nuclear war — there will be no one alive and well enough to act as prosecutor,

judge, or defendant.

The Nuremberg Principles have three aspects, only two of which were clearly understood at the time. First, they defined the activities deemed criminal: war crimes, crimes against humanity, and crimes against peace. This aspect of the Principles is quite well known around the world by this time and is known to many people, lawyers and lay people alike, in the United States.

Secondly, they provided that all people are required to obey international law even if they are military personnel, and notwithstanding specific orders to the contrary from superior officers. A soldier at whatever level, including a general or a commander or the Secretary of the Department of Defense, is accountable if he commits a war crime, a crime against peace, or a crime against humanity. This principle is also familiar to most of the people of the world who are thinking about these matters.

The third principle of Nuremberg is only now emerging into full bloom. It forbids any person, any civilian, any citizen or alien, to commit war crimes, crimes against humanity or crimes against peace. More than that, anyone who knows that any of such crimes are being committed — anyone who knows about these acts and does nothing — may be in complicity.

This pronouncement of individual responsibility and guilt was a new event. It was coupled with the advent of television, which changed the character of citizen knowledge, involvement, and responsibility in international relations. Today, no person who reads the daily newspaper or watches television can be ignorant of the many war crimes, crimes against humanity and crimes against peace that are committed regularly.

Watching television news during the Vietnam War meant watching killings in many places under many conditions, including the massacre at My Lai. The court martial trial of First Lt. William L. Calley, Jr. was based on violations of the Nuremberg Principles. For the first time in our nation's history, United States military personnel were required to try a United States soldier for violations first enunciated in 1945 in response to foreign fascism.

Now, as I talk to people engaged in protests against various United States government actions, to civil disobedients around the country, I constantly hear references to the Nuremberg Principles: "I do not want to be in complicity with violations of law by my government in Nicaragua, Grenada, or other parts of the world," they say. These references, this consciousness, reflect the success of the United
Nations and the principles of international law it has helped codify, collect, develop and make known throughout the world. It is appropriate that the year 1945 should not only mark the beginning of the atomic era, with the dropping of the bomb on Hiroshima, but that it should also mark the founding of the United Nations as an organization of people and of governments to consider how to meet common problems throughout the world and the beginning of the public’s recognition that it is a crime to break the peace. It is a crime to attack civilian humanity; it is a crime to behave, in wartime, in a bestial manner.

This concept of individual guilt, central to the Judeo-Christian faiths, among others, had been eclipsed for centuries by the legal fiction which absolved anyone of individual responsibility for institutional actions by corporate entities with anonymous boards of directors in the industrial and commercial world. While the corporation itself is regarded as a person, the individuals serving on the board of directors and the individual stockholders and bondholders may not be charged, as individuals, for civil or criminal acts of the corporation except under the most extraordinary circumstances. In short, one cannot “pierce the corporate veil.” Under this principle, few corporate investors or board members were ever held accountable for actions of corporations during the days of the robber barons, although corporations, in their infancy, made unsafe products, used production methods that were unsafe for workers and wreaked havoc on the ecology of many regions throughout the world.

But with the signing of the Nuremberg Principles in 1945, this veil protecting individuals from punishment for institutional behavior was lifted, at least with respect to certain international acts. A marriage took place again between morality and legality. As Justice Jackson stated when signing the London Agreement for the United States:

For the first time, four of the most powerful nations have agreed not only upon the principles of liability for war crimes of persecution, but also upon the principle of individual responsibility for the crime of attacking the international peace. Repeatedly, nations have united in abstract declarations that the launching of aggressive war is illegal. They have condemned it by treaty. But now we

5. I became conscious of the significance of this rule of corporation law on my first trip to South America. Instead of “Inc.” or “Co.” at the end of a company name were the letters “S.A.” They did not stand for “South America” but for “Sociedad Anonima.”
have the concrete application of these abstractions in a way which ought to make clear to the world that those who lead their nations into aggressive war face individual accountability for such acts.⁶

The concept of individual guilt — of complicity based on knowledge, of responsibility for the acts of one’s government — is also a product of 1945, like the atomic bomb and the United Nations Charter. And I maintain that the ratification of the U.N. Charter and the enunciation of the Nuremberg Principles are of equal moment to the world as the dropping of the bomb on Hiroshima. It would be highly unlikely, given the history of the world and the nature of human beings, that the atrocities committed on a consistent basis by the fascist powers would go unwhipped of justice in a world trying to dig its way out of the horror of thirty million dead, hundreds of million wounded, and even more millions homeless, hungry, and hopeless. In 1945, the birth of the United Nations, in the midst of war, gave hope. The announcement of the principle of individual responsibility for atrocious, inhuman acts — that gave hope. The arrest, not the capture and execution, of warmakers, of heads of warmaking governments — the arrest and trial before international tribunals of the strutting fascist military and industrial leaders — this also gave hope that the world would become a place for men and women to live in dignity, and for children of all races, classes, and creeds to grow to maturity.

The full horror of the dropping of an atomic bomb on a civilian city — that came later. In 1945, we ordinary citizens really did not know what we had wrought. And even the learned ones who had prepared the bomb did not know for many years what they had done to the human beings, and to the very soil, they had attacked.

II. A Mere Piece of Paper?

It can be said, and truly said, that the UN Charter is just a piece of paper, that the Nuremberg Principles are just a piece of paper. At the moment of its birth, the atomic bomb was also a piece of paper, nothing more. When the physicists developed the formulas that unlocked the secret of the atom and made possible the unleashing of its energy for destruction or construction, they wrote their findings on pieces of paper. Those papers had no value to the world until they were

published, studied, debated and tested by physicists and mathematicians from many nations over several years. And when all of the intellectuals in the business — all of the eggheads — accepted as true the symbols on those pieces of paper, even then, nothing was changed in the world as a whole.

It was only when the United States government, during a global war against a powerful enemy, learned that the enemy was working toward an atomic bomb and therefore decided that something could be done with these formulas to magnify immeasurably the power of the United States in the world that it decided to carry out the Manhattan Project — only then did those pieces of paper begin to come to life. And only when the government assigned a general to work with a physicist from Berkeley to build an intellectual city whose sole purpose was to maximize destruction, only then did those pieces of paper begin to change the world.

The Emancipation Proclamation, after all, was also only a piece of paper. But when the United States government, in a horrible and brutal civil war, decided that it must confiscate billions of dollars in property, without compensation to their owners, in order to save the nation, it was only at that moment that the idea of freedom finally took root throughout the United States. The system of chattel slavery was abolished forever on our soil. And this action — late as it was and incomplete as it proved to be — was also written on a piece of paper called the thirteenth amendment.

The Social Security Act, as well, was initially just a piece of paper. Yet it has changed the meaning of the word “retirement,” and even of the words “old age” and “senior citizens.” It has provided a small measure of security and some hint of dignity to millions of people who, before 1935, would have died of starvation and neglect in our country.

I do not mean to suggest that the Emancipation Proclamation and the Social Security Act deal with as large a question as the atomic bomb, or that they have proven as successful in solving the problems they addressed as it was. The forces at work on those two pieces of paper were never as awesome as the forces assembled by the United States government at Los Alamos. And their tasks were never as comprehensive. But each of those documents, in its own way, helped pave the way for the UN Charter and the Nuremberg Principles, and the affirmative features of the world we know. These pieces of paper consist, not of mathematical symbols or equations, but of words:
Mere words? No, Majestic words! Stern words that sent men to trial as war criminals at Nuremberg and My Lai. Humane and loving words that founded UNICEF and World Health Organization to save the lives of millions of children. Smart words that founded UNESCO to train tens of thousands of teachers. Just words that hold nations accountable and determine the decisions of the World Court. Equal words that improve the legal status of women and people of color. Constructive words that fund projects to save the endangered environment. Principles of peace that require all nations to beat their swords into plowshares.

III. The Manhattan Project: Who Spoke For Us?

General Leslie R. Grove and J. Robert Oppenheimer knew a great deal about the operation of the military and about mechanics. Otherwise the Manhattan Project would have failed entirely, or at least been slowed down considerably. The two men from disparate disciplines also knew a great deal about human nature. In creating a virtual city, they knew the components necessary to achieve maximum creativity and production from workers whose sole purpose was the development of tools of massive destruction and the production of human horror on a scale never before imagined by man.

I am not a student of the Manhattan Project, and I have not spent time in the library looking for the list of occupations represented by those recruited to come to Los Alamos. But I do feel, from the vantage point of 1986, that the people in charge of the project made fatal errors in their choice of occupational expertise. I understand from Owen Chamberlain and Emilio Segri, who were there, that they brought people to Los Alamos to sell many ordinary goods, including alcohol; that they brought chaplains and other religious leaders, and teachers for the children of Project employees. Apparently they also brought some patent lawyers because new technical developments were being made. But they also needed — yet they did not include — doctors, psychiatrists, ecologists, philosophers, historians and lawyers with broader perspective and concerns than simply whether a particular advance was really new and, therefore, patentable.

The Interim Committee in charge of the Manhattan Project included military men, scientists, the Secretary of State and the Presi-
dent's personal representative. Several men were presidents of universities. They had no right, as responsible human beings, to omit from basic discussions specialists in every discipline that would ultimately be affected by the outcome of the work on that Project, and to omit leaders of the working people whose occupations would be radically changed by permanent concentration on production for war. If they knew the awesome nature of their task — and there is no suggestion that they lacked that knowledge — they were bound as members of human society to consult with the learned ones from every field of human knowledge in order to make decisions that would affect the future of the whole human race, of all life on this planet, and the future of the planet itself.

What difference would it have made if these additional experts had participated in the decision-making? The job was to make the bomb before the Germans did. That was it. And a damned important job, too, given the nature of the fascist powers and their threat to return the world to barbarism in the name of rule by a superior race. But what would a philosopher, or a historian, or anyone from the humanities have said about the Project, after the defeat of the Nazis and the Fascists in Europe in the Spring of 1945 eliminated any danger that an enemy power would develop an atomic bomb in that era of history? Japan was not on its way to the bomb, as Germany had been, thus leaving only the question of shortening the war with Japan.

That is, that was the only question to a person not committed to the research, to the experimentation and the intellectual excitement of seeing physical principles designed into reality — to a peace-loving citizen of the world from another discipline — the only question remaining after Hitler and Mussolini were defeated was whether the atomic bomb was an appropriate way to end the war with Japan.
That question was not debated from as many viewpoints as were required to find the wisest answer. And the decision on the actual targets — two civilian cities on the island of Japan — seems to have been made, from all accounts, quite casually. I do not know what a panoply of the best professionals in the United States would have decided in the Spring of 1945 if they had been consulted on the continuation of the Manhattan Project or on the proper target for the first atomic bomb. But even if we assume that they would have favored continuation of the work, that they would have voted for Alamagordo and Hiroshima and Nagasaki, that does not end the matter.

IV. The Law Schools: Where Were They?

After the bomb was dropped and after the Japanese government surrendered in the Fall of 1945, the future of every profession in this country faced a qualitative change. The ability to make an atomic bomb had changed, forever, the field of military science (if that is not a misnomer). It had also changed, forever, the fields of biology and all of the natural sciences. It had made necessary — imperative — a field of ecology. It had also affected the work of the medical profession, with respect to treating physical wounds, as well as mental illness. The bomb had changed history, the need for learning the lessons of history, and the ability of historians to convince people born after World War II that they would have any need for history.

The bomb also changed, forever, the field of law; not only international law, but local law, and more, the concept that disputes can be settled peacefully.

Given the fact that the President of the United States — first Roosevelt, then Truman — did not fully understand at the time the awesome nature of the work being done with United States government money and manpower at Los Alamos, what was the responsibility of academia in the Fall of 1945?

One responsibility was to begin studying the qualitative changes wrought in each field by the ability of one nation to destroy more people and plants and animals than had ever before been possible. The books used in physics classes were updated after August 6, 1945 to reflect results measuring spontaneous fission rates that had been important in making the nuclear bomb. There were changes in the curriculum of courses in engineering all over the country.

Yet in law schools, professors and administrators sat, and continue to sit, on their hands. Curricular changes were urgently needed because
the atom bomb was, by its very nature, illegal. The bomb violates all of the laws of war in existence before World War II began. It inflicted cruel and unusual punishment on civilian populations — that was its purpose. It was not limited in its destructive capacity to hit military targets. It was not a clean weapon (if that is also not a misnomer). It could only make a big bang — destroying all in its vicinity — and it was a large vicinity, even at Hiroshima and Nagasaki.

But the atom bomb was more of a threat to law than that. It not only violated existing law. It led thinking people to question whether law could limit bestial acts committed by government. This led to questioning whether the idea of law is dead as a method of achieving order; whether the idea of negotiation, arbitration, and litigation as methods of settling disputes is outmoded; whether law can continue to be used between disputants, or whether force will now make all decisions.

If the best lawyer in the country, or the best legal scholar, had lived through the Manhattan Project — or even the fateful Spring and Summer of 1945 — that person would have surely found a way to bring to some law school somewhere the need to study the legal ramifications of atomic law or atom bomb law.

If academics had been fully engaged in working to create the United Nations, they would have suggested a new course in the law of the United Nations, or at least a significant addition to international law courses in 1945. Certainly they would have suggested using the UN Charter as an example of a treaty, rather than the old chestnut involved in *Missouri v. Holland,* the ancient treaty with Canada on the migration of birds. And they would have insisted that the Nuremberg Principles be studied in detail, as an international agreement binding on the United States in the future and binding on all nations after its adoption by the UN General Assembly in 1946 at the request of President Harry Truman.

Of course, one must always go through the curriculum committee! And that can be a long and difficult process. But I know that at my own school, the University of Michigan, within a few years after the end of World War II, my dean, E. Blythe Stason, introduced a new course dealing with the new financial arrangements to be made in a Europe containing a defeated, but scientifically smart, West Germany, and an England and France with many other nations needing food, clothing, housing and new industrial plants. The innovative courses at

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Michigan brought to the campus business lawyers from Western Europe, anxious to participate in building a new financial structure in postwar Europe. Dean Stason, like any law school dean in the 1940’s, knew that law must change as financial and industrial realities change. He knew that there would be many opportunities for lawyers trained in Ann Arbor to think globally about loans and international contracts and new transnational corporations.

But why didn’t he know, why didn’t someone tell him, that law must also change as engineering and military realities change, that the very concept of law was threatened by the force of the atom bomb? The bomb had caused many to rush to prayer alone, abjuring the concept that reason and law can be used, must be used, if civilization is to endure. Why didn’t someone tell my dean that the UN Charter and the Nuremberg Principles created a new field of law? Why didn’t the contours of Peace Law begin to emerge? I do not mean to focus unduly on the dean of my particular law school. The same could be said of the deans of every law school, of the faculties of every law school, and of the deans and faculties of every medical school, of every graduate school, and of every liberal arts college. Why, in the Fall of 1945, did none of this happen?

There is little point in speculating. Perhaps the atom bomb was simply too big to think about, what with the end of the war and all. And its impact was really not understood among intellectuals who were not physicists or military people. The UN Charter was too small, in 1945, to think about — if you lived in the United States. The Nuremberg Principles were barely a ripple in the legal seas of Lake Michigan in 1945. And academics from nearly all disciplines kept themselves busy in 1945, and for many years after that, trying to absorb and deal with the massive number of GI’s coming into their institutions.

But not the atomic scientists. They were the first professionals to organize, to deal with the facts of life — the new facts. That is natural for they were the closest to the corpses, they knew the most about the dangers. Dr. Owen Chamberlain shared his memories with me about one of the first actions of professionals in response to the atomic bomb threat. He remembers that:

A bunch of us at Los Alamos were getting together to warn the mayors of the 100 largest cities in the United States that now warfare had changed and we had to eliminate war. Otherwise our cities would be turned to melted glass. The sand around the base of the tower where the test bomb was exploded had melted and turned into a kind of crude glass. We took some of it and encapsu-
lated a chip of it in a lucite cylinder that could be used as a paperweight or something and we sent these things to the 100 mayors, saying that war had changed and people must be alerted to the fact that war is more dangerous than it used to be.

Dr. Chamberlain left Los Alamos in April, 1947 and does not know what response the scientists received from the mayors. But already, in 1945, the Bulletin of the Atomic Scientists had been launched. Soon the warning nuclear clock was developed. But the scientists were virtually alone in their midnight ride to sound the alarm.

By 1950, 2,500,000 people throughout the United States and 500 million people in the world had come to understand enough about atomic bombs to sign the Stockholm Peace Appeal to end their use. But, still, where were the courses in Peace Law? In Atomic Medicine? In Mental Health in the Nuclear Age? In Conversion to a Permanent Peacetime Economy?

V. United States Actions Abroad

It must be that the policy of the United States government had something to do with the failure of intelligent people in this country to study and write and come to conclusions about the qualitative changes wrought by atomic energy used for destructive purposes, and about the qualitative changes inherent in the organization of the United Nations and the pronouncement of the Nuremberg Principles.

When I have attended meetings of the American Association of Jurists in Latin and South America since 1974, I have frequently ex-
pressed pride in the democratic traditions of my country. I am proud of those traditions, and I think it is important, in a foreign atmosphere where U.S. Government policies are under attack, to state this. I remain proud of the principles in the Declaration of Independence and their call to arms against an imperial power. I am proud of the principles in the Constitution and Bill of Rights, the Reconstruction Amendments and the 19th (women's suffrage), the 24th (no poll-tax) and 26th (votes for 18-year-olds) amendments. But when I have made such statements of pride, and given a little of the history that went with these written expressions of freedom and equality and justice, I have been met by educated answers from many Latin and South Americans who have told me, chapter and verse, exactly what the United States government and its troops were doing in their country at almost every moment in our history.

And when I have said that the United States took a step forward in 1945 by signing the UN Charter and by agreeing to the Nuremberg Principles, when I have said there was a magic moment when we were in favor of peace, they have replied, "But even in that brief moment, here's what the United States government was doing, covertly or overtly, in my country. And here's what your corporations, what we now call transnationals, were doing in my country at that moment." And they have described actions I had not known about, actions of my government and of leading U.S.-based corporations that violated the basic sovereignty of their nations.

Even in my ignorance of these unpeaceful acts, I could only count five or six weeks of U.S. commitment to the United Nations and the goal of permanent international peace. It was June 26, 1945 when the U.S. delegates signed the Charter at San Francisco. It was August 6, 1945, when the U.S. government dropped the atom bomb on Hiroshima with no advance warning.

This atomic explosion was not intended to be an act of the new United Nations. And it was not intended solely to end the war more quickly and to save American lives. It is clear from U.S. government records that there were two purposes in the dropping of the bomb in Hiroshima after Germany and Italy had been defeated. One purpose was to end the war with Japan. The other purpose was to prevent the Soviet Union, the other major power in the world, from participating in the defeat of Japan by conventional weapons, thus preventing the Soviet Union from playing a major role in the construction of peace in the Far East. The bomb became the first major step in the Cold War.

When the United States hosted the delegates from 46 countries in
San Francisco in the Spring of 1945, some leaders of our government knew that we were developing a bomb that would abolish all existing understandings about the balance of forces in the world. And some of the people who signed the Charter for the United States knew that their efforts would soon be against the United Nations and in favor of United States dominance of the world in an American century.

True, this dominance of the world was not to be obtained or continued in the style of Imperial England. This was to be neocolonialism — dominance by loan, by stepped-up use of the media, by use of the land of foreign powers as military bases for our atomic weapons. We would work sometimes in and through the UN, but with the bomb securely in our pocket, in direct violation of the new United Nations Charter, to be dominant by the threat of use of force and, where “necessary,” the actual use of force, as in Vietnam, Nicaragua, and Grenada, among other places.

VI. Peace Law

Seeing events in this light changes markedly the task before us. It is not to ask why the United Nations has not done more. It is to learn from the UN how it survived this massive body blow at its very creation in order to support it effectively.

Today, the survival of the UN and its related agencies continues to be the basic problem in the face of specific, numerous attacks on the power, decisions, and budget of UN agencies by the United States government. Within the past few months, President Reagan has announced our withdrawal from the World Court, both as to the case brought against us by Nicaragua and on other “political cases.” The Joint Chiefs of Staff have recommended against U.S. ratification of a basic international document on treatment of combatants and war victims, the protocols to the 1949 Geneva Conventions, which are strongly supported by the International Committee of the Red Cross and others concerned about victims. Reagan has taken us out of UNESCO without debate or consultation with Congress. And the United States has cut its contributions to the UN by 20%.

Nonetheless, we — as people living in the United States of America, as citizens of the world, and as lawyers, and particularly as law professors who have such influence on the development of future leaders — must go forward. We must act. Peace Law, I believe, is a large step in the right direction.

Peace Law emerged out of the United Nations Charter, the Nu-
remberg Principles, other UN Covenants, Conventions and Protocols, and the fact of atomic weapons. It includes discrete portions of a number of fields of law: constitutional, international, administrative, legislative, labor, immigration, tax, criminal, tort, ecology — and with considerable attention to federal jurisdiction and civil and criminal procedure.

Peace Law has a goal, as do other traditional fields of law — contract law and real property law, for example, are not neutral; their goals are to support the enforceability of contracts and to uphold rights in real property. As the new economic system of capitalism arose out of the defeat of the old economic system of feudalism, new rules of law were necessary, and they created new fields of law, which vigorously insisted on achieving respect for and enforcement of written contracts and written deeds. Constitutional law has the significant goal of supporting the enforceability of the United States Constitution.

The goal of Peace Law is to bring about world peace by concrete measures to encourage peaceful resolution of disputes and disarmament. The major tools in achieving its goal are work in the United Nations and the principle of individual responsibility for continuing and expanding peace. Major participants in the field of Peace Law are, and must be, all of us: community activists, lawyers, teachers, concerned public officials, scientists, economists and other experts, judges, jurors, legislators, and men and women who work for a living.10

How to use Peace Law is becoming clearer each day as we respond to inquiries at Meiklejohn Civil Liberties Institute.11 During one recent week, for example, Peace Law issues kept hitting page one, and phone inquiries came in from around the country. The government of Nicara-

10. Later lectures discussed: The Courtroom as a Forum for Peace Law; Congress as the Second Front for Peace; Is Nuclear War Illegal; UN Structures to Further Peace; The Economics of Peace Law; The Social Responsibility of Public Officials; Individual Responsibility for Peace; and Who Is Really Going To Wash the Dishes. The accompanying selection of readings provided basic source material on each of these subjects.

11. The Institute, established in 1965 as a research center on civil liberties and human rights, added the Peace Law & Education Project in 1983 to assist practicing attorneys, pro se activists, judges, scholars, legislators, policy makers, and journalists working on questions as varied as the drafting of nuclear-weapons-free ordinances, defending against conspiracy charges in a prosecution of sanctuary workers, preparing a memo on the illegality of apartheid for a West Coast port commission, and writing voir dire questions for a civil disobedience case arising out of actions by the Emergency Response Network. The Institute has prepared peace law packets on the major defenses in civil disobedience cases, on the right to present such defenses, and case file summaries of 150 cases in the Peace Law Brief and Issues Bank.
Gua had announced its suspension of certain civil and political rights in strict accordance with the provisions of an international treaty which it had signed, that is, the International Covenant on Civil and Political Rights. Significantly, President Ortega's announcement was almost exactly in the language of Article 4 of that Covenant and was limited in scope and in duration, as was President Lincoln's suspension of the writ of habeas corpus under conditions he no doubt perceived as similar to the conditions perceived by Ortega to exist in Nicaragua today.

Or consider the picture that ultimately emerged as United States armed forces surrounded Italian armed forces on Italian soil in connection with the highjacking of an Italian vessel and the surrounding of an Egyptian airplane. This incident can be analyzed with much more clarity by referring to Peace Law and the more familiar field of International Law. The latter does not cut as deep as the former, however, because International Law has no automatic commitment to the value of peace and has proved to be an inadequate match for another field, Military Law.

Daily reports in our press on the problems connected with what we call "Third World debt" are also much closer to analysis and peaceful resolution when they are studied in the context of Peace Law than when they are simply seen as money owed to the United States and to private banks by developing nations. Peace lawyers must ask hard questions, such as whether the borrowers had the authority to put up the particular collateral (if it is a publicly-owned public utility, for example), and whether the borrower followed the law of his own country in making the loan.

VII. Dream vs. Reality

What would happen to the piece of paper called the UN Charter if the United States government assigned a military general and a university scholar to build an intellectual city whose sole purpose would be to maximize peace? What would happen if they were assigned to integrate the Nuremberg Principles into their work? Whom should they invite, and from what disciplines, to insure the success of their endeavors? Certainly their work would be improved by representation of the myriad number of new organizations developing across our country: Physicians for Social Responsibility, Lawyers Alliance for Nuclear Arms Control, Lawyers Committee on Nuclear Policy, Government Officials, and Educators, and Social Workers, and Business People for Social Responsibility. And today, unlike 1940 and 1945, invitees could
include members of, for example, the California Legislature's new Peace Caucus, and the Congressional Arms Control and Foreign Policy Caucus, and committees on international solidarity in many labor unions.

But it is counterproductive to spend time on these questions. I have found in my work as a lawyer, as a political person, and often as a parent and a wife, that "freedom is the recognition of necessity."12 It is certainly a distant dream to think of the United States government assigning anyone to build an institution whose sole purpose is to maximize peace through disarmament, with no cost-plus contract.

What can strengthen us to go forward in working for peace, and using Peace Law as a valuable tool, is some reality. That reality is that the people of the United States, and of the world, are not limited in their capacity to demand and enforce peace by the current view of any government, including our own, that does not understand that their right to peace comes first. We are the people, and we have the power to change things. We have this power whether or not our government supports our efforts. We will be stronger when we acknowledge, overtly and without hesitation, that anyone who denies that nuclear war will result in ecocide is clinically insane.

We have this opportunity and responsibility regardless of any transient attitudes of so-called leaders, or failures of the media to give the UN, the UN Charter, and the Nuremberg Principles their proper place in the day's news. It is time to salute the UN for educating the people of the world, including Americans, about the horror and illegality of apartheid, for teaching us about starvation in Africa and facilitating distribution of food there, and for running refugee camps in many war-torn regions. It is time to welcome the integration of the Nuremberg Principles into the hearts and minds of millions of people in the United States and throughout the world, with its call to action for peace and against war.

To recognize the 40th anniversary of the atom bomb, to celebrate the 40th anniversaries of the United Nations and the Nuremberg Principles, and to participate in 1986 as the International Year of Peace, I propose that courses in Peace Law blossom in law schools throughout our country.

Law Schools: Where The Elite Meet To Teach

Howard A. Glickstein

Howard Glickstein is the dean at Touro Law School. From 1980 to 1985, he served as dean at University of Bridgeport School of Law subsequent to his professorships at Notre Dame and Howard University. He was an attorney with the Civil Rights Division of the United States Department of Justice, 1960-1965, and was general counsel and staff director with the United States Commission on Civil Rights, 1965-1971. With a national reputation for his active leadership in civil rights organizations, in this essay which follows he turns his attention to the problem of faculty hiring at law schools.

It was 18 years since I had graduated from law school. During those years, I had worked for a leading New York City law firm, and for the Civil Rights Division of the United States Department of Justice, where I argued cases in the federal district and appellate courts, prepared briefs for the Supreme Court and helped draft major legislation. I also had been the General Counsel of a federal agency and served in a position to which I was appointed by the President of the United States and confirmed by the United States Senate. Now, I was applying for my first job as a law school faculty member. I was in the presence of a law school dean who was reviewing my resume. After a few minutes of reading, he looked up, smiled and said: "Oh, I am glad to see that you were on the Yale Law Journal." I can think of no better example to demonstrate the elitism and narrow hiring criteria that permeate American legal education.

The vast majority of law schools embrace a similar profile of the qualified law teacher. He (and that was the case until most recently) is a graduate of one of 10 to 20 law schools, he was on law review, he clerked for a judge or spent two or three years with a prestigious law firm. (More than five years in active practice might reduce someone's qualification for law school teaching. This is rather ironic if you believe that law teachers should be teaching students how to be lawyers).

The law schools have determined who are qualified to teach in them without any attempt to demonstrate that the qualifications they seek are related to the mission of law schools. Are persons with these
qualifications best able to teach in a classroom? Are they best able to prepare people for the practice of law? These difficult questions have not been answered. We have not imposed upon law schools the same obligations we place upon police departments, fire departments, or even elementary and high school systems to demonstrate that the qualifications they have established are job-related.

It is unusual at the many conferences, seminars, and discussions of problems in legal education for one to hear a discussion of who is qualified to be a law teacher. It also is curious that in the many recent critiques of deficiencies in legal education little was said about the qualifications of those who are teaching in law schools. Derek Bok, President of Harvard University and former Dean of its law school, bemoaned the deficiencies of law schools but never once suggested that perhaps part of the problem was the backgrounds of those teaching in law schools.1 Justice Burger has criticized the performance of lawyers in the courtroom and their general insensitivity to issues of professional responsibility. He has called upon law schools to address those problems but has not suggested a need for law schools to assess who it is that is teaching in them.2 The report of a task force on lawyer competency, chaired by Roger Cramton, former President of the Association of American Law Schools and former Dean of Cornell Law School, noted the relationship of the backgrounds of those selected to teach in law schools and the curricula and methods of law instruction.3 The report urged that in appointing and rewarding faculty, law schools should place substantial emphasis on potential and performance as a teacher but no detailed recommendations were offered about who should be selected to teach in law schools.4

One study that did look closely at the background of law faculties was a 1980 report known, after the committee chairman, as the Foulis Report.5 The report cited research that showed 59% of all law school

4. Id. at 4.
5. See LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMEN-
teachers possessed J.D. degrees from one of the 20 top "producer" schools, while almost 90% of the tenure-track faculty at the 20 "producer" schools held the J.D. from those same schools. Nearly a third of full-time law teachers received their J.D. degrees from one of five law schools (Harvard, Yale, Columbia, Michigan and Chicago). The report wryly noted:

Were we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system. . . . It seems clear that the inbreeding here is likely to contribute to a form of legal education that serves large firms and their corporate clients better than it does the lawyers who handle the personal legal problems of average people.

As a means of injecting greater diversity into legal education, the report recommended that "the law school recruitment process for full-time faculty increasingly look to the practicing segment of the profession for its potential faculty members and seek creative ways to attract practitioners to teach, such as 'practitioners in residence' programs and law firm sabbatical programs.'"

The elitist hiring standards utilized by most law schools have posed a bar to the entry of minorities into the law teaching profession. A recent survey indicated that 5.6% of full-time faculty members were minorities in 1983-84 while 9.4% of all law students (or 11,900 of 125,000) were minorities. From 1981-82 to 1983-84 the percentage of minority faculty dropped and the number of female faculty increased 21%. Of the 247 full-time minority faculty members in 1983-84, 21.5% taught at four historically black law schools. Of the 57 law schools with no minority teachers, more than one-third were public institutions.

Several reasons are advanced for the small percentage of minorities in law teaching. The most important is the belief that the pool of "qualified" minorities in teaching is small and that those who are
"qualified" are lured elsewhere, for example, to major private firms. But there is a catch-22 aspect to this argument. It depends on one's definition of "qualified." Having set the qualifications for law teaching without proof of their validity, the law schools can deny that they have restricted access to minorities. They will argue that the test of discrimination is whether there is some disproportion between the available job pool and those who are employed. They will point out that if you look for minorities who have attended the 10 or 20 so-called best law schools, who have been on law review, who have clerked for a judge, or who worked for a prestigious law firm, you will find very few people. People who fall in those categories are much in demand by law firms, government agencies, and corporate law departments. According to the proponents of this position, the 5.6% representation of minorities on law school faculties actually exceeds the available pool of "qualified" persons.

For law schools willing to broaden their concept of who is "qualified" to teach — and this seems unlikely as long as mostly white males from some 20 law schools are left to define the term "qualified" — they would find a reservoir of minorities well-suited for teaching who are waiting for the opportunity to contribute to legal education and scholarship.

Recently, the Society of American Law Teachers (SALT) looked at the issue of minorities on law school faculties. SALT reports that "[t]he efforts to integrate the law teaching profession have involved an excess of deliberation and a minimum of speed." Many schools hired a token minority faculty member in response to pressure from minority students in the late 60's and 70's. But now, as Dean Carl G. Singley of Temple Law School states: "Blacks [and all minorities] are no longer in style."

SALT blames the poor results of minority hiring on "institutional discrimination" rather than "intentional or conscious" racial choices. SALT called for "voluntary quotas," concluding that:

11. Id. at 29.
13. Id. at 1.
14. Id.
Despite our best intentions, law school faculties will remain virtually all white unless we impose clear, unalterable obligations upon ourselves by holding designated positions open until they are filled by high caliber minority faculty.\textsuperscript{17}

Elitism in law school faculty hiring also can affect law students. Often law school faculty members from the 20 “producer” schools find themselves teaching at “lesser” schools and tend to hold their students in disdain or to treat them patronizingly. After all, their current students are not quite like their law school classmates. Many of these teachers have a certain mind-set about what type of person should be in law school. Those of their students who do not fit this mind-set are less likely to be recognized as capable. On one occasion, a faculty member with an Ivy League background strongly recommended an applicant for admission to me. A major qualification he stressed was that “she is the sort of person you would like to have dinner with.” Apparently, the applicant’s social acceptability was a major consideration in the mind of the faculty member.

Out of touch with the world

Most faculty members from the 20 “producer” schools are proud of the legal education they received. Their teaching techniques generally follow what they experienced in law school. But are the teaching techniques that succeed at the 20 “producer” schools the best tech-

\textsuperscript{17.} \textit{Id. at 1.}
niques for other law schools? For example, techniques designed to teach students how to *think* like a lawyer, might be well-suited to schools where graduates begin their careers with large law firms that teach them how to *act* like lawyers. A heavy emphasis on such techniques might not be the best method for preparing students for solo or small firm practice. Good pedagogy requires that you adjust your teaching techniques to your particular audience. Student bodies differ from law school to law school. But flexibility is difficult for people who believe that the teaching techniques they experienced are unquestionably the best.

Faculty members who continue to try to teach as they were taught will have particular difficulties in these days of declining law school enrollments. In February 1985, at a conference of law school deans in Detroit, Michigan, one dean, the product of one of the elite law schools, predicted that declining law school applications would result in admitting persons without the very high qualifications we have known in the past fifteen years. He observed that law teachers have grown accustomed to treating their students as colleagues. His remarks suggested that he and other faculty members might not know what to do when some lesser breed of people begins entering law schools. What they might have to do, of course, is teach. There is something quite limited about a teacher who is incapable of teaching any but the best and the brightest. The law is not an occult science whose mysteries can be fathomed only by a select few. Reasonably intelligent people can be trained to be lawyers. Good teachers can successfully accomplish that training. Graduates of the elite law schools, however, come from an environment where scholarship is paramount to teaching. They often do not understand the importance of being a good teacher, as well as a scholar.

I have touched on some of the consequences I believe result from elitism in faculty hiring. Social scientists undoubtedly could identify many others. I do not mean to suggest that graduates of the "producer" schools or editors of law reviews are unfit to teach in law schools; but I do believe that other qualities and experiences also are relevant to selecting law teachers. This is an important topic that warrants discussion and study.
The Tunnel Vision of Legal Training

Joseph R. Grodin

Joe Grodin is an Associate Justice of the California Supreme Court, having served previously on the First Circuit Court of Appeals, the Agricultural Labor Relations Board in California and the faculty at Hastings College of the Law.

In response to this invitation to contribute some “provocative thoughts” on legal education, I offer a couple of proposals addressing problems which deeply trouble me. One has to do with the first-year law school curriculum, and stems from the proposition that there should be greater emphasis in the first year upon legal principles which serve to define various relationships across doctrinal lines. As an example, the first semester might focus upon traditional doctrinal categories (e.g., tort, contract, property) and the second semester upon particular relationships (e.g., landlord-tenant, employer-employee, seller-consumer, physician-patient, attorney-client) as to which the doctrinal categories tend to overlap and merge, with some statutory infusion as well. I realize that the idea would require rather massive reorganization of resources and development of new materials — both difficult things for a law school to do. There would be substantial gains, I believe, in developing more realistic and more creative understanding of how the legal system operates.

The other idea, hardly original with me, concerns the typically narrow emphasis of the law school curriculum and law reviews upon appellate opinions, as if they contained the ultimate relevant reality. As an appellate judge, I am impressed time and again with the lack of guidance we receive from litigants concerning the policy choices which often must be made in deciding among various competing approaches to a common law, constitutional, or even statutory problem. These choices cannot realistically be made without some assessment, explicit or implicit, of the consequences for future litigants and for society (see my concurring opinion in Ochoa v. Superior Court (1985). The best lawyers confront those assessments in their briefs and oral arguments in some meaningful way, and the very best seek to provide the court
with available empirical data, but I must say that both types are somewhat rare.

The fault lies in part, I think, with the almost exclusive emphasis in most law schools upon "legal" materials from the social sciences (note sociologist Cynthia Epstein's observations, p. 449), and with the tendency of law review editors and writers to confine themselves to a library instead of getting into the world and inquiring as to the impact of the legal rules which they have chosen to consider. I realize it is a whole lot easier, and safer, for a student writing a law review note to analyze and criticize appellate opinions as a form of exegesis than it is to develop a questionnaire or conduct interviews with live human beings, but I suggest that the students, and the legal world, would be better off if there were a bit less of the former and a bit more of the latter. Boalt Hall's Jurisprudence and Social Policy Program (as described herein at p. 691) is, in my view, an enormous step in the right direction.
A New Direction in Legal Education: The CUNY Law School at Queens College

Charles R. Halpern

Charles Halpern is the founding dean of the City University of New York Law School at Queens College, having previously taught at Stanford Law School and Georgetown University Law Center. He was a founder of The Center for Law and Social Policy (1969) and the Mental Health Law Project (1971) in Washington, D.C. From 1975-77, he served as the executive director of The Council for Public Interest Law. In his article, he describes the innovative and inspiring CUNY program, designed to train lawyers to serve the public interest.

I. Introduction

In the fall of 1981, while I was teaching at Georgetown University Law Center and working on a book about public interest law, I was offered the opportunity to become founding Dean of a new law school, the City University of New York Law School at Queens College. I had thought about the possibility of a deanship before, with varying degrees of interest, but I was always put off by the limited opportunities in existing programs where institutional forms had been shaped by prior generations. I was not an enthusiast of the conventional approach to legal education. It was, in my view, too narrowly focused on doctrine and insufficiently attentive to the roles that lawyers can play in serving the public interest. The opportunity to start a new program seemed especially attractive because the proposed CUNY Law School was expected to develop a new curriculum integrating clinical methods and emphasizing public interest and public service law. Since 1969, I had been involved in public interest advocacy and in developing and teaching a variety of clinical programs which brought second- and third-year law students into active public interest law settings. The invitation to set up a new law school curriculum along the lines indicated at CUNY seemed a natural extension of this work.

Through the spring of 1982, my main task was to recruit a small group to work together to plan and implement the new program. The
two academic appointments which I made during this period brought unique skills and resources to the task. Howard Lesnick, with whom I had worked for many years through the Center for Law and Social Policy, was appointed a Distinguished Professor in the City University. He was, at that time, a visiting professor at New York University, and had, for twenty years, taught at the University of Pennsylvania. John Farago was then the Associate Dean at Valparaiso Law School, having graduated from New York University Law School while completing the course work for a Ph.D. in higher education. For some years previously, Lesnick had been thinking about the process of legal education and how it might be reformed. Farago had been learning the practical side of how to run a law school, from admissions to placement, while writing theoretical articles on jurisprudence.¹

None of us foresaw or understood fully the difficulties of establishing this Law School. We began the task full-time in June 1982. At that point, we had a year in which to design a curriculum, recruit students, hire a faculty, locate a building, build a library, and obtain funding for the next year. We also had to establish our identity in the City University system, a sprawling, complex academic bureaucracy, as well as in the City of New York, a very much larger conglomeration, uniquely indifferent to new enterprises and often cynical about those which have an idealistic cast.

In fact, the time available was substantially less than a year. The critical time for recruiting students is the fall of the year preceding their matriculation. Therefore, we had to be in a position only a few months after we began the planning process, to inform potential students and their pre-law advisors of our existence and of our program. We had a mandate to design a new curriculum and only a few months in which to do it. Similarly, recruiting a faculty was a matter which had to proceed in the fall of 1982. We had to have a good sense of what skills, experience, and qualities we were looking for in the faculty in very short order, and we had to tell them enough about the law school program so that they could decide whether they wanted to cast their lot with this new and untried venture.

¹. Appointments made during the spring also included talented administrative staff members: Carlton Clark, Admissions Director, and Constance Mandina, Assistant Dean; Jack Himmelstein, a leading innovator in legal education during several years of activity while associated with Columbia Law School, worked with us as a consultant during the initial planning year, and his thoughts about legal education are reflected throughout the curriculum.
The summer and early fall of 1982 saw our basic educational concepts take shape. We sought to devise a program which would provide students the opportunity to learn in an informal environment, supportive of collaborative working relationships, in which the contributions of each person would be encouraged and valued. At the time we started to design the program, the pressure was tremendous. It was necessary to produce a description of the new curriculum to include in our first catalogue. Moreover, we had to rely on media accounts of the new school in order to attract students, and those accounts could only flow from our articulation of the program.2

We took an unconventional approach to faculty selection. We did not establish as the initial screen for faculty candidates a requirement that they had been editors of prestigious law reviews. We sought a mix of prior lawyering experience, particularly in public interest fields, prior teaching experience in clinical and classroom settings, and a commitment to the innovative goals of our program. We wanted to have a faculty which was broadly representative in terms of race, ethnic, and gender composition. We also wanted faculty members who were dedicated to teaching and enthusiastic about working with interdisciplinary materials. Necessarily, in recruiting the initial group of nine faculty members, we tried to balance their strengths. In starting a new institution, we also needed people with a sense of adventure and a willingness to tolerate predictably high levels of physical inconvenience, stress, and workload.

In student recruitment, we attracted over 1000 applicants for 140 places. Since we were not going to be a traditional law school offering the same program as most other schools, what we had to offer was special and unique — an emphasis on public interest and public service law and the promise of a curriculum that would be novel and engaging. As a publicly-supported school, our tuition was relatively low. These advantages were balanced against the facts that our curriculum was untested, our temporary building was inadequate, and our unaccredited status made our graduates’ access to the bar outside of New York uncertain.

The students we drew were risk-takers and people committed to a different kind of law practice. While we took into account traditional numerical indicators, such as grade point average and Law School Ad-

2. Coverage that year in The New York Times, Newsweek, Newsday, and other print media were absolutely critical to our ability to inform potential applicants that this new program existed.
missions Test scores, we tried to make a judgment based on a broader range of criteria. We asked the applicants to write essays about why they wanted to go to law school and, in particular, why they wanted to go to this law school. We evaluated their written statements and also their previous experiences. Many of our accepted students were older — the median age in the first-year class was 29 — and there was a good deal of life experience to consider. Some of our students had extremely high numerical indicators and would have qualified for admission to many law schools. They selected us because of our special program. Other students had relatively low numerical indicators and had other elements in their application materials that made us think they could perform well in our program and as members of the legal profession. The inaugural class had students in it who had been journalists and policemen, teachers and union organizers, nurses and social workers. The wide range of experiences which they brought to law study has greatly enriched the program of the school.

We were mindful of the fact that we were a part of the City University of New York, supported by public funds, and that the rich diversity of the City’s population ought to be represented in our faculty and student population. This diversity is an outstanding characteristic of our faculty (half of whom are women and one-third minorities) and of our student body (56% women and 26% minorities).

My years as a Dean have been among the most difficult and rewarding of my professional career. We have undertaken an extremely ambitious task. We have restructured most of the courses that are studied in Law School. This meant that faculty members had to develop many of their own teaching materials. The new materials have to be tested and revised annually. Because we are committed to the integration of the study of lawyering skills with the study of legal doctrine, we had to develop new pedagogical approaches, relying heavily on simulation techniques. Some of our teachers were experienced in the use of simulations in instruction, and others had to learn the process. Altogether, the burden on faculty members was considerable. We expected the burdens to become less onerous as courses were taught for the second and third time. Though this has been true in part, we must still review our courses yearly and reshape them in light of our experience and resources.

We have relied heavily on faculty collaboration, and most of our courses are taught jointly by two or more of our faculty members. We want to continue this practice and the emphasis on extensive (and intensive) faculty-student contact. At the same time, we must balance
the faculty members' needs to explore some areas of law in greater depth and to continue their activities in the wider community outside the law school. We do not yet have a solution to this problem of balancing demands on faculty time, but our Curriculum Committee is working on it. I believe that it will take some significant modifications in the curriculum to permit faculty members to establish an appropriate balance between teaching obligations and the other elements of a full professional and personal life. At this point, it appears that we have sufficient flexibility to make the necessary adjustments, and we are hopeful of making further progress on this issue.

The Law School as an institution has developed a sense of community to an unusual degree, and the amount of student, faculty, and staff commitment and loyalty to the institution is unique and heartening. We have tried to engage the entire law school community in critical decisions relevant to their welfare, employing a structure which is less hierarchical than is conventionally found in law schools.

Our governance system allows students and support personnel to play a role in decisions through participation as members of policy-making committees. The Law School's central governance body, the Assembly, meets monthly to review committee actions. It is made up of all members of the faculty and administration, and representatives of the students and support staff. Most committees also include a similar membership mix. There is some disagreement about the adequacy of student and support staff representation. Efforts are underway to adjust our internal governance plan to increase the participation of these groups. Other attempts are underway, beyond adjustments in the governance structure and other technical approaches, to build a heightened sense of engagement in the whole community.

Within the Law School's current governance structure, few issues are subject to vote. We try to reach a consensus on policy issues. Though this form of governance is mostly successful, efficiency sometimes conflicts with the participatory decisional process. Hierarchy is not missing from the law school's structure. The most obvious hierarchical elements arise in areas such as evaluation of students' work by faculty and the necessity for the dean and faculty members to evaluate each others' work for purposes of reappointment, tenure and promotion. We are constantly working at achieving a balance and at resolving tensions on these points as the institution matures. Our main objective in this sphere has been to put in place a governance system which increases participation and individual responsibility. We hope this governance system will constitute an important part of the educational
process and will reinforce the curricular emphasis on personal responsibility in law study and law practice.

Obviously, any judgment about the success of our program as a whole will have to wait until the school has reached a level of institutional maturity. Many people look to bar passage rates as an indicator of the institution's success. We too seek success as measured by that standard. However, we are also aware of the insufficiencies of the bar examination as a test of lawyer competence. We plan to measure success by evaluating the performance of our graduates in law and law-related jobs over the coming years. I like to think that Governor Cuomo's prediction offered at the law school's inauguration will chart the future for the program. He said he believed that the Law School "will be a place where thoughtful, committed, compassionate lawyers are trained. . . . It will become one of the nation's most distinguished and distinctive legal institutions. It will be a school that produces idealists as well as pragmatists, citizens as well as lawyers."

Our Law School is an institution that is still evolving. We continue to build a community and apply our ideals in practice on a day-to-day basis. Even a faculty which shares a strong commitment on fundamental values can still differ sharply over particular curricular decisions and personnel matters. A governance system which is designed to empower students will inevitably fall short of fully achieving its goal. A law school which is a constituent element of a massive university system, as we are, has to adapt its internal procedures to the rules and customs of the larger institution. These shifts and adjustments will continue to shape the law school. One of our opportunities in starting a new institution was our capacity to experiment. Experimentation implies that we will systematically evaluate the results of our effort and adapt the program in light of what we are able to learn. At this stage of development, I am heartened by the progress we have made and often surprised by the extent to which we have succeeded in making a dream become a reality.

The Announcement which we published in the fall of 1982 captured the ideals and spirit we hoped to make real in this new institution. It conveys an approach to legal education with which most of us now at the law school feel closely identified. The most important section is called "Themes of the Educational Program." This section has been progressively refined each year and still incorporates the core concepts that appeared in our first Announcement. The next section of this piece draws heavily on our current "Themes" description. It reflects a collaborative effort of Lesnick, Farago, and me — in that order — with
significant input from the thirty faculty members who have joined us since we began.

Following the "Themes" section, I have included the current description of the Law School's courses for the required part of the curriculum — the first three semesters. The "Course of Study" section captures some essential elements of the Law School's philosophy translated into action. This section communicates the structure and content of the newly-created courses, which are quite different from those offered in the standard law school curriculum. Professor Lesnick is the primary draftsman of this section; it reflects the editorial hand of Professor Farago and input of the entire faculty.

The program places a great deal of emphasis on small group work and on close and frequent interactions between faculty and students. Our House System, one of the central elements that shapes the daily experience of students and faculty, is made possible by a favorable student/faculty ratio. There are elements in the program which cannot be replicated in all law schools, but others may suggest ways that a law school can deploy its resources to explore new techniques and to achieve some of the educational objectives which we continue to pursue.

II. Statement of Themes of the Educational Program

We seek to retain the strengths of traditional legal education while making significant innovations. Our central purpose is to create an educational program that honors students' aspirations toward a legal career built on a commitment to justice, fairness, and equality. These principles form the basis of the Law School's motto, "Law in the service of human needs." (See also Jan Costello's essay proposing a curriculum designed to train lawyers to represent the powerless, herein at page 431.)

Legal education too often teaches students, both implicitly and explicitly, to set aside their values. As a result, it can channel them into legal careers unrelated to the objectives that initially led them to study law. Through the curriculum, the career planning program, and the organization of our work and life at the law school, we hope to encourage students to think actively about their life choices, their evolving concepts of professionalism, and the content and processes of the law itself, in ways that foster their capacity to practice law in a socially useful manner.

We subscribe to many of the goals of the traditional curriculum,
specifically, the desire to give students mastery of legal knowledge, experience in the techniques of legal work, familiarity with a range of legal areas, and the facility to think critically about what they read, what they do, and what they see teachers, lawyers, judges, and other students do. We want to go beyond that, however. We want students to learn to perceive and understand the premises and choices implicit in the structure and work product of the legal system. We want them to exercise their reflective judgment in assessing their own responses to the world around them, and to enable them to reaffirm in their work the principles of justice that attracted them to a career in the law.

These objectives echo those expressed by many of our colleagues throughout legal education. They ricochet through the literature of our profession. What is special about our critique is that we have both the opportunity and the mandate to build an alternative program, matching our concerns regarding the incompleteness of the traditional with concrete forms of innovation.

A. A More Comprehensive View of Law As It Is Today

Legal education should present an expansive view of the function of law and lawyers in our current society. The traditional subjects of law study, especially in the crucial first year, excessively reflect the world (including the legal world) of nearly a century ago. The emphasis on private law, on litigation, and on transactions between individuals can distort students' views of what law is and what it does in today's world. They live in a world which should be concerned with the law's response to interactions between bureaucracies and ordinary people, to the protection of minorities, to the desire for democratic participation in administrative decisionmaking, and to such proposed alternatives to adversary litigation as mediation.

We have designed a curriculum responsive to these concerns. It pays far greater attention to theory and to practice (including the students' own work experiences), and integrates them into substantive courses. Our curriculum has fewer courses, and is broader in scope, to facilitate a more fully integrated approach and an emphasis on collaborative teaching efforts. It reflects a fresh look at the content of the curriculum, especially in the first year. Attorneys in practice are seldom presented with a legal problem neatly compartmentalized into analytically distinct subject headings as do traditional first-year courses; hence, a curriculum that brings together the subjects of study is at once intellectually preferable and better adapted to educate attorneys to be
able to address the many-sided problems with which they must deal on a daily basis.

The unusually broad scope of our courses facilitates teaching of related subjects in a single course in ways that are obstructed by the traditional curriculum. The compartmentalization of Contracts from Property, for example, or of Torts from Criminal Law, impedes learning as much as it facilitates it. Similarly, the traditional segregation of the study of lawyering skills and professional responsibility from the study of substantive law interposes an artificial distance between connected areas of study. Our courses interact in a purposive way with one another. The design of an overall curriculum enables teachers (and students) in one course to take explicit account of what is being examined in another, and on occasion to bring two courses together to study an area relevant to each. The use of mediation, for example, as a less adversarial means of resolving disputes, is studied in three of the first-year courses, each in the context of a particular subject. In this way, the law school's curriculum seeks to counteract the fragmentation of thought that is produced by the usual array of narrowly-defined subjects. Our students learn to address the law as a complex and internally interactive system.

B. Law As Interaction Among People

Legal education should place greater emphasis on law (and lawyering) as a process of human interaction, on the ability to see implicit premises and links with moral, social, and political theory. It should convey the specific content of legal rules and argument, in ways that do not focus excessively on learning as simply acquiring knowledge of specific content.

The overall theme of our integrated curriculum is especially reflected in our treatment of three areas, crucial to students' learning, that are given much heavier emphasis in our curriculum than has been done in traditional law schools. They are emphasized, not in separate courses, but by recurrent attention in varying contexts all through the curriculum. These areas are: legal theory, which teaches students that the doctrinal principles they are learning and evaluating do not arise out of logic or precedent alone, but are embedded in a social and ethical context; clinical education, which teaches students to take the actions and make the decisions that lawyers actually face; and professional responsibility, which teaches students that mastery of legal doctrine, theory, and lawyering skills is not an end in itself but a means
toward a legal practice that can reflect the professional person's choices, goals, and values.

In the first three semesters, the content of the courses is presented through a combination of lawyering simulations and substantive lecture/discussions. The analysis and criticism of legal doctrine receive significant attention, while the simulations encourage students to work with one another in many of the ways that lawyers do, including individual reading, research and writing, collaborative analysis and strategizing, counseling, negotiating, mediating, and litigating. In addition, they provide a context for reflection that is often missing in the sequential crises that lawyers face in practice.

Clinical work is comprehensively integrated into the course of study. Clinical training in law school teaches by immersing students in the daily work of the law and the actual decisionmaking of the lawyer. In the first three semesters, the integration of differing subject matter with clinical methods and professional responsibility is in significant measure accomplished through the institution that we call the Houses. The Houses are core working units of approximately 20 students. Clinical work in the fourth semester and the third year emphasizes the representation of actual clients, whether within the law school or through closely supervised clinical fieldwork.

Through role-play and with the aid of videotape, students can work on problems structured for maximum learning. In these ways, students learn from time spent with clients, colleagues, and adversaries, in libraries, conference rooms, and courthouses. From the first semester on, they begin to experience the institutions of the legal system and what it means to be a lawyer. They are invited to reflect on their own decisions and the varied interpersonal dilemmas and lessons that their work presents. They will understand the often contradictory emotional tensions inherent in their profession, because they will have lived through those tensions with the support and the opportunity for reflection that law school is uniquely able to provide.

By providing an opportunity not only to work as lawyers do, but to think about that work, the law school's curriculum, especially the work of the Houses, brings together practice and theory in order to foster a deeper and more realistic training for the practice of law. Legal doctrine is integrated with social, historical, and ethical theory as well as with clinical experience, and students are required to address the application of theoretical insights and hypotheses to that experience. Students graduate having already participated in, and having already reflected on, an unusually sophisticated and extensive range of actual
lawyers' work.

C. The Responsibility of Legal Practice

Legal education should pay attention to what students learn about law and lawyering from their extensive contacts with the working world during their law school careers. The clinical work that students do, and the vocational decisions that they make, involve significant latent issues of professional responsibility. Part of the law school's purpose must be to make these issues manifest, to help students address them with the same critical, analytic curiosity that they bring to bear on the substance of the law.

We believe that grappling with these questions is at the heart of public interest practice and that an awareness of personal and professional responsibility therefore should be integral to students' lawyering work. In order to encourage such a focus, members of the law school faculty work in their teaching and planning to help make explicit the consideration of these often elusive issues.

In addition, through our career planning and counseling functions, we seek to help each student identify the type of practice that best captures the principles that led him or her to want to be a lawyer. Our career planning efforts constitute a crucial part of the educational program. We devote time, energy, space, and support to assisting students in finding the legal work they want. The Career Planning Office develops and implements a process that goes beyond simply providing a meeting ground for students and employers. The faculty tries to make it a central part of the curriculum from the first year to ask students to think critically about questions of choice of work, and of individual and professional responsibility for the availability of legal representation to the non-wealthy. We also work actively to develop job opportunities — during the summers and after graduation — in public and private positions that enable students interested in one or another aspect of socially useful practice to develop relevant experience and skills. Upper-year courses pay particular attention to what students are learning (often implicitly) about the work of a lawyer from their academic and work experience.

In addition to the substantive attention that we give to questions of professional responsibility, we hope that the innovations to which we are committed — the curriculum, the collaborative teaching, the emphasis on reflection and theoretical inquiry, our admissions and placement programs, and, most especially, the House system — help create
an environment for work and study that fosters the development of a
deep regard for the ethical foundations of the legal profession.

D. The Responsibility of Legal Education

Just as we encourage our students to practice law with conscious
awareness of professional responsibility, we believe that the law school
itself has an institutional responsibility to exemplify and embody a
comparable approach to our practice as a school. To that end, we are
committed to supplementing traditional classroom methods of legal ed-
ucation with ones that we feel capture most effectively the principles
we seek to honor.

Thus, the Houses provide a context for practice, learning, and re-
flexion that derives from our commitment to match our teaching
method to our principles. Working together as colleagues in the
Houses, students, faculty, and staff can develop relationships of mutual
respect, reliance, and support that are far richer than is usually possi-
ble in educational settings. The familiar “Socratic” method of large-
scale learning through professorial questioning of a few students is used
only when it seems productive. An understanding of the practice, expe-
rience, and responsibility of being a lawyer is fostered through role-
play, simulations, and other clinical techniques. Lectures are used when
they most effectively present needed information, while student initia-
tive and independence is encouraged by means of self-learning through
library research and computer-assisted instruction (which at the same
time provide a productive contrast to the uniform progression and de-
ferred evaluation of the classroom). All students learn the emerging
techniques of word-processing systems and computerized information
retrieval systems that increasingly form the foundation of modern law
practice. The law library invests heavily in computerized teaching
materials and information retrieval systems, the use of which is inte-
grated into the curriculum.

In encouraging collaborative student work as a valid method of
learning, the law school intends to alter the traditional hierarchical
structure of legal education. Teachers work as senior colleagues with
students, fostering an emerging sense of individual ability and compe-
tence in place of the hostility, passivity, and alienation that are all too
common among law students. Through learning to take responsibility
for their own learning, students develop a more sharply honed critical
sense and an approach to practice that respects the autonomy of the
client. The school’s small size and favorable faculty-student ratio en-
ables us to foster a supportive learning environment designed to maximize individual and professional development.

Finally, examinations are intended to be the servant and not the master of learning. (See also Janet Motley's critique of traditional, end-of-semester exams, herein at page 723.) To the extent feasible, evaluation is based on the quality of students' work done as part of the course itself. Where the aim is simply to assure that a body of basic doctrinal material has been learned, students are tested by a Mastery Examination, that is, one that is graded pass/fail. The Mastery Examinations seek to certify basic knowledge in particular areas, and to assure students, faculty, and potential employers that all graduates of the law school have a solid foundation in the traditional substance of the law. That foundation, and the test-taking experience that the Mastery Examinations provide, aids our students as they prepare to seek admission to the bar. Mastery Examinations are designed to assure all students that they have basic lawyering knowledge and skills. Students who experience difficulty in passing one or more examinations receive intensive individualized evaluation and guidance before trying again.

E. Conclusion

The themes of our educational program reflect our view of what law and legal education should do: teach the law as it is today, teach the importance of understanding the human roots of the legal profession, emphasize the central place that issues of professional responsibility should occupy in the curriculum, and fulfill the duty of the law school to devise a pedagogy that expresses the principles on which it is founded. The result is a law school that encourages its students to realize their own potential as professionals and that simultaneously realizes its potential as an institution to place the service of human needs at the core of its mission.

III. Course of Study

As the "Themes" section above suggests, we are attempting to develop a better way of preparing people for the responsible practice of law. We do not value change for its own sake, and have retained much of the content of traditional legal education. We do, however, believe that where change can work an improvement, it should not be shunned simply because it requires a departure from traditional practice.

The course descriptions that follow present a synopsis of our
House system and of the content of our first three semesters. The courses, which are the substantive elements around which student assignments are built, constitute the intellectual/theoretical core of the curriculum. The Houses are the curriculum’s primary experiential core, the major way that the students participate in the courses.

A. The House System

Each student is affiliated with a House. With the renovation of our permanent building (to be occupied for the 1986-87 academic year), the core of a House will be a unit of approximately 20 students, each with his or her own desk, bookshelf space, and lockable personal space, adjacent to the offices of the faculty members affiliated with that House. In our permanent building, each pair of Houses will share a small classroom (with videotape equipment) suitable for simulated interviewing, negotiation and counseling sessions, and faculty-student conferences; a word processor and core library, including a Westlaw terminal; and a secretarial office. At present, the House System exists in an improvised form in the two buildings which the law school now occupies. It still provides students with their own work areas and an environment which is more like a law office than like a law school. The daily experience of students involves them in a mix of classroom work and lawyering work centered in the Houses. Each student’s House experience is directed by a member of the faculty who serves as House Counselor.
Much of the material of each course is studied and applied in the work carried on in the Houses, rather than in a large class, and much of the faculty’s teaching consists of supervision of students working in the Houses on problems introduced in the courses. The work of the Houses is carried on individually and in small groups. In appropriate cases, students’ work is videotaped for critique by faculty and other students. It is through the Houses that we intend to achieve the integration of clinical methods and a lawyering focus with the substantive, theoretical or doctrinal material.

The work of the Houses continually places students in the role of lawyers, confronted with responsibilities that intersect with substantive material from the courses. For example, students do not simply study the premises of criminal law, but experience in role the choices facing a lawyer representing or prosecuting one accused of a crime.

The House system is intended to make the experience of being a student less sharply dichotomized from the experience of working. It allows us to move toward our goal of individualized learning in a context that values cooperation and community. As a result, students learn not only to take a more active, responsible part in their own education, but they learn to approach the practice of law in a way that is active and responsible as well, and less likely to embody reflexive adoption of role-defined acts and attitudes.

As discussed in the preceding section, the curriculum undertakes to integrate related materials. Several consequences of that integration, which make our curriculum different, warrant mention here. First, courses bear unfamiliar names, covering parts of several different traditional subject areas. Conversely, portions of particular traditional subjects may appear in two or more of our courses. We have taken special care to assure ourselves and our students that our curriculum includes basic coverage of the fundamentals: Contracts, Torts, Property, Criminal Law, Constitutional Law, Civil and Criminal Procedure. These and other familiar aspects of the law school curriculum constitute an important part of our students’ intellectual preparation.

Second, in order to provide the common core experience that an integrated curriculum calls for, we have made the courses comprising the first three semesters of work required of all students. As a result, we are able to use varied teaching styles and groupings of students, depending on the nature of the material being taught. For some segments of a course, the entire class meets together. Other material is studied in the Houses, as described above. The faculty coordinates its teaching activities in all courses and, in almost all instances, teaches in
teams.

Third, our curriculum does not merely reallocate the intellectual content of the traditional law school program. It seeks to integrate two different sorts of learning: the development of lawyers' perspectives and skills with the acquisition of knowledge of the substance of the law. As students learn about the law, they are also learning about what it means to be a lawyer, and they are encouraged to reflect on the personal and professional responsibilities attendant on that role. In other settings, this latter sort of learning often is permitted to remain unconscious, and as a result, is not given the sort of attention that our curriculum demands.

In seeking to address that problem, our curriculum utilizes two different types of courses. One, like most college or law school courses, presents the content organized according to a clarifying intellectual organization. Recognizing the analytic value of grouping ideas, concepts, and themes, we present the content of the law through courses that reflect a series of organizing principles. A second kind of course, represented in the first year program by the *Work of A Lawyer* course, seeks to make conscious the acquisition of skills, role, and responsibility. This sort of course cannot exist in a void, but rather it requires the context that the other courses provide.

Together with the House system itself, the three-year progression of courses expresses the broad concept of clinical education to which the law school subscribes. One or another variety of clinical study is a part of the program of every student throughout the three years. In the first half of a student's course of study, clinical work is carried on through simulations and course work (The Work of a Lawyer, Lawyering and the Public Interest) because that format permits us to maximize the learning at the level of both skill development and reflection on lawyering role and choices. In the fourth-semester program of *Elective Concentrations*, students are introduced to the world of actual practice, in settings in which they are able to assist practitioners in legal work. At the same time, they learn the ways in which legal regulation is shaped by the forms in which legal representation is delivered to people who are the subjects of regulation. Students in third-year clinical programs use what they have learned to begin the representation of individuals and groups in selected practice settings, under faculty supervision; those taking the *Lawyering Seminar* study lawyering applications of one or more substantive subjects that they have elected to study as part of their third-year program.
B. The Required Courses

The required courses constituting the first three semesters’ work are described here in greater detail. The first year Curriculum includes the following courses: Adjudication and Alternatives to Adjudication; Liberty, Equality, Due Process, in Historical and Philosophical Context; Law and a Market Economy; Responsibility for Injurious Conduct; Law and Family Relations; and The Work of a Lawyer.

*Adjudication and Alternatives to Adjudication* is offered in the fall of the first year. This course examines the structure of the judicial system for the resolution of legal disputes. It introduces students to what lawyers do in court and how they prepare a case. It integrates material dealing with civil, criminal and administrative litigation, studying the range of uses of adjudication, the bases for legislative choice among types of enforcement mechanisms (civil/criminal, judicial/administrative), and the varieties of legal remedies. The course includes a brief intensive summary of the New York and Federal Rules of Civil Procedure, designed to familiarize students with the process of a trial and the basic rules and issues of procedural law.

The aim of the course is to help students understand the adversary model and to become adept at working within it, without coming automatically to view all legal issues through its lens. It asks why we have courts, whether courts satisfactorily achieve their purpose, what impact adversarial procedure has on what lawyers and clients come to do and expect, and how lawyers might pursue alternatives to an adversarial approach to legal problems. The course encourages students to examine the concept of due process of law and the underlying premises of the adversary system, in order to understand better the values to which the concepts of fair procedure and adjudication respond and the ways in which the adjudicatory system both serves and disserves those values. The course explores the ways in which the very same issues are central to the development of existing and proposed departures from the litigative model, and in that connection considers in depth the premises, purposes, and promise of mediation.

The course seeks, further, to help students perceive and understand how one’s conceptions of the lawyer’s function influence the effect of any method of dispute resolution. In that connection, the course examines traditional and alternative conceptions of the lawyer’s role. The purpose of any critique of the adjudicatory system or of the traditional conception of lawyering is not simply to applaud or to condemn the legal system, but to enable students more fully to understand, and to
take responsibility for, the impact of the choices that they will make with respect to their practice.

*Liberty, Equality, Due Process, in Historical and Philosophical Context* is also offered in the fall of the first year. This course studies the legal expression of our concepts of liberty and equality, and our commitments regarding them. It examines constitutional text, Convention and Reconstruction debates, and Supreme Court decisions in a framework that addresses the development of legal doctrine in its historical setting and examines its political and social significance. It commits significant time and effort to the study of historical events, including the antecedents of the Bill of Rights in the English and American Revolutionary periods; slavery, the antislavery movement and Reconstruction; the reign and fall of White Supremacy; the fear of Communism, 1880-1980; free immigration and the closing of the gate; and the rise of the labor movement, that have shaped our national consciousness of such issues as free speech and racial equality. The course similarly attempts to connect constitutional concepts to moral and political theory; it studies the first amendment as part of the study of liberty, and equal protection as part of the study of equality.

The course is designed to help students overcome the tendency to view law and legal doctrine as simply a system of analytic reasoning. Through studying legal doctrine in its historical and philosophical context, students can perceive the ways in which legal principles both express and shape fundamental human values and explore the content and implications of those values. Our aim is that students will better understand: a) the significance of choice in litigative or legislative issues with which the Supreme Court, Congress and the President have grappled; b) the presence of ambivalence or conflict in society's fidelity to the values in question; and c) the processes by which the law only partially expresses the values that it espouses, channels that expression in self-limiting ways, and tends to legitimate the persisting gap between those values and the prevailing social order.

This course helps students learn from the experience of grappling with emotionally charged and divisive issues, values, and perceptions sharply different from their own. They observe the ways in which the adjudicatory system, the Supreme Court, and the traditional conception of lawyering deal with these issues; and understand the ways in which such issues shape the evolution of legal doctrine.

In all of the foregoing, the aim is to enable students both to understand more fully the world in which we live, and to exercise a fuller, more responsible choice in their own work as lawyers. Many students
are drawn to law because of its capacity to express a commitment to the values with which the course deals. The course is designed to help students understand the ways in which the issues that it addresses are replicated in the day-to-day work experience of a lawyer, in relations within the law office and with clients, adversaries, and tribunals, and in the decisions that a lawyer makes in choosing areas of specialization, his or her clients, representational objectives, and methods of pursuing them.

*Law and a Market Economy* is a year-long, first-year course covering *Allocations and Transfers* in the fall semester and *Associations* in the spring. This course focuses on the ways that law shapes and responds to economic transactions between and among people, acting individually or in association with others. It studies the traditional core areas of Contracts, Property, Torts and Corporations in ways that address their functional and ideological interrelation, and it also introduces students to the study of antitrust, labor relations, and administrative regulation. The focus of the first semester is on transactions between individuals (Contracts and Property). The second semester focuses on the association of individuals, through corporations, trade associations, or labor organizations, and on governmental responses to such organizations (Corporations, Antitrust, Administrative Law, aspects of Torts dealing with enterprise liability, and aspects of Labor Law arising out of collective action among workers).

The two aspects of government involvement in private enterprise, facilitation and regulation of the marketplace, have traditionally been separated in the law school curriculum. The aim of uniting them and exploring the interactions between them is to help students understand the interpenetration of public and private law. Beyond that, integrated study is designed to help students to perceive the relevance of social and political theory to the development of the common law and regulation. It helps students to understand the role of market ideology in shaping the ways in which such concepts as autonomy, liberty, and equality tend to be defined and understood. It makes explicit the underlying premises reflected by market ideology, those regarding the human personality and the nature and purposes of human interaction.

The course teaches the skills of drafting and negotiation in a context that provides an opportunity to examine the implicit ethical content of apparently neutral substantive law. The interrelation of legal doctrine, legal theory, and professional responsibility is closely examined to the end that students can better understand the social consequences of the traditional approach to lawyering and the choices that
they can make in carrying on their own work as lawyers.

Responsibility for Injurious Conduct is offered in the spring of the first year. A central theme of Torts and Criminal Law is the function and content of the prevailing legal bases of civil and criminal responsibility. Malice and intent, causation and fault (including negligence), and the ideas of legally protected and unprotected interests, the requirement of a legal duty to act, and legally nonaccountable inflictions of harm are all addressed. In this course, students examine the types of injury for which the law gives a remedy, and the varieties of remedies available. They are asked to assess the political sources and social implications of the ways in which the concept of responsibility is defined and used, and to consider the justice and functions of varying allocations of risk, cost, and harm. The course also examines some fundamental aspects of the enforcement mechanisms of the law, primarily the negligence and criminal justice systems, including in that examination such private institutions as insurance.

Studying this material in an integrated way facilitates development of a more sophisticated understanding of the legislative choice in adopting criminal or civil sanctions to enforce new or existing duties. Beyond that, a goal of studying the law's concept of responsibility is to make explicit the premises on which it is based, and to consider the extent to which those premises are congruent with those underlying the Market Economy and Adjudication courses.

The course considers the relation among several themes by which the law shapes our notions of personal responsibility: the emphasis on adjudication, guilt, punishment, and deterrence; the orientation toward rights rather than responsibility; and the individualist stance that is presumed to inform human behavior and is legitimated by the law. In that connection, it examines the system of enforcement, the institution of public prosecution and the evolution of insurance from simply a cost-spreading system to one premised on the denial of responsibility. The course studies the emergence of such alternatives as no-fault liability, courtroom diversion projects, mediation, and the ways in which each can respond to an alternative set of premises about responsibility.

A major purpose of raising the above questions is to ask what it would mean for a lawyer to bring issues of responsibility into the lawyer-client relation, in light of the power imbalance that may exist between clients and their adversaries and between client and lawyer, and in light of the norms of professional ethics.

Law and Family Relations is offered in the spring as part of the required curriculum. This course examines the ways in which the law
reflects and reinforces fundamental premises about family and love relationships. The course raises uniquely vexing questions of the effect of the law on private autonomy; of the distinction between public and private law; and of the interaction between the law and race, gender, sexual orientation, and class. It requires students to address and take seriously the legal problems of ordinary people — of people in crisis — to grapple with acutely difficult aspects of the relationship between lawyer and client, and to understand and assess the impact of their own values on their work. It is designed to foster an awareness of cross-cultural differences and of the need for self-understanding in dealing with questions of professionalism and of law that may touch a lawyer deeply. It provides an occasion for study of the relevance of anthropology, sociology, and psychology to legal development, and it presents unusual opportunities for the study of drafting, counseling, negotiation and mediation.

The premises on which family law was built are now very much drawn in question, and there has been rapid change (as well as powerful demands to reaffirm prevailing norms). By studying the subject in the context of a first year largely devoted to asking similar questions about the immutability of basic premises, the course is intended to help students see the process of change in the family law area as an example of broader questioning and choice.

The re-examination of fundamental premises is intended to raise profound, and profoundly difficult, links to the practice of law. They include questions about access of women, children, the aged, and others to effective legal representation, and questions about our sense of the qualities needed to be a good lawyer. The issues are studied as ones facing the profession as a whole in setting norms of professional responsibility, and in regulating admission to law school and to work as a lawyer, and as ones of individual responsibility. What are the implications of the evolution of the area of law and family relations for the choices that each of us will make as a lawyer?

The Work of a Lawyer is a year-long course in the first-year curriculum. This course provides a framework for studying the ways that lawyers work and think. It teaches the fundamental lawyering skills of legal analysis and synthesis of cases and statutes, legal research and writing, interviewing, counseling, negotiation, and advocacy, including for the purpose material traditionally taught in courses in Legal Method, Civil Procedure, Professional Responsibility, Jurisprudence, and introductory clinical or Lawyering courses. Beyond that, the course introduces students to qualitative skills not often included in the law
school curriculum, such as listening (to clients, adversaries, others), exercising judgment and reflecting on one’s decisions, and engaging in the process of moral reasoning.

While focusing students’ attention on the development of their skills as lawyers, the course is also designed to develop in students the need for a critical awareness of social, legal, ethical, and psychological content that their work necessarily reflects. Students examine the philosophical, political and psychological premises of the lawyer’s stance, as expressed in the Code of Professional Responsibility, legal reasoning, and the substantive law itself. The goal is not simply theoretical but practical — to develop realistic ways of fashioning a working conception of the lawyer’s role expressive of the commitment to human needs. The objective is to teach what has been thought of simply as skills training in a way that does not fragment skill from values and reflection on choice. It combines the acquisition of skills with an inquiry into the professional role and responsibility that will be carried on throughout the three-year program.

This course is the focus of the law school’s effort to integrate the mastery of substantive knowledge with the experience of the work of a lawyer. In order to achieve this integration of the study of lawyering with the study of law, the team teaching each first-year course works in collaboration with the team teaching Work of a Lawyer to develop applications of the subject matter to the practice of law. Moreover, the House system, and the simulations carried out in the Houses, provide a major link between The Work of A Lawyer and the other first year courses. The work done in the Houses for the courses is the work of a lawyer, and provides the medium for discussion, analysis, and reflection regarding the skills and issues that are central to the material of the Work of A Lawyer course. The Houses, then, serve as both context and subject matter. In the Houses, students initially garner the experience that permits them to go beyond learning the law in order to learn to be lawyers.

The Second-Year Curriculum includes the following required courses offered in the third semester (the fall term of the second year): Raising and Spending Public Money; Taxes, Appropriations, and Benefit Programs; Public Institutions and the Law; Lawyering and the Public Interest.

The purpose and contours of the Second-Year Curriculum are informed by the school’s central mission, as described in its by-laws. They are first, to educate “men and women to be lawyers who will practice with a concern for the social responsibilities of the legal pro-
fession and for the public interest,” and, second, “to teach in ways that help students to learn from their own experience and from their ability to reflect on that experience.” The choice of both subject matter and teaching method is a conscious attempt to serve the objective of enhancing students’ capacity for active, responsible learning and decision-making in their work while at the school, and to make responsible choices about the effect on society of their work as lawyers. To pursue this objective is to take seriously the question of the meaning of a career in law oriented to the public interest, to grapple with the difficulties in conception and application of the idea, to make a real attempt, in terms of education and job possibilities, to facilitate the development of a public-interest practice by those who are open to it, and to do all of this without imposing a particular conception of the public interest or of attorneys’ work choices on students.

The Second-Year Curriculum maintains the emphasis on the study of law in full context, which includes a focus on lawyering and its integration with legal theory and doctrine. An immediate objective of the fall-semester work is to prepare students for lawyering in non-simulated field settings in the fourth semester and in the third year. This preparatory objective is served as much by the substantive component, which is designed to provide a deeper perspective on public-interest advocacy, as it is by the experiential side.

In the fourth semester, students work full-time for the entire semester in an area conceived and executed as a single integrated experience. This gives each student the opportunity to work extensively and intensively on a rich legal subject in a way that addresses its complexity, and encompasses the breadth of an academic perspective and the particularity of concrete applications.

*Raising and Spending Public Money: Taxes, Appropriations, and Benefit Programs* is offered as part of the required curriculum in the fall of the second year. The central purpose of this course is to give students a broader perspective on public allocations than is often found in the dispute-oriented focus through which the effect of the law on under-represented interests is often studied or questioned. To this end the course seeks an integrated look at taxation in the full range of its subjects (income, sales, property), and governmental authority (federal, state, local). It seeks then to integrate the study of taxation with the study of appropriations, with a particular focus on government benefit programs (old age insurance, public assistance, unemployment insurance, medicaid) and the redistributive purposes and effects of governmental taxing and spending power as a whole. The course examines the
effects, on clients' choices and activities and on society, of factors such as interstate competition for industrial development and the desire to facilitate the mobility of capital, which shape tax and spending policy.

Areas chosen for examination are drawn from revenue sharing, grants-in-aid, block grants, and the financing of benefits programs; the effects of financing methods on eligibility requirements and procedures, and on the level of benefits. The course also examines legislative and executive control of budgetmaking, including impoundment, zero-based budgeting, "sunset" legislation, and other attempts to control spending policy, the meaning and impact of budgetary balance and imbalance, questions of tax policy, including issues of federalism, choices among the subjects of taxation, progressivity, the tax expenditure concept and the choice between taxation and appropriation as vehicles of policy implementation, and the bases and effect of choice among the subjects of taxation (payroll, income, property, sales). Students learn the structure of the Internal Revenue Code, and acquire experience in working with it. In coordination with other third-semester courses, they examine legal problems in a legislative context, experiencing the lawyer's role both as legislator and as representative of interests seeking legislative responses.

Public Institutions and the Law is also offered in the fall of the second year. This course seeks to study the phenomenon of bureaucracy, to gain some understanding of a legal institution as a bureaucracy, to examine the bases and function of distinguishing public institutions (administrative law) from private institutions (corporations), and to consider the complexities and ambiguities of the idea of public-interest lawyering from inside as well as outside an institution. Lawyers working in governmental agencies tend to view their work as by definition public interest lawyering. Others, outside of government, may see the matter in a more complex way, often defining the public interest as opposing (or at least contending with) government agencies and their lawyers.

In this connection, the public-private distinction needs explicit examination. Administrative law can be seen as arising out of the attempt to create or empower public institutions to control private institutions, in a legal regime that tends to equate public power with coercion and private power with freedom. The ways in which public and private corporations or other large institutions are alike and different in their functioning as bureaucracies and in their need for regulation, is a central issue in the course.

The following areas illustrate the subject matter from which the
course material is drawn: a) the impact of the demand for fair procedures on agency decision-making, citizen protection, and the substantive law (including examination of the processes by which legal rules such as those involving welfare terminations and school suspensions tend to be absorbed by the institution); b) the evolution of efforts to structure public participation in agency decision-making (from judicially enforced rules of standing, intervention, or hearing, as well as substantive law, through less adjudicatory methods, such as mediated or negotiated decision-making, that seek to avoid replicating the unregulated discretion of an earlier time); c) the discretion of an agency to formulate policy, including legislative oversight as well as judicial review, and the ways in which an agency makes choices within its zone of discretion; and d) professional responsibility issues of government lawyering, such as the routine invocation of justiciability defenses and indictment, plea-bargaining, and the trial tactics of prosecutors.

_Lawyering and the Public Interest_ is the third required course in the fall semester of the second year. The central objective of this course is to enable students to acquire some of the skills and understanding that they need to carry on a practice oriented to the public interest, and specifically to prepare them for the clinical practice that will be a focus of the fourth semester and third year. The content of the course centers on four areas: evidence, procedure, advocacy skills, and theoretical perspective. In each area, the emphasis is on combining a focus on litigation with a broader context. In addition, it considers advocacy in legislative or rule-making settings, pre- and post-litigation negotiation, settlement, and enforcement efforts, and the implications of several differing critiques of a rights-based orientation to legal aspects of human problems.

The course also is the vehicle for coordinating and carrying out the experiential side of the semester's work, drawing the subject matter of all three courses together in a program that combines further development of the educational potential of simulations with an introduction to the real world of lawyering. The course explicitly addresses questions about the role of law and lawyering, including questions involving the search for jobs and choice of legal work that have arisen for students in their legal work during the preceding summer, and that will arise in the semester as it goes on.

In the spring semester of the second year, students register for one of the Elective Concentrations (Administrative Regulation and the Accountability of Public and Private Power; Criminal Justice; Equality and Inequality and the Role of Law and Lawyers; Housing and Urban
Thus, each student spends the entire fourth semester's work in an area of concentration defined, planned, and executed as a whole. The work combines three major aspects: a program of law-school based study that examines legal developments in the area in question from historical, theoretical, and social-science perspectives, a "field" placement in which each student works under the supervision of a practitioner, and of a faculty member, in a particular practice setting within the relevant area; and a law-school based program of reviewing the lawyering issues that are raised by the field work, in order to supply the reflection and perspective that an academic study can provide.

The Third-Year Curriculum provides substantial room for election of courses, departing from the first- and second-year course pattern, which seeks an integration and breadth that a more elective pattern could not achieve. The third year provides an opportunity for students to pursue their interests in greater depth; to fill in substantive areas that they wish to explore further; and to undertake intensive clinical activity, representing clients in courts and administrative agencies. Students approaching graduation often have a cleaner sense of areas of law in which they intend to practice and, in this light, are better able to choose among the options available to them.

As with the institution as a whole, the course of study continues to evolve. The last remaining piece of the course of study is now in place, with the third-year curriculum having now been offered for the first time. Along with other facets of this innovative program, its implementation has been closely monitored, and modifications will be made as its effectiveness is tested in practice.
Lawyers Above The Law

Gustave Harrow

I. Introduction

The trouble with legal education is that it prepares students to be lawyers — as the legal profession wants them; and the trouble with the legal profession is that it is above the law and alienated from it.

Legal education and practicing lawyers are above the law because the predominant teaching predicate is that lawyers are to be taught to serve the “interests” of clients. This places lawyers above the law, because the pursuit of “interests,” and assistance in aid of them, are what law or legal experience is not. To the extent these emphases are predominant in teaching, it is not essentially guided by law. Instead, law or the legal process becomes another technological tool used in furtherance of control, power, and private “interests.”

If the terms “law” and “legal process” have any distinct meaning, they involve normative conceptual constructs and their experiential counterparts, the essential functions of which are to characterize pursuits of “interests” as lawful or not and to delimit or guide these pursuits in directions which are “legal.” This means that law and legal process (or experience) necessarily involve evaluative or “normative” concepts and premises as their essential, inherent and distinctive characteristic, and they, by definition, may not be secondary.

The practical result of confusing the pursuit of interests with the application of law, or the experience of legal process, and of defining the lawyer’s role as assisting the pursuit of clients’ interests, is that law becomes irrelevant to the role except when disregarding the law would
be an undue risk, i.e., would undermine interests. The lawyer, then, does not function "within" the law in terms of operationally sharing its concepts cognitively or being part of the "experience of law." To control and exploit, rather than to be "within," immediately sets the lawyer apart from the process and experience.

If these premises are valid, and the implications for lawyers are unacceptable, then the entire restructuring of legal education in fundamental respects is necessary. Current legal education, for the most part, implicitly prepares lawyers for this alienated role. Instead, legal education ought to define its own function and define the role of the lawyers, rather than the reverse. Most critically, this should proceed on the basis of an articulated theory of law. Without the latter as a method for redefining roles and consciousness of them, legal education will continue in terms of "interests" as the predominant predicate. Ironically, this also alienates the lawyer from the client, and the result is often a dysfunction in terms of clients’ interests. All players in the game become "objects."

In the analysis below, a structural definition of law is proposed in an effort to demonstrate that definitionally it is a self-contradiction to predicate the pursuit of "interests" as primary. It is a theory from which a lawyer’s role “within” the law can be deduced, without embracing substantive values as preconditions. On the basis of this “structural” definition, some of the key implications for lawyers’ roles and professional responsibility will be outlined.

A key implication is that, when the lawyer is above and alienated from the system in which he works, intense conceptual and psychological contradictions result. One of the results is the effort to develop insulating mechanisms. These tend to separate the lawyer’s work from his own judgment about, and responsibility for, actions taken as the agent for clients.

These insulating mechanisms raise far-reaching questions in many contexts and may signal one of the most disturbing psychological, ethical and legal issues in contemporary experience. This is the problem of determining the genesis and scope of individual responsibility for those who have furthered the actions of collective entities or of other individuals. In general terms, this problem involves acts by agents who are constituents of a legal entity, or acts by agents on behalf of a principal, which have furthered the interests of and are attributed to the principal or entity. Insulating mechanisms are generated when furthering these interests in the performance of these roles contributes to ethically unjustifiable results or illegality. Clarifying the criteria for, and removing
psychological blocks to, individual responsibility of agents generally, and of lawyers specifically, in these situations requires a revision of the conceptual constructs defining their roles. In a legal framework, these revisions necessitate the development of an antecedent jurisprudential theory.

In addition, the conclusion developed here indicates that legal education ought to stimulate and teach the theoretical bases of law not only as a framework for lawyers' roles, but also as the direct and effective way of explicating and revising the prevailing teaching consciousness of lawyers' roles and responsibilities. Through this method, students and lawyers can come to share the experience of a legal system and relate to its participants and themselves as humans instead of objects.

II. Outline Of A Structural Definition Of Law

A. Scope of Definition

A structural definition of "law" or a "legal system" implies a delineation of the formal components or characteristics which are necessary yet sufficient to identify these phenomena without reference to the specific content of any particular system.

The terms "law," "legal system," "legal process," and "legal experience" will be used alternatively to refer to the same phenomena. They are here used, in the first instance, to denote "normative conceptual constructs." The phrase "conceptual construct" refers to an interrelated set of propositions and premises which employ and are expressed through certain key concepts.

1. The single source, which has influenced the theoretical portions of this essay generally, are the works of F.S.C. Northrop, particularly The Meeting of East and West (1946); The Logic of the Sciences and Humanities (1947); and The Complexity of Legal and Ethical Experience (1959).

Northrop, a philosopher, was one of my teachers in law school; he left a lasting impression, of which I was only dimly aware until I started teaching some twenty years later. He is, I believe, one of the seminal thinkers of our time, who started as a philosopher of science and then moved on to social, ethical, legal and human philosophy on all levels. In response to an analysis made by Northrop of some of Albert Einstein's observations, Einstein wrote:

Northrop uses these utterances as point of departure for a comparative critique of the major epistemological systems. I see in this critique a masterpiece of unbiased thinking and concise discussion, which nowhere permits itself to be diverted from the essential.
The premise here is that the conceptual construct, or conceptualizing process, involved in "law" or a "legal system" is normative in character, in that the function of its organizing concepts is an evaluative one. This evaluation refers to certain social interactions in terms of "justifications" of, or "obligations" with respect to, them.

The subject matter of these social interactions consists of empirical events or processes in which the exercise of power, or the use of coercion, in these interactions occur. The terms "power" or "coercion" are used to refer to social interactions in which an individual or group causes another individual or group to comply with its desire, despite a desire by the latter not to comply.

These legal evaluations of "power" are implicitly in terms of relations. The "actors" involved in these relations, when made reference to in the context of a legal normative construct, are concepts. These concepts will be referred to generically as "terms," "persons" or "parties." As such, a legal system is a normative conceptual construct, which is distinct from the empirical events being evaluated. In legal discourse, normative evaluations of power relations are expressed in terms of the concepts "right" and "duty."

The essential definitional premise is that a "legal system" exists when a particular set of legal evaluations, or a legal normative construct, is deemed to be shared in a particular social context, and it relates to and accounts for all power exercised within that social context.

While "law" or a "legal system" are conceptual constructs, the function of which is not only to evaluate, but to control the exercise of power, this does not mean that a "legal system" is definitionally one which must effectively control all power; nor does it mean that the effective control of all power in a given context is a "legal system." Rather, the meaning is that no exercise of power in a given social context is definitionally "exempt" from or outside of the scope of the legal normative construct employed, and that the system is normatively shared and "accountable" for all exercises of power.

The term "legal process" is used as an alternative to "law" and "legal system," to assure that no inference is drawn that the latter necessarily comprises a system or body of "rules" or "laws". Rather, the proposed structural definition of law is equally consistent with the premise that a legal system, in theory, requires no more than one "rule" or "law". This could be the rule that all relations in the system are to be normatively defined by the decisions of one particular "ruler". But for this one procedural premise, the system could be characterized as
wholly "process" rather than "rule" related. The definition does not result in characterizing a legal system as either "rule" or "process" related, but encompasses any and all combinations of these functions.

The term "legal experience" is used as a synonym for "law," "legal system" and "legal process" to assure the inclusion, in the structural definition of law, of two basic components or dimensions, which together more fully express the nature of the subject. While "normative conceptual constructs" are conceptual preconditions of "legal systems," these systems also encompass concomitant psychological or emotive experiences in the social processes to which they apply. The objective in analytically separating these components is to stress the dual character of a legal system. In one dimension it remains "conceptual" in character, as when an observer cognitively constructs concepts and premises. In another dimension it is "experiential," in that in addition to the conceptual component there are ongoing emotive-affective-aesthetic, psychological experiences. While these components coexist, it is useful to distinguish them and to refer, alternatively, to the "conceptual" and "experiential" components. A legal system, however, encompasses both dimensions and they are inseparable counterpart components.

B. The Presuppositions of a Structural Definition of Law

The defining structural characteristics of a legal system as developed here entail three essential presuppositions. These pertain to the mode of cognitive experience involved in normative discourse, the implications of this mode for evaluating the exercise of power, and the conclusion that a legal system exists in a social context when the participants in it relate to a given normative construct in a particular way.

The first presupposition is that normative discourse in general implies that it is meaningful to characterize or measure human conduct in terms of it being "obligatory" or "justified."

The second presupposition relates to the subject matter of normative legal discourse, i.e., specifically, power relations. This presupposition is that, normatively, every exercise of power or coercion requires a "justification."

Together these two presuppositions mean that evaluating or measuring power relations in terms of normative constructs is a defining condition for the understanding of a legal system, and that it is not meaningful to conceive of a legal system except in terms of this condition. They also mean that legal normative discourse has its inception in, and remains wholly focused upon, the justification of power. The con-
trary conclusion, that it is meaningful to speak of the exercise of power as normatively legal or illegal only after a "legal system" has been instituted through a substantial monopoly of power, is a contradiction in terms. Instituting a system of controls cannot induce a normative mode of thought or experience because this mode of thought is intrinsic to cognitive experience and is distinct from power processes. By virtue of this cognitive experience, power is perceived as requiring a justification.

The third presupposition is that a "legal system" is instituted when the participants in a social unit or process identify as, or are normatively identified as, "members" of the unit or process, or when they share, or are normatively deemed to share, the normative conceptual construct invoked. Depending upon the particular normative construct, this identification or sharing may be experienced by or imputed to the participants.

This presupposition clarifies an apparent inconsistency in the dynamics of a legal system, i.e. that the individuals or entities which have a legal "obligation," by virtue of such a normative construct, to comply with an exercise of power despite a desire not to, and despite their personal "justifications" for not doing so, are still legally obligated. They are normatively reconciled to compliance with a particular exercise of power because it conforms with the shared normative construct, which conceptually precedes their individual or personal preferences. However, this presupposition does not necessarily imply the literal "consent" of all members to a normative construct. While, in a particular legal theory, "consent" noting "acceptance" by the participants may be deemed necessary to satisfy this presupposition, it is not the only manner in which it may be satisfied because the normative legal construct may be shared by them without an articulated consent, or may be inferred because they are deemed "members" of a system.

An example in which this presupposition has been deemed satisfied by "consent" is the Declaration of Independence. Implicit in the Declaration's concern for justifying the Colonies' dissolving an established normative legal power relation with the British Crown is a specific theory of law. This theory presupposes the first two presuppositions stated above and constitutes one specific way of satisfying the third. The Declaration presupposes that power must be justified, which includes the presuppositions as to both the normative mode of thought and power, and it specifically declares that the power relation involved in the institution of government requires the "consent of the governed."

It should be observed, however, that the Declaration not only involves a basic procedural presupposition, it accepts a substantive pre-
condition as well. Its procedural antecedent is "consent," and its substantive antecedent is that "all men are created equal" and that they are endowed "with certain unalienable rights." This antecedent illustrates how the essential presuppositions of a definition of "law" can be derived from substantive premises. The broad range of specific substantive criteria in legal systems, which normatively evaluate and functionally control power relations in social contexts are not, however, antecedent to them. The essential point is that the "sharing" of the normative system's first principles is conceptually antecedent to specific uses of power, whether the sharing is acknowledged or inferred.

III. "Rights" and "Duties" as Conceptual Tools For Valuing and Controlling Power

Two basic conceptual tools in legal discourse are used to express normative evaluations in the power context. These are the concepts "right" and "duty". These concepts are abstract symbols which express normative conclusions with respect to power relationships. As symbols for the expression of normative evaluations, they relate or attach to other concepts, i.e. "terms" within a conceptual framework, and do not inhere in empirical interactions in social processes. The concepts to which "right" and "duty" relate, are here referred to as "persons," "parties," "entities" and "terms." The word "term" is most generally utilized as it is least suggestive of an empirical counterpart. The empirical counterparts of "terms" are "individuals," and (individuals in organized activities) "organizations." When it is concluded in legal discourse that, for example, an individual has a "right" or "duty," the meaning is that, in applying the conceptual juridical framework, a shorthand conclusion as to the individual's normative status in a power relation is expressed (symbolically, in terms of "rights" and "duties").

While "rights" and "duties" are distinctive concepts, they each express the same normative conclusion as to any particular power relation, but do so from contrasting perspectives. One perspective is that of the term or party which, in a power relationship, is empowered or permitted to enforce its preference or interest, or have it enforced. This perspective is symbolized by the concept "right". The commensurate perspective is that of the term in the relationship from which compliance is required. This perspective is symbolized by the concept "duty". Because both concepts make reference to the same relationship, they can be referred to as a "two-term" relationship. The "rights" and "duties" in this relationship are commensurate concepts, having meaning in terms of each other, and each has an incomplete meaning without reference to the other.
In every instance in which a legal system is operative in defining relationships between parties in terms of rights and duties, it is necessarily defining the scope and manner in which the system recognizes, permits or implements an exercise of power. In a metaphorical sense, every legal “right,” no matter how complex, represents the power of the system, and it may be said that a person or entity that has a “right” attributed to it enjoys the support and the power of a “public” dimension.

This characteristic distinguishes legal from ethical normative concepts and experience. Ethical discourse does not denote concepts of public enforcement nor, therefore, concepts of “rights”. Rather, it focuses on definitions of “responsibility,” e.g., the “Lawyer’s Code of Professional Responsibility.”

The functions of “right” and “duty” in normatively characterizing legal relations is also distinctive in that, in evaluating relations between any two terms in a conceptual construct, reference is definitionally made to a third term. This third term represents the method for evaluating power relationships in the system. A legal system, then, can be referred to as a “three-term relation.” All legal systems, processes or experience are, therefore, structurally “three-term relations.” While the conceptual normative premises constituting the third-term can identify and justify the exercise of power by specific, organized governmental institutions, they are distinct from these empirical processes. The third-term normative premises and methods are conceptual in character and do not inhere in the empirical processes of counterpart governmental institutions.

It is by virtue of the “third-term” sharing that participating “terms” are part of, or members of, a single legal system. The role of the “third-term” in normatively resolving conflict between other terms can, then, also be understood as investing legal experience with a “public” character. The distinctiveness of “legal” experience, in relation to “ethical” experience or discourse, is also unique in this function. In legal experience or discourse, while interrelating parties or terms may have conflicting interests and may retain conflicting normative convictions, the third-term nevertheless normatively resolves the conflict. Ethical experience does not entail a separate criterion for resolving such conflicts. Where the conflict-resolving term is not present, there may be “ethical” or “moral” discourse, but not legal experience. Legal experience, definitionally, entails such conflict-resolving criteria and methods.
IV. The Public or Governmental Function of the “Third-Term”

As delineated above, rights and duties denote not only relationships between two or more terms in the system, but also their mutual relationship to a third-term, which represents a method and/or criteria for resolving power conflicts. This, again, gives “law” its “public” or “governmental” character.

As noted, for purposes of a structural definition, it is not necessary to consider whether there are substantive preconditions, e.g., a “consent” or “acceptance” explicitly by individuals to justify third-term coercion or power. Rather this definition focuses upon the explication and clarification of cognitively necessary concepts in relation to the indicated subject matter. “Sharing” a construct is a defining condition.

The concept “right” may be described as the “empowerment” of a particular term in the system. By definition, the empowerment is authorized or circumscribed by the third-term normative construct. Therefore, every “right” denotes third-term support of the exercise of power, that implies third-term “permission” to exercise power.

Rights may be substantively defined directly by the third-term normative construct, or this function may be relegated by it, within parameters, to particular entities or persons in the system. The only distinction is that, when power is delegated to a person or entity in the system, it is a discretionary. There is, otherwise, no essential distinction in character between the two forms of normatively authorized power.

Similarly, no distinction can logically be made on the basis of whether a “permission” to substantively define “rights” is given to an empirically functioning “public” governmental institution (third-term equivalent), or to an empirically participating non-official “private” person. The progression in permissions to exercise power, from a third-term “public” or “governmental” entity or subdivision, to non-official “private” entities or persons, does not affect the structural dynamics described above. Both empowerments stem from the same (“public”) third-term conceptual construct in the three-term relationship. Therefore, a distinction cannot be logically made between “officially” prescribed rights and duties and those prescribed non-official “private” parties, since all devolve from one third-term normative construct. To conceive of rights and duties as having a source in the “private” person, or outside of the third-term normative construct, is a contradiction in terms.
V. The Interrelated and Commensurate Character Of all Terms in the Three Term Relationship

Because the function of a legal system is to normatively evaluate and control the exercise of all power by all terms within the system, there are certain commensurate implications with respect to all of the terms.

As to third-term normative constructs, any empirical governmental entity designated by virtue of these normative constructs to exercise power in resolving conflicts, and to enact or enforce "laws," has the "right" to do so. However, it also has the duty not to exercise or permit the exercise of power by itself or by any term, which violates or undermines the applicable, authorizing normative construct. This is true because, by definition, the legal system limits and accounts for the exercise of all power, including the power exercised by a third-term governmental counterpart.

Similarly, for any right attributed to a participant term (i.e., any discretionary permission to exercise power) duties are entailed since, by definition, there are parameters to any such permission. The right to exercise system-supported power entails the duty not to exceed the "right" or power allocated. Because this power is derived from the third-term normative construct, the "duty" involved can be described as relating to the third-term as well as counterpart terms. Participants' use of powers or rights entail duties not to infringe, undermine or disempower the third-term normative construct, i.e., the legal system, which authorized the rights.

Accordingly, while a "right" as a juridical concept is used to symbolize the status of a particular term in a legal system, and may be described as an "empowerment," this is a description of one perspective in a three-term relation. It denotes, in addition to commensurate of "duties" to comply for the other terms, a duty for the empowered term not to exceed the parameters of the permission allocated to it.

Also, as to any "duty" attributed to a participant term to comply with the rights of other terms, a commensurate "right" is implied to resist any excess or misuse of the other's rights. When the parameters of a "permission" are violated, commensurate rights to rectify the infringement are triggered.

The result, logically and juridically, is that there is a complete and pervasive interrelationship of "rights" and "duties" among all three terms. Hence the "three term" relation (as a definition of law and legal system) means that the normative status of any term can only be un-
understood in terms of its relations to the other terms.

It is useful, in conceptualizing the multi-faceted character and inextricable interrelations of rights and duties in legal experience, to schematically present the conceptual components and relations involved. This diagrammatically illustrates the interrelations of rights and duties and how these concepts are definitionally meaningless if contemplated out of relationship to each other.²

Basic flaws in legal analysis result from the failure to clearly distinguish between the conceptual constructs employed to normatively

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2.

*Schematic Presentation of a Structural Definition of Law*

**Shared**

**Third-Term**

**Normative Construct** and Empirical “Governmental” Counterpart

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![Diagram](attachment:image.png)
characterize empirical events, and the empirical events themselves. This failure results, in varying degrees, in assuming that the conceptual constructs are inherent in the empirical events, the identification procedures recurring ambiguities as to the source and meaning of legal doctrine, and rigidity in the development of its premises, categories and applications. Most significantly, it transposes "rights," which are concepts, into "interests," which are empirical facts and processes.

This failure to distinguish between conceptual and empirical phenomena is induced, in part, by misunderstandings of the character of the concepts "right" and "duty". It must be understood that the concepts "right" and "duty" do not evaluate individuals out of the context of a relationship, and that the terms "right" and "duty" have meaning only as commensurate evaluative concepts which pertain to the same relationship. A failure to recognize this can result in conceptually cutting off legal "rights" from commensurate "duties". In isolating "rights" from commensurate "duties," there is loss of limitations to and responsibilities for empowerments and loss of sight of the three-term relationship which characterizes legal concepts. This lays the groundwork for converting "interests" into "rights" and for self-contradictory doctrinal analyses.

The historical and doctrinal consequences of this ambiguity are of first-order magnitude. When juridical "rights" are confused with and defined in terms of "interests," their development hinges upon the social recognition accorded to, and the dominance of, "interests" which
are then used as the source for defining “rights”.

The dynamics involved are illustrated in American constitutional history by the genesis, development and decline of “property rights.” When these were accorded “substantive due process” protection, the implicit assumption was that these “rights” were “unalienable,” inherent in the “pursuit of happiness” and that they in some way had their genesis in empirical pursuits rather than in the legal conceptual constructs applied to them. This blocked a gradual, coherent evolution in the development of these rights and fostered their transformation into fighting slogans. When these “rights” were recognized as the formulations of normative conceptual constructs, a logical and definitional block to their transformation was removed.

This key distinction between normative conceptual constructs and empirical societal events is easily clarified by distinguishing the constitutive norms of a legal system from a counterpart “government,” which may be identified through the normative construct. As described above, an institutionalized “government” may qualify, in terms of a basic normative conceptual framework, for the “empirical” third-term counterpart role of further defining, creating and allocating rights and duties. Its “legality”, however, is not self-defining; it is derived from the constitutive normative construct. On this foundation, any permission to exercise power is implied from “third-term” conceptual norms, and only derivatively from the empirical counterpart, institutionalized “government.”

“Rights,” then, have meaning in terms of permissions to invoke governmental enforcement. When a legal system, via a governmental counterpart, empowers non-official persons, e.g., lawyers, with the capacity to formulate or further legally cognizable and enforceable rights and duties, the legal system is as fully involved as when it empowers “official” entities with the same capacity.

Also, while a “right,” by definition, denotes a power to enforce, every “right” attributed to any term in the three term relation implies commensurate “duties” in the other terms. Therefore, the structural definition of law also makes clear that state enforcement does not simply relate to the “rights” of the parties. It relates as well to “duties”. This underscores and illustrates the definitional conclusion that no term in a legal relationship can exercise a power or right which violates the rights of another term.
IV. Implications Of The Structural Definition Of Law For Lawyers’ Roles And Responsibilities

It is beyond the scope of this discussion to offer a philosophic demonstration of the structural definition proposed. However, the definition is premised on the assumption that it clarifies and explicates pervasive implicit meanings historically. It is also presented with the conviction that cognitive or epistemological necessities underly this usage.

A. Rights and Duties vs. Interests

As developed above, the structural definition proceeds on the premise that all entities within a legal system are conceptual constructs, understood and defined in terms of clusters or combinations of legal rights and duties. Because a designated entity within the legal system has meaning in terms of a set or constellation of rights and duties attributed to it, it is a symbol (like a mathematical symbol) for expressing a given set of relationships. For example, the established terminology used to designate entities generically within a legal system is “person”. This is a concept which does not have a specific or necessary one-to-one physical counterpart. It may refer to physical individual, or to a set of relationships, e.g., a corporation, or unincorporated association. These designations may also be understood as symbolizing “terms” within the system, as distinct from words which describe functions outside of it. Interests and wants, however, are defined by individuals outside of their role in the legal system; and they are delimited by the legal system.

Thus, when the term “guardian” is used, it is a legal concept representing, in symbolic form, a constellation of rights and duties. It is not a description of a biological or other empirical set of facts, e.g., a biological mother or father. If this concept is used in a legal context to describe the biological parent, it is a way of summarizing the legal status or position of the parent. In this way, the term “guardian” can also apply to an individual who is not a parent. Likewise, terms describing public offices, e.g. “president,” denote a complex set of relationships — rights and duties, powers and responsibilities. Every four years or so it refers to a different biological individual.

B. The Lawyer as a “Term” in the Legal System

The question, then, is what are the defining relationships signified by the term “lawyer” in our legal system. The etiology of the term
makes it apparent that it is used to designate a "person" or "term" in
the legal system which has a special relationship to the legal system;
specifically, a role in implementation of the system itself. The term
"lawyer" therefore, signifies an entity in the legal system; specifically
one which is defined as an agent in the system which, in some way,
assists in its implementations. In our system, a lawyer is designated "an
officer of the court" and courts possess inherent authority to regulate
and set standards for lawyers.

A "lawyer", then, functions as an agent of the legal system in aid
of clarifying, applying, and furthering the system. This role entails as-
certaining for clients the implications of rights and duties and assisting
clients in effecting them. Regardless of the specific way this is done, the
salient point is that the lawyer's function is necessarily defined in terms
of applying legal rights and duties, and not in terms of fostering or
furthering biological individual's wants or "interests".

This characterization of the lawyer's role is not antithetical to an
"adversary" system. An adversary system provides that "clients" have
available to them (for a fee) the services of a lawyer in clarifying and
defining the process accurately and having it appropriately applied in
the face of opposition. This does not entail furthering the "interests" of
the client, which is a function in a distinct realm of discourse making
reference to empirical facts.

An individual's "interests" may find support in the legal system,
but this only constitutes a convergence of disparate factors. The salient
point is that the nature of legal experience is such that it permits and
may justify the negation of an individual's wants or interests. Nor does
adversarial representation entail or permit the deprivation or diminish-
ing of another person's rights. Because specific rights and duties are
counterparts of the same concept, the appropriate application of rights
and duties, as seen in the definition, cannot have the effect of under-
mining another person's rights. Any inappropriate application of either
rights or duties on behalf of a client results in an inappropriate applica-
tion to another person, the client's legal counterpart. Therefore, be-
cause the term "lawyer" signifies a function in terms of furthering legal
rights and duties, it is a function which is, conceptually, wholly dispa-
rate and distinct from the process of furthering individuals' empirical
interests; and the incorporation of interest furthering into the generic
definition of a lawyer's characteristic role is a contradiction in terms.
C. The Lawyer and “An Independent Professional Judgement”

The codes of professional responsibility make clear that the lawyer owes his client the full, complete benefit of his “independent professional judgement.” The concept “independent professional judgement” is useful in that it aptly sums up the unquestioned fiduciary character of the lawyer’s professional obligations to the client. It was developed and is expressed largely in terms of the lawyer’s duty to avoid any influences which conflict with or may impair his ability to render a completely unbiased and totally focused professional service to the client. Accordingly, the lawyer must not be influenced by his personal interests, the interests of other clients or the interests or power of third persons. Even an “informed consent” may not ordinarily waive these requirements, for a lawyer must be dedicated to serving the client’s interests, without “conflicts of interest.”

Yet this dedication produces, in concept and in practice, a self-contained relation between lawyer and client — outside of or “above the law.” This representation of unqualified interests is translated into the duty of “loyalty”.

The client’s unqualified interests have no intrinsic or definitional relationship to the legal system and to the legal rights of other persons. Interests are wants — which are empirical events not found in or defined in terms of the legal system. Therefore, when the lawyer’s role is defined in the traditional terms of “loyalty to client,” two misconceptions are involved: that lawyers represent “interests” and that the lawyer’s fiduciary responsibility runs to the client, not to the legal system. When the role of the lawyer is understood as representing or securing legal rights, on the other hand, this duty of “loyalty” to further interests becomes a self-contradiction. Rights imply duties, and duties imply commensurate obligations to the client’s legal counterparts and, hence, to the system.

The structural definition of law, therefore, implies an “independent professional judgment” in assessing and securing a client’s legal position, not the client’s interests. The lawyer’s assessment and assistance is not to be impaired either by the lawyer’s self-interest or the client’s interests. Thus, when a lawyer’s assistance is predicated on a “calculation of risks” for the client’s interests, there is an essential disregard of the lawyer’s role and responsibilities. Actions which are the product of a computation of risks compromise and contemplate violation of the rights of the client’s counterpart, which contradict the lawyer’s function. To assist in a way which ignores or fails to involve an
independent judgment as to the client's *legal* position is to function as a non-lawyer.

Also, a lawyer as a specially designated agent in the system is an implementer of the law in terms of the system's internal process, i.e., its concepts and meaning. This implies that the lawyer is responsible for formulating an independent judgment as to this interpretive function and that, in formulating a judgment, the lawyer cannot ignore the *purposes* or objectives of the system. To do so would be tantamount to forfeiting professional judgment. Ignoring the purposes of the system would inevitably mean that lawyers could systematically employ tactics designed to exploit technicalities and flaws in the system on the theory that a client's *interests* are the essential criterion for professional judgment. A lawyer who has suspended judgment as to the consequences of his actions for the system, i.e. who has suspended his own judgment as to whether actions support or undermine the system's structure, is not acting professionally, and is acting as a non-lawyer.

While one function of the lawyer is to further or secure the client's legal *rights*, the lawyer also has an obligation to form his own judgment and to *assist* consistently with his assessment of consequences for the client’s legal counterpart (which is the same as assessing the consequences for the system’s purposes). That is to say, if the lawyer's function is to secure the objectives of the legal system for his client, it is also his duty to respect them for the clients’ counterpart. This means he cannot inevitably slide into a calculation of risks; and he cannot formulate a judgment which is purposefully delimited by “technical” analysis, which consequently fails to incorporate the system’s purposes. This would be a calculated *partial* judgment, rather than an independent professional one; and this delimitation is a forfeiture employed to “beat the system,” not to implement it.

At present, the lawyer functions in terms of the two disparate and distinct realms of “law” and “interests,” and the lawyer's role is defined in terms of relating and negotiating these realms. Being in the middle means experiencing pervasive opposing pulls, and yielding to “interests” becomes inevitable. When a lawyer is expected to negotiate and further a client’s interests despite a professional legal judgment which would inhibit or prohibit this, the development of insulating mechanisms is also inevitable. The rationale develops that the lawyer should not be accountable in the same way if his role *requires* him to assist despite his *own* contrary judgment. On this basis, operational immunization is implied. On the other hand, where professional conduct is confined to assistance which is based on an independent judgment as
to legal position, this insulation vanishes because the lawyer is then expected to adhere to his judgment.

When the lawyer's function is forfeited by relinquishing judgment, the lawyer no longer functions as a lawyer, i.e., as an integral component of the legal system. The lawyer is then outside of and is using the system; thus, any "immunities" which might attach to the lawyer in the system are lifted, and the lawyer is answerable for aiding an unlawful act in the same manner as a non-lawyer.

D. Summary of the Impact of Confusion in Roles

As described above, the confusion inherent in defining lawyers' roles in terms of "interests" results in a fundamental distortion of role and in the basic pragmatic consequences for and mode of rendering professional services.

Definitionally, if the scope and the central focus for the lawyer is described in terms of rights and duties which are legal concepts, it cannot be described in terms of economic, social, political, emotional or psychological facts or wants which are "interests". Similarly, legal concepts exist and can only be defined in terms of a legal system — not economic, business, political or psychological systems. The business of the lawyer, then, is to secure the client's legal rights as defined by the legal system, not to manipulate the system for the client's interests.

In addition, the securing of legal rights is, by definition, inconsistent with depriving others of their legal rights because rights are the conceptual counterparts of duties. Therefore, the lawyer, in securing rights can never assist the client in violating, disregarding, or undermining the legal rights of others, including the system itself.

For the lawyer, therefore, there is a fundamental difference between representing interests and legal rights. "Interests", as such, are what the client wants. What the client wants does not necessarily take account of the client's legal "rights". When the lawyer does assist in furthering interests as such, his function involves a calculation of risks in light of the legal system's coercive potential, something quite different from representation to further and secure legal rights.

VII. Implications For Legal Education

The dilemma and ongoing intense conflict presented by the alternatives of furthering client's "interests" in contrast to protecting their legal "rights," needs sorting out in law school. If legal education is to
come to grips with the confusion resulting from this dilemma, it must first explicate its existing prevalent presuppositions and their implicit inferences for lawyers' roles in the legal system. When this is done, it will be seen that the most determinative inference for legal education at present is the same as it is for practicing lawyers, i.e. that lawyers are to *loyally* serve client's "interests". This places lawyers and legal education "above the law."

From the client's perspective, believing, as a result of the same prevailing presuppositions, that the lawyer is there to serve clients' interests means that no one in the system thinks in terms of "rights" but rather a low-risk calculation of "getting caught." On this assumption, the lawyer's analysis of risk is reported, and the lawyer is under realistic competitive pressure to comply.

The capacity to resist such pressure is basically flawed by the lawyer's own role model. The only way to withstand this kind of pressure is to incorporate and integrate a lawyer's role in the legal education which conceptually places this "risk computing" function off-limits. Where this is lacking, there is no effective method or model for withstanding concrete economic pressures. When a lawyer *is* clear about role, however, he can make it clear to the client, and he has an effective shield against the intrusion of expectations geared to a calculus of interests and risks.

There are implications here also for a lawyer's self-image and the public's low image of the profession, which are inevitable when the professional renders legal assistance in furtherance of doubtful objectives. As seen through the structural definition of law, the essential components of a legal system and legal experience contradict this possibility. The substituted presupposition for legal education would foster a role for lawyers in which both their conceptualization and experience of a legal system takes them back into it and in which law is not seen as a technological instrument for other purposes without its own internal meaning and conditions.

When the pursuit of "interests" is predominant, the lawyer is not only alienated from the legal system, he also tends to become alienated from his client, since the client may be *experiencing* the system in terms of a perception and feeling of "justice," which the lawyer, as extrinsic technician, is not. Alternatively, when the client shares or anticipates this alienated "interest" role, the lawyer is likely to regard it exclusively, and it flows over into relations with the client. An "interest" defined role results in the profession's gravitating toward and formulating mechanisms for limiting responsibility for the consequences of
lawyer-assisted clients' actions. This insulation is the opposite side of the coin of alienation. In this situation, when lawyers acquiesce in or effectuate objectives of the client which are antithetical to basic values of the lawyers, or which result in undetected evasions of the law or illegalities, the lawyer feels in need of a role-defined immunization from responsibility.

Clarifying the criteria for, and the parameters of, individual legal responsibility of agents generally, and of lawyers specifically, in these situations requires a revision of the conceptual constructs defining roles. These revisions in constructs necessitate the development of an antecedent jurisprudential theory, with organizing concepts which have the capacity to define roles and imply criteria for individual legal and professional responsibility.

In this context, the above analysis implies two basic objectives for legal education. One is to heighten and integrate an understanding and consciousness of the central character of law and legal theory, and the significance of their implications for the practicing lawyer. Another objective is to prepare students for the inevitable conflicts between these implications and the demands of employers or clients to serve "interests".

In American culture, both theory and emotion (emotive-affective-aesthetic experience) are minimalized and suppressed. The focus of conscious attention has been on a pragmatic, middle level of experience which emphasizes "practical" results. On the one hand, this has produced a certain receptivity to and capacity for change. On the other, it has meant a certain impatience with and resistance to theoretical inquiries. The result is that theoretical presuppositions have remained largely unexplicated; and they have become susceptible to conscious and deliberate distortion to satisfy power or pragmatic pressures and preferences. As a consequence, "interests" tend to be seen as irreducible first principles. This has been compounded in human relations by trivializing and not developing emotional-aesthetic capacities. The result of this is to dull sensitivities to the consequences of behavior, thereby reinforcing a focus on self-interest.

The implications of these emphases for legal education have been that there is no effort to seriously study, research or teach theoretical bases of law. Even in the heyday of American legal realism (and in its aftermath), analysis was (and is) essentially relegated to the application of sociology, political science, psychology and economics to "law". This has been done by legally-trained teachers who have acquired limited skills in these areas; rarely have there been professional philoso-
In addition, with some, though at times noticeable exceptions, other disciplines, such as political science, sociology and economics, are instrumentally applied to the study of legal processes, i.e. they are merely seen as tools for conceptual clarification of what the dynamics of law "really" are, and how it functions. This does not ordinarily entail probing into the essential presuppositions of legal experience except in an indirect way. Rather, it assumes the objective of a sophisticated understanding of legal processes for its more pragmatic application.

With regard to teaching, there is no serious effort to treat theory as an acceptable, respectable, or a necessary area of study, let alone a central one. In the main, at most, it may be toyed with in an introductory session or two to a subject. The message is that it has been used as a take-off point to stimulate some interest and has no intrinsic relevance.

There is, then, no opening up in law school to the preconceptions which necessarily underlie any field of learning or experience. There is no meaningful or sustained scrutiny of the implications of these presuppositions for the role, functions and responsibility of the lawyer.

At the same time, legal education is still largely unrelated to the functional, operational needs of the practicing lawyer and does not effectively prepare students for the practice of law. While there has been a resurgence of interest and dedication of some resources to clinical programs, these are still only available to a fractional part of the entire student population. A modified "case book" method still predominates. This method is occasionally, but not systematically, instructive with respect to skills needed in practicing law, i.e. in terms of client relations, advocacy, writing or negotiating skills, and does much less to sharpen analytic skills than it purports to do. Indeed, the traditional method is a circuitous means for conveying to students the necessary information and understanding of existing rules of law and provides very little assistance in effectively using these rules in practice.

The result is, again in a rather ironic way, that this traditional method has imposed itself as a buffer, insulating not only theory and emotive or experiential understanding of legal processes from the student, but also as an obstacle to efficiently acquiring the information and skills necessary to practice law. The traditional case book method has resulted in an inordinate waste of time in law schools.

Although taking the apprentice out of the law office and into the case-book law school has not been efficient in terms of acquiring skills necessary to practice law, it has been highly efficient in terms of instil-
ling an orientation which places lawyers above the law and in teaching them that their function is to further "interests," in contrast to "rights" of clients. It does this in much the same way that "basic training" in the military reorients a civilian's consciousness into a soldier's discipline and, if necessary, the capacity to kill without reflection.

While law school does not entail the physical hardship of basic training, it is geared to accomplish the same psychological indoctrination, or consciousness revision. The traditional methods of law school accomplish this goal by rendering the student relatively powerless. Basic training does this by insulating and confining the trainee and implementing arbitrary and harsh conditions without explanation. "Civilian" identity is quickly set aside, and the ground is right for planting a different, or substantially modified, identity or consciousness. Traditional law school methods do this by causing learning to be as indirect, mysterious and as hard as possible. The result is a sense of powerlessness, which renders students ripe for the inculcation of a modified consciousness. In large measure, through the conceptional model of the "adversary system," students are taught to understand the legal arena as one in which the lawyer furthers "interests." In this way, also, students come to need and relish a sense of power.

In addition to the need to integrate "theory" into legal education (as one indispensible way of revising the prevalent adversary, interest-focused consciousness) it is necessary to bring "practice" back into legal education. This can result in a more realistic sense of power and less student alienation from the law. It requires comprehensive, systematic and required clinical programs, with particular emphasis on supervised internships. It also means reintroducing more direct learning of the "black letter" law for faster and more thorough learning of certain basic tools. I do not mean to imply that critical analysis is not essential; rather, I simply recognize that practicing lawyers need basic knowledge of the rules to be competent. I would prefer to see a reversion to a direct apprenticeship in the law office than the continuation of a method which wastes human resources in this way.

In law school, there is a failure to integrate the "experiential" or emotive component in law to acknowledge, for example, a "sense of justice" or injustice as central to legal experience. Instead, the student is cut off from his own feelings in this respect and confronted, from the first day in law school, with contemptuous attitudes toward "gut reactions." The message is that these naive student reactions must undergo immediate radical surgery to disembowel them from the experience of "being" a law student and lawyer.
If the above definition of legal experience and its epistemological and psychological assumptions are valid, this failure means cutting off a basic, integral component of legal experience. The concomitant, necessary counterpart of “conceptual,” cognitive experience is emotive-feeling experience. The consequence for the student-becoming-lawyer is not only to cut him off from his own feelings, but to cut him off from his client’s “experiential” consciousness of law and “justice.” Except for clients who are inured to ongoing legal involvement and entanglements, or those who are consciously manipulating the law as an instrument to further interests, clients usually have strong feelings — expectations, hopes, fears, consciences — in relation to their legal experience. The lawyer who is cut off from these feelings in himself is also cut off from them in clients. The result is, again, that the lawyer is outside of and above the law.

The lawyer also loses sight of some of the most significant issues for his client. The lawyer remains largely unaware of, or insulated from, feelings which may not only be significant but central to the client’s experience. In response, clients “learn” that this component of experience is not relevant to the law and fail to urge their inclusion in the legal arena. As a result “legal” services rendered clients may be incomplete or may exacerbate rather than resolve the client’s problems. The lawyer, then, is at odds with the client, although this may remain unarticulated.

The implication for legal education is that we must foster integration of the “experiential” component in law, and, in doing this, enable the student to retain or make contact with this component in himself and in clients. Various innovations can further this objective. First, it is necessary to inquire into and articulate theories of law which imply significance for the “experiential” component in legal processes for all participants. This means, again, that inquiry into legal theory must be a core concentration in legal education.

Pragmatically, consciousness of the emotive in legal experience means experiencing it. This implies various modalities, such as simulated exercises in attorney-client relations, negotiations, arbitration and litigation geared to heighten awareness of experiential aspects in these situations. More important than simulations, however, is supervised clinical or intern experience with real clients. To date, clinical programs, to the extent they are available to students, are largely geared to acquiring technical “practice” skills, which, in effect, means a focus on power. In this clinical context, a basic complement can be introduced by stressing the “experiential” component. Faculty and peer
analysis of and commentary on student participation in real-life situations can serve to heighten awareness in an intense manner. We must confront in clinical situations the tensions created by consciousness conflicts in order to realistically prepare students for the dilemma which will confront them.

In addition, literary and dramatic portrayals of law in human experience can have an enormous impact on consciousness revision and awareness of the emotive component in legal experience. In addition to classic and current works of literature, there is a vast store of films which have themes in this precise area. These should be viewed in the classroom. To reap the benefits that can be realized through this method, it is imperative that it be treated as seriously as any aspect of the curriculum.

VIII. Conclusion

There is a pressing need to re-define lawyers’ roles and to prepare students by translating theoretical issues into a new consciousness in the performance of professional functions. This means sensitizing professionals to the profound implications of their roles.

The study of legal processes can then develop an integrated consciousness of role which is not fundamentally conflicted and which has a cohesive theoretical framework. In this way, programs can integrate and accord an appropriate significance as well as responsibility for lawyers’ roles, and lawyers can become integrated in the legal system, and integrate their work with themselves.
A Semi-Modest Proposal: Is a Little Business Sense Too Much to Ask?

Marjorie Holmes

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Having worked for several corporations prior to attending law school, and presently working as in-house counsel for yet another corporation, I have come full circle in my view of lawyers. While traversing that circle, I have worked as an associate dean in a law school, as a civil litigator, and now primarily as a negotiator. In all these areas, lawyers display a common failing: they cannot or, worse, do not know how to solve problems. To a great extent, the fault can be attributed, I believe, to our system of legal education.

Lawyers in practice can be divided into two major categories: A) those who are primarily involved in transactional work, and B) those who are primarily litigators or adversaries. My experience suggests that 85%-90% of practicing lawyers do so on a transactional basis, that is, their primary function is something other than going to court. They may be shepherding business deals, working for corporations, working in government, or representing private parties, attempting to prevent or resolve disputes by methods other than litigation. Let us examine then how and what law students are being taught and whether their legal education prepares them for this transactional business.

When one examines a law school curriculum today, it appears remarkably unchanged from generations past. Courses include Contracts, Real Property, Torts, Constitutional Law, Civil Procedure, Criminal Law and/or Procedure, with various levels of writing and research skills thrown in, usually some type of oral advocacy, and various electives (often determined by one's own state bar exam). Most "practical" courses emphasize litigation skills. Few of the electives, if any, cover important skills such as negotiation, communication, or methods of alternative dispute resolution. Law students graduate from law school with a solid foundation in substantive law, but sadly lacking the tools to
build on that foundation.

The foundation is undisputedly important. Casebooks, which continue to be the primary teaching tools in most law school courses, are comprised almost exclusively of examples of adversarial proceedings — court cases, usually appellate proceedings lacking any human content. While case law may give us precedent, an essential tenet of jurisprudence, and a forum for exhibiting the adversarial talents of lawyers, it does not teach students practical ways to prevent and resolve disputes. I am often told by business people with whom I deal daily that lawyers are not practical and that their greatest failing is not understanding how the business world works, i.e., an executive wants a problem solved in a succinct, practical and quick manner, grounded in law, affecting the economic bottom line as little as possible. Yet the cases one studies in law school, which are the result of expensive time-consuming litigation, do not meet these criteria. Recently a corporate vice president expressed his frustration to me that one of our outside counsel was so left-brain-oriented, such a linear thinker, that he could create nothing but new motions to file.

Statistics tell us that approximately 8% of all lawsuits actually go to trial. Why, then, is the overwhelming emphasis in law school on case law and litigation skills? Law students graduate with a distorted notion of how the law works and with the one-dimensional misperception that the pinnacle of success is to be a well-known litigator. Problem-preventers and problem-solvers need to be added to that pinnacle, and law students need to graduate with some sense of how to fill those roles.

Lacking ability to negotiate
I propose that the law school curriculum be transformed in the following ways:

1) Because negotiating a contract or reciprocal easement agreement is as important as knowing the underlying law, the teaching of negotiation skills should be incorporated into basic substantive courses, such as Contracts and Real Property. In addition, a separate course in general negotiation should be offered.

2) Knowing how to structure settlements and to analyze the risk involved in each element of a settlement is of crucial importance to transactional lawyers and litigators alike. A course in which these skills are taught would enable law students to think (as lawyers should constantly) in settlement terms.

3) As lawyers, we need to develop our right-brain way of thinking. We need to be more creative in the ways in which we approach problems, especially in devising and structuring settlements. Creativity, which recent studies suggest can be taught, needs to permeate the law school as a whole.

4) Law schools should teach the full range of alternative dispute resolution processes, e.g., mediation, arbitration, “mini-trials” and how each can best be utilized. At a minimum, mediation should be taught as a class unto itself with the other alternatives being combined into a second class.

5) All law students should be required to take a course in communication and interpersonal skills. Lawyers who don’t listen are destined to failure. Problem solving means being able to elicit the appropriate information from a client and to communicate back to that client effectively. Not surprisingly, much of this communication is by telephone and the course should include — as mundane as this may sound — proper use of the telephone. Many lawyers are abrupt or constantly interrupt a telephone conversation with a client in order to take another call, speak to the secretary, or sign letters. Communicating effectively also means writing in plain English, not “legalese.” Although we all may have learned to write that mythical legal memorandum to a senior partner, lawyer-client communication is a very different animal, and law students need to be skilled in both types of writing.

6) Law schools should establish dispute resolution centers, perhaps modeled along the lines of some neighborhood centers, which presently exist to resolve disputes among neighbors,
small businesses, landlords and tenants, and which avoid the cumbersome aspects of government involvement and legal representation. Students would participate for clinic credit under close faculty and community supervision.

7) Certain substantive courses, especially those in the family law area, should no longer be taught by the casebook method, but rather, should emphasize non-adversarial resolutions. (Other substantive courses might still use the casebook method, but not as the sole focus.)

By implementing the above suggestions, law schools will respond to the real needs of our profession and our society. The time has come for law schools to acknowledge what lawyers actually do and then begin to adequately prepare law students for their role as problem solvers.
Liberal Values in Legal Education

Duncan Kennedy

_Duncan Kennedy is a professor at Harvard Law School. He has taught a wide variety of subject areas, including Contracts, Torts and Property. Recent attention has focused on his involvement with the Conference on Critical Legal Studies. This is a lightly edited transcript of a talk given to a SALT conference on goals in law teaching at N.Y.U. Law School in December, 1979._

The subject of my essay is the role of liberal law teachers in legal education. I want to address a problem that seems to have emerged for people like us in the last fifteen years as legal education has gone through various changes. There's a younger generation of teachers who one might have expected would have had a significant impact on what we tend to see as the conservative character of legal education. A much more liberal younger generation of law teachers has appeared, a lot of them blacks and a lot of them women (not a lot of blacks or women by any absolute standard, but, compared to the incredibly small number before, a significant number). At the same time, many young white male teachers have come to feel that they ought to be getting their values and their politics into their educational activity. We might have expected, then, that legal education would be evolving into something quite different than it was before, with a different kind of impact.

Even if these younger people have not taken over schools, they ought to at least represent a counterforce within their institutions. There ought to be a real sense that legal education is a battle ground between conservative and more left approaches. I don’t think that has really happened. I think the sad fact is that the increasing number of blacks and women on law faculties, the increasing number of young white male teachers who are oriented in their own minds to “infusing legal education with values,” have actually stabilized legal education. They haven’t in any way reduced its substantively conservative content and impact. What looked like a potentially politically significant event has been largely co-opted by the institutions where this kind of younger faculty are teaching. (Of course, I’m not just talking about younger faculty — I’m talking about liberal faculty of all ages.) It didn’t happen. It doesn’t seem to me to be happening. Let me explain why I think
that is the case.

My most basic point is that the way we have collectively gone about trying to introduce our politics into legal education has been counterproductive. In order for my argument to make any sense, I should first say something about where I'm coming from politically. My critique flows out of a fairly particular political position.

I can’t describe that position in terms of a blueprint for a future society, but the general notion is that our society is constructed around illegitimate hierarchies, lots of different illegitimate hierarchies, and that it’s also constructed around very complicated bureaucratic, ideological control systems which make life dead, painful, generally unpleasant, and also reinforce the hierarchies. I don’t want to give much of a general definition of illegitimate hierarchy except to say that it’s a person with their foot on someone else’s neck.

Illegitimate hierarchy is pervasive. In our own lives, illegitimate hierarchies and these bureaucratic control systems are very heavy. For example, the tenure system that we all operate inside of seems to me an illegitimate hierarchy. There are untenured faculty members and tenured faculty members. The making of that distinction and the application of the standards for tenure are a mechanism by which people with tenure oppress people without tenure. Of course, it’s not the same as the oppression of the people who are the objects of wipeout, quasi-genocidal economic destruction in the big cities. But it’s nonetheless a form of illegitimate hierarchy, of oppression which is built right into our lives. The tenure process is, first of all, incredibly arbitrary; second, it’s degrading. It’s a way in which people with tenure communicate to people without tenure that they’ve got to kiss ass and toe the line and figure out what their elders and betters want, and do it, if they want to survive in the institution.

So it’s not just an illegitimate hierarchy, it’s an illegitimate hierarchy with a function – the function of maintaining dominance, socializing people, getting them to incorporate the values of people with tenure, getting them to submit on many different levels of their selves to this alien thing. And it has a second function as well: the tenure process sustains the hierarchy of law schools. We are organized into a hierarchy of law schools. When I was afraid that I wouldn’t get tenure, a very important meaning of that for me was that I would be booted down the hierarchy. It was very frightening. People at all levels of the hierarchy coming up for tenure have to deal with the fear of status degradation that will happen to them if their colleagues get together and say, finally, “This person has to go.”
They won’t say, “We don’t like you.” What they’ll say is, “You’re no good.” When I felt those beams of possible judgment aimed at me, at that point the meaning of the hierarchy of schools became incredibly clear. The tenure system allows each school to pretend to itself that it has a place — an achieved, justified level that might go higher. It allows everyone to say, “At all costs, we must not sink lower.” The longing to rise higher and the fear of sinking lower function for the schools the way they function for the individual professors. They generate demands, norms. They make the lower schools imitate the higher schools. And they cause people to do terrible things to each other for fear if they hire this person, or let this happen within the curriculum, they’ll sink. And they do terrible things to each other through the longing to scramble up the ladder to the roof.

The ladder is bullshit. The differences asserted among the schools in the hierarchy are not, from any point of view that I accept, serious, legitimate, meaningful, hierarchical differences to which I can subscribe. The hierarchy is one in which the very good people in a lower status school will have trouble ever escaping the feeling that they are worse than very bad people in a higher status school. People who are no good are able to use their hierarchical position to oppress people who are, to my view anyway, better, although lower down in the hierarchy. The second function of the tenure system — after the function of internal control of younger faculty — is to maintain this false hierarchy of schools.

These aspects of law school fit into and also help to create and legitimate the class, race and patriarchal hierarchies of the whole society. Law schools are part of a set of institutions that convey a message by their very structure. They all reinforce the legitimacy of the economic hierarchy in which some people have lots and lots of money and power and access to knowledge, and other people have none or very little. Between the bottom and the top, people are strung out in a long series, and everyone is desperately concerned with where they fit in. Everyone’s behavior is invisibly, yet powerfully shaped every day by the necessities of maintaining a place — scrambling up, not being forced down.

If this picture is at all plausible for you, it’s hard to deny that a law teacher’s worklife has political content. Legal education at present is a not insignificant producer of ideological legitimation for the system of hierarchy. As a teacher, I see myself as having some responsibility for trying to turn that around. One way to contribute just by being a known liberal on the faculty is to protect the liberal students from be-
ing bulldozed out of their liberal values — liberal now in the most general American way — and to support them against conservative students and conservative professors. That’s a liberal goal — sometimes defensive, sometimes offensive. To the extent it is successful, there will be more liberals and fewer conservatives, just because there’s less one-sided ideological pressure on the liberals.

There’s another goal, from my point of view, which is to try to lay the groundwork for a radical political force which would conceive of itself as distinctly to the left of moderate, reformist American liberals. And that has two aspects. One is to try to change that liberalism, to transform it by analysis, critique, and activism; the second is to build a radical movement which would be an autonomous force in its own right, which would be distinct from the traditional American liberal consensus. This radical part of the program involves not simply supporting the liberal students against conservative students and conservative professors, but trying to act on them, to push them to the left. It also involves trying to find and support, even trying to help create, networks of radical students in law school and of radical professors around the country — students and teachers who see themselves as wanting to go a lot further than most people want to go.

That notion about oneself, in the vaguest experiential sense, is what I mean when I talk about radicalism. It’s not very specific. It means that over and over again, when the discussion gets around to what to do, you want to do a lot more, and everyone says, “Gee, you’re crazy.” That’s the basic experience. The people you’re dealing with just say, “That’s too much.” For example, I’m in favor of abolishing tenure altogether — everybody has tenure, or nobody has tenure. In general, people don’t agree with that. People who are otherwise politically sympathetic think that’s going too far. Building that sense of wanting to go too far is a concrete political objective of mine.

Against that background, there seemed to be a number of possible ways of approaching my life as a law professor. I don’t want to claim, or give even the slight impression, that I (or anybody that I know) chose to be a professor of law as a kind of deduction from my political program. Never could I have honestly said, “I have my political program, and the right thing for me to do to maximize my forward impact on the achievement of the political program is to become a law professor.” I don’t think that’s a real way of seeing the situation. The situation is much more like, “Here I am, I’m a law professor. I’ve got this political sense of things: I would like to dismantle and destroy the hierarchy. I don’t have enormously precise utopian proposals, though I do
have a few and would like to talk about them. Starting from here, what might I do?"

Let me make a gross distinction between two kinds of strategies, what we might call the litigation strategy and the ideological strategy. The litigation strategy is the notion that what one ought to do in one's teaching is to try to increase the number of lawyers who are involved with the "movement," in the broadest sense — who can effectively and competently pursue liberal or radical political goals through the courts and in the other kinds of lawyer roles. That's extremely important, but for this symposium I would like to address the other strategy, which has to do with the problem of what we do in our daily teaching classroom activity and how we relate that to our left politics. This problem will arise even if we spend a lot of time involved with the litigating strategy because we've got to spend at least some time on the general run of students, and most of us spend most of our time on them.

Unfortunately, it has turned out to be astonishingly difficult to find ways to use our day-to-day teaching experience — just the normal classroom interaction — as an aspect of political activist practice. It's just very, very hard to do it.

Part of this is ambivalence. I don't think I have to say much about the feeling that maybe politics has no place at all in law teaching, just because law is not political — the feeling that it's just rules and analytic techniques out there which we have the job of imparting to our students, without letting ourselves get in the way. Legal education has been past that for a while. We recognize that law is a form of politics, not reducible to the other forms, but not separable either, so there is some responsibility on any teacher to help students understand that their activity just can't be neutral.

But there is another, more serious ambivalence, about whether legal education itself is necessarily a political activity implicating the personal political beliefs of the teacher. There is a basic liberal ideal, which I subscribe to, that it isn't the teacher's business to impose his or her political beliefs on students. The teacher's role is to get the truth out as best he or she can do it, and let the chips fall where they may when the students get around to choosing what to believe and what to do.

And it seems to follow that a teacher should not conceive teaching as intended to influence the politics of students, as part of a political practice that aims at results in the world to be achieved through the medium of students. That would be "indoctrination," and indoctrination is a very bad word.
My own resolution of this, at least at the moment, is that if you are serious about the proposition that law is political, then you have to accept that views of law will be different according to the political vision of the person who holds them. So your truth about law, whatever it is, will be a partial truth, rather than an absolute one; it will be a political truth. Nonetheless, you have to teach it, since it is your truth of the subject, and all you can do is alert students, constantly and carefully, to the extent of subjectivity that is inevitably involved in your interpretation of the materials.

Further, what you choose to teach is not dictated, in terms of its detailed composition, by the curriculum. There are a million ways to teach torts or property or contracts that fulfill the legitimate institutional requirement that teachers adhere to the syllabus and prepare students for the bar. Of course, you can adopt someone else's version, and pretend you are just "teaching the course." But that's a political choice. I choose to construct my own materials, and to do it so as to get across my version of the truth of law as effectively as possible, while at the same time trying to arm my students as best I can to resist me, defend themselves against me with the very stuff I'm giving them.

Having done that, I hope that the overall impact of my teaching will be to move them. My own admittedly and inevitably political version of the truth of law is that the law is implicated, deeply, in the injustices of the world, while at the same time it is a cultural reservoir of the longing for justice. If I influence my students' ideas, through the force of arguments, rather than through mere authority or by cheating, then I hope they will act on those ideas.

I've just been describing my (ill-defined) politics and my values as a law teacher. The question for me is not whether but how I should incorporate them into my day-to-day activity.

Whatever our particular political perspective, we all tend to approach the problem through the distinction between value-neutral and value-laden teaching. We begin with that distinction because almost all of us — whether liberal or radical — have a sense that our own teachers in law school wanted to be "value neutral," and that value-neutral teaching in this system is implicitly biased to the right. Teaching which sets itself up as "value neutral" is really right-wing teaching.

That's true for both the variants of value-neutral teaching which you see all over the country. There's a "doctrinal" variant, in which the content of the class is a list of rules, exercises in applying the rules, and very short formulaic policy tags that justify each rule. It's not that there's no policy. There's always policy in everything in American legal
education. There's no one left who doesn't do at least some of it. But it tends to be just a tag; every rule has a little policy all its own. "This rule is justified by security of transaction." "This rule is justified by the necessity for some equitable discretion in the application of even the strictest standards." If you look at *Prosser on Torts*, that's the way it's constructed. Every rule has a justification, but no justification is more than one sentence long.

The other value-neutral form is the upper class, snazzy, fancy-pants law school mode, which is in a sense the opposite of the one I've just described. In the fancy mode, rather than many rules, each with a one sentence policy tag, there are very few rules and many policies for each one of them. There are mainly cases, and each case falls apart into a trillion possible interpretations. No case has a meaning, and the basic value-neutral message is: "Look, kids, if you try to figure this out, I will stop you. I can stop you every time. At any moment in which you think you have a formulation of what this case meant, watch me zap it." That is value-neutral.

The implicit political message of this fancy pants variant is different from that of the doctrinalist variant. The doctrinalist is really quite conservative. The fancy-pants is centrist: "Things are so complicated. Everything can be looked at from different points of view. There can't be any right answers and there can't be any wrong answers. Your understanding as a student is so small, the system is so intricate, the skills to be mastered are so overwhelmingly difficult, that you'd better not try to master it in a critical way." All you can hope for is to be able to counterpunch the teacher once in fifty times. And if you do, the counterpunch is a triumph, although you'll then be beaten up to encourage the others.
At least in retrospect, many of us now see how heavily political both the variants of the value-neutral mode really were. The doctrinalist mode makes the system seem inevitable. The rules are just there, and they couldn’t be otherwise, and it’s natural for them to be what they are. The disintegrated, fancy-pants mode just leaves people feeling passive. You have to be passive because of the infinite complexity and confusingness of experience in the modern world. Anybody who proposes anything in the way of a substantial modification of any aspect of the system is going to discover that the teacher can show them that it’s simplistic, knee jerk and dumb, although well-motivated. “You know, you are a person of good faith, but let’s face it, you really missed the boat. I mean we couldn’t possibly do anything like that because there are fifty thousand other intricate consequences that would follow.”

Now, if you believe in the value-neutral/value-laden distinction, it is likely to appear that to get out of that bind we have to infuse our courses with values — our values. And that, in turn, suggests we avoid both the string of endless rules with formulaic policy justifications and also the disintegrated, fancy-pants mode. What we have tended to do is to introduce formal discussion of the assumptions and value premises of the rule. We give people a chance to explore, and we introduce our own values about how things should be organized, how the rule ought to be.

But there are two fundamental difficulties with that approach. The first is that its meaning has been controlled by the course organization of law school. If you start out to infuse your values, the first place you start out to infuse your values is not Contracts. It’s not going to be Torts. It’s not going to be Property. It’s going to be, in general, one of the courses which everybody from the beginning has sort of recognized has a lot of “value content.” Courses like Constitutional Law, or Race Relations, or Women in the Law, or a seminar on Welfare Law, or other courses which have built right into their subject matter a reference to the values that you think you’re going to be promoting.

The consequence of that seems to be that rather than moving people’s politics in any direction at all, what happens is we create a sort of two-tier system: the real system and the phony system; the hard system and the soft system; the system for competent, tough teachers who have something to communicate to their students to help their students, and the system for nice guy, liberal teachers-on-vacation, where everybody gets a chance to take time off from the nasty, unpleasant, hard work of becoming a lawyer and revert to the modes of their college experience. That’s sort of a disaster.

One reason why it’s a disaster is that it just doesn’t work. You are
not going to have much impact on the actual concrete politics of students if you approach the problem of the curriculum by handing over the "real" curriculum to your opponents. There's nothing wrong with trying to appropriate for yourself and then expand our nice, humanistic and somehow vaguely liberal curriculum. But it's disastrous if it means giving up on the part of the curriculum that students are desperately anxious to find out about in the short term in order to save themselves within the hierarchies of the bar.

Our collaboration in that division — by handing over to them much of the core curriculum and keeping for ourselves these soft, political, value-laden courses — derives from our refusal to mount a deadly serious critique of our hierarchical society. There are good reasons those hard courses seem impervious to value injunctions.

If you take them together — property, contracts, torts, substantive criminal law as opposed to criminal procedure, corporations, administrative law — the rules that are being taught in that set of courses are the rules that define our form of hierarchical bureaucratic, welfare state capitalism. That is, those rules taken as a body are the system we would like to change. If the pattern of our efforts as teachers is that we leave that as is and spend our time teaching courses that reflect relatively weak attempts to modify that structure a little bit, by reformism, without shaking it to its foundations, then basically we just reinforce the actual system. When we use our constitutional law courses, for example, mainly as places to invent new rights, we reinforce the idea of a politics of mild reformism. Creating more rights is not a viable response to capitalism, to the existence of a hierarchy of wealth and power rooted in private law and the law of the administrative state.

If this makes sense, you may well say to yourself: "You know, I have marginalized myself. I've got all these nice goo goo subjects, and students come and they like me, and they really love it when I teach that stuff, and I make good friends with a lot of them. But that's too marginal. I want to be closer to something which would have a bigger impact on their actual politics than I can have that way." At that point, you turn to the real, the basic, the hard curriculum.

The first problem is that the hard courses are just as hard, technically hard for us as teachers as they are for students. As students, most of us adopted this very hard/soft model; we went through looking for the nice, value-laden course and endured the hard course. We didn't learn the hard courses critically at all. We knew that the nice, soft, easy courses were for us, and we simply did time with the other courses. So we don't know contract law in the same way that we know

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constitutional law.

The second problem is that the values notion is going to get us in trouble the minute we start applying it inside the hard curriculum. The values notion is intensely subjectivist and individualistic. It has this ring: values are the most personal, the most fragile, the least hard, the least concrete, the least objective, the least in-common thing that we've got. We're taking the hardest thing in the school and the softest thing and we're going to put them together. What we get is doctrinalism most of the time and "free play period" during the rest.

Free-play-in-contracts means that there are some doctrines which occasionally we throw out to the class and say, "Knock this one around for a while, folks." The pressure on us to be hard in the hard courses is an overwhelming, constraining, though not entirely illegitimate thing. So we say to ourselves, "I'll be hard most of the time; I'll find some way to learn it from a book and somehow I'll teach them the rules, and then I will be warm, fuzzy, open, accepting, supportive, experiential, for time-out-period, and that's the way one ought to be in discussing values."

Each student, for example, will get to mouth off ad libitum — just keep on talking. It doesn't matter. No student has to respond to anything another student says because it would be inconsistent with the idea that this is a discussion of each person's personal, individual, subjective values that anyone would say, "Look, you are a windbag, enough." Anybody can say anything they want to for as long as they want to. There is no requirement that anything be responsive to anything else — a reaction which could be interpreted as saying, "My values are right and your values are wrong." The whole idea of values precludes the idea of one person's values being right and another person's values being wrong.

Yet if we adopt this attitude as teachers, we will quickly have to deal with students sanctioning each other. In the value discussion, someone will come up with a value, and say this is my value, and the class will hiss. Then we have a choice. We have to be repressive one way or the other. Either we are complicit in this smashing of the values of the minority, or we intervene, and suddenly we find ourselves clicked into a quasi-parental role in which we say something like, "Free speech precludes the use of intimidation, and, therefore, you should be more polite, and how can you really be expecting other people to sympathize with your values if you don't sympathize with their values when they express them?" Thus, we affirm process values.

This sort of neutrality is not going to get us anywhere, I don't...
think. As a basic approach to giving at least some little part of legal education a counter-hegemonic, ideological content, turning it into a place where people change, giving them more ability to sustain themselves in whatever left political values they have, this isn’t going to work. And, institutionally, it’s incredibly dumb as well.

Those hierarchies that I mentioned before have a certain autonomy; that is, they function according to rules, and they aren’t particularly focused on smashing the left. They aren’t totally arbitrary. But if we do it this way, we are walking into the meat grinder. We will be identified as people who have trouble controlling our classes. Many students will be deeply annoyed at the character of the free-for-all policy/values discussion. Every instant of black letter teaching we do is going to be a payoff, on some level, to get them to tolerate the session which follows. Our status in the faculty will be identified with our softness, not our leftness, not our opposition to the existing regime in this country. We will not be regarded as fighters. Rather, our status will be rooted in the idea that there are some people who have got the toughness to function effectively in the institution, and then there are the leftists who are incompetent.

That’s the basic perception: that liberals are just less competent. They are much nicer. The typical teaching problem for a liberal teacher at a teaching clinic is, “My students love me, but they clearly don’t think I’m as good as the people who are less nice and do all kinds of things that I disapprove of.” It’s that love versus respect business again.

My own teaching history is a protracted example of trying to do it somewhat differently. I’ve been trying to do it differently for over a decade. I have done lots of different things, and none of them have worked. I have been in the position of the warm, loving teacher. It was wonderful at one level, and on another level it was just degrading. It was degrading to be the dump for everybody’s feelings of lostness and alienation in the horrible, oppressive Harvard Law School. I sit there, and they come in, and I say, “It’s all right, everything’s okay, don’t drop out.” And they leave, and the next person comes in.

Most everyone believes that I am a good human being, and I think, “I’m a good human being or I certainly wouldn’t be doing this.” And then it turns out that they believe everything that they are being told about freedom of contract by their centrist or right-wing contracts teacher. He is actually convincing them that the economy would break down and that it would violate our fundamental notions of fairness if, for example, courts imposed compulsory duties in relationships between
landlords and tenants. My niceness is simply stoking the fires of the students to go and really learn the deeply ideological stuff the conservative teachers are trying to teach them. That’s what I’m really doing. I’m helping them survive the problem of learning the conservative curriculum.

I have also tried to create a lot of changes in the classroom, some of which were designed to break down the hierarchical structure of the classroom. At Harvard, when I first arrived, there was no such thing as “passing” in the big first-year courses, so I could have a little impact — cultural, humanistic and political — by simply saying, “Anybody can pass when they’re called on.” People can identify with a no-hassle pass. Life would be nicer if there were fewer hassles in general. That is the real message I was conveying. The no-hassle pass is good because as a humanistic gesture it allows people not to have to talk when they don’t want to talk. And that was it.

Another experiment illustrates some alternatives to the value-neutral versus value-laden dichotomy. This is a four-week teaching program in Torts. One goal is to give the liberal students a set of arguments that they can use effectively to defend judicial interventionism on behalf of the poor and consumers against large corporations and stronger economic parties in general. I think these arguments are effective basically because they are true. I don’t see any conflict between truth and politics here.

I constructed the materials myself. They consist of cases from a series of doctrinal areas that aren’t usually treated together. The first issue is the good faith obligation to settle a valid insurance claim within the limits of the policy. The second is the good faith obligation of the insurer to settle a claim by the insured against the company. The third is the good faith obligation in discharge of people under at will employment contracts. The fourth is the issue of the landlord’s duty to maintain leased residential premises. The fifth is products liability, and the sixth is medical malpractice.

The whole thing is a month-long section in which we take up these doctrinal situations, all of which involve judges trying to decide whether to impose duties, on sellers to buyers, which can’t be disclaimed. They all involve using tort law to violate freedom of contract, and for that reason they are very well suited to undermine the conservative message of the first-year curriculum. They introduce the students to a whole series of justificatory arguments in favor of interference with freedom of contract, and also to nasty — and also true — criticisms of right-wing arguments in support of freedom of contract.
The basic doctrinal points are very simple. You get the black letter of each doctrinal area in a lecture, and there is an argument about the justifiability of the practice, the imposition of the nondisclaimable duty in violation of freedom of contract. The same point is being made for each case, day after day. The basic point is, "You liberals don’t have to be ashamed of sticking compulsory terms into contracts. When you are in favor of doing that, you have good reasons for it, better reasons according to your own values than conservatives have for not doing it."

The conservatives get absolutely equal time. I think the liberal arguments are much better. My authority as a teacher is a thumb on the scale, in spite of respecting everybody’s right to their position, and their dignity as a participant, but it’s a thumb that produces balance. It prevents the liberals from capitulating or getting demoralized. It reassures them that their values are not just irrational, humanistic prejudices that must wither in the cold light of the marketplace.

There is a sense in which this is a form of indoctrination. That doesn’t bother me; it’s indoctrination in a mode of liberal argument within law. It’s indoctrination in how liberal judges actually think, and, let’s face it, it’s as useful — professionally useful — to conservative students as to anyone else. There are a lot of liberal judges out there.

The other goal is very different; in fact, it seems completely contradictory. The other goal is to disorient, alarm and frighten the liberals about the techniques they use in the class to explain the limits on their willingness to impose compulsory terms.

The liberal majority has an explanation of compulsory terms, which is "inequality of bargaining power." The notion is that we look at the particular bargaining situation, and if it’s unequal, then it’s a good thing to impose compulsory terms. That explains why compulsory terms are not socialism. It explains why compulsory terms don’t represent a fundamental rejection of the status quo. It shows that compulsory terms are reformist and remedial. All we’re doing with compulsory terms is rectifying the imbalance of bargaining power in that bargaining situation. This, they believe, is the basic argument in their favor.

I argue to the liberals that that makes no sense — that the idea of inequality of bargaining power as a justification for imposition of these compulsory terms doesn’t work. They can’t give a definition of inequality of bargaining power that doesn’t ultimately have one of two flaws. Some definitions don’t explain the cases. For example, imperfect competition doesn’t always explain the cases. Then there are definitions that turn out to be hopelessly vague or internally contradictory. For
example, "natural" or "just" prices don't hold up under critical analysis. All their proposals as to when there is inequality of bargaining power get attacked by me, and the conservatives love it.

That is, I join together with the conservatives, and we trash the liberals. They propose, hour after hour, how the cases can all be made sense of in terms of inequality of bargaining power. The conservatives and I agree that the real explanation is that the judges perceive the distribution of wealth and power in the society as unfair and unequal, and that they are expressing their substantive preference for redistributing income and power from social classes that have more to social classes that have less. Or that the judges are acting paternalistically because they don't like what they see (I think often rightly) as self-destructive choices people make with their money.

The argument is that we can't explain why we want to do this without entering into a fundamental critique. Not a critique of how in this bargain and that bargain it happened to be sort of unequal and unfair, and, gee, the law should step in to fix it up, but into a critique of the fundamental economic structures that are sustained by property rules, contract rules and tort rules.

That is not a humanistic exercise. The purpose of it is to give the liberals in the class a sense of having participated in a spectacle, one that leaves them at the end saying, "Something's really wrong with the way I'm approaching this." This is not me saying, "Question your assumptions." Nothing like that. I want them to admit that something's really wrong with the way they approach it. I want them to say to themselves, "My claim that all I care about is inequality of bargaining power doesn't explain the results I favor." Then, if it all worked, they'd say, "The only thing that explains it is, well . . . I guess I actually am more against the system than I really believed I was. I'm not only concerned about inequality of bargaining power. I'm concerned about class power, too."

That is an example of trying to do substantive, ideological, political work in a law school classroom without violating anyone's academic freedom. Two points: First, of course, it's not very significant. It would be considerably more significant to accomplish a meaningful political victory either through the courts or through lawyers' impact on other kinds of institutions, and that's a crucial thing to do. But what I'm talking about is what we do most every day, what we do in class. We've got to do something in class, after all. The argument is that it would be better to have some of this in the class along with the other stuff.

The second point is that, at least on one occasion, I blew it at the
end. I blew it by losing my temper. This technique that I'm describing is dependent on me being very negative, not just towards the system but towards the students who want to believe that they are coherent liberals. The mistake I made, and this is an incredible danger, is this: I had been very cool in developing the arguments back and forth, but there was a point in the discussion when a liberal economist made a heavy law-and-economics argument about imperfect competition, and how that explained all the cases. He caught me off balance. I wasn't quick to deal with it. I knew that he was just wrong, but I couldn't really say why, and I lost my temper. I didn't abuse him, but I was snippy.

When I got mad, I lost about half of what I'd accomplished up to that point because I violated the norm of how the teacher can act ideologically without violating academic freedom. We shouldn't get mad, because, given our heavy institutional power, that's just unfair to the people who disagree with us. That's a basic problem with this approach because these are things we're likely to feel passionately about, and it's hard to be fair. But it's not impossible. And if we don't get mad, we can harness our own negativeness, toward the system and toward aspects of legal education and student life that we don't like, in a way that allows us to get even instead.
TORTS? NO, I DON'T WANT TO TALK ABOUT TORTS! WE JUST SPENT ALL MORNIN' TALKIN' ABOUT TORTS!

WOODROW, WHAT YOU'VE GOT TO REALIZE IS THAT THE WORLD DOESN'T BEGIN AND END WITH CASEBOOKS! THERE ARE MANY OTHER EQUALLY ACCEPTABLE WAYS OF LOOKING AT LIFE!

HMM...

YEAH, I SUPPOSE YOU COULD MAKE A CASE FOR THAT..
Economies of Mind: A Collaborative Reflection

Dinesh Khosla and Patricia Williams

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Pat Williams is also a professor at CUNY Law School, having taught previously at Golden Gate University School of Law. Currently she is teaching in the areas of commercial transactions and administrative agencies, as well as Law and a Market Economy. She graduated from Wellesley College and Harvard Law School. Her fields are Contracts, Consumer Law and Uniform Commercial Code.

In the fall of 1984, we collaboratively taught a course entitled Law and a Market Economy. In terms of the traditional curriculum, the course incorporated elements of Contracts, Property and Jurisprudence. Having something to do, perhaps, with the chemistry of that particular audience of first-year students, our course ended up being something far more than that. We engaged in a comparative analysis of how societal goals are reflected in economic structures and of what sorts of structures might be created to achieve those goals. The course became a synthesis of each of our visions and ideologies, a sharing of our very different cultural myths and political dreams.

As we proceeded through the semester, and as our lectures began to overlap into the sort of pleasing perceptual grid which law professors love to flutter, like butterfly nets — over the minds of their students, we became aware of two distinct voices in those lectures, two voices which came from deep within a single source of consciousness.

One was the voice of market economy. It was a familiar voice, the voice which drives much of our present economy; it was the voice of the impulses of having, using and transferring which characterize most of the materialistic and social opportunities of our world. Contracting, promising and relying give shape to that voice and lend it its power.
The second was that of gift economy, a voice whose resonance comes from the impulses to share and to give. As an economic force, it exists in some parts of the world, but in most of our experiences, it is the voice of a bygone era.

Alone, we found, each of those voices suffers serious limitations; weaving both of them into the framework of human needs resolves those limitations to a great extent. The fugue, the simultaneous voicing of gift and market ideals, took us closer, we believe, toward a model of a humane and non-exploitive society. The process of attempted synthesis recognized the essential polarity of the two voices — gift exchange, representing the impulse toward wholeness, and market exchange, tending to nurture the parts — and yet allowed for the fact that the languages of each are no more than two differing systems of symbols working to describe and resolve the same reality of need. The discourse which follows is an attempt to summarize the themes of our work together as we reflect on the roles of values and ideology in legal education.

* * *

Market: (cantankerously) I don’t want to be here. I don’t need to be justified. If you’d just leave me alone, I could get about the business of feeding, clothing and enriching people.

Gift: (sotto voce) You do bring food and clothing into the marketplace, but it is I who enrich people, with the passage of gifts in a community.

Market: Buying and selling is nothing more than an efficient and sophisticated form of giving and receiving.

Gift: Are you willing to sell without buyers? I, the true gift, have released, in giving, the expectation of immediately reciprocal receipt. I exist as more than a linear relationship between two benefits, two detriments, two points, two people. I am circular. What I give stays inside as well as goes beyond. And when I give something to another which also remains inside myself, I have committed an act of supreme trust, in allowing a part of myself to travel beyond my control. The matter of receiving is made diffuse because I may not get back my gift or its equivalent from that other. My trust is that I will get something back from someone, at some time; and when that gift is indeed returned, when it has passed out of sight, into the unknown and comes back, then the circle of giving is complete.

Market: It is precisely that same trust, which, when applied to the marketplace, enhances the ability of transactors to plan and see their
expectations bear fruit, and which allows them a maximum degree of freedom of choice.

Gift: But the mood of my trust is very different. The ambiance is encompassing. There is no bargain in this trust, there is no offer, no qualified acceptance or condition in this gift. There is a joy of giving. There are rituals associated with giving, rituals that foster a bond between giver and receiver. So it is not giving in the sense that you are used to. I am full of warmth. In giving I receive. I possess nothing, so that I may give.

Market: I gather, so that I may give; I possess, accumulate, profit and reinvest. In this way, I redistribute.

Gift: Your accumulation implies stagnation. In the circularity of gift, the wealth of a community never loses its momentum. It passes from one hand to another; it does not gather in isolated pools. So all have it, even though they do not possess it and even though they do not own it. And because of that circularity of motion, whatever wealth there is becomes abundant, because your food is my food, my clothes are your clothes. Abundance is all around because it is not interpreted from the perspective of strictly numerical accumulation, but instead from the perspective of satisfaction.

Market: But if we are both poor, your food won't feed either one of us. I allow the self room to provide for itself, through notions of basic survival such as appropriation and exclusivity. I use possession to sustain and increase the self, and thus enhance the citadel of all selves.
Gift: You allow the self to emerge but not merge. The citadel of a self identified through possession puts moats between people, moats literally and figuratively sized according to the metes and bounds of one's estate. And there is limitation in that, and isolation. I sustain and increase the self by passage of the gift, from one to the second to the third. With each passage, the circle increases, and wealth increases in proportion. The increase also stays in motion, not with the person who gave or received. The increase moves with the object.

Market: Your increase is not substantative; you call satisfaction profit. You create bonds but not bread.

Gift: Let me tell you a story. I was working in an Indian village a few years ago. One afternoon some people in the village approached me and said, “Will you participate in a ritual tomorrow morning?” I asked what the ritual was about; they said that it was about sun worship.

The ritual started before sunset that afternoon and ended at sunrise the next morning. I participated in a most profound manner. Late in the afternoon, I was sitting on the bank of a river that brings water to the thirsty villages of India. I was sitting there with a huge white sheet spread in front of me, and everyone from that village, after they offered prayers to the Sun God, came and dropped small pieces of food on that white cloth. I had food before me which could feed easily 500 people. The food came from the untouchables; the food came from the Brahmins; the food came from the rich and from the poor, from the crippled and from the healthy. The food came from every corner of that village.

So what did I do? I gave back the food — or redistributed it, you might say. And for one day, all disadvantage disappeared. Suddenly there were bonds where none had been before. Untouchables’ food was eaten by Brahmins, and the rich fed the poor. There was a community, however shortlived.

That is how I bring bread, through bonding. I enhance the self in relation to others, not alone. It is very important, this “intangible” sustenance. Gift feeds people in three ways: it creates community, it creates good will, and it is itself an expression of good will.

Market: Your circle works well for those within the circle. But might I ask how the untouchables fare by the light of an ordinary day? Does not a self dependent on others risk oppression and stasis? The bonds of community can constrict creativity, and conformity may masquerade as ritual. I bring freedom from all that. I release the individual from bonds-turned-into-shackles and allow the self to choose the standards by which it shall be governed. The benefits of such compartment-
talized responsibility should not be dismissed as merely alienating. The ability to bargain easily and anonymously enhances a sense of power over the past and minimizes fear about the future; division of labor is facilitated, and creativity is liberated.

Gift: Yes, I have great respect for the power of compartmentalized responsibility. I remember that in the wake of the disastrous chemical spill in Bhopal, India, the president of Union Carbide stated that he would accept "moral responsibility" but would not admit "legal liability." I remember that the death of 2500 people and the injury to some 200,000 more was frequently and summarily attributed to "valve failure," "defective product," and "elements of fault."

It is my concern that your market theories of law have infused every aspect of human sensibility with a protectionist philosophy that is bizzarely incongruent given the rich potential of that sensibility. This incongruent application has inspired a set of structural justifications for levels of irresponsibility whose reach far exceeds the original domain of laissez faire, and which account for the way in which some of society's most abominable acts of disenfranchisement are quietly accomplished.

Market: That's not fair. You could not have done much better than I in the face of so colossal a mishap. You wring your hands and call the loss incalculable, which accomplishes nothing. I am structured to at least try to calculate the loss, on however small a level. It is this accounting which is offensive to you, not the lack of an accounting.

Gift: I am not talking about the accounting of cost-benefit analysis. Such accounting rips community to pieces, sees only monetary value, and accounts only to the will of the willful and possessed. In my accounting, legal structures must accommodate not merely pecuniary values, but also the spiritual, religious, aesthetic, social and moral. The spirit of the gift brings forth the self as part of a whole relationship: it brings forth the individual self, the group self, the emotional self, the religious self.

Market: (allegrissimo con staccato) Spirit??! Religion??!

Gift: Calm down. The spirit of which I speak describes the totality of the self, pertains to an ego that is larger than that of an individual participant. To say it very simply, the surplus, the profit, the spirit of gift nourishes those parts of our being that are not entirely personal, but which are derived from nature, ecological balance, social connection, political connection, race, hierarchy for some, non-hierarchy for others, and God, if you believe in God.

Market: I see. But you are talking about a form of social contract whose exchange rate is beyond value, whose interconnectedness makes
everything priceless. And if things are that mythically, unknowably complicated, how can you ever risk anything? Price is nothing more than a quantifier of risk; and if risk is beyond quantification, how could society ever have produced those infinitely varied designer togs in which you wrap yourself, or all the automobiles in which you have ever luxuriated, or the tropical fruit you ingest in December, or the ice cubes which pop out of your refrigerator door in August? I bring exactitude to the chaos of wandering emotionalism; I bring clarity to the undefined; I mark off the essential from the immaterial; I transport goods from point A to point B; I get things done.

_Gift:_ You take things out of the circle. When you take things out of the circle, community dies. The lines of your exchange do not connect people. Wealth loses its motion because you make profit by retaining things. Wealth gathers in a few hands; some have, others don't, and even if there is abundance there is scarcity.

_Market:_ I exist because there is a need for me to exist. I exist because you created the objective conditions which caused me to come into being. I exist to satisfy the need for freedom of action, freedom of choice, and material variety. I exist to provide innovation, excitement and possibility. Yes, I bring a taste of estrangement from the status quo, but I give the opportunity for a universe of new relationships.

I came to be because you created an insatiable urge for division from the whole and for specialization of thought. I came because the self divided itself into past, present, and future, I created a form of contract which recognized those divisions as discrete parts and which could, by such recognition, bind them back together again. I came because the self learned to talk, to promise, to drive language-stakes around the borders of ideas which were then called "property".

I came to help you. I didn't beg to be here; you wanted me.

* * *

Even as we write this, the temptation to assign one or the other of the voices to one or the other of us is great. But it is as impossible to do so now as it was during the course of the semester. We found ourselves confronting, sharing, and crossing over sides of the argument constantly. The voices of both market and gift spoke from within each of us, and each of us spoke in two voices.

But even this small level of synthesis was not easy. We had both underestimated the extent to which the gift voice is dismissed as nostalgic or impossible; and we had forgotten the joy which merely describing a community premised on an economy of sharing can bring. We
were forcefully reacquainted with the degree to which the relentless dissection of our own law school experiences had shut out, from the matrix of compartmentalized consideration, large parts of our selves. We remembered how market economy had been served to us as though it were a whole, the purest of ideological visions; we remembered how the economy of gift was brushed aside as a utopian dream, as an intangibly universalized myth. In the end, the synthesis we achieved was simply in revealing the myth of gift as a forgotten but graceful ideology, and the vision of pure market theory as a secularized dream. In that revelation, we hope, are contained the seeds of a legal vocabulary based on compassionate universalism and greater understanding.
I KNOW! I KNOW! OVER HERE!

THE PRECEDENT TO WHICH YOU ALLUDE IS THE 1954 DECISION OF THOMSON VS. M'CULL!! THAT'S CORRECT, WOODROW.

GOOD TO GET THAT OFF YOUR CHEST, EH, WOODY? BY GOD, I LOVE THE LAW!!
Charles Lawrence has taught at the University of San Francisco School of Law since 1974 and has visited at Harvard, Stanford and Berkeley. He teaches Constitutional Law, Race Discrimination, Educational Policy and the Law, and Lawyering Process, and is co-author of The Bakke Case. Prior to teaching, he worked as a public interest lawyer with Public Advocates, Inc.

Prologue

This narrative records to the best of my ability an actual dream which I had four or five years ago. When I awoke from the dream, I went immediately to my typewriter and tried to put it down exactly as I had dreamed it. I read through it twice and put it aside, deciding that it was too personal and perhaps too provocative to share, much less publish. When Michael Burns first wrote me about this innovative issue of the Nova Law Review, I remembered the dream and, after considerable searching, found my discarded draft beneath one of the piles of miscellany on my office shelves. I showed it to a couple of friends who wisely counseled me to keep it in moth balls. “Who knows. You might want to teach at one of those prestigious law schools one day,” they cautioned. “Perhaps you could edit it to make it more abstract and theoretical — less concrete and personal.”

Obviously I have given their wisdom little heed. The dream and Roberto Unger’s Passion, which I recently struggled through, counsel a different wisdom. I have done minimal editing of the original draft, choosing to sacrifice what might have been gained in stylistic refinement in order to preserve the chronology and feel of the dream.

The Dream

I am sitting in a room. On the other side of the room a man and a woman sit at a small table. The room is large, stark and empty, except for the three chairs in which its occupants sit and the table. The man and the woman are talking. They are talking about me. They talk as if
I were not there, although both are obviously aware of my presence.

The man is white, balding, bearded. I do not recognize him, but I know he is a colleague at the prestigious law school where I have been teaching as a visiting professor. He is sitting in the far corner of the room behind the small table. He leans back in his chair. His body language conveys aloofness, arrogance and condescension. Occasionally he looks off into the distance as if reflecting on some important thought.

The woman sits on the other side of the table. She is a colleague at my home school, the University of San Francisco, and a friend. She knows that I am able to hear them but pretends that I am not there. I think that her reason for pretense is her embarrassment for both me and herself. She is embarrassed by my invisibility and by her own tacit complicity in rendering me invisible. But she is not comfortable with confrontation. She knows I am capable of making myself seen and heard. If I choose to ignore them, she will allow it.

My colleague from U.S.F. is defending me, or rebutting the argument which the gentleman from the more prominent institution is making against me. She does not presume to represent me. (Remember that all three of us are acting as if I am not there. And, at this point, I think we may all believe it.) The discussion is about my qualifications to assume a full-time teaching position at the eminent law school where I am visiting. Its tone is more that of an academic debate than a trial or a hearing. Again, I remark on my invisibility because the debate seems less a debate about me and more a debate on the capabilities of my species.

My friend from U.S.F. has just said something in my favor. In the dream, I do not actually hear her words, but she is very earnest. The man across the table barely listens to her argument, though his professorial theatrics mime all the appropriate listening postures. He deigns to listen, but he already knows that she is wrong. He is preparing his rebuttal.

He says, (and I think that these are the first words I hear) “But what has he done, produced? Does he have an area where he can really claim expertise? Why, just the other day I was talking to one of his admiring students. She praised his teaching, but when I asked her if she could direct me to an important and well-recognized scholarly contribution he had made to the field, she could not.”

At this point I pick up my chair and cross the room to join the conversation. I must speak for myself. I can no longer accept invisibility. I am not experiencing anger. I don’t remember deciding that I must make my presence known and felt. I simply get up and move...
because it seems the right time.

"I have done a not insignificant amount of work in the area of equal protection," I say, "particularly with reference to its application to issues of race discrimination."

I say this as if I had always been part of the conversation. The gentleman seems, at first, mildly startled by my presence. But his expression changes quickly from surprise to anticipated triumph. It is a look which says, "Now I have you where I want you." He will test me and prove me a presuming fool.

"What is the significance of fear?" he asks, raising his eyebrows in anticipation of my non-answer. He knows he has won. He will prove his point to the young woman across the table.

I have a sinking sensation in my stomach. My palms are sweaty. I do not know the answer. I don't even understand the question. I have failed my race. For a brief and agonizing moment I am transported back to a first-year contracts class at Yale. One of two black students in the class, I am on my feet struggling to make some sense of Professor Kessler's questions about consideration and my progress up a flagpole.

Then, just as suddenly, I am back at the table with the professor from the prominent law school who would disparage my colleagueship. But, now, I am very calm ("cold" in the honorific sense with which that word is used in the street vernacular). I realize now that I have won. Even before I have conceptualized my answer, I know that I will
triumph. I am no longer struggling to find my protagonist’s answer. I am calmly contemplating my own. Because I am now in search of my own answer, I know it is there and that it is right. It just needs discovering.

The answer is not fully given in the dream. But in the millisecond before I wake, it is fully conceived. I have begun to respond, and my protagonist understands that he should have never given me the opportunity.

This is my answer:

The significance of fear must be understood from two points of view: that of the oppressor or master and that of the oppressed or slave. Each of the perspectives must in turn be understood on several different levels of consciousness. The first is the fear of the slave. I begin here because it is the fear that is most apparent and because it is the fear that I know first hand, that I am experiencing at this moment.

I am not certain where my answer is headed; that is, I have not fully articulated the argument in my head prior to embarking upon my verbal response. But I am confident it is there. The words I speak are new to me. It is almost as if I hear them for the first time as they are spoken. But the thoughts they embody are somehow familiar. It is because they are mine. I am searching for my answer, not that of the questioner.

This is a sensation I have often experienced in teaching. A student poses a problem. I begin my answer certain of the theme, knowing that I understand what must be understood, but not sure how I will get there or precisely where I will be when I arrive. I am thinking out loud before an audience of 85 students. There are times when I conclude my answer with the sensation that I have listened appreciatively while someone else explains something I never understood before.

All of this takes a great deal of time to write, but in my dream I feel it in its entirety in the time it takes me to speak my opening sentence. To repeat: “The first is the fear of the slave.” I continue:

This fear is experienced at three levels of consciousness. At the most immediate level, the slave fears the physical violence of the master. It is a violence that may be experienced in many ways — that he will feel the cut of the overseer’s lash, or that men, in white sheets, will come in the night to hang and burn him, or that she and her family will be deprived of food and forced to starve, or that she will be beaten by her husband. At this level of consciousness,
the slave does not understand the reason for the master’s violence. The master is viewed as hateful, crazy, depraved, immoral. In the extreme, where the slave has been conditioned to self hate, the slave may view the master’s violence as justified.

At a second level, the slave fears rejection. [This is the fear I have experienced only moments ago. It is a fear with which I continue to struggle.] The fear is in response to a different form of oppression. The slave has been told and comes to believe that he is welcome in the master’s house if only he can prove himself worthy of admission. He feels secure from the physical violence of the whip and the lynch mob. Now he fears the emotional violence of being deemed inadequate, or not being accepted by the master. This fear, like the fear of the battered wife or the godfearing peasant, is even more debilitating than the fear of the irrational whip because the injury is internalized and, in part, self-inflicted.

At the third level, the slave no longer fears rejection because he now understands the cause of the violence he has experienced at the two previous levels. He has discovered the sham of white supremacy, and the divine right of kings and Social Darwinism. He has no respect for those who reject him. He understands that they are not superior, but more than that he begins to suspect that their need to do violence to him is evidence of their inferiority. Again, the slave fears physical violence from the master, this time because he understands its source. If the master suspects his comprehension, he will strike out in a desperate effort to maintain his ill-gotten status.

As I verbalize this thought, I feel myself somewhere between the second and third level. Will the master dismiss my analysis as “intellec
tually inadequate,” as “unsupported by documented evidence,” as fur
ther proof of my “lack of qualifications”? Will I believe him and accept and internalize his judgment? Or will he recognize that I have discovered his charade and act it out one more time mouthing the argument of “inadequacy,” “incompetence” and “lack of qualification,” while blacklisting me as “dangerous” behind the scenes? Will he see that I have understood too well and inflict violence by denying me the re
courses of academia or access to its forums of communication?

I press on, despite my fears, with the sense of exhilaration and fatalism that one experiences in battle. Perhaps I have the skill to walk the tightrope, to tell just enough of the truth to be bought out instead of wiped out. But that can only result in continued enslavement. I am still in the midst of improvisation. The theme is within me but I do not know on which chord it will resolve. Like Dr. J, in mid-flight, I do not
know until the shot is made whether it will be a slamdunk or a reverse layup off the glass.

My answer continues:

From the perspective of the master, there are also three levels of fear. The first level is the fear that the ignorant slave will rise up and kill him. Because he believes in the myth he has created, of the master's superiority to the slave, the violence he fears is an irrational animal violence. If there is anger and hate among the oppressed, it is due to their lack of understanding of their proper place. It is because they have been misled into thinking they are capable of independence.

The second level of fear experienced by the master is the fear that he will be found out by the slave, that the oppressed will discover the sham of a meritocracy where the master defines what is meritorious. He fears that when the slave understands that the master's superior position is ill-gotten, he will rise up in revolt. This is a greater fear than the first because the violence of the rational human being is more certain than the irrational violence of the animal.

The third level of fear experienced by the master is the fear of self-discovery. He fears that in the slave's challenge to the slave system, he, the master, will be brought face-to-face with his own image; that he will be confronted with his own insecurity and inadequacy; that he will understand that his need to define others as inferior and treat them as such comes from his own feelings of inferiority. He fears that his shell game is all that he has, that he is nothing without the slave.

And now I realize that the ultimate fear of the slave and the master are the same. Each is forced to confront his solitariness in the world. Each is compelled to accept responsibility for who he or she is.

The dream ends. I do not know my protagonist's response. It no longer matters.
The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law

Howard Lesnick

Howard Lesnick is one of the founding faculty members of CUNY Law School with primary responsibility for the development of the curriculum. He served on the University of Pennsylvania Law School faculty for over twenty years and has visited at Berkeley, Chicago, Columbia, Michigan, NYU, Stanford and Texas. He is widely known for his work in labor law and in legal representation of the poor, and is a co-author of Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism (1981).

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-
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 landholder-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-


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).
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 situa-
tions — 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 ob-
jectification of the adversary is viewed as self-evident, and not to be
reappraised in particular cases.¹

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 du-
ties, 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 in-
dividuals, each having subjective and arbitrary desires, and character-
ized 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. Auton-
omy 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.

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].
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 particularly 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.\footnote{See E. Dworkin, supra note 4, at 159-74.}

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
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.  

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-

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,

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. 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. 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-
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.
Teaching First-Year Students: The Inevitability of a Political Agenda

Leon Letwin

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As I'm sure is true of most instructors, I have many teaching aims—some of which no doubt conflict and some of which I'm only dimly aware. But one central objective is this: I would like students (especially in their first year) to recognize that there is nothing necessarily right or inevitable about the agenda of issues presented for their consideration; and that the act of defining the issues (by myself, the casebook author, or whomever) expresses political choices as much as, or more than, the choice of solution to those issues.

I experience difficulty in achieving my goal because in large measure I am fettered by the very traditions that I want challenged. I find myself accepting, almost reflexively, the conventional definition of "the issue" and reserving my critical talents, such as they are, for the debate as to the best solution. On occasion—all too infrequently—I am able to come up with a challenge to the conventional agenda of issues myself. As a modest example, I offer the following: *Erie v. Tompkins*,1 it will be recollected, is famous for its holding that federal judges in diversity cases are bound by the common law as announced by state judges. One can debate the pros and cons of this view, but the transcendent importance of the issue is widely taken for granted. Charles Wright writes, "It is impossible to overstate the importance of the *Erie* decision . . . . [I]t returns to the states a power that had for nearly a century been exercised by the federal government."2 And consideration

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1. 304 U.S. 64 (1938).
of the *Erie* issue occupies many pages in most civil procedure casebooks.

But a contrary and more useful perspective might be that the importance of the decision is easily overstated; that *Erie* raises a fairly trivial issue of power allocation; that the case has been exaggerated out of all proportion to its significance; and that the truly vital allocations of power run along altogether different lines than the division of power between state and federal judges to fashion common law rules. For judges, whether they be federal or state, are overwhelmingly white, upper middle-class, male and drawn from a narrow stratum of society. Now *that* is a phenomenon the importance of which it is impossible to overstate. Indeed, the important fact about *Erie* is not the differences between state and federal judges (so that which group gets to proclaim the common law looms as a crucial issue) but the similarities between the two, given the narrow social base from which they're both drawn. This doesn't answer the question whether *Erie* is right or wrong, but it does deflate the importance of the issue; and it puts in issue which issues ought to be the subject of intense debate.

I would be pleased if I were able to identify and challenge more frequently than I do the systematic assumptions which underlie the teaching program.
Ruminations On Legal Education In The Next Decade

Don Llewellyn and Richard Turkington

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Introduction

At the 1985 American Bar Association convention in London, Professor Aubrey Diamond of the University of London, noting the spate of literature in the United States on the role of legal education in producing competent lawyers, said that it seemed as if we “speak of little else.” Lawyers and law teachers do, of course, talk about a lot more than lawyer competency and legal education in the well over two hundred legal periodicals that are published each year in this country. Yet


2. Approximately 148 of the law schools that are accredited by the A.B.A. and/or AALS publish a legal periodical. These accredited schools publish an additional 60 secondary law reviews, and 30 legal periodicals are published by non-accredited schools, making a total of 238. This figure does not include publications in other disciplines, such as philosophy and political science, that discuss law-related matters.
if an observer from another legal system were left with the impression that over the last decade legal education has myopically focused on the competency of the practicing bar and the role of law schools in lawyer competency, this would be quite understandable.

A primary focus in reforming legal education during the past few years has been on expanding the course offerings in lawyering skills. Many of these reforms can be traced to Chief Justice Burger's public and very appropriate criticism of the competency of lawyers generally, especially with respect to trial advocacy skills.³

The Chief Justice's complaints have engendered much comment, producing an interesting and thoughtful dialogue. Although there have been powerful detractors from his views, the competency-skills movement has already had a significant effect on legal education.⁴ It has


4. Professor Allen has been an outspoken critic of the Chief Justice's views, (Allen, The Causes of Popular Dissatisfaction with Legal Education, 62 A.B.A. J. 447 (1976)). Professor Cramton has challenged the Chief Justice's generalizations about the extent of incompetency in the practicing bar and argued persuasively that lawyer incompetency is not justifiability attributed to legal education. He has conceded that the Chief Justice's views have raised important issues; in fact, Cramton served as Chairman of a task force on "Lawyer Competency: The Role of Law Schools," established by the American Bar Association on the very day that the Chief Justice leveled his most severe criticism of lawyer competency. Some indication of those effects on legal education is found in the substance of the Task Force Report. Several of the recommendations of the Task Force that appeared in its published report in 1979 directly related to emphasizing more lawyering skills experiences in law schools. The most important of these are:

RECOMMENDATIONS ADDRESSED TO LAW SCHOOLS
B. Educational Program
RECOMMENDATION 3
Law schools should provide instruction in those fundamental skills critical to lawyer competence. In addition to being able to analyze legal problems
expanded clinical education offerings to include a variety of intern and external programs which, in turn, have given stimulus to the adoption of other types of lawyering skills offerings.

Furthermore, the competency-skills movement is affecting the mix of legal doctrine, perspective, skills and practice courses that are offered in many law schools in this country. The inclusion of more legal writing in the first year, the addition of required and/or elective courses in the second and third year that have written work product components, and the addition of more drafting and litigation skill-type courses — through simulation and in the clinic — will necessarily produce changes in the legal doctrine and perspective course offerings.

The student/teacher ratio in the average law school is approximately 25-1. The addition of more teacher-intensive course offerings will require severe restructuring of the curriculum generally and will

... write, communicate orally, gather facts, interview, counsel, and negotiate. Certain more specialized skills are also important for many law graduates.

Law schools should provide every student at least one rigorous legal writing experience in each year of law study. They should provide all students instruction in such fundamental skills as: oral communication, interviewing, counseling, and negotiation. Law schools should also offer instruction in litigation skills to all students desiring it.

**RECOMMENDATION 4**

Law schools and law teachers should utilize small classes as opportunities for individualized instruction in fundamental lawyer skills.

**RECOMMENDATION 5**

Since lawyers today commonly work in teams or in organizations, law schools should encourage more cooperative law student work.

**RECOMMENDATION 8**

Law schools should experiment with schedules that provide opportunity for periods of intensive instruction in fundamental lawyer skills.

**RECOMMENDATION 9**

Although the law faculty must retain responsibility for course content and quality control, law schools should make more extensive instructional use of experienced and able lawyers and judges, especially in structured roles in which they utilize their professional knowledge and skill.

The Task Force then issued this caveat:

These recommendations should not be read as a call to turn law schools into trade schools. We strongly believe that the areas of program improvement recommended in this report offer as much challenge for intellectual and academic inquiry as those traditionally emphasized in law schools; and their development is important not only to the practitioner but to those who utilize legal education in various other professional roles, including teaching, business, and government.
add further cost to legal education at a time when legal education is laboring under financial constraints from several directions. Entering professors are pressing for higher salaries. Many law schools are going through the initial capitalization investment for computerizing aspects of law school administration, the law library and student services. Although tuition has continually increased over the last decade to meet these costs, government subsidies for student tuition loans have now decreased and, in turn, have affected enrollments.

Broad economic factors that affect the legal profession directly also have indirectly further taxed legal education. The profession is absorbing increasing numbers of law graduates but at a slower pace. The number of lawyers in the United States has risen from 330,000 in 1970 to 622,000 in 1983; the projected figure for 1987 is 750,000. There is now one lawyer for three hundred and seventy-five persons in the United States, compared to one for six hundred thirty-two in 1970.5

As a result of this phenomenal expansion of the bar, there are now both real and imagined concerns among students and legal educators about placement. One reflection of this concern is that in 1984 enrollment in law schools decreased in all general areas except for female6 and minority students. Financial and placement pressures have pushed more of our full-time students into substantial part-time law jobs while they are attending law school. More law school resources are now utilized for placement and admissions than before.

These phenomena will likely increase in the next decade. Although the proponents of more teacher intensive and clinical kinds of experiences have recognized the need for additional resources to finance these proposals,7 the overwhelming number of law schools that implement these reforms will have to do so within their own existing re-

6. Data available from the A.B.A. indicates that student enrollment in A.B.A. accredited schools is down in the following areas: Total Enrollment, 125,698, down from 127,195 (1.18%); Men, 77,200, down from 79,215; Men receiving J.D.'s, 72,950, down from 74,840 (2.5%); Average law school enrollment, 72,240, down from 73,523; First-year enrollment, 40,747, down from 41,159 (1.00%); J.D. enrollment 119,847, down from 121,201; Full-time enrollment, 100,931, down from 102,188; Part-time enrollment, 24,767, down from 25,007 (4%); Total “other” enrollment, 973, down from 1139.
sources. It is within this financial context that curriculum reform must be examined, at least for most law schools.

Legal Education, the Recent Past: Theoretical Perspectives and Legal Service

When we entered law teaching in 1967 and 1969 respectively, the world, America and legal education were different from today. The focus of legal educators was on a different set of priorities and concerns. As we recall those expressions of concerns about deficiencies in legal education and those speculations about the future directions of legal education, they seem but whispers from a distant past when viewed from the perspective of legal education in the mid 1980's.

During the late 60's and early 70's, legal education was going through a bullish stage. Student enrollment, which began to dramatically increase in law schools in the middle 60's, continued to expand until 1981; enrollment rose from 64,406 in 1967 to 127,312 in 1983. During this period, there also occurred the enrollment of women in unprecedented numbers. As we teach today in schools where nearly 50 per cent of the students are women, it is almost impossible to imagine that in 1967, just 18 years ago, less than five per cent of the law students in the country were women. There were 47,980 female law students attending law school in 1983, compared to 2,906 in 1967. After an initial period of somewhat significant increases in minority student enrollment, there has been a leveling off and there is some question as to whether there will be future improvement in this area.

Also during the late 60's to the middle 70's the number of law teachers grew with the expanding law student population. Many law teachers were hired straight out of graduate school, without a great deal or, in some instances, any significant experience in practice.

During this period of expansion, the movement to have a significant legal service component in law schools was building momentum. Legal service clinics in law schools were established not only to provide students with experience in practical skills, but also to effect social change by providing heretofore unavailable services for the poor, both in criminal and civil matters. See, generally, Grossman, Clinical Legal Education: History and Diagnosis, 26 J. LEGAL EDUC. 162 (1974). The leading impetus for clinical education with direct

8. The Lawyers Almanac, supra note 5.

9. After an initial period of somewhat significant increases in minority student enrollment, there has been a leveling off and there is some question as to whether there will be future improvement in this area.

The period of the late 60's to the mid 70's (when we first began to teach) was marked by the infusion of social service-oriented clinical education, as well as theoretical and legal process perspective courses. What a difference fifteen years make! Today, speculation about the future direction of legal education has an entirely different focus. In-house legal clinics are shrinking or about to become a dinosaur of the past, to be replaced by the more economically efficient, simulated course model and by external programs. Moreover, the simulated course phenomenon is promoted exclusively for the purpose of exposing the student to practical skill experiences and, at most, only lip service is given to the role of law schools in providing services for the poor or in promoting social change through reform litigation. The demise of in-house clinics also reflects legal education's realistic assessment of the limited and shrinking job market for legal service lawyers. Although the reform movement in the late 60's and early 70's introduced some theoretical and perspective courses which have gained a firm hold in most law schools' curricula, the emphasis now is clearly away from the-

client-student interaction during this period was the Ford Foundation which, through the Council on Education in Professional Responsibility (C.O.E.P.R.) funded the establishment of law clinics in a number of law schools. Law students were viewed as a source of inspired and cheap labor for providing services to the poor. See Monaghan, Gideon's Army: Student Soldiers, 45 B.V.L. REC. 445 (1965); Brown, The Trumpet Sounds: Gideon - A First Call to the Law Schools, 43 TEXAS L. REV. 312 (1965). Grossman includes much early criticism of the service clinic programs; see, e.g., Gorman, Proposals for Reform of Legal Education, 119 U. PA. L. REV. 845 (1971).

The Present Challenge — Competency

At the American Bar Association meeting this summer, when Professor Diamond made the statement that introduced this article, Professor Cramton, then president of the AALS and a frequent and leading commentator on issues in legal education, poignantly raised some questions concerning the role of legal education in developing lawyer competency. He pointed out that developing technical skills is not enough: attention must be directed to psychological factors and attitudes which play a vital role in the competent performance of lawyers. As Professor Cramton correctly observes, the difference between having the technical skills and performing as a competent lawyer is a product of personality traits such as diligence, integrity, self-image and the collective perceptions and attitudes that the individual attorney has concerning law and the role of lawyers in society.

Professor Cramton then issued the following challenge to legal educators:

[How can we give . . . [law students] a positive image of themselves as professionals, as craftsmen who take pride in their work, as lawyers who always give good measure because that is the only way they can look themselves in the mirror when they get up in the morning?]

He suggested that the best way to achieve competence in the bar is to make lawyers “care about the wellbeing of their clients and to care about their image as professionals.”

In this part of this article, we would like to respond to Professor Cramton’s challenging question. First, we will discuss a team-teaching concept originally suggested in the Carrington Report in 1971 and presently in practice in the Graduate Tax Program at Villanova. This

12. A recent survey of law school curricula indicates that 23 of the 146 schools that were surveyed required students to take an Enrichment/Perspective/Horizon/Humanistic/Jurisprudence/Philosophy course after the first year. Twenty-eight schools required a Clinical/Skills/Practice/Advocacy type course; one hundred and seventeen required Professional Responsibility. See, Verkuil and Krinsky, A Survey of Required and Elected Courses in American Law Schools, presented at Deans’ Workshop, A.B.A. Midwinter Meeting, 1984, on file with authors.

team-teaching model is both cost effective and pedagogically sound. More importantly, it responds, at least in part, to the challenge of Professor Cramton by simply "showing the students how," exposing the students ("up-close and personal") to professionals who have a good image of themselves and care about clients. Give the students that exposure in a simulated clinical setting and, over the course of the term, those professionals will demonstrate their positive qualities, and those same qualities will be inculcated into the students. Second, we will discuss the adjustments that may have to be made with respect to doctrine and perspective courses in order to accommodate the increasing demands that the skill courses make on law school resources.

The Role of the Practitioner — Team Teaching

The 1971 Carrington Report on the Curriculum Study Project Committee recommends team teaching. For example, Legal Planning, a course which is a part of the standard curriculum recommended by the Committee, is described in the report as a course which should be taught by a team including at least one practitioner engaged in legal planning.14 Although some law schools may have instituted the kind of team teaching suggested in that report, it certainly has not been widely adopted.

Virtually every law school in the country uses practitioners as adjunct faculty members, but any suggestion that they should have a permanent and expanding role in the law school must be evaluated carefully. There are obvious deficiencies inherent in the use of practitioners as part-time teachers. They provide little opportunity for student access, and a demanding practice provides serious competition for their time and energy. Furthermore, it is difficult for them to develop pedagogical skills comparable to a full-time faculty member. On the other hand, the use of practitioners as adjunct instructors is economical. If a law school is in close proximity to a sizeable bar with a diversity of specialists, there is always a pool of very competent practitioners who are willing to serve as adjunct faculty members for a modest stipend. The obvious challenge is to tap this resource without compromising academic quality.

A system referred to as "modified team teaching," is in operation in the Graduate Tax Program at Villanova. Under this system, practi-

14. PACKER & EHRlich, supra note 7. No law school has instituted the curriculum recommended by the report or any curriculum which resembles it.
tioners having special skills are recruited to teach advanced courses, including clinical simulation courses, together with a full-time faculty member. The full-time faculty member's role is to serve as the educator who develops the overall structure for the course, tends to the mundane tasks of preparing a syllabus and assignments, provides access for students, and conducts examinations. The adjunct faculty member takes major responsibility for the classroom presentations, thereby freeing the full-time faculty member to play his role in other courses or other sections of the same course.

This model is ideal for professional training and resembles the models which are used in dental and medical schools. The student in this type of course is put directly in touch with the "real world" and can be exposed to the kinds of transactions that the practicing lawyer most frequently encounters and to the issues that emanate from these transactions. The Carrington Report refers to this as an effort to make students keenly aware of the interaction between legal principles and the environment in which they operate. Furthermore, the presence of a real practitioner enhances the students' experience and provides a more vivid model to emulate. At the same time, the full-time faculty member can insure that a basic foundation of legal principles will be properly developed throughout the course. One might refer to this function as developing the doctrine.

![Team teaching](image)

This kind of interaction between law teacher and practitioner is contemplated but not often realized in the typical external clinic. A
number of impediments inherent in the external clinic to achieving a
close and meaningful contact between the practitioner and the full-time
teacher are not present in the simulation exercises. In virtually all ex-
ternal clinics those impediments include: 1) heavy caseloads, which are
frequently managed by an inexperienced practitioner (or at least not
the kind of distinguished practitioner who would be invited to partici-
pate under the proposed model), and 2) a changing docket of actual
client matters, which prevents prediction of the kind of issues that will
arise and, thus, inhibits proper structure of the classroom component.

The full-time teacher and the practitioner should also experience
professional growth from the kind of exchange contemplated in the
modified team-teaching model. Those who have participated in team
teaching in the Villanova Graduate Tax Program report that they have
benefited from the experience. It gives the full-time teacher a real
world context in which to place his knowledge of the legal doctrine, and
the practitioner is required to go through the typical law school class
drill, which frequently results in a useful reexamination of even the
most fundamental assumptions and beliefs.

Professor Cramton would likely raise at least one concern regard-
ning modified team teaching as a method of raising the level of the stu-
dents’ concern about their own image and the well-being of clients: He
is very wary of the legal profession’s dominant model for ethical behav-
ior which he described as the “total commitment” model. Under this,
the lawyer must do everything for the client (short of violating the law)
that the client would do for himself if he had legal knowledge and skill.
Our adversarial system will produce just results in the long run only if
there is total commitment on behalf of each party. Professor Cramton
is concerned that on some occasions this kind of zeal may have a nega-
tive effect on the pursuit of justice and the well-being of the general
public. As he correctly observes, the total commitment model only
serves justice when both parties, and the public as well, are protected
by aggressive and competent counsel.

The practitioner’s degree of commitment has not been a problem
in our experience at Villanova. It is true that in the simulated cases
that are used in the Graduate Tax exercises, the opposing party in vir-
tually all cases, the IRS, is well-represented. More important, however,
the practitioners selected for this role have the emotional and psycho-
logical traits which the Carrington Report regards as vital in the at-
tainment of competence. That report states:

As an advocate, he [the effective lawyer] should be aggressive. But
his aggression should be controlled. This is especially important in negotiation or planning for the avoidance of disputes. It is important to possess a sensitivity to the consequences of stress, not only on others with whom the professional may deal, but also on himself. It is useful to understand the psychodynamics of power, especially as they operate on one's self; thus it is important to recognize the responsibility of power over others, without being infatuated by it. The model [lawyer] . . . should also feature the craftsman's sense of autonomy, which enables him to withstand criticism, to express unwelcome opinions, and to cope with conflicting claims to his loyalty. He should possess a larger-than-ordinary time perspective which enables him to sacrifice present benefits for larger future ones. He should share an interest in the general welfare; the cynical lawyer is an ugly menace, not only to others, but ultimately to himself. At the same time, he should not be so committed to his personal view of what constitutes the general welfare that he is unable to reckon with the differing views of others.15

Although there may be instances where a practitioner endowed with the character traits enumerated above, acting under the constraints of the total commitment requirements, would have a significant negative impact on the pursuit of justice or the well-being of the general public, those situations are relatively rare. If such a situation were to arise in the classroom setting, it should invite a thorough discussion of the dilemma the practicing lawyer faces. The students in a team-taught course will identify with the practitioner and, thus, be more acutely sensitive about the issue than is usually the case in classroom discussions of ethical dilemmas.

In most instances, especially in those areas which are highly regulated by complex statutory material, total commitment is the appropriate standard.

For example, assume a tax lawyer shares the present view of the Treasury that the tax incentives presently available under the Internal Revenue Code to certain corporations who establish a presence in United States possessions, such as Puerto Rico or Guam, should be restructured so that the incentives would be available only for those corporations which substantially increase employment in the region. Nevertheless, if that lawyer represents a client such as a drug company (The Treasury target) which operates totally automated facilities which can easily be established in any geographic area, the lawyer

15. Id. at 104.
must inform the client of the present tax incentives and do everything possible to help the client attain them. Similarly, the tax lawyer should inform the client of the policy concerns that are presently manifested and point out that those concerns may lead to reform of the law. He should also be secure enough to tell the client that seeking such tax advantages may create public relations problems. That same lawyer should also have the autonomy and courage to engage in law reform activities and to publicly endorse proposals for equitable taxation, even though it may be opposed by his clients.

Lawyers who can demonstrate that kind of emotional balance should be recruited for a team-teaching role. That kind of lawyer will enhance competency training, and the total commitment which that lawyer has to his clients will not interfere with his contribution.

Furthermore, exposure to such competent and ethical lawyers is particularly important for today’s law student. Every legal educator is aware that shrinkage in financial assistance has caused law students to seek part-time employment. In many instances, that employment is as a law clerk at a firm where the law school has no input. The experience may or may not have a positive effect in the formation of the student’s character traits. Modified team teaching, on the other hand, gives the law school the opportunity to present an approved role-model to the student. In that way, any negative influence that an outside experience may have had on the working student can be neutralized. It is our view that the time has arrived for full-time teachers to work in tandem with a select group of practitioners, and that the division of labor should follow the modified team teaching model discussed above.

The Challenge of Teaching Perspective (or Theoretical) Courses in the 1980's and 1990's

Earlier in this article, we speculated that the current focus on competency skills would affect the mix of doctrinal, skills, and perspective courses in the curriculum. The heaviest cost to this mix will fall, we believe, on theoretical or perspective courses, which will be reduced because of increasing pressure in law schools to enhance the student exposure to skills courses. The shifting of law faculty to skill courses, and the public posture of legal education and the Bar on the need for more practical training, will reinforce the less-than-enthusiastic attitudes that many students bring into law school about theory and may result in less enrollment in elective courses with a dominant perspective focus, and in the elimination of certain courses altogether.
We believe that the study and learning of doctrinal material is important. Students need to know and be able to employ in concrete factual situations, the basic rules, principles and concepts of several areas of law. Doctrinal studies also are, we believe, still a very effective way to develop basic analytical and case analysis skills. Although students need to develop writing and other skills directly related to the everyday responsibility of the practitioner, such as client interviewing and counseling, negotiation, drafting, and advocacy skills, they must also be exposed to more general perspectives on law and the legal system, and to basic understandings about nonlegal disciplines that have special significance to legal policy. These disciplines would at least include economics, psychology, history, sociology, and philosophy.

For purposes of this discussion, we will use “perspective” material or courses, in a very general sense, to include both interdisciplinary courses, such as law and psychology, and classic theoretical subjects, such as jurisprudence and legal process, as well as other understandings about law, such as modes or views on the interpretation of statutes.

16. A report by a committee of the Harvard Law School faculty aptly summarizes skills that doctrinal studies effectively develop. They are:

I. Legal Reasoning and Argument

II. Analysis

A) "common law" case analysis — parsing of judicial decision (procedural posture, holding/dictum, etc.), analogy and distinction, doctrinal development.

B) language analysis — use and interpretation of words and phrases in rule statements; getting meaning from (or conveying it through) context, history, purpose, “structure,” etc.

C) problem analysis — conceptualization, categorization, characterization, means-ends analysis, goal-setting, priorities feasibility, strategy.

III. Argument, Inference, Proof

A) Fact determination — what counts as “fact” in adjudicative, legislative, advisory, etc. settings; how facts are established (stipulation, judicial notice, inference from evidence, client’s word, legislative investigation, presumption, etc.); reliability — needs for and cost of; introduction to pertinent psychology and epistemology.

B) Composition of legal argument — how conclusions are drawn out of positive law, precedent, various policy factors, “equities,” style and substance; psychological considerations.

Tentative final draft, Chapter I, THE PRESENT STATE AND FUTURE DIRECT USE OF LEGAL EDUCATION AT HARVARD: GENERAL CONSIDERATIONS, 9 (1982) in possession of authors.
The Importance of Perspective (or Theoretical) Studies to the Legal Profession

Lawyers are members of what is predominantly a public profession. The professional lives of most lawyers consist of primarily policymaking or consulting functions. At most, twenty percent of lawyers are actively involved in litigation or appellate advocacy. Lawyers predominant in elective offices at the federal level and are now becoming increasingly involved at the state and local level. For the lawyer who is or will be a policymaker in government, theoretical understandings are essential to the making of sound policy. The general structure and overview which perspective materials provide facilitate clear judgments and careful choosing between competing policies and principles. For example, a legislator or legal assistant who is contemplating legislation prohibiting conduct that his or her constituency considers immoral would benefit greatly from exposure in law school to the writings of contemporary moral philosophers and to a thorough discussion of the concept of "victimless crimes."

Professor Feinberg, for example, has developed a way of looking at the issues and arguments that are brought to bear when the government enacts legislation that is designed to enforce the legislators' sense of moral offense in their communities. He breaks down the whole range of justification for such legislation, from enforcing morals to preventing physical harm and paternalism. He also discusses in a clear and cogent way the issues involved in weighing the conflicting principles on tough moral and social questions. The general structures in Feinberg's article provide a way of looking at and organizing in one's mind the range of considerations that ought to go into making sound policy.

The policymaker must also have an understanding of the issues that are presented when a law defines something as criminal, i.e., prostitution or gambling, even though there is no victim in the classic sense. In considering the soundness of legislating against this kind of conduct, the cost of law enforcement, for example, is a factor that ought to be

17. This is a term that is used to describe a group of contemporary philosophers that write about important moral and social issues, ranging from abortion to reverse discrimination, as well as more general questions such as justice. Their writings have influenced legal scholarship and other disciplines as well. Some of the best known and influential of these are Ronald Dworkin, Joel Feinberg, James W. Nickel, and John Rawls.

taken into account. Regardless of how one resolves these controversial questions, the legislative process and, ultimately, the public, benefits from a thoughtful consideration of all of the pertinent factors.

In some areas of the law, such as tax, knowledge of another discipline, economics, is essential to understanding doctrine. Federal income law, in large measure, is an assortment of economics and accounting concepts. Beyond that, tax policies are central to financial planning decisions in every facet of our economy. Those who formulate tax policy must, therefore, continually examine the economic climate. In a period such as the late 70's and early 80's, when interest rates soared, a tax system that attached no consequence to bargain interest loans simply did not contend with reality. Even a concept as fundamental as the accrual method of accounting, which permits deductions to be taken when the obligation is fixed and the amount is ascertainable, must be altered to prevent using money at the government's expense by causing the deduction to precede actual payment for a substantial period of time.

An additional perspective can be obtained by examining the methodologies employed in other disciplines. For example, a recent article in the Journal of Taxation suggests using an econometric model to predict the appropriate estate plan for a married couple where state and federal taxes are interdependent and thus have a multiple looping effect which is caused by their interaction.

Theoretical understandings also have practical value, even for the lawyer who engages in more traditional forms of professional activity. The lawyer's comprehension of such things as the nature of federalism, the defeasibility of legal concepts, the jurisprudential or politi-

19. The absence of a traditional victim requires that elaborate informer systems be developed to perform some of the enforcement functions of the victim, e.g., reporting that a crime has been committed and identification. In our constitutional system, informer systems may be very costly in terms of allocation of resources and other rights. The cost of enforcement may outweigh the benefits of legislation. See generally, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 151 (1968).


22. See, for example, the interesting litigation strategy that resulted in the decision by Ralph Nader to sue General Motors in a state court in New York when other state and federal forums were available. S. SPEISER, LAWSUIT 31-42 (1980).
cal philosophy of a particular court, the difference between policy and principle arguments, and the allocation of decision making between intra-governmental institutions, all provide valuable input for all phases of litigation decisions. Such understandings are as important to the competent, caring professional as cross examination skills.

A few elaborated illustrations will suffice to demonstrate this. In a well-noted case, consumer advocate Ralph Nader, brought suit against General Motors in a state court in New York for violation of his legal right to privacy. The state civil suit charged General Motors with (1) tapping his phones, (2) surveillance of his activities, and (3) subjecting him to repetitious anonymous phone calls and other activities. The activities alleged in the complaint occurred in Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire and New York. Given the contacts with these jurisdictions, Ralph Nader had the option of initiating the lawsuit in either a federal district court or a state court in any one of these jurisdictions. Stewart Speiser, Ralph Nader's lawyer, has written about the strategy that went into the decision to sue in a state court in New York, even though New York did not recognize a legal right to privacy which would prohibit the alleged activities of General Motors. Some of the factors that were considered in the decision to sue in New York were: (1) the choice of law rule of the various jurisdictions; (2) the substantive law of privacy of the various jurisdictions; (3) the tradition of jury awards in federal and state courts within jurisdictions and between different states; and (4) the availability of potentially dilatory procedural moves, such as interlocutory appeals in


25. The distinction is one that Ronald Dworkin has developed in his work. See, R. DWORINKIN, TAKING RIGHTS SERIOUSLY 22-28 (1977).

26. Examples are as numerous as there are hard decisions in appellate court litigation. Two quickly come to mind: (1) whether to appeal a jury determination in a personal injury action on the basis that it is excessive and (2) whether to appeal a school board's decision after a hearing that there was no abuse of discretion by a principal who suspended a student.

27. S. SPEISER, supra note 22. Two of the counts on invasion of privacy were sustained by the New York Court of Appeals in a decision that has become important to the law of privacy generally. See generally Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).
state and federal courts. A general understanding of our federal system is essential to the identification and evaluation of these factors.

After Nader defeated attempts by General Motors to dismiss the privacy suit on pleadings motions in the New York courts, General Motors settled before trial for $425,000, which at that time, 1960, was by far the largest monetary recovery ever in this type of action. Mr. Speiser's interesting account of the analysis that went into the ultimate decision of a choice of forum and other aspects of litigation strategy demonstrates how essential general understandings of our Federal system are to the everyday decisions of lawyers involved in litigation in which the parties have contacts with several states.

"Defeasibility" is a term that Professor H.L.A. Hart used in his inaugural publication to explain an essential feature of some legal concepts. Hart pointed out that legal concepts, such as torts or contracts, are characterized by one feature: even though certain legal requirements have been demonstrated, liability may be defeated by demonstrating that other conditions are present. Thus, even though it has been established in a contract action that there was offer, acceptance and consideration, the claim may be defeated if there was fraudulent misrepresentation; if, in a battery action, the defendant intentionally struck the plaintiff, the tort action may still be defeated if the defendant acted in self-defense. In everyday litigation, understanding the defeasibility of legal concepts is important to the drafting of a complaint and answer, to choosing correct procedural moves, to structuring discovery, and to developing a theory of the case.

The distinction between an argument of policy and an argument of principle is one that Ronald Dworkin has developed in much of his work. Basically, policy arguments are those that identify a goal and assess the extent to which particular action does or does not promote that goal. They are arguments determining the extent to which actions are efficient in accomplishing something in the society. Arguments of principle are those that support a particular position by invoking a proposition that is grounded in society's sense of justice and morality. The matter is, of course, much more complicated than this brief summary suggests.

Given the above, there are several practical significances to understanding the basic distinction. In countering an argument of policy there are three basic options. One is to question the importance of the

29. R. Dworkin, supra note 25.
social goal that is promoted. More likely, you would question the efficiency of a particular action as a means for accomplishing the goal. Finally, you might point to other important goals that would be frustrated by the particular action in question.

However, when you attack an argument of principle your moves are different. Arguments of principle have essential roles in litigation involving fundamental rights. Rights often "trump" government action that promotes societal goals. For example, if there was a warrantless search of homes in a residential area for evidence of a crime, it would promote the general goal of crime control but the action would be unconstitutional because of failure to conform to the probable cause and warrant requirements of the Constitution.

Partially as a result of these features of rights arguments founded on principle, much of the argument strategy in constitutional litigation evolves around "characterizing" the interest or right involved. This is because if we can persuade a court that the government action substantially interferes with "a fundamental right," then the "trumping" feature of such rights will almost invariably override the policy asserted to justify the government action.  

Perhaps it has too often been said, and it is too obvious, that theoretical perspectives are important for good lawyering. Yet we suspect that this basic fact may be too easily forgotten during this skills competency phase of legal education.

A Case for Teaching Theoretical Perspectives in the Context of Substantive Courses which Traditionally Emphasize Doctrinal Coverage: The Pervasive Method

Teachers who believe that theoretical perspectives are important also find methods of bringing them into their courses. Other teachers find them less important and do not. The teaching of theory in law school is likely to be more challenging than ever in the next decade, in part because students come to law school with a very goal-oriented,

practical mindset. They are concerned about jobs in a finite market; they are often in debt. These and other factors contribute to a lack of enthusiasm for theoretical or abstract discussions. As law teachers, we must demonstrate to students that a theoretical understanding is useful in the day-to-day decisionmaking of lawyers, who represent clients as well as make policy. An effective way to accomplish this is by teaching the theoretical perspective as part of a course which primarily focuses on legal doctrines.

Integration of perspective materials with traditional materials on common law and constitutional cases, statutes, and regulations enhances the student’s appreciation for the value of a theoretical perspective. It also expands the student’s knowledge and understanding of the cases, statutes, and regulations that are the focus of the discussion. Finally, it is likely to contribute to that lawyer’s caring and sense of a broader obligation to the profession and society.

There are a few major casebooks which splice theoretical and primary material well, but, by and large, the law teacher who is interested in integrating theoretical materials must develop his or her own supplementary materials for a particular course. With the technology of word processing and electronic reproduction, supplementary materials can be produced quickly and inexpensively. The initial reproduction of excerpts of theoretical writings, either from books or secondary publications, and lines of cases, interpreting common law doctrine, the constitution, or statutes, and regulations, will involve a modest expenditure of time. Over the course of using the materials in class, specific questions can be developed which will become the focal point of class discussions as the materials “mature.”

Courses in the area of public law, with an emphasis on rights against government, are prime candidates for philosophical and jurisprudential perspectives, and a great deal of good material is available.31

31. There are several sets of published materials that do a good job of interfacing philosophical and jurisprudence materials with primary authority. See, e.g., Feinberg & Gross, Philosophy of Law (1975); R. Kipnis, Philosophical Issues in Law (1977); Morris, Fundamental Responsibility (1961); Several recent books are also useful: See also Ely, Democracy and Distrust (1980); R. Berger, Government by Judiciary (1977); M. Perry, The Constitution, the Courts and Human Rights (1982); D. Richards, Moral Criticism of Law (1977).

Professor Turkington has utilized supplementary materials to teach perspective components in courses on Constitutional Law and Privacy. A partial syllabus follows.

A. Separation of Powers

1. The Federalist, Madison, #47; Hamilton, #69.
Courses that have a heavy statutory component and involve important

6. Introductory Note: Justice Taft's and Justice Brandeis' employment of *Marbury v. Madison* as precedent in *Myers*.

B. Introduction to Jurisprudential Foundations of Constitutional Law; Philosophies of the Role of the Court in Constitutional *Adjudication*.
4. Wright, the Role of the Supreme Court in a Democratic Society — Judicial Activism and Restraint, 54 Corn. L. Rev. 11 (1968).
5. Contemporary Talk: Interpretive and Non-Interpretive Review.
6. Professor Ely on: *ELY, DEMOCRACY AND DISTRUST* 1, 2 (1980).

C. The Use of History in Interpreting Constitutional Text: Discovering the Intent of the Framers.

D. Concepts of Fundamental Rights and Justice
1. Supreme Court Justices and Moral Philosophers
   On Rights
   On Justice
public law issues are ripe for developing supplementary sets of materials dealing with various perspectives and statutory construction in the legal process. There is much that has been written from a very theoretical perspective about the meaning of language, generally, and there is much that has been written in law reviews on statutory construction questions. Questions on statutory construction are also tied closely to questions of a more jurisprudential nature. The attitude that a court takes in interpreting language in a statute which is open-textured may well depend upon whether that particular court embraces any of the dominating schools of jurisprudence, legal realism, positivism, or natural law. Questions concerning the appropriate role of courts in a constitutional system and the relationship between the legislature and courts in respect to policy-making are also relevant considerations in statutory courses. Materials on history and sociology may work well in a course such as Contracts.

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a. The Justices

b. The Philosophers

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32. The "unpublished" materials by Hart and Sachs, entitled *Legal Process*, may still be the best source for perspectives on statutory construction.

33. The most recent and, perhaps, most useful example of the spate of literature that has been published on Interpretation is a two volume symposium in the Southern California Law Review devoted entirely to the subject. See also *Interpretation Symposium*, 58 S. Cal. L. Rev. 1 (1985).

34. The Syllabus in this footnote was prepared by the late Professor Douglas Salem for an Introductory Course at Southwestern School of Law. Professor Turkington taught from the materials in 1978 at Southwestern and found them to be an effective fusing of historical-sociological perspectives with primary authority in the area of contracts law. Further refinement of the materials was prevented by Professor Salem's untimely death in 1979.

I. Introduction — Editorial Note Containing
In short, the varieties of supplementary perspective components that could be brought to law school courses are only limited by the lack of interest, imagination or time of the law teacher.

In this era of fiscal belt-tightening, the teaching of theoretical understandings in the context of the substantive course is not only peda-

A. Explanation of function and structure of section.
B. Brief excerpts from Holmes, The Common Law and Chief Justice Coke on the need to understand the historical context in which legal principles evolve in order to use them.
C. Brief excerpts from two classic historical treatises on the forms of action and pre-18th Century contract law.

II. Eighteenth Century Contract Law — Equitable Conception of Contract
F. *Seymour v. Delancy*, 6 Johns Ch. 222 (N.Y. Ch. 1822).

III. Nineteenth Century Contract Law — The Will Theory of Contract
A. Horowitz, *The Emergence of An Instrumental Conception of Law*.
C. Restatement of Contracts, (1933), Introduction and section 81.
F. *Seixas v. Wood*, 2 Caines (N.Y. 1804).

IV. Twentieth Century Contract Law — Balance of the Equitable and Will Theories — Return of Status
E. Restatement of Contracts, 2nd, section 90.
F. Uniform Commercial Code, §2-302.
G. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948).
gogically sound but is cost efficient in terms of faculty resources. Most importantly, it will contribute to the development of the caring, competent law professional which is the primary challenge in legal education in the next decade.
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Staying Alive

Lucy S. McGough

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Just as I did when as a child I had bronchitis and promised upon recovery to become a missionary, four years ago, I made a deal with God that if I survived my first semester of teaching Trusts and Estates, I would share my journals with other first-timers. I hate to twice-tempt fate.

My first preparation of a law course occurred when I began teaching in 1971; then after twelve years of teaching the same courses, I volunteered to teach in what was for me a major new substantive area of trusts and estates and to assume responsibility for a four-semester-hour course, as it was then constructed.

In re-reading my journals from the long Winter of '83, I have reexperienced for the third time the harrowing adventures of a first preparation, and from that material, some patterns of distress emerge which I suspect are endemic.

1. Journal-keeping has become an exceedingly valuable mental reflection exercise for me, and I am indebted to the Project on Law Teaching and Humanistic Education for suggesting the “consciousness-raising” process to me. The process is known by many names and flourishes in a variety of forms: Pepys' Diaries; a scientist's laboratory notes; as well as a class “post-mortem,” the label used by Professor Newell in Ten Survival Suggestions for Rookie Law Teachers, 33 J. LEGAL EDUC. 693 (1983). Though journal-keeping varies among individuals, I record any ideas, feelings, and less frequently, insights, about law or teaching whenever they occur to me. I carry my small notebook with me wherever I go. When a course is in progress, I try to be disciplined enough to record my plans for each class before class and, after class, to note briefly anything of significance which occurred. Journal-keeping is a private conversation I have with myself although for the purposes of writing this essay, I am sharing entries with colleagues whom I trust will read them with forebearance and charity. Nothing has been changed in the entries as they were jotted down except names when I have concluded that the individuals might suffer some embarrassment about my publication of private conversations which occurred between us.
Teachers of law do very little to insure the encouragement and preservation of excellence in teaching, assuming that we could agree on what it is or even, like Mr. Justice Steward, know it when we see it. Perhaps we can only perceive good teaching through experiencing it, in the role of either student or teacher. It might logically follow that if we were willing to share our own experiences, we might arrive at a consensus for professional aspirations within our lifetime (which is the only deadline I am really interested in).

But that is a lofty and exceedingly difficult task far beyond this small piece. I offer these thoughts because, with few exceptions, there is little in our common literature which addresses the particular plight of a first-time teacher and attempts to unshroud some of the most persistent ghosts which haunt that experience. Perhaps at the various clinics for new teachers this process is afoot, but if so, it is a rear-guard action on tiptoes and needs to be brought into contact with the rest of the army.

Though "born again" as a first-timer in 1983, I had lost all of my zeal for writing about that teaching experience until an event occurred this past Spring. The occasion was a "personnel decision" faculty meeting which had evolved into what can only be characterized as a wholesale drubbing of the classroom work (vis-a-vis "teaching") of the young professor under review. Finally, at that meeting, a senior colleague, highly respected for his teaching, quietly spoke up for compassion and forebearance, recounting some incidents of his own early embarrassing ineptitude. His was a quiet, gentle act of self-effacement, of even courage, which made me squirm in my silence. More significantly, in fourteen years of teaching, I cannot ever remember hearing another confess that he or she had not sprung full-facultied from the brow of Zeus.

It is in the spirit of his example that I write for new teachers (and even seasoned colleagues who can admit to a touch of teaching anxiety then or now), and for anyone who is interested in facilitating the suc-


3. In a moving eulogy to a great teacher-scholar, Dean Calabresi shared an encounter he had with the late Grant Gilmore. While all of the Gilmore memorials should be read by all who would emulate his teaching success, this particular paragraph from the Calabresi tribute has given me enormous solace:

When I began teaching at Yale, I was so nervous that I could not eat
ccessful integration of young teachers into the collegium. We woo recruits at great expense of time and money; however, thereafter in our efforts to relate to them, unless we seniors are willing to drop our Darth Vader masks and heavy breathing, we cannot hope to help them be as good as they are capable of being, as soon possible. Can you imagine anyone sidling up to Lord Vader for anything, much less sharing confusion about the impending battle plan or asking for a tip on commanding?

Based upon my own experience of teaching a new course after twelve years of having a constant, perhaps stagnant, teaching package, the three emergent themes are pressures, fears, and isolation. In fact, the entire experience might well be summed up on the single apocalyptic observation that in the first teaching of material, pressure produces fear, which is suffered more acutely in isolation.

But never fear, gentle reader, help is only a few paragraphs away. In mitigation, I offer tightly formulated rules, quintessential elixirs, categorical imperatives developed by generations of legal scholars when presented with symptoms of the intolerable ambiguities of the human condition. What's more I offer solaces (and an even number them) for the inevitable and unavoidable hardships of the experience.

Pressures

According to my journals, on February 24, 1983, on national television, some kid demonstrated an ability to put a Rubik's Cube in order in two minutes — with only his toes. As a related phenomenon, I submit that most of the pressures upon a first-term teacher are internal and self-generated. Certainly that was my own experience as these two before my classes. I asked my fellow teachers when the nervousness would end, when I could approach my classes with confidence in my knowledge, in my capacity to arouse and to explain. Different teachers gave difference answers. But Grant replied: "If it ever does, get out of the profession . . . at once." A teacher so complacent — so confident that he or she is living in the Golden Age of his or her achievements — may indeed explain, may indeed seem to the students of the moment to be a great teacher. But such great teachers (as Grant said elsewhere) 'should be hunted down and shot.' Openness to students and their ideas can exist only in self-doubt, in the knowledge that the last year, the last class went well, that all could so easily go well again — but that the next time could also be a disaster. It is uncertainty that prompts the restless intellect needed to encourage students to think for themselves.

Calabresi, Grant Gilmore and the Golden Age, 92 Yale L.J. 1 (1982).
following journal entries document.

“April 13, 1982: Why does this stuff, class closing, the Rule of Convenience, ‘vesting’, that old bugaboo from property, defy my efforts to keep it in proper focus? One minute I think I have it, the next it’s all fuzzy focus? As one student said yesterday, ‘This stuff is getting pretty hairy.’ Now how can I teach these materials when the best I think I can muster is to lead them on a small footbridge across a morass crock-full of alligators: One slip and we all become breakfast?”

“April 15, 1982: Conversation with X [who had for many years taught Trusts and Estates]. I laid my proposed hypo on him, and he struggled with it. Said not a year went by that he did not make a mistake in class which he had to correct. Thinks this stuff is incredibly difficult to grasp and that I cannot cover it in the time remaining. Terrific (I have made a side-bet with myself that I can get through this stuff without making a mistake.)”

Of course, these two journal entries evidence wholly inconsistent mental positions. My smug side-bet created an internal self-expectation which all facts belied. The students perceived the difficulty of conceptualization, I could even acknowledge the difficulties, and my veteran colleague confirmed that this particular material was not the stuff of flawless performances. Unlike the kid with the Rubik’s Cube, internal and external disaster lay in wait for me and shortly occurred.

“April 17, 1982: I got cocky, took a ‘what if the testator actually had a grandniece born in Sheboygan, without his knowledge, who was then adopted by his daughter, a half-wit . . . ’ type question. Quick as a flash into the swamp. Floundered for twenty-minutes. I got so confused I would have been hard-pressed to come up with my own name. I am thoroughly disgusted wth myself and very depressed.”

Solace 1: Making a mistake in teaching is okay. (Repeat) (Set to music and sing daily in the shower). (Tattoo on your wrist for permanent reference).

Clap your hands if you believe in this Solace. Silence? Students can make mistakes, colleagues can make mistakes, Nixon can be forgiven for accepting the gift of the loveable cocker spaniel, but not you, right? Accepting your own mistakes as an inevitability is very, very difficult, particularly when they are made in front of an audience. Perhaps the more constructive path to mental health is to focus on how the “damage” of mistakes can be contained, on the bare possibility that they can occur even to a perfectionist, the basic personality type of most law professors.

Rule 1: Bluffing an assertion is bravado better left to poker
players.

In the first place, bluffing rarely works. Bold assertions, particularly when coupled with words like "never," "not a single," "certainly," and other similar absolutes, are gauntlets to even the most apparently-comatose group of students. I have suffered the experience of having students all semester, toil for days in the library, breaking camp only when they have ferreted out the contrary authority (more often than not from Texas). "Kill the Leader," social scientists warn, is an inevitable stage in the development of any group. In the second place, you are succumbing to the siren's song of the authoritarian mode of teaching which will get you in the end. (See Rule 20.)

Rule 2: Trust your instincts. When you become aware that you and the class are floundering, cut your losses by climbing back into the nearest boat; even a sturdy log will do.

We're all guilty, I suspect, of compounding an error by floundering while waiting for a Muse to appear with a gift of insight. Regrettably, like Godot, the Muse is unlikely to arrive before the bell rings, if ever. Better to postpone further elaboration until you can relax, clear your brain, and reconstruct in the privacy of your study where you went awry. Putting a confusing issue aside saves not only class time but also many a professorial hide.

Rule 3: If you can muster humor about your floundering, do it.

Particularly when you've set yourself up as a Master Teacher (see Rule 20), an obvious mistake in exposition brings about the same sort of tension that an audience would feel if Baryshnikov missed a leap and fell into the orchestra pit. Humor immediately defuses tension, and a remark doesn't even have to be very funny to restore comfort.

Rule 4: The only sure thing worse than having made a mistake, is to persist in it.

Acknowledging your mistake and a subsequent brief recapitulation of a corrected version of the issue, is essential. Our wares are few: accuracy of discourse, integrity, and fair-dealing.

Rule 5: Nowhere is it written that the students can't be tapped to retrace a path wrongly taken.

If you accept the proposition that a classroom can be best used as a place of collegial give-and-take, and that dynamic is in place, then consider assigning all students the wonderful opportunity of figuring out where you went astray. The assignment becomes a disarming invitation; they go for it like guppies. I am, however, quite skeptical about singling out the kid who asked the question that created the debacle in the first place and assigning only him (or her) the quest. That seems
punitive and sets up a *mano a mano* dynamic for the remainder of the course in which one of you must die. And it is not always the bull. Pressure also arises from the sheer volume of the new material to be synthesized before you can begin to feel comfortable about teaching anybody anything about the course, as this journal entry attests:

“February 8, 1982: Trying to get centered before class which is in twenty minutes — worried about pacing. We are going at a snail’s pace. Must press on. Will handle questions by posting office hours. Advancements, releases of expectancies — two pounds of detail in Atkinson. Who was he? Did he ever leave the library?

(After class): Blank looks, blank looks. Threw me off, and I snapped at one woman. Another student said, ‘Let me slow you down a minute, please . . . ’ and then asked a question. We’re crawling. Very flat class. I didn’t keep eye contact and when I did, it looked like a sea of fish, belly-side up and staring into eternity. I had lost them but was afraid to depart from the charted course. What now?”

*Rule 6: The Trap of Traps is agenda-obsessing: setting a goal of coverage is one thing; losing a class in the process is too high a price.*

If you cover 200 miles in a forced march and arrive with no soldiers, where are you? Here the eyes have it: if they are glazed, and you can’t attribute the condition to a Section celebration the night before or that they have been bound in their seats and held over by your colleagues in the three immediately preceding classes, then you should find out where they got lost.

*Rule 7: It is okay to address the students as persons in class vis-à-vis as the Grand Inquisitor’s next targets.*

The application of this rule will permit you to ask the students why they are looking perplexed (a more polite term than ‘blitzed’ or ‘fish-eyed’). By inquiring about where they got lost, you can demonstrate your appreciation of the fact that you are a facilitator of their learning who cares that they understand what you are attempting to display for their use.

*Rule 8: Pace, as a manipulation of time, is relative.*

If you can bank on the fact that no one in the class has spent half the time in class preparation that you have, and you can, then cases which now are like child’s play to you may yet seem like Chinese puzzles to the novice.

*Rule 9: Beware the lure of nit-learning.*

My ingestion of gargantuan amounts of Atkinson is a perfect example of the distinction to be drawn between food for thought and food for class consumption. Once one has invested in information-gathering,
it is devilishly tempting to display all that erudition, particularly when one has a captive audience. This is not to say that I am not eternally grateful to treatise writers like Atkinson or that my effort in digesting his work was wasted. He gave me a sense of detail in my learning that paradoxically should have enabled me to forego all but the briefest mention of in class.

(Although it does not appear in this journal, a related phenomenon which occurs in subsequent offerings of a course is the research done in response to a particular student’s off the wall, but intriguing, question. Certainly, the follow-up report to the student and the class is silver well worth mining; it is responsive, collegial learning at its best. Laying it out the next year, however, when the issue does not spontaneously arise as a need within that class’s experience, is like serving leftover tuna soufflé.)

Pressures also come in all shapes and sizes and can take the form of gossip and rumors blowing through the student body. Before you have taken one step into the classroom, your credentials, experience, and personal life, real and imagined, have been dissected more thoroughly than any frog in Biology 101. The dilemma of whether or not to confront misinformation, to debunk gossip pressure, is raised in the next entry.

“February 9, 1982: I heard a rumor today from a student friend. Apparently the students think that I am leaving next year because ‘the law school is making her teach Trusts and Estates.’ [In fact, I was leaving because of an intriguing opportunity at another law school, but I hasten to add that I was completely happy where I was, enjoyed the somewhat greater job security which a Chair affords, and had in fact volunteered to teach Trusts and Estates.] I have decided, after much agonizing, to confront the rumor briefly in class.

(After Class): I explained to the class that rumors notwithstanding, I had volunteered for the course because I knew that the same transcendent concerns in this course were at work in the Family Law course which, as they all knew, I had taught for many years. That, yes, this was my first venture, but I wanted to learn the area and had wanted to force myself out of an authoritarian mode of teaching. That I was willing to learn along with them, if they were willing to suspend judgment and learn along with me. It was very frightening to be so bare before the class. And they were silent — rapt, but silent. (What if they go to the Dean with a recall petition? What if they demand tuition refunds?)”

“February 10, 1982: (After class) Terrific! Bright eyes, nodding
heads, wonderful interaction with what was probably the first class of well-prepared students. Dealing with inconsistent cases, possible threads of reconciliation run amuck; exciting, emotional energy. Lovely, lovely. I really needed this. Dark thought: Can I keep this up? Will tomorrow be a bomb?”

- Solace 2: No matter how hard you try, it is impossible to sustain a fever pitch, and more often than not, the ecstatic teaching experience is immediately followed by a time of ennui.

A “bomb,” relabeled and perceived as an essential stroke in a cycle, is not a bomb. Mysteriously, and hopefully more often than not, the class will ignite and you will know why you wanted to teach. There are, however, many classes when your most precious hypotheticals will seem leaden and the only sound in the room will be the echoes of your own voice and the scratching of dutifully yet dully scrivening pens. It is the very unpredictability of ignition and lift-off that keeps you going.

Rule 10: Honesty about depth of knowledge is often a good policy.

Honesty is not necessarily and invariably the best policy for everyone, including me. What to do about rumors floating about your course or about you? Some surely you ignore; others, if your conjecture is that they are disruptive of the class dynamic, are better dealt with, even at the expense of precious classroom minutes.

In the case of this particular rumor, I realized that I had somehow managed to convey a complete disaffection for the materials of the course which was alarming to the students and which, if unchecked, could defeat even the headiest and most intellectually curious among them. I realized that I had apparently presented a very controlled, authoritarian image to them though it was actually a mask contrived out of my fear that if I let the discussion open up, I could not cope with their questions. That is a fear of all of us who lack confidence that we “know” the course. (See Rule 20.) Unflinching, tight-fisted control of a class can be a soporific, or worse, obscure the teacher’s passion and devalue the worth of the classroom adventure.

Every one of us harbors the fantasy of wanting to be the very best teacher in the school, or, for that matter, the universe. Competition can be healthy, but it can become another source of pressure for the rookie. I decided to invite a former colleague, now in a bank’s trust department, to present two lectures of ERTA and other tax aspects of estate planning. (It didn’t take very long for me to appreciate that tax coverage would be more than I could handle during my maiden voyage.) The next journal entry records what resulted from that decision.
February 25, 1982: After class three students approached me in the hall to say how good Barbara was. Why did they think she was so good? Why did I think she was so good? I watched her carefully. She excluded this aura of confidence, sort of an 'Okay chickadees, this stuff isn't overwhelming.' Sort of a sauce of reassurance went forth to blanket the class. She talks a steady stream and is flip in her approach to those holies of holies: Used 'Joe Schmo and all the little Schmos' in her estate planning hypo, kept it very simple as illustrative of a commonly occurring fact pattern. At one point, she dismissed a doctrine as being really of 'importance only in the classroom.' She's very out front — 'You are going to be doing such and such.' I find I tend to say 'all of you' or 'some of you' — speaking to them as a collective rather than using her approach of appearing to be talking directly (and personally) with each one. I think her approach is better. She was authoritative but not authoritarian.

Rule 11: If available time for preparation still leaves you feeling incompetent to teach some material, ask a colleague or practitioner to do a guest spot.

Now is that threatening advice? Of course it is. (I left out the part of the journal entry wherein I wallow in jealousy of Barbara). But this Rule is based on the wisdom of hindsight. Its application enables you to learn about a body of material, at least in overview, and to gain from another's demonstration of handling the material effectively with a class. You have secured competent coverage for your students and have been freed to concentrate on the remaining aspects of the course. Furthermore, you risk nothing in your relationship with your colleagues. I have since served a stint doing a buck-and-wing on the Rule Against Perpetuities, and it is enormously flattering to be asked to do a guest spot. Warm feelings were generated in me for the wisdom and perspicacity of my junior colleague-host. And the price? Well, there is a risk that the students will immediately start picketing in the corridors for hiring your guest as your permanent sub. Aside from that, I haven't found any.

Rule 12: Take every opportunity to watch other teachers at work.

Every visit to watch others teach is valuable in honing your own sense of effective teaching. At least to some extent, you can tailor your own methodology through close observation of the others. [But see Solace 3.] There's even a great deal to be said for watching weak colleagues: not only will you perceive what is to be avoided, but you'll walk away with greater self-confidence.

If you took a poll of all the law teachers in the country, probably
95% of them would agree that visitation is a wise rule. In my experience, however, visitation, except when “personnel decisions” are the next day, rarely occurs. My own theory of why visitation doesn’t occur on a regular basis (and why, for that matter, we devote so little energy to discussions of teaching methodology) is that we all prefer to cling to a primary identity of “lawyer” rather than “teacher”.

In tension, though, with advice that you observe and talk with other colleagues, is the counterweight of acknowledging your own idiosyncratic talents and limitations, as illustrated by the next journal entry.

“March 2, 1982: This is the ‘neurotic’ behavior J. [my spouse and fellow law teacher] is always harping at me about: My going over and over these materials trying to find the ‘best’ way, the most logical way to present this material. And my being ‘supercompulsive’ about typing out an outline of coverage instead of just ‘winging it.’ I am always comfortable only when I have an outline and research notes before me when I teach — my security blanket.”

Solace 3: You cannot radically change your persona or your approach to classroom preparation or presentation now at this advanced stage of your development.

Most of us cannot even muster a recognizable impression of Johnny Carson or Einstein or Paderewski or Sophia Loren, or whomever we most admire. I have known several colleagues who go into class without a single note; when I enter, I often appear like a camel packed for a three-week trek over the burning sands. I know several hilarious colleagues who could at least eke out a living in the Catskills. Sadly, not I. But my special cross in life is that I live with a colleague who is able to teach anything with éclat in two hours notice and then urge that anyone can do it. His time in preparation is spent in working until he finds the golden thread and can mentally organize the class discussion. (I think ‘winging it,’ free floating along with a class on only a mental outline smacks of the same craziness as that of the Flying Wallendas; he thinks my six, neatly tabbed, and mostly typed master notebooks per course is a clear manifestation of neuroticism.)

If sexual identity is fixed at six, then surely your approach to learning and the presentation of ideas is firmly in place long before you entered this profession.

For every song and dance dazzler on a law school faculty, who regularly opens to rave reviews and packs the students into electives, there are a dozen more quiet but equally learned non-performers. The true measure of great teaching is deferred over a lifetime in calls and
notes from the field as students pursue the law and remember insights gained from your classroom. As some sage once observed, "God created Man with a flourish of diversity." Accept your whatever-you-are: Major overhaul is out of the question. Minor tinkering and tune-up may be possible. At the risk of appearing to trivialize the mystery of teaching, I submit that if encyclopedic research on pink paper, carrying a rabbit's foot, or never taking a note on what you read has been your methodology, then it is not only all right, but is would be insane for you to attempt to change and expect to feel comfortable again for a very long while.

This is not to suggest that you cannot or ought not to enhance your teaching effectiveness if it is within your power and will. Commonly recurring criticisms made about young teachers are that he or she "speaks in a monotone" or "the presentation is dull." More often than not in my collegial experience, such a situation results not from any innate drabness of the individual but from an overly controlled, fear of flying technique which will dissipate in most as the new teacher gains self-confidence.

Furthermore, presumably there are limits to changes you might be willing to make in order to be more "popular," a common litmus test for effective teaching. When I first entered teaching, a friend sent me a professional profile from an alumni magazine of a highly regarded university. The article extolled the phenomenon of packed enrollment in nutrition courses taught by a professor, who produced light and sound shows on the major food groups, and arrived on a motorcycle customized as a different vegetable for each class. Surely there are honorable responses short of such theatrics to cries, such as, "Thrill me with negotiable instruments."

The list of pressures upon a first-timer seems endless: faculty meetings, faculty committee meetings, university faculty meetings, perhaps even community service commitments; special law school events, both learned and social; dinner parties, cocktail gatherings, student beer blasts — all of which seem to rise to the level of a command performance. Furthermore, you want and need to get a sense of the political and social life of this new environment before deciding whether this is the institution to which you want to make a permanent commitment.

And then there's the pressure to produce scholarly writing. Where's that dandy, little article you began outlining when you received this offer to teach? You know, the one you'd be able to knock out in six months now that you have all the extra time of the academic...
life? Does your mother write to ask where her book is, the one like Edna’s wonderful child wrote and dedicated to her? You even ask yourself, “What’s the matter with you? Didn’t you want to become an academic because you wanted to share your thoughts with the world?” You keep rereading your faculty’s standards for promotion and tenure: At least one scholarly article for promotion and an additional “seminal” scholarly article for tenure. “Seminal?” Crimeny! When was the last time you can remember reading a truly “seminal” article in all of the reams of legal literature? Besides, you’re so tired of putting pen to paper now that you can’t face even making out a grocery list. Get someone in your family to do it.

Ah, now there’s a real source of pressure — your family. Aren’t they the folks who gave up the fortune you could be making in private practice in exchange for having more of your time and more of you? According to the daily market quotations, your stock at home is at an all-time low. All you seem to have done is move from the firm library to the law library.

But all the pressures, great and small, from students, colleagues, family, and from within yourself, some real, some imagined, produce the core fear that for the first time in your life you will suffer academic failure.
possibly surround this course in the time remaining for preparation. Witness these early journal entries of mine:

"January 31, 1982: I am in a blue panic, acute anxiety attack. To think that I volunteered for this beast. Sheer masochism. The perpetuities stuff at the end of the semester is hanging over me like an ominous cloud: Will I ever understand defeasible fees? Do I have to?"

"[Same day, four hours later]: Triple panic. So much to do. Took an extra valium. Just realized that had left out entirely 'Dead Hand Control' materials in blocking of course. Now have reworked and will have only two days to cover. Can that be done?"

"February 1, 1982: Reworked outline. Tried to go to sleep last night by finishing Vonnegut’s Jailbird. Really an inane work, but powerful. Have little grasp of an intellectual message but certainly there is an emotional impact. Must try to calm down. My shrink-friend says, 'Take one day at a time.' Easy for him to say."

Rule 13: Do attempt to make a blocking of the course and the material which you want to cover.

Ask an approachable colleague who has taught the material for his (her) syllabus and how he or she thinks the available calendar teaching days should be allotted. In addition, some casebook authors will share their notions of what materials can be shorn, if necessary, according to the number of credit hours which your course carries.

Rule 14: Do not share the blocking outline with the class.

Inevitably you will be inadequate to the task of setting and predicting the course’s pace the first time around. If you get out of synchronization with your outline, some students will seize upon this as a sign of weakness and lack of direction. You do not need any of those feelings from the students. You have enough internal insecurities on those scores without taking it from others.

Rule 15: The shrink is right: to minimize anxiety, take your task one hour, one day at a time.

Let whatever happens to be your particular “perpetuities terror” wait unwatched in your mental vault. Make a liveable, realistic study schedule, and congratulate yourself when you stick to it.

Rule 16: Do not take valium.

Rule 17: If you feel you must take valium, take as little as possible.

Remember that it has bizarre side-effects, like making you smile a lot and look like Dopey the Dwarf, hardly an image you want to project, and making your loved ones unrecognizable from thirty feet away.

Rule 18: Never read Vonnegut during a first preparation, or for
that matter, during any anxiety attacks.

A little more of the same anxieties, but converted into anger and transferred to the students, appears in this subsequent entry:

"February 2, 1982: (Before class) Seem fairly calm although my palms are continuing to perspire. I just want the class over and behind me. Who on earth has signed up for this elective by a green teacher?

"(After class) Odd, how lackluster they seemed. A few unprepared with no enthusiasm for work. That angers me — here I am knocking myself out, and they are doing nothing. They don’t even (won’t ever?) understand how difficult this is or it could have been. I remember what A and B [two Trusts and Estates grand gurus with whom I had spent some time several years before] said they did with their courses: ‘Throw them [the students] into the thicket, let them flounder around for a couple of days, and then lead them out — Razzle-Dazzle! Then the little bastards will be grateful to you.’ Should I deal in ‘Razzle-Dazzle’?”

Rule 19: Take a handkerchief or tissue with you to class.

Sweating palms are a disaster, and second only perhaps to the Heartbreak of Psoriasis, and are an occupational hazard as yet only whispered about. Perspiration on the blackboard means that the chalk will skip, and diagrams will become a hopeless muddle, thus fanning rumors that you are mentally muddled. Besides, “Effective Use of the Blackboard,” whatever that means, is still a criterion in use in some schools’ teacher evaluation forms.

Solace 4: Yes, Virginia, it is true that the class will rarely be as prepared and work and worry about the materials as much as you will.

Steel yourself against the temptation to unload responsibility for your fears upon the hapless students. Their panic levels probably approach yours. Sometimes what seems like surly stupidity is just plain paralysis. Their peer group also frowns on anything that threatens the group. The guy who knows the holding in a particular case is risking his status at Fred’s Bar next Saturday, or the prospect of a date with Mary Lou, or worse. Not infrequently, the student you call on is suffering that day from the hangover or other personal problems like you had as a student (and regrettable sometimes still do.) In addition, many students see the classroom as a game played with a stacked deck. You, after all, are mastering two subjects each semester you teach. They are struggling with five or six. You’ve accumulated experience as a lawyer which they wholly lack.

Perhaps the greatest fear of all is that we are only human and
fallible after all, despite our pretentions and fantasies. Although this Mother of All Fears appears often in the pages of my journal, one entry can serve as an example from my experience.

"February 19, 1982: Abatement with widow's election: What a zoo. I can't figure some of this stuff out, even with five, count them, five hornbooks spread before me. Am I smart enough to be a teacher? My thoughts turn to the humanists. [The Project for the Study of Law and Humanistic Education to which I remain indebted.] Lots of confessions of distance from students, confessions about reluctance (or inability) to relate to colleagues, but I have rarely (have I ever?) heard from a law professor an admission of a lack of intelligence or fears of such a lack. We don't surface this last great feared inadequacy: It is the unspeakable. Is it there in others?"

I am now reminded of the episode with Bill after class last week. [Bill is a colleague and former teacher of mine, one of the most rigorous and scariest ones of all, who is gradually becoming the longed-for friend.] More sensitive than credited at large, he stopped me as I was hurrying back to my office lost in thought. He asked, "What's the matter?" I hesitantly shared the edges of my doubts about being smart enough to be a "real authority"; that all of the professors I had admired most were the Heavy Authorities. He laughed and said, "Didn't you ever have someone who you felt didn’t do a good job of teaching?" I immediately named D., then added that I didn’t admire him and didn’t want to emulate him. Bill started to speak, but at that very moment, a student rushed up to me with a question, and the opportunity was lost. Tantalizing: Would Bill, the Summas Authoritatus, have confessed that he didn’t always know everything? That he had midnight fears that sometimes he could only posture?

**Rule 20: Let go of omniscience as a test of good teaching. Credit your confirmed powers to ask the right questions and practice what you preach about the unraveling process of legal analysis.**

Face it, surely even Soia Mentchikoff sometimes whistled in the dark. The Myth of the All-knowing Teacher has been perpetuated by those authoritarian teachers who so controlled and manipulated their classes that they gave every appearance of infallibility. As a consequence, a whole new generation of successful, even adoring students now strive for the omniscience of their role-models and are plagued by self-doubt. Look again at the mightiest of your models: It’s the Wizard pumping away at the Oz light and sound machine.

As I hope to demonstrate later, fears flourish best in isolation. Sometimes, however, a first-timer’s self-doubts are fed by colleagues.
The next entry illustrates both phenomena.

"Valentine's Day [1982]: Here I sit slugging through Trusts again. After the rigidity of Wills and its slew of hoary rules, Trusts concepts are very loosey-goosey. It's all a bit intimidating because I now have a mindset from the Wills materials that there are fixed rules somewhere in this haystack. I spoke with T. [a colleague also teaching Trusts and Estates] and got a tip about a better discussion of Trusts in another casebook. That was very helpful. It was good to know he had troubles with this stuff too. On the other hand, there is the every-cocky G. who keeps insisting that all of this is "so easy." [G. is an acquaintance in teaching who has taught Trusts and Estates for many years.] I wonder if he has forgotten what the first approach to these materials was like? Has he forgotten his own ignorance?"

*Rule 21: Do seek collegial counsel but choose potential mentors wisely.*

Standing intellectually naked before a colleague can be very intimidating, particularly for a new teacher who may reasonably fear that his mental gaffes or babbling inanities will be the subject of collegial gossip over coffee or, worse yet, will be summoned up later in retention and promotion meetings.

Unfortunately, a snake or two inhabit Eden. An academic community, like probably even the monastery, has its share of pompous, arrogant, duplicitous, even vicious colleague-imposters. Some will decry your nakedness, but, unlike Adam's awakening to acknowledge, will neither perceive nor recall their own. Until you have a sense of an individual's trustworthiness, the best advise is to prepare for the seeking of advice from other faculty members as carefully as you would prepare for a pretrial conference with opposing counsel. Go as far as you can in researching a question and isolate the particular issues which you cannot resolve after study. And even as I write such advice, I am pained by its necessity.

As this particular journal entry indicates, my colleague, T., recognized in my casual comment about my difficulty with Trusts his own earlier arduous quest, and suggested a better source of explanation. But of the two things he gave me on that occasion, his empathy and information, by far the more valuable was his empathy.

In contrast, as it turned out, G. defeated me in my approaches at every turn. He betrayed my confidences, I later learned; he passed off what I thought to be brilliant, albeit cryptic, insights as his own, though I found afterward that he was parroting what a noted commentator had earlier written in a far more easily comprehensive form; and
he failed to clue me in to the existence of a companion teacher’s manu-

ual, upon which he had heavily relied in his course, when he pressed

me to adopt the casebook which he used. (Of course, I should have

checked with the publisher, but such manuals are new tricks for us old
dogs, a still non-existant resource for my other courses.)

Rule 22: When considering texts for the course, a teacher’s man-

cual is a substantial asset to be taken into account.

Only at the end of the course did I learn from a student, who had

obtained a contraband copy, that there was a teacher’s manual for the
text which we had used during the semester. As it turned out, I was the
only soul in the class who did not have access to one. It was rather like

playing at Wimbledon with a badminton racket.

As with other types of supporters, teaching manuals are rarely dis-

cussed in polite company. Yet their purpose is to make a first prepara-
tion efficient. As you gain your own momentum and strength in offering
the course, you will find yourself more and more in disagreement with
any manual’s proposed methodology and often, its conclusions about
the materials it presents. But in the meantime, a good manual is the
equivalent of the information lode amassed by the best of colleagues.

Rule 23: Keep a journal of your first year.

After many years of walking, we forget how difficult the first steps
were; so too with teaching and recalling the difficulties of learning. My
colleague T. had not forgotten, and because of my journal-keeping, I
hope I can always remember my struggling as I now serve as a mentor.

Furthermore, if the stuff of teaching is taking the students where
they are and leading them through the thickets, then recording your
initial notions of “thicketness” will be invaluable in enabling you in
subsequent years to address their misconceptions and anxieties. Be-
sides, it makes you appear like a fabulous magician when you can say,
for example, “I bet some of you think that Trust law lies somewhere
east of Never-Never Land, where there are no signposts, no rules to
mark the landscape as there were in Wills?” (Guilty nods all around.
Wonder in the eyes.)

I have found that reaching students empathetically in their feel-
ings about materials can open up all sorts of vistas. To push this partic-
ular example from Trusts one step further, the comparative ruleless-
ness-of-Trusts perception permits a glide into a historical discussion of
why and how the trust mechanism developed. (One has to be devious in
slipping history into class discussion; otherwise, the old This-Won’t-Be-
On-The-Exam defense mechanism produces tune-out. Avoid the use of
the term “history” or its cognates entirely: It seems to result only in
instant torpor for this generation of listeners.) If the students can convert their anxiety about “rulelessness” into the heady exhilaration of “flexibility,” then they can appreciate the ingenuity of their English predecessors who dreamed up the trust concept. In short, they can now perhaps learn the craft of law.

Isolation

The single most striking fact about my journals of this particular semester is that only once is a conversation with another first-timer recorded. Furthermore, I suspect that this was a period not unlike all the previous years of my teaching life. Of course, I entertained and was received for social occasions with newcomers. Of course, I occasionally encountered a new colleague in school during that semester. Like most senior faculty members, I regularly engaged in the ritualized exchanges of greetings with fledglings: “How’re you doing? How are your classes going?” (“Fine.”) “Good. I know they are. If you need me, I’m down the hall.” (“Thanks, I’ll remember that. Have a good day.”) “Sure, you too.” Yet I had no other real conversation about teaching than the one reported in the next journal entry, my conversation with George, one of our ablest new recruits. This encounter was in fact the longest conversation about teaching I had ever had with any new colleague. (My track record since is somewhat better, I hope.) Unlike George, most newcomers to teaching lack the temerity to broach the subject, and, goodness knows, I have never probed for problems in adjusting to teaching for fear of appearing overly maternalistic, among other reasons.

“March 4, 1982: I saw George tonight as I was working late at the law school. He and I were the only ones there. He said that he had left to go home at 5:30 to say “hello” to his and grab a quick snack before returning to hit the books again. A group of his students had spied him leaving and called out archily, “Leaving so early? Must be nice!” He’s angry about that. (See Solace 4.) He said he was working night and day just staying ahead of his assignments, just staying alive. We commiserated at length. Among other imponderables, he asked, ‘Are we doing too much work for the students in agonizing over their perfect understanding (or lack thereof)?’ Poor dear, he expected pearls of wisdom from me. Little does he know that for six weeks now, I have been a walking testament to the efficacy of Pepto-Bismol. We kicked the subject around. No solutions but a start.”

Rule 24: You should propose as a faculty policy that every
faculty member teach a new course at least every seven years. (However, you should probably not urge this proposition until after you have tenure.)

George was a first-timer like me. And my heart went out to him as it had to no other new teacher in years. I suspect that a lack of summonable empathy plays a large role in our isolation in rank. I had "forgotten" (more likely, "blocked") the terrible tremblings of my own first years. The mere suggestion of such a faculty policy might do wonders to increase faculty mentorship.

Solace 5: Any first preparation usually results in the teacher’s doing what will ultimately prove to be too much synthesis for the students.

Rule 25: Don’t flog yourself for fear of “pitching the learning level too low.” You should propose as an additional faculty policy that any professor who teaches only the top ten percent of his/her class, should receive only ten percent of his/her contract salary. (However, you probably should defer this proposal until after you are both tenured and utterly irreplaceable.)

I am only slightly satiric in making that a suggestion. The saddest truth about teaching is that your first time through a course is probably your best effort to teach marginal students: Then the presentation is, by necessity, at its most elementary level, and you are most sensitive to symptoms of incomprehension among the class members. Although finding the golden mean of a class is a very, very complex task, there is a cult within this profession that preaches that good sophisticated teaching can only occur when it is directed to the level of the class’s cream, dullards be damned. That is an odd precept in view of the fact that every blessed soul in a classroom has already earned the right to be there and to be taught.

Years pass, and one’s predisposition and peer pressures coalesce to produce a tendency to teach an increasingly narrow group of students. Perhaps the ultimate ironic end for any would-be teacher is that he is discoursing in class only with himself.

Not all the isolation experienced by the new teacher results from being left adrift or abandoned by colleagues. To a great extent, learning a new course is a solitary undertaking. Pressures can produce self-absorption which, in turn, feeds fears which heighten pressure. In Twain’s metaphor, solitude is as different from isolation as lightning is from a lightning bug. Solitude, the scholar’s milk for his heart and brain, can all too quickly curdle into isolation. I offer the next journal entry as evidence of such a silent transmogrification: “March 12, 1982:
My study plan was interrupted by an interminable faculty meeting and then again by student K. She is having incredible personal problems with a non-responsive spouse, who is undercutting her and her dreams of being a lawyer in a thousand little hurtful ways. She can’t sleep, can’t concentrate, but can recognize that she is lashing out at her children. She is having all of the signs of a massive anxiety attack which I would have discredited had I not seen her, nor would I have recognized it before I tackled this semester. We talked at length. I saw her evident distress two weeks ago and shrugged it off. How many others have been trying to get to me this semester?"

Rule 26: Don’t forget during the madness of your early years what attracted you to teaching in the first place.

If we had been content to instruct, we would have stayed in practice and, for a much higher price, routinely given instruction to judges and juries and clients. If all we had wanted to do was to hole up somewhere and write, publishing companies and a thousand governmental agencies would have provided us with a cubby, pen, and paper.

Presumably, teachers teach to interact with students.

Unfortunately, however, the premiums of the early years of this profession are all awarded for the pursuit of those two careers unchosen. The world’s view notwithstanding, ("You mean you teach six hours a week and you’re considered ‘full-time’?" — usually intoned with Naderesque incredulity). There is never enough time. Individual students can get lost and so can we. Try to make room for student contact out of class for whatever their worries if, for no other reason, than to keep your own values and aspirations intact for the day when you can be more accessible.

"Thursday, April 29, 1982: It is over. And how do I feel? A trifle let-down. No great feeling of exhilaration that I had anticipated. In fact, I didn’t want to write about it at all until now. On balance, I feel I did a credible job with the course. The class applauded, but then they always do. Nothing unusual. Three said they really enjoyed it."

Solace 6: It is enough to walk away having survived with self-respect intact.

If in the weeks following the end of classes, you find yourself thinking about new approaches to the course for the next year, you are hooked and may, someday, sooner than you think, become a teacher even you would pay money to know.
Enlarging Legal Education: Berkeley’s Jurisprudence and Social Policy Program

by Sheldon L. Messinger and Philip Selznick

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Philip Selznick taught in the Sociology Department at the University of California at Berkeley from 1952 until his recent retirement and served as department chairman from 1963 to 1967. He founded the Center for the Study of Law and Society at Berkeley in 1961 and was also founding chairman of the Jurisprudence and Social Policy Program at Boalt Hall.

The call of this Symposium has been for provocative ideas aimed at transforming legal education. In his comment on page 547, Justice Grodin bemoans “the lack of guidance we receive from litigants concerning . . . policy choices,” a failing which he partially attributes to “the almost exclusive emphasis in most law schools upon ‘legal’ materials, to the exclusion of relevant materials from the social sciences. . . .” Other commentators, within this Symposium and elsewhere, have raised similar concerns.

We believe that our Jurisprudence and Social Policy Program (JSP) at Boalt Hall directly responds to this very legitimate critique. JSP is, at once, an alternative to and an enlargement of the traditional law school program. We are committed to “getting the word out” about what we are doing here at JSP — to legal educators as well as to

those in other disciplines. This paper tells our story.

I. Origins

The desire among some members of university law school faculties to change or supplement their basically professional curriculum appears to have been born with the curriculum itself. As early as 1887, Yale Law School established an alternative course of study "for those not intending to enter any active business or professional career, but who wish to acquire an enlarged acquaintance with our political and legal systems, and the rules by which they are governed." By 1916, only nine students had completed the program and it was abolished, although not without an effort to produce a substitute with emphasis, among other things, on "Historical Comparative Analytical and Functional Jurisprudence." At Columbia Law School in the late 1920's, it was proposed to take account of the new sociological jurisprudence by teaching law as a part of the social sciences. When the plan was defeated due to the prevailing judgment that it tilted the balance too far toward scholarly and away from professional education, its faculty supporters departed to form the Johns Hopkins Institute for the Study of Law. Devoted "primarily to the nonprofessional study of law, in order that the function of law may be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life," the Institute was a casualty of the depression. Similar efforts have followed with more or less the same results.

Boalt Hall's Jurisprudence and Social Policy Program — "JSP" — is in the tradition of these attempts to open the boundaries of legal education and scholarship. We trust that their failure is not a necessary outcome. In any case, their "failure" was relative, not absolute; each appears to have succeeded in enlarging the intellectual content of the research and teaching in the school where it took place and in American law schools generally. Even if JSP does not accomplish all of its goals, it would be worthwhile to do this much. Further, the JSP pro-

2. Recognizing that law reviews are not normal reading fare for those outside legal circles, we also have presented this material for a dialogue at the Center for the Study of Democratic Institutions in Santa Barbara, California.
4. Id. at 470-71.
5. Id. at 474.
gram, unlike some of the others, does not contemplate any diminution of Boalt Hall's role in the preparation of professional lawyers. The program is supported by an augmentation of the resources of the school and will enhance the offerings available to students enrolled in the professional curriculum. Still another reason for being hopeful, and perhaps most important, JSP is the product of a movement that draws initiative and support from many sources, outside as well as inside the law school. Since the 1950’s, there has been renewed concern among officials and private citizens about the role of law in society, and increased scholarly interest in the study of legal institutions. Many disciplines — anthropology, economics, history, philosophy, political science, psychology, sociology — share this interest and have expanded research and teaching about law and society. JSP is a response to this interest and depends upon it.

At least since 1961, a group of Berkeley scholars from the social sciences, humanities and law have engaged in collaborative research and teaching about law and legal institutions, in part through the Center for the Study of Law and Society. Although they shared an interest in developing an integrated, multidisciplinary curriculum, and there was considerable indication of student interest, no major effort to do anything about it was made or in prospect.

In the early 1970’s, however, a new opportunity arose when a campus decision was made to phase out the School of Criminology. A planning group established to consider a replacement recommended creation of an interdisciplinary, research-oriented program in which criminal justice would be a strong but not dominant part. It also recommended that the new program have a strong humanist component and a place in the undergraduate as well as graduate curriculum. A concern for social policy, it was suggested, might serve as an integrating focus for a variety of relevant disciplines.

It is this program, relatively unchanged, that the law school faculty agreed to house and nourish, beginning in 1977. As it now exists, JSP is a multidisciplinary program of teaching and research at both the graduate and undergraduate levels. These activities are the responsibility of the Boalt Hall faculty, especially but not exclusively the new faculty members added in connection with the program. The graduate component, supervised by Berkeley’s Graduate Division, leads to the M.A. and Ph.D. degrees. Graduate students may or may not have, or simultaneously pursue, a professional law degree but as JSP students they are officially members of the Boalt Hall community. The undergraduate component, leading to a bachelor’s degree in Legal
Studies, is an integral part of the College of Letters and Science. Undergraduates are members of the Legal Studies "major" within the College and are not Boalt students, even though the Boalt faculty is responsible for the curriculum.

As of 1985, JSP has added nine full-time, permanent members to the law faculty whose primary responsibility is to develop and operate the JSP program. Some transferred from other campus units, including the School of Criminology; most have been recruited from the outside. The new additions include two economists, two historians, two political scientists, and three sociologists; search for a philosopher continues. Of the nine already on the faculty, only one has a law degree, previously acquired in Europe. Two lawyers from the Boalt Hall faculty, who were among the program's founders, as well as a third appointed more recently who is heavily involved in empirical studies, are also generally considered part of the core JSP faculty.

II. Perspectives

From its inception, it was asserted that JSP should encourage humanist as well as social science perspectives. This emphasis distinguishes what we are about from recent precursors of JSP, including the "law and society" movement. For most of this century, "progressive" jurisprudence has stressed the potential contribution of the social sciences. This may have had more to do with concern over social policy than with confidence in these disciplines. Nevertheless, there were some who found considerable enlightenment in social science theory, and perhaps even more who were attracted by the promise of empirical research. JSP shares these interests, but is wider in scope.

The 1974 committee report proposing the new program called for it to incorporate a revitalized jurisprudence, one that would make a difference for how law is studied, taught, and practiced. In the broad meaning intended, jurisprudence includes not only legal theory and philosophy but the whole range of intellectual resources that contribute to an understanding of law, including social, cultural, and institutional history, comparative study, psychology, and social science. For this reason we thought it would be well to signal our commitment by including "jurisprudence" in the title of the program. We knew this was a risk, because in this country the word is not exactly user-friendly. This choice was perhaps balanced by another, equally strong concern for empirical inquiry and social policy. "A concern for policy," the committee argued, "can bring focus to social science research, historical
investigation, and philosophical analysis. These in turn can insure that policy studies will be truly basic and critical, not confined by existing assumptions and perspectives.” Hence the title “Jurisprudence and Social Policy.”

This combination presents us with a difficult but exciting challenge. It is all too easy for students of jurisprudence to become absorbed by technical puzzles, or by arcane issues in the history of thought, with little connection to questions of fact and policy. Much of the same may be said of other disciplines, such as political science and sociology, which have strong theoretical as well as empirical interests. We respect the need for close analysis of key ideas, and for autonomy in scholarship, but we think it is not too much to ask, at appropriate times, what difference does it make for legal policy if you have one or another conception of obligation, discretion, right or responsibility. It will take sustained awareness on the parts of faculty and students to keep asking that question.

We think philosophy and history are central to the program because the main objective of all legal scholarship is, or should be, the clarification of fundamental values. If we are to be wise about social policy we need to be as clear as we can about what is at stake in legal ordering — what ends are sought, what means are used, what assumptions are made, how multiple purposes clash or are accommodated. For this we must rely heavily on the analytical rigor modern philosophy can bring to the study of received ideas and premises; and on historical and comparative inquiry to help make us aware of the nature, as well as the roots, of our traditions and institutions.

This concern for fundamental values deepens our commitment, as a school of law, to justice as a governing ideal. The connection between law and justice is sometimes obscured and even broken. Learning to “think like a lawyer” may be thought to mean giving one’s whole attention to positive law — how to find it, how to reconcile its elements, how to criticize it from within, how to apply it in particular “fact situations.” In some beginning courses, the law student’s first task is to distinguish his or her own sense of justice from the kind of argument that will carry weight in court. As a result, many students come to believe that justice and law are more or less equivalent or, on the other hand, that justice is a distant, ineffable ideal whose relation to law is tenuous at best.

7. Report to Sanford Elberg, Dean of the Graduate Division, University of California, Berkeley (Aug. 23, 1974).
Most of us take for granted that law is an imperfect embodiment of the moral ideal we call justice, even if that ideal is very narrowly conceived as the faithful realization of existing law. Justice may be elusive and protean, yet few would deny that the aspiration to do justice is an important source of creativity and criticism in the way we deal with positive law. Although much is unsettled, we know enough about justice to make it a proximate and practical resource for criticizing rules and developing principles.

On the other hand, there is more to law than a concern for justice or for moral and cultural ideals. The legal system is also a practical instrument of social organization. The call for law reform, and for new perspectives in jurisprudence, often has less to do with justice than with social utility. The dominant aspiration has been for a more effective, more flexible, more fully purposive system. The idea is to devise institutions that will mobilize and direct social energies while minimizing costs. The United States Constitution is a legal document, but its framers sought order, prosperity, and effective government at least as much as freedom and justice. Most of private law and a great deal of public law is a way of using authority to serve utilitarian ends. Law stabilizes expectations, allocates risks, compensates harm, facilitates association, settles disputes, regulates conduct, and authorizes officials to tax and spend. Put another way, law is largely an instrument of social policy and to that extent must be judged in light of social utility. Justice is never absent as a legal concern, but it is not necessarily in the foreground or at the cutting edge for those who use or are affected by it.

Nor will it necessarily be in the foreground of all the studies of law pursued by JSP students and faculty. Many issues of social policy turn on the interplay of moral ideals and proximate utilities. In studies of criminal justice, environmental policy, economic regulation, corporate responsibility, and many other topics, it is naive to focus on abstract ideals without considering the practical jobs that must be done. If we do not take account of social reality we are not likely to be successful in setting standards or realizing ideals. We may want to change that reality, if we can, but ignoring it is no help. It follows that empirical study of law in context and in action must have a high priority in the JSP program. This is not a way of divorcing law from values. On the contrary, it is a way of asking what these values amount to and how they may be made good.

Despite considerable research in recent years, there is still relatively little factual knowledge about patterns and contexts of legal deci-
sions, especially research that is cumulative enough, and sound enough, to justify conclusions for policy. We want to know how the systems work at every level and, if need be, in exacting detail. Studies of *law in action* take us into a world of pressure, constraint and opportunity. Here principles, policies and rules form only a part of the environment of decision. The exigencies of power and the scarcity of resources dominate the scene. As we explore this realm, it is easy to draw an always chastening and sometimes pitiless contrast between the legal ideal and the human or organizational reality. This form of analysis can degenerate into debunking, but it is a valid part of the social scene of legal ordering if it reveals an underlying process or identifies a persistent dilemma.

The perspective of action strikes an antiformalist note, which may encourage skepticism about rules and purposes, if it is true that an excess of formalism in reasoning or in procedure is often pernicious in that it undermines substantive justice. But the answer is not to embrace a radical antiformalism. We try to cure defects by revising rules and inventing procedures. Indeed, law in action is, to a large extent, the proliferation of institutional forms. The problem is to bring about a better fit between law and values on the one hand, law and reality on the other. This is not accomplished by undiscriminating skepticism about the worth of rules or the integrity of decisions.

The study of *law in context* is a very large part of law and social science. Standard topics include the interplay of legal rules and eco-
nomic activity, law and public opinion, law and the distribution of power, law and politics, patterns of criminality. Historical, sociological, economic, political, and psychological foundations of legal rules and policies are explored. Much of this has to do with incipient law and with the obsolescence of law. Social change is a central concern, especially the response of law to altered values, new forms of organization, and technological development. At its best, this approach goes beyond viewing legal institutions as dependent variables, subject to the influence of economic, political or social contingencies. Rather, it suggests that rule-making, sanctioning and adjudication are pervasive aspects of social life and not only of formal government.

JSP also encourages concern with the interplay of law and social policy. From the point of view of social policy, the continuity of legal and social phenomena poses a major dilemma. On the one hand, there are strong reasons for minimizing the role of state law insofar as it involves coercion, close surveillance, centralized decision, or other techniques of domination. On the other hand, the idea of bringing law closer to society, thereby reducing alienation and domination, is an invitation to democratize the legal system. In theory, democratic law enlarges participation, stimulates new forms of advocacy, and may rely on devices close to the people, such as tenant associations and other community groups. It may also proliferate rights, make people more litigious, and extend the reach of legal authority. As a result, there is a persistent search for alternative forms of legal ordering, including new ways of settling disputes.

The dominant trend in American legal scholarship has managed to combine a reformist spirit with a comfortable sense of identity and a deeply felt acceptance of the worth of law. JSP is bound to encourage a more restive, less complacent outlook. This is so because a multidisciplinary faculty will not have the same commitment to legal professionalism; because we want to give an even more important role to jurisprudence, and a jurisprudence worthy of the name demands sustained reflection on basic premises and fundamental dilemmas; and because a social science standpoint takes its departure from theories of society, economics and policy, not from law alone.

But if JSP is a critical enterprise, as it must be, we do not expect it to be a source of alienation. We have reason to suppose that a spirit of "critical affirmation" — looking to the promise of law as well as its limits — will prevail. We hope for an enterprise that will be as attractive as it is unsettling.
III. The Graduate Program

JSP prepares graduate students for careers in research and teaching, and for legal practice broadly conceived. Some students expect to teach in humanities or social science departments as specialists in legal ideas or institutions, and to participate in undergraduate legal studies programs; others may prefer law school teaching, to which they can bring special skills and knowledge. Still others hope for careers in research, for example, designing systems for collection and analysis of data required by a court, a prosecutor's office, a corrections department, or a legislative committee. The reality of these expectations cannot yet be fully assessed, but experience so far suggests that they make sense.

Completion of the program leads to the Ph.D. degree. During the first year, all students participate in a seminar jointly taught by several faculty, bringing a variety of perspectives to bear on selected problems. Currently the theme of the seminar is legal change. Students who have not had prior legal training (we annually admit a few students who already have the J.D.) are also required to begin the study of law by taking at least one traditional first-year course such as Contracts or Torts, plus a course in Legal Research and Writing. Additional law study is arranged in consultation with an advisor.

In addition to gaining general familiarity with the broad field of jurisprudence and social policy, students prepare two special "fields" or areas of concentration. The list of fields recognized by the program is long. Representative examples are law and regulation, the judicial process, criminal justice, legal history, legal philosophy, and social and legal theory. By the end of the third year, JSP students are expected to submit written work testifying to their preparation and then to take an oral examination administered by a five-person faculty committee appointed by the Graduate Division upon recommendation of the program. At least one of the committee members must be from outside the law school.

Some students pursue the J.D. as well as the Ph.D. Such students will typically take more courses offered by the JSP faculty, as well as courses outside the law school, than will other J.D. students. With good planning, at the end of the third year students concurrently in the JSP and J.D. programs will typically have completed the J.D. degree and be almost ready to submit papers and take the oral examination. Most have taken an additional six months or a year to be fully prepared.

There are now about forty JSP students at one or another stage of
graduate study. They have a wide variety of intellectual interests, as indicated by the topics chosen for dissertation research. A word first about the three who have thus far completed their dissertations. Lloyd Burton studied water rights disputes in the Southwest between American Indian tribes and major users of water, such as farmers and municipal water districts. An important theme is how parties to complex environmental disputes decide whether to seek litigated or negotiated settlements. George Wright, who came with a strong background in classics as well as a law degree, explored the concepts of sovereignty and rule of law in the works of Hobbes and Occam. And Joseph Rees studied the operation of a new program for voluntary self-regulation in occupational safety.

A similar diversity of interests is reflected in the dissertations in progress. These include two studies of law and philosophy, one centering on the implications of non-utilitarian theory in moral philosophy for constitutional adjudication, the other on the relation between legal reasoning and coherence theories of truth. Several doctoral candidates are doing research abroad. One is in Indonesia studying the role of law in forestry conservation and development; another is comparing police in Japan and the United States; a third is doing an historical analysis of the transition in Australia from a penal colony to a constitutional republic.

Finally, let us note that several of the students have taken teaching positions. Two currently teach in political science departments at major universities, one in California, one in Texas. Another has recently joined a law school faculty in Iowa and still another has been teaching in a law school in Illinois. Three others have foreign law school appointments, two in Australia, the other in Japan. So far, at least, those who have completed the Ph.D. or are close to completing it have all opted for academic posts.

IV. Undergraduate Legal Studies

A major responsibility of JSP, and therefore of the School of Law, is the design and staffing of an undergraduate curriculum within the College of Letters and Science. The main objective of Legal Studies is to provide students with an opportunity for sustained reflection on key ideas such as freedom, privacy, equality, and justice; for close and realistic examination of how the legal system works; and for historical and comparative study. It is not meant to be preparation for law school, nor does it provide paralegal training. It is based firmly on the view that
law is part of a rich humanist tradition and the study of legal ideas and institutions should be an option for contemporary undergraduates.

From its inception, the undergraduate component was understood to be a major part of the new enterprise. In part, this was due to the administrative expectation that the faculty resources assigned to the graduate program would be partially justified, as usual, by a significant contribution to undergraduate education. In addition, undergraduate teaching is very valuable to graduate students as a source of employment and, not less important, of teaching experience and learning. But these considerations were not central in planning JSP. Instead the concern has been and remains to offer a curriculum that speaks to the nonprofessional, is genuinely multidisciplinary, and deals with fundamental ideas and values.

In 1980, after a few years as a limited set of courses, Legal Studies became an upper division "major." At Berkeley, this means that students may make the subject their main focus of interest during their junior and senior years. During the past several years, approximately 125 students have chosen to do so at any given time, about the number contemplated at the beginning. Of course, many students who are not majors take Legal Studies courses. The major requires everyone to take a Foundations course, which provides an overview of the legal process and of basic issues in the study of law. Students must also take at least one course within each of four rubrics: legal and social theory; historical and comparative perspectives; principles and problems of substantive law; and administration of justice. Since approximately nine Legal Studies courses are required for graduation, a modest amount of specialization is permitted. Students are also encouraged to take related courses in other departments.

About 200 students have graduated from Berkeley with degrees in Legal Studies. We have not kept close track of their careers, but our impression is that a sizable proportion has gone on to law school, or plans to do so at some point. On the other hand, those with whom we have discussed the matter believe the program provided no special preparation for law school. Like others who have chosen other careers, they seem to appreciate the program for its contribution to their general education.

V. JSP and Boalt Hall

The policy of the program and of the law faculty as a whole is to make JSP an integral part of teaching and scholarship at Boalt Hall.
For the time being JSP does not play a major role in the activities of most J.D. students, but it does expand their educational opportunities. Some participate in courses designed primarily for JSP students, such as the course on 19th century social and legal theorists. In addition, some JSP faculty teach courses designed as much for J.D. as for JSP students; examples include Administrative Law, American Legal History, and Constitutional Law. These are attended mainly by students in the J.D. program. There has also been joint teaching by the lawyer and nonlawyer faculty in such courses as Contracts and Civil Procedure.

An important road to integration is the development of sustained collegial relations, and this has occurred to a substantial degree. Communication has steadily increased, and joint activities have been arranged including a faculty seminar devoted to law and economics, another presenting selected social science methods, and a third dealing with modern theories of textual interpretation. Boalt’s traditional Friday afternoon faculty colloquia, given over to the presentation of papers by faculty and visitors, are other sites of intensive communication. There is every reason to believe that this will have a long-term effect on legal education as perspectives are enlarged and as new materials are made available for enriching the basic curriculum. Nor is this a one-way process from humanists and social scientists to lawyers. Both the teaching and research of the nonlawyer faculty are clearly enriched by their increasing familiarity with legal materials and ideas. In time, a foundation may be laid for redesigning the curriculum so that at least a significant number of future lawyers will have a broader understanding of what they are about, especially the values that are at stake in legal practice.

JSP was not begun as an effort to change Boalt Hall. Rather, the law school setting was perceived as a congenial home and a major resource for a program that would be mainly concerned with humane scholarship, liberal education, empirical research, and policy studies. The Boalt faculty already included many eminent scholars, some of whom were doing “jurisprudence and social policy” before the name was invented. And it was believed that a strong base in the major campus institution concerned with law would offer the best promise of success.

Still, whatever the primary intent of JSP, it does expand the role of the law school in the educational activities of the university in the ways we have discussed. It invites all Boalt faculty to participate in a curriculum designed for advanced students concerned with the law but who do not plan to become conventional practitioners. It also invites
them to participate in undergraduate instruction and thereby to con-
sider new subject matters as well as new ways of organizing old ones. 
To the extent that faculty members accept this challenge, they are 
bound to be affected.

Will they accept it? Experience so far suggests that law school 
faculty members will do so unevenly. Clearly, some faculty who had 
taught only J.D. students find the experience of dealing with under-
graduates rewarding. It seems fair to assume that this means that more 
college graduates are entering the world with a more sophisticated appre-
ciation of law and the legal process than would otherwise be the 

case. Whether such students will become better law students (which 
many of them choose to do and would probably have done in the ab-
sence of the program) we do not know. Whether they will become bet-
ter practitioners is even more uncertain.

Something similar can be said about participation in the education 
of the graduate students, although in this case there is literally no way 
of faculty avoiding contact: JSP students are “Boalt Hall students” and 
ever more routinely participate in all of the activities open to other 
Boalt Hall students. So far we perceive no dramatic changes in the 
“bar courses,” although, as noted, some are now taught occasionally by 
the new faculty or by lawyer/nonlawyer colleagues. Further, a substanc-
tial number of the faculty have engaged in designing and teaching 
courses, often with a nonlawyer colleague, that take into account the 
interest beyond and behind “the law” that is associated with JSP. 
Courses on libel and on the relations between law and technology are 
examples. They are also considering and attempting to design course 
sequences — for example, in law and technological development, and 
on financial instruments and institutions — that may bring more order 
to offerings beyond the first year.

It would be wrong to believe that such courses and plans for or-
dered sequences are the result only of JSP — at the better law schools, 
at least, such developments are common. JSP students and the new, 
nonlawyer faculty accelerate a trend that is already present. Part of 
this trend, also represented by JSP, is the effort to further incorporate 
“external” perspectives into law school teaching and research. This 
trend is based on more than the desire to make law a truly “learned” 
profession. It also reflects changes in what lawyers do and what they 

must know. The reality today is that history, philosophy and social sci-
ences are an integral part of legal argument. Beginning J.D. students 
are often skeptical about the relevance of such materials. After some 

experience working for law firms part-time or during the summer,
many report that what they learned about regression analysis or polyarchy or decision theory or Paretoan optimality has been a concrete and direct part of what they have had to read and write about on the job.

Challenges remain. It is not apparent, for example, that JSP has satisfactory curricula at either the graduate or undergraduate levels. At the graduate level, no clearly interdisciplinary perspective has emerged to frame our effort; instead, to a considerable extent, individual faculty members teach and do research from within the perspectives of their own disciplines. Some, indeed, think this is not only inevitable but desirable. Whatever one’s stand on this matter, it clearly poses a dilemma for graduate students attracted by the promise of a more integrated curriculum. A related problem is that there is no clear agreement about what all JSP students must know, although we seem to be making some progress in identifying the common “core” of “jurisprudence and social policy.”

At the undergraduate level, the lack of a unified framework is less troubling. Undergraduates hopefully gain understanding of a variety of approaches to the law and legal institutions from which they can later choose — should they decide to go further. More troubling is our relative failure, so far, to agree on a fixed content to which all Legal Studies majors should be exposed. Not all faculty, it should be noted, would label this “troubling.”

Seen in relation to the broader law school enterprise, questions remain as well. JSP seems neither to have disrupted nor diluted the efforts of Boalt faculty to engage in the education of practicing attorneys. Arguably, it has enhanced these efforts. At the same time, JSP does and should make one consider afresh the role law schools should play in the larger world of university education. JSP implicitly asserts that it should be extended beyond graduate education for practicing attorneys. To what ends? We have tried to provide some tentative answers, but we could use assistance in both culling and expanding them. And then some might believe that law schools should stick to the traditional last. Should they?
Of Law, the River and Legal Education

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I. Introduction

This is an essay about legal education and the responsibility of law professors. My overall objective is to comment on the recent controversy sparked by Dean Paul D. Carrington’s article, Of Law and the River, which appeared in volume 34 of the Journal of Legal Education.¹ In that article, Dean Carrington argued that law teachers who “embrace nihilism and its lesson that who decides is everything, and principle nothing but cosmetic [have] an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.”² The article spawned bitter controversy because it was generally understood as a broadside attack on an ill-defined group of left-wing legal academics loosely associated with the Critical Legal Studies movement.³

Unfortunately, the ensuing debate about Dean Carrington’s suggestion has, in my opinion, become embroiled in a largely fruitless controversy concerning what Carrington meant by “nihilism” and whether he was really proposing some sort of loyalty oath for law teachers. Some have argued that the people that Carrington has tagged as “legal nihilist” really are not nihilist, at least in the way that Carrington has used that term. Others have raised serious academic freedom objections

* I would like to thank Lucinda Finley for reading an earlier draft and suggesting revisions.

2. Id. at 227.
to Carrington’s suggestion that the legal nihilists, however defined, should depart the law school. Finally, still others have understandably wondered whether Carrington’s remarks can be interpreted as calling for a modern version of the Red Hunts of the 1950’s. While the nature of the charges and counter-charges posed by Carrington and his critics raise serious and important questions for the legal academy, I will refrain from entering this aspect of the debate. I do so because I believe that there are some important issues which have been raised by Dean Carrington’s article but have been obscured by the din of the ensuing controversy and debate. In this essay, I will try to explicate what I believe to be the real issues raised by Dean Carrington’s article.

II. Of Law and the River

Carrington’s Of Law and the River was inspired by Mark Twain’s beautiful and largely autobiographical short story Life on the Mississippi.4 That story is about Mark Twain’s experiences as a cub (apprentice) steamboat pilot on the Mississippi river at the turn of the century.5 According to Carrington, Twain’s story is the “best book in English about professional training”6 and especially legal training. In his view, “[l]earning to be a steamboat pilot is more like learning to be a lawyer than you might suppose.”7 To understand why this is so it was necessary for Carrington to tell some of the story. In evaluating Dean Carrington’s telling of the story, it might be fruitful to ask what Carrington must believe in order to believe that his interpretation is better than some alternative interpretation.

The story as told by Dean Carrington is this. Learning to be a steamboat pilot is like learning to be a lawyer because there are a number of similarities associated with the nature of professional training required. One significant similarity is that persons who are attracted to such training do so because of the “aroma of power” associated with the role of the professional. In Life on the Mississippi, Mark Twain writes that he took “measureless pride” in the piloting profession because it offered him independence, freedom and above all power. A

4. All citations are to the New American Library Edition (1961) [hereinafter cited as Twain].
5. The part of Twain’s story which is relevant to Dean Carrington is Part I of the book in which Mark Twain speaks of his experiences as cub pilot on the “mightiest of all rivers.”
6. Carrington, supra note 1, at 222.
7. Id.
river boat pilot in his day "was the only unfettered and entirely independent human being that lived in the earth." Unlike mere Kings, who were "hampered servants of parliament and people," a Mississippi pilot was not so restrained. As Mark Twain has described such power:

The captain could stand upon the hurricane deck, in the pomp of a very brief authority, and give him five or six orders while the vessel backed into the stream, and then that skipper's reign was over. The moment that the boat was under way in the river, she was under the sole and unquestioned control of the pilot. He could do with her exactly as he pleased, run her when and whither he chose, and tie her up to the bank whenever his judgment said that course was best. His movements were entirely free; he consulted no one, he received commands from nobody, he promptly resented even the merest suggestions . . . . So here was the novelty of a King without a keeper, an absolute monarch who was absolute in sober truth and not by a fiction of words. 8

In Dean Carrington's view, the law professoriate share a common fascination with power not unlike the "aroma of power" which attracted the young Twain to be a Mississippi cub pilot. 9 The power inherent with such professions is undeniable. At one point, Carrington alludes to the fact that the legal profession, like the pilot profession of Twain's day, has organized itself as an exclusive club to limit and control entry and unauthorized practice. 10 Law teachers, like master pilots, serve a gatekeeping function in determining who is privileged to pass into the profession. The power over control of entry raises important issues concerning the conflicting responsibilities of persons having gatekeeping power to the users of their professional services and the persons who are training to acquire the abilities to provide such services. The debate within legal education over the relative importance of skills training and clinical education as compared to traditional forms of theoretical or doctrinal training is itself structured by the underlying tension created by these conflicting responsibilities.

At yet another point, Dean Carrington emphasizes the "esoteric nature of the data that informs [the river pilot's or lawyer's] profes-

8. Twain at 94.
9. Carrington argues that "[a] law teacher who does not know that he or she enjoys power needs closer self-acquaintance." Carrington, supra note 1, at 222.
10. The position of the River Pilot's Association was, in Twain's view, "the compactest monopoly in the world." Twain at 109.
sionalism.” According to Carrington, “[p]ilots, like lawyers, dramatized their technocracy by cloaking work in a professional and mystic language that excluded laymen from understanding.” Mark Twain reported, for instance, that river pilot talk “took the hope all out of me . . . I wish the piloting business was in Jericho and I had never thought of it.” Certainly, first-year law students would find Twain’s frustrations with pilot talk similar to the frustrations they experience with the lawyer talk they confront in their law studies.

Dean Carrington observes that the affectation of language associated with professional training becomes an important source of power. But the nature of such power goes beyond what Carrington sees as the development of a “mystic language [that] exclude[es] laymen from understanding.” What Carrington fails to acknowledge is that language can also be utilized to create power and justify privilege by defining legal “truths” in ways that sublimate deep controversy and conflict. In claiming the authority to define “legal truths,” lawyers can create and perpetuate the basis for their authority by reinforcing and legitimating legal definitions which depend upon essentially contested values and assumptions. For law students, lawyer-talk can also serve to establish lasting impressions about the nature of the professional role they are seeking to adopt.

11. Carrington, supra note 1, at 222.
12. Id.
13. Twain at 51.
14. Carrington, supra note 1, at 223.
15. Id.
16. See Frug, The Language of Power, 84 COLUM. L. REV. 1881, 1892-93 (1984) (reviewing BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW). As Professor Frug has expressed the point: “Language is a mechanism through which the power to define truth is exercised and a device that generates power through the ability to define truth.” Id. at 1892. See also M. FOUCAULT, POWER/KNOWLEDGE 93 (1980).
17. Legal training can take the hope out of those students who come to the law school with aspirations of performing a progressive, socially active role in society. Students who come to law school with plans to do more than just make money soon discover an amazing contrast between the preoccupations of their legal training and “the real world.” They discover that the primary means of instruction, the case method, is the dominant form of instruction, even though its antiquated emphasis on private common law is of diminished importance in the statutory world of the 1980’s. They also learn that the formal curriculum is structured by a public/private distinction which emphasizes the importance of private law subjects and minimizes public law subjects — the only real source of public interest law studies. Students soon learn that law is extremely competitive and individualistic; that law school is a place where tough-minded, interest-maximizing behavior is cultivated and rewarded. It doesn’t take long
In learning lawyer-talk, students learn that there is a fundamental
distinction between the technocratic discourse of lawyers and the every-
day discourse of ordinary persons. Students struggling for cognitive and
verbal mastery soon learn that they must adopt a passive attitude to-
ward the underlying emotional and political dimension of their law
studies. In learning their professional role, students are taught to think
of clients as “abstractions” or “objects” devoid of human content.18 In
the typical law school hypothetical, “A hits B” becomes the standard
analytical frame of reference for evaluating legal problems. As a result
of such training, a divide is created between the role of lawyer as a
rational technician, and of lawyer as a humanistic, emotional, and po-
litical human being.19

Even more significant, in Carrington’s view, is the way the techno-
cratic interest of professionals, whether river boat pilot or lawyer, has
the capacity to change the way they see the world. Mark Twain de-
scribes in moving detail how his pilot training narrowed his perception
of the river. Twain writes that, as result of his professional training, he
“had lost something, that could never be restored . . . while I lived. All
the grace, the beauty, the poetry, had gone out of the majestic river!”20
Dean Carrington finds especially relevant a passage in which Mark
Twain comments on the way he “learned” to view a beautiful sunset:

This sun means that we are going to have wind tomorrow; that
floating log means that the river is rising, small thanks to it; that
slanting mark on the water refers to a bluff reef which is going to
kill somebody’s steamboat one of these nights, if it keeps on
stretching out like that; those tumbling boils show a dissolving bar
and a changing channel there; the lines and circles in the slick
water over yonder are a warning that the troublesome place is
shoaling up dangerously; that silver stread in the shadow of the
forest is the break of a new song, and he has located himself in the
very place he could have found to fish for steamboats; that tall
dead tree, with a single living branch, is not going to last long, and

before reformist ideals are faded by the emphasis of other values and attitudes. See
also Klare, The Law School Curriculum in the 1980’s: What’s Left? 32 J. LEGAL
EDUC. 336 (1982).

18. See Gabel, Reification in Legal Reasoning, 3 RESEARCH IN LAW AND SOCIO-
LOGY 25, 35 (1980).

19. See Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 432
(1971). See also Himmelstein, Reassessing Law Schooling: Towards a Humanistic

20. Twain at 67.
then how is a body ever going to get through this blind place at night without the friendly old landmark?  

No, the romance and beauty were all gone from the river. All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat. Since those days, I have pitied doctors from my heart. What does the lovely flush in a beauty's cheek mean to a doctor but the "break" that ripples above some deadly disease? Are not all her visible charms sown thick with what are to him the signs and symbols of hidden decay? Does he ever see her beauty at all, or doesn't he simply view her professionally, and comment upon her unwholesome condition all to himself? And doesn't he sometimes wonder whether he has gained most or lost most by learning his trade?²¹

Mark Twain, of course, was describing the dehumanizing effect of his professional training as a river boat pilot. Dean Carrington believes that this is one of the risks that law students and cub pilots share alike. Indeed, one recent criticism of legal education, coming from the humanists, is that it over-emphasizes cognitive learning at the expense of humanistic learning.²² The humanists argue that legal responsibility and ethics can not be learned by purely rational exercises nor by forms of instruction which have the effect of infantilizing and demeaning law students.²³

Another important source of criticism, emanating from the left, is that there is an ideological content to legal education which shapes underlying attitudes and values of the law in ways that legitimate existing injustices within the legal system.²⁴ This criticism, associated with the

²¹. Id. at 68.
²³. Id. at 23. The dehumanizing effects of legal training has been noted by others as well. See, e.g., Cramton, The Ordinary Religion of the Law School Classroom, 29 J. LEGAL EDUC. 247 (1978). More recently, Derek Bok has criticized the traditional modes of legal training on the grounds that they emphasize adversarial confrontational lawyering at the expense of the "gentler arts of reconciliation and accommodation" and the values of "collaboration and compromise." Bok, A Flawed System of Law Practice and Training, 33 J. LEGAL EDUC. 570, 583 (1983).
critical legal studies movement, suggests that there is much more than just a dehumanizing risk associated with professional legal training. The claim of the critical legal educators is that there is a "hidden curriculum" within legal education which teaches a unique "set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession."25 These educators and scholars argue that the traditional idea of law which is taught in legal education today is based upon a subset of professional norms and practices which seek to persuade us that existing injustices within society are necessary or natural.

Critical legal educators assert that traditional pedagogy mystifies reality by making what is illogical and unjust appear inevitable, logical and fair. Duncan Kennedy, for example, has argued that "[t]eachers convince students that legal reasoning exists, and is different from policy analysis, by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question-begging, incoherent, or so vague as to be meaningless."26 As an ideology, legal education conceals the actual meaning of law and human conduct much in the same way that river boat training concealed the romance and beauty of a beautiful sunset for the young Twain.

As an alternative, Critical Thinkers have argued that law schools should become nonhierarchical communities which permit students to learn how legal theory and practice can be utilized for creating democratic communities in society. The underlying ideal is to recrime law schools to the democratic objective of teaching students how "legal theory, doctrine, and practice can be integrated in a way that helps break down the structures of human domination."27 Students would be

25. See Kennedy, supra note 24 at 595. A similar critique has been advanced by Critical Legal scholars who have challenged the traditional professional vision of law practice. Bill Simon, for example, has argued that the traditional vision of law practice is premised upon a subset of established values and attitudes which constrain the possibilities for establishing nonhierarchical lawyer-client relationships. See Simon, Visions of Practice in Legal Thought, 39 STAN. L. REV. 469 (1984) [hereinafter cited as Simon]. See also Gabel & Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. REV. L. & SOC. CHANGE 269 (1982-1983).

26. Kennedy, supra note 24, at 596.

trained in ways that de-emphasize their role as technical expert by re-emphasizing their ability to better understand the political and moral consequences of their work by examining the underlying relationship between legal doctrine/legal practice and the basic beliefs and values of various social and political theories. Students would learn how to represent clients in ways that empower people to advance their own interests and values instead of those of their lawyer. Instead of training for "the reproduction of hierarchy," law schools would become a training ground for "constituting or reconstituting nonhierarchical communities of interests."

It is at this juncture that Dean Carrington sets himself apart from the critiques of the humanists and the politicists within the profession. While Dean Carrington seems to believe, as the humanists and politicists believe, that law teachers have "an ethical responsibility to do what can be done to help students resist this dehumanizing effect of technocratic learning," he nevertheless defends traditional norms and modes of instruction within legal education against the criticism of both groups. And what should be done? In regard to pedagogy, Dean Carrington believes that law teachers should follow the example set by Horace Bixby, Twain's river pilot teacher. Dean Carrington states that Bixby "could be described as a devotee of the Socratic method. He asked a lot of questions and commented forcefully when his responses were inadequate."

Mark Twain provides us with a hint of that method in a passage involving an interchange between Twain, the young cub pilot, and Bixby, the master pilot. While Twain was at the wheel of the craft, Bixby "turned on" Twain and asked:

"What's the name of the first point above New Orleans?"

I was gratified to be able to answer promptly, and I did, I said I didn't know.

29. Id. at 1894.
31. Simon, supra note 25, at 1894.
32. Carrington, supra note 1, at 224.
33. Id. at 225.
“Don’t know?”

This manner jolted me. I was down at the foot again, in a moment. But I had to say just what I had said before.

“Well, you’re a smart one,” said Mr. Bixby. “What’s the name of the next point?”

Once more I didn’t know.

“Well, this beats anything. Tell me the name of any point or place I told you.”

I studied a while and decided that I couldn’t.

“Look here! What do you start out from, above Twelve-Mile point, to cross over?”

“I-I-don’t know.”

“You-you-don’t know?” mimicking my drawling manner of speech. What do you know?”

“I-I-nothing, for certain.”

“By the great Ceasar’s ghost, I believe you! You’re the stupidest dunderhead I ever saw or ever heard of, so help me Moses! The idea of you being a pilot-you! Why, you don’t know enough to pilot a cow down a lane.”

Dean Carrington suggests that “beneath the veneer of authoritarian abuse and cringing enmity, there was between master and cub a bond of shared purpose which most law teachers would envy.” In Carrington’s view, law teachers’ have a responsibility to do what Bixby did — teach “judgment and courage” by exposing students to a “hard-eyed realism and tight mastery of self-doubt.” One wonders, however, whether either judgment or courage is ever fostered by such methods. Much of the criticism of the so-called Socratic method of teaching has emphasized its destructive nature in dampening individual initiative and personal responsibility.

34. Twain, supra note 4, at 48-49.
35. Carrington, supra note 1, at 225.
36. Id.
37. The Socratic method “has been attacked as infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values.” Stone, Legal Education on the Couch, 85 HARV. L. REV. 392, 407 (1971).

Dean Carrington ignores such criticism. Indeed, he believes that law teachers actually have a professional responsibility to require students to participate in the Socratic dialogue. According to Carrington, “[t]eachers have a duty to dispute any [student] claim of right [to a “no-hassle pass” rule]. Carrington, supra note 1, at 226. One wonders, however, whether mandatory classroom participation fosters professional responsibility and student initiative, as Carrington claims, or whether it really creates an
In Dean Carrington’s view, however, law teachers can teach professional values by “putting their students on the spot and requiring them to exercise both judgment and courage.” He believes that law teachers can perform this function by exhibiting in their teaching “some minimal belief in the idea of law and the institutions that enforce it.” While he acknowledges that the belief in the idea of law is premised upon a mere hope that those in authority seek to obey the law’s command, he admonishes law teachers to have the “courage to maintain belief in such a hope.”

It is in this context that Dean Carrington sets forth his controversial views about so-called “nihilist” law teachers. In his opinion, a nihilist teacher is a person who has come to doubt the validity of the legal profession because she believes that “law is a mere deception by which the powerful weaken the resistance of the powerless.” He claims that “[s]uch disbelief threatens competence [because] [l]awyers lacking confidence that legal principles actually influence the exercise of power have no professional tools with which to do their work.” He believes that the nihilist teacher must ultimately “abandon whatever professionalism they have, to choose between simple neglect of their work or the application of common cunning, such techniques as bribery and intimidation in all their many forms.”

atmosphere conducive to professional irresponsibility in teaching by rendering students powerless to resist abusive teachers?

38. Carrington, supra note 1, at 226.
39. Id.
40. Id.
41. Id. at 227. Carrington’s definition of legal nihilism would suggest that much of the work of the American Legal Realist was “nihilistic.” Realists such as Morris R. Cohen, Felix S. Cohen, Walter Wheeler Cook, Karl N. Llewellyn, and Jerome Frank spent a life time demonstrating the contradictions and indeterminacy of legal formalism. See E. Purcell, The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 74-94 (1973). In demonstrating the indeterminacy of formalism, the realists sought to illustrate how legal decisions served to mask privilege and justify “judicial despotism and political authoritarianism.” Id. at 91. As Tony Chase demonstrates, Carrington’s critique of the “legal nihilists” is deja vu of the old critiques of the legal realists. See Chase, What Should A Law Teacher Believe?, 10 Nova L.J. 404. See also Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 48-51 (1984).
42. Carrington, supra note 1, at 227.
43. Id.
Dean Carrington takes care in noting that the ethical responsibilities that he foresees for non-nihilist teachers does not require them to reject "Legal Realism and its lesson that who decides also matters." He argues, however, the "[w]hat [professionalism and intellectual courage] cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic." He believes that the legal nihilists have an ethical duty to leave the law school because nihilists, in Carrington's view, lack the courage and judgment to teach students the importance of obeying the commands of law. He thus believes that law teaching should be left to teachers who are "able to keep the faith of the secular religion" by making a public commitment to "the law."

Like Mark Twain's riverboat pilot who "cares nothing about anything on earth but the river," Dean Carrington believes that the law teacher must love the law and the institutions that enforce it. As Dean Carrington explains in the conclusion of his article:

For safe rivers, the public needs loving pilots. To limit might, the public needs lawyers who acclaim the hope and expectation that rights will be enforced. Seeing her blemishes (they are many) and knowing her perfidies (which are not few), true lawyers can love the law just as true pilots love the river. We love law not be-

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44. Id.
45. Id.
46. Id.
cause reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible. Sharing that commitment may be our most important power and responsibility. 47

In concluding his article in this way, Dean Carrington can be seen as the great defender of tradition within legal education. Despite its highly controversial overtones, Carrington’s article is an honest and, some might say, moving defense of the status quo. On the other hand, Dean Carrington’s article raises more questions than it answers. There are, of course, extremely troublesome questions of academic and political freedom raised by Carrington’s assertion that legal nihilists have an ethical responsibility to leave the law school. There are, however, equally serious and important questions concerning the particular professional role Dean Carrington believes should be taught in law school. These questions are themselves highly relevant to the perplexing issues of academic and political freedom which others have raised in objecting to Dean Carrington’s views.

III. Of Law and Legal Training

Mark Twain writes that “[y]our true pilot cares nothing about anything on earth but the river, and his pride in his occupation surpasses the pride of Kings.” But does it follow, as Dean Carrington seems to suggest, that the ultimate ethical responsibility of the law teacher is to teach law students to care nothing about anything except obedience to “the law”? An evaluation of Dean Carrington’s particular views of professionalism requires, in my view, a broader inquiry into the nature of law and legal training.

Dean Carrington actually says very little about professionalism of lawyers other than making some rather general remarks about the importance of commitment to the discipline of law. At one point, for example, he states that “[o]ne cannot believe in the worth of one’s professional skill and judgment as a lawyer unless one also has some minimal belief in the idea of law and the institutions that enforce it.” 48 At another point, he admonishes that “[w]hen . . . the university accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students or disables them from

47. Id. at 228.
48. Id. at 226.
doing the work for which they are trained." What Dean Carrington seems to recommend then is that law teachers train law students to accept responsibilities for implementing the "idea of law." The belief in the "idea of law" is expressed in the "hope that people who apply the lash of power will seek to obey the law's command.""

But what particular "idea of law" must be obeyed? In emphasizing that the idea of law is merely a "hope" that people will conform to the law's command, Dean Carrington suggests that lawyers must remain faithful to the "Rule of Law". But one might raise an objection to Carrington's position on the ground that he fails to distinguish between two distinct obligations: the obligation to obey the "ideals of the law" and the obligation to obey the "rules of law" in force. The "ideal of law" refers to certain legal and democratic values which a just society must acknowledge; whereas the rule of law refers to partic-

49. Id. at 227.
50. Id. at 226.
51. More recently, Kenny Hegland has acknowledged that he too believes it is time for lawyers to "say goodbye" to the critiques of the critical legal studies movement and reaffirm their commitment to the "Rule of Law." See Hegland, Goodbye to Deconstruction, 58 S. CAL. L. REV. 1203 (1985). But what "Rule of Law" should lawyers obey? People like Carrington and Hegland must believe that there is some fixed set of just "Rules of Law" which lawyers can discover and apply in some consistent manner. On many issues, there are simply too many uncertainties, gaps and ambiguities in the "Rules of Law" to permit lawyers to predict with any certainty how particular rules will be applied in a given case. There is also the problem of rule indeterminacy. How do we determine how to apply the "Rules of law" (assuming that they can somehow be discovered) if the structure of legal argumentation about such rules leads to indeterminate outcomes? See e.g., Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976).

Moreover, while lawyers may be able to predict how particular legal rules of law will be applied in some cases, this does not mean, as Kenny Hegland argues, that we can count on the Rule of Law to "protect the weak from the strong." Hegland, supra at 1219. Predictability in the law does not insure legal justice. Treating like cases alike can lead to perpetuating injustices in the name of the "Rule of Law." And, as Joe Singer has demonstrated, it is perfectly possible for there to be predictable patterns of decisionmaking even though the underlying legal arguments used to justify decisions are indeterminant. This is because "[c]onsidered choices can be described and even predicted to some extent because they are conditioned by legal culture, conventions, 'common sense,' and politics." Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 25 (1984). But this only means that particular "Rules of Law" may reflect and reproduce injustices and inequalities found within the ruling conventions of society.

lar legal commands or a conception of legality which may or may not correspond to the ideals of law. The ideal of law may itself justify a person to reject a particular conception of law whenever there is an irreconcilable conflict between the rules of law and the underlying ideal.

If Carrington is understood to mean that law professors must teach students to be faithful to the particular rules of law in force, then what must the law teacher do when she is confronted with illogical, incoherent and unjust law? Does Dean Carrington's notion of professional responsibility require the teacher to teach students they must obey the commands of unjust law? Should law professors teach students the necessity of obeying the commands of law no matter how inconsistent it may be with the ideals of the legal system? Shouldn't law professors train law students in the skills of critique and the overriding responsibility to transform unjust and fundamentally inconsistent law?

Certainly, professionalism must allow law teachers to criticize and argue against particular rules of law that are found to be illogical, incoherent or unjust. It would only seem reasonable to conclude that law professors have a professional responsibility to be honest and truthful. One might go even further and argue that law professors have a professional responsibility to reveal inconsistencies and injustices they honestly believe exist within the particular set of legal rules they teach. A law professor teaching constitutional law, for example, would be professionally justified in exposing students to the injustices of the racist premise of Jim Crow discrimination in public education legalized under the rule of law established by the Supreme Court prior to Brown v. Board of Education. If that is permitted, then there is no logical reason for not encouraging law professors from exposing how the rules of law of contracts, property, or torts serve to legitimate similar injustices in society.53

Of course, this does not mean that law professors should indoctrinate their students by brainwashing them or otherwise forcing them to accept the professor's values or politics. I think Duncan is right when he says that "[t]he teacher's role is to get the truth out as best he or she can do it, and let the chips fall where they may when the students get around to choosing what to believe and what to do."54 It seems to me that truth and honesty are the best antidote for the dangers of indoctrination. Indeed, indoctrination is more likely to be a problem with

53. See Kennedy, Liberal Values in Legal Education, 10 Nova L.J. 603 (1986).
54. Id.
Minda

forms of teaching which fail to critically examine or question the implicit assumptions and values assumed within existing legal doctrine and theory.

The aim of legal education should go beyond teaching merely what the law is — rather there should be an explicit concern for the ideals or the promise of what the law might become. To achieve that objective it seems only necessary that professionalism be defined to invigorate, not stifle, intellectual inquiry and debate about the legitimacy of particular conceptions of law and legal education. Professionalism in law teaching should thus encourage legal academics to expose, not shield, inconsistencies and injustices within particular rules of law and practices of legal institutions.

A concern for the ideals of law should, in my opinion, commit law professors to a critical inquiry of the values and assumptions that exist within law and legal institutions to determine if the rules now in force deviate from the ideals or promise of what law ought to be. The challenge to legal educators then is to discover whether the values and assumptions of our legal system are compatible with human freedom and a truly democratic society. Dean Carrington seems to accept the idea that law teachers must reject moral relativism when he acknowledges that law professors should reject legal nihilism, but not the lessons of Legal Realism.

If Dean Carrington's conception of the lawyer's obligation is interpreted to mean the "ideal" of law as distinguished from the mere rules of law in force, then Dean Carrington is simply wrong in suggesting that, like Roberta Unger (the only so-called legal nihilist he identifies), or any one else I know within the critical legal studies movement, is opposed to the "idea of law." On the contrary, it is because critical legal educators are deeply and passionately committed to the "ideals of law" that they take risks and exhibit courage in challenging what they believe to be unjust, hierarchical structures of domination existing within law and legal education. From our perspective, it is the traditional forms of pedagogy and training which are creating nihilistic atti-


tudes to the law and its ideals. The ethical problems created by the lawyers in the Watergate episode were, after all, upon us long before the Critical Legal Studies movement came on the scene.

By exposing law students to the inconsistencies and injustices with the legal system, law teachers would be equipping their students with professionally relevant skills of critique and analysis which may serve them well in their professional practice. In adopting a critical perspective in their teaching, law teachers would also provide their students with the insight that they are not powerless to change the world and that the legal structures now in existence are neither the inevitable nor the natural consequence of what law might be. As a result, legal education could become a training ground for learning how to actually render law and our legal system truly just and equitable.

Of course, Dean Carrington might still complain that Critical Legal educators are a threat to the profession because they believe in the wrong "ideals" of law. Indeed, I believe this to be the true source of Dean Carrington's objections to the so-called legal nihilist in legal education. Legal nihilists are to be excommunicated from the legal academy because they do not exhibit the true faith in Carrington's particular conception of law and legal education. But in restricting the right of others to argue in support of a competing conception, Dean Carrington's view would suppress discussion about the most important questions that need to be debated within law and legal education. It seems to be, that in this important respect, Dean Carrington's view is fundamentally flawed.

Indeed, a commitment to the ideals of law should require more, not less, discussion about how we can learn to actually realize the ideals of a truly democratic society within our legal system. As Gerald Frug has argued: "what we need to discuss is our different conceptions of what our profession and our nation should become; we need to build ways of talking that allow us — all of us — to argue about our future while still making practical decisions about alternative courses of action." If Dean Carrington's view is taken to mean that only those who believe in his view of law and legal education are qualified to be law teachers, then alternative voices would be effectively silenced and the ultimate power and authority to define truth would be given to a chosen few.

This then raises, in my opinion, the danger posed by Dean Car-

57. Frug, supra note 27, at 1895-96.
rington's conception of professionalism and the law teacher's responsibility. In arguing that law teachers must make a public commitment to "the law," Dean Carrington seeks to defend the very values and modes of instruction which are now openly under attack within the discipline. Dean Carrington's response is to tranquilize the substantive concerns of others, which threaten his particular conception, by passifying voices of dissent. The plea to obey "the law" must be understood for what it is — a rhetorical strategy utilized to shift the debate within the profession about the content of law and legal education over to a debate about the necessity of protecting law and its institutions from non-believers.
A Foolish Consistency: The Law School Exam

Janet Motley

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A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do... speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Ralph Waldo Emerson

Introduction

Probably everyone who has participated in the endeavor of legal education also has participated in complaining about it. A particular focus for those complaints has been the process of law school examinations. Of course, the dissatisfaction expressed by students has been substantially different from that expressed by professors. While students complain about difficulty and unfairness, we professors complain about the poor quality of the responses, lamenting the lack of inspiring intelligence and competence among our students.

This latter lament does not ring true in my personal dealings with my students. Teaching in a clinical internship program, I meet regularly with students who are engaged in learning the practice of law in “the real world.” At these meetings we discuss the things they are learning and how they are learning them. Consistently, I have found students to be resourceful and reflective, performing their duties quite competently — apparently a departure from what has been demonstrated by many of them in their law school exams.

As an advocate of the concept of learning from experience, it seems clear to me that there is something which we, the academic community, should be learning from this disparity. It is my thesis that law school exams, as now administered and used, fail to serve an educa-
tional purpose and may be counter-productive to our educational goals, particularly the goal of teaching our students to learn from experience. Furthermore, the present system is guaranteed to create artificial categories and classes of students, which, in turn, stigmatize and dramatically affect their lives. All this, in the light of strong evidence indicating that the exam does not even do a satisfactory job at assessment, calls for a reevaluation of our perpetuation of tradition.

As supposed role models for our students, it would seem appropriate for us to examine our goals and behavior in light of the results we are producing. Undoubtedly, there are things we can learn from our experience. Whether we are effective learners remains to be seen.

Given that we spend so much of our time dealing with law school exams — writing them, grading them and complaining about them — and that our students spend even more time studying for them, taking them, worrying about them and complaining about them, the topic should be worthy of study. This article looks at the law school exam as a teaching/learning instrument and makes suggestions for new approaches. As an educational institution, we should insist that the exams we give have an educational end.

Many legal educators have taken an interest in the examination process. The strength of many of their indictments of the process invokes wonder at their apparent failure to effect change. Steeped as we are in a profession which reveres the past, perhaps our resistance to change is explainable; it is not, however, justifiable. Though we might be proficient at professing, we may be fairly ignorant as teachers. Over ten years ago, a well-written article appeared, condemning our approach to the examination process as non-educational.¹ Ten years later, little change is evident, except that more "objective" questions are given, primarily to make grading easier. Perhaps the time has not been right for dramatic change, or even for serious self-reflection. Hopefully, that time is now.

The examination process holds great potential for use as a teaching/learning device and, as professional educators, it is our duty to see that it serves this end. Examinations test both substance and skill. Sev-

¹ Nickles, Examining and Grading in American Law Schools, 30 ARK. L. REV. 412 (1976) [hereinafter cited as Nickles]. Nickles studied the testing methodology used by law schools and argued persuasively that such practices are outdated and have been discredited in research. Other authors have addressed the invalidity and unreliability of grading. Although these points will be mentioned in this article, they do not constitute its central point.
eral skills are incorporated in responding to most law school exams, among them analysis, reasoning, synthesis and persuasion. With some changes in attitude and behavior, the examination process can be used to teach these skills. In addition, the process may serve as a model for the development of the skill of learning to learn, incorporating that important skill into the training of future professionals. This article looks at the law school exam as a teaching/learning instrument and makes suggestions for new approaches.

I. The Teaching/Learning Function of the Law School Exam

The asserted purposes of law school exams are varied, many arguably related to the teaching/learning function. The most obvious function is to measure, either absolutely or relatively, the learning and/or competence of the examinees. Assessment may provide valuable feedback and/or serve as a motivator for further study. In fact, it is difficult to separate the assessment function from the motivation function. Assessment also may provide information to students regarding their comprehension and ability; likewise it is difficult to separate these functions. Other uses served by exams include giving feedback to professors regarding their teaching effectiveness and preparing students for the bar exam. I would suggest that there is an additional function which must be served — teaching students important lawyering and learning skills. Specifically, the exam should be used to teach those skills for which it purports to test as well as the skills of learning from experience and self-directed learning. While the other functions are self-explanatory, this last group of functions, the skills teaching role, requires some further description.

The notion of using examinations explicitly as a teaching device is only vaguely mentioned in relevant literature. Certainly this is curious, for the concept would seem to underlie some of our basic operating principles. First, we assume that examinations test not merely for the knowledge of substantive law (doctrine), but also for important skills such as organization, analysis, writing style, persuasion and synthesis. Second, in our curricula we provide very little explicit instruction in these skills, particularly after the first year. Third, we assume that students should be improving in their exam-taking as they proceed through law school, that third year students should write better exams than first year students, even in the absence of explicit instruction. In other words, we assume that students should be learning skills from their examination experiences, doing progressively better jobs at dem-
onstrating their ability to organize, analyze and persuade.

There may be some who argue that the exam is not intended as a teaching device and that, therefore, it should not be critiqued on that basis. Yet the examination process, simply by its imposition and weight, will have the effect, intended or not, of teaching something and, as the focus of attention for most students, should teach something positive. Just what it teaches is something, it seems to me, about which we should be conscious.

II. Effectiveness in Achieving Teaching/Learning Functions

In determining whether examinations require our attention, it is essential to see what they are and are not accomplishing. While the complex nature of the teaching goals may prevent precise measurement of effectiveness, both empirical studies and our own experiences provide sufficient answers.

A. Assessment as a Teaching/Learning Function

The assessment function of examination so dominates the consciousness of formal education that it might be difficult to conceive of an expanded role. Of everything that has been written about the examination process, the topic of assessment has been most thoroughly cov--

2. "The infrequency of examinations in law schools is an admission that testing is used only to assess the scholastic progress of students and not to maximize instructional possibilities associated with examinations. This philosophy forces legal education to forfeit the benefits of testing when employed as a teaching device, and examining, it has been said, controls the learning process of students to a greater degree than any other pedagogical technique." Id. at 462-463.

Nickles cites several studies showing correlations in academic achievement with frequent testing and gives the following reasons for this relationship: 1) students have increased motivation to learn when they are being graded; 2) frequent testing reduces test anxiety; 3) frequent testing helps to structure the subject matter and forces student activity with the subject matter on a regular basis; and 4) knowledge of test results leads students to greater efforts. Some of Nickles' assumptions are challenged in this article.

3. See Zander, Examinations in Law, 10 J. Soc'y Pub. Tchr's. L. 24 (1968-69) [hereinafter cited as Zander]. This was a paper delivered to the 1967 Meeting of the Young Members' Group of the Society.

"If one considers the volumes that have been written by academic lawyers about even the most trivial problems of substantive law it is curious that so little attention has hitherto been given to the question whether we are doing the best we can to devise a fair and intelligent system of examinations." Id. at 24.
ered. As difficult as it is for us to believe, the case against our most traditional form of exam, the essay, has been well established. In one of the best known studies, Dr. Benjamin Wood, a psychologist, studies the examination process at Columbia University School of Law in 1923 and 1924. His tentative findings were so dramatic that he continued to observe the process and, in an article written in 1954, stated:

In general, the method of deriving grades is characterized by extreme subjectivity. . . . In fact, the evidence is so strong that we may almost say with finality that the traditional prose examination, singlehanded and alone, is inadequate for the requirements of modern educational administration.  

4. In spite of overwhelmingly strong evidence that this is true, we law professors find this conclusion almost impossible to swallow. After all, we are the products of a system which labeled us as the “cream,” based primarily upon such assessments. How could those results be wrong? Doesn’t our continued high quality academic achievement and scholarly work prove that those assessments were correct? Besides, don’t we find great consistency among ourselves in our assessment of our students? Our colleagues are usually in agreement with us when we select out our brightest students through the exam grades; mustn’t that kind of corroboration prove the accuracy of what we are doing? In sum, we have a strong, ego-based attachment to the examination process, particularly the essay exam. Nickles conducted an extensive survey of attitudes and practices regarding law school examinations. Many of the responses to these survey questions indicate wide gaps in perception between faculty and students.

Question 17. Do you believe students in your law school are satisfied with the grading system which your law school employs?:

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<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
<th>MIXED</th>
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<tbody>
<tr>
<td>FACULTY (N = 57)</td>
<td>74%</td>
<td>25%</td>
<td>1%</td>
</tr>
<tr>
<td>LAW REVIEW (N = 39)</td>
<td>56%</td>
<td>41%</td>
<td>3%</td>
</tr>
<tr>
<td>S.B.A. (N = 35)</td>
<td>31%</td>
<td>60%</td>
<td>9%</td>
</tr>
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Question 17B. Do the students think the system is fair?:

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
<th>MIXED</th>
</tr>
</thead>
<tbody>
<tr>
<td>FACULTY (N = 54)</td>
<td>78%</td>
<td>13%</td>
<td>9%</td>
</tr>
<tr>
<td>LAW REVIEW (N = 40)</td>
<td>55%</td>
<td>45%</td>
<td>—</td>
</tr>
<tr>
<td>S.B.A. (N = 34)</td>
<td>38%</td>
<td>56%</td>
<td>6%</td>
</tr>
</tbody>
</table>

Note that the attitudes of the law review students, the pool of future law professors, falls midway between those of the faculty and the S.B.A. Apparently, the system of positive rewards serves to validate the experience for some, while invalidating it for others.

5. Wood, Measurement of Law School Work, 24 COLUM. L. REV. 230 (1950) [hereinafter cited as Wood]. Numerous studies have demonstrated the severe unreliability of essay exam grades. “The average correlation between the marking of an essay examination by two professors has never exceeded 0.65 or 0.70, and has usually been found to be in the neighborhood of 0.50.” Wood, at 230. See also, Zander, supra note 3 at 28-29; Coutts, Examinations for Law Degrees, 9 J. Soc’y PUB. TCHR S. 404.
Dr. Wood's findings concluded with findings of subjectivity and unreliability regarding the essay exam.

In addition to these charges, the essay exam has been denounced as an invalid process for measuring ability and learning. This arises from the uncertainty of what is being tested for and graded in a typical essay problem. Is the test designed and graded to assess knowledge of rules of law, organization, writing style, analysis, spelling, grammar, reasoning, persuasiveness, and/or handwriting? Each one of these elements, and more, come into play in reading student answers to essay exams — some consciously and acknowledged, others unconsciously and unacknowledged. Within this conglomeration of uncertainties lie even greater ambiguities. What is "good" legal analysis? What is "good" legal reasoning? What is "good" legal writing?

Since the process of legal analysis is typically taught indirectly through the case method, it is treated as a gestalt with components remaining unexpressed beyond the ultimately tautological observation that only applies the law to the facts. As a result, there is no shared articulated model of legal analysis. Each professor develops his own, consciously or unconsciously. The models, therefore, as applied in the course of diagnosis and evaluation of student products...
and performances, are idiosyncratic.\textsuperscript{7}

If the assessment function of exams is to serve as an educational device, assessment must be reliable and valid. There is convincing evidence, however, that assessment is neither reliable nor valid.

Furthermore, in order to be educational, assessment must provide feedback to students which can be used as a data base for developing skills. Assessment which merely states "You did poorly" will not usually achieve this educational end. The teaching/learning function served by assessment is, for the most part, an indirect one. Although students may study "harder" because they are going to be assessed or have been assessed, that additional study is not necessarily guided toward an explicit learning goal. For example, a poor grade might induce a student to spend more time memorizing rules; it will not ordinarily teach him anything about analysis or reasoning. Shortcomings need to be specified and skills need to be taught if assessment is to operate as an education device.\textsuperscript{8}

The unfortunate perception seems to be that unless students are threatened or rewarded via the grading system, they will not seriously consider their studies, nor will they apply themselves to their work.\textsuperscript{9} For all of us, this is a sorry acknowledgement of the motivation to get good, or at least passing, grades.\textsuperscript{10} What is the teaching/learning func-

\footnotesize{7. Cort & Sammons, \textit{supra} note 6 at 415-416.}

\footnotesize{8. In spite of these fairly obvious shortcomings of the exam process itself, the essay exam in particular, the traditional testing pattern, remains in place and favored. In Nickles' survey there was almost unanimous agreement that the best form of evaluation for law school was the essay exam with some objective questions. \textit{Nickles, supra note 1,} at 433. This bias in favor of the essay exam may have innumerable roots. It might merely reflect the tendency held by those attracted to the legal profession to prefer tradition. It might be based upon a lack of information about the underlying unreliability and invalidity of the process. Whatever the cause, it is a sorry statement about our lack of creativity and reflection.}

\footnotesize{9. At least one wise teacher has advised against the use of a system which motivates by fear. "[I]ntelligence can never be awakened through compulsion." J. KRISHNAMURTI, \textit{Education and the Significance of Life,} 36 (1957). \textit{See also} Cramton, \textit{What It's All About: Teaching and Scholarship, The President's Address, AALS} (January 1985). Cramton warns of the "boot-camp" mentality which drives the enjoyment out of the educational experience.

\footnotesize{10. What professor hasn't experienced some dismay at the most frequently posed question on the first day of class — "What kind of final exam will we have?" Or, its runner-up — "Will this be on the final exam?" The commonly acknowledged fact that many students determine which courses to take in law school according to the final exam schedule is just another demonstration of the disproportionate attention which is...}
tion served by this motivation? As discussed earlier, exams, particularly essay exams, may be both unreliable and invalid. Motivating students to improve their performance of this task could depreciate the value of all school-associated "learning" — the "jumping through the hoops" syndrome of sorts. Those who do not achieve positive recognition in this way may discount the entire process. The psychological implications are disturbing:

It is difficult to exaggerate the damage done to promising

given to this process.

Carl Rogers has noted the same phenomenon in graduate study in psychology. According to Rogers, an implicit assumption about graduate education is that evaluation is education and education is evaluation. "It is incredible the way this preposterous assumption has become completely imbedded in graduate education in the United States. Examinations have become the beginning and the end of education." C. Rogers, Freedom to Learn 174 (1979).

11. In his survey, Nickles asked:

"Question 15. Do you think there is a significant correlation between academic success in law school . . . and success as a practitioner?

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>FACULTY (N = 50)</td>
<td>68%</td>
<td>32%</td>
</tr>
<tr>
<td>LAW REVIEW (N = 39)</td>
<td>36%</td>
<td>64%</td>
</tr>
<tr>
<td>S.B.A. (N = 35)</td>
<td>14%</td>
<td>86%</td>
</tr>
</tbody>
</table>

Nickles, supra note 1.

Whether or not student perception is accurate, it does give us some information about the credibility of our evaluation method in their eyes. It certainly should tell us that the motivation which is engendered by the examination process is not related to desire to become a successful practitioner, but rather, is related to fear of some kind.

Nickles also asked whether students who received lower grades would be motivated to work harder or would be discouraged and, thus, work less. The majority of faculty responses indicated a belief that students would usually or sometimes work harder, while the majority of student responses (including law review) reflected a belief that students would usually or sometimes become discouraged. Apparently there is an impression, on the part of the professors, that students will work harder in the first year but become discouraged in the second and third years. Also, as pressure mounts and more negative feedback is given, discouragement increases. Nickles, supra note 1.

Nickles talks about the plight of the student who finds himself with good, but not top 10% grades after his first year (almost the whole middle of the class). "A real possibility in legal education today is that [such a student] . . . will rationalize his future in law school by deciding to relax his efforts to learn. He may decide that grades have less value to him now and that he can probably work less and get about the same grades, which is undoubtedly true in many cases with the five-level grade system and bunching of students on the grading curve." Nickles, supra note 1 at 475. Nickles cites several studies which show that students may give up trying to achieve good grades where the good grades are few and past experience has been discouraging.
graduate students by this completely fallacious assumption that they learn by being threatened, time after time, with catastrophic failure.12

The use of the exam as a motivator cannot be examined in a vacuum. Motivation absent an understanding of the task to be tested or of how to acquire the skills to perform that task is likely to result in frustrating and wasted efforts. Motivation, then, is directly related to both feedback and explicit skill instruction. That is, if the exam is to be used to help students develop skills beyond the memorization of rules of law, these skills should be explicitly taught and tested. For the most part, we don’t do this. Nor do we teach students how they might learn from past exams (experience); instead, we rely on fear as the motivator to magically transform the unknown into the known.

Just as the motivation aspect of assessment does not presently serve an educational end, the feedback aspect of assessment falls short of its possibilities. Examinations, particularly essay exams, have potential for performing an important educational end if students receive information (feedback) which can be used to improve future work. A number of letters appearing in a bluebook, perhaps accompanied by unexplained check marks, question marks, exclamation points and numbers in the margins, does not fulfill this feedback function. A poor or disappointing grade may be interpreted by a student as an indication of lack of comprehension or ability. Just as likely, however, it will be filtered through a sophisticated and complex system of rationalization, distorting whatever message the exam grade or experience may have potentially provided.

B. The Teaching/Learning Function of Providing Feedback on Teaching Effectiveness

“Examinations ought to help us decide where our objectives are unrealistic, where they need to be more closely specified and where they are not being met in our teaching.”13 Surely this is a valid teaching/learning goal. Yet, law professors, as a group, have been unwilling to regard student performance on exams as any reflection on our teaching effectiveness. We may be the most judgmental and nonreflective of any educators in our failure to assume responsibility for the fruits of

12. C. Rogers, supra note 10, at 177.
13. Brimer, supra note 5, at 40.
our labors. Of course, it is perfectly logical to blame students who perform below our expectations. After all, we caught onto the system fairly easily when we were students; we didn’t need special attention nor more explicit instruction on how to take exams. In fact, we were so good at that game that we were drawn to return to it — back to the place of positive reward. When it seems like we’ve said the same thing at least ten times in class, or gone over the solution to practice exams or hypotheticals in meticulous and simplistic detail, and “they” still don’t get it, well, it must be “them”! Some students, of course, pick up our messages and do fairly well, although not enough of them and not as well as we’d like. These are the “better” students; the ones worthy of our time and energy.

We don’t know whether the “good” students succeed because of our teaching, regardless of it, or in spite of it. I have seen evidence, both in my contemporaries and in my prior students, however, that many practicing attorneys succeed in spite of the brands that were placed on them as students. We might deduce from this that the students who do not perform well on exams are not necessarily destined to professional incompetency. If they are not receiving, or are unable to demonstrate that they have received, what we are attempting to transmit, maybe we should be looking at the means of transmission.

C. Teaching Students to Take Future Exams

The effectiveness of the law school exam, as it is used to help students learn to succeed in future exams and, ultimately, the bar exam is uncertain. Just as we cannot determine the effect our teaching has on our students, it is difficult to prove a direct correlation between the mere number of exams given in law school and increasing success on them. If it is true that students have little opportunity to learn from the exams they take, then more is not necessarily better. One benefit of exams, in terms of practicing for future exams, is that students become familiar with examination procedures and, thus, they might approach the process with less trepidation. Then again, students who have performed poorly on law school exams might approach their most significant exam experience with even greater trepidation and negative self-fulfilling prophecies.

The only way that law school exams can serve a useful purpose as a practice instrument for future exams is if they are used as teaching devices. If we cannot truly call the examination process a learning process, the pretense that it serves as one violates our duties to our stu-
D. The Exam as a Device for Teaching/Learning Lawyering Skills

In theory, we teach substantive courses, not with the goal of having students learn or memorize a set of rules, but rather to further the process of developing the skill of "thinking like a lawyer." Yet, it is not clear that this is, in fact, the result. While focusing their attention on the examination at the end of the course, students forsake the larger perspective. The objective becomes learning the rules, not how lawyers think and act. Students lose sight of the human dimension in legal disputes, the elaborate rationalization used to support positions ultimately based on political, social or economic bases, and the creative reasoning which marks a good lawyer. Naturally, there will be objection to such a bold statement. Most professors would contend that students are learning how to consider a particular area of law as a lawyer would, and that this skill is tested in final exams. Student attitudes, often expressed as anxiety over missing a particular substantive course, prove that students are focusing on doctrine. Further, if one were to take a survey of how students study for exams, it would surely demonstrate a focus on memorizing rules of law. The responsibility of professional educators should include a consciousness about not only the substance of what we are teaching, but also the consequences of our methodology. If we expect students to demonstrate organization, writing prowess, analysis and reasoning, presumably we expect them to learn these skills before they sit for the exams. How are these skills to be learned? Hopefully, if our classroom teaching is successful, our students are being exposed to the process of legal analysis, some legal reasoning, and maybe even a little persuasion. The extent to which any particular student receives classroom training in these skills may be dependent upon many factors, including teacher techniques and the minimal amount of participation by each individual student. Will this suffice? A first year class in legal research and writing may provide some groundwork, but, given the intensity and pressure of the first year of law school, it cannot be expected to provide thorough preparation in this area.

How much actual experience does a first-year law student have in organizing an essay exam-type answer, in undertaking an extended analysis and performing sophisticated legal reasoning of the kind sought in the actual exam session? There may be some practice exams, but unless these are specifically and individually critiqued, they may do
nothing more than reinforce incorrect behavior. It appears that, in the process of studying for an exam, there is not much potential for learning the kinds of skills which the exam is allegedly used to test. The foundations, or models, for these skills have not been provided in a way that students may work with them in exam preparation. Case briefing, it may be argued, fulfills this function. Yet, having students recite the issue, rule, and analysis of a case is a substantially different exercise from identifying issues and reasoning with rules and facts which are presented in the typical exam problem.

Our attempt to teach skills and substantive knowledge concurrently may be, in fact, counter-productive methodology, making preparation for exam-taking an incomprehensible task for first-year students. In his quite detailed study of law school exams, Professor Josephson sets forth a taxonomy of learning adopted from Bloom's Taxonomy of Cognitive Learning. \(^\text{14}\) Josephson's "Law School Learning Pyramid" has, at its base, knowledge. Moving up from that base we pass through understanding, issue-spotting, problem-solving, judgment and, finally, to synthesis. The four top levels of the pyramid involve "sophisticated intellectual powers which concern the way substantive information is used."\(^\text{15}\) If our purpose is to teach our students and to have them learn the skills which we will be testing in our exams, this pattern of cognitive development should be useful. It seems, however, that we fail to use this taxonomy effectively; we keep our students in a state of confusion about the first level (knowledge), both in terms of what they should know and how they should go about learning it. The first level (knowledge) gets entangled in the third and fourth levels (issue-spotting and problem-solving), trying to hone rules of law out of cases. To learn law in this way, the student must be able to decipher the issues in the cases, but the issues are really only decipherable if one knows what the rules are.

We complain when our students demonstrate a lack of knowledge of substantive law, yet we deride and threaten ill-bodings for those who would use straight-forward means to obtain that information (i.e. commercial outlines). At the same time we hide that substantive knowledge in the sophisticated process of appellate case analysis, attempting to teach all levels of the pyramid at once, obfuscating all of them. This is the preparation that our students receive for the examinations which will play such a significant role in their lives. It does not appear to be a

\(^{14}\) Josephson, supra note 6 at v. 1, p. 58.

\(^{15}\) Id. at v. 1, pp. 58-59.
well-designed learning format.

Nor can we say that students learn anything constructive during the process of taking an exam. The typical one to three-hour exam provides little opportunity for reflection, and the normal exam room atmosphere is not likely to stimulate any great “Aha’s”. In one respect, it might be said that students are learning how to cope with stress, to work under pressure and to think quickly, but those are not the primary skills we allegedly are testing. Test conditions are not conducive to teaching our intended goals.

Do our students learn anything from the examination process after the fact? In other words, are they learning from their experience? Educators in all fields should be striving to ensure that their students are learning from their past endeavors; legal educators should be especially concerned about this, as we have recognized that the ability to learn from experience is one of the most important skills any attorney can possess. Thus, we should ask how much our students learn from the examination process, a focus of their three years of professional training.

If students are to learn from the exam experience, they must be given time for reflection and analysis as well as specific feedback from professors. As a rule, this does not occur. The minimal feedback which is given (sometimes no more than a grade) arrives so long after the course has ended that serious consideration of it would compete with and detract from present study commitments. The typical law school exam is, in short, a dead-end.

III. What the Exam Process is Teaching

The failure of the examination process to perform effectively as a teaching function should be reason enough to question its habitual implementation. There are, however, even further failings which arise from our persistence in clinging to tradition. These are the profound effects which the exams, in their administration and their influence, have on the attitudes and performance of our students and ultimately,

16. Although Nickles' survey indicates that 60% of law schools encourage students to discuss individually the results of their examinations with their teachers, there is no discussion of how this is done, whether faculty members cooperate in this “policy” and whether it actually happens. “As a general practice the professors do not conduct post-mortems during which examinations are discussed with classes and the bases for evaluation and assessment detailed.” Nickles, supra note 1, at 438.
on the viability of our legal system. These effects touch upon matters of competence, creativity, attitudes about cooperation and collaboration, integrity and self-esteem. These factors, in turn, affect attorney performance, client satisfaction and the ability of the legal system to serve its function.

In terms of how we are using exams to teach and what our students are learning from the experience, these effects can be classified into two broad categories: the reinforcement of undesirable skills and attitudes and, the inhibition of the development of the skill of learning from experience. Concomitantly, there is a danger that we are instrumental in the development of attitudes which will ensure mediocrity in educational and professional performance.

A. Learning and Reinforcement of Undesirable Skills and Attitudes

What are the skills our students are learning by participating in the traditional exam procedure? Whatever they are, they should be examined for their utility in the context of the practice of law and in the context of a productive adult life.

One of the obvious skills that our students are learning is to work under severe time pressure — to work quickly. On the surface, this might appear to be a useful skill; we know there are times when quick action is required. But what about its appropriateness in everyday practice? Of course, we would encourage efficient work, but we also want to stress care and thoughtful consideration for all tasks. Asking students to speedily answer a complex legal problem implies that this is possible. In fact, how many law professors spend merely the one to three hours allocated for an essay exam in drafting their model answers? An accompanying implication is that working under such time pressure is acceptable and, perhaps, routine for the practicing attorney. The temptation to take on an overly burdensome caseload is unchecked by regard for professional excellence when hasty problem-solving is the training norm.

Legal problems should not be considered with speed. There is rarely an occasion in practice when this is required. It is not sufficient to answer that the students have been spending a great deal of time learning the applicable law. Regardless of knowledge of the doctrine, analysis and reasoning are processes which take time. Why encourage students to do this quickly, particularly before they have had the necessary years of experience required to become adept at performing
these skills? Students who are unable to develop speed do not do well in the examination situation, regardless of their ability to "think like a lawyer."

Another of the skills which our students are perfecting in preparing for law exams, including the essay, is memorization.

The problem of the undue emphasis on memory with its consequent vast expenditure of time on learning the text-book and a mass of cases is one of the most intractable. A competent lawyer feels no embarrassment on consulting his library before advising a client. Yet we test our law students as if the only kind of knowledge worth recognizing is that carried in the head.

Students with poor memories necessarily will not fare well on our exams, regardless of their abilities to analyze and reason. The effect is a lack of confidence, as well as confusion about the role of an attorney.

In addition to speed and memory, students learn that the majority of the grade for most essay exams depends upon the skill of issue-spotting. The ability to spot-issues does not necessarily include the ability to analyze or to reason. It often does not involve the demonstration of the ability to prioritize issues, nor the discussion of problems of proof, practicality of remedies, nor the numerous other skills which practicing attorneys must use in resolving real-life problems. It is not surprising that students and alumni often comment that they see no relation between taking a law school exam and practicing law. The lesson learned is that what is taught in law school has little to do with what a lawyer does. The educational process is discounted.

Something that students may be learning is that their efforts are better devoted to activities outside of school.

Since the system rewards only a few, punishes the rest, and is perceived as largely unresponsive to the degree of effort devoted to study, it is not surprising that clerking in a law office, combined with a passive and limited response to the upperclass curriculum, is a frequent choice. The wonder is that so many second and third-year law students work as hard as they do.

17. How presumptuous to criticize these same students for poor writing and organization when we are reading a product which has been given less thought and time than the roughest of rough drafts of anything which we might ever consider allowing another person to peruse.

18. Zander, supra note 3, at 34.

The current system of examination also affects student attitudes about their professional roles. One of the most significant means of effecting behavioral change is through modeling. As professors, we are in the position of modeling behavior to our students for three years. What we are modeling may, to a large degree, influence the behavior of future attorneys.\(^{20}\)

We implicitly model and teach relationship behavior which is detrimental to professional performance. We encourage patterns of blame and denial of responsibility. We teach our students to distrust us—that perhaps we are not capable of doing the job they are paying us to do. We demonstrate attitudes of noncaring and refusal to help for those who appear to be in subordinate roles. We teach nothing about working together. Finally, we teach that those who have attained some position of authority are no longer required to learn from their experiences, for we keep doing things the same way in spite of massive evidence of need for change. One specific example regarding exams demonstrates this. Among the behaviors which facilitate learning, including the learning of professional attitudes, is the selection and arrangement of learning experiences for continuity, sequence, and integration. In other words, do we present material and skills to our students in a progressively more challenging and logical order? The failure of law schools to adopt a progressive, graduated and integrated curriculum is reflected in the examination process. First-year law school exams test for the same skills, level of knowledge and ability as do second and third-year exams, although we do hope to see improvement in these skills over the three years. By failing to accommodate this need, we frustrate our students and our expectations, leading to anger, resentment and mutual disrespect.

The reliance which traditional legal education has placed upon examinations and their by-products, grades, has given them profound in-

\(^{20}\) "There is growing recognition among educators that, within a professional school, the individual and collective teaching, helping, and administering relationship with the student is the core of his preparation for professional relationship. We are becoming aware that this relationship, in the context of which knowledge and skills are conveyed, determines in large measure the learner's capacity to work purposefully with people in ways appropriate to the profession, whether in the helping relationship between practitioner and recipient, in collaborative work with colleagues, or in his relationship with subordinates and persons in authority within his own profession's hierarchy. C. Towle, The Learner in Education for the Professions 21-22 (1954).
fluence over the lives of law students. Using grades we categorize and stigmatize students in many ways. The social, economic and psychological effects are intricately woven in a complex tapestry of seeming significance.

As soon as first semester grades are announced, definite social groups develop based in large part on these grades. Study groups are formed, or reformed, usually with others in the same grade range. After all, how many good students want to share their proven ability with other students who cannot help them in return? Before the categorization which comes with grades, most first-year students experience at least a degree of camaraderie with their peers; no one knows who is going to make it. After grades, cards tend to be held much closer to the vest. This ranges from unwillingness to share class notes and other study materials, to withdrawal from other students and an attempt to go it alone. 21 There is nothing inherent in the nature of an examination to cause this reaction. The reaction comes from the significance that is attached to grades which are derived from the exams.

In a society where jobs depend upon grades and the activities associated with grades of distinction, and where those jobs are scarce, competition becomes the driving force. A highly competitive environment, although it might provide the external stimulus for study, has its drawbacks. Among the disadvantages are the lack of opportunities for and the avoidance of collaboration, the development of an "every man for himself" attitude, and a deterrent to the establishment of close relationships.

In The Learner in Education for the Professions, Charlotte Towle defines several aims for professional training. One of these aims is "to develop a capacity for establishing and sustaining purposeful working relationships." 22 In almost every way, the extreme competitiveness for

21. "Much professional work involves cooperative activity, but law school does little to assist a law student to work effectively as a member of a team. The competitive environment of law school tends to pit each student against all others and, not surprisingly, feelings of isolation, suspicion, and hostility develop among students.

"Knowledgeable observers comment that law students become more isolated, suspicious, and verbally oppressive as they progress through law school; their aptitude for verbal articulation increases, but they rarely stop to listen to others. If so, will they be good counselors? Will they need to unlearn a number of things in order to operate successfully as a professional?" Cramton, The Ordinary Religion of the Classroom, 29 J. LEGAL EDUC. 262 (1978).

22. C. TOWLE, supra note 20, at 10. Most attorneys work directly with clients. Very few law school courses deal with this fact and even fewer attempt to provide
grades and jobs is guaranteed to adversely affect the development of the characteristics required to form such relationships; of self-awareness, self-understanding and the capacity to work together. First, students are engaged in a system where most of the stimulus for performance seems to come from external circumstances — grades, jobs, bar exams. Although each of these is related to the ultimate internal pressure of the ego, for its own protection, the ego will force attention to be directed to external events and conditions. For its survival, the ego must place causation for inadequacies and failures on these externalities — the professors, the system, the school, the exams, the narrow-minded employer or the judge. Any realistic sense of personal responsibility must be stifled. Thus, the defenses are established to avoid self-awareness, self-understanding and deep relationships. Most student relationships in law school are based on the “misery loves company” theme, and most interchanges and dialogues are about common discontents. Probably the most stimulating “intellectual” discussions among students occur during their first year of school, before they have been tainted by the classification of grades.

training in interpersonal skills. In the course in interviewing and counseling, many professors have adopted the theme of the “client-centered approach” developed by Carl Rogers. See, e.g., BINDER AND PRICE, LEGAL INTERVIEWING AND COUNSELING. This collaborative approach views the client as a partner in the problem-solving process. Typical student reaction to this theory of lawyering is surprise and resistance. By their second year in law school most students see their professional role to be that of the problem-solver and the dominant role-player in the relationship.
In stifling the capacity to develop meaningful relationships, not only do we inhibit the ability to engage in fruitful and satisfying collaboration, but we also encourage the adoption of values and priorities which we, as law professors, commonly disdain. The emphasis on grades, on competition, on achievement even at the cost of friendship, has as its basis the rewards of power and money. No wonder that by the third year of law school we find little concern for public interest law or for working with the economically disadvantaged. The entire system has pointed to other goals. "Do well on these exams if you expect to stay in law school, to make law review, to graduate high in your class, to get that prestigious and high paying job." As the law student's (and the lawyer's?) life becomes more and more devoid of internal satisfaction, less in touch with ultimate values, this striving for "things" will be an obvious substitute. In the long run, such things do not maintain their value as surrogates for self-awareness, self-understanding and the capacity for meaningful relationships. 23

Most likely this sounds like a distorted and exaggerated description of the possible effects of our examination process. It probably is. Yet, these effects are present to some degree, and though the exam process is just a part of the entire legal education system, it is reflective and symptomatic of very particular attitudes about who we are and what we value.

Much of what has been described above explains the fact that many students see law school as a battle; in this battle it's "us against them" — and, we're the "them". Faculty meetings are seen by students as occasions for faculty members to plot against students. Graduation is a cause for celebration of the fact that the faculty has been conquered — they've made it through in spite of, or maybe even to spite, us.24

23. Conventional education makes independent thinking extremely difficult. Conformity leads to mediocrity. To be different from the group or to resist environment is not easy and is often risky as long as we worship success. The urge to be successful, which is the pursuit of reward whether in the material or in the so-called spiritual sphere, the search for inward or outward security, the desire for comfort — this whole process smothers discontent, puts an end to spontaneity and breeds fear; and fear blocks the intelligent understanding of life. With increasing age, dullness of mind and heart sets in.

J. KRISHNAMURTI, supra, note 9, at 9-10.

24. "Legal education, like other areas of graduate and professional education,
It should be useful to examine some of the likely reasons for the lack of friendship, trust and respect between faculty and students. We came through the system, through the same hurdles and hoops. We came through with flying colors; most of our students will not. We have proven our worth, at least to ourselves and to those within our closed society. In this game, with these rules, many of our students are not proving their worth. So, we simply don't respect them. Our value systems, reinforced by our common association and our professional elitism, are fundamentally oriented to "intellectual" achievement as measured by the standards of grades, degrees, publications, and employment history. Most of our students will never measure up to us using these standards. Those of us who consider ourselves to be open, humanitarian people pay lip service to the notion that our students are fine individuals with many other attributes worthy of our respect. But, how many of us really respect them when they don't prove themselves in our game? The general disdain that academicians hold for practicing attorneys is merely another indication of this self-aggrandizement and further reason for contempt for and by our students.

Respect is a two-way street. If we don't give it, we don't get it. When students don't respect their professors they are eager to find examples of behavior which justify their attitudes. These examples are not too difficult to find. And so, the law school environment becomes poisoned with gossip, complaint and ill-feelings. Even students who have performed well and have "earned" some measure of respect from their professors fall into this diseased state, for to do otherwise would alienate them from their classmates. The situation thus occurs whether or not the participants actually believe and support the things that are

has been influenced by this instrumentalist perspective. In one respect — student-faculty relations — the problems may be more serious than elsewhere.” Empirical data from a 1975 study of higher education, recently reported by Carl Auerbach, indicates that student-faculty relationships are more impersonal in American law schools than in other fields of graduate and professional education. Only about one-third of law students — the lowest proportion of any field studied — felt that law faculty could be trusted to look out after their interests. “In no other discipline,” Auerbach states, “did the graduate students perceive the relations with their professors as [so] impersonal . . . .” This student perception was reflected in faculty attitudes: 55% of law faculty the highest proportion of any discipline — felt that a teacher could be effective without personal involvement with students. Cramton, What It's All About: Teaching and Scholarship, 2 The President's Address, AALS (January 1985).

25. Id.
said. Likewise, on the part of the faculty, those faculty members who would dare to say complimentary things about the students risk the loss of agreement and support from their colleagues.

The exam process is encrusted in tradition, mystery, gamesmanship, classification and unreliability. By controlling this process we control the lives and futures of our students. By preventing our students from acquiring self-control for their parts in this process, we become unfair and arbitrary. Our failure to teach the skills which we test, and to continue teaching them until some mastery has been achieved, keeps us in control. This is not to say that the blame for the existing condition is all ours, but the responsibility is.

B. Inhibition of the Development of the Skill of Learning from Experience

Professor Keeton has stated:

Skills of learning have received less explicit attention in law schools than skills of analysis. Increased interest in clinical education has tended, however, to focus increased attention on the importance of learning how to learn and the importance of developing and nurturing good habits of learning. This emphasis arises naturally from recognition that the scope of the experience any particular student may have while in law school, and more especially, while in a single course in law school, is so limited that the lessons to be derived from that experience will be of relatively little value unless the student is learning something about experience more generally. Perhaps the most valuable thing to be learned is learning how to learn from the experience of the future. 27

Keeton discusses the criteria which should be met by “experience-based” courses in order to effectively train students to learn from their experience. Although Keeton is referring to clinical courses, his comments are equally apropos to the exam-taking process in the traditional law school course. Certainly the process is an experiential one. If it measures the demonstrated performance of important skills, we must seek to have our students master these skills and be able to transfer what they have learned to future uses in practice. Thus, we should be giving thought to how our examination system affects the ability of our

students to learn from the experience.\textsuperscript{28}

Many professors who teach traditional courses have not had much exposure to this concept of learning from experience nor the notion of progressive learning which accompanies it. Students move from class to class, semester by semester. Except for those few courses, primarily in the first year, which run through two consecutive semesters, the final examination is the last contact between students and professor. Regardless of how the exams turn out, the professor must transfer his/her attention to a new class. Those who have fared poorly on the exam will be passed on to other classes and become someone else's problem. This rather self-centered approach not only results in many tortuous hours of exam grading and exasperation for professors, but, more significantly, constitutes a seriously incomplete experience for our students. We stifle the development of the ability of our students to recognize their own lack of knowledge and skill by the way we handle exams. Students are rarely able to factually determine what they know and don't know. They usually don't know how to take steps to remedy the situation, nor are they encouraged to take such steps. Many professors, tired of long, frustrating hours trying to explain to students what they have done wrong, have set obstacles before students who wish to review their exams. This leads to a pattern of excuse, rationalization and poor performance, rather than encouraging a pattern of self-directed learning and growth. Although we acknowledge the need for the skill of learning, we ignore it when it comes to the ways in which we teach. In every way, the effectiveness of our students as professionals will depend upon their ability to continue to learn and grow.\textsuperscript{29}

\textsuperscript{28} At least one survey has indicated that lawyers learn their most important skills in practice. See Josephson, supra note 6 at v. 1, p. 141. This finding probably is not surprising to most law professors. We often tell our students that many of the tasks they will need to master in order to be effective practitioners can only be learned by experience. Unless we establish the pattern of reflective behavior which is essential to learning from experience, we are not teaching our students what they will need in order to be effective practitioners.

\textsuperscript{29} We are, in my view, faced with an entirely new situation in education where the goal of education, if we are to survive, is the facilitation of change and learning. The only man who is educated is the man who has learned how to learn; the man who has learned how to adapt and change; the man who has realized that no knowledge gives a basis for security. Changingness, a reliance on process rather than upon static knowledge, is the only thing that makes any sense as a goal for education in the modern world.
Failure to develop the skill of learning from experience leads to an inability to grow and adapt. Students who are unable to improve their performance will develop various defensive behaviors to protect their egos. Among the most common of these behaviors are: 1) rationalization — the reason is logical, but not true; 2) compensation — the student may stress a strength to camouflage a weakness; 3) reaction formation — the student acts opposite from the way he/she feels, such as acting as if grades don’t matter to him/her; 4) repression — denial of the existence of a problem; 5) emotion insulation and apathy — staying uninvolved and pretending not to care (our “disaffected” law students); and 6) verbal aggression — counter-attack against the person or persons who are perceived to have caused the problem. The system of defensive behaviors which we have developed as a species is quite complex. The system can be expected to be most highly developed in the environment of a professional school where individuals who have been selected on the basis of past high performance now find themselves performing relatively poorly or merely adequately. The maintenance of such behaviors inhibits change. In short, cause is seen as external to the individual and no responsibility is assumed for personal circumstances.

Another defensive behavior which is heightened by the law school

C. Rogers, supra note 10, at 104.

Our current behavior inhibits our students’ ability to develop the skill of learning from experience. In working with student interns I frequently ask them why they don’t achieve high marks on their exams or why they don’t show signs of improving after their first year. I usually get responses about writing problems, “I’m not a good exam-taker,” and the like. When I press them about what they have done to improve, I find two things. First, many students have given up all hope of ever performing well on exams and have sentenced themselves to mediocrity in this area. Second, students who have tried to discover their “wrongdoings” have been, for the most part, frustrated in their attempts. As stated above, most professors don’t like to spend time going over old exams. Because the grading process itself is so energy-consuming, most professors do not make detailed, if any, comments on essay exams. Students who look through old exams for clues about their performance will not find them. I have even heard some students express doubt as to whether their exam papers are actually read. After a few such disappointing experiences, students stop looking.

Studies of professional behavior have demonstrated a limited ability among professionals to learn from experience. This ability seems to be displaced by defensiveness, closed-mindedness and a general nonreflective attitude about personal behavior and responsibility. See Kreiling, Clinical Education and Lawyers Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision, 40 Md. L. Rev. 284 (1981).

experience, and is antithetical to the development of a self-directed learner, is dependence. Shaffer and Redmount discuss how the mysteriousness and obliqueness of law school classes tend to make students dependent upon professors.\(^{32}\) It makes them look to professors for information which they are told they will never actually get (i.e., answers). The exam process reflects this pattern as well. It is almost as if the mysteriousness as to what should be written on an exam or how to do it cannot be entirely revealed, for if it were, then students would not need to depend on professors anymore. If students really understood how to take exams, they might find that the system isn’t such a mystery and that they are, in fact, capable of learning a lot on their own.\(^{33}\)

These behaviors should all sound familiar to the observant law professor. They are, of course, inappropriate for any adult, but particularly for a professional person who must be responsible for the welfare of others. As the people charged with preparing students for professional practice, we should be doing whatever possible to ensure that this kind of defensive behavior is not reinforced.

With our emphasis on traditional legal process and our modeling of many of the traits discussed above, we can be assured that our students will not be skilled at learning, especially the “significant learning” described by Carl Rogers, which involves changes in behavior.\(^{34}\) The inability to recognize and change ineffective behavior is a tradition which does not merit preservation. “To think critically and objectively in order to effect change rather than to be blindly worshipful of traditional thinking and doing is the persistent aim of professional education.”\(^{35}\) If our students are to learn such behavior, we need to be demonstrating it.

32. Shaffer and Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190 (1976) [hereinafter cited as *Shaffer and Redmount*].

33. This dependence, when combined with the fear of failure, produces a system similar to military training. It acts to keep the students in line and eager to please. “The process is roughly what psychologists call ‘identification.’ Fierce pride and confidence are its characteristics, but among the effluvia are arrogance, combativeness, narrowness, and, deep within perhaps, some suppressed self-revulsion and self-doubt.” *Shaffer and Redmount*, supra note 32, at 197. These are traits which have been associated with attorneys and law professors alike; none are conducive to growth and adaptation.


IV. Learning From Experience

If we continue to give exams, because they test for important skills, we should use that process to instruct our students in those skills. Beyond the direct educational benefit of training our students in organization, synthesis and analysis, we should be using the process to model how the professional person learns from experience.

Learning from experience sounds like something which is simply common-sensical, not a "skill" which needs to be learned. Aren't we frequently telling our students that many of the things they learn or want to learn in law school can only be mastered through experience? Apparently, we take for granted that everyone has the innate ability to learn in this way. Rather than take such a critical notion for granted, I suggest that it is our responsibility to examine the facts. True, we often learn from our mistakes, yet we are just as apt to make new mistakes or repeat old mistakes as we are to move toward mastery. If we want to ensure that our students enter the professional work place with the capacity to use their mistakes creatively and to learn in a more conscious and effective manner, we must be more explicit about this kind of behavior. Being more explicit about our behavior requires an understanding of the elements involved in learning. Educational theorist Arthur Chickering has described these elements in a fashion easily translatable to the law school experience.

Effective learning ... has four ingredients that themselves call for four different abilities. The learners must be able to enter new experiences openly and fully without bias; they must be able to stand back from those experiences, observe them with some detachment, and reflect on their significance; they must be able to develop a logic, a theory, a conceptual framework that gives some order to the observations; and they must be able to use those concepts to make decisions, to solve problems, to take action. 36

In respect to the law school examination process, none of these conditions are met. Our students do not enter the process openly and fully without bias; rather, they come with tales and horror stories derived from rumor, from professors, from TV and movies, and from their own past experiences with examinations. What's more, so much of value rests on the performance that it cannot possibly be looked upon as an opportunity to explore openly various theories and methods of

making legal argument, arguing public policy, or whatever the underly-
ing goals for the process. The exam process is filled with superstitu-
tions, not with an attitude of open engagement in a learning process.

The opportunity to stand back and observe with detachment is also non-existent. Too much depends upon the outcome; too much ego is entangled in the grade. When the results are disappointing, the significa-
cance must be diminished and the cause externalized — "the professor, the process, my style," and so on. This is the type of logic, theory and framework which is implemented to make sense of the observations. And, because the theories can be borne out consistently, they have the appearance of accuracy. Finally, the kinds of theories which result from the process are not conducive to the kinds of decisions we would like to see our students making. This attitude results in abandonment of serious study and rationalizations as to why classroom learning is irrelevant to practice and why it is far more useful to spend hours clerking in a law office then studying for classes.

In the present system there is no place for testing hypotheses, for experimentation or creativity. A mediocre student would not dare take such a risk, and even a student who has earned good grades on a set of exams is not about to experiment with different styles and new ways. The magic formula has been found, although it is often not consciously understood. The important thing is to hold onto that magic, and therein enter the superstitious rituals.

To deal explicitly with the examination process is neither spoon-
feeding nor non-intellectual. Theories of action must be formulated, re-
quiring students and professors to articulate the ideas underlying be-
havior. These ideas can then be tested in action and carefully examined to determine their validity. Not only does such a process incorporate a more conscious approach to learning on the part of the students, it also demands that professors be able to break down the elements of what is being taught into transmittable parts, so that students can understand what constitutes "good" analysis and "good" writing. The same reason-
ing that has been applied to experience-based learning in clinical courses is appropriate here.

What we want to make real is how an attorney organizes and uses factual information, for it is this "thinking like a lawyer" that we are testing. We can lecture and talk about organization, synthesis and ra-

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37. We have all known students (ourselves included?) who always wore the same shirt, tie, jeans, or watch to exams, or, who always used the same kind of pens, sat in the same place, or felt jinxed by the assigned exam number.
tionale, but the concepts remain empty unless they are attached to con-
crete experience. The experience, in turn, becomes useless if not at-
tached to observation and analysis. It is the development of behavioral
patterns supporting this type of reflection which we should encourage.
If anything, we discourage attempts by students to learn from their
experience and assist in the incorporation of bad habits of nonreflection
and rationalization. 38

The present examination system is antithetical to the process of
learning from experience. Even worse, it is a demonstration of how we,
as educators, are failing to learn from our own experience, in respect to
what works and what doesn't work in training future lawyers. We have
become so locked into the theoretical need for certainty and stability
that we have become frozen, unable to respond to present situations.
We create such a stagnant environment that all discussions of change
are looked upon skeptically and resisted by our students as indications
of blundering or ineptness. Experimentation and exploration are not
welcome. Instead, we breed attitudes of blame, rationalization and ex-
cuse. Bottomline, we produce irresponsible professionals and human
beings.

V. Designing A System That Works

This section begins with a review of the elements which are re-
quired in the process of learning from experience and then sets forth
several means of consciously and explicitly implementing the learning
cycle and the examination process.

A. Necessary Components in Learning from Experience

1. The Need for Examination and Feedback within the Semester

Clinical educators operate on the premise that, if the student is to
learn from experience, feedback on performance must be given as soon
as possible after the performance. While the action is still fresh in the
mind of the student, he or she is best able to recall reasons or premises

38. I have observed these habits in working with interns. When we discuss the
need to be reflective about their experiences, or when they are asked to discuss what
they have learned about the lawyering process or the judicial system, they have a diffi-
cult time discussing these matters at any level of sophistication. They are not incapable
(they usually get to it by the end of the semester), but they are woefully inexperienced
at this kind of conscious self-examination.
(theories of action) upon which behavior was based. These premises can be examined to demonstrate why particular actions have proven to be effective or ineffective. With the passage of time, the ability to recall dissipates. Further, the matters to be examined lose their import as current pressing matters take their place; thus, motivation for reflection and analysis is lost.

The law school examination is normally given at the end of the semester, after the last day of classes. These examinations take some time to grade and are often not completed by the professor for at least several weeks. Students receive their grades sometime during the following semester, when they are already fully engaged in new classes, or during a vacation period while they are away from school. The professors, as well, are engaged in teaching new classes, with new students and often new subject matter. No one is particularly motivated to spend much time reviewing the past. Better luck next time!\(^3\)

Professor Keeton discusses this feedback process in relation to clinical courses.\(^4\) The critique, or feedback, is important, he explains, not only because it serves the intrinsic purpose of telling the student what was good and bad about the performance, but also because it serves as a model for evaluating performance. If we intend to encourage the development of self-directed learners, we must provide such models for evaluation. The models themselves include theories of action for effective performance and an implicit message that it is part of professional behavior to evaluate one's performance, not necessarily from the judgmental viewpoint of "good or bad," but with the goal of improving performance.\(^5\)

There is a second difficulty with the nature of the feedback given for law school exams; it is almost non-existent. In recognition of this need for feedback, some professors use score sheets for individual is-

39. Professor Zander has suggested that, at a minimum, professors should provide an exam-review session soon after the exam to discuss general problems which occurred in the exam papers. Zander, supra note 3, at 35-36.

The process of reviewing exams is time-consuming. The deeper, more specific and more meaningful level of review, the more time required. Professors are usually reluctant to spend such time as it might necessitate reducing substantive coverage. Yet this attitude seems rather ironic and short-sighted, analogous to feeding more information into a computer that is not programmed to utilize it.

40. Keeton, supra note 27, at 220.

41. This kind of behavior must be taught and practiced to the point of becoming second nature. See C. Towle, supra note 20, at 161.
sues, use of facts and analysis. Unfortunately, these score sheets do not analyze the individual student's work so as to facilitate his or her learning. The scores will indicate that a student did or did not do something successfully, but not why or how. Further, we know that even when using specific scoring sheets, a significant subjective factor comes into play. Usually we leave some section on the score sheet to denote this; we may call it creativity, originality, or analysis, but it has actually played a much greater role in arriving at the final score than can be indicated by that particular sub-grade. A sterile number does not inform the student. In short, feedback must be immediate and specific.

2. The Need to Be Specific about Instructional Goals

How specific are we about our intentions? We express an amorphous goal for our students when we tell them that we are going to teach them to "think like a lawyer." To a person who has never been a lawyer, it is basically meaningless. In addition to enunciating a goal which cannot be comprehended, we demonstrate behavior which is, for the most part, very unlawyerlike. Though not uncommon among lawyers, the obfuscation of intentions — the deliberate withholding of information requested and/or required by the other party — is not behavior we want to encourage.

We play the game of "hide-the-ball" in regard to both the rules of law and the skills to be demonstrated in an examination. Some teachers spend time going over what information will be covered on an exam and in what form. Fewer teachers spend time discussing the actual examination process, what is expected and how it is to be done. What we don't do is model or demonstrate exam behavior so that the goals which we are defining can be translated into action by the students. Perhaps we feel that our frequent use of hypotheticals in class is sufficient preparation for the exam; yet a comparison between the typical classroom hypothetical and an examination question would indicate the weakness

42. Professor Michael Levine has suggested a system of multiple grades for each exam to reflect student performance on each of the various skills which are tested. The faculty would get together and agree on which skills were to be tested. Supposedly, this would reduce arbitrariness in grading. Levine, Toward Descriptive Grading, 44 S. CAL. L. REV. 697 (1971). In Levine's system, students would receive four or five grades for each course, depending upon the number of categories tested. This would make class ranking less feasible and would give students the kind of feedback they need on their strengths and weaknesses. Levine suggests four categories for ranking: issue spotting, control of the material, completeness and logic, organization and presentation.
in this assumption. To compound this situation, we construct and grade exams so that knowledge of substantive law and demonstration of analytical skills are inseparable. We can't be sure how much of either our students have learned. And, finally, we blame them for this failure.43

3. The Need for a Complete and Satisfactory Product

Very few of our students ever have the experience of writing a good exam, knowing that it is good and why it is good. If the complaints of my colleagues are accurate, then even those students who are receiving relatively good grades are not producing the quality of written work which we think they should in order to demonstrate competence.

Attempting to demonstrate mastery of a skill which has never been learned is like shooting in the dark. The signposts which we have provided for guidance give but vague direction because they come in the form of abstract concepts and generalizations, and because there has been little foundation laid for comprehending them. Our students, having never or rarely seen a real attorney analyze a case, are directed to approach their essay answers as an attorney would analyze a case. No surprise that so many of them fall short. When they do fall short, though, we still deem it to be acceptable, as long as the work is not found to be so bad as to merit a failing grade. The majority of students will fare somewhere in the middle, never reaching the stratosphere of the top 10%, and never being expressly told that their work is not acceptable on a professional level, although the doubt and insecurity is surely felt. Thus, mediocrity becomes an established and accepted fact in the educational institution. We give up attempting to make fine professionals of our students, yet we continue to look at the practicing bar with disdain, as if we had nothing to do with it.

43. Towle defines several psychological influences on students' abilities to incorporate new information and behavior. Foremost among these influences is the ego's perceived need to survive. "If the educational experience is to be a conscious process in order to lower anxiety so that the ego's integrative, executive and regulative functions may be free to operate for productive learning, the student needs an awareness of the purpose of procedures and some knowledge of the norms of learning and the nature of learning." C. TOWLE, supra note 20, at 161. We simply do not provide this information. How often do we tell students why we do what we do? How much time and effort do we take to fit the substantive minutia in which we become absorbed, into the larger picture of lawyering? How many professors give several practice exams and distribute and go over model answers so that their students will have some notion of what the game is about?
“There are too few occasions in law school in which students are required to do and redo work until it meets a reasonably high standard.”44 Because students produce very little work product in law school other than exams, the examination paper is the logical point of focus for rewriting exercises. The reworking of a product toward the accomplishment of some high standard would work hand-in-hand with the feedback process and carry it to a functional, though not final, conclusion. It would require a shift in attitude from testing to teaching — from evaluation to education.

What is required is a combination of appropriate feedback45 and repeated opportunities for redoing work which does not meet a high standard. This procedure would require professors to concretize their testing goals and explain their evaluations. It would force us to deal with the subjective element in evaluation and to structure evaluation in a more supportable conceptual fashion. The fuzzy notion of “I know a good exam when I see it” would not be convincing nor helpful as feedback.

The opportunity for redoing work will also increase student motivation. Presently, students see little value in reviewing their past exam performances. Students see their grade in a course as a given thing, so that no amount of study of a past exam will change the result. And results, not process, are what our students have been conditioned to see. Because we have not articulated or demonstrated the skill of learning from experience, students often do not see much of a relationship between grades from one semester to the next, nor from one professor to the next, except as reinforcement of defensive rationalizations.

Requiring work to be redone until it meets a high standard provides motivation to learn from experience. In order to reach that high standard as quickly as possible, with as few rewrites as possible, students will be very interested to learn what they have done wrong and what they should be doing instead. Feedback, which might otherwise be taken half-heartedly, would be welcomed.

Finally, as students begin to notice progress in their work, they might actually begin to appreciate the learning process, incorporate...
new habits or self-evaluation, and acquire the kind of self-confidence that arises with a sense of competence. As Kreiling has pointed out, "some feeling of competence is necessary for professional growth." Chickering elaborates:

The rewards that come from bringing order to experience through reflection and abstract conceptualization, the excitement of seeing knowledge and skills effectively applied, the sense of making real gains in working knowledge create a self-amplifying process that generates increased energy and commitment for further learning... Successful learning tends to beget a desire for more learning.

The failure to achieve high standards within a reasonable number of rewrites may be an indication that a particular student is not suited for the profession. If such a student is allowed to matriculate and, ultimately, to graduate, he/she will become an attorney without ever having had the experience of doing well at the important skills which exams allegedly test. Not having developed the foundation of mastery, the new lawyer might practice on the same mediocre level which proved adequate in school. This failure to develop professional skill foundations and a professional attitude toward work and learning is reflected in charges of incompetence aimed at the profession.

B. Some Ideas for Improving the Process

1. Recognition of Obstacles

Doubtless, those who have read to this point have concerns about the realistic opportunities for putting theory into action. The implications are clear; more demands on time, energy and resources. In times of decreasing student enrollments and possible faculty and financial cut-backs, these demands may seem impossible. Yet, this challenge can and must be met if we are to call ourselves educators. The demands of the public and the judiciary for a more responsible and well-trained bar

46. Kreiling, supra note 30, at 299. One of the joys of teaching in the area of clinical education is that of witnessing the development of self-confidence in our students. The same pleasure should be available in any educational context.

47. Chickering, supra note 36, at 62. This concept of requiring or affording opportunities for rewrites is not a new one. Professor Charles Kelso did this as a visiting professor at Antioch in 1975 with very positive results. Cahn, Clinical Legal Education From a Systems Perspective, 29 CLEV. ST. L. REV. 471 (1980).
require it. The desire on the part of students to develop a greater sense of self-confidence, supposedly through more experience-based education, requires it. The failure of traditional methods to teach effective self-directed learning requires it. Our recognition of the significance of learning from experience requires that we demonstrate that we are learning and are capable of adapting appropriately.

The problems we might face in moving towards the goals outlined in this article are several. First, if one is teaching classes of seventy-five and more, the task of providing specific feedback for each student seems insurmountable, given other regular duties. Second, the difficulty in grading and critiquing that number of exams in a short time, so as to provide quick feedback, seems overwhelming. Third, the task of giving and grading more than one exam per class looks like a full-time job in itself; forget class preparation, scholarly research and committee work. Fourth, the repetitiousness and tediousness of what is required is not suited to the role of the academic. Finally, each of us is not trained to do the kind of teaching that appears to be necessary.

These challenges are not impossible to meet. The fundamental change which must occur in order for any of these challenges to be met is a change of attitude about ourselves, our students and our respective roles in the educational process. This is most obvious in relation to the fourth problem, the danger of repetitiousness and tediousness. Changed attitudes are also necessary to overcome other perceived difficulties. For example, well-trained teaching assistants could be utilized for grading exams and papers; this would require a shift in values and attitudes for most legal educators. To deal with the fact that most of us have not been trained to perform such teaching duties, we might have to subject ourselves to a little training by those who possess such skills. These ideas, and others, are dealt with in more detail in the following section.


Given the noted unreliability and invalidity of the essay exam as an evaluation device, various reforms, including outright abandonment, have been proposed. As mentioned earlier, Professor Levine has suggested multiple grades for each exam to reflect student performance on each of the various skills which are tested. Professor Josephson has suggested an appeal procedure to weed out bad questions and to amelio-
rate feelings of unfairness. Professor Zander has suggested that the essay be replaced by sophisticated multiple choice exams in order to eliminate grading variations. He has also suggested the use of take-home exams to eliminate the emphasis placed on speed. In addition, abandoning the essay exam is presently under consideration by the Committee of Bar Examiners of the State of California.

Unfortunately, most calls for reform fail to address the examination process as a learning experience. For example, the proposal before the California Committee of Bar Examiners would test examinees in skills which are more directly relevant to the practice of law. While this is commendable, the performance test on the bar exam should not be emulated by law schools because it still places an enormous premium on speed. Nor would it provide the feedback and opportunity for rewriting which are needed in the learning cycle at law schools. Unless these components are purposefully added, and unless care is taken to construct the assignment so that it can be used to test skills in a progressive fashion, not much is gained.

Building upon the notion that our students should have opportunities to complete their work successfully, we can construct learning exercises from our exams. For example, an exam might be given, followed by an assignment to re-write the exam. The re-write can be fashioned in a number of ways. Students might be allowed to use the library, or their casebooks. In doing so, they would be imitating the kind of

49. Zander, supra note 3 at 33.
50. "The Committee believes from preliminary study that essentially the same skill and achievement level can be reliably tested in two days as is currently being tested in three days, and that substantial sums will be saved in administering and grading the examinations while reducing undue stress on applicants." Letter from Committee of Bar Examiners to Deans of Law Schools (August 30, 1984).

As background for its proposal, the Committee reported on a study which indicates a high correlation between results in the essay examination and results in the performance test on the Bar exam.

The performance test . . . measures legal, analytical and writing skills. These skills are presently also measured by the essay examination. However, the performance test also assesses additional lawyering skills by evaluating an applicant's ability to solve the types of legal problems that a lawyer is expected to resolve in actual practice. The objective of the performance test is to examine a broader range of legal skills and provide a more meaningful measure of an applicant's competence to practice law.

thought process in which lawyers are frequently engaged — taking a set of facts and developing appropriate legal arguments based upon research, not memory. In this situation, students would be particularly motivated to do the work, and analogies could be made to the motivations of attorneys working on real cases. In a sense, the work product is seeking a similar result. In the case of the student, the goal will be the satisfaction of the professor; in the case of the lawyer, the goal might be the satisfaction of the client or the judge. The student should be able to grasp the similarity in the application of skills and in the professional attitude which accompanies the work.

Students might even be permitted, or, in some instances, encouraged, to collaborate on the re-write. The process of collaboration helps to develop both skills of, and attitudes about, working with other professionals. Students engaged in collaborative ventures must learn to share responsibility, to communicate, particularly to listen, to delegate and to trust. These are skills which receive little or no attention in our present curriculum. On the few occasions when students do work together we find one of two things: excitement generated by group dynamics and the exchange of ideas, or, resentment and dispute caused by feelings of distrust and inability to communicate. Probably the latter type of experience has led many professors to shy away from group learning exercises. Rather than shy away from them, we should be looking at what kind of teaching/learning is required to facilitate collaborative work. (This would be more meaningful, of course, if we ourselves were modeling collaboration for our students.)

Following a re-write, students could be required to analyze the first exam, including what was right, what was wrong, and why the mistakes were made. Such an exercise would be an explicit demonstration of the operation of the learning cycle. Students would be engaged in the process of looking at a past experience, determining what occurred, developing theories of action for future performance, and then applying those theories to a new experience. This articulation of theories and the opportunity to put them into practice operates in a spiral, rather than a circular, fashion. In other words, the student will be engaged in the learning cycle, but, hopefully, will never return to the beginning point. Rather, the student will continue to improve upon performance each time through the cycle. This is exactly the kind of behavior which we should be instilling in the future professionals whom we are teaching. It is the mark of an effective adult — one who continues to learn from his/her experience. The input of professors, instructors or teaching assistants is critical to this process. Students will not
be able to make complete and valid critiques of their own work due to lack of experience, unrefined skills, or misunderstanding of substantive laws. What we aim for is to teach our students to be self-directed learners: learners who are able to engage in this learning process and to utilize other resources to acquire information which can be used to further their goals. The process of having students critique their own work is a necessary first step for the self-directed learner. The student will then receive an evaluation of his or her own critique, and will be assisted in becoming more adept at the process.

Further, a written critique by the student will allow the grader to determine just where corrections need to be made. For example, a student who has critiqued his or her work and has determined that fundamental errors were made due to a misunderstanding of substantive law, might have missed the fact that the first exam failed to use the facts effectively. A grader could look at the first exam, the analysis, and the rewrite and know that the student needs to develop an appreciation for the role of facts and the skill of applying them to the law. This could be discussed with and demonstrated to the student. In fact, it might turn out that many students are suffering from similar skill weaknesses. These students could be worked with in a group which would focus on this skill.

Students might be allowed or required to re-write the exam a number of times until some desired level of achievement is demonstrated. This would require some coordination between professors to allow time for such re-writes before students fall under the pressure of preparing for other exams.

Grading systems would have to adjust to such a fundamental shift in curriculum. Students who undertake several re-writes would require motivation to do so, presumably in the form of grades. Thus, in such a process, the final grade for the exercise might be a combination of its components — the initial exam, the analysis and the re-writes. In such a system, where the emphasis is on the development of competency, a grading curve might be inappropriate, as each student would be working to improve his or her performance over his or her prior performance, rather than over the performance of others. The system would also require the removal of the anonymity principle, although other safeguards could surely be developed.

Many other variations on this general idea might be developed. An exam might be given, reviewed in class, and critiqued and/or re-rewritten by students. Whatever form is used, it should be repeated more than once during the semester to provide opportunity for progress.
through repetition. If all, or many, professors required these exercises, students would have several opportunities each semester to develop their skills.

Another possible exercise would require students to write their work products in stages — such as outline, rough draft, or statement of facts — providing for grading, critiquing and rewriting at each stage as the product progresses. This step-by-step procedure would allow for examination of theories of action and the direct experience of how such theories work in practice. Professors who are unfamiliar with such intensive teaching could consult the volumes of available materials used in legal writing courses and could receive training themselves in this skill.

These steps all consume great amounts of time and resources. It is unrealistic to expect the traditional classroom teacher, with a large student load, to devote the necessary personal attention to each student. Thus, for this purpose, teaching assistants and writing instructors should be used. The professor would be responsible for training those who work with him/her and for spot-checking their work. Perhaps, ideally, this entire aspect of skill development could be treated separately from the substantive law courses, in an intensive fashion. In such a program, students might advance according to their proven ability rather than moving on before they are ready. This would entail the testing for substantive law separately from the testing for skills of writing, persuasion and analysis. It might be done simply, by using objective exams which are rather straightforward. In such an event, the burden upon substantive professors would be eased and the task of teaching these skills could be focused in a coordinated skills program. Naturally, the two types of teaching are related, for the substantive courses are always working on the thinking skills. Nevertheless, it could be useful to teach the thinking and writing skills even more explicitly through a bifurcated system, at least in the first year. First-year teachers might then be available to give more individual attention to students in their upper class courses, where classes are generally of smaller enrollment. They could use the framework and methodology which has been learned in the first year. Meanwhile, the intensive labor of teaching students the skill of learning in the context of the legal profession, could be designated to a cadre of specialists consisting of professors, instructors and teaching assistants, coordinating their efforts with the substantive teachers. The opportunity for feedback leading to progress and mastery would far outweigh the loss of professor-graded exams.
Whether or not the far-reaching step of implementing such a bifurcated system is adopted, I propose that we test for knowledge of rules of law separately and prior to testing for ability to apply rules. Distinguishing between these two realms of knowledge would facilitate identification of student difficulties and would identify those who are simply not putting in the necessary effort. Tests on doctrine could be given periodically throughout the semester after a given amount of material has been covered in class. Or, professors might assign particular areas of substantive law to students to be read outside of class and not covered in class. This would demonstrate to students their ability to learn on their own. Having demonstrated basic knowledge of rules of law, students would be free to use the library and other resources when preparing written work products. In this way, the assignments could more closely approximate real lawyering work, and the professor would be freed from concern about substantive coverage. Grading and feedback could be focused clearly on the skills which essay and performance exams are designed to assess.

VI. Conclusion

It has become clear to me as I have studied this subject that the examination process does not serve its intended purposes, nor does it serve much of any valid educational end. In fact, the examination process reflects problems which pervade all education: excessive competitiveness and unhealthy stress; over-emphasis on rules; poor faculty-student relations; unrealistic workloads in the first year; lack of challenge and stimulation in the second and third years; failure to teach collaboration; failure to teach and model self-directed learning skills; and the encouragement of defensive postures and narrow minds.

Having matriculated through the same system, it is not surprising that we perpetuate it. The surprise comes if we perpetuate it knowing that it is ineffective and contrary to our responsibility as professional educators. My intention here is to encourage participation in the revitalization of the experience of legal education so that it is alive and responsive to real needs. We have the opportunity to transform legal education into an inspiring and intellectually creative endeavor. Experiential education can provide enormous joy and satisfaction for students and teachers alike. Let us, then, break free of our foolish consistency, beginning with our approach to law school exams.
Ideas, Affirmative Action and the Ideal University

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The affirmative action issue in the context of educational institutions is based on a misconception of the nature of discrimination and on the failure to appreciate the connection between racial discrimination and ideas. The university and the system of general education are defined functionally as fora where ideas are developed, discouraged and exchanged. These ideas are fashioned pursuant to the pervasive idea of progress. From classical Greek and Roman civilizations to modern times, the western idea of progress has been the belief that humans have continuously advanced from an original condition of cultural primitivism to higher levels of civilizations and that such advancement will continue through the present time into the future.¹ Throughout much of the history of the evolution of the idea of progress, Westerners considered progress to have a racial basis. No matter how it was explained, whether in terms of Aryans, Teutons or Anglo-Saxons, it always meant the same thing: that the superiority of white people was the key to progress. This idea was warmly received by the New World's efforts to justify slavery, by de jure racial segregation, by Nazi Germany's extermination policies and by South Africa's policy of apartheid.

Thus, the exclusion of Blacks from historically white schools, col-

leges and universities symbolized the idea that Blacks simply were not capable of advancing themselves or others toward an abstraction called the future.\(^2\) Certainly, segregation had numerous other symbolic purposes, but its most direct impact in so far as the exclusion of Blacks from white educational institutions was concerned was to advance a racist kind of Darwinian progress.

The triumph of \textit{Brown}\(^3\) was to declare this country's rejection of the racist conception of the idea of progress. Segregated schools had represented an idea that national policy now deemed illegitimate. Henceforth and forevermore they were to represent another idea, the idea that the nation, including the stigmatized Blacks, would be advantaged by Black participation in the process of shaping the future. What better way to symbolize this shift from the racist idea of progress to the inclusionary idea of progress than by integrating educational institutions? \textit{Brown}'s message was that segregation itself had meaning that transcended legislation and judicial decisions. Segregation's message was broadcast each time anyone and everyone saw, thought about or interacted with one-race educational institutions. It was this message that \textit{Brown} sought to change, and racial integration was the vehicle by which this change was to be effectuated. The theory of \textit{Brown} was that the external effects of the paradigm shift would pave the way for similar gains throughout the society.

Now let us consider the typical affirmative action hypothetical. Suppose two persons, one black and the other white, apply for a faculty position. The white candidate's paper credentials are better than the Black candidate's credentials. Which would you hire? The choice of the Black person is problematic. Persons who favor affirmative action would make this choice without hesitation while persons who are against it consider this choice to violate the anti-discrimination principle. But let us ask the same question another way. Suppose two qualified persons, one black and one white, seek a faculty position at an institution that historically had symbolized the racial basis of progress? Now it should be clear that hiring another white person to sit on all-white faculty continues to broadcast the pre-\textit{Brown} idea that the key to progress is Anglo-Saxon monopoly over the development and exchange of ideas about the future. Another way to look at this same problem follows. Is the shift from the racist conception of progress to the post-

\begin{itemize}
  \item \textit{2. E. Cornish, The Study of the Future (1977).}
  \item All references to \textit{Brown} refer to \textit{Brown} v. Board of Education of Topeka, 347 U.S. 483 (1954).
\end{itemize}
Brown conception of progress made by hiring this one Black candidate? The answer is no. Indeed, if the faculty continues over a long period of time in the situation in which the one faculty member is perceived as a token, the hiring of that person will come to symbolize the university’s adherence to the old idea that Blacks are not qualified to participate in the making of progress.

The hiring of one is as bad as the hiring of none because neither position changes the symbol of Black exclusion. Each day the university opens its doors for business, thousands of white people pass across the campus, through the hallowed halls, and in and out of the libraries. Unless the one Black faculty member is hung from the flag pole so that everyone can see that there is a Black presence at the university, she will have a difficult time trying to be a symbol of the institution’s paradigm shift. Making the lone Black faculty member dean or president is like hanging her from the flag pole. Still, the pre-Brown message remains the same. Why? Tokens are incapable of changing the ethos of all-white institutions. It is this ethos that white people have nurtured and developed for centuries that dominates the process of thought at universities. This ethos will change only after the scholarly traditions that were and are present among faculty at historically Black institutions are duplicated and extended in juxtaposition with the scholarly traditions at historically white universities. This juxtaposition would bring the two segregated worlds together in a way that would shine like a beacon to the rest of the world. Its message would be loud and clear. The one-race university would have become a world university.

Finally, is affirmative action constitutionally compelled? The complaint that is usually made is presented in libertarian terms. It is said that the Constitution protects individual rights rather than group rights and that affirmative action is an effort to protect group rights. A weaker version of this argument is the assertion that even if the Constitution permits efforts that are designed to protect group rights, it constrains that power by rendering invalid such measures that infringe on individual rights. Affirmative action is then attacked from two sides. Affirmative action is said to infringe on the rights of individual white aspirants who are better qualified than the Black recipients and affirmative action is said to violate Brown because the Black beneficiaries have not been personally victimized by racial discrimination. None of these arguments meet Brown at the critical juncture where Brown involves the affirmative obligations of educational institutions.

Rather than talk of affirmative action as if it involves some kind of neutral voluntarism, let us consider affirmative action in its post-Brown
light. Governments and educational institutions should read *Brown* as prescribing a set of affirmative obligations. Affirmative obligations are duties that require action in accordance with a new legal standard. Such duties differ from duties to refrain from acting in certain ways or negative obligations. *Brown* is generally read as prescribing a negative duty, the obligation not to engage in racial discrimination. This construction of *Brown* pervades the affirmative action debate. Yet, the anti-discrimination principle was written into federal constitutional law long before the Supreme Court decided *Brown*. What *Brown* added to the law of the land was an affirmative obligation to change those practices that broadcast the idea that whites had a monopoly over the process of fashioning progress. If the duty could have been satisfied by admitting a single Black or a small token to the schools, the Supreme Court would have commanded this action in *Brown*. Also, if there had been a right to be admitted to the all-white schools that took precedence over the duty to restructure the schools, the Supreme Court would have ordered the schools to admit the Black children. After the *Brown* decision, a right was involved, but it was a right to precipitate the courts to dispense a remedy in response to the failure to perform in accordance with the duty to restructure the system by which the races were educated. Thus, affirmative action was originally conceived as a necessary response to an affirmative obligation to create a racially unitary system of education.

Importance in integrating culture

As first articulated in *Brown*, the duty was a new one and, since it
involved the old idea of progress, its implementation required the over-
hauling of an entire system of education. But the significance of this
transformation has not been fully appreciated. Of necessity it involves
affirmative action of a massive sort. Students, faculty and physical
plants are shifted from one section of town to another and often against
the individual wills of parents, staff, faculty, students and neighbors.
But the process of dismantling the system of racial segregation in the
schools could not be stopped by claims that freedom of choice had been
infringed, although many opponents of integration were able to slow
the process almost to a halt. This process should not be limited to the
public secondary schools. Indeed, in so far as the idea of progress is
concerned, universities are as important if not more important than the
public schools. In a society in which credentials play such an important
part in social and economic achievement, a high school diploma has
importance as an initial qualifier, but is a poor means for determining
how to distribute social and economic plums. Undergraduate college
degrees are fast becoming the same kind of primary qualifier. It is the
graduate and professional degrees that launch people up to the level
where they can make a difference. Thus, to a large extent, the univer-
sity determines whether high school graduates succeed. High school
has become a preparation for admission to college, and college is a
preparation for graduate or professional schools.

Given this connection between the levels of education, the trans-
formation that school boards are obligated to undergo to comply with
Brown should be extended to higher education. The affirmative action
debate almost always misses this connection between the levels of edu-
cation. Perhaps one reason is that the secondary schools admit everyone
within their jurisdictions, while admission to higher education is a plum
that is sought by many applicants. How to determine who is to receive
this plum is a question that has not been more carefully considered
than it has during the era of the affirmative action debate.

I attended a state university in the south. Nearly every white high
school graduate in the state who applied was admitted to one branch or
the other of this university. When I applied, however, I did not receive
any information about my admission until I travelled to the campus
and had a confrontation with the director of admissions. He informed
me that he had not responded to me because it would be better if I
attended one of the fine Black colleges in the state and because he
thought that the university was too expensive. Obviously, this university
should not have difficulty admitting Black students who are qualified to
be there. The real question was not one of qualifications. The question
was whether the university was prepared to broadcast to the world that Blacks have an equal share in the intellectual life of the university. Universities chose to postpone this new reality and therefore to answer the question with a resounding no. Yet the national debate never focused on the university’s fears of this new reality. Rather, it was more convenient for universities to discuss the problem in terms of admission and hiring standards.

When is treatment different? Let us say that the university uses the same standards for the admission of Blacks and Whites but that as a result the student population is all-white. In such a situation, Blacks would have been excluded and Whites included. Why is this not different treatment? Now suppose that a set of standards are used that result in the admission of both Black and White students. Would it matter if most of the White students were admitted in accordance with one set of standards and most of the Black students were admitted pursuant to another? Suppose the standards used were based on the findings of an intelligence test that found that Blacks from segregated neighborhoods were deeply imbued with what I have called the tradition of orality, while Whites were products of a tradition of written expression and recording? Would that justify different tests for each group in order for the same measurements of qualification to be available to the admission officials?

Despite the various ways that the use of different tests could be justified, it appears that a lottery would be the best way to achieve the world university that I have been advocating. The results would probably give the university a polyglot student population. This is what is needed to broadcast the idea that every world group whether Black, White, Red or Yellow is capable of participating in the process of fashioning the idea of progress.

In the following sections, I present a theory of affirmative action in the university context. This context is presented in two parts. The first part introduces the role of symbolism in the operation of segregated academic institutions. The second part focuses on the legal ramifications of this symbolism.

1. Ideas

Brown did not simply outlaw segregation. It also declared that the idea of segregation is invalid. By that I mean that institutions could no longer operate in a way that signalled their adherence to the idea of racial preference. One way to grasp this is to consider why some civil
rights statutes prohibit racial-preference advertising in the sale and rental of housing and the location of for-sale signs in transitional neighborhoods for the purpose of engaging in activities associated with block-busting. The legislation prohibited these forms of publication because they broadcast the idea that racial segregation in housing had community support.

The first amendment assures us that individuals have the right to broadcast ideas. I wonder if ideas ever deserve legal protection separate and distinct from the assertion of individual rights to hold them. This impulse is like the concern for the rights of objects of nature. Do trees have rights? Unlike the land ethic that considers the rights of things that humans did not create, the idea ethic considers the rights of things created by humans.

It is important in grasping what I am trying to say that speech acts and ideas be distinguished. Speech acts such as talking and the variety of forms for the publication of speech must be tied to individuals in order for them to be constitutionally protected. The ideas that I am concerned about are created at some point in history and survive the ages. Some of these ideas are considered anti-remedies in that a particular society considers these ideas to be in conflict with the ideas of remedies that society promotes. In such a situation, the Federal Constitution would protect speech acts that broadcast such ideas from gaining the kind of widespread support the favored contradictions receive. In such situations the ideas are in the air somewhere, floating from one conversation to another, sometimes separated by month or great geographical distances; yet they are as real as any tangible thing that we all see and touch.

Racial segregation is such an idea. At one time in the history of the United States, this idea was favored and ideas that promoted racial integration were considered anti-remedies. Today, it is racial integration that is favored so far as speech acts are concerned. But ideas do not reside only in speech acts. The fact that universities and secondary schools, both public and private, continue to be racially segregated breathes life in the idea that segregation is permissible. And, as I stated above, the continued absence of Blacks from the faculties of universities adds credence to the idea that Whites have a monopoly over the process of securing progress. The white person who is hired to a faculty that is all-white is indeed innocent; and the fact that another

White person is hired neither adds to nor detracts from the idea of white monopoly. Hiring one Black person probably signals change for a short time, but in time that signal comes to be a beacon of the institution's acceptance of the idea that Blacks have no role to play in fashioning progress. Only when the hiring of Blacks to the faculty happens randomly and often enough is the message of a new idea of progress conveyed.

The affirmative action debate is cast as if it is a selection of some kind of enduring construction of the Constitution. Yet it is more than this. It is a manifestation of the endurance of the idea of segregation. This does not mean that opponents of affirmative action are segregationists. It means, however, that the remedy could only be considered if in fact the idea of segregation has survived and is manifest in institutional behavior.

Segregation is the kind of idea that tends to thwart the development of other ideas. Thus it is antithetical to the mission of the university. Segregation prevents us from realizing the full range of ideas that could result from the juxtaposition of the scholarly traditions of the White and Black worlds. No one knows what the outcome would be, but it does not surprise me that many readers are surprised to hear that there could be a scholarly tradition in the United States that was not developed in the hallowed halls of White universities. Such ignorance is a product of the lock the idea of segregation has on American minds. Affirmative action in dismantling the system of one-race university faculties is required if the racist idea of progress is to be rejected for the idea that all world groups, even Black people, have contributions to make to the idea of progress.

I have identified two ways that ideas can be subjected to treatment. Ideas can be the subject of speech acts and other forms of expression, and ideas can be projected by signs and symbols other than speech acts. In the past, the idea of racial segregation was given preferential treatment in both forms. After Brown, however, racial integration has been given preferential treatment in the expressive realm while racial segregation has been given preferential treatment in the symbolic realm. Thus one finds institutions that have none or only one Black faculty member, a handful of Black administrators spread in insignificant ways throughout the university, and a few Black students, actively preferring racial integration while their failure to move beyond their token numbers broadcasts their symbolic preference for racial segregation.

Affirmative action is a real enigma in this regard. On the level of
expression, the idea of affirmative action at the university is a popular subject. Yet on the level of nonexpressive symbolism, the idea of affirmative action at the university hardly exists. By having token numbers of faculty and administrators, the university broadcasts its opposition to the idea of affirmative action more loudly than their faint support for affirmative action as expressed in reports to federal agencies, for example. To be sure, universities have been active in admitting and recruiting Black and other minority students. But what message do you think the university gives to these students when they arrive and find that all of their administrators are white and only a few of their teachers are Black? One message probably is that the university will not be among the institutions that will employ you after you graduate.

Does an idea such as the idea that Blacks are qualified to teach deserve equal treatment in the symbolic realm? As I have stated before, legal protections are available to protect ideas in the expressive realm, but it is in the nonexpressive symbolic realm where ideas are broadcast the loudest. Should an institution be allowed to manage its nonexpressive symbols such that an idea is limited to the expressive realm? Or is this kind of double talk a form of misrepresentation that deserves some legal response? Suppose the legal system forced a university to be consistent in so far as race is concerned. What you say and what you do should flow in the direction of supporting and rejecting the same ideas. Or, perhaps a university, the place where ideas of all sorts are to be expected, should provide an environment where all ideas are allowed to flow?

It seems to me that the idea of racial integration in the life of the university can be protected only by compelling the university to give this idea preferential treatment in the symbolic realm. The idea could be discussed and debated in the expressive realm by all those persons who desired to do so. After all, the university should be vigilant in encouraging a free flow of ideas in the expressive realm. But in the symbolic realm, there should be no question about whether or not Blacks, other racial minorities and women are actually participating in the life of the university on all of its various levels in numbers that are sufficient enough to affect the ethos of the university. Otherwise, the process of idea exchange will not include the ideas of large and increasingly important segments of world cities.

2. Symbolic defamation

I have stated that the idea of racial segregation is announced by
the operations of the university. In this section I want to show that this form of symbolic speech supports a theory of liability that justifies affirmative action as a remedy. The theory is based on the impact of this form of symbolic speech on Black people. I call this impact symbolic defamation and analogize it to what has been called group defamation. Symbolic defamation is a product of nonexpressive statements while group libel is a product of speech acts. Because of the size of the group, symbolic defamation does not purport to give rise to claims of right to damages. Thus, like group libel, individual members of the victimized group would have a difficult time demonstrating that the defamation was "of and concerning" them. Unlike group libel, however, individual victims of symbolic defamation would not have to assert the nature of their own victimization. The reason is that the fact of the defamation would be analogous to a criminal act. The criminal nature of the violation would arise from the fact that it would violate a duty established by public law and the remedies for the violation would benefit a broad public interest. Instead, public interest remedies such as a rehabilitative coercive order would be available.

Group libel is the name of a common law action that arises from a speech act that defamed a group of individuals. Symbolic defamation arises from the nonexpressive symbols that stigmatize Blacks. The action was born in the duty defined in Brown v. Board of Education to dismantle the racially dual system of education. Thus, symbolic defamation is no more a tort than is any other action to desegregate the schools. What symbolic defamation adds to prior readings of Brown is that it focuses on the meaning Brown assigned to the persistence of segregated educational institutions. What Brown saw as an inferiority complex arising from segregated academic institutions, I am calling symbolic defamation.

I have said that symbolic defamation is more like criminal action than like a tort action. Nonetheless, individuals may sue to enforce the duty. Perhaps the best way to understand how such an action is not a typical civil action is to consider the nature of the rule the action seeks to protect. Civil actions seek to protect either a property rule or a liability rule. If the claimant has a valid damages claim, the action is designed to enforce a liability rule. If the claimant has a valid claim for an injunction, the action is designed to protect a property rule. In each

of these situations, plaintiff may use the claim or right to a remedy for leveraging in striking a bargain with the defendant. But we would hardly deem it proper for a plaintiff to make a cash settlement of an action to dismantle a school system. No one plaintiff can lay claim to all of the benefits that flow from the desegregation of an academic institution. Rather, the benefits that flow from desegregation spread generally throughout the public. Thus the rule to be enforced in symbolic defamation actions is inalienable, although in an appropriate case it could be converted into a liability rule.

The affirmative action debate assumes that the pre-Brown model of constitutional litigation governs post-Brown school desegregation litigation. The pre-Brown model was based on the assertion by an individual of some need for the protection of a personally-held constitutional right. After Brown, however, a plaintiff in a school desegregation action was acting to protect a general public interest. The general public benefit from desegregation resides in the juxtaposition of the scholarly traditions that developed in the previously segregated worlds. This juxtaposition would structurally reform the ethos of the university and maximize the opportunities for ideas to be developed and exchanged. The Brown decision discussed additional benefits that flow to the public through the expansion of employment opportunities and political participation. Thus the post-Brown model of school desegregation litigation is based on the assertion of a claim of right to protect the public interest.

The remedy one would seek in a symbolic defamation action is a dismantling of the segregation at the institution. This would be far more of a structural reform of the university than the declarations that have been made in affirmative action plans. All too often, affirmative action at the university has meant little more than a budgetary and administrative inconvenience. It has not meant a process of reform. University officials will say very proudly that they have searched high and low but have not been able to find any qualified Blacks to serve on their faculties. Not only do they believe that this explanation is satisfactory but they do not seem to realize that this assertion falsely stigmatizes an entire race to an undeserved position of scholarly inferiority. Indeed, the scholarly traditions in Black and White American cultures are different and the White tradition has had a monopoly over fashioning the American idea of progress. But the facts of difference and of White monopoly does not make the White tradition any better. The very thought is a carry-over from the segregated system that like these modern apologias are as defamatory as is the fact that the university
operates as a one-race institution.

3. The ideal university

All universities whether public or private should be world universities. A university qualifies as a world university if its population includes people and cultures from around the world. Universities in the United States appear to be world universities when one considers the fact that a large enough number of foreign students and faculty are present that the ethos of the university is affected by them. But on the issue of ethos, statistics are not nearly as important as the affirmative action debate would have one believe.

Ethos pertains to the fundamental climate of the university. It is the pervasive idea about what the university is and about how the university interacts with people. It is the busy officiousness of the administrative staff and the bawdy frivolity of fraternities; the intense intellectual atmosphere of classes and the festive environments of campus pubs; the competition for examinations and the competition of intercollegiate sports. It is crew cuts, jackets and weejuns in the midst of long hair, jeans and sneakers. It is architecture and the presence or absence of campus greens and statues. Ethos is the sum total of all of the factors that give the university its personality.

Thus, the climate of the university is pervaded by an international flavor that exists separate and apart from the numbers of foreign students and faculty present. The foreign language courses and houses, the books authored by scholars from other countries as well as the variety of courses and disciplines that are designed specifically to investigate the history, culture, language and politics of other areas of the world contribute to the idea that the American university is a world university.

Ironically, the ethos of the university is not affected by Blacks from the United States. Except for a few Black studies courses that were sprinkled throughout university curricula in the 60's and 70's, the curriculum does not demonstrate the university's belief that these subjects should be a permanent part of the academic program. In part, this perception was based on the fact that many Black studies programs were supported by soft money donated during the period following the urban riots. Even where the university was able to find a budget item that could be assigned the responsibility of covering the expenses of Black studies, it failed to hire Black faculty to tenured and often failed to hire them for tenure track positions. Often, a political issue at the
university arose over what kind of academic credit to give students who participated in these programs and over what kind of status to give the programs. Would the Black studies program be a part of one, several or no departments or would it remain a “program” outside the intellectual zone that harbored the rest of the academic offerings?

The ideal university operates in the future. This does not mean that the university merely prepares its students for a hypothetical future world. If the university operates in the context of a one-race ethos, the future is not hypothetical, for the ethos at the university is only capable of ghostwriting ideas that are associated with absent racial groups.

One concern of the ideal university is how to cope with the revolution in information technology. On one level, the new technology has rendered human interaction inefficient; on another level the new technology reflects the need for ideas that use a wider variety of signs and symbols. At the same time that humans are rendered obsolete by the wizardry of computers, humans are guaranteed an important role to play in the future development of software. Indeed, the availability of hardware and software that are capable of performing in a variety of languages demonstrates the fact that it is the language of humans that must be grasped before the full potential of the language of computers can be realized.

Thus, rather than rendering human interaction obsolete, the computer revolution will make it more imperative at least to the extent that the signs and symbols of groups that have been segregated from one another are concerned. I suspect that we know more about the languages of people who live in remote parts of the seven continents than we do about the signs and symbols of people who live on the other side of towns, railroad tracks and mountains. My concern is that the people who use these symbols to create ideas may have developed a system of idea creation that is capable of inventing something new when that method of creation is juxtaposed with known methods of invention. The one-race university will never know whether rich ideas of remedy are buried beneath the sands of segregation. Only the inclusionary world university will have the laboratory conditions suitable for this optimal form of idea development.

How would the Black intellectual experience be added to the previously White university? During the 1960's a movement was made to add Black Studies to the university curriculum. While these programs took on a variety of structural arrangements, they typically were established as appendages to the regular academic programming at the uni-
versity. I am not advocating a structural program at the university that is as sophisticated as some of the plans for Black Studies were. I believe that the hiring of Black faculty to regular faculty positions would take care of the situation. Any structural arrangements needed to produce the kind of ethos I am advocating would come from the fact that Blacks are involved in the intellectual life of the university.

Law school faculties could use the goal of effectuating an ethos of shared scholarly experiences to justify hiring Blacks from other disciplines to teach on law faculties. A number of Black scholars have distinguished themselves in the social sciences and would be valuable additions to the study of law and anthropology, politics, history, economics, sociology, philosophy and religion. The Black intellectual experience in these fields would richly endow a law curriculum. Even in many of the regular law courses, Black social scientists could add significantly different perspectives to the study and teaching of law. I am thinking of courses in family law, criminal law, consumer protection, urban law, international public and private law and courses on federal grants and administrative law.

Black lawyers who have distinguished themselves in some area of legal service should also be invited to teach on law faculties. Some law schools have begun to use Black faculty as adjunct professors to teach seminars. While Blacks certainly should have access to these teaching opportunities, the use of Black teachers in this way fails to accomplish the academic goals I think the university is obligated to pursue. First of all, one of the reasons the Black professor is hired is so that she will be able to offer special services to students. This teacher must service not only the students in the general population but must also service those students who seek him out because they feel a special affinity to him because of his race. If he is a token, he will spend a great deal of his time responding to students’ requests for assistance. A good deal of his responsibilities will be of a type that an administrative dean should handle, but the students are not taking them to the dean’s office because of the absence of Black administrators. A token who is a lawyer will become lawyer-in-residence for Black people in and around the university. The university places the token in that position then offers friendly advice about resisting the urge to overextend oneself. Finally, the university wonders why this person did not meet the requirements for publishing tenure-qualifying articles. It is clear to me that the only way to include Blacks on faculties is by adding a large enough number that no one member is forced to perform the role of a token. Because I am convinced that the universities will not hire more than a token num-
ber of Black faculty members, I have discussed affirmative action and proposed a way to view the affirmative action problem. One-race academic institutions rob those institutions of scholarly traditions that could maximize opportunities for the development of ideas, and symbolically defame Black people. Symbolic defamation is a legal basis for obtaining an affirmative action remedy from a court. Finally, I have discussed some of the ways that Black people can be located for service on law school faculties and have described some of the problems associated with the institution's expectations of tokens. Perhaps this discussion will cause someone to rethink the question of affirmative action in the university context.

4. What is the goal?

The goal of affirmative action should be to integrate a Black ethos into the university's personality. With this standard as the goal, questions of statistics, goals and quotas become irrelevant. A university that proceeds along the lines of the affirmative action debate is perpetuating the idea that the only valid intellectual ethos in American history is the white one. Consider, for example, the university's efforts to comply with its affirmative obligations. Faculty positions are advertised with the promise that the university is an equal opportunity employer. This standard is a pledge of allegiance to tokenism. All the university will accomplish when acting in accordance with this standard is a good faith effort to find out which Black scholars are willing and able to operate effectively in a white context. No one stops to consider the fact that this small challenge is more than is asked of any of their white faculty members and probably involves searching for someone who is not like but is unlike the other faculty members. None of the other faculty members are asked to be a token; none of them have any experience of serving as a faculty member under these circumstances. Yet somehow the faculty considers itself to be expert not only in locating Black faculty but also in fashioning the standards for measuring the qualifications of potential Black faculty. The only Blacks who are involved in this process are the few tokens who have found their way through the maze to teach in what continues to be identified as a white university.

The goal of the university should be to juxtapose the Black ethos that is found at historically Black universities and the white ethos at the same institution. Education at the Black university emphasized race consciousness and the plight of the race rather than the ambitions of
the individual. The purpose of education was to move the race closer to the promised land of freedom and economic opportunity and, *ipso facto*, farther from the dens of oppression and poverty. Administrators and faculty have developed fine academic traditions at the historically Black universities. Their contributions to the arts, literature, science and medicine rank them among the truly great universities in America. I believe that these contributions would have been even greater if the faculties at historically Black universities had had continuing access to the resources of the historically white universities. Historically Black universities have already been transformed such that they reflect a greater presence of white faculty and students. This development is problematic because there has not been a commitment to the preservation of the Black ethos. Thus, the threat is that the Black ethos might be destroyed at historically Black universities prior to the development of a Black ethos at white universities.

Although universities have played an important part in the development of the Black scholarly tradition, they have not had a monopoly over intellectual thought in the Black community. The Black university is a part of a pervasive oral tradition that from the pre-slavery African roots through the civil war had dominated and shaped Black intellectual development. Every culture has forms of talk that could be associated with an oral tradition and indeed these are the genesis of folk traditions in poetry, philosophy, law, art, music and religion. Yet Africans and Afro-Americans carried the use of orality one step farther.

For a long time, orality was the only means employed for the development of a Black ontology. Thus even history and legislative codes were recorded by human encyclopedias and news including new laws and other developments were announced orally through song, drums or speeches. The presence of dangerous opponents who chose to censure communication caused the slaves to continue to rely on orality. As a result, the spirituals were disguised messages and codes for the governance of the conduct of the slaves. These political purposes were continued in poetry, reggae, the blues and jazz. It affected religion and was present in magic and voodoo. And it led to the development of vehicles that allowed some of the slaves to become educated although they had no schooling. By the time a university education became available to them, the oral tradition was well-entrenched. The take-off period for

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Black intellectual thought occurred in the 1920's during the Harlem Renaissance. The streets of Harlem became the university that gave birth to the poetry of Claude McKay, Countee Cullen and Langston Hughes, the music of the great jazz figures of the era, the art and variety shows.

In the context of the university, orality means a greater concern for teaching and oral exchange of ideas than for writing. Yet, the white tradition places writing at the top of the list of obligations expected of the faculty member. In the integrated university, however, there would be both teachers and teacher/writers. This would strengthen the university because it would broaden the base of persons qualified to become members of the faculty. Without any structural changes other than the change in the conception of what a teacher should be doing, the university would be free to add Blacks to the faculty at will. In so doing, they will change the ethos of the university and substantially advance educational opportunity.

The one structural barrier that is preventing white universities from the reality of a Black ethos is the belief that only the standards that flow from the white academic tradition are relevant to the process of transformation. Such a premise is a rejection of the idea that the standards that are a part of the Black academic tradition have value in the context of the white university. Standards should be developed in cooperation with representatives from the Black universities and from the Black intellectual community in general. I know that universities cling to their independence, particularly on questions of faculty composition. Yet the absence of a Black ethos, even in the process of fashioning standards for the hiring of faculty, answers the question of whether there will be a Black ethos at the white universities before it is asked. If the standards used come out of a white academic tradition and the administrators of this standard also come out of a white academic tradition, the Black intellectual ethos will die despite the fact that one or two Black tokens carry the flag at white universities.

7. On orality, see B. Sidran, Black Talk (1971); on education, see H. Bullock, A History of Negro Education in the South (1970); on the Harlem Renaissance see J. Johnson, Black Manhattan (1930); on the history of Black scholars in higher education, see H. Bond, Black American Scholars: A Study of Their Beginnings (1972).
A Law School With A Bent For Public Service

Daniel Pollitt

Dan Pollitt has been a member of the law faculty at University of North Carolina since 1957, having also taught at American, Arkansas, Oregon, Duke, Virginia and Georgetown law schools. He has served as Special Counsel to various Congressional committees, and was a founding member of Southerners for Economic Justice, North Carolina Labor Law Center and North Carolina Civil Liberties Union. Dan has written prolifically on issues of civil rights, civil liberties and labor relations.

Law schools often proclaim on an exterior frieze some noble humanistic sentiment: “equal justice under law,” for example. But within, this kind of concern is submerged in a preoccupation with how to succeed in the law of business relations, corporate affairs, and taxation. Law schools, it is complained, turn out generations of “hired guns”, selling their legal talents to the highest bidder.¹

The law rightly teaches to challenge such easy generalizations. But some over-all observations have validity, at least in the main. With this reservation, let us proceed.

There is a sameness about law schools, the entire species stemming from a single origin.² The early law schools were staffed by retired judges, who would lecture on the Black Letter rules of the law. Students would take notes, and then stand for the bar as soon as they felt confident of success. But law schools were few and far between. More often than not, would-be lawyers in our early history “read the law” in a law office. They learned its substance by reading the texts of Black-


stone and Kent, Story and Cooley. They learned its processes — counseling, interviewing, negotiation, planning, compromise, reconciliation, litigation — through first-hand participation. This "hands on" type of legal education began to change in 1870 when Christopher Columbus Langdell became dean of the Harvard Law School, and began to navigate in new directions.³

Dean Langdell believed that law best could be learned in a primary way, by reading the decisions of the appellate courts, rather than in a secondary way by reading what others had said about the decisions. He compiled the first "case book," a collection of decisions related in subject matter, and he prompted the Socratic Method of instruction. This method of teaching law is familiar to television viewers by Professor Kingsfield's "bully boy" inquisitions on Paper Chase. The student is called to "recite" a case, and then is asked a series of searching questions. The other students are to empathize and vicariously experience the same intellectual stimulus.

Supporters of the approach say that, in addition to teaching students how to read cases and understand legal precedent, it makes them more intellectually rigorous, more skeptical of dogma, and better able to see all sides of an issue — in short, better advocated.⁴

Apart from the case method, Dean Langdell put his mark on other aspects of law teaching. In selecting a faculty, he deliberately bypassed the mature lawyer with experience in using the law as a method of solving society's problems. He went to the young, brilliant academics with no experience other than reading cases.

Langdell developed a core curriculum. His first year of contracts, torts, procedure, property, and criminal law prevails today. He required college experience as a condition of post-graduate legal studies. He doubled the period of instruction. He demanded periodic evaluation of students by written examinations designed to test the ability to recognize and apply the rules of law to a complicated statement of facts.

Langdell's method of learning the law focused on judge-made law at the appellate level, to the total exclusion of law made by legislative bodies and then fine-tuned by administrative agencies. Schools now


teach courses in legislation and administrative procedure by utilizing, ironically, the opinions of the appellate courts as teaching materials. Hardly ever must a student familiarize himself with the basic legislative materials: floor-debates, committee reports and testimony in committee hearings. Seldom does the student examine the legislative or administrative processes by which the laws are made and initially applied. The United States Code and the multi-volume Code of Federal Regulation sit unopened on library shelves, gathering dust as students search out a judicial decision explaining what it is all about.

Langdell was flattered by imitation as law school after law school followed the Harvard mold in terms of curriculum, instruction, and staff. Today, more than 100 years after his startling innovations in legal education, Langdell would find himself comfortably at home in most law schools the country over.

Why has the Langdell model prevailed over these many decades? Not for lack of critics. For most students, says the Carnegie Commission Report on New Directions in Legal Education, the first year is an “exciting, agonizing, challenging, intellectually eye-opening experience.” A minority, however, find the Socratic method of instruction humiliating and degrading, as an ego-boosting professor demonstrates his superiority over the hapless student. Others find it frustrating, as they close their minds to the ongoing discussion and speed-read the next case out of fear that they might be called on next. Be that as it may, as the process of studying appellate court decisions continues in the second and third years, it strikes most students as “too often simply more of the same and a bore.” The fire burns bright, and then burns out. Thus, a “feeling of malaise and discontent” stalks the students and faculty at the nation’s elite law schools.

At Stanford, reports a New York Times Magazine article entitled The Trouble With American Law Schools, the horseshoe-shaped classrooms (designed to encourage face-to-face discussion) are often filled “with empty seats and awkward silences.” Students simply stop going to class in the second and third years, learning the law instead through a cornucopia of study aids, course outlines, and other assorted

7. Packer & Ehrlich Report, supra note 2 at 22.
8. Id. at 21.
9. See Margolick, supra note 4, at 22.
expedients that lay out legal doctrine in neat, easily digestible pieces. This pattern will suffice for the professor whose examinations are "machine-graded" and who asks little in the way of excitement and creativity.

Stanford’s Dean Ely agrees that the second and third years of law school are "pretty universally dull."10 Fifteen years earlier, then-Dean at Stanford, Charles Meyers declared that "legal education is too rigid, too uniform, too repetitious, and too long."11 But his proposal to shorten law school from three to two years, a proposal subsequently echoed by Chief Justice Warren Burger,12 fell on deaf ears.

A more sweeping and serious indictment of America’s law schools is that they do "suprising little" to improve the system of justice — so says Harvard President Derek Bok, formerly the law dean there.13 Many students are influenced by Ralph Nader, Joseph Rauh and other civil libertarians to enter law school out of a sense of mission, out of belief that law can be an instrument for social betterment. But the law schools somehow pound this humanistic inclination to the bone, and, by the third year, these students are likely to vie for the highly-paid position with the Wall Street firm. When recruiters from the Environmental Defense Fund visited the Stanford Law School in 1982, only four students signed up for interviews. Only two of the graduating class opted for jobs with public interest law firms.14

In his 1983 Report to the Harvard Board of Overseers, President Bok concluded that the overwhelming preference among top law graduates for the corporate law firm represents a "massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit."15

Long ago the young Abraham Lincoln reportedly told a group of fledgling lawyers at a bar admission ceremony that if they read Blackstone and Story and Chitty and the other texts with diligence, they could become master craftsmen of the law. He then went on to say if they read these same texts, and, in addition, studied literature, hist-

10. Id.
11. Id. at 32.
12. Former ABA President Justin Stanley also endorsed the proposal for a 2-year law school. Seligman, Is Law School Education Obsolete? The Case for Schools of Public Law, JURIS DOCTOR 16 (May 1978) [hereinafter cited as Seligman].
13. Quoted in Margolick, supra note 4, at 21.
14. Id. at 32-33.
15. Id. at 21.
tory, economics and the Bible, they could become master *statesmen* of the law.

These words have not yet rubbed off on the law schools. Law schools make no effort to control or influence the undergraduate curriculum; and once students are enrolled, there is no effort by the law schools to compensate for any deficiencies in the areas of literature, history, or the social sciences. There is not even a course in the law schools to explain the American legal system: how it works, its historical development, the underlying theories, its enduring controversies. Students are plunged at once into what Holmes called a "fog of details." Appellate decisions are often discussed without regard to ethics, history, or political considerations. We teach the "separate but equal" doctrine of *Plessy v. Ferguson* without mention of the Hayes-Tilden compromise which ended the period of Reconstruction.

Lawyering skills are neglected as well, except for the minority of students who have access to the "clinical" programs. Law schools simply eschew the practical knowledge which joins classroom studies to the outside legal world. There is a price for this. Chief Justice Warren Burger estimates that fewer than 25 percent of all attorneys are qualified to appear in court; he complains that "we are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians." Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia agrees, and bluntly characterized some attorneys as "walking violations of the Sixth Amendment right to counsel."

There are now 172 law schools approved by the American Bar Association, 16 of them approved in the past twenty years. Nearly all of

17. Professor Willard Hurst criticized the "case method" of instruction because it pushed to one side "the bulk of lawyer's special skills." "A lawyer must draft documents," he said, and "he must untangle complicated tangles of raw fact" — not merely handle the predigested "facts" stated in reported opinions of courts. He continues: "[H]e must weight facts for the formulation of policy and know how to choose and employ legal tools as positive instruments of policy. But these things the student learned under the case method only as neglected by products of reading the assigned opinions . . . The Langdell curriculum put a firm intellectual discipline in place of lax apprenticeship; but it offered no substitute for other aspects of training that had been a part of the better office education."

*See Bunn, supra* note 3, at 4-5.
19. *Id.*
them fall into the common Langdellian model. Indeed, the major recommendation of the Parker and Ehrlich report for the Carnegie Commission on *New Directions In Legal Education* is summarized in one word — "Diversity," because "legal education has, for too long, been in the grip of a single model."20

President Michael Sovern of Columbia (former dean of the law school) has also recognized the need for something more than Langdell's method of instruction. His suggestion was that students take a year off from law school to "clerk" in a law firm between their second and third year.21 This comports with the recommendation of the Court of Appeals for the Second Circuit that legal skills be taught, and that they be taught by outside practitioners, rather than in the law schools.22 Or consider the system in England, where aspiring attorneys receive three years of academic training at a university, followed by two years under tutelage of experienced practitioners. Other European nations follow the West German model of legal education, in which students spend four years at a University, and an additional six months preparing for a state bar examination. Then, for the next two or three years, they rotate apprenticeships with a judge, a prosecuting attorney, and a practicing lawyer.23 They get complete exposure to law in the books and to law as it is practiced.

There have been many efforts to reform the American system of legal education. During the 1920's and 30's at Yale, the so-called "legal realists," headed by Jerome Frank, Thurman and Arnold and others, wanted to bring large doses of the social sciences and some "skills" courses into the curriculum.24 This has been achieved, at least in part. A course in Professional Responsibility is now required (because so many lawyers were involved in President Nixon's Watergate cover-up). There are traditional courses in Legal History and Jurisprudence, and many schools are beefing up their offerings in clinical education and "client counseling". In October of 1985, some 100 law teachers attended a two-day session at N.Y.U. Law School on *Teach-

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20. *See supra* note 2, at 84. The report emphasizes the "need to dismantle the unitary mold of legal education."


23. *Id.* at 16.

ing Negotiation and Mediation, reflecting the growing interest in alternative dispute resolution. All of these piece-meal reforms augment the "law review," where the top students get extensive writing experience; the seminar program, where all students are required to write a legal paper; and the "moot court" program, where students brief and argue a simulated case. But, still in all, these offerings remain a very limited portion of the standard three-year fare.

Why is there no more movement in this direction? Because of strong opposition from almost all quarters. Long ago, Woodrow Wilson observed that changing a curriculum is like moving a graveyard. The end results, other than to tinker a bit here and there, are simply not worth the effort on the part of a busy dean.

Professors enjoy their "Lone Ranger" status, doing their own thing in their own way at their own pace. They resent efforts to herd them into new directions, into unfamiliar ways. Although some law professors do inject history, sociology and economics into class discussions, faculties consist of those who excelled at the case method. They are comfortable with it, have years of experience with it, and are not inclined to risk a pleasant routine for something new, different, and perhaps difficult beyond their ken. There was no widespread response, for example, to President Bok's suggestion that the law professors incorporate empirical evidence into their teaching and research.

Students, too, seem content with the "passivizing" experience, wherein they lay back, take notes, cram for the exam, and hope for the brass-ring job with a big firm. When Harvard tried to grade students on their class attendance and participation there was immediate mass protest; signs sprang up reading, "Only dogs bark on command." The idea was shelved.

The legal establishment is quite content with the status quo, as law schools turn out bright graduates with the latest information on the intricacies of corporate law. The universities, as well, enjoy the system because, as the Carnegie Commission Report put it, legal educa-

28. The adjective is that of Stanford's Professor Paul A. Brest. Id. at 31.
29. Lardner, supra note 1, at C2, col.6.
30. Cornell's Professor (and former Dean) Roger Cramton fears the "conversion of the American Law School from an educational enterprise into an organization performing a convenient grading, sorting and labeling function for legal employers." Id. at col. 1.
tion is "run on the cheap". One professor can teach a large number of students in a bare room with no equipment other than a blackboard and a piece of chalk.

This combination of student resistance, faculty resentment, bureaucratic inertia, and employer satisfaction is a formidable obstacle to experimentation within established structures. Nevertheless, there are changes.

Northeastern Law School in Boston offers what it calls a program of "cooperative legal education, combining practical experience with academic excellence." The school closed its doors in 1956, but re-opened in 1968 with a new belief that its program of instruction "must offer more than an arena for scholastic competition. It must strive to prepare lawyers thoroughly for the heavy responsibility of actually representing clients with competence and conviction." After the standard first year, students spend four quarters in the classroom, alternating with four quarters of legal apprenticeship in legal (and legislative) offices throughout the land. However measured, the program is a success.

In 1972 Antioch opened a law school in Washington, D.C. The core curriculum originally was built around the problems and concerns of the urban poor, with heavy emphasis on "clinical" participation and education. In the second and third years, the students are encouraged to "intern" in Congressional offices, to "clerk" with a judge, or "apprentice" on a part-time basis with a law firm. Consumer advocate Ralph Nader described Antioch as a "symbol of what law schools should be concerned about." Unfortunately, the law school has been plagued by conflicts reflecting personality difficulties, and its future is decidedly uncertain.

In 1983, the City University of New York opened a law school at Queens College with the express purpose of training lawyers for public service. Its dean, Charles Halpern, who describes in more detail the CUNY program on page 549, has said that the school will "take both

31. Packer & Ehrlich Report, supra note 2, at 64. They add: "Law schools in general remain to this day self-supporting. Indeed, one suspects that at the less well-endowed private universities the law school subsidizes the more costly parts of the university." Id.
32. CATALOGUE OF NORTHEASTERN UNIVERSITY SCHOOL OF LAW.
33. Id. at 5.
the intellectual high road [and a] highly unimaginative, vocationalist, professional approach. Some courses are designed to permit students to "ponder the larger questions of law and society," others to teach "lawyering skills". Clinical programs will emphasize "both the practical day-to-day aspects of being a lawyer and the ethical responsibilities of the profession."

Chief Justice Warren Burger sent Dean Halpern a telegram praising the school's "new approach;" and some 1,100 men and women applied for admission in the opening class. The admission process sought diversity. The 144 students ultimately selected were chosen in large part because they saw the law "as a public service profession" and wanted to use it "as a means of working for a more just society." Older students with "real world experience" were admitted because they would enrich "both the school and the practice of law." Further diversity was insured by a mandate from the Trustees that the school search for students, who, "because of socioeconomic factors such as poverty or race," might not otherwise have had the opportunity to become lawyers. But that's all there is in the way of legal education.

A New Law School With a Bent For Public Service

Is there a need for an additional law school, churning out still more lawyers? Are we not now surfeited with both? Can even the existing law schools all survive as the number of applicants continues to wane? These are pertinent and substantial questions. But while some complain of too many law schools and too many lawyers, a recent study by the American Bar Association found that each year about 23 percent of adult Americans need legal advice. Of this large number, one-third has never consulted an attorney; close to two-thirds have sought legal help only once or twice in their entire lives. Surely we can antic-

37. Id.
38. Id.
39. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Seligman, supra note 12, at 15. The Packer-Ehrlich Report states "There is a quiet crisis in the availability of legal services. Almost all developments in the law
ipate some form of "judi-care," some mechanism that provides low cost, high volume, group legal service for the middle class that will prompt a significant legal reform in the coming decades. With this trend in mind, a good case can be made for a new law school with a bent for public service.

The number of lawyers in America has doubled since 1970. There is no shortage of competent attorneys willing to draft a will, incorporate a business, prepare a lease, or search a title. Professor Alan Dershowitz told the current entering class at the Harvard Law School, "We have too many lawyers trying to save too much money for too many rich people." He quickly added that, in contrast, we have "too few lawyers trying to protect the liberty of everyone."

Professor Dershowitz spoke a truth all too familiar to civil libertarians. In many areas it is well nigh impossible to locate a lawyer willing to sue the local sheriff for police abuse, the local school board for library censorship, or the local Mr. Big, whose company dominates the local economy, for employment discrimination against minorities or women. There is a shortage of lawyers willing to take up the cudgels for civil rights, civil liberties, and international order. Over one-third of the 1,500 inmates on death row are without legal representation. This grim statistic alone demonstrates a need for a school where students are prepared upon graduation not only to "do well," but also to "do good," a school committed to diversity, innovation and public service. The school might well take the following form:

Size: The law school should remain small, with not more than 100 students in each of the three classes. This would encourage an intimacy in faculty-student relations, and would minimize peer pressure or op-

and the legal process move in the direction of increasing the need for legal services, yet those services are out of the practical economic reach of the major part of our population." Bonn, supra note 3, at 5.


47. Id.

48. Bradshaw v. U.S. District Court for the Southern District of California, (9th Cir. Sept. 7, 1984), 53 U.S.L.W. 2145 (Sept. 25, 1984) hopefully is unusual. There, after the court of appeals held that the plaintiff had satisfied the criteria for appointment of counsel in an employment discrimination case, the district court strove for over 13 months to find an attorney who would volunteer to represent the plaintiff on a contingency fee basis. Twenty private attorneys refused the case. Then "because of the difficult issue involved," the State Bar of California was requested to file an amicus curiae brief. The bar failed to respond.

49. At Harvard Law School, An Informal Briefing on Reality, supra note 46.
pression in student-student relations as all concerned get acquainted while working in tandem for a common goal. There should not be faculty lounges and student lounges, but simply lounges.

Calendar: Because of the "internships" and the "light loads" in the upperclass years, the students would begin their studies in June (or early July) instead of August (or early September), and thereafter attend summer classes. In short, the school would run around the calendar, with no summer recess. This is not new, in a realistic sense. Most law students now seek summer employment in a legal establishment to enhance their legal knowledge and marketability. Legal studies do not end in May, they only take a new form.

Curriculum: Legal education would commence with two five-week summer sessions. "Introduction to the Law" courses — legal process, legal method and legal history would occupy the first session. Criminal law and criminal procedure, an easy bridge from undergraduate to professional training, would occupy the other.

In the fall and spring, the first-year curriculum and the "case method" would be kept intact, as the students learn substance and how to read a case. There would be room (since criminal law was taught in the summer) for a statutory course: Labor Law and/or Employment Discrimination, for example. In the second summer, students would take Constitutional and Administrative Law, preparatory for their experience in Washington.

In the second year, the students would move to Washington, D.C.
During the day, they would “intern” in the Congressional offices for one semester and “intern” with those who head the major departments and administrative agencies in the other. They would learn, first hand, how law is made; how law is construed and applied by those with primary responsibility. In the process they would witness the art of compromise, the balancing of social values. In the evening they would take a reduced course load, as do the students in the evening divisions at Georgetown, George Washington, Catholic, American, and Howard law schools.

The students would return to the home campus for the third summer, taking a heavy load of taxation, commercial transactions, or other courses required by the bar examiners and the practice of law.

The fall of the third year might well be spent “out-terning” with a District Attorney, a domestic relations judge, a legal service office, the ACLU, the NAACP, or a United Nations agency to get a taste of “real world” experience.

In the spring, it’s back to the home campus for an extensive grounding in trial practice and for a round up of required and review-type courses.

Thus, the school would teach the basic skills required for the practice of law, the practicalities of law-making and social change and, above all, social values. The school should seek to convey a deep sense of dignity of the human person.⁵²

The Student Body: The typical law student is a white, recent college graduate, with a middle-class background. He is selected for admission primarily on the basis of a “paper record”: a high cumulative grade point average over four years of college, plus high achievement on the standardized legal aptitude examination.

The proposed school should look not only at the cumulative grade point average of the recent undergraduates, but also at the extra curricular activities which indicate social concerns. It should welcome the “high risk” student with leadership credentials. It should seek out the “late bloomer,” the student activist, the Vista Volunteer, the housewife whose children are now in school, the retired person with a “yen for the law”. It should search for students who, because of socioeconomic factors such as poverty, ethnic background, or age, might not otherwise have had a chance to become lawyers. In short, it should actively recruit those who give promise to diversity and, thereby, enrich the legal

⁵⁰ See supra text accompanying note 16.
profession and society itself.

*The Faculty*: The Carnegie Commission report concludes, “[i]n the end, of course, a law school’s strength is in the capacity of individuals on its faculty . . . At all costs, that capacity should be protected.” 53

When most law schools recruit, the emphasis is on “promise”. The target group consists of young men and women who graduated in the top of their class and who thereafter clerked for a renowned appellate court judge and/or spent a two- or three-year apprenticeship in a prestigious law firm. They are hired at a beginning level and at a beginning salary, as is a professor of English literature, or Spanish.

There are exceptions. Burke Marshall went to Yale in his mid-forties after serving as the Assistant Attorney General in charge of the Civil Rights Division at the Department of Justice. Frank McCulloch, after three terms (15 years) as Chair of the National Labor Relations Board, joined the faculty at the University of Virginia. Georgetown recently recruited Father Robert Drinan from the House of Representatives and Eleanor Holmes Norton from her Chair of the Equal Employment Opportunities Commission.

This proposed school would recruit on the basis of performance, not promise. We would seek out men and women who have demonstrated a mastery of the law, men and women who have demonstrated a regard for its processes, men and women who have won their spurs in the arena of social concerns. All this on the theory that the best education is the modern equivalent of a Mark Hopkins on one end of the log and a student on the other. The key in any education is the teacher-educator; how he teaches, yes, but more significantly how he lives and exemplifies the values inherent in what he teaches. Values are exemplified better than they are taught.

*Clinics and Conferences*: The law school would engage in a program of continuing legal education extending beyond its immediate campus. Individual professors would be encouraged to establish clinics in the cutting edge of the law. They could embrace such subjects as International Law and Human Rights, Women’s Rights, Employment

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51. The second year in Washington is the unique attraction that would draw most of the students to the proposed school. Provisions would be made for the handful of students who would prefer a year at the United Nations, abroad, or even staying at home.

If the demand warranted, the school could establish an evening division with a course of studies extending over four years. Those “daytime” students who could not go to Washington for whatever reason, could find useful daytime law-related pursuits, and attend class with the evening division.
Relations and Workers Compensation, Environmental Problems and Policies, the Death Penalty, Prisoners’ Rights and Alternatives to Incarceration, and The Religious Clauses of the Constitution. The list is endless.

With student assistance, these clinics could prepare background information in publishable form. They could propose legislative reform with documented position papers. They could occasionally embark upon major litigation. In short, the program of continuing legal education would keep all concerned abreast of new developments and provide opportunity to help shape the directions of legal currents.

The Enhancement Of The Human Spirit: In all that it does, the school should seek an element which Harvard’s President Bok says is now generally neglected in legal education: the enhancement of the human spirit. It should demonstrate that the study of law need not be dull. It need not be inward-directed. With alternating periods of study and public law experience nurturing one another, law study can become lively and public-oriented. The school would teach legal substance and the joy of intellectual pursuit. It would teach that law is a process for the sensible solution of human problems, ever ongoing. It would teach respect for precedent and how to face change with confidence and pride. It would teach that law, perforce, consists of dull details, but that law also stands for idea, honor, even romance and high adventure.

The school would demonstrate by concrete example that there is more than one mold for legal education; that it is possible to establish a school where caring youths find sympathy, understanding, guidance, and example as they prepare for a career in law and public service.

52. “The higher goal of law is justice.” Packer-Ehrlich Report, supra note 2, at 35. The late Chief Justice Earl Warren commonly asked counsel “I know the law, but is it right.” The question should be asked repeatedly in law school classes.

53. Packer-Ehrlich Report, supra note 2, at 85.

54. See supra text accompanying note 15.
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It's hard to believe that twenty-five years have gone by. Brandon, my nephew, was only three years old then. I was in law school and he didn't see me often enough to be sure that I was his Aunt Patty. Now, here he is graduating, crossing the stage and receiving his law diploma. His father and mother never would have predicted that Brandon would have entered law school. And I could never have predicted what radical yet overdue changes would occur between our two stints in law school.

Was it really that long ago that I crossed the dais joined by two women classmates holding newborn babies in their arms? To see them filled me with happiness and pride for all the women who for three years were women, mothers, wives and students. It also saddened and angered me. As these two women reached for their diplomas, the President of the University greeted them with a warm and seemingly understanding smile. But neither he nor most of the other men present that day really understood what it had been like for women to work their way through the still largely male-like institution during pregnancy and the first two years of the lives of their babies. So few people really understood. Certainly none of the young fathers had babies in their arms.

Brandon is walking off the stage now. There are lots of babies in the audience and not just with their mothers. I can see at least a handful of babies playing with the robes of their new lawyer-fathers. It's hard to believe that so much has changed since 1985. I began to think about it last evening as the family gathered to celebrate with Brandon.

I remember the initial reactions to my announcement of plans to study law. One good friend appeared delighted, though he immediately and candidly replied that he'd divorce his wife should she return to school. They had children just as we, but he couldn't imagine who would care for them if his wife were at school. I heard this same story
all too frequently. Women were at law school, but a wife was there only with her husband's grudging acceptance and expectation that she would plan her school schedule to fit with the needs of "her" family. There was Jackie who spent every free moment in the law library because her husband insisted that she not study at home at all. She would leave campus quickly after her last class, pick up her son, return home, and become "mom" and "wife". Once in a while Jackie's husband would pick up their son, if it weren't "inconvenient" for him. It made me angry that she so willingly accommodated her husband's demands as the price for pursuing an important goal in her life. This entire picture was such a contrast to the stories my husband told about his law school days. He was single and, though he worked hard at school, he and his male friends who had children made time for law review, lunch-time basketball and afternoon frisbee games. Jackie couldn't. I couldn't. We had children to be concerned with.

Child care arrangements were to be the woman's exclusive responsibility, too. She would have to take the long hours necessary to find a suitable day care center or babysitter. Our university day care center was better than many, especially because we had the good fortune to get a slot for our two kids and because the teachers were wonderful. But it only accommodated twenty pre-school age children, if toilet trained, was only open during the day, and enjoyed little financial or moral support from the University administration. It was hardly adequate for a University population numbering over ten thousand, including many single parents and many who attended or taught classes at night.

I discovered the center by talking with other students. The law school catalogue didn't bother to mention it. And only Rachel could attend at first because Stephanie wasn't yet toilet trained. So I had to look elsewhere. The best I could find was a nearby day care factory. It was clean. It was safe. It was licensed. But that wasn't enough. For the mothers knew, from the times we put down our law books to glance at books on child care and child development, that children needed not only safe but also special places with lots of love and attention and caring adults. Yet Stephanie, age two, often stood forlornly alone in a huge play yard, overwhelmed by the noise and commotion of fifty children she had never seen before. And after play time she would follow the other troops inside where twenty-year-old girls, not mothers themselves, would insist that the kids simply sit at a table to draw or complete a worksheet morning after morning. And every other month there were new teachers. Salaries were low. Benefits were meager or non-
existent.

Those images haunted me at law school. I didn’t want simply to drop Stephanie somewhere. I and other mothers with me wanted for our children the love and attention and caring that we could give them only part of the time if we were also to pursue other goals. So I pressured Stephanie to learn to use the toilet. With some exaggeration about her success I got her into the university day care center with her sister, but I squirmed for six months wondering and worrying each day about her having too many “accidents” to be able to stay. I was lucky that she really learned how to use the toilet just as the teachers’ patience was nearing an end.

I was lucky, too, that it was a good day care center and reasonably affordable. Most of us paid $200 to $300 a month per child for our day care. With tuition for part-time students running over $4,000 a year, it was also a strain to meet the day care costs. At least we had one full-time income. Some of my friends were divorced and had little income, if any. Their resources, primarily from student loans, were often stretched beyond limits by their day care expenses. All too often mothers were forced to choose between studying and keeping their child home for a day in order to save a few dollars. Few people sympathized with the anguish of that choice, yet most students sympathized with those who needed to sacrifice study time to a “real job,” a job in a law firm, to make ends meet.

Many times I thought about how much easier it would have been had both my daughters been school-aged. Then I could simply take day classes, pick them up at 3:00 P.M., and study evenings. I soon discovered that mothers with school-aged children had problems, too. Often times important classes and meetings occurred in the late afternoon when the children’s school was “out”. And what arrangements could be made when there was a school holiday for the child but none for mom? And a sick child automatically meant that mother would miss classes because dad “had” to be at his office while mother was only a student. She could afford to alter her daily schedule. He couldn’t.

There were other battles for us to face, too. Many of the young men in class thought “mommies” strange entities. One young man constantly teased me about how I carried my books. “You look like you’re carrying a baby. Having kids sure has given you lots of experience lugging things around. One problem, though. You take all those cases we read much too seriously. Guess it’s that maternal desire to protect the poor plaintiff or defendant.” Such comments often hurt and confused me. I believed that being an intelligent woman and a mother allowed
me to bring some very special qualities to the classroom. I soon discovered that motherhood made me something less, not something more.

Others couldn’t believe that the moms in class could be so prepared, even have ideas to contribute. "Don’t you have to spend your time changing diapers and reading fairy tales?" was the popular and insensitive refrain. The guilt this aroused robbed me of some of the pleasure of doing well. It aroused anger, too. These students assumed that, once home, it was my role to minister to my children. I pitied the young women who would marry these young men and find themselves expected to be "only a mother." It just didn’t occur to these young men that my husband desired and enjoyed bathing and feeding and reading to our girls while I read Contracts. Even on those evenings when neither of us felt like handling these child-chores, my husband didn’t look to me as the sole caretaker. We both felt that these girls were our daughters, and sometimes we simply negotiated who was to care for them.

I had known for many years that being a woman didn’t limit my abilities or my desire to achieve. In fact, being a mother broadened my world view and enhanced my potential contribution to law. Motherhood — caring for little people — gave me a new sensitivity to the needs of all people. When I read a case I could appreciate that it was about people and conflict, not just about legal theory. But once pregnant and a mother, I was often relegated by some men to the position of a fragile, even child-like person who neither wanted nor was able to do more
than warm baby food or chauffeur little ones to kindergym classes. Motherhood supposedly dulled my senses and desires to pursue what non-mothers and all fathers clearly could.

While many of my classmates were dubious or scornful, the administration and most of the faculty were largely indifferent. They might have cared had they thought about it. But most of the faculty were either unmarried and childless or older males whose wives had been the primary caretaker of their children. They knew little or nothing of my children. The application for law school certainly didn’t inquire. The faculty rarely spent time discussing the nature of the student population, what demands were made of student time, and how those demands affected their lives. They knew of course about the young children of some of their newer faculty, but expected no less productivity from them as a condition for continuation, promotion or tenure. Having children was their choice and therefore their problem. How then could they appreciate the struggle of mothers who were law students!

There go the caps tossed into the air. As I look at the sea of faces I realize that law schools are no longer populated primarily with twenty-two year olds. So much seems to have changed.

The seeds of change were sown before I went to law school, in the golden era of law schools. Thousands wanted to go to law school in the late 1960s and through much of the 1970s and, thanks largely to expanded consciousness, many more of the applicants were women. The percentage of women entering law schools rose dramatically. There was some plumbing to do; new bathrooms had to be added. And the male club would never be the same again.

Applications started dropping dramatically by the early 1980s. All but the elite law schools were now more concerned about their survival and were delighted to admit older women and men who were returning to school five, ten, or even twenty years after graduating from college. Oh, yes. Remember George and Martha. He was 65, retired president of a truck line. She was 62. In their last year of law school they crossed paths. The last time I saw them they were walking hand-in-hand in the parking lot. Claims for recognition and understanding of student needs now also came from those with more life experience and maturity. Maybe that made the changes inevitable. I certainly didn’t feel the inevitability then.

Or maybe it was just a lucky break. One of the women on the faculty was awarded tenure after struggling eight years, sometimes teaching part-time to reach that goal while at the same time raising her
two children from birth. Her husband was a lawyer in a large commercial firm and much of the responsibility for the children rested on her. No longer burdened with the fear that offense to other faculty might jeopardize her chances for tenure, she persuaded the faculty to set up a committee to consider how the law school might better accommodate the needs of students, faculty and staff who were also responsible for raising children.

The committee began to find out about "the other life" of its student parents. Its reports helped to dispel the fantasy that students had only to eat, sleep, play intra-mural sports, secure student loans and study law. The faculty began to systematically gather information from its applicants, its admittees, and its alumni about the number and ages of their children, the responsibilities of "the other parent," and ways in which the law school could help students attend meaningfully both to their children and to their legal education. And from that information came lots of good ideas which the school began to implement over the years.

The law school catalogue was amended to invite parents and prospective parents to consider the law school's part-time program, which would allow students to stretch out their studies and take classes both during day and evening. An additional assistant dean, a young parent, was hired to work part-time and assigned the responsibility of counseling these students, helping them to work out a balanced and satisfying schedule which wouldn't leave them torn, exhausted or burdened with guilt. She worked hard, too, on getting an Order of the Coif chapter for the law school. I heard that they didn't think too highly of law schools with part-time programs. I wonder if she succeeded. I'll have to ask Brandon.

Faculty began to invite law student parents to bring their children to class. The older children would come in with their crayons and coloring books. The younger ones might sleep, or coo. If one started to disrupt the class, someone would take the child outside for feeding, diaper changing, playing or comforting, and others in the class would later pitch in to help the caretaker pick up the material covered in class.

An alumnus endowed a fund for a child care staff person to work in the law library and donated funds to the library building campaign on the condition they be earmarked for construction of two sound-proof study rooms, equipped with cribs and toys, where parents could bring their children to study in the library.

Faculty began posting times when they would be off campus and their offices could be used by students. Space and privacy for student
activities, once at a premium, became abundant almost overnight without a dime spent on construction. Students used the offices for study groups and organizational meetings, and one or two of these offices also had a crib and a cache full of toys.

The law school and others convinced the university to build a new family center located near the university’s three graduate schools. The center offered both day and evening child care for pre-school age children and facilities for families to gather for dinner and some evening entertainment. And the university contracted with a neighboring high school to offer afternoon enrichment programs to the school age children of its faculty, staff and students. These came after years of struggle. The priests who ran the university talked about the importance of family but they weren’t really conscious of or sympathetic to the concerns of parent students. It took a lot of time and effort to educate the “fathers” about what it meant to be a parent.

The word about this newly “family conscious” law school and university spread quickly and it became a mecca for some of the brightest student and faculty parents in the nation. That talent started to attract recruiting by some of the most prestigious law firms in the country who pledged with the placement office that they would set aside some attorney positions for job sharing by parents whom they hired. Some even began to set aside space in the office for child care. That began to enrich and humanize those law firms, and their practice, and their clients and . . .

“Come on, Aunt Patty, let’s go grab some champagne and celebrate. Are you dreaming or something?”


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Bibliography
Concerning child care generally, see UNIVERSITY OF WISCONSIN EXTENSION-HEALTH SCIENCES UNIT, PROCEEDINGS OF THE UNIVERSITY OF WISCONSIN CONFERENCE ON CHILD ADVOCACY (J. Westman ed. 1976).

Concerning women in law school generally, see:
3. Strachan, A Map for Women on the Road to Success, 70 A.B.A. J. 94 (May 1984);
Reteaching Criminal Procedure: A Public Interest Model for the Defense of Criminal Cases

Paul Savoy

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Holmes' celebrated aphorism about the life of the law consisting of experience and not logic is snappy, but it hardly does justice to the role that theory plays in the practice of law. Our experience, first in law school and later as students of continuing education, is so indelibly impressed by certain fundamental ideas that we respond to them like subjects of some post-hypnotic suggestion, hardly aware of the extent to which we practice under theory's spell.

As heartening as it is to witness the growing acceptance of clinical instruction and the value of teaching the skills of the practicing lawyer, clinicians are still compelled to submit to the intellectual monopoly that classroom instructors continue to exercise over the teaching of legal theory and substantive law. The wall of separation between the teaching of theory and the teaching of practice is one of the most disturbing and persistent problems in the continuing development of legal education.

The pressing task for clinical education is to undertake the work of creating theoretical models that will reflect the concerns and problems of the practicing lawyer, rather than taking substantive and procedural doctrine as we find them. The tendency in far too many law schools today is for the clinical teacher to have to devise ways of offering instruction in practical skills and professional responsibility without inconveniencing the classroom teacher or making excessive demands on the time devoted to what is thought to be "important" in the curriculum. Clinicians must start thinking of themselves as theoreticians as well as practitioners so that when our students graduate, they will be prepared to enter not only the practice of law, but its theory as well, not the theory of the casebooks, but the theory of the whole case, the-
ory suited to the demands and realities of practice. Conversely, the substantive law teacher must emerge from the isolation of the classroom and become better acquainted with the realities that his ideas must confront and the problems those realities pose. The right relation between theory and practice ultimately turns on the capacity of legal education to consistently convey to students the quintessential idea that good theory is good practice, and good practice good theory.

I. Theory and Practice in the Defense of Criminal Cases

Nowhere is the separation of theory and practice more apparent nor more problematical than in the criminal law. I am never quite sure how to respond when the students I supervise in a clinical program in criminal law talk about the "real world" in referring to their experiences in the courtrooms and corridors of our criminal justice system. It suggests that what we do in law school is somehow unreal, as if legal education had no relation to what prosecutors and defense lawyers and judges do, as if the educational process did not have the most important socializing effects upon law students, shaping their attitudes, values and judgments about the adversary system in ways that are astonishingly resistant to change.

What I suspect is implicit in the disillusioned descriptions of the "real world" — conjuring up images of a school of hard knocks where ideals and principles are incapable of surviving — is a sense that one has encountered not so much "reality" as an ineluctable form of evil that law school somehow conceals. Measured by the standards of conventional morality, it is an essentially evil world that the graduate encounters in criminal law after law school, a world in which perjury is commonplace, where cross-examination is used not to elicit the truth but to confuse and discredit the witness without regard to her veracity or integrity; where procedural safeguards are used not to prevent the conviction of the innocent, but to frustrate, delay and obstruct the prosecution of the guilty; where the function of defense counsel is to see that his client does not get the punishment he deserves; where "putting the prosecution to its proof" means using the system, in the words of one treatise writer, "to bring about a miscarriage of justice." 2

What disturbs the students in our clinical programs, I suspect, is

the apparent hypocrisy that has disturbed young people of every generation. This apparent contradiction between theory and practice, between the academic world and the real world, contributes to a growing sense among our students of the declining authority of the academic establishment. Having lost much of their intellectual and moral claim to legitimacy, the law schools have resorted to the artificial contrivances of authority and community — the mandatory grading curve, the authoritarian classroom and the student-faculty relations committee. We see ourselves, and our students increasingly come to see us, as perpetually straddling two worlds, the world of the ideal and the world of the practical, the world of public values and the world of private self-interest, the heavenly city of the Constitution and the gates of political hell.

The assumption underlying this dualistic consciousness is that the academic model is somehow right or good, but impractical and unrealistic, while the real world is morally deficient and ultimately subversive of constitutional rights, but hopelessly incapable of reform. Such a view errs twice. First, it tends to discredit our system of constitutional safeguards, as if to say, well this is nice in theory, Professor, but in the real world, it’s another matter. Second, and more relevant to the concerns expressed in the pages of this Symposium, such a view discredits the entire enterprise of legal education, as if somehow legal theory had come to the end of its rope.

In this Article, I suggest that far from a situation in which we have a correct theory and a deviant practice, much of what is widely regarded as the most ethically untenable aspects of the defense of criminal cases is a logical and inevitable result of the constitutional theory we have been systematically and, one must add, dogmatically teaching in law schools for the past 20 years. I shall explore the unsettling possibility that pervasive and important assumptions about the nature of procedural rights in criminal cases may be erroneous, or at least that an interpretation of the Bill of Rights which would impose more of an obligation on defense attorneys to be concerned with issues of guilt or innocence, truth and falsehood, justice and injustice, is as constitutionally defensible as the orthodox ideology of criminal procedure that makes the guilt or innocence of their clients a matter of such astonishing indifference to so many defense lawyers, and which leaves issues of truth and justice to the moral philosophers.

Because readers will be and should be extremely skeptical of the claim that much of what we have been teaching in Criminal Procedure classes for the past two decades may be fundamentally flawed, I shall
examine the conceptual foundations of current doctrine in sufficient detail to at least suggest that a new kind of teaching and scholarship in criminal law is called for, and that in seeking to identify some of the root deficiencies of our criminal justice system, the conventional wisdom has been rounding up all the wrong suspects.

Finally, I propose to examine the implications of these assertions for the future of legal education, and more specifically, how they affect the teaching of professional responsibility. The tendency of most teachers in presenting issues of professional conduct is to show how analytically or constitutionally-sound decisions may not be ethically correct. To be sure, this helps students understand how moral and personal values are relevant to their professional role as attorneys, but it still leaves them with the unmistakable impression that substantive and procedural doctrine is still the main event. The thesis presented here is that what is ethically correct is also what is constitutionally sound, that ethical considerations are not merely matters of personal taste or subjects for a romp in the clouds at annual meetings of the American Bar Association, but form integral components of constitutional and substantive values.

II. Uncommon Law: The Traditional Ideology of Criminal Procedure

There is no principle more familiar nor more embedded in the constitutional jurisprudence of criminal procedure than the idea that the procedural safeguards of the Constitution protect the guilty as well as the innocent. The notion that criminals have constitutional rights may offend the man on the IRT subway who is concerned about the rising crime rate, but every law student soon learns that the common sense of the common man is wrong. The basic premise of our adversarial system of criminal justice is that a defense attorney has a duty to raise every available legal defense without regard to the actual guilt or innocence of her client. If the eyewitness identification is shaky, attack it; if the complaining witness has a criminal record or a moral stain on her repu-

tation, display it; if the evidence has been illegally seized, move to suppress it, even if it establishes incontrovertible proof of your client's guilt; if a key prosecution witness has disappeared, or there is a break in the chain of evidence linking the murder weapon to the defendant, or other weaknesses in the prosecution's case, the defense attorney is expected to exploit it. "Putting the prosecution to its proof" is what it's called and a good defense lawyer is expected to do just that, even if he knows that his client is guilty and even though, if he is successful, his client will be free to commit other murders, other rapes, other acts of child abuse. *If my client walks, it's because the prosecutor didn't do his job.* Or, less elegantly, as one defense attorney put it, "I say, if [the prosecutors] weren't professional enough, fuck 'em." 4

How can you defend a person you know is guilty? No question strikes closer to the heart of the conscientious defense lawyer and no issue takes a greater emotional toll on her. "The reasons for many of our procedural rules in criminal cases continue to elude me, as they did in my first days of practice," says Barbara Babcock. 5 In a candid and thoughtful piece on the moral dilemmas of the criminal defense lawyer, Professor Babcock presents a wide variety of rationalizations for defending the guilty, 6 but perhaps the most compelling is that the Consti-

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6. Among the most frequent rationalizations offered by defense lawyers are: 1) Yes, it is dirty work, but someone must do it; 2) a lawyer never really "knows" whether a client is guilty or innocent until a jury determines it; 3) being accorded the full panoply of constitutional rights affords the defendant a measure of dignity which encompasses the basic needs of the human personality; 4) most people who commit crimes are themselves victims of social injustice and, in any event, the laws are enforced in such a discriminatory manner and the conditions of imprisonment so dehumanizing that conviction often works a greater injustice than acquittal; 5) being a champion for the unpopular individual and occasionally winning against overwhelming odds, particularly when it is a victory over government, is more rewarding than the work done by most lawyers. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177-78 (1983). *Compare* J. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?*, THE MAKING OF A CRIMINAL LAWYER 13-14 (1983), which offers various reasons why people become criminal defense lawyers:

'[T]he cineromantic thrill of being involved with cops and robbers; the challenge of pitting your wits against the massed forces of the state; the saintly feeling of standing with the reviled and friendless; the intensity of dealing with people in crisis; and the necessity of defending liberty by making the state prove its case before putting anyone (THIS MEANS
tution is thought to require it. The text of the Bill of Rights, it would appear, could hardly be plainer. The fourth amendment says that it is not only the right of the innocent but the right of "the people" — presumably the guilty and the innocent alike — that is secured against unreasonable searches and seizures. Similarly, it is "the accused" who shall enjoy the right to a speedy and public trial, and "no person" shall be compelled to be a witness against himself in a criminal proceeding nor be deprived of life, liberty or property without due process of law. If an injustice results, in the sense that a guilty person escapes a punishment he deserves, it results because our constitutional system of justice, according to the received view, not only permits it, but demands it, and a defense attorney would be derelict in her duty to her client if she did not assert every available procedural protection.

III. Reteaching Criminal Procedure

A. *The Truth-Determining Value of Procedural Rights*

One of the principal justifications for our adversary system of...
criminal justice is that the truth will ultimately emerge from a presentation of conflicting viewpoints by partisan advocates. Insofar as procedural safeguards are designed to promote reliability in the truth-determining process, however, the idea that the guilty as well as the innocent are entitled to the procedural safeguards of the Constitution is a far more radical claim than we have supposed. After all, what is a guilty person's complaint about being compelled to submit to an unreliable procedure? That it is too likely to result in the imposition of a punishment he deserves? It is undoubtedly true that an unreliable procedure — using a standard of reasonable suspicion instead of proof beyond a reasonable doubt, for example, or refusing to permit an accused to cross-examine the witnesses against him — creates a substantial risk that an innocent person will be found guilty. But how does the use of such unreliable procedures violate any right of a guilty person?

A court, to be sure, does not "know" that an accused is guilty, but the defendant knows of his own guilt, or at least with the assistance of counsel, is usually capable of ascertaining his guilt or innocence. Procedural protections for factually guilty persons thus derive not from any personal right of the accused, but rather from epistemic considerations, that is, from the fact that at the outset of the criminal process, courts and law enforcement agencies are not in a position to reliably know whether an accused is guilty or not.


Truth . . . is best discovered by powerful statements on both sides of the question. This dictum describes the unique strength of our system of criminal justice. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty will be convicted and the innocent go free. [citations omitted.]

12. This analysis draws partly on R. NOZICK, ANARCHY, STATE AND UTOPIA 102-08 (1974).

13. The Sixth Amendment right to counsel is perhaps the most essential of all the procedural guarantees of the Bill of Rights because lawyers "are the means through which the other rights of the person on trial are secured." United States v. Cronic, 104 S. Ct. at 2043. "If charged with crime, [the defendant] is incapable, generally, of determining for himself whether the indictment is good or bad." Powell v. Alabama, 287 U.S. 45, 68 (1932).


15. By a "factually guilty" defendant, I refer to a person who a jury would find guilty if it were presented with all the facts in the case, as opposed to a defendant who may be acquitted and is "legally innocent" because the prosecution has failed to present sufficient admissible evidence to establish his guilt beyond a reasonable doubt.
The procedural protections of the Constitution thus speak with different voices to different audiences, depending on their actual knowledge of the defendant's guilt or innocence, a phenomenon that I shall refer to as the *epistemic* nature of procedural rights. To governmental decisionmakers such as police officers and judges, the Constitution says that the various screening procedures guaranteed by the fourth, fifth and sixth amendments must be applied to *all* persons; indeed from the perspective of governmental actors, guilt is unknowable except as it is determined in accordance with these constitutionally-prescribed procedures. For the accused, however, procedural protections such as the right to a public trial or the right to cross-examine witnesses, are guaranteed only when the defendant is factually innocent, or more broadly, only when he has a good faith belief in his innocence. On this theory, procedural protections, as William Simon has suggested, should be invoked by conscientious defense counsel "only when there is some reason to believe that the truth is not clear, and that the judge will be in a better position to decide after a trial than the advocate is now . . . [or] when the client sincerely wants to explain or justify himself and proposes to do so."  

Procedural rights thus have a paradoxical quality; they are designed to protect the innocent, not the guilty, but because governmental entities, by hypothesis, are incapable of ascertaining guilt or innocence except in conformity with the procedures mandated by the Constitution, procedural rights must be afforded to all those who claim them. Consequently, it is the individual defendant, with the assistance of counsel, who must be the sole judge of what procedural rights he is entitled to assert because only the defendant is capable of personally knowing whether he is guilty or innocent.

The concept of procedural rights is therefore neither as straightforward nor as indifferent to considerations of guilt or innocence as classical theory assumes. A more mature reflection on the nature and


purpose of procedural safeguards should lead us to conclude that the guilty are but third-party beneficiaries of a system of justice that is capable of minimizing the risk of convicting innocent people only by requiring governmental actors to treat everyone as innocent until proven guilty. From the perspective of governmental decisionmakers, the presumption of innocence and the various screening procedures of the Constitution function as rules of conduct that must be followed without regard to the actual guilt or innocence of the accused. From the perspective of the individual defendant, however, procedural protections are contingent entitlements that are dependent for their legitimate assertion on the defendant’s good faith belief in his innocence and the conscience of his lawyer in deciding whether to claim them.

The implications of such a theory for the defense of criminal cases are far-reaching. The constitutional value of procedural protections such as the right to trial will be implicated only when there is some reason to believe that one’s client is innocent or that she at least has a sincere belief that her conduct was excusable or justifiable, or that there were circumstances mitigating her degree of culpability. On this theory, a lawyer can never constitutionally justify attempts to discredit testimony which he knows to be true, or permit a defendant to take

the vindication of procedural rights in the Burger Court’s disposition of habeas corpus and related collateral remedies. See United States v. Frady, 456 U.S. 152 (1982) ("At the outset, we emphasize that this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent."); Engle v. Isaac, 456 U.S. 107 (1982) ("cause and prejudice" standard held applicable to claims affecting the truthfinding function of the trial as well as those based on the value of deterring police misconduct); Wainwright v. Sykes, 433 U.S. 72 (1977) (White, J., concurring) ("It is . . . of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to ‘negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.’"). See generally Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436 (1980). The Court’s linkage of procedural protections with factual innocence is distinguishable from the view presented here insofar as the former permits a reviewing court to make a judgment about the defendant’s factual guilt or innocence, thereby depriving persons who may actually be innocent of the right to trial and, where applicable, the right to a jury determination of the disputed facts. See L. Tribe, CONSTITUTIONAL CHOICES 113 (1985).

19. But see M. Freedman, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 43-49 (1975) (if defense counsel failed to vigorously cross-examine a truthful witness because he knew his client was guilty as a result of confidential communications from the client, such disclosures would soon cease to be made).
the stand and perjure herself,\textsuperscript{20} or engage in any of the routine procedural tactics that defense lawyers typically use to obfuscate rather than elucidate the truth.\textsuperscript{21}

\begin{itemize}
\item\textbf{20.} It has been suggested that the proper course under such circumstances is for the attorney to move to withdraw without disclosing his reason and, if the request is denied, for the attorney then to proceed with the case, permitting the client to testify in narrative form without guidance through the lawyer's questioning. \textit{ABA Standards for Criminal Justice, Standards Relating to the Defense Function}, Proposed Standard 4-7.7 (2d ed. 1980). Another proposed solution is for the attorney to be excused from the duty to reveal a client's perjury on the theory that such disclosure would violate the attorney-client privilege of confidentiality. \textit{See M. Freedman, supra note 19, at 40-41. The ABA Model Rules of Professional Conduct endorse the position that defense counsel should disclose the perjury to the court, leaving it to the trial judge to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. However, the Model Rules caution that this ethical duty “may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.” \textit{American Bar Association, Model Rules of Professional Conduct}, Rule 3.3, comment (1983) [hereinafter cited as Model Rules].}

After the completion of this article, the U.S. Supreme Court handed down its decision in \textit{Nix v. Whiteside}, 106 S. Ct. 988 (1986), holding that a defense attorney's threat to expose a client's proposed testimony as perjurious did not breach the standards of effective assistance of counsel set down in \textit{Strickland v. Washington}, 466 U.S. 668 (1984). In \textit{Whiteside}, the defendant, charged with murder, claimed that he had stabbed the victim in self-defense as the latter was pulling a pistol from underneath the pillow on the bed. Although Whiteside had consistently stated that he had not actually seen a gun, and no pistol was found at the scene, he told his attorney shortly before trial that he had seen something “metallic” in the victim's hand. When questioned about this, Whiteside responded, “If I don't say I saw a gun, I'm dead.” His attorney told him that such testimony would be perjurious and that if Whiteside insisted on testifying falsely, he would disclose the perjury to the trial court. Whiteside, heeding his attorney's admonition, testified only that he thought the victim had a gun. He was convicted of second-degree murder.

Chief Justice Burger, writing for five members of the Court, concluded that “whether [defense counsel's] conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose the illegal scheme, [defense counsel's] representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under \textit{Strickland}.” \textit{Whiteside}, 106 S. Ct. at 997.

\item\textbf{21.} \textit{See Simon, supra note 17.}
1. Can A Lawyer Ever Know the Truth?

Does a lawyer ever really "know" whether a client is guilty? And even if he does, is it a lawyer's job to be concerned about the ultimate truth or justice of his client's cause?

It is said that one cannot know whether a client is guilty until a jury returns a verdict; therefore one cannot know what the truth is until a jury determines it. I am inclined to agree with Geoffrey Hazard's characterization of this line of argument as "pure casuistry." Professor Hazard comments, "of course there are doubtful situations, but there are also ones that are not doubtful. A thing is not made true or not by a [jury's] pronouncing on it, and a lawyer can reach conclusions about an issue without having a [jury] tell him what to think."23

To be sure, there is always the possibility that a lawyer may be wrong in concluding that his client is guilty. Having practiced just long enough to develop that pneumatic confidence that often comes with experience unseasoned by maturity, a lawyer may think he knows "the ring of truth" when he hears it, only to discover, too late, that his summary judgment of his client's guilt was mistaken and that he had talked an innocent man into pleading guilty and accepting a prison term. Experiences like this can lead to gnawing self-doubt and a protective cynicism that comes to regard all questions of guilt or innocence as essentially unknowable. In most cases, however, this kind of epistemological skepticism is unwarranted.24 "I've been there," says a former associate of Edward Bennett Williams, "believe me, you know."25

Of course, the categories of guilt and innocence are not always so simple and clear-cut. There are many gray areas at the boundaries of criminal culpability, especially in cases in which the principal issue of contention is not whether the defendant committed the physical act, but whether he had the requisite state of mind. Even when guilt depends solely on the identity of the assailant, there will be situations in

22. See generally M. Freedman, supra note 19, at 51-58.
24. Even those commentators who maintain that the adversary system prohibits defense counsel from acting upon his knowledge or belief regarding the defendant's guilt, acknowledge that the attorney has a responsibility to know everything the client knows that is relevant to the case. See M. Freedman, supra note 19, at 30. "If we recognize that professional responsibility requires that an advocate have full knowledge of every pertinent fact, then the lawyer must seek the truth from the client, not shun it." Id.
25. Quoted in M. Freedman, supra note 19, at 51.
which persons who appear to be clearly guilty are in fact innocent. Persons who confess their guilt to their lawyers may be lying, perhaps to protect another, or to achieve notoriety, or perhaps because they believe their culpability regarding related acts makes them guilty of the particular crime of which they stand accused. Nevertheless, the fact remains that most defendants are actually guilty of one or more of the crimes with which they are charged, and virtually all criminal defense lawyers, as well as prosecutors and judges, understand and believe this.

Perhaps the most important aspect of the Supreme Court's recent decision in Nix v. Whiteside, holding that a defense attorney's threat to expose his client's proposed perjury does not deprive the client of his right to the effective assistance of counsel, is the epistemological premise upon which the Court's conclusion is based. Implicit in the Court's decision is the assumption that a lawyer: 1) is capable of knowing whether a client is lying, and 2) is authorized, if not required, to act on that knowledge when the attorney's belief in the falsity of the client's story is based upon "good cause."

The relevant task for legal educators is to understand and respond to the necessity for teaching the art of ascertaining the truth, not merely the skill of cross-examination, which is aimed at one's adversary and all too often used to confound the truthful witness, but the ability to be present with one's own client in truth, even if that means the truth of our present uncertainty regarding the client's ultimate culpability. Our radical doubts about the reliability of all human knowledge tend to be confused with the more narrow and practical issue of our ability to discover whether a client is being truthful in a moral sense,


27. See A. Dershowitz, The Best Defense xxii-xxii (1982). Attorneys, in deciding whether to act on the basis of their knowledge, should be held to a standard that requires them to be convinced beyond a reasonable doubt that their client is guilty. Cf. Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121, 149 (1985), suggesting a standard for dealing with client perjury.


29. 106 S. Ct. at 993; id. at 1006 n.8 (concurring opinion of Blackmun, J.). Most notably, the Court, in responding to "the suggestion sometimes made that 'a lawyer must believe his client not judge him,'" blocks this avenue of escape from moral responsibility with the reply that no "lawyer can honorably be a party to or in any way give aid to presenting known perjury." Id. at 997 [emphasis added].
that is, whether the client has a good faith belief that the events occurred as she says they did. A course in *Truth 101* and *102* can provide students with instruction in fact investigation, training in the use of the polygraph\(^{30}\) and hypnosis,\(^{31}\) the use of experts in the field of parapsychology, as well as development of the student’s own intuitive and psychic abilities; but perhaps most important, as we teach students to become more trusting of experience itself, they will be able to let go of self-protective models and theories about truth and knowledge, so that the moments when they come to the edge of uncertainty and not knowing will become less threatening.


Perhaps the weightiest argument for invoking procedural protections on behalf of a client without regard to his attorney’s personal knowledge of his guilt, is the one advanced by Monroe Freedman. Professor Freedman says:

The point is not that the lawyer cannot know the truth, or that the lawyer refuses to recognize the truth, but rather that the lawyer is told: "You, personally, may very well know the truth, but your per-

30. Although most courts continue to adhere to the rule that in the absence of a stipulation, polygraph test results are inadmissible to corroborate a defendant’s innocence — *see* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (failure of polygraph to have attained “general scientific acceptability”) — the polygraph is still a relatively inexpensive investigative technique that can enable an attorney committed to an innocence-oriented conception of his role to more adequately represent a client. The chief problem in asking a client to take a polygraph examination is that it makes it more difficult for the attorney who assumes the traditional adversary role to seek an acquittal if the results of the polygraph point to guilt; and for any attorney, “to know that you represent an innocent man only increases the pressure and the awareness of the responsibility that goes with proper legal representation.” Broiles, *Foreword*, in R. FERGUSON & A. MILLER, *THE POLYGRAPH IN COURT* vii (1973). *See generally*, Santo, *The Polygraph*, in 4 *CRIMINAL DEFENSE TECHNIQUES*, CH. 66 (1985) [hereinafter cited as *Criminal Defense Techniques*].

31. Until recently, the majority rule permitted the use of hypnotically enhanced testimony in criminal trials with the instruction that the use of hypnosis affected credibility only. *See* Walman, *The Use of Hypnosis in Criminal Proceedings*, in *Criminal Defense Techniques*, CH. 68A. Within the last few years, however, a growing number of courts have concluded that hypnosis has not been generally accepted by the relevant scientific community and that testimony induced by hypnotic techniques is therefore inadmissible. *See, e.g.*, State v. Collins, 464 A.2d 1028 (Md. 1983); People v. Hughes, 453 N.E.2d 484 (N.Y. 1983); People v. Shirley, 641 P.2d 775 (Cal. 1982).
sonal knowledge is irrelevant. In your capacity as an advocate (and, if you will, as an officer of the court) you are forbidden to act upon your personal knowledge of the truth, as you might want to do as a private person, because the adversary system could not function properly if lawyers did so.\textsuperscript{32}

Were defense counsel to represent a client according to his own assessment of guilt or innocence, he would be assuming the role of judge and jury rather than advocate, and this he may not do, Professor Freedman says. But why not? Partisan advocacy is appropriate only insofar as it furthers some legitimate purpose of the adversary system. Whether that purpose is defined as assuring the reliability of the truth-determining process or minimizing the risk of convicting the innocent, it is difficult to see how either purpose is furthered when partisan advocacy is used to obstruct the conviction of a client one knows to be guilty.

In asserting that the adversary system prohibits an attorney from acting upon conclusions regarding a client's guilt, Professor Freedman begs the question. The central issue is not whether the adversary system, as it has been traditionally understood, requires an attorney to be indifferent to the justice or injustice or his client's cause. Rather, the important question is whether the traditional model is misconceived, whether the longstanding assumption that an attorney's obligation to his client is to “get him off” even though he has actually committed the crime charged, is simply wrong. The real difficulty with expecting a factually guilty client to choose between imprisonment, on the one hand, and complete truthfulness on the other, is the more obvious objection that such a moral burden may simply be too heavy.\textsuperscript{33} Yet, un-

\textsuperscript{32} M. Freedman, supra note 19, at 53. See Aronson, supra note 26, at 300-02: Rather than requiring the judge to perform the functions of both investigator and arbitrator, the adversary system requires that each side investigate, introduce, and argue the evidence most favorable to its own side of a legal dispute. . . . The best way to accomplish this goal is by providing the accused a representative who does not act according to a personal opinion on the facts, but rather assumes innocence and acts as an advocate to promote that view.

The classic statement of this position is by Lord Brougham, in his defense of Queen Caroline's divorce case before the House of Lords: “[S]eparating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.” \textit{Quoted} in M. Freedman, supra note 19, at 9.

\textsuperscript{33} See G. Hazard, \textit{Ethics in the Practice of Law} 130 (1978).
less we begin to take seriously the idea that the relationship between attorney and client in criminal cases evolves in a continuum of shared public values, and that procedural devices are not to be used to undermine a client's sense of responsibility for his criminal acts, we are in danger of ending up with a process of constitutional adjudication that looks as if it were based on the premise that the system is working as long as the defendant goes free. 34

The teaching and enforcement of professional responsibility has traditionally been understood as a matter of considering the ethical premises and problems of the legal profession independently of the requirements of substantive law and constitutional doctrine. 35 The view presented here is that the goal of achieving a more ethical way of lawyering is not likely to be accomplished until we accept the fundamental premise that ethical concepts are ultimately rooted in substantive values, and that what is ethically correct is also what is constitutionally sound. The dilemma expressed by the shorthand phrase that a lawyer owes a duty of loyalty to his client's cause as well as a duty of candor to the court, is ultimately the dilemma of understanding the paradoxical nature of procedural rights in our constitutional system of justice. 36 Always a bridesmaid, never a bride, professional responsibility must finally become an equal partner with constitutional values in establishing a workable marriage of theory and practice.

B. The Dignitary Value of Procedural Rights

Some may see the conception of procedural justice proposed here as too narrowly instrumentalist. It will be said that procedural safeguards have a dignity dimension as well as an instrumentalist value,

34. See W. TUCKER, VIGILANTE: THE BACKLASH AGAINST CRIME IN AMERICA 78-79 (1985) ("If we can let this person off, the argument seems to go, 'then none of us will ever have to fear oppression from the government.'").


36. See supra text accompanying notes 17-18.
that the purpose of procedural guarantees such as the right to a hearing or trial are to be found not only in the protection they afford against erroneous deprivations, but in the respect and "feeling of just treatment" they afford persons accused of crime.

An innocence-oriented perspective of the criminal process, it should be made clear, is not entirely instrumentalist in its goals. In suggesting that persons who lack a conscientious belief in their innocence are not entitled to assert procedural protections, I do not mean to deny that such persons have a right to be free from brutality or other forms of violence. The constitutional restraints on the use of violence in extracting confessions or the use of particularly shocking means of obtaining physical evidence proceed from the same source of values that prohibit the torture of prisoners, or the failure to provide inmates with adequate food, lighting, heat, sanitation or medical care. These are not true procedural rights, as Thomas Grey has noted, but are more appropriately regarded as substantive in nature. As such, they are guaranteed to all persons, the guilty and the innocent alike; those accused of crime as well as those whose convictions have become final.

Moreover, even with respect to "true" procedural rights, such as the right to trial, there is clearly a dignitary purpose to be served in permitting a factually guilty person to present his story to an impartial factfinder provided the defendant honestly believes he is innocent or that there were circumstances mitigating culpability. Yet, it is not readily apparent how respect for personal dignity is served by allowing

37. Carey v. Piphus, 435 U.S. 247, 261 (1978) (students entitled to recover at least nominal damages for denial of administrative hearing even if their suspensions were in fact justified).
38. For a discussion of the dignitary value of the right to be heard by an impartial factfinder, see L. Tribe, American Constitutional Law § 10.7 at 501-506 (1978). On the dignitary aspects of other procedural entitlements, see LaFave & Israel, Criminal Procedure, sec. 1.6(f), at 29 (student ed. 1985).
42. Grey, Procedural Fairness and Substantive Rights in Due Process, XVIII Nomos 182, 183-84 (J. Pennock & J. Chapman eds. 1977). Professor Grey comments: "[I]f procedural fairness were given so broad a sense [as to encompass dignitary values], it would thus embrace all conceivable substantive moral and legal rights, and there could be no prospect of giving it intelligible consideration as a separate and finite concept on its own account." Id. at 184.
a defendant who knows he is guilty of the crime with which he is charged to deny responsibility for his wrongful conduct. Indeed, there is much to be said for the view that allowing individuals accused of wrongdoing to use the criminal process to escape responsibility for their acts treats them as less than persons. It may be true that the desire to escape a deserved punishment is basic and widespread, but it does not follow that the Constitution enacts Bonnie and Clyde's theory of individual autonomy.

An innocence-oriented model of procedural rights would require us not only to reconsider the kind of substantive theory that has monopolized classroom teaching; it also invites us to rethink client-centered approaches to clinical instruction which assume that "the lawyer's function [is] to help the client arrive at the client's solution." We will need to consider whether in counseling a client in a murder case, for example, defense counsel has the duty not merely to seek the truth, but to pursue William Simon's provocative suggestion that she discuss with her client "society's feelings about the nature of the crime, the legitimacy of the state's attempt to punish him, the client's own views of his action, or their effect on his life in society."

Techniques aimed at developing skills to effectuate the client's goal and interests, may simply be inadequate, at least in their present form, for the legal representation of the criminal defendant who, understandably enough, is eager to avoid a deserved punishment. While most people have a strong desire to escape punishment, deserved or not, it is questionable whether constitutional and ethical principles should be based upon such a self-centered theory of human psychology, particularly as they affect litigation involving the enforcement of public values.

A lawyer who finds a client's decision morally objectionable should at least be permitted to withdraw. In some situations, however, withdrawal may not be the most desirable or principled option, and defense counsel may have a moral and constitutional duty, for example, to expose a client's perjury, even though it is contrary to the client's self-interest. Moreover, even a purely selfish individual may not be effec-

45. Simon, supra note 17, at 56.
46. See Nix v. Whiteside, 106 S. Ct. at 995.
tively assisted by a traditional adversary defense. Professor Simon has pointed out how such a defense "may merely prolong and intensify an ordeal regarded as more terrible than the threatened punishment. Or it may make the punishment, if it should occur, more difficult to endure by forcing the client to struggle against it and to deny its legitimacy."47

Finally, the emergence of a model of criminal procedure that links procedural entitlements to the factual guilt or innocence of the accused would place the entire system of plea bargaining in a different light. The practice of negotiating guilty pleas, which has traditionally been thought by academic critics to be essentially subversive of constitutional rights,48 would emerge as a principled and equitable form of disposition of criminal cases, one that might come to be regarded not only as necessitated by practical considerations, but as consistent with the complex of constitutional values affecting the administration of criminal justice. To be sure, there remain substantial abuses in the conduct of plea bargaining such as the practice of overcharging and problems associated with "prosecutorial vindictiveness" that require reform.49 Yet, for all the flack it has taken from its academic critics, the plea bargaining system, as it has been carried on by its besieged practitioners, may be doing a lot better job of justice than its critics have supposed. What we may discover is that the real problem lies with the theoretical dominance of the adversary model and its reverence for trial by combat, which academicians have long advocated as the rule, and practitioners, albeit apologetically, continue to observe as the exception. We may come to learn that there is nothing sacred about the idea of a trial, and that practice requires no apology.

John Griffiths pointed out some years ago that what we are really teaching in law schools is not a balanced approach to criminal justice based on two competing models of the criminal process — the Crime Control Model and the Due Process Model — but a monolithic system based on one and only one conception of the criminal justice process, that is, the Battle Model.50 By extending the teaching of skills in nego-

47. Simon, supra note 17, at 58-59.
50. Griffiths, supra note 3.
tiation, arbitration and mediation to the disposition of criminal cases, and, perhaps most importantly, by providing students with the requisite theory for understanding plea bargaining and other nonadversary approaches to criminal cases as principled methods of dispute resolution, clinical education has a unique opportunity to develop genuine alternatives to the Battle Model of criminal advocacy. A truly holistic method of clinical teaching is thus capable of freeing students and practitioners from the compulsion of adversary roles by integrating skills training in alternative dispute resolution with the teaching of alternative theory for an alternative practice.

C. The Privacy-Protecting Value of Procedural Rights: Unraveling the Mystery of the Exclusionary Rule

It is generally recognized that independent of any concern with preserving the reliability of the truth-determining process, there are certain procedural guarantees, most notably the fourth amendment prohibition against unreasonable searches and seizures, which have as their purpose the protection of extrinsic values such as privacy and personal autonomy. While there remains substantial disagreement over whether, and to what extent, a violation of the fourth amendment should be sanctioned by excluding evidence obtained in violation of its provisions, opponents as well as defenders of the exclusionary rule agree that even criminals have personal rights of privacy.\footnote{Weeks v. United States, 232 U.S. 383, 391-92 (1914) (the fourth amendment "reaches all alike, whether accused of crime or not"); Grano, \textit{supra} note 3, at 435 ("This is not to say that the guilty do not deserve the fourth amendment's protection."); Griffiths, \textit{supra} note 3, at 385 ("[G]uilty defendants, too, are entitled to have the integrity of their persons and homes protected.").}

The theory and practice of testing the reasonableness of searches and seizures thus proceeds on the critical and unquestioned assumption that the fourth amendment establishes a personal right of privacy that protects the guilty as well as the innocent. But does it? Does a person driving a car with a corpse in the trunk and a five-year-old kidnap victim on the floor really have a legitimate expectation of privacy that a police officer is bound to respect? Why is it not constitutionally sound to say that a person who uses his privacy for criminal purposes forfeits that right of privacy in much the same way that the right to free speech is forfeited by the speaker who falsely shouts "fire" in a crowded theater and causes a panic, or who uses speech to commit a
crime, whether it is perjury, counterfeiting or false advertising?\textsuperscript{52}

Because criminal procedure has been severed as a law school subject from the rest of Constitutional Law, and because it is usually taught in the first year before there is any comprehensive understanding of the principle of judicial review or the theory of constitutional adjudication upon which it rests, the fourth amendment has evolved in a conceptual vacuum, isolated from the collective understanding that has informed the intellectual growth of other constitutional ideas. This educational insularity has prevented us from seeing that the exclusionary rule is not a unique phenomenon in the history of legal ideas, but is rather a function of certain fundamental principles of constitutional law which, if applied to the teaching of criminal procedure, might enable us to derive genuine solutions to some of our most intractable dilemmas.

1. The Exclusionary Rule and the Principle of Judicial Review

Few ideas have had such a hypnotic effect on the legal mind as the concept of the exclusionary rule. Defenders of this rule talk about it as if it were some entity lurking in the interstices of the fourth amendment, like a silent watchman dispatched by the Founding Fathers to police the police. Critics of the rule conceive of it as a judically-implied remedy for the violation of a personal right which courts may grant or deny, depending on the good faith of the police and the efficacy of the remedy in deterring police misconduct. Neither of these ideas of criminal jurisprudence, however, reflects the true nature and function of the fourth amendment.

Were Criminal Procedure to be taught as an integral part of mainstream constitutional theory, it would become readily apparent that the exclusionary rule is not a distinct legal entity, but is simply a function of the fundamental principle of judicial review articulated by Chief

\textsuperscript{52} In an early article on the exclusionary rule, Dean Edward Barrett posed the common sense question, “[I]f one were to look only to the rights of the defendants, why would it not be reasonable to take the position that by engaging in [criminal activity] within their houses, they have waived their constitutional right to privacy and could in no event complain of the police entries . . . ?” See also Loewy, The Fourth Amendment As A Device for Protecting the Innocent, 81 Mich. L. Rev. 1229 (1983), which states: “The thesis of this Article is that the primary purpose of [the fourth amendment] is to protect the innocent. By ‘innocent,’ I do not mean totally innocent. (How many of us are?) I mean innocent of the crime charged or not in possession of the evidence sought.”
Justice Marshall in his opinion in *Marbury v. Madison*.\(^{53}\) There is no separate exclusionary rule any more than there is a separate reversal-of-conviction rule. The exclusion of illegally-seized evidence is either required because of the principle of judicial review or it is not required at all.

If, as the Supreme Court has repeatedly said, the fourth amendment right of privacy is a *personal* right that "reaches all alike, whether accused of crime or not,"\(^{54}\) then a criminal conviction based on evidence seized from the defendant in violation of his fourth amendment right could not stand without rejecting almost 200 years of constitutional precedent. With the exception of cases involving the validity of searches and seizures, no decision of the Supreme Court has ever permitted a state or federal court to employ the judicial power to convict a person of a crime without permitting him to defend on the ground that governmental power was being exercised in violation of a personal constitutional right.\(^{55}\) To so hold as Henry Hart suggested in a classic dialectic, would require us to "rethink *Marbury v. Madison*."\(^{56}\)

Although continuing to recognize that "the rights assured by the Fourth Amendment are personal rights,"\(^{57}\) a majority of the Court nev-

\(^{53}\) 5 U.S. (1 Cranch) 137 (1803). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the criminal law analogue of *Marbury*, the prosecutor contended on appeal from a state criminal conviction that there are instances in which the constitutional rights of a defendant might be violated without there being a judicial remedy. Rejecting this contention, Chief Justice Marshall replied, citing *Marbury*, that if a state were to prosecute one of its citizens "who should plead the constitution in bar of such prosecution . . . [and] his plea should be overruled and judgment rendered against him . . . unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.” *Id.* at 403-04. See Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, (1974) ("The exclusionary rule is "simply another name for judicial review."). See also Justice Butler's much neglected but valuable dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 487 (1928), citing both *Marbury* and *Cohens v. Virginia* for the proposition that the principle of judicial review applies to all "provisions of the Constitution safeguarding personal rights," including the fourth amendment.


Nevertheless has concluded that the exclusionary rule itself operates as "a judicially created remedy . . . , rather than a personal constitutional right of the person aggrieved." However controversial that conclusion may be, it does not depend for its validity upon a rethinking of Marbury v. Madison. What requires rethinking is the widespread assumption shared by the Court and its critics alike that factually guilty defendants have personal rights of privacy.

2. The Common Sense of The Common Law

At common law, an arrest, even though made without probable cause, was not unlawful if the person arrested was actually guilty of the crime for which he was arrested. The conclusion that a felon has no personal right to object to an unlawful search or seizure is supported by a long line of distinguished authorities from Lord Justice Mathew Hale, one of the leading jurists of English history, to the modern reporters for the American Law Institute’s Restatement of Torts. The reason for the common law rule, explain Professors Harper and James in their treatise on the law of torts, is because "notwithstanding the lack of reasonableness on the part of [the arresting officer], the [defendant] has got exactly what was coming to him," and therefore, "he has sustained no wrong."

The teaching of legal history as an integral part of legal advocacy has all but vanished from the modern curriculum. This is not to say that the casebooks or courses are not sprinkled with snippets of historic cases, or the ringing phrases of early English or American freedom fighters. Yet, how many of us have actually read the famous cases we

59. See Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition?', 16 CREIGHTON L. REV. 565 (1983).
60. See 2 M. Hale, Pleas of the Crown, 76, 78 (1736); 4 Stephen’s Commentaries on the Law of England 223 (21st ed. 1950); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 673, 685 (1924) (“The policy of the [common] law is that no felon has any right to complain of being caught.”).
61. See 2 M. Hale, supra note 60 at 76, 78.
62. Restatement (Second) of Torts § 119, comment g (1966) (if the actor “arrests another for a particular felony and the other has actually committed that felony, it is immaterial that his suspicion is based upon grounds which would not be sufficient to create suspicion in the minds of reasonable men.”).
63. 1 Harper & James, Law of Torts § 3.18, at 280-81 (1956).
quote or reflect on the deeper meaning of the lines we love? For example, a careful reading of a celebrated 18th century case,64 which has been designated a landmark of English liberty by the U.S. Supreme Court, would make it clear that historically, the guilt or innocence of the victim of a search was far more relevant to the validity of the search than the standard historical accounts suggest. Discussing certain similarities between the protection against arbitrary searches and seizures and the privilege against self-incrimination, Lord Camden in his opinion for the court declared:

It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.65

Consider also the often-quoted words of Sir William Pitt on the occasion of his opposition in Parliament to legislation that would have authorized the issuance of general warrants:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.66

If, as Pitt declared in his ringing oratory, "the poorest man may, 64. Entick v. Carrington, 19 HOWELL'S STATE TRIALS 1029 (1765).
65. Id. at 1073. Elsewhere, Lord Camden, in response to the argument that general warrants should be sustained because they had for so long gone unchallenged, replied:

There has long been a submission of guilt and poverty to power and the terror of punishment. But it would be a strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute.
Id. at 1068.

While Lord Camden's opinion is most assuredly distinguished for its indictment of the abuses attendant upon the use of the general warrant, it is equally noteworthy for its repeated references to the fact that it is the innocent person, not the criminal, whose privacy is at risk. See id. at 1065, 1065 and 1066.
in his cottage, bid defiance to all the forces of the Crown," what force majeure can it be that suddenly permits the King's men to enter, along with the wind and the rain, when they are in possession of a valid search warrant supported by probable cause? If such an entry is lawful, as it clearly is under the fourth amendment, it surely must be because the supposed commission of a criminal act, of which probable cause merely provides the evidence, forfeits the poor man's privacy.

3. The Exclusionary Rule as a Form of Third-Party Standing

If the search of a man's home or the seizure of his person when he has actually committed a criminal act creates no actionable wrong, the defendant cannot satisfy the normal standing requirement that a litigant assert his own personal right or interest rather than the rights of a third party. Thus, when a factually guilty defendant is permitted to object to the introduction of illegally-seized evidence, he is, in effect, being granted a form of third-party standing, analogous to permitting a guilty defendant who claims a violation of the first amendment to attack the facial validity of an overbroad statute.

There is a significant doctrinal affinity between the first amendment doctrine of overbreadth and the fourth amendment principle behind the exclusionary rule. Both concepts are forms of third-party standing designed to protect innocent persons by empowering the guilty to assert the rights of law-abiding citizens who, for one reason or another, are not likely to be effective in protecting their own constitutional rights. The general warrant, the dragnet, the roadblock, the random stop, the house-to-house search and the drug courier profile are all classic examples of the vice of overbreadth. Each of these law enforcement procedures succeeds in apprehending the guilty only by casting such a wide net across the community that it ensnares a substantial number of innocent citizens as well. A drug dealer who conceals a quantity of cocaine in his car and objects to a random stop without probable cause or reasonable suspicion is thus in the same position as a defendant in a first amendment case whose criminal activity of inciting a riot is prosecuted under an overbroad statute. The rabble-rouser is permitted to escape prosecution by attacking the facial validity of the


overbroad statute because it has a “chilling effect” on the first amendment rights of protected speakers. The drug dealer is permitted to escape prosecution by raising the rights of innocent citizens whose privacy is “chilled” by the use of overbroad police procedures. The fourth amendment exclusionary rule, like the first amendment doctrine of overbreadth, thus functions not as a sword for the guilty, but as a shield for the innocent. If Blackstone were writing today, what he might have said is, “Because it is better that ten guilty persons escape than one innocent suffer, the law in its wisdom affords the guilty third-party standing to raise the rights of the innocent.” This, I take it, is what Justice Jackson had in mind when he said in Brinegar v. United States, that “courts can protect the innocent against such invasion only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar’s car must be regarded as a search of Everyman.”

Factually guilty defendants in criminal cases thus serve, in effect, as private attorney-generals, deputized by the courts to enforce the public interest in governmental obedience to the rule of law.

IV. A Public Interest Model of the Criminal Process

Criminal cases are the oldest forms of public law litigation. The public law designation emphasizes that in the typical criminal prosecution, the courts are called upon by prosecutors to enforce public norms embodied in penal statutes, and by defense attorneys to implement the public values expressed by constitutional provisions. Consequently, courts are required in criminal cases to engage in a form of decision making that makes the private dispute-settling mode of adjudication inappropriate to the disposition of the public law issues before them. Concepts borrowed from the world of private tort law, with its theories of causation, its retrospective goals of compensation and notions of personal zones of privacy, are therefore inadequate to the task of enforcing the kinds of public values that are at stake in criminal cases. The right to be free from unreasonable searches and seizures is more like the collective right to clean air than the individual right to a personal en-


70. On the nature of public law litigation in which courts are asked to vindicate the public policies embodied in the applicable statutes or constitutional provisions, see J. Vining, Legal Identity: The Coming of Age of Public Law (1978); Chayes, Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4 (1982).
clave of privacy. 71

While the public nature of criminal prosecutions is implicitly rec-
ognized by the principle that prosecutors have a duty not only to secure
convictions but to seek justice, 72 the role of defense counsel continues to
be regarded as essentially private in nature. The enormous controversy
and confusion that surrounds the defense of criminal cases continues
unabated because neither legal educators nor practitioners have suc-
ceded in articulating a workable framework for public law advocacy or
a set of role expectations for defense lawyers that is appropriate to
their function in litigating public values.

The public law nature of criminal cases raises a number of com-
p lex and troubling questions for the teacher and practitioner of crimi-
nal law. For example, should defense counsel invoke the exclusionary
rule in behalf of a client whose personal right of privacy was not vio-
lated by the police and whose “standing” to exclude otherwise admissi-
ble and reliable evidence of guilt depends on the public interest in en-
forcing governmental compliance with the rule of law? 73 In advising a
client whether to co-operate with law enforcement authorities, does an
attorney have a duty to explain the complex policies behind the privi-
gle against self-incrimination? 74 These and other questions regarding
the rights of criminal defendants to enforce public values unrelated to
the reliability of the guilt-determining process must come to occupy a
more prominent place in the educational process and cause us to con-
sider a public interest model of criminal justice as an alternative to the
traditional adversary and client-centered approaches that have domi-
nated criminal advocacy.

71. See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev.
349, 367 (1974). Professor Amsterdam characterizes the fourth amendment not as a
provision that “safeguard[s] my person and your house and her papers and his effects
against unreasonable searches and seizures,” although its enforcement may have that
effect; rather, it is “a regulatory canon requiring government to order its law enforce-
ment procedures in a fashion that keeps us collectively secure in our persons, houses,
papers and effects, against unreasonable searches and seizures.” (Emphasis added).

72. See American Bar Association, Code of Professional Responsibility
EC 7-13.

73. See infra p. 828.

74. See infra p. 833.
A. The Criminal Defendant as Private Attorney-General

Since *Mapp v. Ohio* was decided in 1961, the courts, in the guise of enforcing a personal right of privacy, have actually been practicing public law litigation in the name of the exclusionary rule. While the language and concepts derived from the classic private-dispute resolution model continue to dominate discussion of the exclusionary rule—as if the rule were a private remedy for the violation of a personal right—the public interest model of adjudication that is implicit in the Court’s revolutionary opinion in *Mapp* has rapidly transformed the nature of the criminal process.

Properly understood, the aim of the exclusionary rule, when invoked by a factually guilty defendant, is not to vindicate any personal interest in a realm of private autonomy, but to enable the defendant, as a private attorney-general, to enlist the judiciary in protecting the collective security of law-abiding citizens not before the court. If a factually guilty defendant can be said to have a personal right at all, it is what might be characterized as “a right to the rule of law,” which is not a procedural right, but a form of substantive due process. While a public interest conception of substantive rights affording every citizen, including lawbreakers, a personal stake in governmental compliance with the Constitution is not inconceivable, such a notion would take the concept of substantive due process beyond even the limits of controversial decisions such as *Lochner v. New York* and *Roe v. Wade*. There, the interests recognized by the Court at least resembled traditional common law rights in property or personal rights of privacy. If

76. In its most recent opinions, the Court has adopted language that is more appropriate to the public law nature of the exclusionary rule. See United States v. Leon, 104 S. Ct. 3405, 3412 (1984):

[T]he exclusionary rule is neither intended nor able to ‘cure the invasion of the defendant's right which he has already suffered.’ The rule thus operates as ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.’ (citations omitted).

78. 198 U.S. 45 (1905).
the definition of personal rights is pushed too far by hypothesizing that individuals have a personal stake in public values that were not designed to protect them, the whole concept of a personal right becomes a pointless exercise. Inevitably, a public interest paradigm will generate new conceptions of substantive rights, but at this stage of constitutional development, it is important to retain terminology which makes it clear that in the public interest model of litigation, the challenger argues the relevance and importance of public policy, not his own personal advantage or right.

A public model of the criminal process has a wide range of doctrinal and functional implications, not all of which will necessarily be satisfying to "public interest" lawyers. How these problems are to be resolved will most assuredly stir powerful feelings and provoke strong disagreement. The immediate task for those of us engaged in the teaching and practice of criminal law is to begin to talk more openly about the real ambivalence and conflict we feel about entrusting the enforcement of public values to those we normally think of as public enemies.

1. Is the Exclusion of Illegally-Seized Evidence a Constitutional Requirement or a Discretionary Remedy?

This persistent and seemingly intractable issue of whether the Constitution requires the exclusion of illegally-seized evidence presents a dilemma that cannot be resolved within the existing paradigm of criminal jurisprudence. To the extent that the exclusionary rule is conceived of as a third-party remedy, the rule, like other forms of third-party standing, is a matter of remedial discretion. However, when asserted as a personal right — as when a client maintains his innocence and says, for example that he was unaware of the presence of the seized contraband in the vehicle or that the evidence was not used by him in connection with criminal activity — ordinary principles of judicial review require the exclusion of evidence seized in violation of a law-abiding citizen's personal right of privacy. The epistemic nature of procedural rights, that is, the degree to which procedural entitlements

80. See Warth v. Seldin, 422 U.S. 490 (1975) (characterizing restraints on third-party standing as a "prudential limitation" on federal court jurisdiction). When dealing with the issue of third-party standing in cases in which the defendant has failed to establish a sufficient connection with the premises searched or the property seized, the Court has refused to allow third-party claims even on a prudential basis. See Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Salvucci, 448 U.S. 83 (1980).
depend on what a defendant and his attorney know about the defendant’s guilt or innocence, thus places the ultimate responsibility for deciding whether exclusion is going to be claimed as a matter of personal right or remedial discretion, within the exclusive province of attorney and client.

An ethical defense lawyer thus has the obligation not only to ascertain the guilt or innocence of his client, but to discuss with the client the complex and extrinsic policies underlying the exclusionary rule. If a decision is made to challenge an illegal search or seizure on behalf of a factually guilty defendant, the challenge, it is submitted, should be made explicitly as a third-party claim, not as a matter of personal right. Of course, if the decision is to assert a fourth amendment claim as a personal right, a court has no choice but to treat it as such, and would be required to exclude any evidence it finds to have been unlawfully seized. 81

2. The Cost-Benefit Approach to the Exclusionary Rule

The Court’s most recent pronouncements on the exclusionary rule have made it clear that whether illegally-seized evidence is admissible in a particular case “must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case-in-chief of inherently trustworthy tangible evidence.” 82 This approach to the rule has been criticized on two grounds: 1) the costs to law enforcement are not as great as the Court suggests; 83 and 2) whatever costs are imposed, it is not the exclusionary rule, but the fourth amendment itself that exacts those costs. 84 The price paid by law enforcement in terms of the number of criminals who are set free by the rule, it is said, is no greater than the costs that would have been incurred if the police had

81. For a court to examine the fruits of an unlawful search in order to determine whether the defendant was factually guilty would be an impermissible form of “bootstrapping.” See Henry v. United States, 361 U.S. 98, 104 (1959).
82. See Leon, 104 S. Ct. 3405.
obeyed the fourth amendment in the first place and the arrests or searches in question had not occurred.  

The epistemic theory of procedural rights that I have proposed would make the propriety of a cost-benefit approach depend on whether the exclusionary rule were asserted as a personal right or a third-party claim. When exclusion is claimed as a personal right, that is, when the defendant asserts a colorable claim of innocence, a court should no more calculate the costs of enforcing the fourth amendment than it should weigh the costs of enforcing a defense required by the substantive law of crimes. However, when a fourth amendment claim is asserted by a defendant in his capacity as a representative of the public interest, the same kinds of considerations that architects of public interest litigation have generally recognized as relevant to the fashioning of equitable remedies for the enforcement of public values ought to be equally germane to the discretionary decision to invoke the exclusionary remedy.  The value of deterring governmental misconduct and the importance of enforcing the moral imperative of judicial integrity, which the Court identified in Mapp and post-Mapp cases as key variables in shaping the nature and scope of the exclusionary rule, are not unique to the jurisprudence of the fourth amendment. Deterrence and exemplification of moral norms are only two of the many factors to be taken into account by a court in providing relief aimed at the vindication of public values. Other relevant considerations include promotion of vigorous decisionmaking by governmental actors, respect for state autonomy, concern for the victim, the public interest in bringing criminal offenders to justice, and where the remedy is retrospective as

85. Id.
86. For a discussion of the various goals of public interest litigation, see P. SCHUCK, SUING GOVERNMENT 16-25 (1983).
88. See P. SCHUCK, supra note 86.
89. Id.
90. See Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 48 & n. 98 (1979).
91. Cf. United States v. Hastings, 103 S. Ct. 1974, 1981 (1983) (federal supervisory power; taking into account "the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past").
92. Cf. United States v. Payner, 447 U.S. 727, 736, n. 7 (1980) (federal supervisory power; referring to "the public interest in prosecuting those accused of crime and
well as prospective, as it is when a court excludes evidence on the basis of past misconduct, the "good faith" of the governmental official also should be relevant. The argument that the cost incurred by exclusion should not preclude application of the rule because the cost would have been the same had the policy obeyed the constitutional command, loses its cogency when applied to the guilty defendant. While it is no doubt true that the criminal offender would have escaped arrest and prosecution had the police complied with the Constitution, he has no personal entitlement to that freedom. If criminals remain at large when the police obey the fourth amendment, it is not because the guilty have a constitutional right to be free from unreasonable searches and seizures, but because the epistemic nature of procedural rights requires that the guilty be treated as if they did. To be sure, we are more disturbed by the spectacle of "a grinning hoodlum skipping out of jail on the basis of a fourth amendment 'technicality,'" than we are by the thought of his having gone unapprehended because the police obeyed the law. This difference in perception, however, is not because "we would rather deceive ourselves than confront life's and the Constitution's sometimes tragic choices," as Professor Tribe has suggested, but rather for the reason that what we know about a person's guilt affects the nature of his constitutional choices, or more accurately, what an attorney knows about a client's guilt determines the parameters of the client's constitutional rights.

To acknowledge that a certain balancing of costs and benefits is already reflected in the probable cause and warrant requirements of the fourth amendment does not foreclose the possibility that another bal-

having them acquitted on the basis of all the evidence which exposes the truth").

93. To the extent that a remedy is preventive and future-oriented, "the focus is on a social condition, not incidents of wrongdoing," and the state of mind of the officer should be irrelevant. Fiss, supra note 90, at 23. However, when future governmental acts are sought to be affected by a remedy that "punishes" an individual officer for past misconduct, in much the same way that criminal prosecutions are expected to affect the future conduct of private individuals, the "good faith" of the officer should be relevant for the same reason that a "good faith" mistake would constitute a valid defense in a criminal prosecution. The "good faith" exception to the exclusionary rule recognized by the Court in Leon, no more amends the constitutional norms embodied by the fourth amendment than a defense of insanity or duress or mistake modifies the substantive norms of wrongdoing expressed in a state's penal code. See G. Fletcher, Rethinking Criminal Law § 6.6, at 454-59 (1978).

94. Tribe, supra note 84, at 610.
95. Id.
ancing is called for when their protection is invoked by persons they were not intended to protect. Judges are not given carte blanche to enforce the public interest whatever the cost in public safety. A public interest mode of constitutional adjudication implies just that — a balance of public values.96

3. Are Criminal Defendants Appropriate Private Attorney-Generals?

The third-party nature of the exclusionary rule raises the more general question whether a person who is guilty of violating public norms as they have been expressed in the penal code of the community is a suitable candidate for enforcing the public values embodied in our society's most basic document. Lea Brilmayer has suggested that the "case or controversy" requirement of article III may be understood in part as expressing practical concerns about a litigant making claims in his neighbor's behalf without his neighbor's consent.97 A person should not be permitted to assert the rights of third parties, Professor Brilmayer proposes, without the cooperation of at least one member of the affected group.

In many respects, the exclusionary rule, which is tantamount to granting citizen-standing to criminal defendants, seems a far more radical judicial venture than more modest but unsuccessful efforts to persuade the Court to confer citizen-standing upon law-abiding members of the community.98 Once we recognize that the injury-in-fact requirement of traditional standing doctrine is not necessary to guarantee genuine adversariness, there seems little reason to continue to rely on the criminal defendant as a guardian of the public interest. Rather than looking to lawbreakers to raise the rights of their law-abiding neighbors, it would seem more appropriate to bestow citizen-standing on the neighbors, or watchdog agencies, or public interest groups.

On the other hand, when dealing with the assertion of third-party standing by a defendant in a criminal enforcement proceeding, rather than by a plaintiff seeking affirmative relief, the reasons for permitting surrogate standing by a non-representative litigant may be more com-

pelling than in the ordinary public interest lawsuit. Moreover, the average citizen may give too little weight to the interest in governmental compliance with the rule of law, having never been subjected to the humiliation of a house search or the withering indignity of a stop-and-frisk. For the average person who would qualify as a citizen-plaintiff, these threats to his security are little more than abstractions.

Even if there is ample justification for continuing to permit a criminal defendant to act as a private attorney general, however, there is no apparent reason why judicial relief when requested by a defendant in a representative capacity, should not take the form of a remedy that looks to the future rather than the past, and is preventive rather than compensatory in nature. In lieu of providing a defendant with the windfall of exclusion, a court might grant prospective relief in the form of a declaratory judgment, or injunctive relief against a particular governmental official, or a system-wide remedy in the nature of a structural injunction requiring the adoption by a police department, for example, of administrative directives for the conduct of searches and seizures, or the establishment of internal review procedures for civilian complaints.

How many defendants would continue to be interested in vindicating the public values of the Constitution if the only relief available were a declaratory judgment or a structural injunction? Whatever form of remedy is to be made available, perhaps one essential criterion for public interest standing should be sincerity. Conscientious defense counsel would be expected to determine whether her client had a genuine interest in the effect of police misconduct on the law-abiding members of the community, on the theory, perhaps, that a public value is not a value unless people believe in it.

B. The Privilege Against Self-Incrimination as A Form of Conscientious Objection

No provision of the Bill of Rights is more enigmatic in its justification than the privilege against self-incrimination. When the great Talmudic scholar and philosopher Maimonides was asked why a person

99. See Amsterdam, supra note 71.
100. See Fiss, supra note 90.
101. See J. Vining, supra note 70, at 102.
102. U.S. Const., amend. V ("nor shall any person . . . be compelled in any criminal case to be a witness against himself").
cannot be compelled to be a witness against himself in a criminal prosecution, he is said to have replied to the effect that the ultimate reason for the privilege resides with God.\(^103\) For all the ink the Court has used on the subject, the Justices have provided little more in the way of illumination.\(^104\)

To be sure, the common law had always regarded torture as an unlawful means of obtaining a confession, both for the reason that a coerced confession is likely to be untrustworthy,\(^105\) and because the use of physical violence in the detection of crime offends "the community's sense of fair play and decency."\(^106\) But when a confession is indisputably true, and the police have utilized no offensive means, the reason for the privilege is more difficult to fathom. Although it is frequently said that the privilege reflects "our preference for an accusational rather than an inquisitorial system,"\(^107\) this merely restates the privilege; it does not explain why a guilty person should be permitted to remain silent in a society in which confession has always been regarded as good for the soul.

1. The Spiritual Meaning of the Privilege

A leading authority on the history of the privilege states that "in

104. The fullest explanation for the privilege is to be found in Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964):

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhuman treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good is shown for disturbing him and by requiring the government in its content with the individual to shoulder the entire load; "our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

105. See 1 J. Stephen, A History of the Criminal Law of England 447 (1883); 3 Wigmore, Evidence § 822 (3d ed. 1940) (contending that the "trustworthiness" rationale is the only defensible basis for the privilege).
107. Murphy v. Waterfront Comm'n, quoted supra note 104.
the broadest sense, it was a protection not of the guilty or the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased." Although there is some historical evidence to support the conclusion that the privilege was intended to protect the guilty as well as the innocent, the right to remain silent traces its origins to cases in which victims of the High Commission and Star Chamber like John Lilburne, William Prynne, and Henry Burton maintained a conscientious belief in their innocence, not in the sense that they claimed to be innocent of the acts with which they were charged (heresy and seditious libel were the usual offenses), but because they regarded their acts as beyond the power of government to punish.

Burton, a Puritan preacher and pamphleteer, brought before the High Commission for his sermons against turning communion tables into altars and setting up crucifixes, refused to take the oath *ex officio* or answer the Commission's interrogatories because while "the Commission pretended that one was bound to answer against himself no further than the law of the land required, once he took the oath, 'they presse it upon the man's conscience to answere in those things which neither law nor conscience bynds him unto.'" John Lilburne, described as "the most remarkable person connected with the history of the origins of the right against self-incrimination," also maintained his innocence. "The law requires no man to accuse himself," Lilburne said, but apparently his objection to being compelled to incriminate oneself was that one would be put in the position of admitting an offense which he believed in good faith he should not be punished for. As Leonard Levy, the eminent fifth amendment scholar, points out, this was a clever tactic, for while partisan judges would not consider a claim of liberty of conscience or freedom of expression, which would openly challenge the legitimacy of governmental authority, they respected the idea of a personal privilege against self-incrimination. Thus, a substantive right of conscientious objection asserted as a proce-

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109. See id. at 281. A member of the House of Commons "praised the virtues of the common law for not permitting any prisoners, not even murderers, to be examined under oath." *Id.*
110. *Id.* at 269-70.
111. *Id.* at 271.
112. See id. at 175. Lilburne expressed the fear that his accusers were intent upon "mak[ing] me betray my own innocency, that so they might ground the bill upon my own words."
113. *Id.* at 284.
dural privilege converted what would otherwise have been an impossible plea to an effective defense.

While additional scholarship is called for, it seems fair to conclude on the basis of the available historical record that the privilege against self-incrimination was originally conceived as a form of conscientious objection. It apparently was intended to convey an essentially spiritual principle which permits a person who has a conscientious belief in his innocence\textsuperscript{114} to assert what is tantamount to a right of "passive resistance" against a process aimed at establishing his guilt.\textsuperscript{115} "Since it has not yet been established that he is guilty, he may not be aggressed against and forced to participate [against his will, although] . . . prudence might suggest to him that his chances of being found innocent are increased if he cooperates in the offering of some defense."\textsuperscript{116}

It is the privilege against self-incrimination that provides the constitutional core of the idea that the defendant has the right to put the prosecution to its proof "by requiring the government in its contest with the individual to shoulder the entire load."\textsuperscript{117} Thus, in advising a

\begin{itemize}
\item \textsuperscript{114} Identifying the protection of the innocent as the purpose of the privilege, Lord Camden, in his opinion for the court in \textit{Entick v. Carrington}, 19 HOWELL'S \textbf{STATE TRIALS} 1029, 1073 (1976), states that "the law obligeth no man to accuse himself . . . because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust." (Emphasis added).
\item Both the privilege against self-incrimination and the prohibition of unreasonable searches and seizures extend to all persons because otherwise "the innocent would be confounded with the guilty." \textit{Id. See also supra} note 65.
\item The thrust of the protection for persons who claim their innocence is twofold. First, an innocent person, by supplying against himself an element missing from the prosecution's case, such as his presence at the scene of the crime, or the fact that he owned the murder weapon, may thereby convict himself of a crime he did not commit. \textit{Cf.} Jenkins v. Anderson, 447 U.S. 231 (1980) (Marshall, J., dissenting) (If petitioner had admitted that he had killed someone in self-defense, "he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide."). Second, the privilege embraces the principle that a person who conscientiously believes in his innocence has the right not to participate in a process that seeks a result repugnant to his conscience. \textit{See} R. NOZICK, \textit{supra} note 12, at 102: "[The defendant] may resist the imposition of [the system] . . . on the grounds that he is innocent. If he chooses not to, he need not participate in the process whereby the system determines his guilt or innocence." \textit{Cf.} M. GANDHI, \textit{NON-VIOLENT RESISTANCE} (1961) ("The real meaning of the statement that we are a law-abiding nation is that we are passive resisters.").
\end{itemize}

\textsuperscript{116} R. NOZICK, \textit{supra} note 12, at 102.

\textsuperscript{117} Murphy v. Waterfront Comm'n, \textit{quoted supra} note 104.
defendant whether to remain silent rather than cooperate with law enforcement authorities, or whether to demand a trial rather than seek to negotiate a plea of guilty, a conscientious attorney, on the view of the privilege presented here, has the obligation to explain to her client that the privilege is not available to a person who knows that he is guilty and who has no valid basis for conscientiously objecting to the law under which he is prosecuted.

To the degree that the privilege has evolved as an unconditional entitlement of all those accused of crime, without regard to a client’s guilt or innocence, or the nature of the offense, *Miranda v. Arizona* can be understood, at the level of the collective unconscious perhaps, as a cultural indictment of our modern system of criminal justice, in much the same way that the assertion of the privilege in Elizabethan England represented a repudiation of the entire system of persecution of Catholics by a government intent upon using the criminal sanction as a means of maintaining the purity of the established faith. It is hardly a coincidence that *Miranda* was decided at a point in our cultural development when there prevailed a serious skepticism about the rightness of punishment even when serious wrongdoing occurred, and that *Miranda* rights continue to be invoked with alacrity by defense lawyers who regard large segments of the substantive law of crimes, particularly those criminalizing victimless offenses and the status of illegal aliens, with withering hostility. Even in cases involving serious acts of violence, some defenders feel that the conditions of imprisonment are so dehumanizing and potentially violent that punishment would impose greater brutality on the defendant than that suffered by the victim.

The claims of conscience implicit in a substantial number of decisions to invoke the privilege raise difficult questions about which there most assuredly will be vigorous disagreement. The fact remains that conscience is a very real and pervasive force behind the defense of criminal cases today and no longer can be ignored. It is time to bring this aspect of the criminal process into the open, and to consider the very legitimate place that pleas of conscience have in constitutional history rather than continuing to regard them as extralegal political acts.

2. The Exclusionary Rule of *Miranda*

Up to this point, I have been considering the availability of the privilege in the absence of any governmental misconduct. More prob-


https://nsuworks.nova.edu/nlr/vol10/iss2/1
lematical are the defense attorney’s options after a constitutional violation has occurred, for example, after the police have interrogated the defendant and obtained incriminating statements in violation of *Miranda*. When a defendant seeks to invoke a procedural guarantee (whether it is the privilege against self-incrimination or any other constitutional safeguard) before any risk-creating governmental conduct has occurred, the defendant must either assert the constitutional claim as a personal right or not at all. Once a violation occurs, however, even though no personal right of the defendant may have been violated, there still exists a basis for claiming third-party or public interest standing since the government, by using an unlawful procedure, has acted wrongfully in imposing a risk of harm upon law-abiding members of the community.\(^{119}\)

As a general matter, public interest standing should be permitted only when the defendant is seeking a post-deprivation remedy;\(^{120}\) pre-deprivation remedies, by contrast, are necessarily personal in nature since, by hypothesis, there has been no unlawful government conduct which stands in need of deterrence or moral reclamation. Accordingly, the question whether a factually guilty defendant can claim third-party standing to challenge the failure of the police to conform to *Miranda* in obtaining incriminating statements from him, will depend on whether the exclusion of the statements is to be regarded as a pre-deprivation or post-deprivation remedy. Insofar as the Court has held that a fifth amendment violation does not occur until the fruits of a violation are actually used against the defendant,\(^{121}\) the *Miranda* exclusionary rule, unlike the *Mapp* rule, is properly characterized as a pre-deprivation remedy. On this theory, a client must have a personal basis for asserting the privilege; otherwise it is improperly claimed. It should be emphasized, however, that the epistemic nature of procedural protections requires that the client and his counsel have exclusive and unreviewable

\(^{119}\) For a discussion of the functional significance of pre- and post-deprivation remedies, see R. Nozick, *supra* note 12, at 104-105.

\(^{120}\) This will normally be the case when the defendant moves to suppress illegally-seized evidence. For an unusual case in which a pre-deprivation remedy was sought for a threatened violation of fourth amendment rights, see O’Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (en banc). An attorney, holding onto the records sought in a search warrant, persuaded the police not to carry out the search, and proceeded in the company of the police to the chambers of the municipal judge who had issued the warrant, and moved to quash it.

discretion to invoke the privilege. Once asserted, the privilege must be treated by a court as if it were being claimed as a personal entitlement by an innocent person.

Procedure and process have long been regarded as free from the kind of subjective and political judgments entailed by substantive issues. Indeed, in the quest for neutral principles that might somehow legitimize the institution of judicial review, procedure has become something of a civil religion. On deeper reflection, however, the problems of procedure turn out to be substantive after all, and process cannot be understood without reference to ultimately subjective and personal factors such as individual knowledge, conscience, and moral judgment.

V. Conclusion

The idea of a defense lawyer sitting across the table from some racketeer or street hoodlum and advising him to tell the truth and cooperate with the authorities initially strikes us as ludicrous. It is simply contrary to the Anglo-American way. We have learned to follow Justice Jackson's unforgettable dictum that any attorney worth his salt will advise his client to keep his mouth shut and plead not guilty. As I write these words, I keep thinking of an English lithograph that hangs on one of the walls in the law school where I teach. It depicts a defendant on the witness stand proclaiming his guilt to a courtroom of astonished onlookers. Judge and jurors, defense counsel and prosecutor, members of the press and public, are all falling out of their chairs, morally outraged by the spectacle of a defendant who, refusing to play by the rules, is actually going to tell the truth, the whole truth, and nothing but the truth.

The Warren era and its romance with the great principles of the

122. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137. Adapting Chief Justice Marshall's dicta, which has provided the basis for the "political question" doctrine, one might say that "the [attorney] is invested with certain important . . . powers, in the exercise of which he is to use his own discretion, and is accountable only to his [client] in his [professional] character, and to his own conscience." Id.


124. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").
fourth, fifth and sixth amendments obscured the ideals of truth, justice and the protection of the innocent that made Perry Mason a mythical hero to my generation. Once we discovered that most clients are not exactly innocent, we needed new ideals to rescue the tarnished image of the defense lawyer. We found them in the vindication of the Bill of Rights and the moral equivalent of war with the specter of a police state as we came to learn that what the defense of criminal cases is about is not the search for truth, or justice. What it's all about is making the government follow the rules. More recently, I find myself wondering what Perry Mason and Paul Drake would have thought about all of this.

One way for a lawyer to get into trouble is to admit any ambivalence he may feel about a cause he has been defending for years. It is one of the tragedies of the traditional model of law and legal education that it partly cripples us to function. It is as if to make our point, we had to demolish every argument on the other side, arguments which, at a deeper and wiser level, we suspect contain some part of the truth. The better approach is to recognize that ambivalence has an important role to play in the educational process. By expressing our true feelings about issues on which our hearts and minds are sorely divided, ambivalence can provide us with the means for joining our students in a common search for more satisfying, more ethical, and therefore more enduring solutions to some of our most troubling dilemmas. Our purpose as teachers should encompass not only the teaching of the law as it is, but the teaching of the law as a good person and a good lawyer might wish it to be.

In presenting a public interest model of the criminal process, I

125. The extent to which the search for truth is subordinated to other considerations is illustrated by Mr. Justice White's memorable statement concerning the role of defense counsel:

Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.


127. See Bollinger, Comment, LAW QUADRANGLE NOTES, UNIV. OF MICH. LAW SCH. ALUM. BULL., Spring 1981, at 14.
have expressed my own ambivalence about our existing system of constitutional rights. However tentative and problematical this new model may be, it is intended to suggest how it is possible to derive from the constitutional text an alternative understanding of the meaning of individual rights in criminal cases that is at least as defensible, as principled, and as rooted in constitutional theory as the ruling model. In the final analysis, these issues of criminal justice may present morally intractable dilemmas — alternatives between contrasting theories of constitutional adjudication for which there exist no objective standards that will enable us to confidently choose one over the other. Our clinical and classroom teaching, and our efforts to relate theory to practice, should at least aim at providing our students with some means of escaping the prison of adversary roles that has taken such an emotional toll on the personal and professional lives of so many criminal lawyers. Our students need to know that what many have already intuited at the level of common sense is common law, that the rules learned for the bar examination are no sacred text and the bar association no church, that what they will be experiencing for the remainder of their professional lives is a process of continuing education that may depend for its practical application and emotional sustenance upon such personal virtues as the quest for truth, individual conscience and the wisdom to know when the client’s private self-interest ends and the public interest begins. In much the same way that we have come to learn that courts are not the only vehicles for realizing constitutional values — that the executive and legislative departments of government also have their part to play — we may come in time to the important recognition that the individual practitioner, as a fourth force in government, is also a vital and enduring source of public values.
DOONESBURY
by Garry Trudeau

UH... MISS SLADE, MAY I MAKE AN OBSERVATION?

MISS SLADE, YOUR... UM... ATTIRE SEEMS MORE APPROPRIATE FOR A BEACH THAN A CLASS OF LAW. WHY CAN'T YOU WEAR SOMETHING MORE SENSIBLE... LIKE MISS CAUCUS...

BECAUSE SHE FEELS MORE COMFORTABLE IN WHAT SHE'S GOT ON! NOW AIN'T YOU SUPPOSED TO BE GIVING A LECTURE?!

HEY... BLONDIE—YOU'RE NICE. WELL?! UH... LOST MY PLACE...
A Neglected Minority — Women In Law School

Faith Seidenberg

Faith Seidenberg has been a leading civil rights attorney for over thirty years, actively involved in Congress of Racial Equality, National Organization for Women and American Civil Liberties Union. She is a member of an all-woman law firm and, as an adjunct professor at Syracuse University College of Law, teaches a course entitled Women in Law.

"How much farther we will have to go to create those profound changes that would give birth to a genderless society. . . . Beyond to a species with a new name, that would not dare define itself as man."

Robin Morgan¹

There are more women in law school than ever before, but many of them do not stay in the legal profession. In August, 1985, the New York Times published an article entitled Women in the Law: Many Are Getting Out:

In March, Madeline Hornwood did something that shocked many of her friends, relatives and colleagues. She decided to stop working as a lawyer.

The 28-year-old former litigator had practiced law in Manhattan for nearly four years. In that time, she said, several things caused her to sour on the profession, including the adversarial nature of the work, sexism, her feeling that she wasn't contributing to society and the lack of time for a personal life.

So even though she owed $16,000 in loans for her legal education, she quit her job with a law firm and is now looking for something in the real estate field. She is certain, she says, that she will never return to the law.²

¹ R. Morgan, Goodbye to All That as reprinted in The American Sisterhood 360 (1972).
There are also men who leave the profession of law, but it seems as if the percentage is smaller. What are some of the reasons for men leaving in smaller numbers? One reason, of course, is the glut of lawyers in our society and, thus, the scarcity of good jobs. In 1970, there were 82,000 law students, 8.5% of whom were women. In 1980, the number had climbed to 125,300, 33.5% of them women.\(^3\)

A second reason is the nature and quantity of the work. If one goes into a large law firm and has to work fifty, sixty or even seventy hours a week, one has very little time and energy left over for oneself or one's family. The pressures are, of course, greater on a woman than on a man because society still demands that a woman be the primary parent and/or nest builder.\(^4\)

Even for men, this kind of work schedule is grinding and often unsatisfying. I know of one young male lawyer who graduated from a prestigious law school in New York City and immediately obtained employment at $40,000 per year. After working for two years, at least fifty hours a week, and having to wear a beeper so that he could be called in on weekends if necessary, he quit and became a piano teacher. He now nets about $12,000 per year and is much more contented, he says. Anecdotal, perhaps, but not unusual. How much more understandable, then, for women who are forced by current mores into working and taking care of a family.

Unfortunately for today's female lawyer, there is very little history on which to draw.\(^5\) Judge Ruth Bader Ginsberg of the D. C. Court of Appeals used to tell a story about her attendance at Harvard Law School in the 1950's. On one occasion, she and the very few other female students at the school were invited to dinner at the dean's house. After dinner the dean asked each one to stand up and state why she felt that she was worthy of taking a man's place at Harvard Law School! We seldom see that kind of open hostility in law schools today, yet both female law students and female lawyers are still treated as the "other." Few law firms make any effort to alleviate the problems of female lawyers in the workplace.

Marna S. Tucker, a partner in a small Washington, D.C., law firm, recalls the resentment caused by her first maternity leave eight years ago. Some of her partners felt ripped off by her request

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3. Id.
for a two-month leave. They felt that because having a baby was her own decision, they shouldn't have to help fund her choice to do so, according to Tucker.

The reaction to her desire to leave early each day to nurse her baby provoked even more of an uproar. Her partners felt that by not being available in the office for after-hours meetings and general partnership talks, she was not fulfilling the obligations of partnership.

Their decision? They docked her partnership share for hours she was not in the office. "I still resent that decision, and it sometimes colors my reaction to other partnership matters even now, eight years later."  

After reading that vignette, I was surprised that she was surprised at her firm's reaction to her pregnancy and birth of her child. What had she expected? Had no one in law school prepared her for the general distrust of, and outright hostility to, women in what was previously an almost all-male profession? No, obviously no one had.

Discrimination against the female lawyer is nourished by law schools. Marcia Greenberger, who graduated from law school in 1971, tells of a common experience:

Only 12 women ultimately graduated in my law school class. We were totally conspicuous. The fact of being different and having to explain and justify to my classmates why I was in law school, especially in the first year, was something I accepted, although never appreciated.

Some professors never called on us. Others took different tacks. My criminal law professor, for example, saved all rape cases for the women — it was a great source of amusement in class to require the women to review the details of the rape and the defenses raised.

But the treatment of women in law school was not an issue that many discussed or viewed as a problem.  

It was a problem then and remains a problem today.

I propose that a course be offered that deals with the problems of the female student and the female lawyer. "Rubbish! Isn't that a little exaggerated?", a male professor might ask. No, it wasn't considered

rubbish to have remedial classes for black pre-law and law students. Granted the problems of women are somewhat different, but no less real. For example, just last year I asked to critique a class in trial practice along with a male District Attorney. After listening to ten male and female students conduct a mock trial, he began his critique, "I know this seems unimportant, but the first thing I always notice is whether the opposing attorney has his tie on straight." The women in the class had not yet entered his consciousness.

When Greenberger graduated in 1971, there were few, if any, courses in Women's Rights. Now many law schools offer a course which deals with, for example, pay equity, abortion rights, and sexual harassment. Yet at no school, I believe, is there a class dealing with the problems of the woman lawyer. If there were such a course, what problems should be explored in depth?

Matters of presentation — attire, demeanor and speech — need to be addressed. No matter what they do, women aren't going to look like white males, the present standard for all lawyers. Should women wear a suit with pants? Is that too "mannish"? If they wear a skirt, must it be gray or brown or black? What do they do if they like red? Will judges be offended and consequently rule against them?

It is a matter of self-confidence. Their place in the courtroom is so new that it does not quite fit, like fine leather shoes not yet broken in. And so they remain prim, extremely businesslike and wary, efficient but not at ease.

Some women attorneys, a certified shorthand reporter observed, do live up to that stereotype of trying to be too "mannish."

"Very few have enough confidence that they don't have to project that mannish image," she said. "It is so ingrained in them that men are lawyers. They try to be overly sober, and are never as friendly as men. They are very courteous, even more businesslike than men in dealing with the court staff. They are just afraid to unwind." 9

Not only are women unsure of how to dress and act in the courtroom, they are also unsure of how to sound. A woman has been indoctrinated from time immemorial to the idea that her voice should be

soft, low and never strident.\textsuperscript{10} But now she must appear before a jury. How can she sound soft and pleasing, but also forceful and in control? Questions concerning how tough to be, and when, plague many women lawyers.\textsuperscript{11} Women lawyers, however, should not simply be moulded into imitating male lawyers. In fact, in so far as females are socialized to be nurturing and socially aware, male lawyers might do well to imitate their female counterparts! Conciliation skills, which are bred into women at an early age, should certainly be part of a lawyer's arsenal of abilities.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{pressure_on_women_to_become_men.png}
\caption{Pressure on women to become men}
\end{figure}

Not a problem for law school? Why not! We teach trial practice in most schools today, and we often use sophisticated video equipment to show the student how she or he looked and acted in a mock courtroom setting. Yet most of these trial practice courses are taught by men for men. Although there are excellent male teachers in law school, they don't speak "female;" that is, they don't begin to deal with the courtroom from a female perspective. Therefore, some of this training must be offered by female professors and geared to the special problems of the female lawyer.

Women, from birth, have been trained differently from men. Women have been taught to be compliant as well as conciliatory. Law,

\begin{itemize}
\item \textsuperscript{10} Seidenberg, \textit{supra} note 8.
\item \textsuperscript{11} Sorenson, \textit{A Woman's Unwritten Code for Success}, 69 A.B.A. J. 1414 (1983).
\end{itemize}
however, often stresses the adversary as opposed to the conciliatory. "I just don't have the personality for the adversarial part of it," said a woman who has been a lawyer for the City of New York for three years. "I'm basically easygoing, and I don't like to argue — especially over the petty nonsense that lawyers argue over. I guess that means I shouldn't have been a lawyer."12

Maybe or maybe not. Perhaps it means that in law school she should have been taught adversarial skills in a setting which would have dealt with, or have been directed towards, the female psyche. There should be women lawyers who would specifically critique the women students and, in addition, expound on the difficulties they themselves have faced. In exploring a common problem, the student would be strengthened by knowing that she is not alone and by receiving the implicit message that there are, in fact, many survivors. [One of the problems law schools must face, of course, is that there are not enough female professors, and there are even less female trial lawyers who have been around long enough to develop theories on how to best present oneself — but there are some.]

The class should deal with the real world of law and women’s place in it — not only how women should sound to the public and how they should dress, but how they should act before a jury, other lawyers, and, of course, judges. Female lawyers should not simply be moulded into imitating male lawyers. The specific problems facing female law students who are married or who have children should be addressed and solutions proposed. It might be suggested, for example, that such students take an extra year to finish law school. This would permit a lessening of pressure at the most difficult times.

Today, female lawyers earn substantially less than their male counterparts;13 nor do they make partnerships as readily.14 "Women have made tremendous inroads into the entry levels of their profession, but they're stalled right at the edge of the top," says Jacqueline Stanley Listig, executive director of an Illinois State Woman’s Rights Agency.15

Therefore, law schools should offer a class dealing with the

problems of female lawyers in the marketplace: their relationships with senior partners, secretaries, colleges, problems of pregnancy, shared time, overtime, terms and conditions of employment, what to expect from others and what is really expected of them.

Lastly, a class should explain the various kinds of work for a female lawyer. The woman who quit her job at age twenty-eight because she didn’t like working fifty hours a week really couldn’t have looked at all the alternatives. A law class could explore the wide range of job opportunities such as: joining a small firm with a normal work week of thirty-five or forty hours, contracting our services twenty or twenty-five hours per week, working as a legal aid attorney, starting one’s own practice, or teaching. The possibilities are endless. In short, such a law class should look into the individual needs of its students and help them to find their own niche.

Male students could also benefit from this kind of education, but women need to know that there is a place for them “out there” after graduation. They need to discover that they have something unique to contribute, that they are valuable. So far, law schools have just made women feel that they should be grateful that they are there at all, “taking a man’s place.” A course geared to the women’s needs could go far in righting past inequities.
Hi, typewriter.

How ya dain', Dollface?

Ms. Joan O'Grady
Birth Date:
July 21, 1935

Okay, Ready?

A. Have you submitted your law board scores?

A. Yes. Mailed under separate cover.

B. Are you a male or female applicant?

B. Female.

C. If your answer is female, why should we take a chance on you and train you to be a lawyer when you'll probably just get married anyway?

Aarrgh!

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Robert Hutchins’ Question¹ Defining the Purpose of Legal Education — Then Doing Something About It.

Fredrick C. Tausend

Fred Tausend is completing a six-year tenure as dean at University of Puget Sound School of Law, having previously practiced law since 1958. An experienced trial litigator, he has also taught courses in civil procedure, antitrust, trade regulation, unfair trade practices, trademark and copyright.

“The purpose of a good law school ought to be to furnish affective professional education and training to the men and women who will become American lawyers.” I believe that this simple maxim, if expounded and implemented, can have a significant effect on the directions which legal education takes as it follows, and occasionally leads, a changing profession. The education of students who are about to become lawyers should be the test by which everything the law school does is measured.

In order to measure the sense of what I refer to as the fundamental principle of legal education, one must first understand what I mean by it and, second, recognize that to serve it well requires a sensitive balancing of other interests, including the interest of most law teachers in pursuing through scholarship, research, and writing those intriguing questions and principles of law which have lured the best law teachers away from practice and into teaching in the first place. Let me start by elaborating on my statement of the purpose of a good law school.

I talk about “professional education and training” in stating the law school’s overriding concern. Professional education seems to me to have different goals than general education or liberal education. By using the adjective “professional,” I suggest that the purpose of the education is to play an important role in equipping the student to engage

¹ "‘What is the purpose of the Harvard Law School?’ asked Robert Hutchins before a crowded gathering in Austin Hall over two decades ago. ‘What kind of question is that?’ whispered a classmate sitting next to me. Wanting to listen to the next words of the great iconoclast of the educational world, I chose not to reply. In retrospect, perhaps, I should have whispered back: ‘It is the question.’” Nader, Introduction to J. Seligman, The High Citadel (1978).
in or practice the particular profession for which the education is intended. The use of the adjective also requires some understanding of what a profession is and, in particular, what the special requirements and obligations of the legal profession are. Much that is wise has been written on the subject, and I gladly refer you to the writing of others. Among works I have found especially illuminating are the two volumes of the biography of Oliver Wendell Holmes by Mark A. DeWolfe Howe, Alpheus Thomas Mason's "Brandeis A Free Man's Life," and more succinctly, Alexander Bicke's short essay on Brandeis, appearing as an introduction to a Brandeis Bibliography by Roy Mersky at the University of Texas Law School. I am also impressed by the American Bar Foundation sponsored study, "The Making of a Public Profession" by Zemans and Rosenblum and "Training For the Public Profession of the Law" by Alfred Z. Reed.

The use of the word "affective" in my thesis statement signifies my conviction that a person's formal legal education should make a difference in the kind of lawyer he or she becomes. I have more to say on that point below.

Turning to the noun, "education," I like what the Latin derivation suggests about that word, the verb "educate" meaning "to draw from." Legal education, at its best and as practiced for the last 100 years in America, may be an almost literal embodiment of the original meaning of the word. When the socratic method or some variant of it is well used, the teacher does indeed draw from the student that combination of information and analysis which we call "legal thinking."

I have also used the word "training" which suggests something quite different from the process drawing forth the ability to think analytically. To me effective legal training means identifying, instilling, and reinforcing certain habits of thought and behavior which, when they jibe with the instincts and values which the future lawyer brings to law school, provide a sound foundation for an able and ethical lawyer.

I have used the verb "become" in my definition of purpose to emphasize the fact that legal education cannot possibly be completed in the time alloted for law school. Of course, we know that the processes which make for the good lawyer begin before and continue long after

2. With some misgiving based on conventional usage, I have selected this word rather than "effective" to make my point that legal education should do more than produce functional results. It should affect each person who participates in it in fundamental ways.
law school; but one thesis of this piece is that law schools can assume more responsibility and become a greater influence than has so far been the case.

Finally, I refer to the law school's mission as the education and training of the American Lawyer. I used that term partly because I know quite a bit about what the American Laywer does and is expected to do, and very little about the role of lawyers in other nations. But I emphasize American also because in America the law and the lawyer have a far more pervasive and decisive role in our society than is the case in other countries and cultures. Doubtless, this is at least in part the result of the comparative absence in America of other strong social structures such as social class, religion, or family cohesion. But perhaps an even greater cause of our constant turning to law is the persistent struggle within American society to balance our egalitarian instincts with our desire to recognize, encourage, and reward individual worth, and our desire to achieve something, neither purely egalitarian nor purely individualistic, called "justice for all." Whatever the reasons, the concepts of law and the legal system are at the very heart of what makes American society hold together and function.3

In this country, we do not bifurcate the profession. Not only is there no separation between barristers and solicitors, there is also no

3. Alexis de Tocqueville's observation of the pervasive influence of lawyers in American society is, if anything, more true and beneficial today than it was in 1835. His conclusion is most succinctly stated in the following paragraph:

Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate, hence all parties are obliged to borrow the ideas, and even the language usual in judicial proceedings, in their daily controversies. As most public men are, or have been legal practitioners, they introduce the customs and technicalities of their profession into the affairs of the country. The jury extends this habitude to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contracts the habits and the tastes of the magistrate. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself to all the movements of the social body; but this party extends over the whole community, and it penetrates into all classes of society: it acts upon the country imperceptibly, but it finally fashions it to suit its purposes.

A. de TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (1945).
genuine separation between public lawyers and private lawyers. Increasingly, civil trial lawyers take criminal defense cases and even distinctions between the so-called plaintiff's bar and the defense bar tend frequently to blur. If one reads the oath that a new attorney takes in the state of Washington, one quickly sees that he and she assume responsibilities not only for their own individual clients, but for the cause of the less fortunate in our society as well. Each lawyer bears some measure of obligation to the protection of the judiciary and the improvement of the law and the system of justice. Not only the oath, but long-standing tradition and the stated policies of most bar associations recognize that each lawyer has a dual set of loyalties — those he owes to his client and those he assumes as "an officer of the court." Thus, ideally and to a great extent inescapably, each American lawyer must have enough knowledge and skill to represent his client's interests effectively, must understand what it means to represent and advocate the interest of another person, must be enough of a legal scholar to understand how the law develops and changes so as to better meet society's needs, and must be mindful of his obligations to preserve our legal system when it works well and improve it where it falls short. In so doing, he must represent his client within the adversary system and, simultaneously, fulfill his duties to the legal system. These duties include a commitment to:

The resolution of disputes in a manner which will prove ultimately acceptable to the participants in the dispute;
the protection of individual rights even when the will of the majority at a given moment would not protect those rights;
the protection of society from those who would outside the law destroy or impair life, liberty, or property; and
that elusive concept on which both civil and criminal justice so often turn — the search for truth.

Virtually every day of his professional life every lawyer balances these interests.

I believe that this analysis of the obligations of an American lawyer furnishes the substance of my definition of the purposes of legal education and helps define the law school's responsibility to the profession. As I have already noted, that portion of a lawyer's legal education which she receives in law school cannot possibly be expected to provide

all of the education and training which a good lawyer needs. But it is
foolhardy to think that we can have a large number of lawyers who
meet the definition of a "good lawyer" unless our law schools take on
the largest share of the responsibility. That portion of a person's educa-
tion which comes from family, religious training, grade school, high
school, college, and early life is, of course, essential to the development
of skills and values required of a lawyer, but they are only tangentially
directed to those special skills, challenges, and sensitivities which are
necessary for a person to meet her obligations within the profession.

Similarly, post-law school education is essential but necessarily er-
ragic and hit-or-miss. Even if we are to enter an era of more consistent
and pervasive continuing legal education and ever-growing opportuni-
ties to be reminded of our ethical duties, law school will remain the
only time in a lawyer's life when she has been exposed to the special
demands and expectations of the profession over a prolonged, concen-
trated, and intense period of time. Law school is the first and the last
institutional opportunity we have to educate and train America's law-
yers in a manner most likely to improve the profession and to assure
that it will meet the obligations inherent in the special role of lawyers
in American society. Acceptance of this proposition results in accept-
ance of my second axiom of legal education — what law schools are
doing is important. While this may seem obvious, I believe that much
of what goes on in law school is based on the belief that law schools,
and particularly law teachers, cannot make much of a difference. Not
so.

It has long been thought that all that law schools could really do
well was to educate (or train) their students in the skills of legal analy-
sis. More recently, schools have taken on, with varying degrees of suc-
cess, the teaching of some of the principal skills of application,\textsuperscript{5}
such as courses in trial and appellate advocacy, courses in legal writing and
drafting, and various clinical programs as well as courses broadening
the law student's understanding of law-related philosophical, historical
and theoretical concerns. Formal courses in ethics are now required. As
the business of running a law firm, large or small, becomes more ex-
pensive and complex, and as technological improvements enable tasks
that used to be performed by lawyers to be performed by secretaries
and paralegals (and economic necessities require them to be so per-

\textsuperscript{5} For an illuminating analysis of the skills of understanding and application, see
Keeton, \textit{Teaching and Testing for Competence in Law Schools}, 40 Md. L. Rev. 203
formed), law firms increasingly seek to hire persons who have the skills of application as well as analytic skills. Sooner or later, law schools will discover that we can do a better job of legal education if we find a way to respond to this ever-growing demand of the profession for which our students are purportedly being readied. Similarly, as lawyers become more involved in setting our social goals society will demand — and should receive — lawyers able to understand the borderland between law and the social order.

The First Year of Law School

The most important year of law school is the first year. We have always known this to be true, but in many ways we have not acted as if we believed it or recognized that this fact imposes certain obligations on every law school with respect to its students.

Persons enter law schools with vastly different backgrounds, foundations of knowledge, and varying aptitudes for quick assimilation of the concepts and techniques of legal analysis. Since law school is, by its very nature, unavoidably competitive and if the concept of equal opportunity among a law school's entering student is to have any meaning, then the first year of law school is the time when disparities among students based on factors other than innate ability must somehow be equalized. During the first year, each student who will succeed must begin to grasp the difference between thinking like a lawyer and thinking like a layman. It is not a mere slogan; it is a distinction both irritating and essential. A law school which recognizes its obligation to give equal opportunity to each admitted student will do all it can to insure that each student makes major strides toward acquiring the skills of analysis of complex facts and legal principles and a sound basic knowledge of legal doctrine in several discrete fields.

To begin to think like a lawyer, the first-year student must learn to

6. While a number of law firms have new lawyer training programs of widely varying degrees of sophistication and intensity, it is my observation that very few of these programs are comprehensive or consistent enough to do the necessary job. As economic demands on lawyers and law firms increase, these programs become even harder to maintain. Of course, many, even most, new lawyers don't even get the opportunity to enter practice with law firms which have anything resembling a formal training program. If he is lucky, a new associate can link up with a more senior lawyer who takes him to court or conference and says, "Watch me." We can, and must, do better if we seriously want to maintain and improve our professional standards of excellence and public responsibility.
think with precision, to question assumptions, to examine thoroughly, and to organize effectively. This is a large order for many students to fill. To meet their responsibility, law schools must be sure that all sections of all first-year classes are taught by at least minimally experienced law school teachers who retain a strong interest in and commitment to teaching. In most law schools, first-year students have few, if any, choices of courses and no choice of teachers. They are simply assigned to a given section. Where this is so, teaching styles and grading tendencies should be “balanced” throughout the first-year sections to insure fair treatment and quality education to all students. Given the measurable and lasting rewards which flow from first-year success (law review selection, clerkships, summer associate positions, and the next rungs up the ladder which these lead to), this is a responsibility which cannot be taken lightly.

For the past several years, the University of Puget Sound Law School (UPS) has followed a policy of limiting first year teaching assignments to teachers who have the qualifications described above; nor has the Law School permitted new teachers or temporarily or terminally “tired out” teachers to teach first-year classes. Notwithstanding our success with the policy, I am told that it is a practice followed more in theory than in fact in many law schools. One colleague at another school informed me: “We don’t do that at my school. Here we have tense kids teaching tense kids.” Of course, law schools need new teachers and those tense kids who teach need to cut their teeth on someone, but isn’t it wiser and fairer in the beginning to assign them to upper level classes where students can elect to take the course or not, where individual course grades tend to be less important for future career

7. The decision as to terminal, i.e. incurable, teaching fatigue or indifference is one not easily or lightly made. Nevertheless, if a law school is to take the purpose defined above seriously, then someone (I nominate the Dean) must decide when the collective energies of the school are better directed elsewhere than toward applying incentives to the reinvigoration of Professor A’s commitment to good classroom teaching. Once that decision is made, the consequences will vary depending on the other qualities which Professor A has to offer to the school, the school’s own standards and requirements for its faculty, and the economic incentives which drive institutional decisions and make hard choices (or the adverse consequences of avoiding hard choices) inevitable. At most law schools, however, in making or ignoring the decision, the benefit of the doubt is given to Professor A. If he wants or is willing to continue to teach first-year courses, he is assigned a first-year course. My implemented purpose test would require the question of temporary or terminal fatigue to be asked and decided, and would resolve doubt in favor of relieving the teacher of his first-year assignments.
choices, and where the student taking the class will have acquired some of the knowledge and skills necessary to fill-in whatever gaps in learning might be created by the teacher's inexperience?

A policy concerning who should teach first-year classes may be as important as what is taught; but it does not obviate the need for serious thinking about what the specific goals of the first year of law school ought to be. Let me begin by observing that those goals can and, no doubt, should, differ depending on the size and location of the school, its economic and personal resources, and the characteristics of its entering students. I hypothesize an urban law school with a somewhat diverse group of entering students in terms of economic backgrounds, LSAT scores and undergraduate grade point averages, age and prior experience. I assume also economic realities which require that the typical first year section will include between 75 and 125 students — i.e. a large class in which regular individual attention to each student is not possible.

Given these fairly typical assumptions, what are suitable goals for first year legal education? I suggest the following:

A key goal must be learning the techniques of careful, precise analysis of legal questions, by understanding identifiable legal principles and application of those legal principles to facts and patterns of facts. A grasp of the genius of evolutionary common law remains, in my view, the insight most essential to becoming a proficient American lawyer.

I also believe the first-year student should gain acquaintance with the development of public law, public policy as expressed through law, and the application of statutes and administrative regulations to the development of legal principles and the resolution of particular disputes. An introduction to statutory and administrative law and to legal process are important in the first-year because they furnish a public law perspective to what may otherwise appear to first-year students to be the exclusively private law bias of the common law.

When I speak of the common law, I refer to that particular process through which judges, at both trial and appellate levels, articulate, expound, and expand or contract rules and principles which may in the future govern the conduct and legitimate expectations of many, even though these very principles and rules have been created in the process

8. While racial and cultural diversity are also important law school (and professional) goals, to date success at achieving a student body which can honestly be characterized as diverse when those criteria are applied has been spotty at best.
of resolving a particular dispute between two, or sometimes among several, parties. Seen in this light, statutes and even administrative regulations become absorbed into the common law process of American law.

Insight into how the common law process unfolds and how it relates to the broader society, the acquisition of the skills necessary to effective participation in that process and the inculcation of refinement of intellectual curiosity are, in my opinion, the basis of first year law school education. Understanding common law thinking is the most difficult aspect of becoming a lawyer and, at the same time, the skill most essential to functioning as an effective American lawyer. Winston Churchill once observed that his early education enabled him to get into his bones "the essential structure of the ordinary British sentence — which is a noble thing." Just as that act of absorption is the prerequisite of the good writer or speaker of English, so must the good American lawyer get the genius of the common law in his bones. Without casting out related and additional goals from the first-year, law schools must concede that there are real and frustrating constricted limits to what can be achieved educationally in a brief time period. Recognizing this, I believe it appropriate to assign the highest priority for the first year to that aspect of legal analysis. It was the inspired contribution of Christopher Columbus Langdell, himself a failed lawyer, to recognize that goal and to discover that it could be accomplished, both economically and efficiently, by the probing examination through the so-called Socratic method of examination of the decisions of appellate courts. While this approach has serious and oft-noted drawbacks, addressing as it does only a part of the task of a complete legal education, it does come to grips with the most difficult and important part of that task. For this reason, I see it as the point at which legal education should begin.

Several other less compelling but highly important concerns should govern first year legal education. The traditional first-year curriculum can be viewed not as five or six different courses, but as one subject looked at from six different perspectives. The best teachers of the traditional first-year courses will understand and develop the interrelationship of the various subject areas. Even absent a formally coordinated approach (which I favor), the good teaching of these subjects will make the point implicitly.

As for teaching method, I believe that fundamental to effective legal education is the active, not passive, involvement of each student on a regular basis. Since learning is accomplished best when anxiety and fear are reduced to that point where they no longer paralyze the
student, I believe it is incumbent upon a serious law school to create a first-year classroom atmosphere where students are strongly encouraged by a variety of appropriate means to participate actively and regularly in their own education and that of their fellow students. This is very difficult in large classes for a significant number of first-year students (I was one of them myself). The techniques used by individual teachers will necessarily vary, depending on their own personalities, predilections, and skills, but each teacher should make it his or her business to find out which methods are most successful for that teacher and that particular class.

As a more general guide, I favor the scheduling of at least one substantive law class taught by regular first-year law faculty members in a section small enough, say thirty-five to forty-five students, so that every student will have the unavoidable opportunity to participate regularly and actively. Once the ice is broken, the student may find that he or she can even splash about in the larger ponds of 75 to 125 students.

An intensive and comprehensive writing program is, perhaps, the most important curricular reform that we can make to enhance our students’ ability to grasp the fundamentals of legal reasoning and analysis, and translate their comprehension into comprehensible written and oral expression. The legal writing program which we have developed over the past five years at UPS has made a significant contribution to our curriculum. I have no hesitation in urging study of it as a model program.

Need for practical experience
The Second and Third Year

For years, legal educators, law students, and lawyers have expressed dissatisfaction with the second and third years of law school. There has been a movement to reduce the required law curriculum, a movement which still appears to have some vitality, even as members of the profession complain that legal education accomplishes too little. Once the fear, unfamiliarity, and anxiety of the first year are gone and most students have acquired (though not as yet mastered, of course) the fundamental skills of legal analysis, these students find repetition and irrelevancy in what remains. Continued heavy emphasis on the theoretical and a continuing absence of the practical begin to irritate and frustrate many law students. Given the cost of law school tuition and the cost of living, as well as the fact that many law students are now older and must support themselves and their families, a majority of law students work at least part-time during their second and third years of law school. Many of these law students have jobs in law offices or public agencies, where they have an opportunity to apply the skills they acquired during their first year in law school. This fact ought to be advantageous to the student’s classroom performance but, for a variety of reasons, that seems too seldom to be the case. To the contrary, it appears to accentuate the perceived irrelevance, even uselessness, of the upper level law curriculum.

In order to find ways, at long last, to meet this problem, it is important first to identify those factors which contribute to the problems with upper-level legal education. In no particular order, they are:

1. When fear and anxiety are gone, the fact that much of what a lawyer or a judge does is not terribly interesting becomes apparent. Every good lawyer and every good judge knows that drudgery — sheer hard work and attention to tedious detail — are an inevitable and indispensable part of the lawyer’s lot. Students usually come face to face with that fact during their second year of law school, and they do not like it.

2. As Professor (formerly Dean) Roger Cramton has observed, most members of law faculties, simply by being who they are, send a contradictory message to their students. The leading lights of almost every full-time law faculty are persons trained in the law who have elected early in their careers not to practice law. Yet, in every law school, year after year, the vast majority of students are there because they seek to become practicing lawyers. There they are, these future practitioners, in the hands and under the influence of men and women
who have decided that he or she does not wish to practice that very profession (Note Jonathan Chase's comments, page 425).

This anomaly exists in most, although not all, teaching institutions, but I think it becomes particularly noticeable and troublesome in professional education. That is not to say, however, that our principal law school teachers ought to be practitioners. To the contrary, my experience working with adjunct faculty at UPS has convinced me that the experienced practitioner who is also an effective teacher is both hard to find and hard to retain. While a carefully planned and integrated approach to the building of an excellent adjunct faculty of skilled practitioners, judges, and other part-time professionals can succeed, and greatly enrich a law school faculty, the task of building a skilled and dedicated adjunct core is more difficult than finding full-time academicians who can make effective teachers even though they may be sending their students a somewhat contradictory message. Thus, the contradictory message will remain a fact of law school life. It should, however, be balanced in a good law school by assuming regular student exposure in the classroom and other law school settings to persons involved in and infectiously enthusiastic about the profession and the practice of law. Such persons can, and should, be focused on both the full-time and the part-time faculty.

3. In many law schools, the top students, at least, have been hired before the end of the first semester of their second year. To the extent that students go to law school primarily in order to get a job, once they have been hired, they have accomplished their purpose, and the importance of law school begins quickly to fade.

4. Most teaching materials continue to emphasize the analysis of appellate decisions. Although most students cannot claim mastery of the skills of legal analysis in just one year, the constant repetition of the same techniques using substantially the same media of instruction makes even the most enthusiastic acolyte want to scream, "Enough!"

5. Too many students, understandably, use their remaining years in law school to take courses in those subjects which they believe are essential or helpful to passing a state bar examination. This approach has two problems.

First, students are choosing courses in which they are not interested and/or which are taught by teachers who do not particularly excite or stimulate their thinking processes. Or they may even take courses from teachers who have a reputation for giving higher grades because they understand that employers use grades as the principal criterion for interviewing and hiring. Prospective employers should be
more sophisticated in their hiring decisions, should have a better understanding of what law school grades mean in general, from particular law schools and from particular teachers, but that is a subject for another time.

Second, the issue of the impact of the bar exam on the education of second and third year students must be addressed head on. A well-taught law school class is not an efficient way to acquire the skills and information needed to perform satisfactorily on a state bar examination. The basic skills of appellate case analysis, identification and articulation of legal principles, and the spotting of particular issues raised by discreet fact patterns are included in the skills taught and, for the most part acquired, in the first three semesters of a traditional law school. Thereafter, a stimulating program of legal education should spend less time on doctrine and issue-spotting. Rather, the understanding of legal theory and policy, the acquisition of skills of application, the ability to relate theory and fact to the development of a new synthesis so as to participate in the evolution of the law, whether it be on behalf of a particular client or for its own sake, are skills absolutely essential to the truly excellent American lawyer, but the demonstration of such skills are rarely subjects of bar examinations, nor may they reasonably be.

Still, most law schools, in these days of increasingly competitive struggles for survival, cannot afford to take a hands-off position, shrugging and saying: "It is not our concern whether our students pass the bar examination on their first try or their second try, or at all. That is simply up to them." Perhaps the great law schools, whoever and whatever they may be, can afford to take such an attitude. Competent law schools who must compete for qualified students with other competent law schools, and whose economic health depends, at least in part, on the tangible gratitude of their alumni, cannot today afford to adopt such an attitude. How, then, can we both prepare students for the bar examination and teach them something challenging and useful in the second and third years?

One possibility, which our school is presently investigating, would be a comprehensive exam covering basic subjects to be administered either at the end of three or four semesters. The exam would cover the basic first-year courses and additional courses to be required in the first semesters of the second year, such as corporations, evidence, wills, trusts and estates. The administration of such a comprehensive exam would, no doubt, be accompanied by a return to a greater number of required courses in the second year of law school. For that reason, I
have some doubt as to its wisdom.

A second possibility is to reduce the number of credits required for graduation from, say, 90 to 86 consistent with ABA regulations, substituting fewer but more concentrated courses in the last semester of law school, and combining these with a mandatory comprehensive bar examination preparation course of, say, six weeks. (Alternatively, it might be given every Saturday during the students' final semester with a concentrated week at the end.) The bar examination preparation course ought to be taught by persons experienced in such courses, not necessarily regular members of the law faculty. I suggest this approach not so much as a way to increase the prospects of bar passage (most good law schools, including UPS, have generally good records of success on state bar examinations), but in order to increase the likelihood that students will select their elective upper-level courses on a basis more likely to hold their interest and their conscientious participation than the all-too-common approach of "I better take Commercial Paper because it will be on the bar exam." Some law school deans assure me that such thinking is rare or non-existent in their schools, but I have talked to their students who confirm my suspicions.

Once a law school has taken concrete steps to relieve some of this pervasive bar exam anxiety, the law school can then concentrate on developing an exciting upper-level curriculum.

I propose that we introduce into more upper-level courses some of the simulated or so-called clinical methods developed through "live client" clinics and through the teaching techniques of such inspired innovators as Professor Anthony Amsterdam at N.Y.U. The use of role-playing by students, requiring them to view the law from the different perspectives of a lawyer, interviewer, legislator, judge, client, or business person can bring important new insights and enhanced interest into the understanding of legal principles and the application of those principles to hypothetical, but reality-rooted situations.

If these "clinical" teaching methods are to become an integrated and lasting part of upper-level education, they must be accompanied by the creation of new teaching materials — a difficult and time-consuming enterprise, but one of enormous value. Among examples of the kinds of teaching materials to which I refer are as yet unpublished teaching materials prepared by Professor Amsterdam and used in connection with The Legal Institutions; Lawyering, and two books authored by Professor Marilyn Berger, together with John Mitchell and Ronald Clark, that will be published in 1986 by Little, Brown, under the names Pretrial Advocacy: Planning Analysis and Strategy and
**Trial Advocacy: Planning Analysis and Strategy.**

We should also expand the opportunities for upper-division students to pursue intensely an understanding of the historic bases of different fields of law and an understanding of how law influences the facts and shapes social relationships in particular contexts. We should focus as well on the application of theoretical principles to specific fact patterns, the writing, analyzing, and exploration of new areas of law, the exercise of judgment in lawyering, including instances requiring ethical choices and what it means to represent someone else’s interest.

For years, law schools and commentators on legal education have simply thrown up their hands and said that most of those tasks outlined above as core components of a revamped legal education are beyond the capability of the law schools, that they must be accomplished in other ways and by someone else. But, increasingly, the question becomes where these tasks will be done and by whom. In fact, the learning of these skills and habits of intellectual thought are neither conveyed or acquired in any, even remotely, systematic way. That many lawyers get them at all is doubtful. As the numbers of the bar increase and the economics of the practice make it even less practical for law firms to do an effective job of training, the subtle dangers to society as a result of our haphazard approach become ever more real.

So what I suggest is that law schools begin increasingly to take on some of the teaching responsibilities suggested in this article. The Langdellian concept of the large class taught in the socratic manner through the analysis of appellate cases while effective in the first year or year and a half will have to be abandoned in not less than one-third of the law school curriculum, perhaps entirely in the last three semesters. Skills, aptitudes, and inclinations which are essential to a truly good American lawyer can, in my opinion, only be effectively taught in smaller groups, probably not to exceed twenty-five or thirty students in most cases. They require an intensity of student/faculty contact and interaction comparable to that in a clinical program, an upper level seminar, or a trial advocacy course. For most law schools, this will mean a vastly more expensive program of legal education.

Who, one must ask, should pay the additional expenses of such a badly needed enhancement of legal education? A small portion of the added cost can come from the students, primarily by spreading their legal education over three and one-half or four years and by their working part-time during the upper-level years. However, substantial tuition increases, financed inevitably by increased borrowings, are, in my view, unwise and even dangerous to the health of the profession.
There is no reason to anticipate that the public at large will support the allocation of vastly increased public funds to provide a better legal education. Realistically, I see only one source for money to support this more expensive brand of legal education in the second part of law school — the legal profession itself. I am not speaking just of contributions from alumni to their particular school (a course which would make the rich richer and leave the less affluent law schools further behind), I am convinced that the legal education we need now will require and also deserve financial support from the organized bar both nationally and on a state level. I believe it is appropriate to seek and expect such support because the profession itself will benefit directly and economically from the success law schools have in graduating better educated, better trained lawyers, and because the profession, at its best has recognized its obligation to serve the public interest as well as its own economic interest.

I have been told by some prominent lawyers who are also interested in improving legal education, that it will take a great deal of effort to convince the organized bar and individual lawyers to assume the kind of financial responsibility I believe is needed. I also recognize that there is a danger that an increased financial stake in legal education on the part of the profession may lead some elements of the profession or the organized bar to attempt to exercise greater control over legal education. That danger, however, already exists and without the benefits that will flow from better financed programs. In any event, I can think of no other safer source for paying for the more expensive programs which I believe are needed.

As I near the conclusion of my six year tenure as dean of the University of Puget Sound Law School, I hope to be able to devote the next six years, at least, to working for improvements in legal education along the lines I have outlined here and, particularly, to convincing the organized bar and leaders of our profession that richer, more in-depth upper-level legal education partially funded by the profession is in its own enlightened self-interest and in the public interest.
Teaching and Writing: Curriculum Reform as an Exercise in Critical Education

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[W]e are committed to the proposition that we are dealing with both logic and experience — or that experience hath its logic, which logic knoweth not.1

The most significant thing about games, therefore, is that they have a resolution, a definition of the meaning of every act within the game, including, ordinarily, a definition of what it means to say that one has “won” or “lost”. A game is an activity in terms of which you can know with some precision what you did and how you came out. Although no human activity can be totally free of ambiguity, a “game” is so set up as to reduce ambiguity to a minimum.2

The only listener tolerated by the speculative philosopher is the disciple.3

* I would like to thank the many people who generously shared their thoughts with me, especially Gary Cunningham, who is working on an article on law teaching and with whom I first discussed many of these ideas, my colleagues Dan Farber and Suzanna Sherry, who provided many useful comments (and who disagree with much I say) and my wife Frances Nash.

2. Leff, Law and, 87 Yale L.J. 989, 1000 (1978). I thought it appropriate to begin with reminders from two of the most powerful teachers I have had.
The craft of teaching is an exceedingly difficult skill to master. When mastered it is an art. We have all seen true masters at work, and for those of us who teach, it is undoubtedly those masters who form our models. Yet teaching is only one of the roles we play. Few would dispute that our principal role is that of legal scholar. It is the function for which we are rewarded with professional esteem and academic promotion. Our productivity becomes an important measure of our success and contributes to the reputation and place of our schools in the social hierarchy of legal academia.

Despite on-going evaluations of our teaching, the lesson soon learned by young academics is that the important thing is the writing. Students, too, sense that in a world of limited hours, our teaching and counseling roles are often treated as second order functions, often to their detriment. The familiar riposte to this complaint is that scholarship informs our teaching and to the extent that we are good and conscientious scholars the integration of our two roles will take care of itself. This view has it that scholarship itself is a form of teaching, albeit to a broader audience. Even admitting the truth of that assertion, it fails to address the problem of institutional valuation of the roles we play, and it fails to give any concrete guidance for us to resolve the problem of apportionment of scarce faculty resources. Thus, the familiar response is not enough. We need to begin to reevaluate our tasks to ensure that the education of the nation's lawyers is central to our mission. We should start to examine ways in which students can be integrated systematically and without apology into the production of legal scholarship.4

To a small extent, that kind of integration has always been done. For those faculty members who use research assistants, the legal training of those research assistants is undoubtedly enriched by a close and intense intellectual relationship with someone engaged in a scholarly project. Some faculty members use seminars to develop particular ideas that are motivating their scholarship. The reactions of students to this kind of focused use are mixed, if my impressions are correct. However,

4. The tension arises because of the peculiar relationship between law teachers, the intellectual and practical skills we teach, and students. As Professor Gilmore put it, although not all would agree with his characterization, "One of the good things about Langdell's reform was that members of the law faculty spent — and even today continue to spend — much more of their time teaching and talking to students than the members of any other graduate faculty in any university would consider tolerable." G. GILMORE, THE AGES OF AMERICAN LAW 58 (1977).
there have been few, if any, attempts to involve students fully in the scholarly projects of faculty, just as there have been few overt and systematic ways to distinguish between those faculty members who are productive and those who are not. When this distinction is clearly made in favor of scholarly production, and when it is coupled with other professional and institutional incentives to put writing first, institutional claims concerning the value of good classroom teaching become increasingly less tenable.

Not only is there an internal contradiction between the two roles, but there is often conflict among faculty members over how to value them. Thus, apart from other more general curricular needs commanding our attention, we have a structural contradiction that produces friction between students and faculty and between members of the faculty, as well as occasional personal anguish over how to spend our professional time. “Curriculum Reform” is often the slogan but less often the vehicle for resolving some of the conflicts involved in law teaching. Yet, even where there have been long-term and systematic attempts to describe the appropriate contours of such reform, they have seldom squarely faced the contradiction which I have suggested is at the heart of the tension in law teaching.

When reforming the curriculum, two central facts (which will be somewhat different for every law school, given the heterogeneity of law faculties within the general orthodoxy which prevails in legal education) have to be reconciled in a way that is consonant with the mission of particular law schools. The first fact is the kind of skills students need to acquire to be good lawyers (not forgetting that for most students law is understood as a craft first and as an intellectual discipline second). The second fact is the capabilities of particular faculties. I will attempt shortly to define what I mean by the “mission of the law school”, but we should hold that in abeyance temporarily.

At the most general level, the skills law schools attempt to teach are analysis, synthesis and the logic of persuasion.5 We attempt to do that through the medium of critical reading and oral and written argumentation. The process of teaching those skills is replicated across substantive areas, although each has its own shading and focus. There are many ways to teach those skills, despite the continued heavy reliance on the traditional “Socratic” dialogue.

One component of the curriculum, legal writing, attempts to focus

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5. I am consciously ignoring the debate over “rule-based reasoning.”
on the written form of those skills, and is usually that part of the first-year program which is designed to introduce students to the sources of the law. The response of law schools to the perceived need to improve writing skills seems to fall short of a whole-hearted commitment. There has been less of an integration of legal writing into the first year than there has been a slight amendment to the traditional first-year courses. Teaching legal writing in the first-year is, by and large, viewed as a burden and, in my experience, has been largely unsatisfactory for the students as well. A number of schools have also adopted a third-year writing requirement in response to complaints by the bar that many law graduates cannot write. The senior writing requirement typically calls for a seminar paper with or without a multiple draft requirement. The direction and amount of supervision are usually determined by the inclinations of the faculty member in charge, who in many cases views the responsibility as a burden to be suffered, except where there is a close congruence between the work of the students and a project in which the teacher may presently be engaged. It is odd that this should be so, especially since the skills I have generally defined are also at the heart of most legal writing the professoriate undertakes. Yet, in few places are the notions of teaching and doing, a relationship that is already attenuated in law school education, kept so clearly separate.

The second fact to be reconciled in any curricular reform is the raw material represented by the existing faculty. In an ideal world, perhaps, the aptitudes and inclinations of the faculty would form a perfect match with the skills that students need to acquire, and the process of teaching those skills would meld exactly with the scholarly desires of the teachers: all writers would be good teachers and all teachers would be good writers. Obviously, all faculties have some who fit that ideal description, and perhaps it is the goal after which all law schools should seek. But, just as obviously, it is not an accurate description of the reality of legal education. Every faculty contains members who are amazingly productive but are less effective in the classroom and those who are exemplary classroom teachers but who publish little or nothing. There should be room for both in a heterogeneous educational environment, and there should be a way to make maximum use of those disparate talents for the benefit of students and the school. It is not impossible to conceive of the law school as a place where students are

6. It might be useful to explore how that theoretical and concrete problem is addressed in clinical pedagogy, a place where it is supposed to be resolved. See also Chase, The Play's The Thing, herein at 425.
trained to perform their public function in a setting which combines the elements of deep commitment to pedagogy and to the values of scholarship. The combination of those two goals, while possibly failing to generate a model of "good office practice" given the limitations of law school, could produce a sense of what it means to be committed to a common project and thus could provide a model of "good law practice," whatever the politics of the participants. The object of curriculum reform should be, therefore, the reconciliation of those two facts and elimination of the structural tension between teaching and scholarship that I have already described.

To pick up another thread before I offer one way to resolve that tension, the mission of the law school must structure and motivate the reform I am arguing is necessary. I am not certain to what extent the mission of the law school is consciously articulated at particular institutions, but it is a source of the institutional identity that we as faculty members carry with us: thus, to the degree that we identify with our role as law teachers, it is a subject, at least psychologically, of no small moment.

The law school is also one source of our definition of community; whether it contributes positively or negatively to that definition merely informs our notions of reform. How the mission of the law school is defined must echo the nature of the community. Without a sense of community goals defined by the concrete interests of the existing faculty, any mission statement risks either being merely abstract verbi-
age or excluding those members of the community who do not conform to the prevailing notions of the institutional identity. Such a disjunctive definition is possible, but the risks to internal cohesion may be unacceptably high. The goal is not to produce institutional homogeneity, but to produce a perspective on the future that makes maximum use of the skills of the existing faculty and also locates those deficiencies which have an impact on both concrete and idealized notions of "who we are" or why we want to be at this particular law school. I am also suggesting that contained within this task is the necessity of understanding how institutional and personal histories affect and to some extent limit our imagination of possible futures.

Defining a mission in this way also generates a minimum set of shared beliefs which makes the process of institutional progress possible and offers a chance to resolve the structural contradiction described earlier. On a material level, it can make the workplace a good and comfortable place to be. I am not suggesting the creation of some happy academic Eden, merely the creation of a means to understand the necessary conflicts that will undoubtedly occur. To a degree, then, I am arguing for a redefinition of the politics of the law school, one which remakes the left-right distinction and one which rejects the received wisdom of what a law school should be. It may be that such a resolution at some institutions will stretch or exceed the limitations of the possible.

But if you accept my construction of the raw materials of curricular reform, my case will be more persuasive if I spell out at least one version of that reform. There are at least two phases in the legal education which is performed by the law schools. First is the period of grounding students in the basic processes of legal analysis which they must possess in order to respond to the needs of clients. This includes an introduction to case and doctrinal analysis, the sources of the law, and legal process (broadly defined to include philosophical perspectives on the law, critical legal analysis, and the methods of legitimation which lie at the core definition of law itself, as well as the more mechanistic "how the legal system works"). The second phase involves some kind of specialization. For most students this second phase is largely self-directed and is defined by their desire, the belief that they must take "bar courses," or the felt needs of the legal market that they will be entering.7

7. This list, admittedly, excludes those students who have well defined intellectual purposes for the courses they select, hence the limitation "most".
If that dichotomy describes the reality of legal education for most students, there is a way both to enhance their educational experience and to incorporate them into the scholarly projects of the faculty without sacrificing a strong commitment to classroom teaching. Before offering any detail, let me sketch the outlines of a proposal. First, all students should be required to undertake a preparatory course in the law which would cover the first year and a half of their law school education. This part of the curriculum would be graded on some variation of a pass-fail basis. It would consist entirely of required courses, including classes on civil liability (focusing on contracts, torts and the private law of property), public law, jurisprudence, legislation and legal history.

The second half of their residence in law school would require specialization in one of several areas, for example: litigation, general business, general practice and public interest. All the areas of concentration would have courses that overlap and would have a strong clinical component, but within the specialty there would be a prescribed series of classes that would build on one another, culminating in a senior writing project which would require students to work with the faculty on sophisticated problems within their area of choice.

Remember that the raison d'être for this proposal is to increase the structural premium for good teaching as well as to promote student participation in the scholarly projects of the faculty. Remember, as well, that this proposal also attempts to answer the need for more sustained student writing. By dividing the curriculum in this way, I recognize that I make certain controversial assumptions. First, I assume that there is a foundation of skills and cultural grounding which every law student ought to have, and second, that the concentration which presently occurs on an ad hoc basis in the second and third year should be guided by the faculty in a systematic way. Thus, the first year and a half should be structured within the context of conventional doctrinal courses in both public and private law (ignoring here the arguments

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8. The general outline for this proposal first took shape in discussions with Professor Gary Cunningham, although I suspect he would both agree and disagree with how I have developed it.

9. These assumptions and the theoretical perspectives they suggest were addressed in a lengthy report by the Educational Policy Committee of the University of Minnesota School of Law in their review of our curriculum. A useful analysis of this process and its content is found in both, Halpern, New Directions in Legal Education: The CUNY Law School at Queens College, herein at 549; and Anstead, A Second Chance: Learning What Law School Never Taught Me, herein at 289.
surrounding that distinction), adding jurisprudence, legal history and legislation as necessary correctives to the narrow view of what is relevant to the study of law that, in my experience, usually infects first-year students.

My suggestion that this period be ungraded is rooted in the belief that to the extent that we can sever the nexus between rank ordering and the educational process, we can get students to focus on the development of the intellectual habits and knowledge that they will need to be good lawyers in the fullest sense of the term. It is also a message to the bar that they, in the first instance, will have to perform the sorting function that they had previously left to the law schools. I also contemplate that a preparatory legal writing program would have to be integral to the curriculum just outlined. It would not be the sophisticated legal writing which is the proper province of the senior writing requirement that I will describe presently, but it would be the kind of writing that helps students exercise the analytic and research skills they are acquiring. There would necessarily be a writing component to the courses in "legal culture" as well as to the traditional, doctrinal first-year courses.

There are other benefits that should not be ignored in the construction of the curriculum in this way. By educating with the purpose of creating a core sense of "legal culture," I am not suggesting that we merely pay fealty to the status quo. Instead, I am suggesting that we be unembarrassed by accepting the tradition of legal practice as a matter of common or public concern which is rooted in both the ethics of a professional practice and in the service to a wide variety of social needs. To that extent, there are standards of excellence or performance which are defined by the activity itself and which can be separated from the politics of those whose needs are being served.

I am also suggesting that the commonplace claim of the right-wing that the law functions as a neutral arbiter of social (mostly private) disputes as well as left-wing critique of the politics of law are, however, well-developed or sophisticated, really caricatures of the way law works. They distract us from what we ought to be doing, which is communicating culture. They are, to my mind, beside the point. Unfortunately, there is a tendency to reduce the task of communicating culture

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10. One problem which accompanies all attempts to eliminate grading is that by ceding the ranking function to the bar we invite law firms and other potential employers to adopt standards which will, undoubtedly, only more fully enable those firms to replicate themselves.
to the mere communication of bits of information. The reduction of culture to the transpiration of information describes the state of legal education today, which the debates about the nature of law do little to remedy. There is a politics to both the task and the culture, but I am not sure that students are well served by either right-wing or left-wing mystifications which deny either its power or its value.

By taking as our initial task the communication of skills and culture, we also respond to another concern: how law schools might better educate minority law students. The pedagogical effects of both right-wing and left-wing ideologies are harmful to many students I have watched and known. The ideologues of the right (who often deny the existence and power of legal cultural hegemony) and sometimes those of the left (who claim to understand the nature of legal hegemony and our role in its perpetuation) disserve minority students by creating a cult of intelligence. The pernicious quality of the "ideology of intelligence" is that it explains or excuses the poor performance of minority law students by asserting that they are "less able" or, less politely, just dumb, rather than that they are misunderstanding a complex new culture, the cues to which law teachers do little consciously to explicate. Others mislead students by telling them law is all politics and that the study of law is best understood as a subspecies of political science, philosophy or sociology. Intellectual concern with the monkey skills of lawyering is somehow an unworthy enterprise for those who want to do politics. I should note that this lack of concern with the content of good lawyering (both by the left and right) is often merely expressive of profound contempt for the content of practice, if not of practitioners.¹¹

With that digression aside, let me turn to the second part of the proposal. Until now, I have been concerned with the first half of law school education. I believe that despite the pressure to learn the specifics of substantive specialties, in many ways our most important tasks are performed in what I have described as the first phase of legal education. Our success in imparting both culture and technique is proved by the critical sophistication that students bring to the "upper level"

¹¹. I recognize that many of the claims in this paragraph are subject to much dispute and the tone I have adopted might be equally subject to argument. I suspect that the tone communicates almost as much as the claims themselves. One impression I did not want to convey is that I am making any special claim to centrality. I am not saying that my position is a specially privileged one and neither am I making an "on the one hand, then on the other" style of argument. More than anything else I am reporting what I observe and trying to explain the problems that I see. See, e.g., Kennedy, Liberal Values in Legal Education, herein at 603.
courses. In many ways we dissipate our efforts by retreating from the cultural foundation we have laid and treating the first part of law school merely as a foundation of technique. By and large, then, we fail to take advantage of this potential critical sophistication, with the result that most of us find ourselves complaining about the ennui of second- and third-year students and acting as though the boredom and cynicism we observe is either natural or unavoidable.

Unfortunately, it is a rare student who comes into law school with enough intellectual self-confidence to immediately grasp the process of becoming a lawyer as a craft, the development of a new intellectual discipline and ultimately as an art, without forgetting the profound social content that is its main import. Equally unfortunate is the process of training lawyers in a way which denigrates the social understanding that students bring to law school. Why, instead, couldn’t we create a critical matrix that allows students to use their initial social and intellectual grounding as a point of departure for understanding the power of the legal vision? It is not surprising that law school becomes merely a game for so many; it is one strategy for coping with an experience that most see as arbitrary, with one’s work only marginally connected to one’s success. Part of the problem, of course, is that we can only partially control the definition of success. We are a professional school, and, for most students these days, success is defined in terms of job offers. To that extent, we are trapped, even as we try to deny the legitimacy of that scale. Yet that realization is not cause for resignation. I suspect that given the structure of legal education we would have cynical, bored or apprehensive third-year students even if they were all guaranteed jobs upon graduation.

What is to be done? First, as I have outlined in the earlier discussion, we need to change the goal of the first part of law school. Second, we need to provide students an opportunity to focus, that is, we need to treat their technical understanding of the law as one part of the intellectual discipline and professional identity they are acquiring. Law is a humanistic discipline and it is applied in quite specific ways. Each application should inform or illuminate a broader understanding of the role and nature of law and society and law in society. Such an understanding can only emerge if course work is imbricated in a way that comprehends technique as only part of the discipline and not as a means for avoiding substantive social and legal questions. Technical so-

plication provides one way of seeing some of the answers which have already been given and yet it should also expose the limitations on our social imagination that the law has required.

The proposal I outlined earlier suggested the creation of areas of specialization within which to organize the upper-level courses. Structuring the advanced curriculum according to technical specialization offers the chance to satisfy the students' needs for substantive cohesion and for a greater nexus between what the students are doing in school and what they think they will be doing in practice. By having areas of specialization, there is, at least, a formal and self-conscious organizing principle for the menu of courses presently offered. If the sequence can be constructed in a way which generates increased sophistication, the third-year writing projects will effectively integrate the writing and teaching function.

Instead of merely having supervised or minimally directed third-year writing requirements, an alternative ought to be offered for those students and those faculty members who want to work on extended research or analytic projects. One such alternative would allow students to take their final semester or part of their final semester of their last year as an ungraded writing semester. The writing section could be organized around seminars as it is presently, or it could be directed by those faculty members who are engaged in projects, who want to supervise research and writing and who could use student assistance in their projects. Students could earn up to twelve credit hours and faculty members could be awarded up to four hours of teaching credit. By making this choice available, students would have the opportunity to do sustained and critical work, and faculty members would have the advantage of involving engaged students in their work.13 Reorganizing writing in this way helps to break down ossified notions of good teaching and offers an alternative vision of how teaching in American law schools can be conducted.14

13. I am enough of a materialist to recognize that if this proposal were ever to come to fruition, there are many issues of physical accommodation which would have to be addressed. For instance, students would have to be provided with more private workspace, more clerical staff might be required and, possibly, fewer students would have to be admitted.

14. I should make it clear that by suggesting the incorporation of a writing requirement in the upper-level course I am not advocating the giving of additional teaching credit for faculty or course work credit for students merely to replicate the present "senior writing requirement." Instead, the supervising faculty should be sufficiently engaged in a project to provide the stimulation for intensive student involvement. Light-
By self-consciously and materially integrating the scholarly project of the faculty with the teaching function, we change the nature of the dialogue; the premium on accurately reciting the lesson is transformed to a premium on creating the lesson. Including writing as a necessary component of area specialization would, I think, help prevent the reification of those specialized categories and would modulate the tendency to become obsessed by and be trapped by technique. The reorganization of the curriculum can then itself become a process of critical education.

15. Though he might want to deny it, that is the pedagogical lesson I learned from Jan Deutch. I have also heard this expressed in a variety of ways by students, most recently by Don Brewster, a third-year student at the University of Minnesota. As put by Lyotard and as translated by Mr. Brewster: "If [the addressee] is sometimes allowed to speak, that is, put in the place of the narrator, it is only in order to verify that he can correctly recite the lesson." INSTRUCTIONS PAIENNES 41 (1977).
The Reality of Law School

Al B. Tross

Al B. Tross is the pen name of a law teacher of long-standing who reminds those of us who read legal scholarship that we habitually accord undue weight to the identity of the author rather than to the quality of the ideas presented.

A common complaint about law school is that it bears little relation to the real world; "real world" in this sense means law practice or other worldly activities. The complaint is severely overstated, but the error is less a consequence of ideological bias than a product of inattention. There is a notable failure to focus on the forms of life in which legal work is solidly embedded. What follows is a sketch of those aspects of law school life that provide ample opportunity for confronting, in advance, the realities of professional practice.

1. Legal work does not evenly spread itself over days, weeks or months, so the practitioner inevitably suffers periods of boredom and days of delirium. If the load is not somehow managed, clients will be lost, preparation for fixed deadlines will be inadequate, or a pattern of pre-arranging and re-scheduling will develop that annoys and frustrates clients and colleagues. While there is a good deal of flexibility in the system, it is by definition discretionary and contingent, so counting on postponements and delays is always risky.

The work of a law student is far more predictable, and unanticipated increases in the load are generally grounds for legitimate protest. Nevertheless, writing assignments, seminar papers and accelerated reading toward semester's end always present problems of load management. Shifting and rearranging tasks requires some skill if deadlines are not to be missed or quality suffer. Adding new items to the list of existing obligations may be damaging if the calculation of one's capacities is faulty. Students traditionally rely on crash programs, but the cost to self and others should not be ignored. Lawyers (and physicians as well) tend to cultivate an heroic image for themselves. What's more, the professional schools too often support it or, in the case of medicine, require it, ignoring the effect eighteen hour days may have on the quality of a student's work or health. Furthermore, a personal "support staff" is usually required, since one must do laundry, prepare meals,
tend to children and meet emotional demands. The habits of students tend to produce the realities of practice.

2. Law schools may be lax in enforcing the requirements of attendance and punctuality in an effort to avoid an excessively schoolish atmosphere. However, judges, clients, other lawyers and assorted associates are less tolerant of people who miss appointments or make lame excuses for being late. When school work piles up classes can be skipped, but certain obligations of practice are far less flexible. Law students who deal with attendance requirements as infinitely manipulable are missing an opportunity to gain practical experience in managing their calendar. The same holds true for calculating the time needed for certain tasks, or for getting from one place to another. Victims of tardiness may take it personally and read it as a negative statement of their place on your list of priorities.

3. Sitting through a boring class seems ridiculous when there is work on a brief or memo to be done, but the discomfort is not different in kind from listening to uninspired preliminary testimony, waiting for a tardy judge to either show up or dispose of a dozen small matters before getting to yours, or reading dozens of tedious cases in search of a small but necessary point. The ability to manage tedium may be more important than appellate advocacy skills if the goal is delivery of quality legal service.

4. For better or worse, work is part of life and must be reconciled with it. There are days when “business-as-usual” is difficult because an important friendship has disintegrated, an accident has reduced a life to a tragedy, scandal now threatens to disturb an otherwise peaceful invisibility, bombs fall on creatures who would rather live in peace, or unanticipated pregnancies occur. Because the world of work is not hospitable to these intrusions, they present more than an issue of personal capacity to get through trying days. For example, a law student quite unnecessarily may decide to take an exam the day after a parent dies, and a law firm may permit its associates only one day off to mourn the death of a grandparent. These situations confront a person’s relation to herself, forcing her to decide what counts under very particular conditions of stress.

5. Law students are not particularly well prepared to deal with orthodoxies, whether their own or those they meet in other people. Those who regularly consume alcohol after five, for example, reject the claim that drinking counts as “doing drugs;” and men notoriously miss the more subtle ways in which they offend women. The extent to which these insensitivities to human activity affect lawyers’ work can become
frightening. Witness, for example, the case of a 14-year-old molestation victim who was completely unfamiliar with the word “vagina” and was prepared (to the horror of the prosecutor) to use less formal terms to describe her anatomy when she testified at trial.

Similarly, students are notoriously insensitive to social class differences when they conduct “client” interviews, tending to brush aside unfamiliar opinions on social issues as unworthy of reasoned response. For some it may be possible to purify experience after law school by entering a law practice more or less homogeneous in its racial, economic, cultural and intellectual practices. But for those who cannot be assured of such a controlled practice from ages 25 to 65, law school provides some opportunity to live with difference. The social world, like the natural, is heterogeneous, and it is worth at least considering whether life in a rose garden is not ultimately boring.  

According to the traditional model, a lawyer is one who uses certain skills and access to information to protect clients or further their interests. This model carries with it the image of an individual who is neither faint of heart nor easily intimidated; one who also knows when silence preserves a better opportunity for success at another place and time. The image is constructed this way because much of a lawyer’s work involves contact with people who purport to exercise some sort of authority. Accordingly, it is central to the task of lawyering that one question, manage, avoid or occasionally beat back exercises of authority.

Official power without authority is said to be either illegitimate or arbitrary. Given the traditional lawyer-model, it is surprising how many opportunities are missed for learning how to deal with law school authorities. Any student knows that complaints about grades must initially be pressed on teachers, but few prepare for these encounters and even fewer check the rules before doing so. Administrators are sometimes outrageous in their treatment of student complaints. Teaching faculty sometimes run their classes like miniature feudalms and have little reason to believe the rules they impose are within any authority granted to the office they occupy. Questioning potentially arbitrary exercises of authority such as these is excellent training, not only with respect to procedure, preparation and presentation, but also for experiencing the moments of praise and the avalanche of hostility that tends to fall on people who disturb the tranquility that surrounds routine authoritarian practices.  

Concentration seems to be important in every valued activity, from pumping iron to quilting. In law practice the ability to consistently fo-
cus attention over substantial stretches of time is sometimes crucial to the task at hand. Litigation is the context in which this attribute is most frequently mentioned, but it is equally relevant to such mundane tasks as case research and client interviews. Paying attention is a skill to be developed because it is required for tasks that are frequently tedious, boring or (at least superficially) repetitious. These latter terms describe many law school classes, the process of studying for exams, and the endless and often pointless hours of appellate case reading. Using these occasions to develop concentration hardly justifies their lack of intrinsic interest, but it is simply a fact of life that much of the required work is without pizzazz. And the stakes are high, for attention bears an instrumental relation to retention, and good retention saves a great deal of busy-work and repetition.

Good attention and retention, however, frequently produce an excess of tension that shows up in tight muscles, nervous habits, exhaustion, irritability, head and lower back pain and sleepless nights. Readily available drugs to which students have traditionally become addicted (the most popular being caffeine, nicotine and sugar) hardly ameliorate these tensions of modern legal life. To the extent tension tends to reduce certain long and short-term capacities, it seems wise to reduce its effects. This means that developing good concentration is a far more elusive goal than ordinarily supposed.

8. Long hours of concentrated attention require a good deal of energy even if the activity is largely sedentary. The macho infestation that became a current tradition in legal education and practice valorized competent performance fueled by bad food and martini lunches — relieved by a mere weekly tennis match. Recent fadish consciousness about health may have altered this picture, but premature aging and a variety of intestinal malfunctions still appear normal for the legal profession, particularly in large firms that make it a policy to steal people’s youth with the promise of future largess. Given the institutional food available to law students and their apparent need to spend long hours conforming to furniture designed for a non-existent average person, law school is a perfectly appropriate time to consider whether the death of the body is a fair price for the life of the mind.

9. According to folklore, a lawyer’s reputation is critical to the development and maintenance of her thriving practice. But reputation is an elusive (and often illusory) thing that may depend on rumor, fantasy, and a thin database. Ultimately, it counts as a roughly “democratic” and always partial sketch of a person’s character. Reputation is also a polite term for gossip. Professionals participate in the reputation game
both by producing their own reputation and transmitting information about others. The personal stake they have in the former should make them very careful about the latter, but generally, they are not. This may have something to do with attorneys' relative ignorance about "the word" that is out on them. Confronting one’s own reputation is uncomfortable (or horrifying) to the extent there is a gap between one’s own intentions and perceptions and his current notoriety.

In his strictly legal work the practitioner is enjoined to be thorough in gathering facts, careful in distinguishing them from opinions, and to closely consider the capacity of sources and their opportunity for accurate observation. Unfortunately, when that same attorney becomes a transmitter in the circulation of reputation information, the care employed in his legal injunctions is sometimes lost, perhaps out of haste to join the ranks of those in the know, or merely to participate in what appears as casual social conversation among colleagues.

Reputations in law school begin on the first day of classes. They are initially based on appearance, background, frequency or quality of oral class participation, and immediate friendly associations. Later the elements include grades, performance in competitions, interview scores and job offers. Many students prefer to avoid the torments of reputation by maintaining a low profile, but it is plain that invisibility can be only a temporary solution to the extent that some sort of reputation remains a necessity or inevitability. Being unknown is, after all, a sort of reputation.
Law school life is full of talk about teachers as well as students. For at least the first year, personalities get far more attention than doctrines or concepts. Most students construct their curriculum on the basis of rumor regarding the difficulty and relevance of courses and the tolerability of teachers. How one behaves in this perpetual circulation of “information” seems relevant to similar practices after graduation. Experienced lawyers are ever-ready with the word on judges, how to pick juries, what sorts of clients to refuse, or what color suit should be worn when trying a particular matrimonial matter. Since there is no reason to believe these informational tidbits differ in kind from their schoolish predecessors, students might do well to reflect on the truth-value of what passes for much of their knowledge, take seriously the responsibility they have as transmitters of it, and form some habits of judgment to guide behavior.

10. Bar associations have largely abandoned the quest for practical ethics in favor of a code that specifies professional transgressions. However, it remains more or less accepted that the small actions and judgments of daily life are what constitute each person as an ethical being. To the extent the ethical sense depends less on codified regulations than it does on an attitude towards oneself and others, it is not entirely satisfied by fine calculations of the risk of detection, or by the sad news that a questionable practice is everywhere indulged, or by an easy substitution of the word “judgment” wherever “want” would be equally appropriate (e.g., “I wanted to settle the matter,” versus, “In my judgment, settlement was best.”)

Ethical situations tend to arise when competitive and cooperative mandates conflict, as they frequently do when law school competitive activities require that all participants use the same books. They also arise when the risk of detection is low, as it is for “take-home” examinations requiring individual work, and in some sorts of research projects. Generally speaking, the temptation in these events is to maximize short-term advantage where the risk of adverse consequences is low, which is precisely why they count as situations requiring an attitude about oneself and one’s relation to others.

No doubt a lawyer’s ethical cynicism has deep roots in her law school years, often recalled as “idealistic” in later years because of a failure to perceive, at the time, that something real was at stake. With the inauguration of the first year, students begin their training by making distasteful arguments in support of clients or causes they loath because the instructor or the role seems to require it. The question worth considering is whether properly following orders is satisfying when it is
11. Law school, like law practice, presents frequent opportunities to re-consider values, priorities and potential in light of an experience which includes exhaustion and elation along with more normally quantified success and failure. A few examples will suffice.

— Law students are all “winners” or they would not be officially enrolled. From this it follows that they do not have very much experience with failure, frustration and disappointment. Since status at the top of the class or the “best” jobs cannot be universally distributed, it is possible that some readjustment of dreams, goals or strategies might be necessary.

— Students forego interesting courses that might broaden their perspective in favor of bar exam material for fear of losing opportunities or maximizing marketability.

— In certain quarters the relevance of law school, along with many other life experiences, is reduced to a line on an imaginary advertising document known popularly as “The Resume.”

As the last example suggests, whether life is to be guided by a documentary rather than a more richly textured image presents a question of values, priorities and potential arising in the immediate experience of student life.

12. Almost everything students are exposed to in school might be read as an occasion for managing disturbance, from simple breaches of contract to severely violent crimes, from errors of procedure to mistakes of judgment. Lawyers’ work outside the crabbed space of books is similarly constituted. The violated spouse, the impossibly indebted merchant, the polluted community and the injured steelworker are all disturbed in their immediate situations. When they present themselves to the lawyer, their disturbance is expressed in their passion, their hysteria, and their confused and excited statements. There is a strong professional tendency to defuse (or ignore) this strata of disturbance in order to reach the level amenable to “reason,” the word lawyers use to describe their way of talking. Therefore, managing disturbance can mean ignoring certain feelings and desires, reconstructing the disturbance to make it reasonable within a particular expertise, substituting one set of concerns for another, or burying the matter beneath a ton of paper. Perhaps because disturbance is at the core of their work, lawyers and students are surprisingly intolerant of it in their daily life. The most modest deviation from the ordinary is noted with admiration or chagrin. For example, raising embarrassing or difficult questions in
class always brings the crowd to a hush; idiosyncracies are cause for derision; and strong emotions are almost universally assumed to interfere with sound judgment. At another level, the study of law itself frequently disturbs existing habits of thought and established patterns of speaking with other people. Almost overnight, or so it seems, the friends, lovers and families of law students become remarkably stupid. The intense experience of legal education profoundly disturbs previous patterns of thought and action.

Students might profitably attend to the appearance of disturbance in the substance of their work, in the discourses that surround that substance (classes, study sessions, etc.), in their own attitudes, thoughts and feelings, and in social relations which exist beyond narrow professional circles. Lawyers may be somewhat more tolerant of disturbance than law students because they have been forced by their experience to accept the limits of legal intervention, or perhaps they have learned how difficult it is to strengthen and flatten diverse forms of life.

Law school will remain unrealistic to the extent that it is treated as presenting situations without meaning beyond the moment. The point is not that school is reality, but that attention and concern can produce significant realities. Put another way, those who regard law school as unrelated to law practice probably do not care about most of the items mentioned in this essay.
Legal Education and The English Language

Stanley A. Weigel

Stanley Weigel is a United States District Judge for the Northern District of California, a position he has held since 1962 following 34 years of law practice. He has been a non-resident lecturer at Stanford University Law School since 1952.

As a condition of admission or of graduation, law schools should require students to demonstrate the ability to write a composition in logical, clear, unambiguous and grammatical English.¹ Neither knowledge of the law nor ability to see all the points engendered by a legal problem are alone sufficient for success in the practice of law, nor, for that matter, in the work of judges and supporting personnel.

In the practice, for example, lawyers are called upon to write contracts, to submit legal opinions and to prepare briefs. If a contract is not free from ambiguity, the lawyer who prepares or approves it for a client may be inviting a justified charge of malpractice. If the opinion is ambiguous or unclear, the client may look for another lawyer — indeed, would do well to do so.² If the brief lacks cogency and clarity, it will be of little service to the court.

At many law schools, including those most highly-ranked, there is a tendency to grade written examinations upon the number of points covered with a modicum of correct delineation of the applicable law. The use of good English all too often appears not to receive much, if any, consideration.

The attitude of many law school faculties is that by the time a student reaches law school, the student should have mastered the use of good English. Perhaps so. However, the sad fact is that far too many students, including those receiving high grades in law school, have not acquired the ability to write good English either upon admission into

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¹ Both "clear" and "unambiguous" because two or more sentences which, in themselves, are clear may, taken together, create ambiguity.

² Calculated lack of clarity may, conceivably, in some circumstances, serve a client well. However, that service assumes that the drafter of the contract knows the difference between clarity and the lack of it.
the law school or upon graduation from it.

Complexities of the law, both common and statutory, do not excuse those in the legal profession from the duty to use good English. Indeed, those very complexities make it important to expose them and, thus, reduce unclear exposition to plain English.

The ability to write well tends to nourish the ability to speak well. And the ability to speak well is also an important element to success in the profession. The use of clear English in speech is requisite to effective direct and cross-examination.

There is no excuse for the failure of law schools to demand that students have the ability to write clear, concise English. That ability is essential to competence in the legal profession. Surely law schools should see to it that graduates do not lack that competence.

3. Neither computers nor word processors can substitute good English for bad. Correct spelling, of course, is part of good English, and there are discs which can be used to correct some spelling errors. However, there is no software which creates good English.

4. Describing the complexities calls for the use of clear English. Otherwise, interpreting the law becomes a matter of piling ambiguity upon ambiguity.
How Women Betray Themselves

Vivian Wilson

Vivian Deborah Wilson is a writer of short stories and novels. She teaches Criminal Law, Evidence and Negotiation at Hastings College of the Law and has written on the fourth and fifth Amendments, presumptions in the criminal law and "The Law of Libel in the Art of Fiction." As her essay suggests, she worries about the new generation of female law professors.

A few weeks ago I found myself on the conference level of a kaleidoscopic Chicago hotel. I had fifteen minutes between meetings. I sat down in the deepest chair I could find in a grouping of furniture that, I've been told, designers classify as conversational. I closed my eyes against the relentless assault of dark red carpeting, flocked red wallpaper, sharp-edged chrome and glass. I smelled something raw, damp. It was easy to believe I was three floors beneath the surface of the earth.

Presently I was joined by a woman, a young woman, and two men. The woman, a friendly sort, introduced herself and her companions — Sydelle, Charles and Jim — all law professors like myself, wearing their affiliations on plastic cards.

Sydelle was the talker of the group. "Don't you think," she said, announcing the subject that had been their conversation and would be ours, "that students nowadays are supersensitive?"

I thought I saw, in her bright, open look, the aggressive delight law professors project when they tell tales about their students — how vapid they are, how cynical, how ingenuous. It's a device, I suspect, designed for the protection of the guilty.

Sydelle was eager to prove her point, tell her story, about a first-year student, a woman, who'd engaged her in conversation, attempting to break the ice with the sort of talk that engages women as they seek out a sisterly common ground. It was an exchange of anecdotes, really, rather than the mutuality of conversation, about the male law professor who discovers in Contracts, in Civil Procedure, in Criminal Law, an

1. Intending, in some swampy depth of the unconscious, to betray only each other.
occasion for the display of his inherited sexism.

Sydelle, of course, had heard it before, recognized the plot, the players — the dumb blonde who cannot distinguish negligence from intention, the middle-level executive in her three-piece suit who files a frivolous Title VII suit, the seductive woman patient who leads the good doctor into flirtation. Sydelle did not recognize herself in the cast.

The student in the story, reaching for a more substantial connection with the teacher, asked, “What did law school mean to you? What was most important?”

Sydelle was ready with an answer, her message for the student. It was, “I caught a husband.”

I asked myself. Does she know what she’s saying?

She did. “The student told me off,” she said. “Berated me. Students nowadays can’t take a joke.” She laughed.

No one else was laughing.

At this point I should say that Sydelle was not my protagonist’s name. I’ve changed all the names and the scene’s locale. It’s my device for ducking the perilous business of identification and, should anyone in the tale turn out to fit the classification, to protect the innocent.

The man I’ve called Charles intruded. “So that’s what you women are after,” he said. “You admit it.”

Sydelle smirked. She didn’t get it.

I wasn’t sure at that moment that I did. It’s not to my credit that I snapped. “You should have told the student you were making a comment on yourself, deprecating yourself, not her.”

She didn’t get that either. She knew she wasn’t deprecating herself. She was proud of herself, it seemed to me, satisfied with the role she portrayed — as Woman, truly Feminine Woman, displaying herself to her audience, looking from one to the other of us for our approval and our admiration.

I wondered, Who is this woman? Is she really advocating law school as a legitimate arena for the vulgar sport of husband chasing? What allows her the privilege of dignifying the caricature of female predator with the imprimatur of her professional authority? I tried to tell myself that it didn’t matter. Perhaps the voice that ridiculed the student’s inquiry, denied the legitimacy of the student’s professional objectives, was merely an aberrational squeak. But perhaps it wasn’t. I was afraid I’d heard a portentous, an ominous throb. Progress has a way of invoking dark moments of retrogression.

By now the two men in our group were studying the flocked wallpaper. They’d lost interest, perhaps, or, perhaps, they had willfully re-
moved themselves from our company, averting their eyes from the em-
barrassing spectacle evoked by my sharp retort. Were we not, Sydelle
and I, enacting another caricature — two women unable to befriend
each other?

The incident would not leave me. It appeared, draped in its origi-
nal blood-red, in my dreams, demanded exorcism. It also begged for
silence. It was made, I thought, of the stuff that strikes writers dumb
— the story that must be told and dare not be spoken. For what would
it tell about me, the observer, the critic, of women’s duplicity, engaged
in the very treachery I purport to examine and, thus, becoming the
object of the tale?

It’s a risky business, story-telling. You never know what inadver-
tent lesson you may teach. (Sydelle didn’t.) I tell myself: You take the
risks you take.

Men, some men, play it safe. They come off victorious in the sto-
ries they tell, war stories in which they brandish swords on the battle-
field, hurl language in the courtroom. Men are the heroes of their sto-
ries. Not so for women. Some women. They are the downtrodden, the
victimized. The tales they tell are tales of abuse, tales told on
themselves.

Or are they?

“I only spoke in class on Ladies’ Day,” a friend who’d gone to
Harvard in the 1950’s tells me. “It was the one day the ‘girls’ were
called on.”

“It was a joke about spendthrift trusts,” a former student reports.
“The young man and the pretty young thing go into Tiffany’s late on a
Friday afternoon. The starlet, in the elderly professor’s terminology,
picks out an expensive bracelet. The man writes a check, leaves the
bracelet to be engraved. When he returned on Monday morning, the
clerk informs him that the conditions of his trust prevented the cashing
of the check.

“Yes,’ the man says, ‘I knew that would happen. Thanks for the
week-end.’”

I describe an encounter over coffee between me, a male colleague
and a possible recruit to our faculty. The subject is skyrocketing prop-
erty values in the San Francisco Bay area. The hilltop house I recently
sold, its price, is the exemplar.

“Vivian was married to a very successful doctor,” my colleague
explains to the stranger.

I know what he means. It takes a man to acquire valuable prop-
erty. Vivian couldn’t have done it on her own.
I relish the telling of that story.\textsuperscript{2} The point is not that I am incapable of earning large sums of money but that my colleague is a fool, engaged in a transparent display of insensitive foolishness. I may not play a victorious role in the coffee break drama. I do in the telling of it — that is my intention. As it is the intention of the Harvard graduate who has pierced the absurdity of her school's primitive rituals, the trusts and estates student who so insightfully perceives what remains obscure to the benighted professor, the woman named Sydelle who knows that the sober study of the law is for women who cannot compete in the hunt for husbands.

\begin{center}
\textbf{In law school, "I caught a husband!"}
\end{center}

But there's a difference, Sydelle's companion, Charles, tells us, "So that's what you women are really after — catching a husband! You admit it."

Admit what men have always known and do not often articulate now that permission has been withdrawn. The proper role for women, the role coveted by women, is auxiliary. Her professional ambitions are

\begin{itemize}
\item[2.] I glory in this one: The scene is a law office. The time is the early 1970's. I am walking down a long hallway. Approaching me is a man, a lawyer in another firm, whom I'd seen now and then in the courtroom. Our association has been limited to exchanging chit-chat. As we came abreast in the hallway he leaned over and pinched my cheek. He said, "Hello, cutie, how are you?"
My response was unexpected. To him and to me. I reached out, pinched his cheek, and said, "I'm fine, cutie. How are you?"
For the first time I knew the literal truth of the phrase, "His face fell."
\end{itemize}
camouflage, are illusion, are snare. If she does not qualify as femme fatale, glamour girl or subservient homebody (the preferred, less threatening stereotypes) she plays predator in pursuit of the fleeing male quarry. It is only when she fails, when the pursuit does not climax in capture, that she absorbs herself with second best.

That is the unpleasant truth that Charles has recognized, that Sydelle, happily garbed in a femininity men have designed for her, acknowledges for herself. The trouble is she is not speaking for herself. She is a law professor. Her garb confers legitimacy upon the endeavor she recommends. As a woman recently appointed to a law faculty, she is the beneficiary of the victories won by older, more daring women (I count myself among them) who challenged, indeed, exploded, the myth of woman as incomplete and, in the sweaty, bloody, tearful, exhilarating process, mapped their own paths, selected their own objectives, defined for themselves their individual identities as women.

Sydelle may not be grateful for the rich possibility feminist women have created for her. Possibility presents the necessity of choice; choice disdains comfort; comfort exacts its own form of revenge. The complexities confronting women are not addressed by flogging ambition onward or withdrawing, in retreat, from challenge. The woman who sees herself with a full professorship, her name on the nationally acclaimed case book, may confront a crucial dilemma: Shall she relinquish the splendors of professional success or turn them in for woman's traditional place in the family? However she resolves what she experiences as conflict, she may, ten years later, examine the very real sacrifices she's made: Has she deepened in humanity, grown or been diminished in range? Has she foresaken some inner sense of her own identity? Or can she truly proclaim that she's had it all?

She will not be aided in her inquiry by dishonoring the tradition that made her decision imperative.

"I used to be a rabid feminist," a female colleague said.
"And what are you now?" I asked
"I'm a mommie," she reported, speaking with the pride that moth-
erhood endows.

To me her gratuitous comparison with the disease that afflicts mad dogs exposes, at its source, a retarded consciousness — one that is narrow, fixed and blunted. It has, as its consequence, the negation of consciousness. I wish I'd thought to say to her, as I said to Sydelle, "It's not feminism you dishonor. It's yourself."

I say it now.