

LAW LEARNING, TEACHER-STUDENT RELATIONS, AND THE LEGAL PROFESSION

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And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have gotten used to it.

G.K. Chesterton in *TREMENDOUS TRIFLES*

I. INTRODUCTION

The lawyer is a product of cultural and professional education who serves particular social roles through his professional identity and capacity. In terms of his professional experience, one may ask how he got to be who and what he is. Further, in terms of his learning experiences and his roles in society, should he and can he be different? These are questions addressed in this writing, with particular focus on what and how the lawyer learns in law school, how teacher-student relations affect his learning, what kind of legal education evolves to produce what kind of lawyer, and what changes or innovations are needed in legal education to make better lawyers more appropriately trained to their social roles and functions. This is a large and almost presumptuous undertaking. It is narrowed somewhat by a focus throughout on individual law student experience and the development of lawyer character and capacity.

Legal education operates with a number of working assumptions, most of which give rise to questions about educational policy and practice. Ultimately, some or many of these working assumptions reflect on the question of what a lawyer is, what he does, and what type of lawyer is best. There can be parochial and technical answers to such questions, but the need for perspective on the lawyer in society suggests that it might be salutary to examine the lawyer in the context of philosophical and historical models of man. This, then, may be translated into

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different types or kinds of lawyers who occupy different roles in society. The roles may be identified from sociological study and from common observation.

Common to all lawyers are general attributes that distinguish the lawyer in his professional capacity. These are, notably, a sound moral disposition and a developed capacity to think. It is instructive to consider how these attributes are developed, with particular reference to law school, the role of teaching and learning in this process, the character of the teacher-student relationship, and the personal experience of the learner. Close analysis and observation reveal certain strengths in legal education, but also point to omissions and flaws that might be (need to be) corrected with pertinent innovations.

In addition to general attributes of all lawyers, there are also specific attributes that are essential to lawyers performing common but separable functions. The reality is that some lawyers constitute a kind of self-designated intellectual and legal elite purporting to serve prestigious functions in society. All lawyers are trained for this, yet a substantial segment of lawyers is needed to deal in practical affairs, for which practical training is needed. Another large segment deals with matters of personal concern, conscience, and compassion. The contexts and methods of legal education need to be more substantially developed in this area as well. The aims and methods of legal education for these different roles must be recognized and explicated, always mindful of the character and competence being developed or neglected, encouraged or discouraged, in the student. Innovation and change in legal education, extending the scope of the enterprise as it is now conducted, appear essential to strong moral, intellectual, and social purpose.

A. *The Working Assumptions of Legal Education*

Legal education, and education generally, is an enterprise replete with untested and essentially self-serving assumptions. It is challenging to inquire, for instance, whether a formal enterprise of instruction is essential to adult learning, or, even more generally, whether teachers are essential to learning at all. Even if one accepts the assumption that teachers and teaching are necessary to the learning process, one may inquire whether certain modes of instruction, such as the Socratic teaching method, are essential to learning.

Such inquiry invites a more profound analysis of the objectives of learning. Especially in professional education, one must determine

what degree of influence the educational process should exert on the learner and what manner of man or woman the profession should seek to produce. And then, if there are considered answers, one should ascertain the educational process, and the methods and relationships within this process, that best suit the objectives. There are answers of sorts that already exist in legal education but they are based on mostly untested assumptions. One answer is that the Socratic method (so-called) sharpens thinking. Incisive thinking is essential to the lawyer because the lawyer must delve through the morass of law for pertinent guiding principles in order to generate thoroughly reflected and tested decisions. Another answer is that teachers are essential to the process that exercises students' minds so that they do learn to "think like lawyers," and that the most economical form for this teaching is the classroom. A third and summary "answer" is that the essence of legal education is to teach "legal thinking," and the better such thinking, the better the lawyer. All of this is learned with the implicit recognition that lawyers work primarily within the framework of, or with constant reference to, juridical institutions. Thus, "clinical legal education" and law clerking, which characteristically focus on advocacy and litigation practice, help orient the student to the realities of the legal professionalism. These are perhaps the most essential working assumptions in legal education.

Within the framework of such assumptions one may ask: what is the significance of the teacher-student relation, how is it negotiated, and what purpose does it serve? In brief, the teacher is the student's intellectual task master. He is instrumental to the learning process as a would-be guide to the landscape and provocateur of thought, preferably sound thought. He joins the student on the field of battle, the classroom, and jousts with the student, often in deadly seriousness, to test and temper the latter's intellectual skills. A by-product of this intellectual exercise may be pain and harassment for the student, but this is regarded as inevitable to sound learning and at worst a passing phenomenon. Other dimensions of the teacher-student relationship, such as friendship, and moral and ethical consideration, are considered fortuitous and of no particular interest or concern.

Another practiced assumption is that the measure of the student's experience is his mental response to instruction. Most students would acknowledge that their minds have been exercised by the legal education experience and that they have learned to think more sharply and

incisively. They may have other feelings and judgments about the character of the legal education experience, but these may not be relevant to the ultimate concern of whether or not they have been effectively taught to "think like a lawyer."

B. *Models of Man and Kinds of Lawyers*

I should like to back away from the prevailing assumptions in legal education and address some underlying issues. Is the lawyer in fact only a technocrat whose hallmark is incisive thinking? Most lawyers do not accept such a narrow view, and most of their constituents expect more. What then are the values, attitudes, and skills that characterize, or should characterize, a lawyer?

The question of what constitutes a lawyer is one of perspective that ought not to be addressed or answered in parochial terms. Implicit in the answer are ideas of the worth of humankind and the role of professionals in ministering to social and human need. The best point of departure for this inquiry may be a consideration of the idealized models of man that occur in philosophy and history. From this, one may develop a composite of the idealized lawyer and, further, a composite of the particular lawyer performing discrete functions in society.

The identification of models of man might begin with a Platonic view¹ of a person who, at his best, is knowledgeable, virtuous, and beautiful. To serve the illusion of the philosopher-king, he is the wisest and most knowledgeable of all. His learning is formed from dialectical inquiry. He prescribes for a society that is intellectually inferior and that requires the benevolent protection of a Guardian. The Platonic view contemplates an intellectual aristocracy in an ordered and controlled society governed by an intellectual elite. One may see a connection between this description and de Tocqueville's observation about lawyers:

Men who have made a special study of the laws and have derived therefrom habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas are naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy.

. . . .

1. See generally PLATO, *The Republic*, Books 3-5, 7, in 3 DIALOGUES OF PLATO (B. Jowett trans. 1892).

So, hidden at the bottom of a lawyer's soul one finds some of the tastes and habits of an aristocracy.²

The Sophist Isocrates,³ by contrast, stressed man's concern with practical action. He saw the limits of unworldliness and concluded that a prime function of education was to improve a person's capacity to meet unforeseeable problems in life with ingenuity and wisdom. For Isocrates, the means to education, and the mark of an educated man, was linguistic prowess. He ran a school of oratory, but for him oratory was something more than persuasion. A person properly schooled in linguistic arts reflected culture and absorbed moral traditions that were translatable into good character and conduct. Isocrates believed in the power of *logos*,⁴ and in the power of the Word, to produce goodness in life. He failed to appreciate the paradox that words were sometimes a substitute for action and that linguistic facility could ignore or defeat what was in reality important.

The Augustinian view⁵ of the educated man offers another dimension or a different perspective on the purpose of education. Augustine, who also lived in a time of strife, sought predictability and certainty in life, not through a planned world, such as the one Plato brought forth, but by reconciling differences between pagan and Christian views. Since reason alone could not reconcile differences, Augustine stressed a commitment to the ultimate law, that of the Christian church, and encouraged learning that stressed discipline and adherence to authority. Inquiry, and the honing of reason, were acceptable in learning but they ultimately were to be tempered by and subordinated to authority. Augustine anticipated the model of the scholastic as an educated man. The scholastic, evolving from the tradition and example of Thomas Aquinas,⁶ is a person rigorously schooled in reason so as to deal with worldly problems and to fashion morality, but with ultimate allegiance to the authority of God and the Scriptures, the authority of a higher

2. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (1966).

3. *See generally* 2 ISOCRATES, *ORATIONS* (G. Norlin trans. 1956).

4. The perception of ancient Greek philosophy that reason, or the manifestation of reason, was the controlling principle in the universe.

5. *See generally* A. AUGUSTINE, *THE GREATNESS OF THE SOUL* (387); Augustine, *On the Models of the Catholic Church*, in 4 P. SCHAFF, *A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH* 41-63 (1887); Augustine, *On Christian Doctrine*, in 2 *id.* at 544-45, 553-54, 555.

6. *See generally* 2 T. AQUINAS, *BASIC WRITINGS OF THOMAS AQUINAS* (Pegis ed. 1945); 1 T. AQUINAS, *SUMMA THEOLOGIAE* (Gilby trans. 1954); T. AQUINAS, *THE TEACHER* (ed. 1954).

law. Learning stops short of experience that cannot be assimilated into an essentially Godly and theological view of the universe.

The sacred view of authority in education is considerably tempered by the great Renaissance scholar and humanist, Erasmus.⁷ It was Erasmus who, in his satire *The Praise of Folly*, said:

Among men of learned professions the lawyers may claim first place for themselves, nor is there any other class quite so self-satisfied; for while they industriously roll up the stone of Sisyphus by dint of weaving together six hundred laws in the same breadth, no matter how little to the purpose, and by dint of piling glosses upon glosses and opinions upon opinions, they contrive to make their profession seem the most difficult of all. What is really tedious commends itself to them as brilliant.⁸

Erasmus intended that we not take ourselves too seriously and that we see some grace in life. He sought to reconcile the corruption of the prevailing Christian society through a renewal based on classical sources. His was a voice of reason and toleration where others were preaching rigid adherence to authority or intense fanatical reaction. The Erasmusan model of the educated man contemplated a breadth of understanding and humane tolerance in the context of strong moral commitment and sound learning. The educated man was wise, magnanimous, and temperate. Withal, he possessed discipline and integrity. It is only Erasmus' adherence to the classics as the source of "humanity" that restricted and refuted that aspect of culture which comes from the contribution of science.

Another harmonizing view of the educated man, and one that broadened the base, was provided by the distinguished Protestant philosopher-theologian Comenius.⁹ His model of the educated person was that of a pansophist, one who seeks knowledge from all sources. Comenius offered a world view that stressed political community, religious reconciliation, educational cooperation, and intellectual harmony. He would extend the promise of education to all classes and sexes and to persons of varying capacity. Comenius sought discovery

7. See generally 3 D. ERASMUS, *THE COLLOQUIES OF DESIDERIUS ERASMUS* (E. Johnson ed. 1900); D. ERASMUS, *THE PRAISE OF FOLLY* (H. Hudson trans. 1941); Erasmus, *Upon the Right Method of Instruction*, in W. WOODWARD, *DESIDERIUS ERASMUS CONCERNING THE AIM AND METHOD OF EDUCATION* 1162 (1964).

8. D. ERASMUS, *THE PRAISE OF FOLLY*, *supra* note 7, at 76.

9. See generally J. COMENIUS, *THE ANALYTICAL DIDACTIC OF COMENIUS* (V. Jelinek trans. 1953); 2 J. COMENIUS, *THE GREAT DIDACTIC* (M. Keatinge trans. 1907); JOHN AMOS COMENIUS, 1592-1670, *SELECTIONS* (I. Urwin trans. 1957).

through the method of induction. Training in thinking was to be rigorous and disciplined, and faithful to a continuing yet broadened authority. Comenius encouraged mental rigor, but also saw a broader understanding and tolerance of others, and greater opportunity, as important dimensions of the educational experience.

A heavy stress on intellect and formal learning characterizes most of the prescriptions for a well-educated person presented thus far. The "good" professional is, implicitly, the well-educated person, whatever that may mean. Rousseau's point of view adds still another dimension to our understanding. In Rousseau's classical treatise on education, *Emile*,¹⁰ the truly educated and competent person is not one who has been denied the free expression of emotion or forced into intellectual precocity before he has gained natural experience. Rousseau viewed the experience of feeling, uncontaminated by a strong and preemptive conceptual order, as the means to broader understanding, insight, and creativity. As he expressed the notion, "I felt before I thought: this is the common lot of humanity."¹¹

Rousseau's prescription for education was for a fairly free experience. He did not wish it to be narrowly vocational or prematurely intellectual. Rousseau's theories contrast sharply with those of Locke.¹² Locke considered the learner as a *tabula rasa*¹³ and would instill mental discipline through a formal program of ordered and somewhat classical learning. His objective was a useful education but its ultimate purpose was to breed gentlemen.

The moral conditions of education and education as a participatory experience are the hallmarks of John Dewey's contribution¹⁴ to the field. "I believe that education is a process of living and not a preparation for future living," he said.¹⁵ He saw goodness and competence as merging in the truly educated person. The educated person was to be, by a process of openness to experience, a reflective person. This reflectiveness is characterized by the intellectual habit of open minded in-

10. J. ROUSSEAU, *EMILE* (W. Boyd ed. 1962).

11. J. ROUSSEAU, *CONFESSIONS* 6 (Modern Library ed. 1945).

12. See generally J. LOCKE, *CONDUCT OF THE UNDERSTANDING* §§ 1, 3, 6-7 (T. Fowler ed. 1890); J. LOCKE, *The Epistle Dedicatory*, in *SOME THOUGHTS CONCERNING EDUCATION* lxi (R. Quick ed. 1902).

13. The concept is that the mind is a blank slate before receiving outside impressions.

14. See generally J. DEWEY, *DEMOCRACY AND EDUCATION* (1919); J. DEWEY, *HUMAN NATURE AND CONDUCT* (1922); Dewey, *My Pedagogic Creed*, 54 *SCHOOL J.* (1897).

15. Dewey, *supra* note 14, at 78.

quiry, and it contributes to responsible experimental action. In his treatise entitled *How We Think*,¹⁶ Dewey outlined a system of problem solving based on a combination of reflective thought and pragmatic consideration. Thinking begins with a situation of experienced "perplexity, confusion, or doubt."¹⁷ Using the data provided by observation and experience, the mind produces suggestions, and then hypotheses, and ultimately elaborations. The process should be one of highly reflective thought that does not foreclose too quickly nor accept the first or easiest available solution. There is then a plan for action, since the ultimate objective of reflected thought is to produce a situation that is clear, coherent, settled, and harmonious.¹⁸

The educated person in Dewey's ideal is a constant learner in life who approaches each experience with reflective thinking. His consciousness extends to both individual (personal) and group (collective) experience in an effort to assimilate these into a happy or harmonious life experience. Dewey strongly believed in the perfectability of humankind.

The uniqueness of the human being and of his experience was the emphasis Buber¹⁹ gave to the consciousness of the truly educated person. In a largely ethical and moral view of life, he stressed the importance of responsibility and genuineness. To achieve these, the educated person must know how to listen as well as talk. He participates with another in meaningful dialogue, authenticated by *being* as well as by *seeming*. One must have the courage to be truly one's self in relationships. There must be genuine exploration by the student, but there must also be a genuine encounter with the authority of the teacher's values. There is an emphasis on truth, and a social by-product is respect. It is the world of I-Thou that takes predominance over the world of I-It. It is the way the world is to be met rather than the way it is to be used that is important.

The ideal evolves from a composite of all of the views represented. The professional person is an idealized figure in Western society and thought to be something more than a skillful methodologist. The desir-

16. J. DEWEY, *HOW WE THINK* (rev. ed. 1933).

17. *Id.* at 12.

18. *Id.* at 72-76.

19. See generally M. BUBER, *The Education of Character*, in *BETWEEN MAN AND MAN* 104 (R. Smith trans. 1965); M. BUBER, *I AND THOU* (R. Smith trans. 1958); M. BUBER, *Elements of the Inter-human*, in *THE KNOWLEDGE OF MAN* 2 (M. Friedman ed. 1965).

able lawyer, then, or several of them, might be seen as knowledgeable, virtuous, and learned in dialectical inquiry. He or she is a guardian for society and a leader of humankind. He is concerned with practical action and skilled in the use of language as a prime mover of social interests. He reflects discipline and respects and adheres to an ultimate authority. He is, withal, tolerant and magnanimous, and he shows a breadth of perspective. Though disciplined and educated, he is also a vital and feeling person. He is open minded, reflective, and inquiring, with strong moral purpose. He values meaningful and considerate relationships with others.

The idealized description denotes several kinds of lawyers, many of whom have been identified, at least in terms of the roles they play, in sociological studies of the profession. Smigel has surveyed and described the implicit values, professional practice, and educational background of *The Wall Street Lawyer*, one of an elitist group serving an elitist clientele in American society.²⁰ Bazelon uses a biographical approach to describe the functions of a lawyer who is handmaiden to practical business affairs in both an analytical and prescriptive role.²¹ Carlin conducted a survey that showed the stratification of the New York City bar in terms of the types of services and kinds of clients served, viewed primarily in relation to the differences in ethical practices and perspectives of the lawyers.²² Carlin also conducted a survey to determine some of the professional practice characteristics of solo practitioners in Chicago and observed that they serve the less affluent, more personally troubled persons in society.²³ Reed surveyed the bar of the city of Springfield, Massachusetts and confirmed three types of practice, elite, middle (business), and poor, and then posited the need for different kinds of training and skills to serve the different interests involved.²⁴

There are, in a kind of self-proclaimed status order, the intellectually elite who master the intellectual skills of logic and rhetoric as the means to affect profound legal and social matters. They are the judges

20. E. SMIGEL, *THE WALL STREET LAWYER* 160-67, 340 (1964).

21. Bazelon, *Portrait of a Business Generalist*, 29 *COMMENTARY* 277 (1960).

22. J. CARLIN, *LAWYER'S ETHICS* (1966).

23. J. CARLIN, *LAWYERS ON THEIR OWN* (1962).

24. T. Reed, *Training the American Aristocracy* (1978) (unpublished manuscript on file at Delaware Law School, Widener University). This work is to be published in book form; for its first chapter see Reed, *Training the American Aristocracy—An Historical Examination of American Legal Education Models*, 6 *TEX. S. L. REV.* 317 (1981).

and the teachers and the lawyers in the most prestigious law firms. There are others, a larger number, who qualify by virtue of an education that has developed their intellectual discipline and knowledge of legal principles to govern and administer the practical affairs of society. These are the business and corporate lawyers, government lawyers, and community officials. Then, there is another substantial group who may be characterized by their ministrations to the more urgent, intimate, and private needs and dispositions of ordinary citizens. They minister more directly to the conscience and the psyche of humanity, where personal concern and compassion govern. These are the lawyers with small general practices, those who address family and criminal problems and who often use legal means to protest the inequities of society and its governance, especially as these affect individual persons.

A lawyer may engage in different functions but there are some transcendent values in what a lawyer is, by tradition and qualification. Every lawyer is considered to be a moral exemplar and something of an expert in clear headed thinking. He is, traditionally, an "officer of the court" as well as a "counselor at law." The lawyer's social hallmark is responsibility for governance and for sound decision making.

There are, then, both general and specific components in the makeup of a lawyer. The general component is a sound moral disposition and a developed capacity to think. The specific components are aggregated to particular societal functions, and may be variously characterized in terms of intellectual precocity, responsiveness to practical necessity, and inclination for humane concern and compassion.

II. THE EDUCATIONAL TASK: TRAINING IN VALUES, SKILLS AND ATTITUDES

A. *The General Component in the Makeup of Lawyers*

I propose first to consider the educational implications of instilling both a sound moral disposition and a developed capacity to think in the law student. In this context, the significance of the teacher-student relationship and its leading characteristics will be developed.

1. *Sound Moral Disposition*

In some attenuated fashion, there is an assumption that vigorous intellectual disciplining brings with it a kind of moral disposition and development. Consider the education of John Stuart Mill by his father,

James Mill.²⁵ At one point, the young Mill describes his learning experience as follows:

In going through Plato and Demosthenes, since I could now read these authors, as far as the language was concerned, with perfect ease, I was not required to construe them sentence by sentence, but to read them aloud to my father, answering questions when asked: but the particular attention which he paid to elocution (in which his own excellence was remarkable) made this reading aloud to him a most painful task. Of all things which he required me to do, there was none which I did so constantly ill, or in which he so perpetually lost his temper with me. He had thought much on the principles of the art of reading, especially the most neglected part of it, the inflections of voice, or *modulation* as writers on elocution call it . . . , and had reduced it to rules, grounded on the logical analysis of a sentence. These rules he strongly impressed upon me, and took me severely to task for every violation of them: but I even then remarked (though I did not venture to make the remark to him) that though he reproached me when I read a sentence ill, and *told* me how I ought to have read it, he never, by reading it himself, *showed* me how it ought to be read.²⁶

It is clear that personal discipline and responsiveness to authority here are as important to learning as mental discipline. There is a moral disposition to obey the teacher, and this is a condition for effective learning. Looseness of thought, personal choice, and dispositions to pleasure have no place in Mill's learning. Both teaching and learning evidence an inherent moral disposition in teacher and learner, with a corresponding response in the learner. Morality here is a kind of compelling, Kantian commitment to duty. Today, the duties and obligations in both teaching and learning may be defined differently. For instance, there may be a duty on the part of the teacher to observe the most effective means for the student to learn. A more egalitarian model, based on a range of reciprocal duties, may be more appropriate than Mill's authoritarian model. Nonetheless, duties and obligations in teaching and learning still demonstrate the importance of moral disposition as a condition of educational experience.

The assumption that moral disposition and moral response are given in professional learning is based on the view that sound moral disposition is a fixed characteristic, the development of which occurs in the formative years of life, substantially predating law school. It occurs in

25. J. MILL, AUTOBIOGRAPHY (Columbia ed. 1924).

26. *Id.* at 16.

character development both within the family and in early academic education. A corollary assumption is that sound moral disposition, once acquired, remains operative without any process of reinforcement or further learning. The education of character or the reinforcement of moral sensitivities is not regarded as an appropriate or necessary subject for legal education. These are assumptions and policies that pass unchallenged until an egregious public event, such as Watergate or mass cheating scandals, draws attention to the possibility that moral character should be more than simply vouchsafed. This notion is particularly applicable to those who are to be professional persons and whose work involves the potential for corruption in exercising great power. Common sense suggests that this should be a matter of continuing concern in professional education.

Arguably, there are influences in legal education and, for that matter, in the practice of law that undermine sound moral disposition in the law student and lawyer. The student's sound moral disposition, at the time he enters law school, is essentially untested by the morally relevant challenge of coping with substantial power and making critical decisions in real life. For most students, the closest moral issue they face is whether or not to cheat on examinations, and for most, this is not a considered or acceptable choice. In law school, the student learns that moral considerations are not decisive either in the analysis or result that attends legal reasoning or thinking like a lawyer. The attitude is reinforced by the cultivation of a learning experience in which the student's personal reactions are deemed irrelevant to the essential character of legal decision making and legal education. Legal education is concerned solely with the student's intellectual capacity rather than his emotional or moral capacities. Additionally, there is the universal commitment in law to an adversary process, which is not without moral consequence for the practitioner. Frank differentiated between a "fight theory" and a "truth theory" of litigation.²⁷ It is winning that counts. In its practical application, the adversary process tempts the practitioner to test and even break the rules to secure partisan advantage.

Still, one may say that a solid moral disposition in a healthy personality survives all such risk and temptation. There is even the seemingly far fetched premise, recently advanced by a molecular biologist studying genetic possibilities, that a kind of genetic imprinting of moral and

27. J. FRANK, COURTS ON TRIAL 80-102 (1949).

ethical dispositions exists in the human personality.²⁸ It adapts itself in different ways in different cultures but the core of personal morality, again in the healthy personality, is essentially unchanging.

Hard data are lacking but a better assumption may be that moral disposition does not survive well when left unattended and unnurtured. This is especially true in a learning and work environment that is, in varying degrees, indifferent to rectitude, insensitive and even hostile to a concern with personal experience, and inclined toward excesses and abuses. What, then, are some of the measures that could serve to secure sound moral disposition? There are some notable possibilities.

Judgments of value that recognize the legitimacy of moral concerns, provide the means for moral analysis, and accept the validity and even the primacy of moral experience and judgments need to be developed in legal education. The answer here calls for something more substantial than modest intellectual inquiry into the ethical rules that are posited to govern professional conduct, though inquiry into professional responsibility, such as that provided by Redlich,²⁹ is helpful. It is noteworthy that at least one law professor and former dean of a major law school, Thomas Shaffer, has set for himself the task of providing the means for moral analysis in learning about law and lawyering.³⁰ Student learning must be attended by moral questions that temper the purely intellectual character of law learning. Extrinsic rewards in learning need to be based on consciousness of issues and judgments that are not largely confined to intellectual analysis alone.

The quality of personal experience in legal education, in the relation between teachers and students and between students and their learning, also can be developed through a heightened consciousness of moral and ethical considerations. ("Ethical considerations" are here regarded as the rules and *ratio decidendi* of moral behavior.) One conceptual source is in the essentially ethical relations outlined by Hohfeldt.³¹ Hohfeldtian concepts of duties, rights, privileges, powers, no-duties, and no-rights, can be dusted off and given a respected and visible place

28. Stent, *The Poverty of Scientism and the Promise of Structuralist Ethics*, in KNOWLEDGE, VALUE AND BELIEF 225 (1977).

29. See N. REDLICH, PROFESSIONAL RESPONSIBILITY (1976).

30. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979). See also Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

31. Hohfeldt, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). See also Hohfeldt, *Fundamental Legal Conceptions in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

in the councils of legal education and in the conduct of a law school. I propose a kind of Fair Educational Practices, analagous to Fair Employment Practices. It should be noted that I do not intend mere exercises in conceptual distinctions between ethical terms because they tend more to obfuscate the real issues and encourage logical fallacy and legalistic casuistry. Ethicists, like lawyers, are also prone to the kind of pendants described by Erasmus.³²

There is a range of concerns and relationships in law school that are attended by ethical considerations, but they mostly go unnoticed. The professor's duty of what and how to teach and the student's duty of what to learn and how to respond to the professor's teaching are ethical matters. They are barely noticed in this context because administrative and instructional policy, along with habits of practice, preempt the matter. An unlimited authority by the educational institution and the teacher is asserted (presumed); ethical issues that are imbedded in policies and practices are more or less dispensed with or go unnoticed. The possibility that a professor must (should) define some limited power of assertion about prerequisite learning surfaces at this point in the analysis. There may be room for the negotiation of agreement about learning so as to better serve individual learning needs and dispositions. And this may be defined only partially by ideas of what content ought to be covered.

The corollary of the professor's particular power is that there is individual student right (not to say need) to structure at least some of both the content and the method of learning. Beyond what is required—and this in itself is a difficult question—a student may choose to learn and concentrate in areas of learning that are of interest to him. He may choose to learn by means that are the most helpful and beneficial to him as learning experiences (of course, within the limits of reasonable economic considerations and instructional availability that govern the particular teaching facility). Of those students who exercise these rights, in an environment more conscious of ethical prerogatives and responsibilities, some may prefer to concentrate on learning criminal law, others may prefer to learn all they can about land development, and others may prefer to explore the complexities of legal counseling. Some may prefer the style of the individual tutorial in learning, others may prefer independent study and a research project over classroom

32. See text following notes 7 & 8 *supra*.

instruction and an examination, while still others may learn better from exposure to practical exigencies as distinguished from mere conceptual inquiry. The style and substance of law learning, then, reflects some ethical regard as well as concern for other considerations. Educational policy strikes balances between judgments of intellectual prerequisites, economic feasibilities, and moral and psychological considerations in learning.

There are other areas of ethical contact between teachers and students, and students and their learning, that are too numerous to be developed here. Another specific example may be helpful, however. The teacher-student relationship, in ethical terms, may contemplate sets of mutual duties between the teacher and student in the examination process. The teacher's duty is to construct an examination that fairly tests the student's legal facility and knowledge, as well as his professional acumen. The examination is not perceived to be merely a synopsis on subject matter and pure thinking, but it is also a term of the relationship between teacher and student. The student's duty is to prepare adequately for the examination and reflect as honestly and thoroughly as he can his knowledge and abilities in the matters being tested. The matter may not, however, end at this point. The teacher may have an additional duty, and the student may have a correlative right, to review the examination results. The requirements and benefits of learning may turn significantly on the kind of feedback the student receives after he has taken a law school examination.

For the most part, ethical considerations in law teaching and learning are preempted or obscured by absolute content requirement assumptions. The visibility of moral and ethical relations in the conduct of legal education must be raised through refined definition and conscientious practice. In this way, the sound moral dispositions in students and lawyers receive appropriate reinforcement, with strong implications for modelling later professional behavior.

It should be noted that embedded in the quality of relations between persons are intertwining emotional, moral, and rational considerations. It is the rational dimension of the relationship between a law teacher and a law student that is most practiced and recognized. Teacher and student relate to one another in terms of an attainable rational objective pertaining to law and legal professionalism and both labor, to the extent they are capable, in the most rational terms to advance teaching and learning on the subject matter. In this teaching and learning enter-

prise, however, there is also an inevitable emotional component. The emotional process generally is not specifically noted or articulated but, in addition to a frequent moral implication, it can have a power and intensity that is of surpassing importance in the relationship. Watson, in particular, and I to a lesser extent, both have written on the importance of personality and emotional disposition in the teaching and learning process as they relate to the learning of law and the development of legal professionalism.³³ Both writers have made observations about the role of anxiety in teaching and learning,³⁴ about teacher personalities and teaching styles,³⁵ about the significance of aggression in the teaching and learning process,³⁶ about student personalities and modelling after teachers,³⁷ and about the emotional implications of different teaching methods.³⁸ Shaffer and I, utilizing systematic empirical observation, have also written in detail on the impact and effect of emotion on attitudes of legal education.³⁹ Though speculative and more remote in time, Frank's observations about lawyers' needs for

33. Redmount, *A Clinical View of Law Teaching*, 48 S. CAL. L. REV. 705 (1975); Redmount, *A Conceptual View of the Legal Education Process*, 24 J. LEGAL EDUC. 129 (1972); Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201 (1968); Redmount, *Transactional Emphasis in Legal Education*, 26 J. LEGAL EDUC. 253 (1974); Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975); Watson, *Reflections on the Teaching of Criminal Law*, 37 U. DET. L.J. 701 (1960); Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968); Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441 (1974).

34. See Redmount, *A Conceptual View of the Legal Education Process*, *supra* note 33, at 135-36; Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, *supra* note 33, at 13, 18, 20. See also Comment, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201.

35. See Redmount, *A Clinical View of Law Teaching*, *supra* note 33, *passim*; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, *supra* note 33, at 106-16.

36. See Redmount, *Humanistic Law Through Legal Education*, *supra* note 33, at 205-06; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, *supra* note 33, at 101-05; Watson, *supra* note 34, at 18-20. See also Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACT. 71 (1970); Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 457-60 (1970).

37. See Redmount, *A Clinical View of Law Teaching*, *supra* note 33, at 706-09; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, *supra* note 33, at 158-60.

38. See Redmount, *Humanistic Law Through Legal Education*, *supra* note 33, at 204-06; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, *supra* note 33, at 116-41. See also Peairs, *Essay on the Teaching of Law*, 12 J. LEGAL EDUC. 323 (1960).

39. See generally T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE*

certainty, and tendencies to mythologize, are also worthy of consideration.⁴⁰

The moral dimension of the relationship between teacher and student has been expressed and programmed best by Rogers, a distinguished humanist and psychologist. Addressing himself specifically to the teacher-student relation and deriving his observations from the way learning occurs in psychotherapy, he postulates three conditions for the teacher-learner relationship that are essential to effective learning.⁴¹ The first is characterized as "unconditional positive regard," where the teacher, in a kind of acceptance without conditions or demands, has and expresses an accepting and a caring attitude toward the student. Second, there must be "empathic understanding," such that the teacher, in a sense, puts himself in the shoes of his student in order to better sense and understand what the student is experiencing. And third, there must be "congruence" of feeling, understanding, and exhibited behavior, so that a person is not expressing one thing, feeling another, and thinking yet another. To the degree that these are shared attributes between teacher and student, the psychological conditions for trust, understanding, and learning exist. The quality of relations described here is nominally emotional, but is in fact moral. They represent an explicit manifestation of the "I-Thou" relationship explicated by the ethicist and philosopher, Buber,⁴² and are distinguished from the more detached, cold, amoral set of relationships that Buber has described as "I-It."⁴³

It is again noteworthy that the moral dimension is not entirely separate from emotional and rational considerations. They commingle but are, for purposes of clarification and demonstration, differentiable.

In brief summary, then, formal legal education in general, and the teaching-learning relation in particular, have a significant contribution to make to the general attribute of sound moral disposition fostered in lawyers. Moral and ethical dimensions accompany the learning experience and they are created and realized in the quality of relationship between teacher and student. These can be effectively raised in con-

(1977). See also Eron & Redmount, *The Effect of Legal Education on Attitudes*, 9 J. LEGAL EDUC. 431 (1957).

40. J. FRANK, *LAW AND THE MODERN MIND* 7-12, 76-83, 89-99, 207-18 (1930). See also J. FRANK, *supra* note 27, at 37-61, 254-61.

41. L. ROGERS, *ON BECOMING A PERSON* 279-96 (1961).

42. See note 19 *supra* and accompanying text.

43. *Id.*

sciousness and programmed by giving express attention in the educational process to ethical and moral requirements, both in the analysis of legally related conduct and in the expression of individual and interactive teacher and student behavior.

2. *A Developed Capacity to Think*

A proper point of departure for reflection on developing capacity to think is the seminal work of John Dewey, and especially his classic *How We Think*.⁴⁴ Dewey addressed himself to the problem of training "habits of thought." He noted that "learning is something that the pupil has to do himself and for himself, the initiative lies with the learner. The teacher is a guide and director; he steers the boat but the energy that propels it must come from those who are learning."⁴⁵ In Dewey's view, the teacher, to be effective, must address himself to two problems. First, he must contemplate the student as an interested party in the learning experience, one who contributes interest, motivation, and a style or system in learning. Then, he must realize the conditions that enhance the student's disposition to think, namely, the kinds of presentation and the kinds of material that do most to generate interest and inquiry.

The learner has already developed some capacity to think before reaching law school. His pre-law school academic credentials vouch for this. He has, at the least, developed normal adult capacities to think. Through his education and living he has likely developed some ability to inquire and analyze by way of analogy, the ability to utilize cause-and-effect analysis, and the ability to think in the abstract. The extension of thinking in law school is into that area identified as "legal reasoning," described so aptly by Levi as reasoning by use of example where cases provide the example.⁴⁶ Thinking here is a process in three steps.⁴⁷ First, cases are presented and the learner observes and contemplates the similarities in fact and circumstance in the cases under consideration. Then, the principle(s) or rule(s) that act as a fulcrum for decision are brought into focus, chosen by the observer because of their apposition and relevance to the cases. Finally, reasoning ability is utilized to select what appears to be the most appropriate or proximate

44. J. DEWEY, *supra* note 16.

45. *Id.* at 35.

46. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

47. *Id.* at 1-8.

rule given the particular facts under analysis. At this point, the decision maker or commentator broadens his basis of judgment by adding facts, rules, and other considerations that he regards as essential or consequential to the determination of a "proper" or sensible result. This legal reasoning process, exercised with considerable sophistication, is perhaps best described by the eminent jurist Cardozo.⁴⁸

This, in essence, is the traditional law school learning process that imbues the student *qua* lawyer with "a developed capacity to think." The "case method," ubiquitous in legal education, is the spirited dialectic that serves the learning process. Properly done, it exercises the student's mind, especially in its capacity to reason from analogy and deal with causal relations. There is also incitement and challenge to creative thought where reasoning must (could) be bent to achieve a desired result. The context of this thinking exercise is a variety of social and moral problems cast in historical and legal frameworks of experience. The teacher in this learning process, by custom and convention, is an agent provocateur. He incites the student to think, questions and challenges him with examples, criticizes the thinking result, sets up hypothetical alternatives to consider, and generally tends to the proper training of this thinking style and habit. At its intellectual best, teaching and learning to "think like a lawyer" is rigorous and demanding. In turn, such thinking is the hallmark of the penetrating lawyer.

Though one may accept that the process of cultivating "a developed capacity to think" is largely successful in "better" law schools, there are nevertheless some critical observations to be made. It is important to recognize that it is essentially only *one* style and habit of thinking that is developed, and, what is worse, it is implicitly deemed to be a sufficient method to attack all manner of problems and produce a sufficiently probative, cogent, and sensitive practical result. The system of legal decision making, especially the judicial process, is singlemindedly committed to it. Conant points out, in his discussion of two modes of thought,⁴⁹ that any "one mode may be underdeveloped or overdeveloped; if so, the balance will need redressing."⁵⁰ Conant's credo is that "a free society requires today among its teachers, professors and practitioners two types of individuals: the one prefers the empirical-induc-

48. *See generally* B. CARDOZO, *THE GROWTH OF LAW* (1924); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

49. J. CONANT, *TWO MODES OF THOUGHT* (1964).

50. *Id.* at xxv.

tive method of inquiry: the other the theoretical-deductive outlook."⁵¹ He observes that "both modes of thought have their dangers; both have their advantages."⁵² He then concludes that "continuation of intellectual freedom requires a tolerance of the activities of the proponents of the one mode by the other."⁵³ His distinction, to give an oversimplified example, is between the thinking of speculative or theorizing philosophers and that of empirical or practical scientists.

The training of thinking in law school is pervasively a unidimensional process with fringe consideration of methods, other than the dialectical case method, of organizing and interpreting experience. It essentially fits and suits the operative juridical system though it may be prejudicial in the way it operates in other contexts, such as the law office practice. The thinking style is incisive but narrow. It encourages focused decision, but does not encourage open minded inquiry. It creates authority by expanding reason, but at the expense of narrowing the base of experience in order to produce conformity in analysis and decision making. It is inimical to dimensions of experience that are "unruly" or irrational, and hence can display no deference toward or consideration of emotional or partly formed experience. It is indifferent to moral expression. It cannot regard single or personal events with adequate individualized concern and consideration. It is, in sum, a sharply honed method that tends to characterize its practitioner, the lawyer, as a person with practiced technique in a certain style of analysis but not much else.

The cultivation of narrow gauged, unidimensional thinking capacity enjoys a remarkable degree of acceptance in legal pedagogy. Llewellyn, in a short book explicating the teaching and learning process in law,⁵⁴ said: "The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock them out of you along with woolly thinking, along with ideas all fuzzed along their edges."⁵⁵ It apparently did not occur to Llewellyn, as it may not occur to others, to question whether such pain in learning and sacrifice in humane values, even as a temporary expedient, is necessary to the teaching of

51. *Id.*

52. *Id.*

53. *Id.*

54. K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

55. *Id.* at 101.

thinking. If, in fact, legal education did *all* that Llewellyn proposed, would it not be a disaster? Are there not alternative ways of thinking in relation to law and alternative modes in teaching and learning thinking?

There are affirmative answers. One is a brief tactical answer that addresses itself to teacher-student relations as they impinge on the student's motivation to learn. The teacher *can* simultaneously teach and be a humane person, the example of James Mill to the contrary. The teacher should be vigilant not to induce more pain in learning for the student than is necessary. When stimulation and correction are needed, support and encouragement are often more effective inducers than punishment and ridicule. In broader humanistic terms, a positive regard and empathy for the student acts as support and inducement to his learning. The ritual of the law teacher in acting the role of the "heavy," sometimes even the humorous heavy, is unnecessary and even counterproductive. (Is the asperity of a Kingsfield necessary?) In a self styled commitment to "knock out the woozy thinking" the teacher may teach too much, and more for personal pleasure and satisfaction than for the benefit of students. One may argue as to the degree of damage involved, but little learning value appears in aggressive confrontation in the name of teaching thinking, and there may be a corresponding waste of valuable learning time and inclination. If a particular teaching disposition should be cultivated in the dialectical classroom, it is not one of toughness but, in the tradition of original Socratic example, one of fairness. The attitude focuses less on the mockery of error than it does on the paradoxes of inquiry.

The technical or stylistic adjustment to the dialectical teaching of thinking does not in itself provide a different mode of thinking. Something more fundamental is required. A choice may be offered that is more attuned to the needs and requirements of law office practice as distinguished from litigation practice, and to the requirements of public service as distinguished from private advocacy. A particularly pertinent recommendation may be the teaching of a kind of field theory of investigation. It may be timely to dust off the neglected contributions of the distinguished psychologist, Lewin.⁵⁶ Lewin, borrowing from Einstein, thought in terms of an analogue for social investigation based

56. See K. LEWIN, *A DYNAMIC THEORY OF PERSONALITY* (1935); K. LEWIN, *PRINCIPLES OF TOPOLOGICAL PSYCHOLOGY* (1936).

on field theory in physics. His transpositions to the field of investigation of human events and problem solving produced a coherent theory of how to proceed in inquiry. It is a model for the development of systematic contextual inquiry in the learning process.

Lewin worked with a concept of "life space" to denote the characteristics of person and environment combining to form the essential context, or the value, behavioral, and circumstantial attributes that form the general considerations under study. He then introduced the concept of situation or particular experience that has bearing on the many characteristics of life space. The situation emitted different kinds of characteristics or facts that had to be properly placed and assessed in the general picture. He then made reference to different kinds of temporal and causal relationships that could or could not determine some aspects of modification or change in the life space. He next introduced the concept of forces that had direction and movement and could impact on different regions of life space. There are concepts of boundary, and of intensity (sharpness) or resistance (barriers), as directional forces sought to impact on or penetrate different regions of life space.

The imagery conjures up a party's total life circumstances (economic condition, family or social position, psychological and ethical disposition) influenced by certain events (a decision to purchase a business, a disabling or possibly terminal illness) that results in certain facts and possibilities (creating debt, possible death) and may have certain causal consequences (the risk of excessive burden to the party, the need to protect the family). Particular forces (the availability of money for a loan, the preparation of a will), depending on whether and how pursued, could affect economic, emotional, or family well-being within the constituted life space. Issues might arise as to boundaries (how far a party should go in planning or intervening) and what barriers (opposition of a spouse, prohibitive legal costs) or intensities (very strong dispositions about not going into debt or not facing the making of a will) could affect direction and movement in the life space.

A developed theoretical system would include magnitudes for the characteristics mentioned and, in fact, it was Lewin's intention to mathematicize his theory. He did so, to some extent, by demonstrating his concepts in the form of topological geometry. Even without this esoteric development, the Lewinian framework may be useful in diagramming the legal and lawyering situation. It lends itself to a substantially more thorough account of the reality bound lawyering and legal

experience than that accorded the planning lawyer through newer refinements in analytical reasoning.

The field theory approach to investigation and decision appears to be particularly apt for lawyers who must encompass a breadth of practical considerations in their decision making and view law as one important variable in a larger or more differentiated outcome not controlled by legal rules alone. This is the work of lawyers engaged in planning with clients and of those who have broad managerial or governmental responsibility. Field theory development, as a mental process, is rigorous and requires sharpening the skills of identification, analysis, and interpretive conclusion. It is experience based. Its commitment is to systematic description and explanation. It challenges imagination and encourages comprehensive reflection.

There is another thinking mode that should be mentioned because of its relevance to lawyers and lawyers' work. This is the intuitional method. Bruner discusses the nature of intuitive thinking and how it is affected.⁵⁷ He reflects on the conditions of learning and the characteristics of learners that appear most conducive to the exercise of good intuitive thinking. For instance, he notes that the development of good intuitive thinking seems to require self confidence and courage in the student.⁵⁸ A fairly broad scope of knowledge in a subject matter, or at least a working familiarity with the structure of that knowledge, also appears to be important.⁵⁹ Remarkable lawyer performance is sometimes associated with developed intuitive capacity. As yet, not enough may be understood about the process of intuition to fashion a program of study for legal education purposes. Intuitional thinking is, however, another dimension of "developed thinking capacity" that may benefit from the efforts of law teachers who seek to comprehend and work with prospective concepts of learning.

In summary, the lawyer's developed capacity to think is cultivated in law school through intensive experience in dialectical exercise. The exercise sharpens incisive thinking, which is aimed at producing decisions. It does so at the expense of a more open minded kind of inquiry that might contemplate a broader range of conduct and consideration. Emotional, moral, and personal concerns tend to be abrogated by the

57. J. BRUNER, *THE PROCESS OF EDUCATION* 55-68 (1960). See also M. WESTCOTT, *TOWARD A CONTEMPORARY PSYCHOLOGY OF INTUITION* (1968).

58. J. BRUNER, *supra* note 57, at 65.

59. *Id.* at 62-63.

process of dialectical thinking in law. There are alternative modes for developing capacity to think, and alternative modes of thinking such as the intuitional and field theory investigation methods. These have not yet been adapted in legal education. Broadening the base in learning to "think like a lawyer" is likely to be especially pertinent and useful to lawyers involved in planning functions and to those involved in management and government. At present, the kind of thinking method that is learned and practiced in legal education is mostly suited for participation in the juridical process. Used to solve problems in a real world context, the method may tend to produce procrustean results.

B. *Training the Intellectual and Legal Elite*

It is notable that in legal education intellectual merit rather than social position has qualified the student for acceptance into training. Yet, ironically, once the student enters law school, as T.J. Reed has observed,⁶⁰ his education is attuned to elitist legal roles and responsibilities. The roles are those of being a judge, a teacher of lawyers, or a member of a large and prestigious law firm. What are the essential values, skills, and attitudes that are recognized here? How is legal education constituted so as to serve these values, skills, and attitudes? What manner of teacher-student relation is involved?

Again with some irony, the general components of legal education also tend to coincide with and serve the specific needs and characteristics of the elitist lawyer group. It is as though legal education is geared to their tasks and circumstances. A propensity to be especially just and wise is what is cultivated or, at least, is intended. Yet, the moral disposition that is fundamental to the sense of justice, is assumed to be pre-existing. The further assumption is that it is mostly unnecessary to nurture or maintain moral and ethical disposition in any formal or specific way and it receives peripheral attention at most. The teaching of "legal ethics," which is mostly an intellectual analysis relating to the Code of Professional Responsibility that recognizes the issue of moral sensibility, has become fashionable since Watergate. It is questionable whether this pedagogical endeavor acts as anything more than a gloss on analytical reasoning as it relates to legal cases.

The training of the intellect is another matter. This is the substantive focus of legal education and, as discussed earlier, the particular method

60. T. Reed, *supra* note 24.

and style of thinking that is cultivated is "legal reasoning" and the mode of instruction is typically dialectical inquiry. The attendant attitudes and skills that are cultivated afford intellectual precocity: sharpness, acuity, and incisiveness. Casuistry, applied with evidence of resourcefulness and originality, may also be noted. The materials for study that provide procedural means to learning to "think like a lawyer," are mostly juridical decisions and appurtenant reasoning of high legal authority. They are analyzed in the manner described by Levi.⁶¹ There is some additional garniture of statutory and scholarly authority that is also infused into the study of dialectical exercises. One collateral benefit is that some law, apart from legal reasoning, is learned, but the means for searching and analytically utilizing the law is mostly what is intended in teaching. Examinations are conducted almost entirely as exercises in legal reasoning. Grading (hence status and employment possibility) reflects the degree of skill in this process that the student has attained and is able to demonstrate. There is also collateral learning experience, notably in moot court and law review participation, that further exercises and hones the students' dialectical and rhetorical capacities.

The teacher-learner relation in training the intellectual and legal elite relies primarily on the classroom as the appropriate working context for dialectical exercise. Students, operating in smaller or larger groups, learn from and with one another as they are challenged by teachers who are highly skilled in the dialectical process. The classroom itself becomes a device for radiating the energy, intensity, and depth of inquiry that those committed to a single purpose can generate. The teacher is a provocateur who challenges the students to sharper and ever sharper thinking. He both preserves and fosters educational direction and discipline, first in his institutionally granted authority to teach and evaluate students, and second in his choice of what and how to teach. He controls the discipline and direction of the learning situation by having at hand the means to enforce *effort*, by grading, and to require *interest or focus*, by rejecting what seems inappropriate to the learning exercise. He may utilize toughness or fairness but either or both may be characterized as maintaining a focus on the task at hand—to learn "legal thinking"—and thus avoid diversion by irrelevancies or personal considerations.

61. See notes 46-47 *supra* and accompanying text.

The structure of legal education for the elite is largely tonal and symphonious. This kind of legal education may hold special appeal for those teachers whose special gifts and personal dispositions contemplate and enjoy manifestly aggressive, disciplined intellectual inquiry. They are likely to be inordinately good at dialectics and rhetoric. Shaffer and I have noted from our study that there may be some discrepancy between the theory and practice of legal education.⁶² There is considerably more emphasis on covering a diversity of legal content, and lecture is more characteristically utilized as the efficient method for covering ground. There are also peripheral phenomena like clinical legal education and interdisciplinary subject matter and teaching. Nevertheless, nearly all law schools are largely committed to the kind of educational enterprise and the method of approach that has just been described. It is a matter of tradition dating back to Langdell and it is backed by the imprimatur and prestige of the most elite law schools, notably Harvard.

The enviable consistency and harmony in the structure of legal education, and the intensity of the kind of learning experience it represents, precludes the *significant* inclusion of other kinds of awareness and learning. The focus on appellate opinions as the primary subject of study minimizes interest, concern, and learning that relates to facts and empirical experience. The larger concern is with the reasoning process; the empirical data are selected, culled, and limited to serve the intellectual exercise. The prime focus on the validity of thought processes mostly excludes concern with the emotional and moral dimensions of experience. Not only are these not studied, but they are, in substantial terms, scarcely noted and are considered distractive. They are merely irrelevant to the essential learning exercise. The intense competition for thinking excellence obscures character and disregards personal interest as the need for reward focuses singlemindedly on evidence of dialectical and rhetorical abilities. The unchallenged autocratic control of the teacher and the one dimensional teaching method discourage experiment with and responsiveness to alternative methods of learning and teaching. These are at best peripheral, no matter how promising or appropriate they may be.

The price of generating intellectual precocity as the hallmark of elitist lawyering is steep. One may graciously acknowledge that this kind

62. See T. SHAFFER & R. REDMOUNT, *supra* note 39.

of legal education has produced a Holmes, a Brandeis, and a Cardozo, and perhaps there are numerous instances of skillful and imaginative legal performance where the demonstration of a high level of analytical capacity and persuasive performance is critical. It is also easy to speculate that a practical result can be both detected and undetected Watergates or simply too much poor lawyering and client counseling.

C. Training Lawyers to Deal With Practical Affairs

There is a general assumption that lawyers are trained to deal in practical affairs. This is because they have developed a high level of skill in incisive and pertinent reasoning, are exposed to and know how to cope with a legal system for solution and avoidance of practical conflicts, and can usually reflect decisiveness and a sense of authority. Whether these attributes reflect a sensitivity and perspectivity adequate to deal with practical affairs is another matter. There is some sense that lawyers tend to be too legalistic. This may be because the legal educational process is only peripherally attuned to be responsive to practical necessity. Are there educational alternatives that adequately prepare the large number of lawyers who must plan and resolve, analyze and organize, and govern in public and private contexts where the predominant considerations are legal and economic? These functions comprise the intermediate (as distinguished from the elitist) world of law and legal and political administration, which is often simultaneously the world of commerce and business administration.

Legal education has less need for an overarching intellectually rigorous method of analysis and decision, as in elite lawyering, than for a process of thinking and experiencing that more effectively blends scope with depth. A knowledgeable awareness and insight into the patterning of business, economic, and political relations is equally as important as skill in the patterning of legal relations. These basic elements intercede with one another in the transaction of practical matters, whether the lawyer or legally trained person is functioning in the context of a court, a private corporation, or a governmental entity. A competent professional managing practical affairs must contemplate the intertwining effects of fiscal, operational, legal, governmental, personnel, and even marketing dimensions of the practical enterprise. Each may require some familiarity with, or even mastery of, the different technical systems that are involved. There may be varying degrees of intellectual and practical complexity. Trying an antitrust case involv-

ing Xerox or IBM is not within the same scope as organizing a small business enterprise. Nonetheless, the teaching-learning task is essentially to provide a framework for study of the basic considerations that govern regardless of scope.

The context of learning and of operation, then, is like a map of law and legal administration, politics and political administration, and economics and business administration. The best intellectual coping method may be the field theory method of inquiry and decision making suggested above.⁶³ There are other educational alternatives, presented by legal and political scholars, and by a lawyer with extensive practical experience, that contemplate the style, method, and substance of legal education in non-traditional terms. One such alternative is the policy oriented theory of inquiry and decision making developed in considerable detail by Lasswell and McDougal.⁶⁴ Their theory encourages a broad but systematic, rational, and empirical inquiry into the analysis, choice of conduct, and resolution of practical affairs. The perspective is of those who govern and manage. Another notable alternative is the somewhat more conventional legal and case analysis approach of Brown and Dauer.⁶⁵ They emphasize the planning function of lawyers in a variety of practical problems. The perspective is that of a lawyer who acts primarily as advisor and consultant.

The appropriate teaching-learning vehicle for training in practical affairs may be the workshop rather than the classroom. Simple or complex commingled legal, political, and economic problems and challenges may be presented. Each may require the amassing of fiscal or economic data and business planning information, governmental regulations, legal and economic surveys, public attitude studies, and more. Analysis may require legal research, economic forecasting, political intelligence, tax study, psychological assessment, and other inquiry. Resolution may involve the organization, merger, or reorganization of enterprises, the drafting of various kinds of regulation or business arrangement agreements, the negotiation of interests, the political or courtroom solution of uncertainties or conflicts, and other lawyer functions. The complexity of problems, and the different sources of intelligence required, suggest that a team approach to teaching and learning

63. See text following note 56 *supra*.

64. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

65. L. BROWN & E. DAUER, *PLANNING BY LAWYERS* (1978).

may be most desirable. The teachers may be members of a team-teaching group who cover the necessary range of skills and knowledge required for learning given the scope of problems under inquiry. The role of the teacher is more analogous to that of house counsel. Each is an expert consultant who is familiar with resources, has insights into analytical complexities, and can offer perspective for realistic and appropriate problem solution. Each teacher is an advisor and, ultimately, a judge of a student's performance. Students learn to work in a cooperative framework, much in the manner of law partners or business associates engaged in a complex consultation. The ambience is one of policy consultation and busy empirical inquiry rather than rigorous, competitive dialectical inquiry.

Units of study may focus on the organization of a business enterprise, the conduct of community government, the planning of international marketing, the merger of corporations, economic development planning, antitrust regulation, and other distinct areas. Each topic becomes a study unit and the focus for a workshop. Within each study unit, student assignments may be varied so as to reflect a range of skill development and knowledge accumulation. These may include skills and knowledge in legal research, analysis of economic surveys, interpretation of attitude and opinion study, conduct of negotiation, and drafting of regulations and agreements. The teachers shepherd the learning process. They provide or direct students to materials, define and sharpen assignments, add information or suggestions, seek creative alternatives in both learning and problem solution, review preparation and work at various stages of development, and offer critical judgments of student performance. Teachers, through their consultative functions in practical enterprises, may provide real and current problems or challenges of learning value on which students may work as closely supervised junior collaborators. It is noteworthy that reflecting and developing skills in consultation are as important as thinking ability and knowledge of subject matter.

Training in practical affairs is not restricted or narrow legal training. Arguably, such training is to some degree as appropriate to a school of business or organizational management, or to a school of policy studies, as it is to a law school. It is especially relevant, however, that substantial numbers of lawyers are frequently cast in the position of being governmental and business leaders. This occurs at the community, regional, national, and international level, in both private and public en-

terprise. Lawyers' education should prepare them for the task. Lawyers may have an advantage and be especially well trained for practical functions if their general preparation in terms of sound moral disposition and a developed capacity to think is combined with the broad scope of facility and knowledge of practical affairs as suggested here.

D. *Training in Matters of Personal Concern, Conscience and Compassion*

The "helping professions," social work, medicine, mental health, and the religious pastorate, are mostly concerned with ministering to individuals, families, and small communities or sub-communities. The problems characteristically relate to personal and social well-being, or to a sense of personal and social well-being. The legal analogue is typically a concern with family relations and family economic security, personal freedoms and deviant or criminal behavior, consumer protection and economic opportunity for the underprivileged and unprotected, and the like. Some of the most fundamental values concerning the freedom and dignity of the individual, and of the individual in relation to society, are involved here. Not only matters of conscience, but also of caring and compassion, are most relevant in these kinds of client experience and personal transactions that engage the lawyer. He is dealing with personal, as distinguished from impersonal or institutional, clients. Ethical, emotional, simple economic, and social considerations may predominate in value and interest for the client. These may at times equal or be even more compelling than legal considerations.

The lawyer, as a "helping professional," must be able to contemplate client experience in highly personal terms. This may mean any or all of the following: Understanding client motivation and emotional conduct, consciousness of the importance of ethical and moral attitudes including a sense of justice, compassion toward and understanding of the client's economic circumstances, identification with the client's interest especially in the avoidance of domination or control by big business or big government, and other terms of legal parameters, perceived mostly in terms of personal and social welfare considerations. Equity may play a larger role than law, and a necessary part of the lawyer's skill may be in knowledge of and experience in dealing with and perhaps overcoming insensitive or unrepresentative law. Problem solu-

tions may be primarily of an economic, social, or psychological character, with the lawyer often helping in a more general nonlegalistic role. At other times, though, the lawyer's competence in advocacy and in invoking the rules and procedures of law is clearly most important.

As intellectual analysis may be the hallmark of elitist lawyers, and legal and economic analysis the work of lawyers dealing with more general and practical affairs, a capacity for empathy and counseling skill may be especially important to those lawyers who attend personal clients and are notably concerned with "caring, conscience, and compassion." The practice of counseling and the teaching of counseling skill focus especially on (1) developing meaningful personal relations and empathic and effective personal communication, (2) comprehending problems in terms of the client's subjective state as well as in terms of objective facts, circumstances, and rules, (3) using analysis that stresses social and psychological considerations, and (4) coming to a resolution that focuses strongly on client need and satisfaction. Probing intellectual inquiry and complex economic, political, and legal analysis are beyond the needs of typical clients and client problems where personal and family affairs, as well as personal and community well-being, are most often the issue. If he sees his role clearly, the lawyer is minister to intimate needs and strong personal feelings. The objective characterization of problems may be in terms of landlord-tenant relations, divorce, burdensome regulation, criminal prosecution, home purchase, sales contracts, will preparation, small business organization, and the like. The lawyer is not dealing so much with complex legal or economic considerations as with limited resources and often complex social, psychological, and political matters.

The teaching-learning model that best suits the goal of cultivating the humane skills is one oriented to a clinic and clinical legal experience. Clinical legal education is, or ought to be, very strongly client focused and socially concerned. In practice, it has mostly lacked a conceptual framework for thorough inquiry into personal life experience and for systematic exploration of the political, ethical, psychological, social, and economic dimensions of personal experience. It has tended to be excessively litigation oriented.

The law school can assist in providing and sustaining the requisite sensitivities, attitudes, and skills for a practice in humane concerns by providing an emotionally and ethically sensitive human learning environment and emphasizing training in practice skills. It can also pro-

vide substantive focus on the psychological, social, and moral, as well as legal, dimensions of experience. Shaffer, in his term as dean at Notre Dame Law School, experimented with "human environments" in legal education.⁶⁶ He sought to adapt the Rogerian tenets of human relations—unconditional positive regard, empathy, and congruence⁶⁷—to the institutional environment in an advertent and self-conscious manner. He stressed collaborative enterprise, and democratized both teacher-student relationships and rules of governance that reflect primary concern with and about persons and personal well-being. This is a difficult undertaking in a conventional law school dominated by the tradition of dialectical inquiry and almost exclusively committed to the development of student intellect. Shaffer's effort represented a kind of tampering with the structure of conventional legal education; much more in the way of institutional planning may be required before a humane disposition and tradition in legal education can develop.

The role of the teacher in "humanistic" legal education is itself ministerial. It provides example and support in the conduct of personal, educational, and professional relations. In pedagogical terms the teacher is often a supervisor⁶⁸ and, with lesser emphasis, an instructor or case collaborator. His combined emotional and intellectual sensitivity and skill help to direct and evaluate student experience with clients, both in contrived and real life situations. His substantive analysis of problems is geared as much toward generating moral and psychological sensitivity as toward an intellectual understanding of economic, political, legal, and other relevant concerns. Supervision may occur in one-on-one relationships between teacher and student or in small groups; thus, the appropriate climate and style for substantive learning may be the seminar.

Client emphasis and counseling concerns best reflect the ambience, value emphases, and issues that characterize or should characterize stu-

66. See Shaffer, *Report of the Dean 1973-74*, 50 NOTRE DAME LAW. 168 (1974); Shaffer, *Report of the Dean 1972-73*, 49 NOTRE DAME LAW. 214 (1973); Shaffer, *Report of the Dean 1971-72*, 48 NOTRE DAME LAW. 232 (1972); T. Shaffer, *Report of the Dean 1974-75* (unpublished). See also T. SHAFER & R. REDMOUNT, *supra* note 39, at 209-29.

67. See text accompanying note 20 *supra*.

68. The discrete properties of supervision as a proper and effective form of teaching in clinical legal education have been developed well by Professor Kenneth R. Kreiling of the Vermont Law School in an unpublished manuscript titled *Supervision in Skill-Oriented Fieldwork Placement: A Primer for Supervisors*. See also R. MOSHER & D. PURPEL, *SUPERVISION* (1972); C. TOWLE, *THE LEARNER IN EDUCATION FOR THE PROFESSIONS* (1954); E. YOUNGHUSBAND, *EDUCATION FOR SOCIAL WORK* (1968).

dent learning and professional practice in matters of caring, conscience, and compassion. However, the skills of advocacy, and especially skills in adversarial negotiation and litigation, are of considerable importance in the promotion and protection of client interests. This importance is fostered by the fact that conflict resolution through the courts and government agencies requires these skills. The tradition of the lawyer as a champion of rights best suits the advocacy and litigation requirement. The skills of criminal and civil procedure, with their attendant rules of evidence, and the requirements of agency practice, must also be learned. They may be, and tend to be, learned formally in classroom instruction and experientially through simulated and real trial practice.

It is pertinent to note that skills training does not occur in a vacuum. The training and learning of different skills is attended by a preference for certain kinds of values and behavior. Advocacy training engenders a preference for sharp thinking and decision, and is associated with contentious and competitive attitudes and environments. Counseling training tends to encourage more concern for feelings and personal experience and develops better in an environment that nurtures and emphasizes humane values. It may even be, as I have suggested elsewhere,⁶⁹ that some lawyers are better disposed and qualified to be personal counselors, others to be negotiators, and still others to be litigators. The implication is that advocacy training, within the primary professional orientation of personal caring, conscience, and compassion, needs to be circumscribed so that contentious and competitive influences do not affect the legal education, and subsequently, the client serving processes. It is a discrete and specialized kind of training that is perhaps most appropriate for those lawyers who may wish to be recognized specially for their interest and competence in advocacy.

III. CONCLUSION

The recondite enterprise of legal education cannot be understood unless prevailing assumptions about educational purpose and methods are recognized, and unless educational practices are related to professional functions and social needs. This may, and does, give rise to challenge.

69. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961).

In idealized terms, legal education serves the general purpose of its students by confirming sound moral disposition and developing the capacity to think. Reflecting the differentiable roles of lawyers in society, it also serves the specific purposes of training an intellectual and legal elite, training lawyers to deal with practical affairs, and training in matters of personal concern, conscience, and compassion. The legal education enterprise is, then, a complex enterprise that calls for differing intellectual substance, pedagogical methodology, and character of teacher-student relationships. These are geared to the different objectives that the educational process is intended to serve and the different roles that lawyers play. The common identity of the lawyer may be suffused by differences in roles, values, skills, and attitudinal emphases.

In current reality terms, legal education is uniform in its focus on developing student capacity to think in a particular style: to "think like a lawyer." It is also single-minded in training an intellectual and legal elite. It appears both to succeed and fail. It succeeds in the sense that it meets an essentially narrow purpose. The challenge is to bring the educational process abreast of the current scope of the practice of law and invest it with the attitudes, knowledge, skills, and teaching-learning relationships that are essential to the development of lawyers who are clearly competent for their separable tasks.