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AN ESSAY ON STRATEGIES FOR FACILITATING LEARNING

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Abstract

This essay focuses on goals, strategies and techniques for the facilitation of student learning. It reflects a bias toward what can be called *active learning* in which students move beyond being passive listeners (and too often even less than that) and instead are prompted to travel along a continuum of becoming fully responsible and active participants in their own learning processes. The underlying assumption is that this increasingly participatory engagement with the learning environment—one constructed and facilitated by the teacher--offers great potential for increasing the quality and depth of students' learning. Ironically, it does the same for the teacher because it places a far heavier responsibility on the teacher to listen, interpret, guide and interact rather than merely "profess".

The analysis also begins from the belief that there is a convenient assumption among law teachers that the existing model of the American law school works effectively. This includes the conclusion that its methods and goals are not only appropriate and comprehensive but are being achieved. The reality is quite different. While law teachers have many positive attributes we tend to be amateurs from the perspective of the quality of teaching and awareness of the most effective ways to structure a curriculum, integrate course offerings and design and execute individual courses. Because most law professors have been extremely successful in their undergraduate and law school careers they may feel as if they are endowed by that experience with the knowledge and ability required to teach well, or they may understand their lack of knowledge and seek to compensate for that deficiency through denial and rationalization. In any event there is no guarantee that earlier academic success bears any direct relationship to excellence in teaching. With that criticism in mind this essay examines strategies for facilitating learning. Preliminary to that analysis, however, I thought it useful to discuss briefly the history of the *Langdellian Hypothesis* about the scientific nature of university legal education and academic legal research and scholarship. It is this flawed hypothesis that shaped the American law school.

Introduction

American law schools are intermediate institutions caught between intellectual and professional/technical paradigms. The university law school in America is a confused institution with multiple personalities. While other academic disciplines also have professional reference groups, law and medicine may be unique in the degree to which their legal and medical professions control the structure and content of the educational process. The American Bar Association and state bar examiners have far more to say

about the form and content of the law school curriculum than any curriculum committee. The judiciary is also an increasingly powerful force in American legal education.

One obvious fact is that 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. Law teachers receive no preparation for what is an extremely challenging and complex task and so like virtually any group faced with working within an institution with a substantial tradition and established way of doing things we end up repeating what we experienced in law school. This is not surprising. Resistance to change is a basic characteristic of the academic culture. Arthur Koestler observed 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.' " [1]

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. [2] 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 "if it ain't broke don't fix it". But we have never done the hard thinking about alternatives, educational motivations, teaching strategies and curricular structure that justifies our self-serving conclusion that we are "doing it right". Along with this goes the possibility that less talented students were or students who possess different learning styles are unfairly short-changed by the reiteration of our own academic experience.

Legal scholars and teachers may have an unstated lack of confidence in their intellectual methodology and in the merits of their doctrinally-driven discipline as an important theoretical system. Eric Hoffer suggested that "eternal" self-doubt is the daily fear of intellectuals in any area. [3] If this is so in disciplines with a clear empirical or philosophical methodology, it is likely to be 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 target audience for their work product. I suspect American law teachers tacitly understand they don't have much to say of profound intellectual substance but, as in the fable of the naked emperor don't want to concede their lack of intellectual "clothes". [4]

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

[2] 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).

[3] "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 HOFFER, *THE TRUE BELIEVER*, , AT 121.

[4] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's,

At the outset, 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". My orientation is highly interactive, even while I respect the function of the traditional lecturer fulfilling the roles of information transfer in large amounts. The tension 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.

The participatory and interactive approaches that dominate this discourse mirror 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. [5] This recognition of identity through action 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, but we will be asked "are you Doers, or Talkers only?" and judged accordingly.[6] The idea is that talking has its limits and that it is far easier to "be perfect" in our words than in our actions. Another way of putting it might be that "talk is cheap."

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". I would note, however, that large first-year classes came into being as an economic necessity for the model of legal education created in the Nineteenth Century and that the gradual emergence of that format in the American law school's first year curriculum had no grounding in choices of the best pedagogical method. [7]

In any event, 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

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444, 445 (1983). "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. 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." *LAW SCHOOL*, *ID.*

[5] 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." HANNAH ARENDT, THE HUMAN CONDITION 159, 160 (1959).

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

[7] SEE, STEVENS, LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S , SUPRA, N. 3.

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

The point is that while traditional methods of teaching such as powerful and/or insightful lectures to large groups have great utility in appropriate settings, they are not the exclusive or the best methodology for facilitating learning in 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.

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. It has seemed 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. New law students are essentially being asked to learn a "foreign" language and to integrate a mass of ambiguous information into a unique conceptual structure. 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 is enhanced through performance of tasks by students and subsequent critique in which they are assessed and judged based on the quality of their performance.

I. The American Law School and the *Langdellian Hypothesis*

If American legal scholars since Langdell had taken another primary data base for study then the nature of their work would presumably be very different. Specific, unique consequences emerged from three critical choices traceable to Langdell. These choices were 1) legal scholars' acceptance of judicial data for virtually exclusive study, 2) the choices of the institutional and curricular structure of the American law school, and 3) the formation of close links with the legal profession, particularly the judiciary. Taking the judicial decision as data for study, evaluation, and critique not only generated unique conceptual patterns in the American legal scholar but forged a lasting relationship between American legal scholars and the judiciary. [8]

John Dawson has commented that Continental legal scholars would look on the Common Law as a "mass of meaningless technicalities." [9] James Conant has noted the distinction

[8] THIS ANALYSIS WAS DEVELOPED AT LENGTH IN DAVID BARNHIZER, "PROPHETS, PRIESTS, AND POWER-BLOCKERS", SUPRA, N. .

[9] JOHN DAWSON, *ORACLES OF THE LAW* 35 (1968). DAWSON CONCLUDES: "BY SEVERING TIES WITH ROMAN AND CANON

in the forms of thought perceived between lawyers educated in American and German law schools. Conant found legally trained Americans to think in patterns he called "empirical-inductive," the Germans "theoretical-deductive." [10]

Rene David described the French conception of university education in law in a way that clearly differentiates it from the dominant 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." [11] He adds: "Other subjects are also taught (in addition to French Law), sometimes to broaden the lawyer's background and sometimes simply because in France it has been within the law faculties that instruction in various relatively new social sciences has been organized." [12] The result, David claims, is that: "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." [13] He 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." [14] The irony is that most American law teachers would think of what they do as theoretical rather than technical, even though their subject-matter is a highly technical mixture of legal doctrines and statutory rules.

Proclamations such as Rene David's description of the French study of law can be seen as the relics of a flawed concept of the nature of knowledge and the universe we inhabit. [15] Nonetheless, this flawed idea continues to generate a powerful matrix that shapes our intellectual worldview.[16] While contempt for law practice in the French (and American)

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."

[10] CONANT, TWO MODES OF THOUGHT, SUPRA, N. .

[11] RENE DAVID, *FRENCH LAW, ITS STRUCTURE, SOURCES, AND METHODOLOGY* 50-51 (M. KINDRED, TRANS., 1972). *SEE ALSO*, JOHN DAWSON, *THE ORACLES OF THE LAW* (1968).

[12] DAVID, *FRENCH LAW, ID.*

[13] DAVID, *FRENCH LAW, ID.*

[14] DAVID, *FRENCH LAW, ID.*

[15] 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.

[16] 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

system of legal education is often voiced in the language of intellectual pretension, in the U. S. at least, it conceals a tacit fear of academic inadequacy in trying to comprehend the "messy" world of reality.[17] In doing so it perpetuates a millennia-old prejudice embedded in our system through devotion to classical Greek philosophy asserting the world of everyday life was not "real" but a "lesser" illusion that blocked us from perceiving true or Ideal reality.[18] What deluded humans perceived as reality were nothing more than the flickering shadows reflected on the wall of Plato's cave.

Contrast the description of French legal education with the implications for American legal education offered by Zemans and Rosenblum. They 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 to be the primary source of the skills and knowledge requisite to the practice of law." [19] But if this is *a* primary responsibility of university law schools--education of students for the practice of law--the rarified rhetoric of many American legal academics is at odds with the technical and knowledge missions of legal education. The technical perspective is, however, precisely 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, distinguished between the love of learning for itself, and the "tempter" for students in technical schools having practical ends constantly in view. [20]

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." [21] Technical schools, on the other hand, regardless of their students' energy, thirst for knowledge or rigor, were not considered by Eliot and many of his colleagues as a proper part of the true university because lurking underneath the technical perspective they saw a tempter or leading motive that they 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

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BACKGROUND FOR TEACHERS TODAY." MAXINE GREENE, *TEACHER AS STRANGER* 72 ( ).

[17] 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).

[18] 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.

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

[20] *SEE*, "ELIOT ON THE SCIENTIFIC SCHOOLS", IN 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 624, 635 (R. HOFSTADTER & W. SMITH EDS. 1961).

[21] *ID.* AT 624.

his own profit." [22] Eliot considered either spirit to be legitimate but observed that "if commingled they are both spoiled." [23]

Thorstein Veblen continued Eliot's criticism with his well known comment 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". [24] Although the tension between vocational, practical and "liberal" education has largely dissipated there is still a tacit issue of quality and intent. What is "theoretical" may have changed but the desire to be "legitimate" remains.

The arguments of Eliot and Veblen were merely later versions of the debate in England over "liberal" versus "useful" education. "Liberal" education represented the love of learning for itself independent of any motivation other than the thirst for knowledge—while "useful" education was considered inferior because it was oriented toward a "lesser" end such as profit and self-interest. [25] It is perhaps helpful to recall that the British debate occurred to a great extent in the context of aristocratic snobbery against anything related to economic activity. The effects of a society rapidly changing from one of privilege to one of merit in which merit was demonstrated by wealth gained through effort rather than inheritance was anathema to many members of the British upper class.[26]

In England a new set of universities were created during the earlier part of the 19th century because of the class conscious character of Oxford and Cambridge. The problem was that European nationalism was on the rise and a nation in political, economic and military competition with its close neighbors in the Industrial Revolution could not wait for traditional universities to develop state-of-the-art capabilities in the realm of physical science. [27]

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[22] *ID.* AT 634-35.
[23] *ID.*
[24] 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).
[25] *SEE*, BARNHIZER, "UNIVERSITY IDEAL AND THE AMERICAN LAW SCHOOL," *SUPRA*, N. .
[26] Charles Gillispie argues that: "So far as Oxford and Cambridge were dedicated to anything, it was to the perpetuation of themselves and of the type of graduate formed by their peculiar social environment—though even this was simply what they in fact did rather than a consciously formulated aim." Charles C. Gillispie, "English Ideas of the University in the Nineteenth Century" at 29. In *The Modern University*, Margaret Clapp, ed. (1950).
[27] Sheldon Rothblatt remarks on the transformation: "The challenge of industrial society was the foremost challenge education had ever faced, and therefore only the highest form of education could meet it. Industrial society was new, it overturned all known values and institutions, it moved at a speed unprecedented in history, and it brought more actors on to the historical stage than had ever before been accommodated. Living in such a society—always restless and impatient, always demanding and unstable, without a centre and without a common core of values—required more than style, conversation, or manners; more than sociability, liberality and civility." Sheldon Rothblatt, *Tradition and Change in English Liberal Education* (1976) at 154.

The somewhat amusing point is that the commingling of motivations warned against by Eliot in the context of Harvard University in contrast with the emergent Massachusetts Institute of Technology, is precisely what Langdell's reforms at Harvard Law School accomplished. [28] The result of Eliot's anointing of Langdell was something that Chroust has termed the "academic-professional" school. [29] Langdell's formula also served other purposes. It was explained by Jerold Auerbach 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, law teachers included, turned for security to scientific expertise and professionalism, to meritocracy and elite rule." [30]

At the point Eliot selected Langdell to be Harvard's new law dean, to be considered unscientific was equivalent to being irrelevant. It was a period during which Harvard Law School had been severely criticized both for being excessively theoretical or philosophical and mundanely practical. In the several years prior to Langdell's arrival, Harvard Law School was regarded as being in a period of decline. It was said: "No one took Harvard seriously" in those decades 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." [31]

The rhetoric of science had supplanted the old idea that wisdom and ultimate insights were to be gained through philosophical reason. As was typical of that time Europe was thought to be the center of intellectual and cultural grandeur relative to the American barbarians. The Europeans had already moved away from metaphysics in their intellectual and educational focus. This is reflected in Kant's lament that: "Time was when she [Metaphysic] was the queen of all the sciences; and, if we take the will for the deed, she certainly deserves, so far as regards the high importance of her object-matter, this title of honor. Now, it is the fashion of the time to heap contempt and scorn upon her; and the matron mourns, forsaken and forlorn, like Hecuba." [32]

Although there was some delay between changes in the European outlook and its absorption into the American academic culture, by Langdell's time metaphysics had come to have highly negative connotations for the domestic *intelligentsia*. It represented empty thoughts that were characterized as superstition and myth. The emergent ethos was, as Rollo May puts it, that: "Reason was supposed to give the answer to any problem, will power was supposed to put it into effect, and emotions-well, they generally got in the way, and could best be repressed." [33]

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[28] "ELIOT ON THE SCIENTIFIC SCHOOLS", IN 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY, SUPRA N. , AT 635.

[29] ANTON-HERMANN CHROUST, VOLUME 2, THE RISE OF THE LEGAL PROFESSION IN AMERICA 197 (1965).

[30] "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).

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

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[33] 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).

It is not surprising that soon after assuming office Langdell removed jurisprudence from the required course of study at Harvard. Langdell advocated his reforms according to the premise 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." [34] What was needed in Langdell's new world of scientific law was a completely new type of legal "scientist" not yet tainted by the distorting world of law practice. 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." [35] Enter the young James Barr Ames, Langdell's model of the new legal scientist. It was an interesting pair. While Langdell had spent his career essentially as a library researcher, Ames came to the task of law teaching without legal experience.

James Bryant Conant described Langdell as one of the great inventors of the latter part of the Nineteenth Century. Langdell's proclamation that law was a science and could be studied by the application of scientific method was undeniably powerful rhetoric. Conant comments: "Law, considered as a science, wrote Langdell. What did he have in mind when he wrote that word "science"? Not the kind of activity in which at the time Clark Maxwell was engaged; not the development of the atomic molecular theory .... Langdell was thinking of science much as was Bell or Edison .... To me, therefore, [rather than being thought of as a scientist] Langdell is to be placed among the great American inventors of the nineteenth century." [36]

The prejudice against the technical orientation and the belief that it is something lesser, intellectually inferior, or even anti-intellectual has caused many law faculty to become trapped in a psychological *never-neverland* in which there is a significant gap between what they profess to be and what they are. This may explain the recent trend toward hiring law faculty with Ph. D degrees. If a system perceives itself as inadequate in method or substance it is easy to see why surrogates are considered more intellectually legitimate. The Ph. D degree compensates for the feeling of inadequacy, even though many of the people who obtain such degrees have little or no experience in law. The expansion in the hiring of Ph. Ds is a rejection of the importance of law and the legal

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[34] CHRISTOPHER LANGDELL, ADDRESS DELIVERED NOV. 5, 1866, REPRINTED IN 3 LAW Q. REV. 123, 124 (1887).
[35] CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917, at 26 (quoting Christopher Langdell). It is interesting that this parallels Aristotle's distinction between the timing appropriate to the 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 Aristotle in secret.
[36] JAMES BRYANT CONANT, TWO MODES OF THOUGHT 45 (1964). NOR WAS LEGAL SCIENCE VERY HONESTLY OR SERIOUSLY PURSUED. SEE, E.G., ROBERT STEVENS, LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S (1983). SEE ALSO JOEL SELIGMAN, THE HIGH CITADEL (1978); SYMPOSIUM, A SYMPOSIUM ON LEGAL SCHOLARSHIP, 63 U. COLO. L. REV. (1992).

profession by the very people who are educating America's lawyers. This repeats Langdell's hiring of a completely inexperienced James Barr Ames as a way of ensuring what he considered a "legal scientist" who had not yet been "tainted" by the experiences of law practice.

The idea that knowledge is fixed and to be discovered by the exercise of reason reminds me of something I experienced in my childhood. When I was six years old my parents bought a house from the estate of a schoolteacher who had collected books. Crates filled with those books were stored in my bedroom closet. Over the years I spent counthours reading the incredible treasure trove these books represented. At the age of ten I was convinced that I wanted to become a nuclear physicist, so I read a text on physics from my "crates of knowledge" that had been published in 1884 or 1885. The text began with a few introductory paragraphs which stated in essence: "Since we have now learned all the important elements of physics and the atom, the remaining responsibility of scientists is necessarily limited to the incremental refinement of that existing knowledge." Even as a ten-year old boy it was not difficult to realize that since this passage was written physics had experienced several breakthroughs rendering the text author's position clearly wrong. These included Quantum physics, Einsteinian Relativity, the splitting of the atom, and Heisenberg's Uncertainty Principle. It had been a bit premature for the author of the physics text to declare something akin to the "end of science" as of 1884.

The point is that Christopher Langdell's idea of science in 1870 was much like that of the author of the 1880s physics text, and just as wrong. [37] But the failure of scholars and teachers of the law to develop a different system over the ensuing years should not be blamed on Christopher Langdell. He was a man of his culture. Several generations of law teachers lacked the intellectual curiosity to extend and challenge his premises. They were satisfied to accept his proclamations and to occupy their comfortable positions as part of the university world. [38] While the effort represented by the Legal Realist movement deserves respect, the general history of American legal education suggests anti-intellectualism brought on by a seemingly contradictory combination of intellectual arrogance and insecurity. [39]

II. Law and Doctrine as a Form of *Prescientific* Knowledge

[37] WOLFF REMINDS US THAT: "ORTHODOX SCIENCE IS "ESTABLISHED" IN OUR SOCIETY IN JUST THE WAY THAT PARTICULAR RELIGIOUS CREEDS HAVE BEEN ESTABLISHED IN EARLIER TIMES. THE RECEIVED DOCTRINE IS TAUGHT IN THE SCHOOLS, ITS EXPOUNDERS ARE AWARDED POSITIONS, FELLOWSHIPS, HONORS, AND PUBLIC ACCLAIM; DISSENTING DOCTRINES … ARE EXCLUDED FROM PLACES OF INSTRUCTION, DENIED EASY ACCESS TO MEDIA OF COMMUNICATION, OFFICIALLY RIDICULED, AND—IN THE CASE OF MEDICAL PRACTICES—EVEN PROHIBITED BY LAW FROM TRANSLATING THEIR CONVICTIONS INTO ACTION." ROBERT PAUL WOLFF, *THE POVERTY OF LIBERALISM* 16 (BEACON PRESS, BOSTON 1968).

[38] GEORGE JOHNSON SUGGESTS THAT: "SCIENCE CAN … BE SEEN AS A CONSTRUCTION, A MAN-MADE EDIFICE THAT IS HISTORICAL, NOT TIMELESS—ONE OF MANY ALTERNATIVE WAYS OF CARVING UP THE WORLD." HE ADDS: "OUR SEARCH FOR TRUTH HAS CARRIED US ALONG A SINGLE BRANCH OF THE TREE OF KNOWLEDGE UNTIL WE ARE SO FAR OUT ON A SINGLE TWIG AT THE END OF A CERTAIN LIMB THAT WE ARE POWERLESS TO IMAGINE HOW IT COULD BE OTHERWISE." GEORGE JOHNSON, *FIRE IN THE MIND: SCIENCE, FAITH, AND THE SEARCH FOR ORDER* AT 5, 6 (ALFRED A. KNOPF, NY 1996).

[39] ERIC HOFFER TELLS US THERE IS AN "IRREMEDIABLE INSECURITY" AT THE HEART OF ALL INTELLECTUALS. ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* (1962). THE INSECURITY MAY BE EXPLAINED BY THE PHENOMENON KEYNES DESCRIBED AS FOLLOWS: "IN THE FIELD OF ECONOMIC AND POLITICAL PHILOSOPHY THERE ARE NOT MANY WHO ARE INFLUENCED BY NEW THEORIES AFTER THEY ARE TWENTY-FIVE OR THIRTY YEARS OF AGE…." JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* 383, 384 (1935).

If the *Langdellian Hypothesis* was wrong, what is the actual nature of the knowledge and experience we seek to teach our students and about which we write in our scholarship? The problem is that there is no obvious intellectual core in American law school teaching or scholarship, only numerous disconnected pieces.[40] This includes the organization of the curriculum into the functional compartments of law as represented in contracts, procedure, property and the like. This organizational form was simply a choice of convenience and necessity. After more than a century it has become an orthodoxy.

Let's assume that Langdell was in fact an inventive genius and that his idea could have resulted in a special system being created worthy of great respect. The events since Langdell indicate that the problem may have been that the creative or revolutionary idea that provides the foundation for a new orthodoxy becomes a rigid dogma that erects barriers to other perspectives. As each group of new adherents are trained in the orthodox system their careers become dependent on that system. They then display a natural tendency to repress alternative views. Arthur Koestler has described this cycle with great insight. He explains: "The new territory opened up by the impetuousness of a few geniuses, acting as a spearhead, is subsequently occupied by the solid phalanxes of mediocrity; and soon the revolution turns into a new orthodoxy … and ultimately, estrangement from reality…."[41] At this point: "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; sooner or later the matrix is blocked, a new crisis arises, leading to a new synthesis, and the cycle starts again."[42]

Part of the difficulty stemming from our long fascination with the Langdellian system asserting that law is a science is that American legal thought is actually far more accurately described as a *prescientific* form of knowledge. The interaction of Common Law judiciary and American law teachers creates a unique approach to knowledge. That knowledge is essentially "prescientific." This means it possesses characteristics of the methodology used to approach knowledge prior to the rise of modern science. G.S. Brett has called this kind of approach "the original and natural idea of knowledge."[43] Interacting with judicial thought, the substance of American law and the knowledge transmitted by law teachers 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."[44] As a form of practical wisdom, law looks toward effective ways to solve critical challenges humans encounter in their political communities.

Several scholars have attempted to explain the nature of legal thought within Common Law systems. Julius Stone has spoken about the system of Common Law precedent as

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[40] 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).

[41] ARTHUR KOESTLER, *THE ACT OF CREATION* 255, 256 (1964).

[42] Koestler, *The Act of Creation, id.*

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

[44] ARISTOTLE, *NICHOMACHEAN ETHICS*, BK. VI, CH. 5 (R. MCKEON ED. 1973).

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]

The Common Law's inherent indeterminacy means the judiciary cannot deal with complex legal situations in self-contained scientific compartments. The judicial task involves interpretation, analysis, distinction and comparison, analogy, identification of hierarchies of principle, divination of purpose and intent, prediction, judgment, and, most of all, making choices. Judicial thought further considers how particular decisions will affect the operation of other political institutions and even the judicial institution itself.

Because American legal scholars take the judicial decision as their primary source, they engage in much the same kind of thinking as judges. 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 substance of law involves factors that are outside scientific controls and that cannot be compressed into arbitrary modules.

The inability to fashion a legitimate intellectual method for teaching and research may be due to the nature of the task itself —including its connection with practice and reality—a linkage many law teachers deny to the point it undermines their ability to engage fully with the deeper principles and structures of the law. [48] Richard Hofstadter, for example, has argued that professional work relies primarily on "a substantial store of frozen ideas." [49] 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." [50]

This perspective highlights the fear I think is felt by many law teachers in America. It is that they are only *mental technicians* rather than brilliant jurists worthy of respect in the same way as are pure scientists and philosophers. This was commented on by Felix Cohen in his description of European jurists who discovered to their embarrassment that

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[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] PART OF OUR DESPERATE GRASP FOR ANY SOURCE OF VALUES THAT SEEMS TO OFFER GROUNDING IS, AS DANIEL BOORSTIN CONCLUDES: "THE DISCOVERY, OR EVEN THE BELIEF THAT MAN COULD MAKE HIS OWN LAWS, WAS BURDENSOME …. [N]EARLY EVERY MAN KNEW IN HIS OWN HEART THE VAGUENESS OF HIS OWN KNOWLEDGE AND THE UNCERTAINTY OF HIS OWN WISDOM ABOUT HIS SOCIETY. SCRUPULOUS MEN WERE TROUBLED TO THINK THAT THEIR SOCIETY WAS GOVERNED BY A WISDOM NO GREATER THAN THEIR OWN." DANIEL BOORSTIN, *THE DECLINE OF RADICALISM* 74 (1963). WE ARE CAUGHT IN A TRAP FORGED BY THE EXUBERANCE OF THE ENLIGHTENMENT AND ITS FAILED DREAM OF HUMAN PROGRESS THROUGH REASON AND SCIENCE.

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

[50] HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE*, *ID*.

they were not required to consume the "draught of forgetfulness" as a condition of entering Heaven. The reason for the exemption was that they had nothing to forget. [51]

But 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." [52] 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.

One of the most ironic aspects of Langdell's Hypothesis is that his new *legal science* was a thinly masked version of metaphysics, but 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.

My criticism is not directed at Langdell who after all at least had the courage to offer an important hypothesis that needed to be tested. My criticisms are aimed at those who failed to understand the implications of Langdell's argument, to challenge its premises and to make the adaptations consistent with a more honest understanding of the nature of legal knowledge and the purposes of legal education administered by a privileged institution granted a monopoly power over the education of lawyers in America. The long period of adherence to Langdellian *scientism* means that law teachers were imprisoned by their failure to understand their duty to create a rich conceptual system that brings together the nature of law practice, political power, economic reality and social justice, key considerations that have been largely short-changed in legal education and research. [53]

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[51] THIS IS SUGGESTED BY LUDWIG VON JHERING IN HIS SOMEWHAT TONGUE-IN-CHEEK OBSERVATION THAT JURISTS NEED NOT DRINK THE "DRAUGHT OF FORGETFULNESS" REQUIRED BY OTHERS ON ENTERING HEAVEN—BECAUSE THEY "HAD NOTHING TO FORGET." *SEE* FELIX COHEN, "TRANSCENDENTAL NONSENSE AND THE FUNCTIONAL APPROACH", 35 COLUMBIA L. REV. 809 (1935).

[52] 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).

[53] Scientism is defined as the "belief that the assumptions, methods of research, etc., of the physical and biological sciences are equally appropriate and essential to all other disciplines, including the humanities and social sciences." *Random House Dictionary of the English Language, Second Edition*. Langdell fits far more into the paradigm set forth by Delanty. *See*, Gerard Delanty, *Challenging Knowledge: The University*

Although Langdellianism weakened its hold as the controlling orthodoxy the balance between these elements is still confused and unstable. The result has not been the formulation of a rich intellectual system but a situation where virtually anything goes in a loose and sloppy system of American law teaching and scholarship. [54] This has rendered the law schools in America institutions without real standards, methods or direction. It has also rendered them vulnerable to excessive politicization. [55]

Another piece of the search for intellectual grounding and depth are the numerous "Law And" approaches to interdisciplinary study. Disciplines such as economics, sociology, sociological jurisprudence, psychology, history and the like are brought into conjunction with traditional legal topics. Once again this represents the uncertainty of many American legal academics. A third element is what might be called the "scholarship of rage" and social change in which interest groups that had been previously denied fair opportunity either within the society or the law schools have launched critiques at the sources they consider responsible for their treatment or that present obstacles to efforts to achieve desired changes.[56] Although other pieces can be identified there is no transcendent thread that binds legal scholars and teachers other than their adherence to tradition in method, format, content and curriculum.

III. "Professing", Facilitating, and Mediating

In the United States, and almost certainly even more in other educational systems, law professors (and other academics) often take the "professing" part of their job much too seriously. The United States is not alone in its use of large classes conducted primarily in a lecture format. There has, for example, been little or no interaction between professors

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in the Knowledge Society 24 (The Society for Research into Higher Education & Open University Press, Buckingham, UK 2001).

"THE TWENTIETH CENTURY WAS THE ERA OF THE EXPERT, AND PROFESSIONAL SOCIETY REPLACED THE LAST REMNANTS OF ENLIGHTENMENT HUMANISM. THE UNIVERSITY ACQUIRED A NEW FUNCTION IN SOCIETY: TO SUPPLY A TRAINED LABOUR FORCE. THE TEACHER AND THE RESEARCHER ACQUIRED A NEW ROLE: PROFESSIONAL TRAINING. IT IS NO LONGER A MATTER OF THE EDUCATION OF THE WHOLE PERSON … BUT OF … VOCATIONAL TRAINING. THE UNIVERSITY AFFIRMED THE NEW CULTURAL MODEL OF SOCIAL INTEGRATION IN THAT IT WAS AN INSTITUTION WHICH SERVICED THE ECONOMIC NEEDS OF SOCIETY, NATIONAL PRESTIGE AND DEFENSE AS WELL AS THE PRODUCTION OF THE TECHNOLOGICAL EXPERTISE."

[54] *SEE*, "THE REVOLUTION IN AMERICAN LAW SCHOOLS," *SUPRA* N. .

[55] FOR A DISCUSSION OF THE IMPACTS, 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). SEE ALSO HEATHER MAC DONALD'S OBSERVATION THAT: "LEGAL REALISM LOST MUCH OF ITS GLAMOUR AFTER WORLD WAR II. BUT IN THE 1970S, LEFTIST LAW PROFESSORS DUSTED OFF THE REALISTS' CRITIQUE AND DRESSED IT UP IN GERMAN AND FRENCH LITERARY AND CRITICAL THEORIES. THEIR FAVORITE PHRASE TO DESCRIBE THEIR WORK—"TRASHING"—REFLECTS THEIR NOSTALGIA FOR THE ANTI- ESTABLISHMENT 1960S. THE RESULT OF THEIR EFFORTS WAS CRITICAL LEGAL STUDIES (CLS), A DIVERSE, SOMETIMES IMPENETRABLE MIX OF MARXIST ANALYSIS, POSTMODERN LITERARY CRITICISM, AND AMERICAN LEGAL SKEPTICISM. CLS DOMINATED THE ACADEMIC LEFT FOR WELL OVER A DECADE, GAINING WIDESPREAD MEDIA ATTENTION IN THE 1980S FOR TEARING UP HARVARD LAW SCHOOL. (CONCURRENTLY, "LAW AND ECONOMICS"—EQUALLY ICONOCLASTIC—MOVED IN FROM THE RIGHT, CREATING, TOGETHER WITH CLS, A PINCER OFFENSIVE ON TRADITIONAL JURISPRUDENCE.)" MAC DONALD, *SUPRA* N. HEATHER MAC DONALD, "LAW SCHOOL HUMBUG," AUTUMN 1995 | VOL. 5, NO. 4. HTTP://WWW.CITY-JOURNAL.ORG/HTML/5_4_A2.HTML; VISITED 6/24/04.

[56] ON THIS *SEE*, DAVID BARNHIZER, "A CHILLING OF DISCOURSE," AND "TRUTH OR CONSEQUENCES IN LEGAL SCHOLARSHIP", SUPRA, N. .

and students in the model of education that has dominated European universities. [57] This is beginning to change but the shift from a primarily passive and vicarious mode of instruction to more active modes of learning is moving slowly. In much of European university education there has for centuries been reliance on the large class lecture format. This represents a pedagogical mode where professors "profess" to a largely passive audience intent on taking comprehensive notes in order to capture the teachers' wisdom.

I want to return to the idea that a central role of the law teacher is the "mediation of experience." Part of mediating experience is helping our students 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 reality and the relative innocence of youthful or inexperienced university students. This difficulty is enhanced because there is 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.

How to teach and what to teach are independent considerations. 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. Part of this involves educating our students toward trying to do what they can to improve an inevitably and permanently imperfect system. If we do not try to instill at least some of that positive and principled value system in our students, then we are nothing more than technicians or bureaucrats—or critics taking cheap and easy shots at the legal system. In either posture we are betraying our responsibility and our profession.

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.

The need for such passive approaches to the transmission of dense clumps of knowledge has been reduced significantly through the supply of textual materials and most recently through new learning opportunities created information technology and the Internet. It has not been eliminated in many contexts, however, because even recently when I was teaching a course on human rights in a London law school I was surprised to discover

[57] *See generally*, David Barnhizer, "The University Ideal and the American Law School," 42 *Rutgers L. Rev*. 109 (1989), and sources collected therein.

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. This represents one of the fundamental differences between American legal education and that done in other areas of university instruction, including in U. S. universities that do not have to follow this approach but often do.

Our tendency to use "professing" as a central pedagogical method reflects other factors than a lack of student access to material. Lecture and large class formats offer more controlled and static pedagogical contexts than exist in using more active educational methodologies such as dynamic interaction and dialogue in which we teachers may be exposed as something less than all-knowing. 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, perception, "thinking on your feet" and spontaneity. Mastery of such methods requires capabilities similar to improvisational theater and "stand-up comedy". The safer and more traditional approach is to retain control by "professing" according to a carefully prepared agenda. This leaves little opportunity for student discussion or dialogue.

"Professing" is very useful for the transmission of large amounts of information at relatively superficial levels of student understanding. But 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." But there is a structural deficiency in this approach that relegates the method to achieving less than its full effect. A central deficiency involves scale. 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.

Socrates engaged in direct dialogue with individuals in small groups with the virtual absence of "professing." [58] This intimate and very personal Socratic communication was

[58] "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

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.

The deficiency 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 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 by which to facilitate learning--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 dialectic. The students are not actively engaged in the learning process even though it is this active participation that is at the center of the most effective learning.

Much of the problem with law school teaching is a direct result of the excessive size of classes in the first year. This creates a critical constraint on the teacher's ability to consistently apply active learning methods. The large class structure that still dominates the law schools was not chosen for pedagogical reasons. Law schools needed to teach significant numbers of students inexpensively so that universities could make money. [59] 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. It is fair to ask what form of organization would be chosen if we began designing the process from a sort of Rawlsian "original position" where the best structure for professional legal education was developed free of the burdens of tradition, economics and the self-interest of the professoriate, universities, and the legal profession.

IV. *"All things with no teacher"*: Students' Acceptance of Responsibility for Their Own Learning and the Facilitative Function of the Law Teacher

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 "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

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ENOUGH TO TURN TOWARD THE GOOD." MAXINE GREENE, *TEACHER AS STRANGER* 72 (1973).

[59] ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

experiences that "push the envelope" of my personal and professional limits in the direction of "all things with no teacher" in my own life.

Perhaps because of my initial perspective gained as a clinical teacher in the beginning of my teaching career I have always seen myself as a facilitator, guide or catalyst of the student's learning rather than as a "professor." Added to this is the idea of the teacher of law as a professional role model--not primarily as a model of a law teacher since very few students enter that profession, but as a lawyer. 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.

This potentially conflicts to some extent with Charles Eliot's idea that knowledge could be transmitted on a "five foot shelf" through a collection such as the *Harvard Classics* for which Eliot served as editor. [60] While a foundation of knowledge is unquestionably vital, and analysis is best done on a foundation of actual knowledge, law both in conception and action offers a dynamic and shifting environment in which change is a constant. The changes are linked to tradition, precedent and fundamental policy choices based on economics, history, philosophy and religion, choices exercised within a shifting context rather than a static environment. This rewards a strong base of knowledge and requires the ability to adapt what one knows to altered conditions. The teacher's goal of infusing students with the abilities of adaptation and flexibility within a grounded intellectual structure has been referred to as one of teaching law students to learn how to learn on their own as independent and effective professionals.[61]

In *The Warrior Lawyer* I applied the strategic thought of Sun Tzu and Musashi to the conditions of American law practice. That work advocated the concept of "*all things with no teacher*". Lest law teachers run to the barricades fearing the elimination of their jobs it is important to understand that this principle 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.

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. Miyamoto Musashi makes this point in his *Book of Five Rings*. [62]

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[60] 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.

[61] *SEE*, E.G., KENNETH KREILING, MARYLAND L. REV.

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

> I have lived without following any particular Way. With the virtue of strategy I practice many arts and abilities--all things with no teacher. [63]

The discipline of strategy has occupied the center of my intellectual system for some time. It provides a methodology that cuts across the barriers of compartmentalized disciplines and uses knowledge of the past and present as the foundation for determining the probabilities and risks involved in actions that still needs to be taken. It resists the confines of disciplines that define, construct and restrict the way we are taught to see the world. Such a comprehensive strategic methodology allows us to more fully comprehend our individual selves and our world. It also enables us to act more effectively in that world. [64] For me this reflects the individual responsibility to go beyond our teachers' limits to create our own systems and to seek to facilitate this same capability in our own students.

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.

Musashi's vision of the best teacher was that "*the teacher is as a needle, the disciple is as thread."* The teacher *draws* the student through the experience and is the student's facilitator in the creation of a learning environment or "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 the *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.

V. An Outline of Educational Goals and Methods

The Carnegie Commission on Higher Education described five missions for the modern university. The missions are: 1) educating individual students and providing a constructive environment for growth, 2) advancing human capability in society at large, 3) educational justice, 4) pure learning, and 5) evaluation of society for self-renewal through individual thought and persuasion. [65] Each mission reflects an implicit agenda

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[63] SHINMEN MUSASHI, *A BOOK OF FIVE RINGS*

[64] I BELIEVE THIS TO BE A BENEFIT OF *THE WARRIOR LAWYER, SUPRA* N. .

[65] THE CARNEGIE COMMISSION ON HIGHER EDUCATION, THE PURPOSES AND THE PERFORMANCES OF HIGHER EDUCATION IN THE UNITED STATES 1 (1973). SEE ALSO, ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE* (CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 1990). BOYER SEEKS TO CLARIFY AND REDEFINE OUR UNDERSTANDING OF SCHOLARSHIP AND ITS PROPER BALANCE WITH TEACHING AND SERVICE, SUGGESTING

involving evaluation and critique of society and social regeneration through education and research. [66] An obvious question is how such goals are pursued in the law school curriculum and in the work of individual law teachers.

Although I am not attempting to follow the Carnegie missions in this essay they do assist us in understanding whether law schools actually attempt to serve such ends through their teaching and scholarship. The history is quite uneven, although a strong thread of academic scholarship has sought to deal with issues of social justice. Isolated pieces of the curriculum have also attempted to address important problems in discrimination and injustice in the application of law so it would be grossly unfair to conclude that such issues have been ignored. But the law schools have been a weak and inconsistent voice in fulfilling their responsibilities of dealing with the reality of the legal profession or with the inadequacies of the judicial branch.

Five categories of educational goals are discussed in this part. They range from what might be considered moral or jurisprudential, to the basic subject matter and techniques of law and legal thought. Each category has a number of subcategories. Each subcategory represents an educational goal that a teacher can concentrate on separately. But the challenge is to select a mix of goals that can become the foundation of an integrated educational strategy. This means that goals, methods and content are part of a focused and coherent educational strategy rather than a collection of segments that may sound ideal in the abstract but do not fit together in a real learning context.

Educational goals need to be integrated with method, scale and substance. While virtually all courses 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. One "size" does not fit all. The ability to achieve specific goals at high levels of quality depends on the appropriate application of particular methodologies to carefully created contexts comprised of motivation, content, goals, and the numbers and demographics of students.

When choosing educational goals for their institutions as a whole and for individual teaching strategies, law teachers should select learning strategies that have the highest

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THAT THE RESEARCH AND PUBLICATION MODEL THAT HAS ARISEN PRIMARILY SINCE THE END OF WORLD WAR II IS DISTORTED AND INADEQUATE TO THE POINT THAT THE EDUCATIONAL PROCESS IS BEING DISSERVED AND A SUBSTANTIAL AMOUNT OF NOT VERY HELPFUL SCHOLARSHIP IS BEING PUBLISHED. HE OFFERS FOUR TYPES OF SCHOLARSHIP: DISCOVERY, INTEGRATION, APPLICATION AND TEACHING. *ID*, AT 16. A CAUSTIC CRITIQUE IS OFFERED BY 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.

[66] FOR IMPORTANT VIEWS ON THE GOALS OF AMERICAN LEGAL EDUCATION, SEE, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (THE MACCRATE REPORT), A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1992). *THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM*, CONFERENCE PROCEEDINGS, JOAN S. HOWLAND AND WILLIAM H. LINDBERG, EDS., MINNEAPOLIS ST. PAUL, (1994); *REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992).

probability for 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. This is more difficult than we think because it requires that we understand how different types of courses, methods and materials are better suited to achieving certain educational goals than others. Being knowledgeable about the distinct qualities of various educational strategies and experiences is important throughout the curriculum and in designing and implementing specific courses.

The ability to achieve educational goals is not best understood solely within the isolated context of a single course but needs to be looked at in reference to the interplay *among* courses. This includes the educational impacts of integrated curricular compartments. Understanding the interplay requires that we envision what we do not only in terms of a single stand-alone course's ability to achieve an incredible array of educational goals but the setting of goals and priorities as part of an integrated curriculum. We must therefore think about the realistic limits of courses and about the "value-added" characteristics of certain types of learning experiences. This requires us to recognize that, like politics, teaching and the facilitation of learning involves the "art of the possible" rather than the ideal.

It is also important for the teacher to accept his or her limits and to understand that different students will be reached at different levels of insight and sophistication in every course. Many law students are in the latter stages of a period of prolonged adolescence. Regardless of their chronological age students unsurprisingly tend to "act like students", displaying the ennui, studied indifference and distancing that are elements of this stage of development within the "student" role. Part of this behavior involves attempting to avoid full responsibility and to manipulate the teacher/facilitator in ways that students hope will help them to achieve a high grade.

Along with accepting the limits of what we are capable of achieving we should consider that it is impossible to plan for all goals. There is a serendipity and randomness that comes into play that operates independently of our "best laid plans." There are unpredictable outcomes over which the teacher has no control. Some students will learn wonderful things that will last them for their lives. These results may have nothing to do with what the teacher planned although they may emerge as an unintended consequence—positive or negative—of the educational process.

On the negative side it is important to understand that some students will take away little from the even the best educational experience. This may be due to their dislike of the teacher, because of personal issues that are blocking their openness to learning, or to inability or unwillingness to fully engage with the course or teacher/facilitator. It may also involve a lack of commitment, lack of ability or poor work habits. Obviously we should add to this the possibility that the failure is not inevitably a fault of the student. The teacher may simply not be very good.

Even the most talented teachers cannot reach every student. The limits of the teacher's role and capability need to be accepted while not being used as an excuse for neglect.

Part of the problem may be a failure to understand educational methodology. While schools of education often take the educational planning and methodology to absurd ends, the complete lack of any educational training of law teachers in educational strategies, methods and techniques is indefensible.

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

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.[67] 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? [68] The law student (and teacher) must be confronted with these issues, including the special duty of the legal profession as ministers of the Rule of Law to reform inequities and the best means of accomplishing those ends. At this point it is useful to remember the warning voiced by Abraham Maslow to the effect that we go to great lengths to avoid gaining an honest understanding of some of our most dire problems in order to escape the sense of hypocrisy that emerges when we know something is unjust or corrupt but we lack the courage to do anything about it. [69] Consider, for example, the implications of

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[67] 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).

[68] 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).

[69] 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

how the "justice system" treats the defense of death penalty cases in Florida. Marcia Coyle reports that the system is rigged against the defendant to the extent it is accurately described as a sham. [70] 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 overall category are the concepts of the responsibilities owed to clients, to the institutions of justice, and to society. [71] Broadly defined, it encompasses considerations of legal ethics and ethical philosophy, professional competence, the roles of lawyer, the effect of economics on the ability of lawyers to act as principled professionals, the nature of the American political system and the lawyer's special responsibility to that system.

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."

[70] 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).

[71] 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: NORMAN W. SPAULDING, "THE PROPHET AND THE BUREAUCRAT: POSITIONAL CONFLICTS IN SERVICE PRO BONO PUBLICO", 50 STAN. L. REV. 1395 (1998); 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); ROBERT P. LAWRY, "CROSS-EXAMINING THE TRUTHFUL WITNESS: THE IDEAL WITHIN THE CENTRAL MORAL TRADITION OF LAWYERING", 100 DICKINSON L. REV. 563 (1996); 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); JENNIFER A. FREYER, "WOMEN LITIGATORS IN SEARCH OF A CARE-ORIENTED JUDICIAL SYSTEM", 4 AM. U. J. GENDER & L. 199 (1995); THOMAS D. MORGAN, "LEGAL REPRESENTATION IN A PLURALIST SOCIETY", 63 GEO. WASH. L. REV. 984 (1995); LAWRENCE E. MITCHELL, "COOPERATION AND CONSTRAINT IN THE MODERN CORPORATION: AN ENQUIRY INTO THE CAUSES OF CORPORATE IMMORALITY", 73 TEX. L. REV. 477 (1995); LESLIE GRIFFIN, "THE LAWYER'S DIRTY HANDS", 8 GEO. J. LEGAL ETHICS 219 (1995); FRED C. ZACHARIAS, "RECONCILING PROFESSIONALISM AND CLIENT INTERESTS", 36 WM. & MARY L. REV. 1303 (1995); REED ELIZABETH LODER, "MORAL TRUTHSEEKING AND THE VIRTUOUS NEGOTIATOR", 8 GEO. J. LEGAL ETHICS 45 (1994); REED ELIZABETH LODER, "OUT OF UNCERTAINTY: A MODEL OF THE LAWYER-CLIENT RELATIONSHIP", 2 S. CAL. INTERDISCIPLINARY L. J. 89 (1993); 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); ROB ATKINSON, "BEYOND THE NEW ROLE MORALITY FOR LAWYERS", 51 MD. L. REV. 853 (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); THOMAS SHAFFER, "THE PROFESSION AS A MORAL TEACHER", 18 ST. MARY'S L. J. 195 (1986).

Our culture follows a combination of false ideals, inapplicable ideals, confused ideals, or no ideals. [72] Lawyers responsible for dealing with the application of power, both for and against their clients, need deep principles for guiding their decision-making. But we have abandoned any belief in ideals strong enough to give us guidance. [73] We try to ignore the fact that lawyers work inside a culture of deception, manipulation, and power even though those are intrinsic to the task of gaining advantages for our clients relative to others. It comes down to the basic role of the advocate. This includes the counseling role because even in that context lawyers are counseling about how clients can best achieve desired ends.

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 depreciate [others' positions]."[74] 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."[75]

The dynamic of advocacy is inescapable and the overall system is not going to change enough to affect the lawyer's 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

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[72] LAW CAN SYMBOLIZE JUSTICE, OR CONCEAL REPRESSION. IT CAN REDUCE EXPLOITATION, OR FACILITATE IT. IT CAN PROHIBIT THE 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. IN AMERICAN SOCIETY, AS LAURA NADER HAS OBSERVED, "DISPUTING WITHOUT THE FORCE OF LAW . . . [IS] DOOMED TO FAIL." JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* VII (1983).

[73] "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 THOUGHTS ON THE DIRECT 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); VINCENT R. JOHNSON & VIRGINIA COYLE, *ON THE TRANSFORMATION OF THE LEGAL PROFESSION: THE ADVENT OF TEMPORARY LAWYERING*, 66 Notre Dame L. Rev. 359 (1990); F. BENTLEY MOONEY, JR., *HOW TO TRIPLE YOUR EFFECTIVE HOURLY BILLING RATE*, Legal Econ., OCT. 1989, AT 32.

74. Aristotle, The Epilogue, *IN* The Rhetoric of Aristotle 3, 19 (L. COOPER ED. & TRANS., 1932). THE COMMON LAW OPERATES ON A MULTIPLICITY OF LEVELS THAT TRANSCENDS THE NARROW LIMITS OF SCIENCE. IT SHIFTS BETWEEN THESE LEVELS AT WILL AND WORKS THROUGH THE APPLICATION OF POLITICAL LANGUAGE TO DISCRETIONARY SITUATIONS. I EXPLORED THIS AS A DISTINCT SYSTEM OF KNOWLEDGE IN DAVID BARNHIZER, *PROPHETS, PRIESTS, AND POWER BLOCKERS: THREE FUNDAMENTAL ROLES OF JUDGES AND LEGAL SCHOLARS IN AMERICA*, 50 U. Pitt. L. Rev. 127 (1988).

75. The Works of Plato 292, 306 (I. EDMAN ED., 1928). SUN TZU SUGGESTS APPROACHES BY THE STRATEGIST THAT PROVIDE A FLAVOR OF HOW THE LEGAL STRATEGIST MUST ACT DECEPTIVELY AND IN A MANIPULATIVE MANNER TO ACHIEVE SUCCESS. "ALL MEN CAN SEE THESE TACTICS WHEREBY I CONQUER, BUT WHAT NONE CAN SEE IS THE STRATEGY OUT OF WHICH VICTORY IS EVOLVED." Barnhizer, *SUPRA* NOTE 58, AT 73 (QUOTING SUN TZU'S *THE ART OF WAR*). "IN ALL FIGHTING, THE DIRECT METHOD MAY BE USED FOR JOINING BATTLE, BUT INDIRECT METHODS WILL BE NEEDED TO SECURE VICTORY." *ID.* AT 75. "[W]HAT ENABLES THE WISE SOVEREIGN AND THE GOOD GENERAL TO STRIKE AND CONQUER, AND ACHIEVE THINGS BEYOND THE REACH OF ORDINARY MEN, IS FOREKNOWLEDGE." *ID.* "BY ALTERING HIS ARRANGEMENTS AND CHANGING HIS PLANS, HE KEEPS THE ENEMY WITHOUT DEFINITE KNOWLEDGE. BY SHIFTING HIS CAMP AND TAKING CIRCUITOUS ROUTES, HE PREVENTS THE ENEMY FROM ANTICIPATING HIS PURPOSE." *ID.* AT 100.

hold conflicting aims.[76] It is an undertaking with consequences for those who participate in it.

It has become increasingly popular to criticize the perceived deficiencies of the adversary system and the lawyer's role within it. [77] Anne Strick has challenged the validity of the entire adversary process by emphasizing the lawyer's commitment to winning through advocacy over the attainment of truth. In her book, *Injustice For All*, Strick called this "the treason of the adversary system," and comments at length on how many lawyers attempt to falsely justify the adversary system as a mechanism for the effective determination of the truth of controversies.[78]

Consider, for example, Machiavelli's observation that the individual must be cunning and deceptive, and that the prince must combine the talents of beast and man in order to survive in a harsh and deceptive world: "One must be a fox in order to recognize traps, and a lion to frighten off wolves. Those who simply act like lions are stupid. . . . [A] prudent ruler cannot, and must not, honour his word when it places him at a disadvantage. . . . 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. [79]

Machiavelli continues: "[O]ne must know how to colour one's actions and to be a great liar and deceiver."[80] The Prince, according to Machiavelli, "should appear to be

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76. *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).

77 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 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). SYMPOSIUM, THE LAWYER'S DUTIES AND RESPONSIBILITIES IN DISPUTE RESOLUTION, 38 SOUTH TEXAS LAW REV. MAY 1997. SEE ALSO CARRIE MENKEL-MEADOW, ETHICS IN ALTERNATIVE DISPUTE RESOLUTION: NEW ISSUES, NO ANSWERS FROM THE ADVERSARY CONCEPTION OF LAWYERS' RESPONSIBILITIES, 38 S. TEX. L. REV. 407 (1997). JOHN Q. BARRETT, A POST CONFERENCE REFLECTION ON SEPARATE ETHICAL ASPIRATIONS FOR ADR'S NOT-SO-SEPARATE PRACTITIONERS, ID. AT 705. "SYMPOSIUM PAPERS FROM THE W. M. KECK FOUNDATION FORUM ON THE TEACHING OF LEGAL ETHICS", 38 WM. & MARY L. REV. (OCTOBER 1996).

78. 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).

79 Niccolo Machiavelli, The Prince 99 (GEORGE BULL TRANS., 1961).

80. MACHIAVELLI, SUPRA NOTE 119, AT 99. MACHIAVELLI TENDS TO BE MISUNDERSTOOD AND CERTAINLY

compassionate, faithful to his word, kind, guileless, and devout. And indeed he should be so. But his disposition should be such that, if he needs to be the opposite, he knows how."[81] Lawyers are Machiavellians by the terms of our professional oath and by the realities of dispute resolution. The result is what Thomas Shaffer terms "compromised morality." [82]

If you lie by commission or omission you become a liar. If you deceive you become a deceiver. We lawyers lie, deceive, argue, seek to undermine, and use the advocate's skills to persuade. These behaviors are inevitable elements of the practice of law. They represent what lawyers are required by oath to do for their clients and they define who we are. Plato described the consequences he perceived as manifest in those who practice law: "[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 . . . 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." [83]

We do practice deception. We flatter to gain advantage for our clients, and we are "keen and shrewd" if we are effective. But have we "passed from youth … having no soundness" to us? This is a profound accusation that must be addressed honestly. Certainly it would be very easy for lawyers to be nothing but the contemptible creatures Plato describes—beings in possession of power and influence but full of conceit and empty of soul. Many lawyers seem to fit this description. [84]

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 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 lawyering 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. [85] This includes also the philosophy

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UNDERVALUED AS A THINKER AND STRATEGIST RELEVANT TO OUR TIME. SEE, E.G., MICHAEL LEDEEN, WHY MACHIAVELLI'S IRON RULES ARE AS TIMELY AND IMPORTANT TODAY AS FIVE CENTURIES AGO (1999).

81. MACHIAVELLI, SUPRA NOTE , AT 99.

82. SHAFFER, SUPRA NOTE , AT 83.

83. MAYER, AT 4 (QUOTING PLATO).

84 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."

85 SELF REGULATING

of ethics and lawyers' responsibility to society. 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. [86]

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, the obligation to be a zealous representative of the client's interests, malpractice issues, confidentiality, and conflicts of interest. [87]

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. Considerations of the effects of the lawyer's professional roles on the attorney involves both definitions of what those roles

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[86] "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). "THE BASIC CONCEPT OF FREEDOM UNDER LAW, WHICH UNDERLIES OUR ENTIRE STRUCTURE OF GOVERNMENT, CAN ONLY BE SUSTAINED BY A STRONG AND INDEPENDENT BAR." FUTURE JUSTICE LEWIS F. POWELL, JR., WROTE IN 1962: "THIS COMMITTEE IS DEEPLY CONCERNED WITH IMPROVING . . . THE ECONOMIC STATUS OF LAWYERS. . . . IT IS PLAINLY IN THE PUBLIC INTEREST THAT THE ECONOMIC HEALTH OF THE LEGAL PROFESSION BE SAFEGUARDED. ONE OF THE MEANS TOWARD THIS END IS TO IMPROVE THE EFFICIENCY AND PRODUCTIVITY OF LAWYERS." ABA Committee on Economics of Law Practice, The Lawyer's Handbook VII (1962) [HEREINAFTER Lawyer's Handbook].

[87] 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.

include and their effects upon the personal and professional lives of an attorney. [88] These issues consider primarily the non-systemic advantages and disadvantages of the lawyer role and the various conforming pressures of that status. [89] A part of this involves defining what is required of a professional of the law acting in a principled manner within the special construct of the lawyer's role. [90] This raises very challenging issues of the tension between obligations owed to clients, to other people and to society generally. [91] 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. [92] Drawing lines in this context of conflicting roles is one of the hardest things for a professional to do.[93]

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[88] STEPHANIE B. GOLDBERG, "LAWYER IMPAIRMENT: MORE COMMON THAN YOU MIGHT THINK, DENVER SURVEY SUGGESTS", 76 A.B.A.J. 32 (FEBRUARY 1990). "A 1989 SURVEY OF 34 MANAGING PARTNERS OF DENVER-BASED LAW FIRMS SUGGESTS THAT THE PROBLEM OF LAWYER IMPAIRMENT—ONE THAT FIRMS OF ALL SIZES ARE SLOW TO ACKNOWLEDGE AND EVEN SLOWER AT DOING SOMETHING ABOUT—IS FAR FROM UNUSUAL." SHE ADDS: "THE CAUSES OF IMPAIRMENT WERE MOST OFTEN ALCOHOLISM AND MARITAL PROBLEMS, AND THE AREAS OF PERFORMANCE MOST OFTEN AFFECTED WERE BILLABLE HOURS (79 PERCENT), THE ABILITY TO WITHSTAND PRESSURE (79 PERCENT) AND THE QUALITY OF WORK (75 PERCENT)."

[89] "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL." ALEXANDER HAMILTON, THE FEDERALIST (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).

[90] 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); "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); "PRINCES OF DARKNESS AND ANGELS OF LIGHT: THE SOUL OF THE AMERICAN LAWYER," 14 *NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY* 371 (2000). SEE GENERALLY, PROFESSIONALISM, PROFESSIONALISM IN PRACTICE, 84-AUG A.B.A. J. 48; DAVID J. BECK, EXPLODING UNPROFESSIONALISM, 61 TEX. B.J. 534 (JUNE, 1998). AS TO THE EFFECTS OF A SHIFT TO HOURLY BILLING IT HAS BEEN OBSERVED THAT THE APPROACH UNDERMINED PROFESSIONALISM. TECHNOLOGICAL CHANGES HAVE INTENSIFIED AND SPEEDED UP THE PROCESS. ONE CRITIC STATES THE "HOURLY FEE SYSTEM IS A DEVILISH CREATURE THAT REWARDS INEFFICIENCY AND PARALYZES PRODUCTIVITY." "ALTERNATIVE BILLING SYSTEMS TO TIME AS A MEASURABLE VALUE," 27 SPG BRIEF 44.

[91] "LAWYERS ARE ACCUSED OF TAKING ADVANTAGE OF 'LOOPHOLES' 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). COMPARE THE MODEL CODE WITH THE ALTERED LANGUAGE OF THE ABA'S MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.3 PROVIDES THAT "[A] LAWYER SHALL ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN REPRESENTING A CLIENT." Model Rules of Professional Conduct RULE 1.3 (1998). THE COMMENT TO THIS RULE STATES: "A LAWYER SHOULD ACT WITH COMMITMENT AND DEDICATION TO THE INTERESTS OF THE CLIENT AND WITH ZEAL IN ADVOCACY UPON THE CLIENT'S BEHALF. HOWEVER, A LAWYER IS NOT BOUND TO PRESS FOR EVERY ADVANTAGE THAT MIGHT BE REALIZED FOR A CLIENT. A LAWYER HAS PROFESSIONAL DISCRETION IN DETERMINING THE MEANS BY WHICH A MATTER SHOULD BE PURSUED." *ID.* RULE 1.3 CMT.

[92] THE OATH TAKEN AS PART OF A LAWYER'S ADMISSION TO THE BAR IN OHIO PROVIDES IN PART: "I WILL IN ALL RESPECTS OBSERVE AND ABIDE BY THE CODE OF PROFESSIONAL RESPONSIBILITY ADOPTED BY THE SUPREME COURT OF OHIO; 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).

[93] FOR A DIFFERENT ORIENTATION TO ASSERTIONS THAT WE PUT CLIENTS ABOVE ALL ELSE, SEE CRAMTON'S ARGUMENT: "MY THESIS … IS THAT … 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."

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. 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 strategy, tactics, and decision-making. 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.

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

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(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).

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.

E. Educational Goals Involving Strategic Awareness and Technical Skills

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

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.

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. Musashi warns us, *"it is difficult to realize the true Way [of strategy] just through sword-fencing. Know the smallest things and the biggest things, the shallowest things and the deepest things."* [94]

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.

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 which demands an aesthetic quality.

Strategic analysis and action. 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. What, for example, is involved in making the right choices and executing them effectively? How does the lawyer learn to understand the relative *weight* of both

[94] *Warrior Lawyer*, *supra*, n. .

sides of the case, as well as the critical elements that will persuade the ultimate decision-makers? In answering questions of professional excellence—including diagnosis, evaluation, planning, and performance—what sets excellent lawyers apart? What skills and talents allow such lawyers to transcend the ordinary? For law teachers it is important to ask not only what is involved in these activities but how can they be enhanced during law school? How do we educate people to become excellent lawyers with an elegance of approach?

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. 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.

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, counseling, investigation and case development. 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, fact investigation and case development aimed at packaging the situation in ways that enhance the probability of achieving desired outcomes. 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. 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.

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.

Negotiation. 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.

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.

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.

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.

VI. A Few Observations on Educational Methods

If the foregoing represents a structure from which law schools and individual faculty members select goals for curricula and specific courses, the following offers an outline of methods that possess characteristics by which the goals are best achieved. They are presented here as part of a continuum that begins with the more passive educational methods to increasingly engaged and active methods in which an important part of the responsibility for learning is placed directly on the student.

One of the most basic methods is lecture. Lectures are good for transmitting information rather than reaching something important inside the student. Any of us could lecture to a 1000 people, or to millions through the power of television or interactive systems on the Internet. The lecture method is best when used for the efficient transferring of a large amount of information and as an introductory process for people. Lectures are much less useful for achieving the quality and depth of understanding that we seek in seminars, courses in trial advocacy and similar skills, or clinical programs. But even in such educational contexts lectures can be used for introductory activities and structural knowledge.

The other methods are more useful for achieving greater understanding and awareness. Another method is discussion. We can use discussion in a large class but it tends to work best in smaller groups. I also have described reading as an educational method. Some people forget the importance of reading for achieving insight and some degree of understanding.

Another method is role-playing. It can be role-playing by the students, and I use student participation role-playing exercises quite often. But there is also law teacher role-playing and demonstration. In my Trial Advocacy and Dispute Resolution courses I often end up attempting to 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 has the result of showing 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. Students could usefully observe a trial and we can evaluate the process and the behavior of the participants. Such observation and critique has some utility but it is a safe form of critique directed at the quality of others' performances. 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 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. In the U.S. a central element of such courses is an

intensive process of critique and analysis between teacher and student. 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.

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.

In this idea of critique, I 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.

A. Relatively Passive 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

C. A Few Brief Examples

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. Think, for example, about the goals, methods and educational challenges represented in the following sampling of courses I have taught. As you look at the course examples it is easy to see that what can or should be done 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.

Criminal Law (4 credits, 60-80 first-year first semester students). Basic materials included typical casebook on criminal law, and occasional use of paperback book relating a criminal law situation, including Kafka's *Trial*. Methods used included lecture, something close to a Socratic dialogue, role-playing exercises by students relating to problems in criminal law, videotapes, small papers and quizzes. It was supplemented by voluntary outside-of-class small group discussions for students who were interested.

Criminal Law (4 credits, seminar-sized section, 20-25 first-year first semester students). Many of the same approaches as were used in the larger section, but the seminars 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. 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.

Evidence (3 credits each semester, team taught with emphasis on trial-related evidence, 30-40 students). Another faculty member and I worked together to teach this two-semester experimental course. The assumption was that students might learn evidence better if it were closely connected with the trial process. We coupled standard evidence texts with the rule handbooks and added civil and criminal case problems in which the students researched, argued and applied evidence rules to the cases. This involved extensive discussion, some lecture for information transfer, videos and computer exercises, research assignments and memos on evidentiary issues. There were also role-playing performances centered on trial exercises intended to improve the depth and integration of students' learning through application of the material under pressure.

Jurisprudence (3 credits, first year course in second semester, 30 students maximum). 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 certain instances to several of the cases they studied in other first year classes. Problems such as *The Case of the Speluncean Explorers* were also used as well as movies that included *Nuremburg*. Primary coverage included Aristotle's *Politics* and *Nicomachean Ethics*, Aquinas, Grotius, Pufendorf, Rousseau, Locke, Hume and Hobbes as well as several American legal theorists. The second half of the semester was devoted to students reading the complete decisions in *Furman v. Georgia* (capital punishment) and *Roe v. Wade* (abortion) followed by extensive discussion, arguments, and role-playing exercises including students serving as Supreme Court justices and lawyers. The goals included not only an introduction to jurisprudential concepts but a demonstration of the roles of deep value systems 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.

Jurisprudence (3 credits, upper level elective course, 25-40 students). Much like the course described above with the addition of a seminar paper component.

Trial Advocacy (3 credits, 8-14 students in their final year of law school). Frequent role-playing exercises relating to elements of trial advocacy, requirement of a substantial trial notebook prepared in conjunction with the final full-day trial that served as their final examination. It 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 that I 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 entire case from whatever information sources were available. This included trying the O.J. Simpson criminal trial at the same time it was occurring, the police murder of Amadou Diallou while the trial was taking place, and redesigning and trying the *Cippollone* case against tobacco companies. The benefit of using "live" cases rather than packaged trial casefiles 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.

Legal Strategy (3 credits, elective, use of Chinese and Japanese military and martial arts strategy applied to law American law practice in areas of evaluation, development of case strategies, negotiation, mediation, arbitration and trial, 20 students) There is extensive use of role-playing exercises in which students are responsible for developing and implementing strategies and critiquing performance.

The course 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 central 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 third theme 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 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.

The course in *Lawyer's Strategies* seeks to bring 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 determine changes that are occurring 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.

At the end of the course students find themselves thinking in a different pattern than when they began. The change is achieved through a combination of analysis, discussion, role-playing exercises, written critiques and planning exercises.