

The Purposes and Methods of American Legal Education

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I. Who Are We Teaching and Why?

It is rare that those who occupy and benefit from a particular “intellectual edifice” such as is found in American law schools are able to perceive the flaws in their own modes of operation and assumptions. We develop a mindset equivalent to a religious belief in the rightness of our orthodoxy and repress or scorn those who would challenge the system from which we derive our identity, sense of self, rewards and status.² Self-interest blinds us to the defects in what we do. Arthur Koestler provides insight in his observation that: “‘professionals with a vested interest in tradition and in the monopoly of learning’ always tend to block the development of new concepts. ‘Innovation is a twofold threat to academic mediocrities,’ [Koestler] writes. ‘It endangers their oracular authority, and it evokes a deeper fear that their whole laboriously constructed intellectual edifice might collapse.’ ”³

As is evident throughout this analysis my position is that there is a significant gap between what law schools claim to do, what they actually do and what they ought to be doing. Nor is the analysis and critique something that raises entirely new perspectives. To the extent that American legal education is a defective mechanism relative to the quality of curriculum and method it is fair to ask why meaningful reform has not occurred. An important part of the answer is that the law schools are an example of the power of tradition, orthodoxy and the self-interest of law faculty, the legal profession and courts. The interests of potential clients as well as society in general receive short shrift in the equation.

The character of the core law school curriculum and its primary methods is a reflection of the fact that because most law professors were extremely successful in their undergraduate and law school careers and feel endowed by that experience with the knowledge and ability required to teach well by means of the same approaches. This belief in doing “what worked for you” fails to take into account that the considerable majority of other law students did not excel or function in the same way as is reflected in the demands and rewards of academic excellence as measured by high levels of success in the most competitive national law schools. These “other” students either do not grasp material in the manner achieved by the typical law professor who ranked among the top

² CHARLES AXELROD OFFERS THIS INSIGHT. “IDEAS DO NOT FLOAT FREELY AMONG PEOPLE; THEY BECOME ROOTED IN COMMITMENTS, OSSIFIED AND SUSTAINED WITHIN INTELLECTUAL COMMUNITIES; THEY ARE CRADLED AMONG AVID SPONSORS AND DEFENDERS WHOSE WORK RELIES ON THEIR STABILITY. THUS THE TENSION OF DISCOURSE REFERS NOT MERELY TO THE PRESENCE OF ONE LANGUAGE ADDRESSING (AND STRAINING) ANOTHER, BUT TO THE PRESENCE OF ONE LANGUAGE ADDRESSING THE INERTIA OF ANOTHER.” C. AXELROD, STUDIES IN INTELLECTUAL BREAKTHROUGH, FREUD, SIMMEL, BUBER 2,3 (1979).

³ QUOTED IN ANTHONY J. DIEKEMA, *ACADEMIC FREEDOM & CHRISTIAN SCHOLARSHIP* 45 (WILLIAM B. EERDMAN PUBLISHING CO. 2000).

five or ten percent of his or her class at the most highly competitive institutions or those students may require or benefit more greatly from other methods of instruction in order to achieve the desired learning.

There is no guarantee that earlier academic success based on excelling in test taking of a highly specialized nature such as exists in the essay examination format in law school bears any relationship to excellence in teaching or excellence in the diverse abilities and skills that determine the quality of a lawyer's performance. Although I can't remember who suggested the point to me, it has been argued that the pool of high achieving students admitted to such institutions as Harvard and Yale law schools would learn the material and be able to function ably as lawyers *in spite of* the teaching they receive. Simply put, driven, highly intelligent, organized self-starters will master the method and materials put before them and have the ability to go beyond that material to add their own rich base, with or without the interventions of law teachers.

Yet such self-motivating and autodidactic students may only represent ten to twenty percent of those enrolled in American law schools. If ten to twenty percent of our students essentially don't need us because they are capable of learning the essence of what we have to teach in the existing format that leaves between eighty and ninety percent of law students who can benefit from more creative and richly textured efforts. The problem, however, is that we have designed and implemented the law school curriculum for the limited number of students who don't really need us rather than for the vast majority who do.

When I began my own development as a law teacher it was as a clinical teaching fellow at Harvard Law School with Gary Bellow as a mentor and four other clinical fellows as part of a team. There was continual critique and focus on both classroom and individualized teaching. There were shared approaches to overarching course goals as well as the specific outcomes that we wanted to achieve in every class. There was a willingness to be evaluated based on a sense of effectiveness, substance and clarity in our teaching of seminars, larger classes and in the individualized sessions with our clinical students. In the process we learned how to learn from each other and communicate honestly with our students. The defensiveness and ego protections that are too common among law teachers who have not had the opportunities to go through a total immersion process of the kind we experienced disappeared early in the process. Both as teachers and neophytes we learned how to become better at what we were doing through the shared communication about success and failure, strengths and weaknesses. Added to this was a constant attempt to figure out the substantive goals and the most effective techniques for what we were doing. It was the kind of experience that would enrich any law teacher and one that is quite rare.

As teachers, our approaches to our students' learning experiences should take into account differences in innate talents, interests, backgrounds and career aims. The learning achieved by our students should not be measured only by a limited testing methodology, but by different career aims and options and other important variables. It has been my experience that many students in courses involving the use of methods and

material such as negotiation, strategy, counseling, dispute resolution, trial advocacy and other subject matters relating directly to the quality of law practice are able to match or surpass the performance quality achieved by students who excel in the traditional course formats.

I have often found a heightened perceptiveness and ability to use and recognize nuance and strategy among students who grades do not place them in the top twenty five or so percent of their law school class as measured by the ability to do well on written essay examinations. Yet the ability to perceive and communicate nuance, recognize issues with the greatest persuasive weight and deal with the human dimension of law and law practice represents qualities that are at the heart of a great deal of an effective lawyer's work. This raises the core question of whether the traditional methods and primary subject matters we concentrate on in American legal education adequately educate those aspiring to become lawyers responsible for representing a diverse range of clients across a wide spectrum of forms of law practice or whether we are preparing law students for something that is scantily related to what they will spend their lives doing in the legal profession.

In regard to our teaching there is no empirical proof that any connection exists between the teaching methods used and the substance of what is taught in American law schools and the quality of service, understanding of the law, and the ethical behavior of law schools' graduates. Our justification of the quality of our teaching and the importance of the subject matters we advance in our classes is based on assumption, tradition and anecdotal examples. We have no real idea of whether the legal curriculum is effective or whether we consistently provide a quality education through the content offered and methods used. Nor is it likely there will be an honest internal critique of the system. Since law faculty are the exclusive judges of their own performance and of the wisdom of the curricular structure and content with which they function, any assessment that does occur is likely to be self-interested and idiosyncratic rather than rigorous and objective.

At the heart of such issues is the extent of law schools' responsibility concerning educating students whose career aims are directed toward becoming lawyers. If law schools are to be evaluated on the basis of how well they fulfill their obligations, fairness demands that those obligations be defined clearly and substantively. It is also only fair to note the limits--not only as to what law schools ought to do within the present structure but limits on what they are capable of doing given resources, student capabilities, timing of the educational input and the ability to buffer the force of the institutions and dynamics of law after students graduate and enter the legal profession.

If we assess the quality of our teaching in reference to the quality of the legal profession based on service to clients and improvement of the institutions of justice I feel comfortable stating that the quality of legal services provided to many clients is sub-standard and the inefficiency and continuing injustices produced by our key institutions remains relatively extreme. This is due to a variety of factors that to some extent includes inadequate education. But a substantial proportion of the lack of quality and professionalism in the legal profession relates to considerations of time and economic

pressures spread across the demands of trying to provide service to a multiplicity of clients. It also, however, involves institutional pressures to conform to the assembly line processes and expectations of important parts of the legal system as well as one's employers. This includes not only the criminal "justice" machinery but many civil disputes and transactions. These problems are exacerbated by laziness, unprofessionalism and incompetence.⁴

II. A Historical Critique

A. Langdell and the "Scientific" Law School

A core stereotype has been the idea that law teaching and legal scholarship is a form of scientific enterprise. As to the almost exclusive reliance on the "doctrine-as-science" perspective that dominated American law schools for over a century, John Dawson contrasted the American approach with European systems. He commented that Continental legal scholars would challenge the American's claim to being a form of legal science and that Civil Law jurists looked on the Common Law as a "mass of meaningless technicalities."⁵ James Bryant Conant also noted a distinction in the forms of thought between lawyers educated in American and German law schools, finding legally trained Americans to think in patterns he called "empirical-inductive," the Germans "theoretical-deductive."⁶

Rene David described the French conception of university education in law in a way that clearly differentiates it from the approach used in American law schools. He states: "The education given by the [French] universities is not a practical training and in some ways even conflicts with the kind of training required by practitioners."⁷ The result: "The breadth of his curriculum encourages the French law student to see legal problems from above and to consider them in all their general aspects, historical, economic, and social. He does not see them, and is not encouraged to see them, from the practitioner's point of view."⁸ David proudly states: "The technical aspect of legal problems receives little emphasis in law faculties, where we tend to live in the realm of ideas and pride ourselves in not worrying about the more mundane, and sometimes sordid, problems of legal practice."⁹

The technical perspective is also the orientation condemned by Charles Eliot as being inherently incompatible with the spirit of the university. Eliot, the 19th Century president of Harvard University who hired Christopher Langdell as Harvard's law dean, sought to

⁴ SEE, E.G., BARNHIZER, DAVID R., "GOLEM, 'GOLLUM', GONE: THE LOST HONOR OF THE LEGAL PROFESSION" (JANUARY 3, 2011). CLEVELAND-MARSHALL LEGAL STUDIES PAPER NO. 11-203. AVAILABLE AT SSRN: <HTTP://SSRN.COM/ABSTRACT=1734412>.

⁵ JOHN DAWSON, *ORACLES OF THE LAW* 35 (1968). DAWSON CONCLUDES: "BY SEVERING TIES WITH ROMAN AND CANON LAW THE COMMON LAW PRACTITIONERS SEVERED THEIR TIES WITH THE UNIVERSITIES.... ACADEMIC MEN, TRAINED IN ITALIANATE LEGAL SCIENCE, WOULD HAVE FOUND IT A PAINFUL AND FRUITLESS TASK TO FIT WITHIN THEIR SPACIOUS SYSTEM WHAT NO DOUBT SEEMED TO THEM AN UNORGANIZED MASS OF MEANINGLESS TECHNICALITIES."

⁶ CONANT, TWO MODES OF THOUGHT, SUPRA, N. .

⁷ RENE DAVID, *FRENCH LAW, ITS STRUCTURE, SOURCES, AND METHODOLOGY* 50-51 (M. KINDRED, TRANS., 1972).

⁸ DAVID, *FRENCH LAW, ID.*

⁹ DAVID, *FRENCH LAW, ID.*

distinguish the love of learning for itself, and what he called the “tempter” for students in technical schools who he considered to have practical ends constantly in view.¹⁰ Eliot asserted that the critical difference between the university ideal and the technical orientation was that the university represented “the enthusiastic study of subjects for the love of them without any ulterior object.”¹¹

Technical schools, regardless of their students’ energy, thirst for knowledge or rigor, were not considered as a proper part of the true university because lurking underneath the technical perspective there was a controlling motive that university *Idealists* considered inappropriate in a true intellectual college. The difference, Eliot indicates, was that “[t]he student [doing technical study] . . . has a practical end constantly in view; he is training his faculties with the express object of making himself a better manufacturer, engineer, or teacher . . . in order afterwards to turn them to human uses and his own profit.”¹² Eliot considered either spirit to be legitimate but observed that, “if commingled they are both spoiled.”¹³

The somewhat ironic and even amusing point is that the motivation warned against by Eliot in the context of Harvard in contrast with the new Massachusetts Institute of Technology is precisely what Langdell’s reforms at Harvard Law School represented.¹⁴ Rather than being a beacon for the pursuit of “pure” knowledge sought for its own sake, the result of Eliot’s choice of Langdell was something that Anton-Hermann Chroust termed the “academic-professional” school.¹⁵ The simple fact is that Langdell rhetorically hitched his “method” to the star of science and formulated his system of legal science to justify the university study of law.

When Eliot selected Langdell to be Harvard’s new law dean, to be thought *unscientific* was equated with being irrelevant or anti-intellectual. Harvard Law School had been recently criticized both for being excessively philosophical and mundanely practical. In the several years prior to Langdell’s selection Harvard Law School was regarded as being in a period of decline and it was said: “No one took Harvard seriously” because: “It had become an essentially unscholarly place. Science . . . was no longer regarded as the object of study in a law school. The purpose of students of this time in the School, as well as in the later career of their generation at the bar, usually was practical and self-centered in the highest degree.”¹⁶

By Langdell’s time the ethos was that: “Reason was supposed to give the answer to any problem, will power was supposed to put it into effect, and emotions [and any other supposed knowledge that could not be empirically demonstrated] –well, they generally

¹⁰ SEE, “ELIOT ON THE SCIENTIFIC SCHOOLS”, IN 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 624, 635 (R. HOFSTADTER & W. SMITH EDS. 1961).

¹¹ *ID.* AT 624.

¹² *ID.* AT 634-35.

¹³ *ID.*

¹⁴ “ELIOT ON THE SCIENTIFIC SCHOOLS”, IN 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY, SUPRA N. , AT 635.

¹⁵ ANTON-HERMANN CROUST, VOLUME 2, THE RISE OF THE LEGAL PROFESSION IN AMERICA 197 (1965).

¹⁶ THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917, AT 21 (1918).

got in the way, and could best be repressed.”¹⁷ Soon after assuming office Langdell removed jurisprudence from the required course of study at Harvard. Langdell advocated his reforms by proclaiming that: “If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices.”¹⁸ What was needed in Langdell’s world of scientific law was a completely new type of legal “scientist” not tainted by the distorting world of law practice.

Richard Hofstadter has argued that professional work relies primarily on “a substantial store of frozen ideas.”¹⁹ He includes both lawyers and most professors in this culture, one where he concludes: “the professional man lives off ideas, not for them. His professional role, his professional skills, do not make him an intellectual. He is a mental worker, a technician.”²⁰ One does not really even have to look closely to understand that the role of the mental technician was implicit in Langdell’s hypothesis about the connection between law and science. He wrote: “Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility to the ever-tangled skein and hence to acquire that mastery should be the business of every earnest student of the Law.”²¹ Langdell’s idea of “mastery” of a cluster of fixed principles is very similar to Hofstadter’s professional man who “lives off ideas, not for them.” What Langdell was describing was mastery of a fixed set of discernible principles akin to an Ideal of universal legal knowledge as if *Legal Forms* existed in some Platonic universe apart from ordinary human existence.

One of the most ironic aspects of Langdell’s Hypothesis is that his new *legal science* was a thinly masked version of metaphysics, one without a clear methodology. Beneath the purported *scientific* data of his system lurked highly metaphysical assumptions on which the “science” of the law was grounded. This includes the obvious assumption that there was a kind of natural law inherent in the structure of the universe that the judicial mind *touched* and which provided fundamental principles according to which human law was applied. This assertion is metaphysical and *a priori*, not scientific.

Langdell argued: “[A] man of mature age, who has for many years been in practice at the bar changes his habits with some difficulty. He has become used . . . to making himself a temporary specialist in a narrow field, and finds it hard to adapt his mind to the quite distinct profession of the teacher, whose field must be the whole law.”²² It is interesting that this parallels Aristotle’s distinction between the timing appropriate to the

¹⁷ ROLLO MAY HAS CALLED THIS PHILOSOPHICAL SPLIT, “THE CANCER OF ALL PSYCHOLOGY AND PSYCHIATRY UP TO NOW.” ROLLO MAY, *THE COURAGE TO CREATE*, AT 43, 44 (1953, 1965).

¹⁸ CHRISTOPHER LANGDELL, ADDRESS DELIVERED Nov. 5, 1866, REPRINTED IN 3 LAW Q. REV. 123, 124 (1887).

¹⁹ SEE RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 26 (1963).

²⁰ HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE*, ID.

²¹ CHRISTOPHER LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871), QUOTED IN JAMES CONANT, *TWO MODES OF THOUGHT* 45 (1964). CONTRAST LANGDELL’S VIEW WITH THE FOLLOWING ANALYSIS. “EVEN PHILOSOPHERS WHO MOST STAUNCHLY DEFEND THE CLAIMS OF SCIENCE TO CERTITUDE, SUCH AS KARL POPPER, ACKNOWLEDGE THAT, AS HE EXPRESSES IT, “ALL SCIENCE RESTS UPON SHIFTING SAND.” (FN. 32) IN SCIENCE, *NOTHING* IS CERTAIN, AND NOTHING CAN BE PROVED, EVEN IF SCIENTIFIC ENDEAVOUR PROVIDES US WITH THE MOST DEPENDABLE INFORMATION ABOUT THE WORLD TO WHICH WE CAN ASPIRE. IN THE HEART OF THE WORLD OF HARD SCIENCE, MODERNITY FLOATS FREE.” 39 ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (POLITY PRESS, STANFORD UNIVERSITY PRESS, 1990, PAPERBACK ED. 1991).

²² CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917, at 26 (quoting Christopher Langdell).

development of higher or mathematical knowledge versus that required to achieve practical wisdom. The higher knowledge was best attained early in one's life before the mind became cluttered with the conditions of reality and experience. Practical wisdom, on the other hand, because it dealt with the conditions of human life and culture necessarily required experience and was found in older members of society. I suspect Langdell must have been reading Plato's *Republic* and Aristotle's *Politics* in secret.

James Barr Ames provided Langdell's model of the new legal scientist. It was both unsurprising and a validation of the manner in which Langdell had spent his career, essentially as a library researcher on legal matters. Like Langdell, who was a sort of research drone for other lawyers, Ames came to the task of law teaching without legal experience and was therefore "untainted" by the practice of law.²³ One need go no further to understand the inherent bias against not only clinical education but clinical faculty who have too much "experience", and would bring that impure state of "tainted" learning to students. Nor should anyone be surprised at the fact that for several generations judicial clerks with little or no actual legal experience and individuals who spent a very limited number of years as associates in large law firms in which their legal experience consisted of research and document review rather than actual practice were seen as the preferred candidates for the legal professoriate.

B. The Anti-Intellectual Orthodoxy of American Law Schools

Before offering analysis relating to educational goals, methods and teaching strategies I want to look briefly at the source from which the modern law school and the doctrinal case method emerged. It is useful to do so because understanding the foundation allows us to be clear about fundamental assumptions of the kind that have dominated American legal education. This brief depiction of the roots of the system is offered because there is an orthodoxy that still controls a significant part of the discourse about potential reform in legal education and is voiced in such elevated rhetoric that it seems "anti-intellectual" to oppose its tenets. That orthodoxy relies on stereotypes and untested assumptions and value assertions to defend against challenges.²⁴

Orthodoxies, and the orthodoxy of American legal education is no exception, preserve themselves through tacit and explicit stereotypes. In his analysis of the phenomenon in *Propaganda*, Jacques Ellul reminds us: "A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor.... The stereotype ...

²³ THIS PARALLELS ARISTOTLE'S DISTINCTION BETWEEN THE ABILITY TO FUNCTION EFFECTIVELY IN THE DIFFERENT REALMS OF PURE AND PRACTICAL REASON WITH THE PRACTICAL RELATING TO THE INSIGHTS GAINED THROUGH LIFE EXPERIENCE AND PURE REASON A STATE ACHIEVABLE EARLIER IN LIFE BEFORE YEARS OF SOCIAL INTERACTION IMPINGED UPON THE ABILITY TO PERCEIVE A HIGHER REALITY.

²⁴ FOR MY ANALYSIS OF THE ROLE OF UNIVERSITY LAW SCHOOLS AND FACULTY, SEE VARIOUSLY, "FREEDOM TO DO WHAT? INSTITUTIONAL NEUTRALITY, ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY," 43 J. LEGAL ED. 346 (1993); "THE JUSTICE MISSION OF AMERICAN LAW SCHOOLS," 40 CLEVELAND ST. L. REV. 285 (1992); "THE PURPOSES OF THE UNIVERSITY IN THE FIRST QUARTER OF THE TWENTY-FIRST CENTURY," 22 SETON HALL L. REV. 1124 (1992); "THE UNIVERSITY IDEAL AND CLINICAL LEGAL EDUCATION," 35 NEW YORK L.J. 87 (1990); "THE REVOLUTION IN AMERICAN LAW SCHOOLS," 37 CLEVELAND ST. L. REV. 227 (1989); "THE UNIVERSITY IDEAL AND THE AMERICAN LAW SCHOOL," 42 RUTGERS L. REV. 109 (1989); "PROPHETS, PRIESTS AND POWER BLOCKERS: THREE FUNDAMENTAL ROLES OF JUDGES AND LEGAL SCHOLARS IN AMERICA," 50 PITTS. L. REV. 127 (1988); "THE ROLE OF PRACTICAL LEGAL EDUCATION IN THE UNIVERSITY LAW SCHOOL," IN PERSPECTIVES ON LEGAL EDUCATION 278 (N. REDLICH ED. 1979); "THE CLINICAL METHOD OF LEGAL INSTRUCTION: ITS THEORY AND IMPLEMENTATION," 30 J. OF LEGAL EDUCATION 67 (1979); "CLINICAL EDUCATION AT THE CROSSROADS: THE NEED FOR DIRECTION," 1977 B.Y.U. LAW REV. 1025.

helps man to avoid thinking, to take a personal position, to form his own opinion.”²⁵ American law schools have been trapped within a stereotype for generations. They have adapted only when compelled by external forces or when the internal makeup of law faculty has changed sufficiently to require the invention of a partially altered stereotype. Even then that outcome has simply shifted the emphasis from one belief system to another equally intolerant, exclusive and anti-intellectual perspective.

To the extent there is any accuracy to the above claim it may be that academics’ contempt for law practice conceals a sublimated fear of intellectual and professional inadequacy in trying to comprehend and give deeper order to the “messy” world of reality.²⁶ If so, it simply continues the ancient dichotomy between the Ideal and the Real and perpetuates a millennia-old prejudice embedded in our system through devotion to classical Greek philosophy that asserted the world of everyday life was not “real” [in the Ideal sense of Platonic Forms] but a “lesser” illusion that blocked us from perceiving true or Ideal reality.²⁷ In this belief system, what deluded humans perceived as reality was nothing more than the flickering shadows reflected on the wall of Plato’s cave and therefore an illusion that caused us to avoid an accurate perception of truth.²⁸

Part of American legal academics’ subliminal insecurity may be tied to the argument that law schools are inherently practical and that their teaching and research is not of the kind that belongs in a legitimate university. Thorstein Veblen, for example, observed that law schools have no more place in the university than schools of “fencing or dancing” and that “training for proficiency in some gainful occupation … has no connection with the higher learning, beyond that juxtaposition given it by the inclusion of vocational schools in the same corporation with the university”.²⁹ Although the tension between vocational,

²⁵ JACQUES ELLUL, PROPAGANDA (1965).

²⁶ DAVID BARNHIZER, “PROPHETS, PRIESTS AND POWER BLOCKERS: THREE FUNDAMENTAL ROLES OF JUDGES AND LEGAL SCHOLARS IN AMERICA,” 50 PITTS. L. REV. 127 (1988); DAVID BARNHIZER, “THE UNIVERSITY IDEAL AND THE AMERICAN LAW SCHOOL,” 42 RUTGERS L. REV. 109 (1989); AND DAVID BARNHIZER, “THE REVOLUTION IN AMERICAN LAW SCHOOLS,” 37 CLEVELAND ST. L. REV. 227 (1989).

²⁷ THIS BELIEF SYSTEM WAS INTERNALIZED IN DOCTRINES OF THE ROMAN CATHOLIC CHURCH AND TRANSMITTED THROUGH UNIVERSITY INSTRUCTION AND PHILOSOPHY. SEE, E.G., IAN P. MCGREAL, ED., GREAT THINKERS OF THE WESTERN WORLD (HARPERCOLLINS, NY 1992). “SAINT AUGUSTINE (D. 430), WHO SOUGHT TO INTEGRATE PLATONIC PHILOSOPHY WITH THE BIBLICAL HERITAGE, TAUGHT THAT THE FORMS ARE THE EXEMPLARS OF ALL CREATED THINGS AND IN THE MIND OF GOD BEFORE THEY EXIST IN MATTER. GOD GAVE ALL CREATED THINGS AN IDENTITY THAT STEMS FROM THE UNIVERSAL FORM CONTAINED IN THE PARTICULAR; HENCE, ALL HORSES SHARE A COMMON CHARACTERISTIC OF HORSENESS THAT DISTINGUISHES THEM FROM TREES, WHICH ALL SHARE THE UNIVERSAL, TREENESS. TO KNOW ANYTHING, THE HUMAN MIND NEEDS TO GRASP THE SPIRITUAL FORM IN THE MATTER, THE UNIVERSAL IN THE PARTICULAR, THE ONE IN THE MANY.” MCGREAL, ID, AT 124.

²⁸ MAXINE GREENE TELLS US HOW PLATO’S VIEW OF THE HUMAN BEING WAS THAT: “HE EXISTED IN TWO WORLDS: ONE PART OF HIM WAS CAUGHT IN THE FLOW OF TIME AND IMPERFECTION; THE OTHER BELONGED TO ETERNITY. HIS VERY NATURE COMPELLED HIM TO WANT TO TRANSCEND MERE FINITUDE AND WISH FOR IMMORTALITY—OR A RETURN TO HIS SOUL’S TRUE HOME. HENCE, EDUCATION COULD ONLY BE A PROCESS OF HELPING PEOPLE ACTUALIZE THEIR LATENT POWER TO DISCERN THE FIXITIES IN THE FLUID WORLD THEY INHABITED AND, BY THAT MEANS, TO ATTAIN RECOGNITION OF THE REAL. NO ATTENTION WAS DEVOTED TO THE PRACTICAL ARTS OR THE MANIPULATIVE ARTS; NO ATTENTION WAS GIVEN TO UNDERSTANDING OR VALUING SPECIFIC, CONCRETE PHENOMENA OR TO CONTROLLING THE DIRECTION OF EARTHLY CHANGE. THE FULLY REALIZED PERSON HAD HIGHER, BETTER THINGS TO DO. AND THAT PERSON STILL REMAINS IN THE BACKGROUND FOR TEACHERS TODAY.” MAXINE GREENE, *TEACHER AS STRANGER* 72 ().

²⁹ THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 211 (1954). FOR A FASCINATING DISCUSSION OF WHAT WAS OCCURRING AND HOW SPECIALIZATION AND THE GERMANIC FORM OF ACADEMIC CREDENTIALISM TOOK OVER THE AMERICAN UNIVERSITIES, INCLUDING HARVARD, SEE 7 PAGE SMITH, *AMERICA ENTERS THE WORLD: 1841-1954* (1985). FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* 342 (1964). A CAUSTIC CRITIQUE OF THE UNIVERSITY IN AMERICA IS OFFERED BY JOHN DIGGINS WHO CONCLUDES: “TODAY THE LEFT’S LIFE-SUPPORT SYSTEM IS THE UNIVERSITY, WHICH HAS PRODUCED A “NEW CLASS” CREDENTIALED WITH ADVANCED DEGREES AND ENJOYING ELITE STATUS, WHAT THORSTEIN VEBLEN—WHOSE HIGHER LEARNING IN AMERICA BEARS THE SUBTITLE “A STUDY IN TOTAL DEPRAVITY”—WOULD PROBABLY HAVE CALLED “THE LEISURE OF THE THEORY CLASS.”” JOHN PATRICK DIGGINS, *THE RISE AND FALL OF THE AMERICAN LEFT* 290 (W.W. NORTON & CO., NEW YORK AND LONDON, 1992).

practical and “liberal” education has largely dissipated and “fencing and dancing” is easily found in university curricula there is still a tacit issue of quality, intent and a “whiff” of intellectual snobbery that allows the intellectual “elites” of American law schools to feel good about themselves. What is “theoretical” may have changed but the desire to be “legitimate” remains.

Legal scholars and teachers may also have an ill-defined and barely repressed lack of confidence in their intellectual methodology and in the merits of their doctrinally-driven discipline as being a legitimate intellectual system. As Eric Hoffer suggests, that would not be surprising given his conclusion that “eternal” self-doubt is the daily fear of intellectuals in any area.³⁰ If this self-doubt is so even in disciplines with a clear empirical or philosophical methodology, it is an even more troubling condition for American law teachers who lack much of anything beyond raw analytic power and a technical, professional and institutional frame of reference and limited target audience for their work product.

I suspect American law teachers understand on some level that they don’t have much of profound intellectual substance to say—at least in the domains of theoretical philosophy or cosmic scientific breakthroughs.³¹ In this regard I challenge the reader to come up with any research publication offered by an American legal scholar in the past fifty years that represents an intellectually substantive breakthrough in knowledge offering illumination to society. If a few such events are identified, even that simply demonstrates the lack of production of profound research that matters other than in a very limited context. This in no way renders all the production meaningless but does stand for the proposition that American legal scholars should look in the mirror and not get so full of themselves as a breed of “higher order” thinkers or teachers of deep profundities.

The seemingly obvious fact is that much of legal scholarship can be described as a sort of “advanced current events” report on issues reflected in judicial decisions or statutory and regulatory interpretations. Except in the sense that there is an incremental connectivity over several decades as doctrinal analyses of changing precedential actions occur centered on clusters of particular issues, can legal scholarship be considered of much consequence. It is the multi-faceted pattern created over time primarily by judges but complemented by legal scholars that is of some consequence—not for its intellectual depth or substance—but for the creation and preservation of the patterns of the Rule of Law that are of some importance. It may be describable as a sort of systemic intellectual illusion (or delusion) but, as with the ministrations and sermonizing of an arcane priesthood in a religious context, the illusion becomes important if accepted and shared by a critical mass of believers. It doesn’t mean it isn’t worth doing on some level but does suggest we shouldn’t engage in the pretension that we are among the highest order of the scholarly class.

³⁰ “THERE IS APPARENTLY AN IRREMEDIABLE INSECURITY AT THE CORE OF EVERY INTELLECTUAL, BE HE NONCREATIVE OR CREATIVE. EVEN THE MOST GIFTED AND PROLIFIC SEEM TO LIVE A LIFE OF ETERNAL SELF-DOUBTING EACH DAY.” ERIC HOFER, *THE TRUE BELIEVER* () AT 121.

³¹ BARNHIZER, “PROPHETS”, SUPRA, N. .

Francis Bacon was certainly advancing this view when he explained that judicial thought was necessarily devoted to problem solving of the cause before the court, warning of the danger of wandering too far afield in pursuit of some deeper meaning.³² He understood that the role of the judge was both to resolve the dispute while providing rules of decision for that and future disputes. Going too far beyond this contextual responsibility betrayed the function of the judge and in doing so blurred and undermined the functioning and purposes of the law.³³ In a similar vein, Locke observed that our system required the law to provide umpires who reached decisions that resolved disputes and that the decisions were not the highest-order philosophical expositions but ones that successfully resolved the problem in a systemically acceptable way.³⁴

In thinking of Langdell's proclamation that the academic study of law was a science and that judicial decisions were the subject matter of that science that contained core principles capable of being extracted and explained by legal scholars, it is important to consider the observations of Bacon and Locke and the fact that judges' decisions are goal oriented attempts to dispose of disputes using language and variations of principles that are functional and intermediate. In the same sense as the computer concept of GIGO ("Garbage in-Garbage Out") it is clear that we are limited by the quality and purpose of the material on which we must work.

Perhaps the problem is that, being secretly ashamed of their academic impotence academics of the law may act much like the naked emperor and his advisors who don't want to concede the lack of intellectual "clothes". Yale legal historian Robert Stevens criticizes the productivity of American legal scholars, concluding that: "Legal scholarship was yet another area whose purpose had been confused by the demands placed on the law schools as they both assumed their role as the sole point of entry for practice in the profession and also claimed legitimacy in the scholarly confines of the university."³⁵ He explained: "For a hundred years, commentators had been expressing surprise that despite the number of distinguished lawyers teaching in law schools, the output of scholarly literature was small."³⁶

We can no longer conclude that the output of law school academics is "small" in the sense of the volume of printed words, but an even greater question remains concerning the quality, character, impact and substance of a great deal of the work.³⁷ As the number of journal locations in which an academic's work can see the light of day has grown exponentially so have the special interests of the new journals themselves, ones that are highly specialized under virtually any heading imaginable. There is an increasing lack of

³² BACON, THE MAXIMS OF THE COMMON LAW,

³³ BACON, THE MAXIMS OF THE COMMON LAW, ID.

³⁴ LOCKE, OF CIVIL DISCOURSE,

³⁵ ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S, 444, 445 (1983).

³⁶ STEVENS, LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S, ID.

³⁷ JAMES MARTIN, THE WIRED SOCIETY (PRENTICE-HALL 1978), REPORTS: "THE FIRST SCIENTIFIC JOURNAL APPEARED IN THE 1660'S, MORE THAN TWO CENTURIES AFTER GUTENBERG'S INVENTION. BY 1750 THERE WERE 10 SCIENTIFIC JOURNALS, AND FROM THEN THE NUMBER WAS MULTIPLIED BY TEN EVERY FIFTY YEARS, THE APPROXIMATE NUMBERS [REACHING 100,000 JOURNALS BY 1950]." A QUICK CHECK OF AMERICAN LAW AND LAW-RELATED JOURNALS SHOWS THAT THERE ARE NEARLY 2000 IN WHICH LEGAL SCHOLARS CAN PUBLISH. THIS DOESN'T EVEN CONSIDER BOOKS, MAGAZINES AND NEWSPAPERS, AND ON-LINE PUBLICATIONS.

common ground or systemic coherence to the myriad splintered fragments of America's legal academia. Ellul warned that the intelligentsia was devolving to groups of special interests communicating through jargon that narrowed their universe and made it increasingly difficult to communicate beyond ones interest clique.³⁸ At this point it is rare for a legal academic's published output to be read by more than a handful of other academics and it is also the case that those loyal readers tend to be people who are already in agreement with the author. The result is that by and large the "scholarship" is "preaching to the choir" with the "choir" reduced to the size of a barbershop quartet.³⁹

At this point it has become much like Von Jhering's "dream" in which European jurists approached the gates of Heaven on death, but unlike other entrants were not asked to consume the "draught of forgetfulness" that removed all earthly knowledge. When they asked why they were not required to do so the response was that they had no real knowledge and therefore nothing to forget. This perspective highlights the fear I think is felt by many law teachers in America.⁴⁰

III. "Thinking Like a Lawyer"

There is a long-standing idea that the central educational goal of a legal education is to teach students to "think like lawyers". Of course this formulation is a vague or perhaps even a meaningless one, at least unless we are able to clearly specify what is involved in the process and then describe and develop the kinds of effective educational methodologies and subject matters that must be part of the complex package. The problem is that we really do not know what it is to "think like a lawyer", nor have we done the hard work (as an overall educational system) necessary to understand what methods and experiences work most effectively to achieve the stated ends. We casually conclude that we do in fact achieve the goal as supposedly effective teachers even though there is ample evidence to support the proposition that there is relatively little connection between what we do and what we claim to be our responsibility and educational goals.⁴¹

The simple fact is that legal education in America is no search for knowledge in its highest realms but an ill-defined hybrid undertaking. Law schools have benefitted enormously from the monopoly over entry to the legal profession granted to law schools by the American Bar Association and state supreme courts. Zemans and Rosenblum observed that: "With formal legal education maintaining a virtual monopoly over preparation for entry into the legal profession, it is assumed that law schools are or ought

³⁸ JACQUES ELLUL,

³⁹ SEE, DAVID BARNHIZER, "TRUTH OR CONSEQUENCES IN LEGAL SCHOLARSHIP?" 33 *HOFSTRA L. REV.* (2005), AND DAVID BARNHIZER, "A CHILLING OF DISCOURSE", 50 *ST. LOUIS UNIV. L. REV.* 595 (2006).

⁴⁰ SEE FELIX COHEN, "TRANSCENDENTAL Nonsense AND THE FUNCTIONAL APPROACH", 35 *COLUMBIA L. REV.* 809 (1935).

⁴¹ RICHARD HOFSTADTER EXPLAINS THE SITUATION AS ONE IN WHICH: "THE WORK OF LAWYERS, EDITORS, ENGINEERS, DOCTORS, INDEED OF SOME WRITERS AND OF MOST PROFESSORS—THOUGH VITALLY DEPENDENT UPON IDEAS, IS NOT DISTINCTIVELY INTELLECTUAL. A MAN IN ANY OF THE LEARNED ... PROFESSIONS MUST HAVE COMMAND OF A SUBSTANTIAL STORE OF FROZEN IDEAS TO DO HIS WORK; HE MUST, IF HE DOES IT WELL, USE THEM INTELLIGENTLY; BUT IN HIS PROFESSIONAL CAPACITY HE USES THEM MAINLY AS INSTRUMENTS. THE HEART OF THE MATTER ... IS THAT THE PROFESSIONAL MAN LIVES OFF IDEAS, NOT FOR THEM. HIS PROFESSIONAL ROLE, HIS PROFESSIONAL SKILLS, DO NOT MAKE HIM AN INTELLECTUAL. HE IS A MENTAL WORKER, A TECHNICIAN." RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE.

to be the primary source of the skills and knowledge requisite to the practice of law.”⁴² Posed in this way it is difficult to deny the assertion.

Listening to the laments of American law professors concerning the loss of the grand intellectual purpose of university legal education and its subordination to “technical”, “practical” or “skills” education would produce a corresponding compassion were it not for the fact that law schools in America have always been focused on skills and technical matters while seeking to define their approach as theoretical. It is this denial of reality that has led to a confused and incomplete educational model. American law faculty are admittedly unwitting examples of the false wizard in the Land of Oz, claiming to be one thing while hiding what is actually done behind a mask of pomp and circumstance intended to give an aura of intellectual grandeur. The problem is that we have deceived even ourselves about the majesty of what we do in our teaching and scholarship and actually believe that what we do is something profound.

The truth is somewhat bleak. We are “neither fish nor fowl” when it comes to intellectual substance and meaning. There are some areas of law in which deeper intellectual substance can be seen. Inquiries into matters of justice and injustice, analysis of the interplay of social needs, politics and constitutional doctrine and democratic philosophy offer examples. But the simple fact is that virtually all of the material in areas such as contracts, procedure, tax, corporations, criminal law, evidence, business associations, patent law, estates and trusts, property and much more is clearly technical analysis and information transfer. How on earth such subject matters can be claimed to represent higher order bodies of knowledge as opposed to the basic subject matters lawyers will or may need when in practice is unfathomable.

Of course they are legitimate parts of an academic-professional education in some form. And a degree of philosophical or even social scientific inquiry into the role, underlying values, efficiency, fairness and legitimacy of the doctrines and operating systems by which they are developed and applied is unquestionably appropriate in some form and perhaps more coherently than is now done. But most of what is offered in most law courses is doctrine and technical analysis of a kind that might be of use to a lawyer but has little to do with any profound meaning. By failing to be honest about the true nature of American legal education and scholarship we have created a mechanism that is neither profound nor pedagogically effective.

If law schools in America had chosen to be true research institutions in which scholars developed a serious comprehensive methodology of research and students earned a first degree in law based on an intellectual interest in understanding law itself as opposed to becoming practicing lawyers then there would be no necessary expectation about educating students aspiring to the profession in professional skills and values. But that is not what occurred and the Faustian bargain between law schools, the organized bar and universities imposes a moral and ethical responsibility on law schools to prepare students for the practice of law at the highest level of the schools’ capability.

⁴² F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 123 (1981).

A. The Meaning of “Thinking” Like a Lawyer?

I have never thought that the real meaning of “thinking like a lawyer” represents a passive state of mind but one involving the ability to actually function effectively as a lawyer in a dynamic and risky environment—including the ability to implement one’s intellectually thought-out path of professional action effectively. Of course we cannot produce a polished lawyer who like Athena leaps fully developed from a “shell” of a three-year law school education. But if we cannot achieve that end, we *can* provide a structure, vocabulary, a package of the foundational skills most essential to high quality legal activity, and a sense of the greater responsibility of a professional in American society. This suggests rather strongly that “thinking like a lawyer” is not only a method of analysis but a substantive set of understandings, principles and awareness of responsibility as a principled professional. It is not only “thinking” in a technical sense but operates in dimensions of value and duty.

No practicing lawyer or judge with whom I have ever interacted sits around in an office and “ideates”. The point is that idea and action are inseparably connected and intertwined with each reinforcing and informing the other as part of a singular system. To treat “thinking” and “doing” as separate phenomena rather than part of a single system is to fail to understand the vital connection between the pieces. The truth is that they inform and enrich each other and when we speak of what is required to educate the best legal professionals an exclusive diet of intellectualism is as inadequate as an exclusive diet of “technical” or narrow “skills” education.

I suggest that the very idea of “thinking like a lawyer” represents at least four different but related functions. One is philosophical and moral and relates to the quality of the understanding of the underlying conceptual value structure and language on which the Western system of law, politics, philosophy and culture are grounded. This approach would seem to be the primary formulation for serious research institutions dedicated to advancing our knowledge of law and its intersection with society if law schools had never accepted the convenient and lucrative monopoly over entry to the profession.

If law schools had concentrated primarily or exclusively on areas of critical research and only educated students who were committed to the study of such issues based on intellectual curiosity independent of any desire to become practicing lawyers they would be entirely different kinds of institutions in number of schools, faculty and students. Rather than 200 U.S. law schools with 6,000 or more faculty members and 130,000 plus law students it would be unsurprising to see something like thirty or forty “theoretical” graduate schools devoted in part to the study of law of some form, perhaps 500-800 faculty members and 5000-10,000 students studying law as an actual graduate discipline.

Law schools made their bargain but the rewards of scale and guaranteed enrollments have come with a price. One consequence is that law schools would have few students and resources if they did not provide the sole path of access to the rights and privileges of the legal profession. But they would be true intellectual institutions and the faculty would be true scholars, much like those in schools of philosophy, ethics and social science. That

choice was not made and law schools will never be true research institutions in that strict sense. They are at best what Chroust called “academic-professional” schools—whatever this means.⁴³

The second element of “thinking like a lawyer” is what might be called the technical orientation, but it is a higher order variation of that idea beyond what most people consider when surfacing concepts of the technical dimension. This is because it includes the ability to interpret not only the fixed but the dynamic data of a situation within that overarching conceptual and substantive structure described above. The ability to do this involves many of the insights and methods inherent in the first understanding of “thinking like a lawyer”. This technical dimension taken beyond the “merely technical” includes a policy, purposive and applied theoretical dimension in which the particular disciplinary compartment is examined and critiqued as a system against professed goals and functions. This critique includes strategies for improving performance and fairness.

Having accepted the primary and even exclusive responsibility for educating lawyers imposes a duty to identify the essential skills, knowledge and values that are central to the lawyer’s work.⁴⁴ The third dimension of “thinking like a lawyer” concentrates on the particular thought processes and actions of the advocate. This orientation is of particular importance to preparing students for the real world of law practice because advocacy inevitably distorts the material of a dispute when necessary to enhance the probability of success on behalf of a client. This distortion is both deliberate and implicit. It also contains a strong manipulative or Machiavellian impulse that generates moral dilemmas for those who work within the culture of advocacy. The process is inescapable. It is powerful. And law schools do a terrible job of preparing their graduates for this culture of manipulation, deception and distortion. The first dimension of “thinking like a lawyer” also informs this aspect of legal education because it is necessary to consider the limits on the process and the tensions between societal and client interests along with the effects on those who function within this domain.

A final variation on what might be included in “thinking like a lawyer” is the transactional interpretations that, while also within the purview of advocacy, contain elements that are more honest and less manipulative. All these forms of thought and analysis are part of “thinking like a lawyer”. The question is the degree to which legal education can and should provide a firm foundation in these forms of thought and action for law students. As to what law schools *should* do, given their monopoly over entry into the legal profession, it seems obvious that they should be doing far more than currently. A problem the schools have never adequately addressed, however, is the extent to which they are capable of offering meaningful education in some areas that would reasonably be thought important for fuller professional understanding and effective performance.

B. Legal Interpretation as Involving the “Original and Natural” Idea of Knowledge

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⁴⁴ This is the focus of the MacCrate Report’s concentration on the skills and values of the profession and its urging that law schools develop better strategies for addressing these needs.

In pursuing a better understanding of why most of the material of law seldom falls within the aura of strict scientific inquiry we need to think about it both in terms of the fact that law involves scientifically incompatible and incommensurable compartments of fact, supposition and knowledge—and also that many of those elements are of an indeterminate character. The result is a probabilistic and hypothetical analytical process in which choices must be made on imperfect knowledge of a kind that simply cannot be fit within scientific method. Julius Stone has spoken about the system of Common Law precedent as inherently indeterminate.⁴⁵ Edward Levi claims that “[t]he categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.”⁴⁶

Dennis Lloyd describes judicial reasoning as “a succession of cumulative reasons which severally cooperate in favor of saying what the reasoner desires to urge” rather than “a chain of deduction”.⁴⁷ Judges and law teachers represent a pattern of thought unlike that in either hard or soft sciences. Law cases of any complexity contain issues of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, doctrinal principles and more. The judge must answer questions that cannot be scientifically or rationally answered. The lawyer must take this into a different dimension due to the need to advance and protect client interests. The substance of law involves factors that are outside scientific controls and that cannot be compressed into arbitrary modules.

American legal thought—and consequently the outcome-oriented and manipulative focus of lawyers in their work—is more accurately described as focused on a *prescientific* form of knowledge.⁴⁸ The interaction of Common Law judiciary and American law teachers creates a unique approach to knowledge. This combination of material and analytic technique is what comprises a central part of the lawyer’s thought processes. It possesses characteristics of the methodology used to approach knowledge prior to the rise of modern science, an integrative, partial and synthetic mode of perception, judgment and decision-making that is at the heart of what lawyers do.⁴⁹

⁴⁵ JULIUS STONE, *LEGAL SYSTEM AND LAWYERS’ REASONINGS* (1964), CH. 7, “CATEGORIES OF ILLUSORY REFERENCE IN THE GROWTH OF THE LAW”.

⁴⁶ EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4 (1949).

⁴⁷ DENNIS LLOYD AND MICHAEL FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* 1140 (5TH ED., 1985).

⁴⁸ SEE, E.G., THE OBSERVATIONS OF DE TOCQUEVILLE IN HIS GROUNDBREAKING EARLY 19TH CENTURY WORK, *DEMOCRACY IN AMERICA*, WHERE HE DESCRIBED AMERICANS AS ESSENTIALLY UNINTERESTED IN PHILOSOPHICAL THOUGHT AND INTERESTED ONLY IN PRAGMATIC ACTIONS. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOL. I, AT 273 (J. & H.G. LANGLEY, N.Y. 1840; ALFRED A. KNOPF EDITION 1945).

⁴⁹ COLIN McGINN OBSERVES THE DILEMMA WE FACE IN TRYING TO UNDERSTAND OUR WORLD THROUGH PHILOSOPHICAL INQUIRY. “PHILOSOPHY IS NOT THE SAME AS SCIENCE. SCIENCE ASKS ANSWERABLE QUESTIONS … WHILE PHILOSOPHY SEEMS MIRED IN CONTROVERSY, PERPETUALLY WORRYING AT THE SAME QUESTIONS, NOT MAKING THE KIND OF PROGRESS CHARACTERISTIC OF SCIENCE.” COLIN McGINN, *THE MYSTERIOUS FLAME: CONSCIOUS MINDS IN A MATERIAL WORLD* 208 (PERSEUS 1999). HE ADDS: “PHILOSOPHY MARKS THE LIMIT OF HUMAN THEORETICAL INTELLIGENCE. PHILOSOPHY IS AN ATTEMPT TO OVERSTEP OUR COGNITIVE BOUNDS, A KIND OF MAGNIFICENT FAILURE.” *Id.*, AT 209. McGINN SUGGESTS WHY WE SEEM TO MAKE ADVANCES IN SCIENCE BUT NOT IN OTHER REALMS OF KNOWLEDGE. HE STATES: “IT IS BECAUSE OF … [THE] FUNDAMENTAL DIVIDE BETWEEN THOUGHT AND REALITY THAT HUMAN KNOWLEDGE IS PROBLEMATIC. KNOWLEDGE IS THE ATTEMPT BY THE MIND TO KEEP TRACK OF REALITY, TO EMBRACE IT IN THOUGHT. IT IS THE MIND TRYING TO GET BEYOND ITSELF. THIS IS AN ENTERPRISE FRAUGHT WITH DIFFICULTIES AND PITFALLS.... KNOWLEDGE IS A KIND OF MARRIAGE OF MIND AND WORLD, AND LIKE ALL MARRIAGES IT HAS ITS FAILURES AND FRUSTRATIONS, ITS DISHARMONIES AND MISALIGNMENTS.” McGINN, *THE MYSTERIOUS FLAME: CONSCIOUS MINDS IN A MATERIAL WORLD* 32. LEGAL KNOWLEDGE AND THE PRINCIPLES OF SOCIAL CHOICE AND JUDICIAL INTERPRETATION FALL INTO A REALM THAT IS NEITHER SCIENCE NOR PHILOSOPHY. LAW BUILDS ITS CONCLUSIONS ON A BED OF ASSUMPTION, ASSERTION AND SHIFTY REALITY THAT WE NEVER REALLY CAPTURE WITH ACCURACY.

G.S. Brett has called this kind of approach “the original and natural idea of knowledge.”⁵⁰ Interacting with judicial thought, the substance of American law and the knowledge transmitted by law teachers, this generates a form of knowledge closer to Aristotle’s concept of practical wisdom than empirical scientific inquiry. Practical wisdom is a “true and reasoned state or capacity to act with regard to the things that are good or bad for man.”⁵¹ Reason and choice are obvious components of the system but the necessity of making choices about good and bad infuses the process with a different kind of understanding, material and experience.

Essential in practical wisdom is the need to learn from one’s experience and do so in a way that embodies prudential, ethical and moral elements. It ironically is the counterpart to Langdell’s idea of the young legal scientist free of the taint of experience because, for example, Plato’s concept of the Philosopher King recognized that to achieve wisdom in human society a lengthy period of experience was essential in which in addition to a lengthy period of intense philosophical study a budding Philosopher King should spend more than a decade in practical matters prior to assuming the responsibility of that elevated status.⁵² Neither philosophy nor experience was enough in itself.

As a form of practical wisdom, law in the hands of lawyers, judges and legislators looks toward effective ways to solve critical challenges humans encounter in their political communities. For lawyers who have accepted the responsibility of protecting and advancing their clients’ interests, the “good or bad” aspects become particularly problematic because of the potential conflict between direct and indirect interests of community and client, and short and long-term implications. This imposes on lawyers an inherent and unavoidable tension. It imposes on law schools the responsibility of preparing their students to function with the insights, skills, knowledge and values involved in the exercise of the great power of law in a system grounded on the Rule of Law.

C. Lawyers and the “Shelf” of Knowledge

Charles Eliot edited *The Harvard Classics* with the idea that knowledge could be transmitted on a “five foot shelf” through a wonderful collection of works representing what he considered the best of human intellectual achievement spanning more than two thousand years.⁵³ In this modern era where our educational system seems increasingly disconnected from the foundation of knowledge that underlies our institutions, laws and aspirations it seems even more vital that the foundation of what we call the Rule of Law be preserved. This cannot be accomplished without a base of shared understandings about humans in community and as individuals as well as coherent views on the roles and

⁵⁰ G. S. BRETT, *PSYCHOLOGY ANCIENT AND MODERN* 36, 37 (1928), QUOTED IN MARSHALL McLUHAN, *THE GUTENBERG GALAXY* 93, 94 (NEW AMERICAN LIBRARY EDITION, 1969).

⁵¹ ARISTOTLE, *NICHOMACHEAN ETHICS*, BK. VI, CH. 5 (R. McKEON ED. 1973).

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⁵³ CHARLES W. ELIOT, EDITOR, VOL. 50, THE EDITOR’S INTRODUCTION, READER’S GUIDE AND INDEX, TO THE HARVARD CLASSICS (P. F. COLLIER & SON, NEW YORK 1910, 1938). ELIOT CONCEIVED HIS TASK AS CREATING A BODY OF KNOWLEDGE THAT WOULD FIT ON A FIVE FOOT SHELF IN 50 VOLUMES AND CONTAIN EVERYTHING HE THOUGHT REQUIRED IF ONE WAS TO BE LIBERALLY EDUCATED.

limits of government and other potent institutions. This foundation is not found strictly or even primarily in law books but developed in our cultural history, principles, institutional and political forms, and grounding values of the kind contained in the *Classics*' collection of Aristotle, Cato, Livy, Dante, Hume, Locke, Grotius, Pufendorf, Leibniz, Adam Smith and far, far more.

Without some grounding in these or similar sources our social, political and legal actors become increasingly disconnected from the foundations that have provided the intrinsic substance of our beliefs—including those of our nation's Constitutional Founding Fathers—and the core understandings that have led to the system's development and evolution. The loss of this shared conceptual structure and language is important because at the point where we no longer have a set of shared values and principles, it becomes irrelevant whether we style ourselves liberal or conservative. This is because we are simply spouting words and slogans that lack substance, as we are without the understanding necessary to explain and justify the points we seek to advance in our discourse.

Eliot was correct in thinking that there is a set of foundational principles, works and resources that inform Western culture and its educational, political and legal system in inescapable and often invisible ways, forming a sort of “cloud” or invisible atmosphere of values and assumptions that guide our behavior and choices. These principles are embedded in the language we use and in our fundamental assumptions. Our learning in the highest liberal arts derives from such sources. Over centuries the authors and preservers of such works—individual and institutional—enriched each other's work to the point that the structure of Western civilization, including the Rule of Law, came to be supported by the analysis in ways we can't begin to understand and from which we cannot disassociate ourselves. They penetrate and permeate our language and conceptual structures.

Reason is a power, not a substance. It is vital that lawyers and judges—those charged with the responsibility for preserving the core elements of the system—be educated in ways that ensure their understanding of the grounding principles and in the skills and commitments essential for the performance of their professional roles at the highest level of quality.⁵⁴ Human thought needs structure, grounding assumptions and values to shape experience and data on which to operate or the mind is simply a machine operating in a vacuum.⁵⁵ The relevance of that premise to the practice of law in America, and to the foundation of knowledge law schools provide their students, is that law and judicial choice are based, however implicitly, on a set of values that permeates our conception of

⁵⁴ LAWRENCE FRIEDMAN, *AMERICAN LAW* AT 257 EXPLAINS LAW'S IMPORTANCE. “[I]T IS THROUGH LAW, LEGAL INSTITUTIONS, AND LEGAL PROCESSES THAT CUSTOMS AND IDEAS TAKE ON A MORE PERMANENT, RIGID FORM. THE LEGAL SYSTEM IS A STRUCTURE. IT HAS SHAPE AND FORM. IT LASTS. IT IS VISIBLE. IT SETS UP FIELDS OF FORCE. IT AFFECTS WAYS OF THINKING. WHEN PRACTICES, HABITS, AND CUSTOMS TURN INTO LAW, THEY TEND TO BECOME STRONGER, MORE FIXED, MORE EXPLICIT.”

⁵⁵ “ALL WE CAN DO BY REASONING IS TO LEARN THAT IF OUR FIRST ASSERTION IS TRUE, THEN ALL THE IMPLICATIONS, WHICH FOLLOW FROM IT ACCORDING TO THE LAWS OF VALID REASONING, MUST ALSO BE TRUE. BUT THE LAWS OF REASONING ARE SILENT CONCERNING THE TRUTH OF THE CRUCIAL FIRST PREMISE.” EUGENE FREEMAN AND DAVID APPEL, *THE WISDOM AND IDEAS OF PLATO* (1963) AT 71.

government and community, of individual human development, of right and wrong, and the interpretations relied on in problem solving and advocacy.⁵⁶

D. The Dynamics of Legal Interpretation

A foundation of language and values is only a beginning and in any event is not intended to be unchanging. Legal analysis is best done on a foundation of actual knowledge, but law both in its conception and in action offers a dynamic and shifting environment in which change is one of the constants.⁵⁷ So, however, is the need for a conceptual architecture within which change occurs, values expressed and experience translated, paradoxically within a system that attempts to hold to a sense of stability. Aristotle wisely warned that law should only be altered gradually and that dramatic disruptions in the applications of legal rules undermined the sense of integrity and legitimacy that was an essential condition required to cause the system of law to be considered sufficiently solid.⁵⁸ The challenge is that too rapid or dramatic reversals or changes in law are as much a danger to our perception of the system's legitimacy as is the refusal of the system to adapt in the face of injustice or generally accepted cultural developments.

The mind *in* society must have a substantive and valuation structure within which data are interpreted but in a shifting culture important elements of the data are fluid and dynamic. How and whether to include the new data in the interpretations recognized through law is a challenging matter. Issues of justice, fairness, equality, balance, timing and political and cultural prudence influence all aspects of the undertaking.⁵⁹ Factionalism and societal disputes further intensify the tension over what to include, when to do it and how to allocate the changing rights and duties.⁶⁰ This process is further

⁵⁶ ON THESE THEMES SEE, DAVID BARNHIZER AND DANIEL BARNHIZER, HYPOCRISY & MYTH: THE HIDDEN ORDER OF THE RULE OF LAW (VANDEPLAS 2009). ERNEST BECKER WARNS US OF THE DELICATE NATURE OF OUR ASSUMPTIONS: “THE WORLD OF HUMAN ASPIRATION IS LARGELY FICTITIOUS AND IF WE DO NOT UNDERSTAND THIS WE UNDERSTAND NOTHING ABOUT MAN.... MAN'S FREEDOM IS A FABRICATED FREEDOM, AND HE PAYS THE PRICE FOR IT. HE MUST AT ALL TIMES DEFEND THE UTTER FRAGILITY OF HIS DELICATELY CONSTITUTED FICTION, DENY ITS ARTIFICIALITY.” ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2D ED. 1971).

⁵⁷ ROSCOE POUND, *NEW PATHS OF THE LAW* (UNIVERSITY OF NEBRASKA PRESS 1950). POUND ARGUES THAT THE PURPOSE OF THE LEGAL ORDER: “IS TO SECURE AS MUCH AS MAY BE OF THE WHOLE SCHEME OF INTERESTS, THAT IS THE WHOLE SCHEME OF MEN'S DESIRES OR DEMANDS INVOLVED IN LIVING TOGETHER IN CIVILIZED SOCIETY, WITH THE LEAST FRICTION AND WASTE.” 3

⁵⁸ SEE, ARISTOTLE, *THE POLITICS*, B. JOWETT TRANS., THE OXFORD TRANSLATION OF ARISTOTLE, W.D. ROSS ED. (1921). “FOR THE LAW HAS NO POWER TO COMMAND OBEDIENCE EXCEPT THAT OF HABIT, WHICH CAN ONLY BE GIVEN BY TIME, SO THAT A READINESS TO CHANGE FROM OLD TO NEW LAWS ENFEEBLES THE POWER OF THE LAW.” BK. II, C. 8.

⁵⁹ “JUSTICE STATES THE FUNDAMENTAL METHOD OF LAW—THE METHOD OF PURPOSEFUL ACTIVITY THAT IS, ACTION DIRECTED TOWARD ENDS. LAW IS TELEOLOGICAL, AND JUSTICE IN ITS BROADEST TERMS IS THE STATEMENT OF THAT FACT AND IS IN A SENSE THE INSTRUMENT WHICH KEEPS LAW TELEOLOGICAL IN ITS METHOD. JUSTICE EXPRESSES AND CELEBRATES THIS PURPOSEFUL ORIENTATION OF LAW; IT IS FORMATIVE BECAUSE ITS USE KEEPS MEN SENSITIVE TO THEIR RESPONSIBILITY AND WILLING TO FIGHT FOR CONCRETE ACHIEVEMENTS. IT THUS IS THE EXPRESSION FOR THE MOTIVE POWER OF LAW....” EDWIN GARLAN, *LEGAL REALISM AND JUSTICE* (1941, ROTHMAN REP. 1981) AT 125.

⁶⁰ THIS INABILITY TO FIND COMMON GROUND, INCLUDING THE CONNECTIONS CREATED BY SYMBOLS AND SHARED MYTHS, IS HIGHLIGHTED BY ROLLO MAY, *POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE* (W.W. NORTON, NY 1972). “THE DEEP SUSPICION OF LANGUAGE AND THE IMPOVERISHMENT OF OURSELVES AND OUR RELATIONSHIPS, WHICH ARE BOTH CAUSE AND RESULT, ARE RAMPANT IN OUR TIMES. WE EXPERIENCE THE DESPAIR OF BEING UNABLE TO COMMUNICATE TO OTHERS WHAT WE FEEL AND WHAT WE THINK, AND THE EVEN GREATER DESPAIR OF BEING UNABLE TO DISTINGUISH FOR OURSELVES WHAT WE FEEL AND ARE. UNDERLYING THIS LOSS OF IDENTITY IS THE LOSS OF COGENCY OF THE SYMBOLS AND MYTHS UPON WHICH IDENTITY AND LANGUAGE ARE BASED.” 68

influenced and to some extent distorted because when it comes to legal analysis the data are also the material of advocacy and are manipulated to achieve a desired outcome.⁶¹

One problem in figuring out how to approach this interpretive dilemma is that there is no obvious intellectual core in American law school teaching or scholarship, only a mosaic of disconnected pieces.⁶² For American law schools this is reflected in the organization of the curriculum into technically functional (rather than truly intellectual) compartments of law as represented in contracts, procedure, property and the like. This organizational form was created primarily as a matter of convenience. Certainly there was no intrinsic intellectual “magic” in the compartmentalization of the law school curriculum when the obvious fact—as any practicing lawyer will admit—is that legal matters inevitably contain multiple facets of law. A “contracts” situation may include procedure, state or local tax, estate and trust implications, dispute resolution possibilities, securities and so forth.

Artificially compartmentalizing the elements of law into relatively rigid domains without appreciation of law’s inter-connectivity is not only anti-intellectual but a defective method for organizing subject matters. Nor was it an accident. As was seen in the discussion of Christopher Langdell’s “reforms” at Harvard in the 19th century, the separation of law study and research into doctrinal compartments was an attempt to present the university study of law as a scientific enterprise. Consistent with the increasing specialization and division of science into detailed sub-disciplines law was also seen by Langdell as something that must be removed from an overarching domain of what might be thought of as metaphysics or philosophy and presented in sufficiently specific detail so that each doctrinal sub-division could be thought of as “scientific”.⁶³

This quickly hardened into an orthodoxy that remains to this day. Arthur Koestler has described this phenomenon in a way that fits the law school culture in discussing how orthodox systems behave. He explains: “The emergent orthodoxy hardens into a “closed system” of thought, unwilling or unable to assimilate a new empirical data or to adjust itself to significant changes in other fields of knowledge....”⁶⁴ Jerold Auerbach explained what occurred in the context of American law schools, remarking that: “The contagious popularity of the case method perfectly expressed the new ambience of the late nineteenth century. Amid widespread fear of social disorder, American educators,

⁶¹ LAWRENCE FRIEDMAN, AMERICAN LAW, AT 257: OBSERVES, “IT IS THROUGH LAW, LEGAL INSTITUTIONS, AND LEGAL PROCESSES THAT CUSTOMS AND IDEAS TAKE ON A MORE PERMANENT, RIGID FORM. THE LEGAL SYSTEM IS A STRUCTURE. IT HAS SHAPE AND FORM. IT LASTS. IT IS VISIBLE. IT SETS UP FIELDS OF FORCE. IT AFFECTS WAYS OF THINKING. WHEN PRACTICES, HABITS, AND CUSTOMS TURN INTO LAW, THEY TEND TO BECOME STRONGER, MORE FIXED, MORE EXPLICIT.”

⁶² LEGAL ACADEMICS ARE NOT ALONE IN THEIR INABILITY TO FIND INTELLECTUAL AND NORMATIVE GROUNDING. JACQUES ELLUL OBSERVED: “MODERN MAN IS BESET BY ANXIETY AND A FEELING OF INSECURITY. HE TRIES TO ADAPT TO CHANGES HE CANNOT COMPREHEND. THE CONFLICT OF PROPAGANDA TAKES THE PLACE OF THE DEBATE OF IDEAS.” JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY*, AT VII (1964).

⁶³ THE SITUATION IS ONE OF “SCIENTISM” OR AN IRRATIONAL FAITH IN THE ABILITY OF SCIENCE TO EXPLAIN ALL MATTERS OF CONSEQUENCE. IT HAS BEEN STATED THAT: “THERE ARE TWO FALSE ROUTES BY WHICH THE HUMAN MIND SEEKS TO FULFILL THE NEED FOR A DEEPER GRASP ON BEING. ONE IS THE WAY OF SCIENTISM, WHICH REFUSES TO RECOGNIZE THE ESSENTIAL BOUNDARIES OF SCIENTIFIC THOUGHT. THE OTHER IS AN UNDISCIPLINED APPEAL TO SHEER FEELING AND PURPORTED IRRATIONAL SOURCES OF INSIGHT.” JAMES COLLINS, *CROSSROADS IN PSYCHOLOGY: EXISTENTIALISM, MATERIALISM, THEISTIC REALISM* (HENRY REGNERY CO. 1962, 1969 ED.).

⁶⁴ ARTHUR KOESTLER, *THE ACT OF CREATION* 255, 256 (1964).

law teachers included, turned for security to scientific expertise and professionalism, to meritocracy and elite rule.”⁶⁵

IV. A Discussion of Educational Methods

In choosing educational goals for their institutions as a whole and for individual teaching strategies, it is obvious that law teachers should select learning strategies that have the highest probability of imparting the desired learning to their students. We are responsible for designing courses, selecting materials, and choosing methodologies that create the best environment for achieving our goals. The ability to achieve overall educational goals needs to be looked at in reference to the interplay *among* courses as well as the goals of a single course. This includes the educational impacts of integrated curricular compartments along with free-standing or specialized elements.

Looking at legal education as an holistic and dynamic undertaking requires that we envision what we do not only in terms of a single stand-alone course’s ability to achieve an array of educational goals but also demands the setting of goals and priorities as part of an integrated curriculum. Part of doing this is considering the realistic limits of courses, the comparative advantages of different courses, the importance of a course to law practice, and the “value-added” characteristics of different types of learning experiences. Logically, we could teach almost anything in any course. But the question is what are the most efficient, effective and cost-sensitive means to achieve educational goals?

Like politics, teaching and the facilitation of learning involves the “art of the possible” rather than wishful thinking about the ideal. There are many things we wish we could achieve but we need to be realistic about what we can achieve within the programs in which we must work, using the skills and knowledge we possess as teachers and the resources available. It is important to prioritize. All goals cannot be achieved. Decisions must be made about the most achievable and the most beneficial.

Information transfer from teacher and selected materials is certainly a primary goal—to a point. Consider the idea of the “five foot shelf” of knowledge as suggested by Charles Eliot in the context of the *Harvard Classics*, or Richard Hofstadter’s statement that we operate on “a store of frozen ideas”.⁶⁶ While from the perspective of a true scientist or philosopher such assertions fly in the face of the pursuit of new knowledge they also represent the need for a base of knowledge and concepts of the kind used in our society. Such knowledge comprises the principles by which our system is organized, arguments understood and goals defined. It is the connective tissue between generations of judges, legislators and lawyers—ensuring that each can comprehend the history of the doctrines and policy before them.

⁶⁵ “TEACHING OF LAW”, AT 458; SEE ALSO MICHAEL ARIENS, “MODERN LEGAL TIMES: MAKING A PROFESSIONAL LEGAL CULTURE”, 15 J. AM. CULTURE 25 (1991); ANTHONY CHASE, “THE BIRTH OF THE MODERN LAW SCHOOL”, 23 AM. J. LEGAL HIST. 329 (1979).

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Similarly, a clear conceptual structure and methodology of analysis, synthesis, judgment and decision-making should be critical as well as a set of the most essential skills. Beyond that the question is in what area is what can be called “deep learning” most important. What knowledge and what methods and what skills are of the kind that their achievement advances the quality of representation and service to society through law?

The tension over the best and most effective methodologies of teaching and the substance and experiences to be communicated and embedded in those processes also involves how to provide a conceptual structure that allows students to better understand a field of inquiry or discipline so that they internalize the core insights and are introduced to its foundational skills. The efficient and comprehensive communication of a basic conceptual framework can be achieved through this mode of instruction. Of course such information transfer can increasingly be performed through interactive software programs and this collection of rapidly improving and sophisticated instructional methods may even be more effective than the traditional in-person class lecture.

Since the espoused goal of legal education involves teaching students “to think like lawyers” this would seem to mean a goal of developing in our students the ability to function as a principled professional over their lifetime of practice as professionals who not only provide high quality service to their clients but accept the responsibility to preserve and improve the institutions of justice. If “thinking like a lawyer” involves a coherent system of technique, strategy, substantive knowledge of law and philosophy how do we understand it in the context of our specific educational goals and methods? And what do we take into account in designing courses and curricula?

One consideration we have tended to ignore in law schools is the fact that one “size” does not fit all students, faculty capabilities and experience, or law school orientation. There has been a stultifying sameness to what law schools do, what they purport to do and how they do “it”. The ability to achieve specific goals depends on the appropriate application of particular methodologies to carefully created contexts comprised of motivation, content, goals, and the numbers and student demographics. Educational goals need to be understood and integrated in a context that takes method, scale and substance into account. While any course could be adapted to achieve virtually any educational goal at some level of effectiveness, some goals are much better attained through specific types of courses using methodologies and content selected as part of a sophisticated educational strategy.

In teaching you should choose whatever method and combination of methods that works best. Different methods work better with different people and situations. The point is that various approaches have optimal applications. We begin with an understanding of what we want to achieve in an overall course and in segments of the course and design the experience to apply the methods that work best for those educational goals.

This analysis reflects a strong bias toward what can be called *active learning*. This seeks to allow students to move beyond being passive listeners (and too often even less than that given the rise of the Internet, e-mails and laptops as added in-class distractions) and

instead represents an approach in which law students are prompted by the teacher to become active participants in their own learning processes. This participatory engagement with the learning environment—a culture that is carefully constructed and facilitated by the teacher--increases the quality and depth of students' learning. Ironically, it does the same for the teacher because it places a greater responsibility on the teacher to listen, interpret, guide and interact.

At the outset of this part of the discussion, I want to emphasize that I conceive my role as that of being responsible for creating, mediating and facilitating learning opportunities for students rather than one who primarily “professes”. Perhaps because of my initial perspective gained as a clinical teacher in the beginning of my career I have always seen myself as a facilitator, guide or catalyst of the student's learning rather than as a “professor”. My orientation is highly interactive, even while I respect the function of the traditional lecturer of information transference in large volumes and structuring of a field or sub-discipline in ways that construct a foundation for further inquiry.

Another central part of the analysis relating to the interactive approach to the facilitation of learning that mirrors Hannah Arendt's observation that it is not primarily our words that represent who we are but that we become real only through our actions.⁶⁷ This recognition of identity through action—primarily “other-directed” action of the kind involved in clinical programs in which responsibility exists for a client's welfare but also “self-directed” action through simulations of reality--echoes John Bunyan's question in *The Pilgrim's Progress* when addressing those who proclaim great piety and faith. He warns that when the Day of Judgment arrives the key inquiry will not be what you said while living, but that each of us will be asked, “are you Doers, or Talkers only?” and judged accordingly.⁶⁸ While talking and the exchange of ideas and information have clear virtues in various contexts they also have limits.

It is, for example, far easier to “be perfect” in our words than in our actions and far easier to be “principled” when speaking about what we *would* do in a hypothetical situation than what we did do in our actual behavior. Another way of putting it might be that “talk is cheap.” One of the justifications for the more interactive learning methods such as seminars, true Socratic dialogue, simulation-based and other role-playing courses in which critique is a core element, and live-client clinical courses is that they contain progressively greater potential for the teacher and student to interact in the dimension of active engagement.

The following listing of passive and active educational methods is offered simply as a means of highlighting some of what is possible in our teaching. The real distinction between the methods is the degree to which the students can be said to be primarily

⁶⁷ ARENDT EXPLAINS: “IN ACTING AND SPEAKING, MEN SHOW WHO THEY ARE, REVEAL ACTIVELY THEIR UNIQUE PERSONAL IDENTITIES AND THUS MAKE THEIR APPEARANCE IN THE HUMAN WORLD, WHILE THEIR PHYSICAL IDENTITIES APPEAR WITHOUT ANY ACTIVITY OF THEIR OWN IN THE UNIQUE SHAPE OF THE BODY AND SOUND OF THE VOICE..... ON THE CONTRARY, IT IS MORE LIKELY THAT THE “WHO,” WHICH APPEARS SO CLEARLY AND UNMISTAKABLY TO OTHERS, REMAINS HIDDEN FROM THE PERSON HIMSELF, LIKE THE DAIMON IN GREEK RELIGION WHICH ACCOMPANIES EACH MAN THROUGHOUT HIS LIFE, ALWAYS LOOKING OVER HIS SHOULDER FROM BEHIND AND THUS VISIBLE ONLY TO THOSE HE ENCOUNTERS.” HANNA H. ARENDT, THE HUMAN CONDITION 159, 160 (1959).

⁶⁸ JOHN BUNYAN, *THE PILGRIM'S PROGRESS* 85 (WHAREY ED. 1928)

observers of what is occurring as opposed to actively engaged participants and performers. Obviously there are overlaps in which the methods can be used in different contexts but these opportunities also must take into account the number of students in a course and what is feasible within the particular course based on goals, the time and labor demands of the methods and the numbers of students being dealt with.

A. Relatively Passive Educational Methods

1. Socratic (depending on size of group)
2. Role Modeling
3. Lecture by teacher
4. Lecture by other than teacher
5. Discussion
6. Reading
7. Observation and critique

B. More Active Methods

1. Socratic (smaller groups)
2. Performance
3. Full experiential (actual representation)
4. Partial experiential
5. Mediated/guided experiential
6. Approximation of experience
7. Pre-activity assessments
8. Post-activity assessments
9. One-to-one critique
10. Self critique
11. Larger scale critique
12. Video and audio review
13. Observation and critique
14. Role playing/teacher and others
15. Role playing/student
16. Interactive/computer exercises
17. Research
18. Writing
19. Writing for publication or use
20. Problem-recognition, Problem-analysis, Problem-solving
21. Solutions creation
22. Independent activity

What can or should be done in a course or curriculum depends on a variety of factors. These include class size and the timing of the course offering in the context of the students' experience. Other factors include student motivation in terms of how "useful" they consider to be the knowledge the teacher is attempting to impart, and the greater

complexity and “texture” of the subject matter in courses such as tax, civil procedure or environmental law.

With the variables of subject matter, priority and secondary learning goals, course composition and size, each type of course creates a different set of dynamics. Additional critical factors in designing and implementing a specific course include the demographic status and experience of the students, taking into account factors such as whether they are primarily new first-year students or upper level. Other relevant factors include whether the course is required or elective; whether the course is on the bar examination, and the degree to which the subject matter is perceived as esoteric or “practical”.

Also in the mix is the experience and “comfort zone” of the facilitator/teacher, both as a facilitator/teacher generally and as one familiar with the specific material, technique and dynamics of the particular course. Just as there is a learning curve for students, law faculty must themselves go through a process of testing hypotheses and seeing what is best suited for individual courses. This normally takes two or three experiences with teaching a course before the package begins to reach a point where the teacher/facilitator feels fully comfortable with the classroom dynamics and sense of mastery of the material.

C. Distinctions between Educational Methods

How to teach, *what* to teach, *who* we are teaching and *why* we are teaching them are largely independent considerations. It may sound like the journalist’s equation of “who, what, where, when and why” in preparing and writing a story and in truth that offers a useful analytic framework for approaching teaching. While traditional methods of teaching represented by powerful and insightful lectures to large groups have great utility in appropriate settings, they are not the exclusive or the best methodology for facilitating learning in all other contexts. The listeners’ experience and ability to understand what is being said in context are important determinants of the utility of the method or mix of methods the teacher selects.

I will, for example, always have very positive memories of Professor Irving Younger’s lectures on evidence that I experienced at the National Institute for Trial Advocacy in Boulder, Colorado. Younger enthralled several hundred young lawyers night after night and I used the lessons learned from his lectures in my own teaching for years to come. But I and the other attendees had already graduated from law school and had at least three years of legal experience. The Younger lectures helped a highly motivated and sophisticated group of people integrate a diverse bundle of experience at a point in time when we knew enough about what we needed to appreciate lessons from a master lecturer. Few law students possess these attributes.

To the extent that we are seeking to achieve important goals that have to do with our students’ understanding of responsibility and justice, it is our job to be realistic while continually striving to help the students create a realistic and principled system of responsibility and commitment. We replicate the methods we experienced in law school because we conclude those methods “taught” us effectively due to the fact that the typical

law teacher was a highly successful law student.⁶⁹ It is just as plausible a hypothesis that we succeeded in spite of those approaches that we replicate because it is all we know and we mistakenly assume “if it ain’t broke don’t fix it”. But in relation to how lawyers to whom we provided education actually perform in many of the niches of law practice the system is “broke”.

In the first year of law school students are being asked to learn a “foreign” language and to integrate a mass of ambiguous and relativistic information into a unique conceptual structure and professional worldview. Their “fluency” in the language and values of law increases as they progress through the curriculum. At a minimum we are responsible for graduates being able to “think and speak law” when they join the legal profession. Unfortunately we often seem to have only taught a kind of “pidgin law” dialect in which too much is left out and nuance is limited.

As a general rule law professors have rarely been trained to consider how best to teach or how to design an integrative curriculum that enhances the ability to achieve high priority educational goals. Nor have we been explicit about many of the most important educational goals and the priorities to be assigned to those ends. Like virtually any group faced with working within an institution dominated by a traditional and established way of doing things we tend to end up repeating what we experienced in law school.⁷⁰ This is not surprising. Resistance to change is a basic human characteristic and is particularly applicable to the insulated and parochial academic culture.

In some ways this analysis is written based on an interpretation of what has existed. As I have sought to show in a separate essay, *Redesigning the American Law School*, the very ground is shifting beneath American legal education and the changes will hit quite a few of the law schools hard, fast and relentlessly.⁷¹ The effects of falling applications, fewer employment opportunities in the legal marketplace, declining budgets for states and universities, increasing costs for law schools created by the higher personnel costs of aging faculty and altered accreditation standards by the ABA relative to faculty productivity, scholarship and measurement of success at educating law students is going to transform legal education.

One dramatic “stealth” change with profound implications is what is generally called distance learning. This can involve computer-based instruction or on-line lectures that are either in real-time or recorded. Computer interactive software is likely to be able to enhance the communication process between teacher and student relative to the large-scale and essentially vicarious model that now characterizes legal education. The

⁶⁹ KEYNES NOTES THAT ACADEMICS HAVE A TENDENCY TO BECOME “ACADEMIC SCRIBBLERS” WHO HAVE FEW ORIGINAL THOUGHTS OF THEIR OWN AFTER THE EARLY YEARS OF THEIR CAREERS. SEE, JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383, 384 (HARCOURT, BRACE & CO. 1935). RICHARD HOFSTADTER MAKES MUCH THE SAME OBSERVATION IN STATING THAT INTELLECTUALS OFTEN LIVE OFF A “FROZEN STORE OF IDEAS.” R. HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1965).

⁷⁰ ONE OF THE REASONS AN ORTHODOXY POSSESSES SUCH POWER IS SUGGESTED IN PETER BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* (DOUBLEDAY & CO. 1963). BERGER OBSERVES: “[M]OST OF THE TIME WE OURSELVES DESIRE JUST THAT WHICH SOCIETY EXPECTS OF US. WE WANT TO OBEY THE RULES. WE WANT THE PARTS THAT SOCIETY HAS ASSIGNED TO US. 93. BERGER ADDS: “INSTITUTIONS CARRY WITHIN THEM A PRINCIPLE OF INERTIA, PERHAPS FOUNDED ULTIMATELY ON THE HARD ROCK OF HUMAN STUPIDITY.” AT P. 68.

⁷¹ David Barnhizer, “Redesigning the American Law School”, Michigan St. L. Rev. (2010).

feedback interactions between faculty and students might actually be enhanced rather than impeded in many situations because methods can easily be developed that use online tutorials and low cost advanced students or recent graduates to supply the interactive element in response to students' questions. Implicit within the shift to various "distance learning" models is the fact that once the "dam" is broken there is absolutely no reason to require that each law school have a physically present faculty in every specific discipline. Great cost savings can be created by law schools sharing faculty on-line, thereby eliminating the number of faculty slots required per law school.

Once expanded distance learning is approved as an accredited educational device for law schools the basic economics of legal education will change dramatically. Not only could law students in two or five or fifty different law schools be taught from an identical text, but they could all be taught by the creators of those texts who presumably are masters of that particular substantive universe and recognized as the leaders in their field. It is not impossible to contemplate law schools with faculties of five or ten who are retained for necessary esoteric courses and ones that require direct contact such as law clinics, trial advocacy, and similar courses.

1. Lectures

It is easy to understand why lectures and large classes have dominated law schools and universities. Heavy or even exclusive reliance on this methodology was understandable and necessary in a world where the students' notes substituted for non-existent or extremely expensive texts. The presentation of dense masses of otherwise inaccessible knowledge through the lecture medium made complete sense as an efficient method for transmitting large amounts of data to students who otherwise lacked access to the information. The premium in such a context is automatically placed on accurate note taking with the teacher's role being one of massive, organized information transfer.

Even recently when I was teaching a course on human rights in a UK law school I was surprised to discover that students did not have their own books but were expected to run around to libraries to find the assigned readings. Books are expensive and outside the United States it is the exception rather than the rule that students purchase texts for university and law school courses. In teaching in England and Russia I was able to supplement some assignments with copied materials but that was quite different from the typical situation where students have to go to university libraries and read course assignments.

In a context where it is highly questionable whether students have read assignments it is unsurprising that students expect the important material to be structured and delivered in ways that substitute for hard-to-obtain material. Thus the format will tend to be the transfer of large amounts of information in a highly structured lecture and large class mode of instruction. The transfer of information in large bundles, with state-of-the-art expertise, and economic efficiency in terms of the number of teachers required per student are all appropriate educational elements when applied within their fields of

greatest usefulness as determined by educational goals and the sophistication and experience of the participating students.

From the beginning of my teaching career it has struck me that large classes and lectures are not the best methods in the extremely challenging first year of a law student's legal education. While in the abstract it might be claimed to apply the Socratic *method* it does so in a context foreign to the individualized and interactive Socratic *culture* that appears to have characterized that peripatetic teacher's mode of instructing. Socrates engaged in direct dialogue with individuals in small groups rather than "professing."⁷² This intimate Socratic communication was required so that the participants' ignorance could be dispelled and wisdom sought on an individual and highly interactive basis. The primary parallel is that the object of the dialogue needed to be brought to the point of accepting his ignorance, biases and ungrounded assumptions so that true understanding was possible.

While lecturing is very useful for the transmission of large amounts of information at relatively superficial levels of student understanding, well-written books and treatises can also serve this purpose. An irony in the process of American legal education is that we describe what is done in law school courses in the first year as a form of the "Socratic method." The problem is that in contrast to the Socratic ideal of personal illumination and growth the large-scale educational format used in virtually every American law school in law students' first year of learning bears scant relationship to the method we understand to have actually been used by Socrates. There is a structural deficiency of scale and vicarious distance characterized in this larger class size approach that relegates the method to achieving less than its full effect.

If the critical foundation of a law student's understanding of the analytic and decision making processes said to form the basis for a lawyer's performance are to be developed in the first year of the educational experience—and if that process requires deep immersion in the subject matter and method and frequent interaction with the "Socratic" teacher—then it is fair to conclude that the structure of the American law school is turned upside down in terms of the scale of classes in the first year compared to the upper levels. The skewed structure and sequencing of the American law school curriculum exists not to serve the best interests of the vast majority of students who enroll in law school expecting to learn the essential skills and values of lawyers but of largely esoteric law faculty who are pursuing their own preferences and agendas thinly masked by the claims to scholarship and intellectual integrity.

The deficiency in the typical American law school class in the first year of instruction relates to several factors. These include how the methodology is applied, the size of the class, and the continual pressures of course coverage that generate an inexorable rhythm

⁷² "IN PLATO'S APOLOGY, SOCRATES COMPARES HIMSELF AS A TEACHER WITH A GADFLY AND TELLS THE ATHENIAN CITIZENS THAT HE WAS "ALWAYS FASTENING UPON YOU, AROUSING AND PERSUADING AND REPROACHING YOU." TO REMAIN IMMOBILE, TO REFUSE TO INQUIRE WAS TO BE CAUGHT NAPPING, TO RESIST BEING STIRRED INTO LIFE. BUT IT WAS NOT ENOUGH MERELY TO AWAKEN: AN INDIVIDUAL HAD TO BE BROUGHT, ON HIS OWN INITIATIVE, TO REGARD VIRTUE. HE HAD TO BE STIMULATED TO TAKE AN ACTIVE ROLE IN THE SEARCH FOR HIS PERFECTION; HE HAD TO BE COURAGEOUS ENOUGH TO TURN TOWARD THE GOOD." MAXINE GREENE, *TEACHER AS STRANGER* 72 (1973).

and compelling need for the teacher to move on. At least equally important are the infrequency of direct student participation in the interactive dialogue and the degree of vicariousness of the student experience. Even if a teacher is skilled in the Socratic technique--which can be a very interactive and dynamic device--the large numbers of students in first year law courses means that most students are passive observers most of the time. In some classes some students are passive observers *all* the time and never engage with the Socratic inquisitor and facilitator. When this occurs the students are not actively engaged in the learning process even though active participation is at the center of the most effective learning.

The size of classes in the first year constrains the teacher's ability to apply active learning methods to the fullest range of students in the most consistent manner. Nor was the large class structure that still dominates the law schools chosen primarily for pedagogical reasons. Law schools needed to teach significant numbers of students inexpensively so that universities could make money.⁷³ Such economic compulsions are fully understandable and still dominate law schools. The law school structure resulted from 19th century universities' economic desires that allowed proprietary law schools and lawyers to buy the more prestigious stamp of university legitimacy compared with proprietary schools for profit and apprenticeships. This history has little relationship to a carefully designed educational strategy.

2. Mediating and Creating Experience, Active Learning and Critique

I want to return to the idea that a central role of the law teacher is the "mediation of experience." Engagement, responsibility, and accountability for one's decisions create a different and more richly textured learning for *all* participants, bringing the experience to life. It is not that transferring information to large groups of students through lectures does not offer educational utility. Nor am I saying that there is nothing learned in large first year law classes where due to the numbers of students and the compulsion of material coverage most of the students' contact with an approach such as the Socratic dialogue is comprised of vicarious observations of others under a momentary spotlight on the "hot seat".

As the teacher and student move from the more hypothetical realms in which interactive methods are applied to true client-based work involving the joint interplay of teacher and student connected with the legal world in a controlled environment where a focused dialogue can occur based on meaningful action in which behaviors and decision actually matter to other humans dependent on the teacher/lawyer and law student the learning process takes on an intensity and life not otherwise present. In such a context it is much more difficult to pontificate about hypothetical situations because you are confronted by reality and are judged accordingly.

Part of creating and mediating experience is helping our students to learn to use their experience to better function within the complex and often harsh terms of reality. But the law teacher faces an immense challenge in attempting to mediate between the terms of

⁷³ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983).

reality and the relative innocence of youthful or inexperienced university students. This difficulty is enhanced because there is a difficult line between understanding reality and cynicism. One of the hardest parts of being a law teacher is that the legal system is so far below what we want it to be in terms of achieving justice and offering professional quality legal services that we risk becoming cynical when critiquing the conditions of that system.

Deep learning of the kind we desire our law students to achieve demands a substantial component of intensive, experiential, active and highly participatory learning that requires interaction and smaller educational groupings. In many instances, this deeper learning can be enhanced through performance of tasks by students followed by critique in which they are assessed and judged based on the quality of their performance.

Central to the idea of critique is that our ego is exposed. In such a context the person being critiqued tends to be apprehensive and defensive. Critique aimed at enhancing self-awareness and insight is in fact far closer to a Socratic methodology than what occurs in many law school classes that purport to rely on that pedagogical strategy. For the process to be useful a trust relationship must be created between teacher and student. Often this means a one-to-one confidential interaction in which the teacher and student are the sole participants. People communicate differently and less honestly when other people are around. There are a variety of skills involved in critique. The essence of the approach emerges from the understanding that the primary aim is for the teacher to guide the students into a path of principled commitment to living their life as the best lawyer they can be.

The “active” teacher surrenders a degree of control and distance. This shift in control can be threatening and humbling for both teacher and student because it requires skills of adaptation, recognition and improvisational dialogue that are difficult to master. Such interactive teaching strategies are difficult, threatening and require skills of listening and heightened perception, “thinking on your feet” and spontaneity. Mastery of such methods requires capabilities similar to improvisational theater and “stand-up comedy”. Not everyone is good at these approaches and to some extent they represent the surrender of direct control over the process of communication. The skills required on the part of the teacher are considerably more nuanced than are needed for the organized lecture approach to teaching and large-scale information transfer.

Creating and mediating experience can also involve the process of role-playing by teacher or student. I use student performance involving role-playing exercises quite often not only in clinical courses but simulation-based skills courses and even in Jurisprudence, Criminal Law and Environmental Law courses. But there is also frequent opportunity for role playing and demonstrations by the law teacher. In my *Trial Advocacy*, *Dispute Resolution* and *Legal Strategy* courses I often demonstrate appropriate ways of doing something, usually after students have sought to perform that skill themselves. This has the advantage of the students understanding that we probably know what we are talking about. It also shows students that we are far from perfect. I have made mistakes when role-playing and students enjoy bringing that to my attention. But they learn through that

process of my mistakes and successes, just as they do through a critique of their own performance and that of fellow students.

Observation and critique are important approaches in the processes of creating and mediating students' experience. This approach offers a wide range of possible educational strategies. I have had students observe a trial and then we evaluated the process and the quality of performance by the lawyers, judges and witnesses. This kind of observation and critique is useful and offers a safe introductory form of critique directed at the quality of others' performances.

There are a number of recorded trials that can be used as the raw subject matter and I have sometimes used "The Trial of Rodney King" as one initial focus. This not only allows us to deal with matters of the structure and technical skills involved in trials but with the ideas of thematic and strategic approaches in conducting litigation. The Rodney King case also, however, opens up issues of racism, the role of police and the potential for the abuse of power by institutional forces, and the fact that there are sometimes hidden texts operating in situations that affect the outcomes. In *King* these include the nature of the community (Simi Valley) north of Los Angeles in which the makeup of the potential jury was considerably more conservative than was likely to be found in a more urban area where there is substantial distrust of police and public authority.

In addition, having four defendant police officers of different ages, levels of responsibility and interests allowed a rich discussion of potentially incompatible trial interests among the four. All this still only skims the surface of the case's potential as a teaching tool. Of course an important lesson is found in the fact that going into the case the nation and presumably the jurors were exposed to the vicious beating of Mr. King by a group of apparently out of control police officers. Faced with this picture most cases would result in plea bargains. But with police themselves as the defendants—and with those police officers facing not only the possibility of prison if convicted but loss of pension and employment benefits—the defendants had little reason to plead out the case.

The defense lawyers were therefore faced with a seemingly impossible case where their clients beat a man in front of numerous witnesses but the clients had no reason to accept a plea bargain. Students were then able to be brought into a discussion of why this occurred and why the defendants were able to essentially win the King case even in the face of apparently overwhelming evidence that included the testimony of a female deputy against the defendants. Here it was possible to open up the fact of racial bias against a very large black male and the fact that most white Americans fear people like Rodney King.

The change of venue also became an issue, but so did the judge's allowance of a second-by-second "micro-analysis" of the damning tape of the beating, a defense strategy that almost certainly distorted the reality of what occurred and resulted in the isolation of movements in ways that could be considered misleading or confusing. A final point worth mentioning is the fact that it pretty much seemed like the prosecution's heart was not in obtaining convictions of police in a situation where the prosecutor's office needs a

close working relationship with the LAPD and convictions and jail sentences could very well have poisoned that relationship.

Although having access to such material as the *King* case offers a rich source of vicarious experience that is a very useful teaching tool, the most vital dynamic in what are called “skills” and clinical courses depends on a critique of the students’ performances in the role of the lawyer. Nor should such courses be thought of as merely imparting lawyer skills in some limited or “anti-intellectual” sense even though such skills and the accompanying understanding are important educational goals. The methods of critique used in such activities are linked directly to the development of a deeper understanding of analytic, synthetic and strategic thought and application that are at the heart of the idea of “thinking like a lawyer.” Interactive methods of teaching are a central part of legal education aimed at allowing students to internalize the skills and understanding in an individual way. Part of that process requires the law teacher to create the experiences and opportunities for student performance that allow for the possibility of a meaningful critique.

Critique itself takes numerous forms. As part of critique, I often create instruments of self-evaluation by students. Students have to perform a legal task and in advance are required to write an analysis of what they will be doing, their goals and how they plan on doing it. That allows us to see their level of knowledge and clarity of thought prior to action. Then after they perform the task or exercise they must produce another written analysis of what happened. This helps bridge the gap between what they planned and what actually occurred. The evaluation process is sensitive, but as students develop an understanding and degree of trust with each other I can draw them into being comfortable in participating in a shared process of evaluation with other students. They learn from each other’s perspectives. We all know that it is easier to critique others than oneself. With the expanded critique we can all learn even more but it has to be done very carefully and only after a sense of teamwork has been established.

3. The “Substantive Methodology” of Clinical Teaching

The idea of involving law students in learning through direct client representation is sufficiently distinct from other approaches that it deserves separate discussion. Use of actual clients for whom the students and clinical teachers accept full responsibility is or should be a core part of legal education.⁷⁴ We would consider it unacceptable if surgeons were allowed to operate on us immediately following medical school graduation if their instruction did not include “real” lab work and patient interaction. In fact there are extensive patient and laboratory experiences in medical schools, as well as frequent observational opportunities and truly Socratic “give-and-take” teaching taking place during “rounds” in which small groups of students and interns are taught to evaluate and diagnose long before they are given any primary responsibility for patient care. Evaluation and diagnosis in fact are among the most critical and difficult skills for a professional whether medical or legal. The medical schools focus extensively on this dimension while law schools are grossly deficient.

⁷⁴ See David Barnhizer, “The Clinical Method of Legal Instruction”, *J. of Legal Education* (1979).

This kind of intensive joining of theory and practice has long been scorned as somehow inappropriate in American law schools, only grudgingly and in a limited way giving way after decades of reform efforts involving clinical education. With rare exception, clinical legal education remains a stepchild in law schools with clinical teachers paid considerably less than their traditional colleagues and typically subjected to heavier workloads. Nonetheless, clinical education is an important educational method for legal education and one for which we should consider a substantive focus as the provision of an opportunity for law students exploring how they can make a contribution to justice in the society designed as reform efforts for people and client groups who otherwise receive inadequate attention in the system.

Of course many of the same methods and techniques of teaching are used in clinical instruction as in other teaching formats but clinical work is sufficiently different from classroom contexts that it deserves specific attention. In part this is due to the learning outcomes and goals of clinical courses that include a more intense and “real” component not achievable in other formats even though there can be some degree of approximation in courses that rely heavily on professional skills simulations and performances. But clinics are different in their ability to utilize randomness, intensity and spontaneity in an uncontrolled environment with actual outcomes at stake not only for students but even more for those who rely on the students. Added to this are the unique justice-oriented and reform perspectives that are at the heart of most clinical courses and the result is that there is a substantive subtext in clinical courses that is not replicable in other law courses.

Social justice is the substantive narrative of American clinical legal education and, while anything can be taught by that method, justice-oriented pedagogy is the *raison d'etre* of the clinical movement. Teaching other courses by the clinical method is quite feasible but if we do so the likelihood is that we are doing so in an effort by the “unwashed” to become part of the fully accepted world of doctrinal law faculty. The faculty members at American law schools are addicted to cushy jobs, relatively easy work and high salaries for what they do. In my experience we (law faculty generally) are also adept at elegant and eloquent rationalizations about the intellectual importance of our work and the high quality of our teaching. A rapid decline in funding for state law schools coupled with a drop in enrollments due to the burgeoning awareness among applicants that law school is not a sound investment along with a probable expansion in distance learning and corporate legal education represent events that will impact the well being of clinical education.

Clinical education cannot be competitively justified on the basis of skills education alone because, for example, my experience is that I (and many others I am certain) can do as well or even better at achieving those goals using strategies developed within clinical education and do so at less cost and on a more consistent basis. The justification for clinical education is “professionalism” but that idea contains within itself a qualitative factor of a higher responsibility due to the acceptance of the burden of trust given us by our clients and an independent commitment to social justice, fairness and reform of underperforming institutions of law and power. Clinical programs lean strongly toward areas of social justice. This approach, to me, is the foundation for protecting clinical

education and attracting bases of support for its existence (and even expansion) in law schools. As a practical matter, at this point it is likely to be the only foundation with sufficient weight and power to have a chance to withstand the budgetary and programmatic crises being faced by many law schools, ones that will only worsen.

Allowing law students interested in careers in fields that connect law and justice to have the opportunities to focus and hone those nascent ideals is something law schools should accept as a primary purpose. This, however, requires that we be honest about the widely varying values and career orientations of law students. Perhaps as much as twenty percent of law students wish to “do good” in the larger sense of social justice and law reform. This is not the focus of a significant majority of law students who simply want to “do well”.

Most students are going to try for the brass ring of lucrative jobs (and many will fail). Their orientation is not something that is likely to change. But perhaps 20 percent of law students are strongly committed to pursuing committed lives directed toward social justice and this represents a substantial core of law students toward whom to aim and market clinical courses. This is the unique contribution of the clinical movement and needs to be emphasized even more. If all clinics purport to do is teach “skills” then they are likely to become the victims of a comparative cost assessment when weighed against other approaches for teaching skills.

Having worked with and against private sector lawyers extensively on a broad front of practice areas, and seeing the “do well” orientation of most law students, my conclusion is that law clinics could build an even stronger message by crafting an explanation for their importance grounded on the enhancement of a special educational experience for that substantial but limited portion of the student body that seeks to advance social justice in whatever way comes under that heading. Even though there are relatively few lawyers and law students who possess such a focus it is a fundamentally important mission for law schools to facilitate and enrich that dedicated core of students and lawyers who possess that orientation.

This is the moment in which the need to become explicit because clinical education is not, has not and will not become a fully accepted and vital part of law school curricula because the traditional colleagues don’t want it to be so. It is a labor intensive methodology that challenges the orthodoxy that controls law schools. It requires experiential knowledge and skills most law faculty lack and where many are challenged. This is because if experiential clinical work is elevated into any kind of primary position it threatens the thinness of knowledge and professional experience possessed by many faculty. In other words, it is impossible for clinical educators to either win out or be protected in a declining resource situation when they are forced to rely solely on the good will of universities and traditional law faculty and administrations faced with needing to make cuts.

V. An Outline of Educational Goals

A. Educational Goals Involving Institutional Analysis and Critique, Social Responsibility, Justice and Systemic Reform

Legal education could be “soul-less” in the sense that it focused only on the strictly technical methods, subject matters and skills that can be agreed on as core elements of what lawyers do. It could be done in that mode, but one hopes that professionals whose responsibilities include not only technical representation for specific clients but advancing justice and improving, preserving and defending the Rule of Law are educated in something more than the technical realm. If legal education is to involve more than technical competence these are the kinds of concerns that one would expect to be at the heart of the larger curriculum.

1. Institutional analysis, critique and social responsibility
2. Justice and systemic reform

Institutional analysis, critique and social responsibility. The institutional fabric of our system of justice includes courts, the police, practicing lawyers, bar associations, agencies, legislatures and the supporting bureaucracies behind these various interests. The relationships among these institutions have profound effects on the manner in which justice is devised and rendered at all stages, including the recurring distortions created by economic, sociopolitical, gender, class and racial interests.

From a teaching perspective this represents a core responsibility of an educational institution that prepares its graduates for careers that determine the quality and fairness of law in action.⁷⁵ Closely related to the study of institutions is the need to understand the methods through which those institutions discriminate against members of racial, ethnic, social, and economic groups through the combinations of the power of the economic and legal systems. A key is understanding the effect discrimination has on the theory and the reality of justice.

Justice and systemic reform. The issue of justice and systemic reform involves the fundamental question--now that you see the problems, what do you do about them?⁷⁶ The law student (and teacher) must be confronted with these issues, including the special duty of the legal profession as defenders and preservers of the Rule of Law seeking ways to reform inequities and developing the best means of accomplishing those ends. At this point it is useful to remember the warning voiced by Abraham Maslow that we go to

⁷⁵ MARTIN BUBER PUT WHAT HE CALLS PARALYSIS AND FAILURE OF THE HUMAN SOUL ELOQUENTLY: “OUR AGE HAS EXPERIENCED THIS PARALYSIS AND FAILURE OF THE HUMAN SOUL SUCCESSIVELY IN THREE REALMS. THE FIRST WAS THE REALM OF TECHNIQUE. MACHINES WHICH WERE INVENTED TO SERVE MEN IN THEIR WORK, IMPRESSED HIM INTO THEIR SERVICE. THEY WERE NO LONGER, LIKE TOOLS, AN EXTENSION OF MAN’S ARM, BUT MAN BECAME THEIR EXTENSION, AN ADJUNCT ON THEIR PERIPHERY, DOING THEIR BIDDING.” MARTIN BUBER, *BETWEEN MAN AND MAN* 158 (1965).

⁷⁶ ALEXIS DE TOCQUEVILLE DESCRIBED LAWYERS AS THE “ARISTOCRACY” OF THE AMERICAN SYSTEM, A PROFESSION THAT HELD THE SYSTEM TOGETHER AND PROTECTED BASIC VALUES OF DEMOCRACY. “IN AMERICA THERE ARE NO NOBLES OR LITERARY MEN, AND THE PEOPLE ARE APT TO MISTRUST THE WEALTHY; LAWYERS CONSEQUENTLY FORM THE HIGHEST POLITICAL CLASS AND THE MOST CULTIVATED PORTION OF SOCIETY IF I WERE ASKED WHERE I PLACE THE AMERICAN ARISTOCRACY, I SHOULD REPLY WITHOUT HESITATION THAT IT IS NOT AMONG THE RICH, WHO ARE UNITED BY NO COMMON TIE, BUT THAT IT OCCUPIES THE JUDICIAL BENCH AND THE BAR.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, BOOK 1, CH. 10, AT 42 (ALFRED A. KNOPF ED. 1945, 4TH EDITION 1841).

great lengths to avoid gaining an honest understanding of some of our most dire problems in order to escape the confrontation with our own sense of hypocrisy that emerges when we know something is unjust or corrupt but lack the courage to do anything about it.⁷⁷

Consider, for example, the implications of how the “justice system” treats the defense of death penalty cases in Florida. The pretense is one of justice but the reality is that the system is rigged against the defendant to the extent it has been described as a sham.⁷⁸ Nor is this the only system that purports to stand for equal rights and justice while masking its true nature as a discriminatory or mass production system whose real purpose is invisibly processing less fortunate people while maintaining the pretense of fairness.

B. Educational Goals Involving Elements of Principled Professionalism, Professional Responsibility and Ethics, and Personal Morality

1. Ethical philosophy and the system of ethical proscriptions
2. Personal morality
3. Principled professionalism and professional role

Included in this category are concepts of the responsibilities owed to clients, to the institutions of justice, and to society.⁷⁹ Broadly defined, these encompass considerations of legal ethics and ethical philosophy, professional competence, the roles of lawyers, and the effect of economics on the ability of lawyers to act as principled professionals. Also included is the nature of the American political system and the lawyer's special responsibility to that system.

Our culture follows a combination of false ideals, inapplicable ideals, confused ideals, or no ideals.⁸⁰ In the face of the increasingly negative value systems of American society,

⁷⁷ ABRAHAM MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 157 (2ND ED. 1968): “EVEN OUR MOST FULLY-HUMAN BEINGS ARE NOT EXEMPTED FROM THE BASIC HUMAN PREDICAMENT, OF BEING SIMULTANEOUSLY MERELY-CREATURELY AND GODLIKE, STRONG AND WEAK, LIMITED AND UNLIMITED. . . FEARFUL AND COURAGEOUS, . . . YEARNING FOR PERFECTION AND YET AFRAID OF IT, BEING A WORM AND ALSO A HERO.” SEE ALSO THE COMMENTS BY KIM ISAAC EISLER, “THE TRUTH ABOUT DIVORCE LAWYERS: IT’S HARD TO FIND LAWYERS BOTH CIVILIZED AND FAIR TO CLIENTS WHO NEED A DIVORCE. HERE’S WHY”, WASHINGTONIAN, OCTOBER, 1995, p. 128. “PUTTING YOUR DIVORCE IN THE HANDS OF AN HONEST COUNSELOR-AT-LAW ISN’T EASY. DIVORCE LAWYERS, AS A CLASS, HAVE EARNED A DISMAL REPUTATION.” . . . “TO MAKE MATTERS WORSE, THERE IS VIRTUALLY NO ADEQUATE PREPARATION IN MOST LAW SCHOOLS FOR WOULD-BE DIVORCE LAWYERS, AND UNLIKE OTHER PRACTICE AREAS, THE FIELD PROVIDES PRECIOUS LITTLE OPPORTUNITY TO STUDY UNDER A MASTER. THERE ARE NO BIG DIVORCE FIRMS WHERE A YOUNG LAWYER CAN WORK AS AN ASSOCIATE FOR SEVERAL YEARS WHILE LEARNING THE ROPES. IN DIVORCE WORK, A NEW PRACTITIONER LEARNS ONE WAY—BY TRIAL AND ERROR.”

⁷⁸ SEE, E.G., MARCIA COYLE, “DEATH DEFENSE IS A SHAM: CLAIM IS FLA. PROVIDES LAWYERS BUT MAKES IT SO THEY CAN’T SAVE INMATES”, NATIONAL LAW JOURNAL A1 (MONDAY, DECEMBER 21, 1998).

⁷⁹ THE FOLLOWING IS ONLY A SAMPLING OF SOURCES THAT TOUCH ON MANY OF THE MOST PROFOUND ASPECTS OF THE CONFLICT BETWEEN AN INDIVIDUAL’S SYSTEM OF VALUES AND THE NATURE OF THE ADVERSARY SYSTEM AND ITS DEMANDS. THEY INCLUDE: DAVID BARNHIZER, “PRINCES OF DARKNESS AND ANGELS OF LIGHT: THE SOUL OF THE AMERICAN LAWYER”, NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY (); TERESA STANTON COLLETT, “SPEAK NO EVIL, SEEK NO EVIL, DO NO EVIL: CLIENT SELECTION AND COOPERATION WITH EVIL”, 66 FORDHAM L. REV. 1339 (1998); BRUCE A. GREEN, “THE ROLE OF PERSONAL VALUES IN PROFESSIONAL DECISIONMAKING”, 11 GEO. J. LEGAL ETHICS 19 (1997); BENJAMIN ALLISON, “A PERSON OR A LAWYER”, 72 NOTRE DAME L. REV. 1723 (1997); HEIDI LI FELDMAN, “CODES AND VIRTUES: CAN GOOD LAWYERS BE GOOD ETHICAL DELIBERATORS?”, 69 S. CAL. L. REV. 885 (1996); ROBERT P. BURNS, “LEGAL ETHICS IN PREPARATION FOR LAW PRACTICE”, 75 NEB. L. REV. 684 (1996); PAUL R. TREMBLAY, “PRACTICED MORAL ACTIVISM”, 8 ST. THOMAS L. REV. 9 (1995); LESLIE GRIFFIN, “THE LAWYER’S DIRTY HANDS”, 8 GEO. J. LEGAL ETHICS 219 (1995); BRYANT GARTH, “FROM CIVIL LITIGATION TO PRIVATE JUSTICE: LEGAL PRACTICE AT WAR WITH THE PROFESSION AND ITS VALUES”, 59 BROOK. L. REV. 931 (1993); JAMES R. ELKINS, “THE MORAL LABYRINTH OF ZEALOUS ADVOCACY”, 21 CAP. L. REV. 735 (1992); THOMAS L. SHAFFER, “THE UNIQUE, NOVEL, AND UNSOUND ADVERSARY ETHIC”, 41 VAND. L. REV. 697 (1988); KENNETH L. PENEGAR, “THE FIVE PILLARS OF PROFESSIONALISM”, 49 U. PITTS. L. REV. 307 (1988).

⁸⁰ “LAW CAN SYMBOLIZE JUSTICE, OR CONCEAL REPRESSION. IT CAN REDUCE EXPLOITATION, OR FACILITATE IT. IT CAN PROHIBIT THE

lawyers responsible for dealing with the applications of power, whether for or against their clients, need deep principles to guide their decision-making. The problem is that many people have abandoned any belief in ideals strong enough to give us guidance.⁸¹ This ethical dilemma is heightened for lawyers because we work inside a culture of deception, manipulation, and power. Those behaviors and values are intrinsic to the task of gaining advantages for our clients relative to others. This orientation comes down to the core role of the advocate. This includes client counseling because even in that role lawyers are counseling about how clients can best achieve desired ends or avoid or mitigate accountability for even serious civil or criminal offenses.

The challenge exists because the advocate's role is inherently deceptive rather than truth-directed. The dilemma is not of recent origin. Aristotle described the role of the advocate as one where: "you must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify [your advantages] and deprecate [others' positions]."⁸² Plato similarly argued the advocate "enchants the minds" of the court. He added, "rhetoric [is] . . . a universal act of enchanting the mind by arguments. . . . [H]e who would be a skillful rhetorician has no need of truth—for that in courts of law men literally care nothing about truth, but only about conviction."⁸³

The dynamic of advocacy is inescapable and the overall system is not going to change enough to affect lawyers' basic way of doing business. This means that lawyers spend their lives immersed in a culture of manipulation of people and power. They do this on behalf of their clients with the goal of gaining advantages from opponents who hold conflicting aims.⁸⁴ It is an undertaking with consequences for those who participate in it. Law schools do a poor job of understanding this and fail to prepare law students for the effects of the culture in which they will spend their lives. Whether the law schools could effectively prepare students to deal with the ethical and moral pressures of law practice is an issue that remains open to question.

It has become increasingly popular to criticize the perceived deficiencies of the adversary system and the lawyer's role.⁸⁵ Anne Strick has challenged the validity of the adversary

ABUSE OF POWER, OR DISGUISE ABUSE IN PROCEDURAL FORMS. IT CAN PROMOTE EQUALITY, OR SUSTAIN INEQUALITY . . . BUT DIVERSION FROM THE LEGAL SYSTEM IS LIKELY TO ACCENTUATE THAT INEQUALITY. WITHOUT LEGAL POWER THE IMBALANCE BETWEEN AGGRIEVED INDIVIDUALS AND CORPORATIONS, OR GOVERNMENT AGENCIES, CANNOT BE REDRESSED." JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* VII (1983).

⁸¹ "THE MACHIAVELLIAN MIND AND THE MERCHANT MIND ARE AT ONE IN THEIR SIMPLE FAITH IN THE POWER OF SEGMENTAL DIVISION TO RULE ALL—IN THE DICHOTOMY OF POWER AND MORALS AND OF MONEY AND MORALS." MARSHALL MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 210 (1962). FOR SOME ANALYSIS OF THE IMPACTS OF ECONOMIC TRENDS ON LAW PRACTICE, SEE MARC GALANTER, *THE MANY FUTURES OF THE BIG LAW FIRM*, 45 S. Cal. L. Rev. 905 (1994); ALEX M. JOHNSON, JR., *THINK LIKE A LAWYER, WORK LIKE A MACHINE: THE DISSONANCE BETWEEN LAW SCHOOL AND LAW PRACTICE*, 64 S. Cal. L. Rev. 1231 (1991); F. BENTLEY MOONEY, JR., *HOW TO TRIPLE YOUR EFFECTIVE HOURLY BILLING RATE*, Legal Econ., OCT. 1989, AT 32.

82. ARISTOTLE, *THE EPILOGUE, IN THE RHETORIC OF ARISTOTLE* 3, 19 (L. COOPER ED. & TRANS., 1932).

83. THE WORKS OF PLATO 292, 306 (I. EDMAN ED., 1928).

84. SEE IRMA S. RUSSELL, "CRIES AND WHISPERS: ENVIRONMENTAL HAZARDS, MODEL RULE 1.6 AND THE ATTORNEY'S CONFLICTING DUTIES TO CLIENTS AND OTHERS", 72 Wash. L. Rev. 409 (1997); THOMAS L. SHAFFER, "ON LIVING ONE WAY IN TOWN AND ANOTHER WAY AT HOME", 31 Val. U. L. Rev. 879 (1997); NICHOLAS TARG, "ATTORNEY-CLIENT CONFIDENTIALITY IN THE CRIMINAL ENVIRONMENTAL LAW CONTEXT: BLOWING THE WHISTLE ON THE TOXIC CLIENT", 14 Pace Envt'l L. Rev. 227 (1997).

⁸⁵ MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (BOBBS-MERRILL 1975); MONROE FREEDMAN, "THE TROUBLE WITH POSTMODERN ZEAL," 38 WM. & MARY L. REV. 63 (1996); MONROE H. FREEDMAN, "THE ETHICAL DANGER OF "CIVILITY" AND "PROFESSIONALISM", 6 CRIMINAL JUSTICE JOURNAL 17 (SPRING 1998); NATHAN M. CRYSTAL, "LIMITATIONS ON ZEALOUS

process by emphasizing the lawyer's commitment to winning through advocacy over the attainment of truth. In *Injustice For All*, Strick called this "the treason of the adversary system," and comments at length on how lawyers attempt to falsely justify the adversary system as a mechanism for the effective determination of the truth of controversies.⁸⁶

The behavior of lawyers certainly often falls short of the pursuit of truth—unless the "truth" is on your side. The system is a mechanism for dispute resolution and is based on power, resources, legal skills, costs and leverage. It often has little or nothing to do with truth. The issue in part is who benefits from the resolution of the disputes. Small claims courts were in theory a means for ordinary people to gain access to fair for a of dispute resolution. In fact they are means for collecting default judgments. The criminal "justice" system is a large scale processing "machine" that is understaffed and underfunded to the extent that it is incapable of handling more than a tiny percentage of the cases that come before it except by expedited procedures and plea bargains in something like 95 percent of cases, many of which risk having little to do with truth or just resolutions of the cases. The damning fact is that we know this is how the system functions, know how it could be made better and fairer, and still take no effective action.

Lawyers are Machiavellians by the terms of their professional oath and by the realities of dispute resolution. Machiavelli observed that an individual must be cunning and deceptive to survive. He writes: "One must be a fox in order to recognize traps, and a lion to frighten off wolves. [But] Those who simply act like lions are stupid. . . ." He goes on to add: "[A] prudent ruler cannot, and must not, honour his word when it places him at a disadvantage. . . ." The reason for this mindset is that: "If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.⁸⁷

Machiavelli concluded: "[O]ne must know how to colour one's actions and to be a great liar and deceiver."⁸⁸ Part of the deceit is that the Prince, according to Machiavelli, "should appear to be compassionate, faithful to his word, kind, guileless, and devout."⁸⁹ The result is what Thomas Shaffer terms "compromised morality."⁹⁰ The problem is that if you lie by commission or omission you become a liar. If you deceive you become

REPRESENTATION IN AN ADVERSARIAL SYSTEM", 32 WAKE FOREST LAW REV. 671 (1997). JAMES E. MOLITERNO, "LAWYER CREEDS AND MORAL SEISMOGRAPHY", 32 WAKE FOREST 781 (1997). CARL M. SELINGER, "THE PUBLIC'S INTEREST IN PRESERVING THE DIGNITY AND UNITY OF THE LEGAL PROFESSION", 32 WAKE FOREST L. REV. 861 (1997).

86. ANNE STRICK, INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF JUSTICE VICTIMIZES US AND SUBVERTS JUSTICE 124 (1977). BUT CONSIDER THE REMARKS OF LAWYER JEROME P. FACHER, THE DEFENSE LAWYER IN THE CASE THAT PROVIDED THE BASIS FOR JONATHAN HARR'S A CIVIL ACTION:

"IF A TRIAL ASPIRES TO BE A SEARCH FOR TRUTH, THE STUDENT MUST STILL ASK WHOSE "TRUTH" ARE WE SEARCHING FOR, WHOSE "TRUTH" HAS BEEN REVEALED AND WHOSE "TRUTH" DO WE ACCEPT? IS IT THE LAWYER'S TRUTH? THE PLAINTIFF'S TRUTH? THE DEFENDANT'S TRUTH? THE WITNESS'S TRUTH? THE JUDGE'S TRUTH? THE PUBLIC'S TRUTH? THE MEDIA'S TRUTH? WHATEVER THE ANSWERS TO THESE PHILOSOPHICAL PUZZLES, A TRIAL CONFRONTS US WITH A REAL LIFE CONTROVERSY WHICH MUST BE RESOLVED BY PRESENTING EVIDENCE, FINDING FACTS AND APPLYING THE LAW. IN LIGHT OF THIS REALITY, A FAIR TRIAL IN A FAIR ADVERSARIAL SYSTEM NOT ONLY RESOLVES THE CONTROVERSY, BUT, I BELIEVE, COMES CLOSEST TO FINDING THAT ELUSIVE AND UNDEFINED CONCEPT CALLED "TRUTH.]" JEROME FACHER, THE POWER OF PROCEDURE: REFLECTIONS ON "A CIVIL ACTION", IN A DOCUMENTARY COMPANION TO A CIVIL ACTION xvii (LEWIS GROSSMAN & ROBERT VAUGHAN EDs., 1999).

⁸⁷ NICCOLO MACHIAVELLI, THE PRINCE 99 (GEORGE BULL TRANS., 1961).

88. MACHIAVELLI, ID., AT 99.

89. MACHIAVELLI, ID., AT 99.

90. SHAFFER, SUPRA N., AT 83.

a deceiver. Lawyers lie, deceive, are argumentative, and use their advocate's skills to persuade others about their sincerity. These behaviors define who we are.

We practice deception. We flatter, cajole and misrepresent to gain advantage for our clients. We are "keen and shrewd". At least many lawyers seem to fit this description.⁹¹ Being immersed in this culture of deception and manipulation imposes costs. Plato argued: "[The lawyer] has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous . . ." This is because: "from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom."⁹²

No one can say for certain that this culture can be changed through formal education and, even if it can be done, that it will work for every aspiring lawyer or even a majority. The culture of law practice possesses a weight, history and leverage that extends into its past and will continue into its future. New graduates can go into this context entirely aware of what they face and still be molded by the pressures, inducements, sanctions and rewards that such a system applies to its participants. This may even be the most likely outcome but we do not know the answer. We don't know what is possible because we haven't made a serious effort.

I argue that there is a need for a focused commitment to curriculum offerings in law schools directed toward the understanding, values, and enhancement of the role of the lawyer as an integral and effective part of the adversary system. This will make no difference for many law students, but it may alter the lives and perspectives for others. We owe it to our students to do what is reasonably possible as opposed to simply throwing them onto the heap of America's practicing lawyers without guidance or support. This is based on the belief that a lack of effective advocates has left the field open for those with money and power to take advantage of the less powerful and the unpopular. Those already in possession of power and wealth have no reason to bargain honestly with those who want a share of that power unless required to do so by an authoritative system.

Ethical philosophy and the system of ethical proscriptions. The focus of legal ethics is the system of proscriptions applicable to lawyers' conduct including the duties and responsibilities found in the professional codes, their interpretations, the law of the legal profession, and the effect of the embarrassing degree of non-enforcement that characterizes the "self-regulating" legal profession. This also includes the philosophy of ethics and lawyers' responsibility to society.

91. KIM EISLER EXPLAINS SOME OF THE WORST BEHAVIOR. SHE REPORTS: "IN DESCRIBING WASHINGTON'S TOP DIVORCE LAWYERS, THE SURVEY IDENTIFIED FORTY LAWYERS CONSIDERED TO BE THE BEST AT HANDLING A DIVORCE IN AN EFFECTIVE BUT CIVILIZED MANNER. IT ALSO DESCRIBED TEN, ONES LABELED "BOMBERS" REGARDED AS THE BEST AT WHAT THEY DO AND STATING THAT: "WHAT THESE TEN OTHERS OFTEN DO IS TORMENT THE SPOUSES OF THEIR CLIENTS. THEY SOMETIMES ARE REFERRED TO AS "BOMBERS" OR "SHARKS"". SHE ADDS: "ALTHOUGH CONTENTIOUS, THE TEN DIVORCE LAWYERS KNOWN AS BOMBERS ARE AS ADMIRED BY THEIR CLIENTS, THE EVIDENCE SUGGESTS, AS THEY ARE DISLIKED, OR FEARED, BY PEACEMINDED ATTORNEYS."

92. MAYER, AT 4 (QUOTING PLATO).

Part of this analysis involves insight into the beliefs of the individual and the choices of values and principles espoused by organizations and social institutions that manipulate law, power and the people under their control. This allows analysis of whether such institutions use principled rhetoric to improve their behavior or rely primarily on public relations rhetoric to deflect or ameliorate criticisms and to create the impression of principled compliance with lofty goals. This includes examining why lawyers have been viewed by society in general in less than favorable terms.⁹³

When entering the profession a law graduate should be aware of such matters as the system of ethical rules that apply to lawyers' activities, the nature of the lawyer-client relationship, issues of attorney fees, the requirement of competent representation as a minimum standard of quality, the obligation to be a zealous representative of the client's interests, malpractice issues, confidentiality, and conflicts of interest.⁹⁴

Personal morality. Personal morality is the individual's system of values and ethics. It includes the individual's beliefs about people and groups, including biases related to those beliefs. Of special significance are the person's views and beliefs and their effect upon the quality of representation given to clients. How this fits into a formal educational structure is questionable in the context of most law schools.

Of course we desire that our students and graduates have strong systems of personal morality even though it would be controversial to define what such systems contain in a culture of diverse values. But putting that significant problem aside it would seem that the best general law schools can do is attempt to ensure the admitted students and graduates are not axe murderers, Ponzi scheme operators, or serious felons. This still leaves space for law schools that specifically advocate a set of religious values about which students are informed when they apply and enter the institution.

Principled professionalism and professional role. Consideration of the effects of the lawyer's professional roles on the attorney involves both definitions of what those roles include and their effects upon the personal and professional lives of an attorney.⁹⁵ These issues consider primarily the non-systemic advantages and disadvantages of the lawyer role and the various conforming pressures of that status.⁹⁶ A part of this involves

⁹³ "THUS THE CLASSIC EPITOME OF THE LAWYER . . . SPREADS THROUGHOUT THE WESTERN WORLD: A CONSUMMATE MALEVOLENCE, CALLOUSNESS TO TRUTH THE BASIC VICE, HARDENED WITH THE SIN OF AVARICE, AND A CONSEQUENT DENIAL OF GOD'S FAVORED—THE DOWNTRODDEN POOR." DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 13 (1973).

⁹⁴ JUSTICE POWELL'S COMMITTEE ON ECONOMICS OF LAW PRACTICE COULD HAVE HAD NO IDEA OF THE MONSTER IT WAS PART OF CREATING AND ITS IMPACT ON PROFESSIONALISM. THE STUNNING CONTRAST BETWEEN THE CULTURE OF PRACTICE OF JUSTICE POWELL'S COMMITTEE AND THE MAGNITUDE OF THE CHANGES IN THE OVERALL CULTURE AND CONDITIONS OF LAW PRACTICE THAT HAVE TAKEN PLACE SINCE THE HANDBOOK'S PUBLICATION ARE REFLECTED IN ITS WORDS CONCERNING THE POTENTIAL LEVEL OF FEASIBLE "FEE-EARNING" HOURS THE LAWYER SHOULD TAKE INTO ACCOUNT IN DETERMINING THE POSSIBLE EARNINGS. "THERE ARE ONLY APPROXIMATELY 1300 FEE-EARNING HOURS PER YEAR UNLESS THE LAWYER WORKS OVERTIME. MANY OF THE 8 HOURS PER DAY AVAILABLE FOR OFFICE WORK ARE CONSUMED IN PERSONAL, CIVIC, BAR, RELIGIOUS AND POLITICAL ACTIVITIES, GENERAL OFFICE ADMINISTRATION AND OTHER NON-REMUNERATIVE MATTERS. EITHER 5 OR 6 REMUNERATIVE HOURS PER DAY WOULD BE REALISTIC, DEPENDING ON THE HABITS OF THE INDIVIDUAL LAWYER OR THE PRACTICES OF THE PARTICULAR OFFICE." AT 287. COMPARE THIS WITH THE 2000-2200 BILLABLE HOURS NOW TYPICALLY REQUIRED OF MANY LAW FIRM ASSOCIATES—WHICH TRANSLATES INTO 70-80 HOURS PER WEEK THAT MUST ACTUALLY BE WORKED TO ACHIEVE THE REQUIRED LEVEL OF BILLABLE HOURS. SEE, DAVID BARNHIZER, "REDESIGNING THE AMERICAN LAW SCHOOL", 2010 MICHIGAN STATE L. REV. (2010).

⁹⁵ STEPHANIE B. GOLDBERG, "LAWYER IMPAIRMENT: MORE COMMON THAN YOU MIGHT THINK, DENVER SURVEY SUGGESTS", 76 A.B.A.J. 32 (FEBRUARY 1990).

⁹⁶ "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL." ALEXANDER HAMILTON, *THE FEDERALIST*

defining what is required of a professional of the law acting in a principled manner within the special construct of the lawyer's role.⁹⁷

This raises very challenging issues of the tension between obligations owed to clients, to other people and to society generally.⁹⁸ The problem is that these competing obligations produce behaviors that if done outside the lawyer/client framework of duty would be thought of as ill-considered, amoral and even contemptible.⁹⁹ Drawing lines in this context of conflicting roles is one of the hardest things for a professional to do.¹⁰⁰

C. Educational Goals Involving Judgment, Analysis, Synthesis and Problem-Solving

1. Issue recognition and issue analysis
2. Understanding of strategy, tactics, and decision-making
3. Understanding of process and procedure
4. Synthesis and problem-solving

Issue recognition and analysis. Legal education attempts to develop the student's ability to develop and examine a set of facts, relate them to applicable legal principles, and through the synthesis, to develop claims, defenses, and supporting arguments. These analytical skills are an essential part of the legal thought process and their development is a priority focus for American legal education. In addition to an understanding of the patterns of basic logic they require the ability to comprehend the full range of issues and possible directions and to predict consequences.

(1788), IN THE WORLD TREASURY OF RELIGIOUS QUOTATIONS 748, RALPH L. WOODS, ED. (GARLAND 1966). JULES HENRY SUGGESTS THE EFFECT ON PRINCIPLE THAT RESULTS WHEN HUMANS CONVERT EVERYTHING INTO FINANCIAL CONSIDERATIONS. HENRY OBSERVES: "MONETIZATION WATERS DOWN VALUES, WEARS THEM OUT BY SLOW ATTRITION, MAKES THEM BANAL AND, IN THE LONG RUN, HELPS AMERICANS TO BECOME INDIFFERENT TO THEM AND EVEN CYNICAL. THUS THE COMPETITIVE STRUGGLE FORCES THE CORRUPTION OF VALUES." Jules Henry, *Culture Against Man* 65 (1965).

⁹⁷ SOL M. LINOWITZ AND MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); MARC GALANTER, "LAWYERS IN THE MIST: THE GOLDEN AGE OF LEGAL NOSTALGIA", 100 *DICKINSON L. REV.* 549 (1996); DAVID BARNHIZER, "PROFESSION DELETED: USING MARKET AND LIABILITY FORCES TO REGULATE THE VERY ORDINARY BUSINESS OF LAW PRACTICE FOR PROFIT," 17 *GEORGETOWN J. OF LEGAL ETHICS* (2004); DAVID BARNHIZER, "PRINCES OF DARKNESS AND ANGELS OF LIGHT: THE SOUL OF THE AMERICAN LAWYER," 14 *NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY* 371 (2000). DAVID J. BECK, *EXPLODING UNPROFESSIONALISM*, 61 *TEX. B.J.* 534 (JUNE, 1998).

⁹⁸ "LAWYERS ARE ACCUSED OF TAKING ADVANTAGE OF 'LOOHOPES' AND 'TECHNICALITIES' TO WIN. PERSONS WHO MAKE THIS CHARGE ARE UNAWARE, OR DO NOT UNDERSTAND, THAT THE LAWYER IS HIRED TO WIN, AND IF HE DOES NOT EXERCISE EVERY LEGITIMATE EFFORT IN HIS CLIENT'S BEHALF, THEN HE IS BETRAYING A SACRED TRUST." WILLIAM J. ROCHELLE & HARVEY O. PAYNE, *THE STRUGGLE FOR PUBLIC UNDERSTANDING*, 25 *Tex. B.J.* 109, 159 (1962).

⁹⁹ THE OATH TAKEN AS PART OF A LAWYER'S ADMISSION TO THE BAR IN OHIO PROVIDES: "I WILL REPRESENT MY CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW, AND WILL NOT KNOWINGLY ASSERT ANY UNWARRANTED CLAIM OR DEFENSE, TAKE ANY UNJUST ACTION, OR EMPLOY OR COUNTENANCE ANY UNDUE INFLUENCE, DECEPTION, FALSEHOOD, OR FRAUD; I WILL ATTEND TO MY CLIENTS' AFFAIRS WITH DILIGENCE, DISPATCH, AND COMPETENCE, FREE FROM COMPROMISING INFLUENCES AND CONFLICTING INTERESTS, AND PRESERVE THE CONFIDENCE OF MY CLIENTS;" RULE 1, SECTION 8. INDUCTION TO THE BAR, SUPREME COURT RULES, GOVERNMENT OF THE BAR, OHIO RULES OF COURT: STATE (WEST 1997).

¹⁰⁰ FOR A DIFFERENT ORIENTATION TO ASSERTIONS THAT WE PUT CLIENTS ABOVE ALL ELSE, SEE ROGER CRAMTON'S ARGUMENT: "THE LEGAL PROFESSION HAS NEGLECTED ITS CENTRAL MORAL TRADITION FOR THE MODERN HERESY, ENDLESSLY REPEATED IN MULTIPLE SETTINGS, THAT "THE CLIENT COMES FIRST," MEANING "FIRST AND ONLY." SOME YEARS AGO THE FIDELITY AND LOYALTY OWED TO CLIENTS WAS BALANCED BY A GENERALLY ACCEPTED UNDERSTANDING THAT THE LAWYER'S PRIMARY OBLIGATION WAS TO THE PROCEDURES AND INSTITUTIONS OF THE LAW." (CRAMTON CONCLUDES THAT THE SYSTEM'S INTERESTS SHOULD PREVAIL). ROGER CRAMTON, "ON GIVING MEANING TO "PROFESSIONALISM", IN *TEACHING AND LEARNING PROFESSIONALISM*, (7, 8) SYMPOSIUM PROCEEDINGS, OCTOBER 2-4, 1996 ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1997).

Within this framework is the skill involved in dealing with ambiguity and contingency that we can think of as tolerating, identifying and manipulating the “gray areas”. To demonstrate the connection between many of the goal areas outlined here, this involves not only the analytic process and those of research and writing, but also ethics and role morality as students (and lawyers) struggle to deal with a morally ambiguous landscape where their duty very often requires the manipulation of others to achieve client ends.

Understanding of process and procedure. Although the rules and issues of civil, criminal, and administrative procedure are generally included in the subject matter of legal education, they are only one component of the legal process. Knowledge of the formal and informal aspects of process and procedure is a powerful tactical weapon in the hands of an attorney. This involves far more than the textbook rules of criminal, civil, or appellate procedure and includes the informal rules and processes that have significant roles in obtaining favorable resolutions of the client’s case.

Synthesis as distinguished from analysis. Legal education is presented in subject-matter compartments, divided more by tradition and the particular preferences of individual teachers than through any attempt to reflect the lawyering process. These arbitrary separations result in students not understanding the integrated nature of the law. They instead view law as a series of unconnected sets of half-understood and compartmentalized principles, rules and doctrines.

Synthesis, or the ability to integrate the knowledge of law into a complete pattern of knowledge and action is one of the most important skills we can impart. The claim that legal education is aimed at teaching law students to “think like lawyers” is an empty boast unless the students are taught to think synthetically and strategically. This premise is discussed at greater length in *Part E* relating to educational goals involving strategic thinking and action.

D. Educational Goals Involving Substantive Law

1. Substantive law, e.g., civil and criminal procedure, constitutional law, criminal law, property, contracts, business, taxation, etc.
2. Evolving and new substantive areas.

Substantive Law. As part of its educational mission legal education has concentrated upon familiarizing its students with an enormous volume of information. It seeks to provide an extensive, issue related framework for the generalist attorney in the areas of subject matter making up the traditional law school curriculum found in every American law school with little variation. Compared to the other categories of educational goals I am spending little time on substantive law goals even though substantive information goals dominate the system of legal education. Anyone who has struggled with the issue of “course coverage” understands the dominant role of substantive law and information dissemination. There has also been an irresistible connection between the power of bar examination-related subject matter areas and the need to ensure that students have been exposed to the information covered by bar examinations. Law schools are captive

creatures of the bar examination and other professional-related requirements. The result is that there is scant room for more innovative approaches to intellectual activity.

On the other hand, the situation may be one of presumption and frame of reference on the part of the teacher and curriculum designers. When I taught Criminal Law to first-year law students I found room for experimentation that I am convinced helped the students understand the subject matter better than could be achieved solely through lectures or use of Socratic techniques in a class of 60 to 80 students. The approaches sought to combine a variety of educational strategies. In the basic Criminal Law offered for 4 credits to first-year first semester students the basic materials used included typical casebook on criminal law, and occasional use of paperback books relating to a criminal law situation, including Kafka's *Trial* and a political critique of the deficiencies in the system, *The Justice Machine*. Methods used not only included lectures and something close to a Socratic dialogue, but role-playing exercises by students relating to problems in criminal law, videotapes, small paper assignments and occasional quizzes. These were supplemented by voluntary outside-of-class small group discussions for students who were interested.

I also taught the Criminal Law course in a seminar-sized section of 20-25 first-year first semester students. The idea behind the course was to create greater interaction between teacher and students, allow the Socratic interactions to become more fully developed and participatory, facilitate the use of other approaches. The small sections of the Criminal Law course were created to allow for the development of research and writing skills in addition to more limited numbers of students for more frequent Socratic discussion. Students were therefore required to write one or more papers during the semester. The period during which I taught in the seminar format also coincided with a three-year period when I was responsible for training the Cuyahoga County Public Defenders. The Criminal Law students were assigned to the case we were using for the lawyers' training trials and served as analysts, witnesses and jurors in the case. Although the assessment is obviously subjective I feel strongly that the methods used in each format took the course beyond the typical first-year course and enhanced the students understanding of both the theory and reality of the law and the system in which it was applied.

I also taught *Jurisprudence* as a 3 credit, first year course to law students in their second semester with a 30 student maximum for the course. The basic approach was to use Christie's *Jurisprudence* text for the first half of the semester to familiarize the first year students with philosophical vocabulary and concepts. This involved a great deal of in-depth discussion and was also related in several instances to cases they were studying in other first year courses. Problems such as *The Case of the Speluncan Explorers* were also used as well as movies that included *Judgment at Nuremberg*. Primary coverage included Aristotle's *Politics* and *Nicomachean Ethics*, as well as Aquinas, Grotius, Pufendorf, Rousseau, Locke, Hume and Hobbes along with several American theorists such as John Rawls and Ronald Dworkin. The second half of the semester was devoted to students analyzing the complete decisions in *Furman v. Georgia* (capital punishment) and *Roe v. Wade* (abortion). This was followed by extensive discussion, arguments, and role-playing exercises that included students serving as Supreme Court justices and

lawyers who argued the cases to the Court. The goals included not only an introduction to jurisprudential concepts but demonstration of the roles of deep value systems and often inchoate assumptions both in argumentation and in judicial decision-making. Because it was an elective offered to first-year students it also had the goal of helping them integrate the analysis in other courses through helping them appreciate the conditions of judicial analysis and the imprecision of judicial doctrine.

E. Educational Goals Involving Strategic Awareness and Technical Skills

It is somewhat misleading to refer to the array of approaches lawyers use to perform well in law practice as “technical” because this risks creating the impression we are speaking mostly of tactics and techniques. There is a coherent system of professional skills that comprise excellence in professional performance. The approach includes the orientation that might be best described as “helping students understand the importance of transcending technique.” This is a central element of effective strategic thought, planning and action, an area in which I have a great deal of interest.

It is important for law teachers to learn how to teach a more holistic approach to the understanding of law and law practice. The legal strategist must have the knowledge to use the full range of tools and weapons and be capable of using them in ways that allow their best use at the proper time--and in the right way to achieve maximum effect. Technical mastery is important because no one can excel without mastering technique. The full range of techniques is understood by the strategist to represent only one part of the total strategic system. Such understanding is necessary for competence but insufficient for excellence that demands an aesthetic quality.

I emphasize strategic awareness as an essential focus for legal education because strategy is far more complex, encompassing, and subtle than the limited (and limiting) realm of techniques and tactics. The problem for the teacher is that there is a natural tendency for us and our students to fixate on narrow conceptions of technique. We confuse mastery of specific technical approaches with the understanding of strategy. This is because it is easier to learn how to excel at a narrow task and we convince ourselves that our mastery of task and technique is more profound than it is. Many lawyers are like the *sword-fencers* of Musashi’s time who became fascinated with technique and lost sight of the larger system within which true combat operates. Such lawyers fail to go beyond the specific context and thus never gain an understanding of the total system within which they function. Because of this, they never transcend the limitations of technique.

Elements of the more complete knowledge system lawyers need to function at the highest levels of effectiveness include the following.

1. Strategy, strategic planning and strategic assessment
2. Case or problem evaluation
3. Case management
4. Solutions and outcome design
5. Legal research

6. Legal writing related to litigation
7. Legal writing related to transactional matters
8. Legislative and regulatory drafting
9. Computer and information management skills
10. Practice management skills
11. Client interviewing
12. Witness interviewing and investigation
13. Client counseling
14. Negotiation
15. Mediation
16. Trial advocacy
17. Administrative advocacy
18. Arbitration
19. Appellate advocacy
20. Regulatory system and lobbying advocacy

Understanding of strategy, tactics, and decision-making. Acquiring skill, strategic awareness, and judgment requires a combination of experience, intuition, ability, and discipline. Strategy improves our ability to evaluate, diagnose, and resolve the problems and opportunities our clients bring to us. The abilities involved in issue recognition and analysis are important in the initial phases of developing legal and factual alternatives in the individual case. Beyond recognition and analysis a lawyer must be able to choose between the issues and alternatives in order to select those most appropriate for obtaining the most beneficial consequences for clients. What is required in this type of strategic analysis is the ability to conceive a plan of effective implementation.

Strategy is a total discipline. Strategic awareness involves the ability to synthesize a full range of knowledge and technical skill and to convert that to a concrete decision and focused action. The discipline of strategy becomes part of the person. It requires self-awareness, the ability to rapidly perceive and interpret events, and to make immediate choices of action under pressure. Part of this demands mastery of the subtle and complex skills of execution, tactics and communication. Although I infuse strategy in all the courses I teach, I introduce students to the approach in a course called *Lawyer's Strategies* that uses *The Warrior Lawyer* to open students up to a coherent strategic methodology.¹⁰¹ The book utilizes insights from Chinese and Japanese military and martial arts classics to create a conceptual structure and strategic vocabulary that is applied to American law practice.

The course in *Legal Strategy* was offered for 3 credits and limited to 24 students. A central part of the approach was the use of Chinese and Japanese military and martial arts strategy applied to American law practice in areas of evaluation, development of case strategies, negotiation, mediation, arbitration and trial. There was extensive use of role-playing exercises in which students were responsible for developing and implementing

¹⁰¹ DAVID BARNHIZER, THE WARRIOR LAWYER: POWERFUL STRATEGIES FOR WINNING LEGAL BATTLES, (BRIDGE STREET BOOKS 1997).

strategies and critiquing performance, their own and others. At the end of the course the students found themselves thinking in a different pattern than when they began.

The course in *Lawyer's Strategies* brought the lawyer as strategist together with the process of planning and action taking place within a dynamic system. As such, the effective legal strategist must not only be able to "see the forest *and* the trees" but must also be able to anticipate and perceive changes that are likely to happen and are occurring and to then adapt to the shifting field of play and take effective action. Part of this process includes planning and the acquisition of critical information, but goes far beyond that to involve the ability to perceive more fully and engage in honest self-critique of the kind needed for professional growth.

The course in strategy is aimed at creating a fuller understanding of the dynamics of the legal system within which lawyers operate. It seeks to help the student to develop awareness of how the pieces involved in law practice operate as part of an integrated context within a powerful system rather than analyzing the various processes only in discrete compartments. The force that ties all the pieces of law practice together into a coherent system is strategy—which can be understood as the ability to both plan and take action to achieve desired goals, or to at least significantly increase the probability of achieving a client's goals.

Several themes provide the foundation for this course. They include the use of power to achieve one's goals as well as defending against others' attempts to use power and leverage against you. Being a lawyer means manipulating people and that is a fact with which many are uncomfortable. Being a principled lawyer involves accepting responsibility for the fate of another person while setting limits on the extent of the manipulation and deception that takes place. A second theme of this course involves understanding and being able to deal with the hard realities of law practice and recognizing the moral dimensions of law practice.

A vital theme of the course is the quality of perception needed to be a good lawyer. The successful strategist is able to perceive both the details and overarching processes of planning and action, and to do so at a time when decisions can be made that are meaningful. Most people tend to see things in pieces rather than as part of a coherent process and dynamic system. Even when people see things in wholes rather than piecemeal far too many tend to fixate on the plan rather than the qualities of adaptation and flexibility that are essential in the real world. In both business and military strategic planning, for example, there is a recurring tendency to develop complex strategic plans that bear little resemblance to the unfolding realities of engagement and action. The problem is that so much effort and resources have been put into the plan that it takes on a life of its own. This can blind strategists to what is actually happening.

Diagnosis and Evaluation. Few clients can afford the complete level of representation that is ideally possible if unlimited resources were available. Client resources are rarely sufficient to allow lawyers to do what would be ideal. This creates a tension between the legal profession's ethical commitment of providing each client with zealous, high quality

representation, and the reality of most of law practice. One way to help overcome or at least mitigate the practical realities of law practice is for lawyers to learn how to become more focused, efficient, and knowledgeable. This offers law teachers a goal that is readily achievable with the appropriate educational strategies.

The discipline of strategy helps produce efficiency in evaluation and action because it enables lawyers to become better at diagnosing and evaluating cases. Improved methods of diagnosis and evaluation enhance the efficiency and speed with which a lawyer determines the value, options, timing considerations, expense, and outcome probabilities of cases. Diagnosis and case evaluation are a large part of what clients pay for, and are among the most important skills if clients are to be effectively counseled about their best options and the costs and consequences of actions.

The most important part of the evaluative and diagnostic process is being aware of why humans decide things in the ways they do. This includes considerations such as what themes touch people deeply? What behavior offends people to the extent they want to punish the person or institution they decide is responsible? What kinds of behavior has the power to influence decision-makers' judgment, either positively or negatively? Answering such questions requires exploration of factors such as the costs, consequences, and individual and institutional rules of operation, rules of engagement, and criteria of valuation and choice to which decision-makers are subject or to which they are likely to be responsive or resistant.

Client interviewing and counseling. Within the framework of strategy there are identifiable processes oriented to the central skill categories and environments within which lawyers operate. These include the skills of interviewing and counseling. Client counseling is a foundational role of the lawyer and in law schools committed to teaching students to "think like lawyers" it seems that educating students to understand the dynamics of client counseling should be a primary goal. Counselor, after all, is one of the terms we use to define attorneys. Counseling is the process of communicating with the client accurately and effectively the condition of the case, its strengths and weaknesses, the alternatives and consequences of potential paths of action and inaction, and the ability to provide this guidance while enabling the client to make essential decisions about the case. Conducting the initial contact with a client and the resulting professional relationship, together with controlling the quality of the information acquired through the interview, are essential legal skills and should be a basic part of legal education.

Investigation and case development. Fact investigation and case development aimed at packaging the situation in ways that enhance the probability of achieving desired outcomes. Along with this goes learning how to develop a complete factual basis in individual cases through investigation, use of discovery processes and other research. Fact investigation, both formal and informal, is integral to effective client representation whether we are dealing with litigation or transactional contexts. This is one of the single most significant skills of the advocate and counselor.

Transactional and Litigation-referenced Negotiation. There are a variety of types of negotiation, including non-litigation or transactional negotiation. While they reflect a linear set of processes each also operates according to its own rules, dynamics, and functions. The types of negotiation include pre-litigation negotiation; post-filing negotiation, pre-trial negotiation; “eve of trial” negotiation; trial negotiation; post-verdict negotiation, and negotiation during the appellate stages of a case. Each negotiation form differs in terms of function and degree of concreteness, at least as measured by the likelihood of being able to actually resolve the process.

A high percentage of all cases are ultimately resolved by negotiation rather than litigation and the understanding of the principles and methods of negotiation is critical. Much of this knowledge can be developed through methods within legal education, including both clinical and non-clinical methodologies. Negotiation is not a singular methodology but represents complex processes with many different functions and purposes. Although we collect these processes under the heading of negotiation this collapses negotiation into an overly simplified concept. Negotiation is part of a strategic campaign, not a singular event. Nor is negotiation necessarily intended to lead to settlement as opposed to being a form of discovery, impression management, and delaying process while appearing to be open to compromise.

Mediation. Mediation is a variation on negotiation. Mediation can be an element at any point, although it is more likely to be used in the earlier stages of a dispute. While it is advisory in nature, mediation creates a communication triangle that encloses all the interests in a psychological *field* of greater reasonableness than is often found in negotiation. To be effective the mediator can't become personally involved, or be seen as an advocate for one side or set of issues. While mediators lack authoritative power, the participation of an independent third party alters the interaction between the opposing lawyers and parties. A mediator is a reflector and facilitator whose task is to help the parties gain insight as to how people who are not subjectively and competitively immersed in this case will perceive, react and judge the things they are saying or doing.

Legal research. Legal research is a fundamental skill that is integrally linked with many of the other skills and goals of legal education. Developing the scope and quality of the student's research while ensuring there is not a substantial degree of waste time due to poor research patterns is invaluable. It improves the quality of the student's total analytical process. The link to the quality of analysis and synthesis enhances the synergy between those processes and the ability to engage in research and writing on a sophisticated level.

Legal writing. The quality of research and its subsequent conversion into written forms with various functions relates directly to the processes of analytic and synthetic thought. If material is understood clearly and in depth then it is reasonable to expect the proof of that understanding to be demonstrated in the quality of legal expression in its written form. Put simply, poor writing is a function of inadequate understanding of what one is writing about. We can relatively easily deal with matters of form and style but it is much more difficult to teach quality, precision and depth of thought as expressed in writing.

The skill of clearly, effectively, and persuasively communicating ideas in writing is an ability that has been largely ignored by legal educators. Like legal research, it is generally unexciting, demanding, and often a tedious process to teach and learn. The “law review” writing style very often required of law students is only one form of legal writing; they seldom have the opportunity to develop the skills of advocacy-oriented expression.

Arbitration. Arbitration includes both binding and non-binding arbitration. Binding arbitration moves the dispute resolution process into the realm of authoritative decision-making where the outcome is increasingly outside the direct control of the parties. Arbitration can be through court process, in which certain kinds of cases are referred by the trial court to a panel of arbitrators, or by contract. The court-ordered referral process is not binding, and does not preclude the lawyers from going on with the case even if they receive an unfavorable decision from the arbitrators. But it can be useful by providing them with a more neutral, or at least different, view of the value and substance of their case and the validity and persuasiveness of the opponent’s position.

As already noted, one of the hardest things for advocates and parties to achieve in a dispute is an objective perspective on the issues and probable outcomes. Non-binding arbitration can help do that, although there are some pitfalls to court-ordered arbitration. Court-ordered arbitration is reasonably close in form to a trial, but with less restrictive evidentiary rules regarding such things as hearsay, objections, and the ability of lawyers to introduce evidence through summary statements. In many court-ordered arbitrations, the lawyers may just state the facts, make a brief opening statement, take limited testimony from several primary witnesses, summarize the testimony of other witnesses, and cross examine opposing witnesses.

Contractually-binding arbitration is not subject to all the procedures dictated by the rules of trial evidence. Because it tends to be, in effect, a final judgment due to the restricted bases for further review of the arbitrators’ decisions, the arbitration process can be as intense and demanding as a trial. The stakes of binding arbitration are high because there is such a limited chance to win on appeal, or to even drag it on interminably, as is characteristic of other appeals. The specific process used in contractual arbitration depends on the terms of the arbitration agreement, and the rights involved.

Trial and administrative advocacy. Since it is not always possible to resolve disputes by negotiation, trial or binding arbitration provides the ability to obtain a final and enforceable resolution. While only a minimal percentage of cases are actually litigated through trial, the abilities involved in representing clients in court are significant. A believable threat of effective litigation is a significant force underlying many negotiations and provides a powerful weapon in the hands of the competent lawyer. The understanding and effective use of the skills of trial advocacy, (including *voir dire*, oral argument, case presentation through introduction of documentation and physical evidence, and witness examination) and/or understanding of tactics and strategy, are essential to the development of the total lawyer.

While it is almost always best to avoid trial or all-out legal “war” there are also times when the battle should not be avoided, and when signing a “peace treaty” or settlement agreement is not in your client’s interest. But legal strategists should never forget that trial is expensive, labor intensive, emotionally draining, often destructive to both sides, and ultimately uncertain in outcome. While lawyers can position themselves to increase the probability of success at trial, but trial outcomes are inherently uncertain. The uncertainty exists because trial outcomes depend on the capabilities, qualities, perception, and values of other people, and on the skills and knowledge of lawyers, clients, and witnesses. Even though the legal strategist seeks to resolve a dispute short of trial, the ability to resort to trial is the indispensable element in our ability to resolve disputes. The knowledge that a decision will be rendered if we do not reach agreement in a dispute is a powerful motivator toward compromises and concessions we would not otherwise make.

The course in *Trial Advocacy* was offered for 3 credits to 8-14 students in their final year of law school. The course involved frequent role-playing exercises relating to elements of trial advocacy and a requirement of a substantial trial notebook prepared in conjunction with the final full-day trial that served as their final examination. The experience also included use of computers, overheads, slides, videotaping and critique of student performances, role-playing by the teacher, and production of exhibits. A key approach used roughly half the time in teaching this course was selection of a well-known dispute that was taking place simultaneously in the “real world”. The students would be responsible for developing the materials and witnesses and then trying the entire case. This included the O.J. Simpson criminal trial at the same time it was occurring, the police murder of Amadou Diallo while the trial was taking place, and redesigning and trying the *Cipollone* case against tobacco companies. The benefit of using “live” cases rather than packaged trial case files was that students learned more about strategy, image and fact manipulation, and had an overall richer environment with which to engage. It works well but it is not easy to do.

Appellate advocacy. The ability to communicate one’s ideas persuasively through oral argument to an appellate court is a special form of advocacy and one for which current legal education generally prepares the student. Most students even prior to graduation can effectively fulfill the role of the appellate advocate, due primarily to the concentration upon appellate decisions and the form of that specialized issue analysis that is the focus of the “case-Socratic” method of instruction.

Conclusion

Students’ Acceptance of Responsibility for Their Own Learning

The most important principle is that our overriding goal is to help students take personal responsibility for their own learning, in essence, the responsibility for creating themselves. Think of the process as one in which the teacher helps the law student weave a personal tapestry of knowledge, skill and values. Musashi advocated the concept of “all things with no teacher” in *A Book of Five Rings*.¹⁰² He voiced the task in the following

¹⁰² DAVID BARNHIZER, *THE WARRIOR LAWYER: POWERFUL STRATEGIES FOR WINNING LEGAL BATTLES* (TRANSNATIONAL 1997).

words: “I have lived without following any particular Way. With the virtue of strategy I practice many arts and abilities--all things with no teacher.”¹⁰³ It is the teacher’s responsibility to draw the student through the experience and to be the student’s facilitator in the creation of a learning environment and the weaving of the “learning tapestry”.

The learning environment designed and facilitated by the teacher is a critical element that makes possible the insights students take away from the experience. The fabric used for the learning process and the initial design of the tapestry are selected by the teacher and this is done by using patterns with which that person is familiar. But the teacher’s goal is that the students learn to become *artists* and *weavers* and that they develop the skills, insights and sense of craft required to continue the professional and intellectual project on *their* own terms, with *their* values and according to *their* abilities and characteristics.

It is important to understand that the principle of “all things with no teacher” doesn’t mean the teacher is rendered obsolete. It stands for the proposition that intellectual flexibility, adaptability, and the recognition that “all roads” can lead to a productive learning experience are critical elements of the teaching method. This concept supports the goal that students must be taught to accept responsibility for their own learning throughout their life. This includes the proposition that they must seek to grow beyond the teacher in knowledge, skill, and understanding.

Teachers share their knowledge and in doing so also inculcate students with concepts that expand the students’ understanding. While a source of knowledge and power, this simultaneously limits students’ ability to see beyond the logic and structure of the teacher’s approach. In other words, the teacher’s “needle” follows a familiar pattern. As students explore within this pattern they are both empowered and limited by the experiences created by the teacher and by the teacher’s limitations and perspectives in knowledge, philosophy and experience. This insight has had implications for my own work. I have sought to operate as an educational strategist who seeks to acquire and synthesize experiences that “push the envelope” of my personal and professional limits in the direction of “all things with no teacher” in my own life.

The driving force behind this view of pedagogic responsibility is that no one will be around to hold students’ hands after they graduate and begin law practice. While we teachers are necessary parts of the students’ developmental process we will not be around after they graduate and enter the profession. Both the quality of their professionalism as a lawyer and the need to protect their clients’ well-being require that students accept the responsibility of independent thinking and action. This means they must be able to apply their minds and skills to solve their clients’ problems. Otherwise they will at best be mediocre professionals and at worst betrayers of people who agree to place their fate in the lawyers’ hands.

¹⁰³ SHINMEN MUSASHI, *A BOOK OF FIVE RINGS*.

