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# STUDYING LAW AS THE POSSIBILITY OF PRINCIPLED ACTION

By GORDON A. CHRISTENSON\*

The study of law may be viewed as the critical analysis of a system of logically coherent rules governing action. In the United States, the responsibility for legal education has traditionally fallen upon the law schools. Within the legal profession and law schools a restive spirit now prevails, seeking to further clarify the meaning of that responsibility.<sup>1</sup> Two responses appear in the law schools, for good or ill.

First, there is the search for worldly skills. Evidence of this direction is found in the development of clinical methods and in concrete attempts to use professionals and the practical world for education outside the classroom.<sup>2</sup> It seeks to use the practical or professional world for preparation. Second, almost simultaneously there appears to be a turning inward, away from the world of action. This withdrawal may be described as the search for intellectual strength in the world of value and introspection.<sup>3</sup>

I shall attempt to show that proper perspectives in both directions are essential to preparation in law. Moving from an appraisal of the clinical mode, I shall consider the problem of ethical consciousness associated with action, noting why it is important to ask whether principled action is possible. Such pos-

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<sup>1</sup>See, e.g., TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: 1971, 1971 AALS PROCEEDINGS, Part One, Section II (P. Carrington ed. 1971) [hereinafter cited as the Carrington Report]; H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 48, 161 (1972) [hereinafter cited as PACKER & EHRLICH]. Thinking in these reports about the goals of legal education is pragmatic. Some goals are quality and availability of legal services, access to power, social mobility, freedom and humaneness for students, better understanding between lawyers and other professionals, intellectual inquiry, vigorous rationality, and use of secular values.

<sup>2</sup>ABA APPROVAL OF LAW SCHOOLS, STANDARDS AND RULES OF PROCEDURE §§ 302, 306 (1973). This expression of the so-called "apprenticeship method" has appeared in many forms during the brief history of legal education in the United States. Its struggle with "academic" law training and the Jeffersonian model introduced in 1779 at William and Mary is traced in II A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 173-223 (1965).

<sup>3</sup>Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) [hereinafter cited as Lasswell & McDougal]. While the contemporary focus has shifted since Lasswell and McDougal introduced a comprehensive value-oriented jurisprudence based on human dignity, the concern for thinking reflectively about choices based on explicit criteria appears the same.

sibility, I conclude, requires the successful integration of proper worldly skills with the best of intellectual powers.

### I. PREPARING THE NEW GENERATION

Every society which wishes to survive must continuously prepare the new generation. In the term "new generation" I include all those who will most likely affect our future, not only the young. Preparation is an act of faith. It expresses a belief that we can equip our children and those yet unborn with the ability both to lead full lives and to cope with problems expected and unexpected. Preparation is the function of all education. The special function of education in law is preparing new lawyers with skills and intellectual traits essential for acting within limits. The notion of reasoned limits to public and private action is in my view essential to survival. It is the duty of legal education to make such a notion possible. The long term self-interest of all requires this possibility, which I call the possibility of principled action.

I use the term "possibility" further to clarify responsibilities of academic lawyers. It is important that we consider the widest range of possibilities of action for the common good according to principles of law. This assumes law's creativity in shaping alternatives and rejects the idea that there is any single ideology which ought to govern all conduct. Just as there are many possibilities so also are there many principles. Some of these are settled; others may change; still others are logically inconsistent. The process of change must be open ended and yet imply limits to action.<sup>4</sup> We need not be concerned here about the mechanics of that process, but we are in debt to legal reasoning for the perfection of common principles through experience, in light of dissent and conflicting authority.

Survival without law as we know it is a competing possibility in preparing the new generation. Some think that behavioralism,<sup>5</sup> secularism,<sup>6</sup> and the seldom articulated jurisprudence called neo-realism (held by many contemporary American lawyers) have already collapsed faith in the possibility that law schools can

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<sup>4</sup>*Cf.* Stone-de Montpensier, *The Compleat Wrangler*, 50 MINN. L. REV. 1001 (1966). Stone-de Montpensier argues that "the law is a calculus having a logic of its own." *Id.* at 1002.

<sup>5</sup>PACKER & EHRlich, *supra* note 1, at 33.

<sup>6</sup>*Id.* at 34. Packer and Ehrlich state, "We believe *secularization* to be the prime intellectual cause of the contemporary malaise in legal education." *Id.* They draw their views on secularism largely from Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

prepare the new generation in a tradition of reasoned limits.<sup>7</sup> While the necessary condition of survival requires order, it does not require a legal system based on the social contract notions of liberty and equality with their judicially imposed limits on public and private power. Such traditional limits very simply could be eliminated. The profession of law could be shorn of its independent claim to hold "justice itself in trust."<sup>8</sup> Legal education under this alternative could mean, as some believe has happened already, training the new generation of lawyers to be technical servants of public and private power, not officers of the court committed to the common good. Rules might be applied, but in different ways under control of different institutions, without the necessity of an independent process.

Socialization of all legal services is also a distinct alternative,<sup>9</sup> retaining the possibility of principled action only to the extent that the state itself would allow. We could easily forego an independent legal system in favor of a bureaucratic one. More likely, some legal services probably will continue to move toward socialization, such as no-fault insurance, welfare administration, trust administration, and tax services, while others remain independent. Some legal services programs, when administered by government, may lose independence or risk suffering loss of funds for offensive independent action.

Classical radicalism is yet another response. Traditionally, it

<sup>7</sup>Foreword to CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (E. Kitch ed., Univ. of Chicago Conf. Series No. 20, 1970) [hereinafter cited as Kitch].

<sup>8</sup>CONFRONTING INJUSTICE: THE EDMUND CAHN READER 251-52 (L. Cahn ed. 1962).

It was our profession . . . that conceived and developed the moral pattern of the trustee, the man who acts devotedly on behalf of another and who is so exempt from the esurient ways of his society that he avoids even the possibility of conflict between his trust duties and his selfish interests. . . . Moreover, since the lawyer must conduct himself worthily as an officer of the court, he has another and more imposing fiduciary obligation: the profession holds justice itself in trust. Rightly then the humblest lawyer may preen himself whenever a court does honor to its function; and by the same token, all instances of corruption are at his cost and to his shame. What a radical standard to erect in this our acquisitive and Philistine society!

*Id.*

<sup>9</sup>Smith, *Legal Service Offices for Persons of Moderate Means*, 31 J. AM. JUD. Soc'y 37, 45-46 (1947). Smith recognizes the possibility of socialization, but is opposed to it. See ASS'N OF AMERICAN LAW SCHOOLS, *THE AVAILABILITY OF LEGAL SERVICES—1972* (M. Paulsen ed. 1972) [hereinafter cited as Paulsen]; Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 COLUM. L. REV. 1153 (1971). Dean Paulsen and Professor Brickman share the concern first articulated by Reginald Smith in 1947 for adequate delivery of legal services by private sources rather than by the government.

has sought to smash the legal order or dissolve it through physical migration or spiritual withdrawal. Ironically, in explaining a different radicalism inherent in the profession of law, Edmund Cahn wrote:

Not one of these radicalisms admits of the possibility that men may be transformed without either destroying or leaving their society. This possibility—the possibility that a man may continue to participate in his social order and nevertheless become transformed—all of them exclude. And it is this possibility on which we lawyers stake our professional lives!<sup>10</sup>

We know from what lawyers in fact do that they legislate, govern, and judge, in addition to serving clients. They provide public service as well as private. They represent both public and private interests. They are participants in the international legal system. While the forms of legal services may change, we begin with the conservative assumption that we are not willing to survive without law. Accordingly, society must prepare the legal profession to preserve the possibility of action and change according to principle.

## II. THE CLINICAL APPROACH TO PREPARATION

Recent experience with legal education's concern for the practical world has not yet demonstrated why programs now called clinical are an essential part of law study. It is not enough that clinical legal education is helpful or transitional to practice or even useful pedagogically. Why are clinical legal education methods or programs *essential*?<sup>11</sup> What is it in them which credibly can support the claims of both students and law teachers that clinical education is a necessary complement to the traditional method?<sup>12</sup>

As Bellow points out, the term "clinical" is ambiguous and impedes inquiry.<sup>13</sup> In the technical sense it means learning by

<sup>10</sup>CONFRONTING INJUSTICE: THE EDMUND CAHN READER, *supra* note 8, at 253-54.

<sup>11</sup>COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SECOND BIENNIAL REPORT, 1971-1972 (1972) [hereinafter cited as CLEPR]. In the President's Report, William Pincus states:

CLEPR . . . has always had human development through education as its primary concern. We have also insisted that the service setting is *essential* for this kind of education. This is because human development . . . requires the assumption of professional responsibility.

*Id.* at 8 (emphasis added).

<sup>12</sup>For a presentation of some of the factors leading to these claims, see Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT 27, 28, 31-33 (1973) [CLINICAL EDUCATION FOR THE LAW STUDENT is hereinafter cited as CELS].

<sup>13</sup>Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CELS, *supra* note 12, at 374, 375.

students under professional supervision, handling real problems in relationship with a real client for academic credit. As a strategy for maximizing intrusion into a particular curriculum,<sup>14</sup> control over the conditions of experimentation and development,<sup>15</sup> or the impact of modest grant funds,<sup>16</sup> this limited definition is highly effective. However, use of the service setting demands a more satisfactory reason for being essential; it demands integration with the best of the analytic methods.

#### A. *Legal Services of Higher Quality and Lower Cost?*

One justification for clinical programs is that law schools are partly responsible for providing a better quality of legal services at moderate cost.<sup>17</sup> Let us call this the socioeconomic responsibility of law schools, since it merges the quality of legal education with socioeconomic goals. This justification is questionable on two bases. The first lies in its economic assumptions. The second results from its failure to distinguish utilitarian judgments about social needs for lawyers from the method applied for their supply.<sup>18</sup>

First, it is assumed that, if law schools developed and used clinical programs properly, the supply of quality delivery systems, integrating paraprofessionals and professionals, would automatically create markets for the services provided. Presumably, competition would ensure wider market penetration, better service, and lower cost.<sup>19</sup> It is postulated that students would accept such a liberal view in their payment of tuition and course enrollment.

It is also argued that efficient private law firms could create a market for teams of clinically trained lawyers and paraprofessionals. However, if the price of service is to go down, the law firms will themselves have to become machinelike bureaucracies in order to achieve economies of scale, and efficiency by itself

<sup>14</sup>Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CELS, *supra* note 12, at 56, 61.

<sup>15</sup>See Pincus, *supra* note 12, at 30-31.

<sup>16</sup>See Brickman, *supra* note 14, at 60.

<sup>17</sup>*Id.* at 65-66.

<sup>18</sup>*Cf.* Rawls, *Two Concepts of Rules*, 64 *PHILOSOPHICAL REV.* 3 (1955). Rawls distinguishes the utilitarian need for a rule from the method used to apply it.

<sup>19</sup>See Kitch, *supra* note 7, at 39; Brickman, *supra* note 9. *But see* Paulsen, *supra* note 9, at 57-61. Posner clarifies the cost analysis based on competition to suggest that litigation for the poor and middle class might be a good strategy if lawyers were plentiful enough to drive the price of legal services very low. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 346-47 (1972).

surely will neither benefit the average citizen nor serve the interests of the poor. An increase in quality without a public market is not likely to reduce price or to spread the benefits of competition.<sup>20</sup>

Economic priorities, either at present or in the foreseeable future, are not likely to create much residual market for legal services offered through law school clinical programs. Nor is placement of graduates in legal services programs dependent on any law school clinical program, except, perhaps, as a means of producing lawyers who will be satisfied with less income. An unlikely alternative might be for the public to fund law school clinics as separate institutions. Teaching hospitals have survived by claiming a large portion of health care funds. Law school clinics, however, are not likely to sustain the same support.

Second, law schools should not confuse the legal service need or market with their proper concern for what law schools do, nor should they be too eager to imitate the health care strategy. Although some arguments for clinical programs are still drawn from the battered analogy to the health delivery system,<sup>21</sup> the forms and quality of that system are highly questionable and should not be used as valid analogies.<sup>22</sup> The health delivery system is supported by clinical medical training centered in urban or suburban hospitals. Quality health care is provided through equipment and services which are elaborate, sophisticated, and thoroughly integrated. It is quality at a price. This centralization may have diverted health care from the poor and the communities by making its cost prohibitive and by making medical resources dependent on teams of specialists and technicians in hospitals away from community needs. Even when care in selecting medical students seeks to maximize the distribution of community services,

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<sup>20</sup>See generally Paulsen, *supra* note 9, at 16-49. Dean Paulsen explores the consequences of group legal services, prepaid insurance, and specialization, and the results of experiments with some of these forms of legal service in Louisiana and other states. The leading study on prepaid legal services, he states, concludes that "'in general, legal insurance cannot achieve the economies of scale possible through group legal services.'" *Id.* at 37. He also indicates that specialization as a result of group legal services may "prove to be a cost, rather than a cost saver, for the general public" as well as result in presenting dangers of "lawyers becoming too narrow." *Id.* at 46. See also Kitch, *supra* note 7, at 39.

<sup>21</sup>Creger & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education*, in Kitch, *supra* note 7, at 77. Stoltz, Packer, and Ehrlich all indicate it is a bad analogy. PACKER & EHRLICH, *supra* note 1, at 39; Stoltz, *Clinical Experience in American Legal Education: Why Has It Failed?*, in Kitch, *supra* note 7, at 54, 70.

<sup>22</sup>R. COOK, *THE YEAR OF THE INTERN* (1972).

medical technicians and doctors tend to work in hospitals, not in the communities. Some states have stopped building hospitals on the grounds that they reflect the wrong priorities for health care, are serving the wrong people, and are too costly.<sup>23</sup>

In other words, the questions of public priorities have not been thoroughly considered in the simplistic application of the analogy. Wider sharing of health or legal care does not necessarily result from clinical training. It may well lead to the opposite result. The reaction of the treated against the treatment received at teaching hospitals, where patients are mere teaching objects, is only beginning to surface. Additionally, some medical interns are seriously questioning the quality of an education that follows medical technique and lacks humanity.<sup>24</sup>

Let me rephrase my skepticism in another way. It may be that the most efficient way of disseminating good legal care would be to simplify our legal system. To do that, very high quality, sophisticated lawyers, obviously concerned with human needs, will be required. If our premise is that the existing legal system is becoming more complex, and if we train lawyers and paraprofessionals to help cope with the existing complexities more efficiently and humanely, then such a choice could well solidify and reinforce existing ills of the status quo, preventing the change and simplification of law. A new bureaucracy and constituency is thus created, perpetuated by convenience which soon gains claims to necessity.

However, the permanence of technical rules is not so easily accepted for the good of society. What happens if a change in public policy or technology should require changes in the rules? Assuming that a change occurs over the objections of those it will displace, who would be responsible for their obsolescence?<sup>25</sup> Who would employ them or pay to retrain them? The vested interest of forces of these kinds is hard to measure, but I would assume that it creates a very great inertial draw upon our ability to

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<sup>23</sup>Herbert Denenberg, Commissioner of Insurance of the Commonwealth of Pennsylvania, has stated that present priorities of urban hospitals—all of which seem to be trying to provide a functionally comprehensive facility regardless of need—cost the public millions in duplicative and underused services. Interview between Dick Cavett and Herbert Denenberg, Dec. 18, 1973, broadcast by the American Broadcasting Corporation.

<sup>24</sup>R. COOK, *supra* note 22.

<sup>25</sup>R. M. Hutchins views theoretical legal education as the most practical for preparing lawyers for leadership in a changing world and for avoiding obsolescence. Hutchins, *The University Law School*, in *THE LAW SCHOOL OF TOMORROW* 5, 7 (D. Haber & J. Cohen eds. 1968).



change or simplify the legal system or to spread its benefits. As professional as the tax bar and the Internal Revenue Service are, how resistant is the tax code to simplification? How resistant is the general bar to the elimination of "liability" or the patent bar to a tougher standard of patentability?

In the total process of legal education as I have defined it, the socioeconomic considerations are important for the Congress, the bar, the services industries, and all citizens. Law schools should also be concerned with responding in quality, but they are neither social service agencies<sup>26</sup> nor formulators of the future directions of manpower supply and demand. Their essential function is limited to preparing future professionals to practice in and cope with a changing world. All other functions are important, but they are incidental and flow from different assumptions. In addition, the secondary functions depend largely upon the kinds of skills learned in the study of law in its primary formulation.

#### B. *A New Synthesis of Theory and Practice?*

Clinical legal education requires a sounder relationship with the world of affairs before it can be accepted as an integral and valuable part of law school curricula. Langdell and his heirs, as everyone likes to point out, introduced the case method to provide a synthesis between the actual world of judicial decisionmaking and the scholarly world of intellectual or scientific inquiry into legal principles.<sup>27</sup> The method replaced presentation of legal principles through the use of lectures such as Blackstone's *Commentaries*. It was a revolution in legal education, and it still has a profound effect and role. The radical empiricism of case study is compelling.<sup>28</sup> Since that time, numerous modifications of the case method approach have been proposed, all designed to reach a better synthesis. Notable are the contributions of the realists and the Columbia law faculty of the twenties and thirties. Lasswell and McDougal in the area of policy-science also attempted to link the disciplines of the social sciences with law in a comprehensive methodology.<sup>29</sup>

Advocates of clinical legal education also claim a new synthesis of the world of action with intellectual inquiry, within a service context.<sup>30</sup> Some see it as stimulating the only new thought

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<sup>26</sup>Kitch, *supra* note 7, at 48.

<sup>27</sup>See generally Stoltz, *supra* note 21.

<sup>28</sup>Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928).

<sup>29</sup>Lasswell & McDougal, *supra* note 3.

<sup>30</sup>It may be that the experience with clinical legal education will lead us back to the

on legal education in the 100 years since Langdell.<sup>31</sup> Current arguments in support of this claim seem to be grounded in the social science of the neorealists. Neorealism, as interpreted by Kitch, views "law not as a cultural, but as a behavioral phenomenon, best understood through the techniques of the social sciences."<sup>32</sup> Judicial opinions are viewed as rationalizations for decisions grounded in service of clients and little related to the reasons set forth. The practice of law is seen as the art of maximizing the client's interests using a panoply of clinical skills called service.

With its material and practical origin, neorealism lends itself to clinical legal education. Law students can plunge into the heart of legal practice by representing a client with a "just cause" (indigent, popular, or powerful clients all have just causes). Divorced from a client's cause, clinical education simply teaches a technique of service which, if coupled with critical thought and substance, may indeed be a most valuable aid in offsetting a tendency for ethical arrogance.<sup>34</sup>

However, with whatever interpretation, the new movements in clinical methods are not yet sufficient for an adequate connection of substantive reasoning with the world of action. Whether

classroom. Professor Bellow seems to say that pressures placed upon the student for resolution of client problems in the clinical experience tend to push intellectual inquiry aside in favor of practical solutions requiring psychological insights. Bellow, *supra* note 13, at 390-91. The clinical attempt to turn the study of law away from a self-contained discipline also may have the opposite effect. Professor Stoltz states:

Clinical experience seems to value practical experience over intellectual abstraction and its incorporation into the curriculum would push students away from interdisciplinary efforts back into the profession, thus tending to make the law more of a self-contained discipline.

Stoltz, *supra* note 21, at 68.

<sup>31</sup>CLEPR, *supra* note 11, at 7-8.

<sup>32</sup>Kitch, *supra* note 7, at 9.

<sup>34</sup>*Id.* at 11. Kitch comments that "Neo-Realism is receptive to the idea of clinical education." *Id.*

<sup>34</sup>The concentration of Bellow's clinical methodology on human relations skills follows the ideas of Erikson, Watson, and Stone to their logical conclusion. See text accompanying notes 36-43 *infra*. But in so doing, the clinical methodology risks becoming detached from substance. Clinical methodology is capable of using the power of psychological manipulation with law as an instrument in the service of any client in the world of affairs. Thus, the synthesis achieved through action may confirm the cynicism of the neorealists. Claims for the clinical method as outlined by Bellow do not seem to agree with teaching the personal integration of fact, idea, and value through action as described by Jerome Hall in his integrative jurisprudence. The achievement of such an integration requires teaching methods which give one the possibility of forming a world-view and therefore the possibility of participating in conscious (ethical) action in the world of affairs. This integration requires a methodology comprised of many perspectives. Bellow, *supra* note 13; J. HALL, FOUNDATIONS OF JURISPRUDENCE (1973).

in law school or in practice, techniques in service of selected cases are always tied to service commitments. Emotional or ideological involvement with causes of community action, defense of indigents, distribution of legal services, assaults on poverty, or environmental or consumer crusades may impede, not aid education. If the main function is to learn skills of service, then clinics supporting causes of the wealthy are as valid as those for the poor—and they may be better if they involve more complex issues. If social justice is the main object of the clinical method, then its justification is not education but service itself.

Clinical programs select clients to whom students are assigned representation for educational value under supervision. The process for such selection necessarily reflects ethical decisions inherent in professional judgments and independence. The ability to appraise such causes independently requires an intellectual foundation in the values of the profession and the legal system in which it operates. Skepticism still warns us that skill in service of any absolute ideology is suspect. Technique without a conscious ethical base for choice can trick us into thinking that the righteousness of client or cause is justification enough. And we are left, as scientists are with the bomb, with a process external to our own premises.

### C. *A Means to Provide Psychological Insights?*

Then by what criteria should a sound linkage to the world of affairs be measured in law school? If they be human or psychological insights into interviewing, negotiating, and adversary skills, how can the clinical method achieve those ends more efficiently than vicarious methods or problem methods concerning ends and means? If they be personal insights into the risks of action on behalf of particular clients, how can risk be countenanced (if we are to learn from mistakes) in the commitment to the client's best interests? Will supervision open or narrow insight? Knowledge of what the law is still determines the main ethical base of the lawyer. Even if the law itself is instrumental in manipulation, as we have been led to believe by the neorealists and behavioralists, substantive analysis and choice are required. How does a claim of civil disobedience, for example, differ from a claim of ideological superiority to the law?<sup>35</sup> How can the clinical method provide a practical way to handle such questions?

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<sup>35</sup>See generally A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* §§ 69-74 (1971). Ehrenzweig attempts to infuse substantive questions such as these with worldly insights from psychology. In his preface, he states:

In his psychological studies, Erikson points out that human biological maturation now occurs 3 to 4 years earlier than a century ago, while the modern educational system delays role commitments until much later. In addition, during the expanded time, the resolution of personal identity is accompanied by a transformation and crystallization of ideology. Watson's and Stone's works add to the understanding we are acquiring of this period in which a novice becomes a professional. According to Stone, legal education's generalist tradition attracts those who are undecided about their career choices.<sup>36</sup> Modern students tend to seek a personal commitment which will lend significance and integrity to personal identity and will be compatible with their professional identity. Thus, Stone and Watson both conclude that, to the extent that an occupational choice is made in law school, legal education is involved in the student's struggle to resolve identity.<sup>37</sup> Legal education becomes both a psychological and intellectual transition into the professional world.

Traditionally, this ritual of entry takes place in the classroom through the Socratic method. Psychological analysis of legal education exposes the aggression underlying the Socratic method. It also offers evidence that the ritual combat can be displaced to the world of action. This ritual at its best channels hostility into academic inquiry.<sup>38</sup> At its worst, it can be self-destructive or dissipate into games.

Clinical education programs can serve as vehicles to carry this ritual combat into the world of indictment, trial, verdict, and sentence. These programs, however, are moving toward behavioral technique and away from combat ritual. As a consequence, we are seeing the main thrust of the clinical method heading toward human relations role playing—into the protective custody of the psychologists and away from the world of action. Some professors have translated what might be called preventive psy-

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It is to [today's young] that I shall try to prove that if their trust in a better world is to bear fruit, they must shun the mere replay of the age-old debate and trade the shop-worn tools of the "Schools" for those of a modern psychology which, with the help of semantic self-control, will separate conscious reason from much of the subconscious irratio of the past. It will be for others to forge the new tools. What I have hoped to do is to offer a key to the toolshed.

*Id.* at 11.

<sup>36</sup>Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 398-400 (1971).

<sup>37</sup>*Id.* at 440; Watson, *On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis*, in CELS, *supra* note 24, at 141-42.

<sup>38</sup>Stone, *supra* note 36, at 406-18.

chotherapy into professional human relations education, teaching interviewing, counseling, mediating, and negotiating. Bellow has recently made such a logical extension from clinical education to methodology. Sacks pioneered the effort.<sup>39</sup> Bellow sees the critical areas of the clinical method as:

- 1) the student's assumption and performance of a recognized role within the legal system; 2) the teacher's reliance on this experience as the focal point for intellectual inquiry and speculation; and 3) a number of identifiable tensions which arise out of ordering the teaching-learning process this way.<sup>40</sup>

Clinical legal education seems to yield easily to psychology, and this may indeed be its strongest contribution to date. However, the psychological dimensions of legal education must be distinguished from the use of psychology as a technique in clinics. Bellow's suggestion of the centrality of role playing in the clinical method, representing psychological adjustment in the professional world, and his analysis of its instructional counterpart, are admittedly limited. Stone outlines the psychological dangers of clinical education: that extraordinarily complex and bad emotional entanglements can result; that no intellectual guidelines exist for avoiding emotional involvement; and that the romantic call to put aside professional limits and "plunge into the human relationship" is irresistible.<sup>41</sup> We are beginning to see how costly in time and professional development are the psychological involvements of the clinics even with the best of academic supervision. While law school clinics handle real cases, students as yet have neither incentives to assume nor defenses against the risks of the practical world and the disastrous consequences that can occur. We do not know whether the clinical method is the best way to establish a professional relationship from a psychological point of view.<sup>42</sup> We have faith that refinements of clinical experience will lead to the self-critical learning of interviewing, counselling, and negotiating skills—human relations skills—prior to emotional involvement with clients and their problems.<sup>43</sup> If this

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<sup>39</sup>Sacks, *Human-Relations Training for Law Students and Lawyers*, 11 J. LEGAL ED. 316 (1959).

<sup>40</sup>Bellow, *supra* note 13, at 379.

<sup>41</sup>Stone, *supra* note 36, at 392, 433-34.

<sup>42</sup>The danger lies in the lack of faculty commitment to clinical education as a legitimate and valuable activity, for, as Stone warns, without such a commitment "students will perceive clinical work as no more than a therapeutic outlet." *Id.* at 427.

<sup>43</sup>*See, e.g.,* Watson, *On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis*, in CELS, *supra* note 12, at 139; Watson, *Professionalizing the Lawyer's Role as Counselor: Risk-Taking for Rewards*, 1969 LAW & SOCIAL ORDER 17; Watson, *The Quest*

end is to be achieved, however, a secure world-view is necessary, especially for lawyers.

### III. WORLD-VIEW

In 1923, Albert Schweitzer considered the relationship between ethical consciousness and what he termed a "world-view."<sup>44</sup> Schweitzer pointed out that stoic and Eastern spiritual influence initially placed ethical efforts above material progress in our tradition.<sup>45</sup> Then, "man's ethical energy died away, while the conquests achieved by his spirit in the material sphere increased by leaps and bounds."<sup>46</sup> Scientific, technical, and artistic achievements were mistaken for civilization, with no ethical base.<sup>47</sup> Thinking we were on "firm ground at last," we sank helpless in the stream of events. Schweitzer concluded that the glorification of practical common sense causes man to turn from ethical consciousness to the hubristic exultation of boys tobogganing down a hill, not thinking what the next hill or turn might bring. A practical person may be under the influence of opinions and emotions created by the facts of the moment.<sup>48</sup>

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*for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968).

<sup>44</sup>A. SCHWEITZER, *THE DECAY AND THE RESTORATION OF CIVILIZATION* (1923).

<sup>45</sup>*Id.* at 39-40. Stoicism in ancient Greek philosophy exercised spiritual influence, as did Chinese, Indian, and Jewish civilizations in placing ethical efforts above those of the material. The Renaissance combined action and ethics for a time.

<sup>46</sup>*Id.*

In this way our own age, having never taken the trouble to reflect, arrived at the opinion that civilization consists primarily in scientific, technical and artistic achievements, and that it can reach its goal without ethics, or, at any rate, with a minimum of them.

*Id.* Stated another way, the fact that an achievement is possible implies a neutral ethical posture which tends to permit "progress" even if it does not espouse it. This statement is similar to neorealism in contemporary law. See Kitch, *supra* note 7, at 9.

<sup>47</sup>See Letter from Holmes to Laski, June 1, 1919, in *HOLMES-LASKI LETTERS* 210 (M. Howe ed. 1953). Holmes writes:

When the Europe and Asia man said Europe has given us the steam engine, Asia every religion that ever commanded the reverence of mankind—I answered I bet on the steam engine. For the steam engine means science and science is the root from which comes the flower of our thought. When I have seen clever women who have read all their lives go off into enthusiasm over some oriental, pseudo-oriental, or spiritualistic fad it has struck me that all their reading seems to have given them no point of view—no *praejudicia*—or preliminary bets as to the probability that the sign turn to the left will lead to a *cul de sac*.

Holmes' "point of view" approaches Schweitzer's "world-view." Both affirm science and the world.

<sup>48</sup>A. SCHWEITZER, *supra* note 44, at 42-43. Compare Kayne's case studies of the same exaltation felt by some clinical law students in anticipation of going to court for the first time and of the dangers of the clinical program when it fails to prepare students ade-

Schweitzer attempted to reestablish an ethical basis by proposing ethical constructs for our convictions and for the ideas we seek to stamp on reality. A world-view is thus derived from personal expression of ethical choice reflected in restraint on power and control of material change.<sup>49</sup> Reawakening of the ethical spirit begins with a feeling of horror at the alternative, for "progress" without regard for ethical values is not civilization.

It is a tradition of restraint, conscious choice, requiring a cultural conception of law:

[It is] supremacy of reason over the dispositions of men [so] that they, and the nations which they form, will not use against one another the power which the control of these forces gives them, and thus plunge one another into a struggle for existence which is far more terrible than that between men in a state of nature.<sup>50</sup>

It is by now trite to say that the normative conceptions of law have not kept pace with the prolific creativity of modern science.<sup>51</sup> The enlightenment, which broke the hold of the church over the moral concerns of men, forced orphaned ethical energy to fuse with secular pursuits.<sup>52</sup> The resulting tension between scientific skepticism and moral imperatives rocked the world in the 20th century in an eruption of totalitarianism in both East and West.<sup>53</sup> Tension between reason and religious will, which has a long his-

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quately. Kayne, *Cases Illustrating Ethical Problems*, in CELS, *supra* note 12, at 114, 119-25.

<sup>49</sup>A. SCHWEITZER, *supra* note 44, at 64.

<sup>50</sup>*Id.* at 37.

<sup>51</sup>See Lasswell, *International Lawyers and Scientists as Agents and Counter-Agents of World Public Order*, 65 PROC. AM. SOC'Y INT'L L. 366, 372 (1971). Lasswell contrasts the traditional training of lawyers to passive client-servicing with the need for training them to mold public policy actively, especially in cooperation with scientists. *Cf.* Letter from Laski to Holmes, Aug. 7, 1917, in HOLMES-LASKI LETTERS, *supra* note 61, at 96. Laski writes:

I am in accord with your remarks on progress. I think we are mistaking material advance for spiritual enrichment. The number of people who contentedly believe that we grow better as the clock slips by is really appalling. I suspect the fact is that unless you are willing to cultivate an intellectual detachment you grow into that lazy optimism as an excuse for the facts. I can see real progress in scientific achievement but though it's added to the comfort of the world I doubt whether as yet it has directed the desires of men and women into socially productive channels . . . . Until we go beyond the stomach stage of civilisation I think the less we talk about progress the better.

*Id.*

<sup>52</sup>See M. POLANYI, *THE TACIT DIMENSION* 57 (1966).

<sup>53</sup>M. POLANYI, *THE LOGIC OF LIBERTY* 109 (1951). "Why did the contradiction between liberty and scepticism never plunge the ancient world into a totalitarian revolution, like that of the twentieth century?" *Id.*

tory,<sup>54</sup> "has kept Western thought alive" and has presented us with infinite creative possibilities.<sup>55</sup> The powerful combination of the creativity of modern science and the normative traditions of law similarly gives us the possibility of controlling change and facing the future without despair.<sup>56</sup>

Michael Polanyi, a scientist and thinker of this century, and Wilhelm Dilthey, an historical philosopher of the 19th century, shared Schweitzer's concern for the reconciliation of outward action with inner knowledge and value. Polanyi sought integration of liberty and the scientific ideal through an epistemology of personal or tacit knowledge.<sup>57</sup> His world-view requires the affirmative integration of subjective knowledge and outward experience which occurs in purposeful action. The expression of knowledge and experience in act contains tacitly much more than the act seems to require; the "tacit dimension" is the basis for expression of the particular in creative action which is conscious but does not explain everything.<sup>58</sup> Similarly, the art of a lawyer always seeks a new level for resolving a dispute or handling a concrete problem. This new level generally restates or distinguishes the principles at odds, reconciling them in decision, suspending them by settlement, or changing them by legislation.

Wilhelm Dilthey expressed a related view in his philosophy of historical understanding.<sup>59</sup> A world-view requires a whole understanding of a person's inner and outward experience. For Dilthey, "the course of a life preserves the relation between the outer and something inner, which is the meaning of that life . . . ."<sup>60</sup>

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<sup>54</sup>For a discussion of the rational development of the irrational in jurisprudence, see A. EHRENZWEIG, *supra* note 35, §§ 121-75.

<sup>55</sup>M. POLANYI, *supra* note 53, at 109-10. "Modern thought is a mixture of Christian beliefs and Greek doubts. Christian beliefs and Greek doubts are logically incompatible and the conflict between the two has kept Western thought alive and creative beyond precedent." *Id.*

<sup>56</sup>See Lasswell, *supra* note 51. Lasswell is concerned with this union in terms of its consequences for world public order. Cf. O.W. HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920). On the tradition of the law, Holmes said, "But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity." *Id.*

<sup>57</sup>M. POLANYI, *supra* note 54; M. POLANYI, *PERSONAL KNOWLEDGE* (1958).

<sup>58</sup>Polyani's world-view approaches that of Holmes, who once wrote, "The postulate of science is that everything can be explained—but with the view of man that I take, this perfectly well may not be so." Letter from Holmes to Laski, Feb. 22, 1929, in HOLMES-LASKI LETTERS, *supra* note 61, at 1134.

<sup>59</sup>See H. TUTTLE, *WILHELM DILTHEY'S PHILOSOPHY OF HISTORICAL UNDERSTANDING: A CRITICAL ANALYSIS* (1969).

<sup>60</sup>PATTERN & MEANING IN HISTORY: THOUGHTS ON HISTORY AND SOCIETY—WILHELM DILTHEY 91 (H. Rickman ed. 1962).



The ability to recognize the objective validity of one's own experience provides the basis for understanding the experience of another in a different time and place. This "historical understanding" implies the possibility of action affecting others, consciously tempered by restraint and reciprocity. Such insights permit a healthy connection with the world through legal analysis of cases or self-critical examination of one's handling of a legal problem.

During the first half of the 20th century, the Spanish philosopher Ortega y Gasset also presented a view of individual authenticity, but a view in the context of the masses and the rise of totalitarianism. It was characterized by his statement that "I am I and my circumstance."<sup>61</sup> The relevance of this concept for legal education at this time in the profession's history is troublesome, for the profession seems to make peace with a world of totalitarian ideologies. Ortega proposed that "there are as many realities as there are points of view. The point of view creates the panorama."<sup>62</sup> The ability to structure these points of view or perspectives, which Ortega calls "culture," consists of the use of abstract thought, allowing one to stand outside his circumstance, turn back, look at it, and reabsorb it in a different fashion, thereby grasping one's circumstance in the concrete and enabling the possibility of authentic action. The resulting relationship with the world allows the possibility of ordering, illuminating, creating, and controlling circumstances. Through evaluating one's own circumstance in the profession or study of law and gaining perspective, a student similarly may acquire the possibility of conscious and authentic action. Such a world-view could also be used to introduce a form of populism to the profession, as indeed the clinics within law schools seem to imply. Within limits and spaces, as in legal forms of action or procedure, there is conscious or ethical shape given to particular legal disputes in the circumstances of decision by participants who know their identities.

Through understanding of the art of the law, students can participate in a possibility that they may act on principle in the world of affairs on behalf of a client or a public or private interest. As in the structures of science,<sup>63</sup> music, and myth,<sup>64</sup> law is both

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<sup>61</sup>See J. MARIAS, JOSE ORTEGA Y GASSET: CIRCUMSTANCE AND VOCATION 361 (1970).

<sup>62</sup>*Id.* at 172. The philosopher Spinoza, who also constructed a philosophy viewing the world as a whole, said, "[I]t is of the nature of mind to perceive things from a certain timeless point of view." B. RUSSELL, WISDOM OF THE WEST 201 (1959). See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971).

<sup>63</sup>See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

<sup>64</sup>See C. LEVI-STRAUSS, THE RAW AND THE COOKED 26-32 (1969).

cultural and creative, operating on various levels of thought and emotion. As myth resolves cultural tensions, music also reconciles intellectual form and emotion. The law closely resembles the cultural expression of these arts, for it also uses the powers of reason with the emotions of injustice and fairness.<sup>65</sup> It deals with pain, hurt, killing, and vengeance. We may also make it dance, if our world-view is as healthy as Holmes'—or Zorba's.<sup>66</sup>

Legal education may not easily retreat from a world-view or be completely captured by its compromises. The possibility that the new generation in the profession can be prepared for principled action requires such a healthy view of the world. We can now see that neither traditional legal education nor the introduction of clinical modes are sufficient in themselves—though they surely may become so—to overcome the nihilism of neorealism in the preparation of the new generation.<sup>67</sup>

<sup>65</sup>See Christenson, *In Pursuit of the Art of Law*, 21 AM. U.L. REV. 629, 631-32 (1972).

<sup>66</sup>Watson made the application of Zorba's world-view to law "that for ideas to be communicated effectively they must be danced . . ." Watson, *Professionalizing the Lawyer's Role as Counselor*, *supra* note 43, at 21.

<sup>67</sup>M. POLANYI, *Perils of Inconsistency*, in THE LOGIC OF LIBERTY 93 (1951). In his essay Polanyi explains how freedom of thought destroyed itself in Europe when the conception of liberty was pursued to its ultimate conclusion—nihilism, a destructive psychological world-view leading to totalitarianism. He concludes, suggesting images of my interpretation in part I of this essay:

The downfall of liberty which follows the success of these attacks [by the nihilistic intelligentsia of Central and Eastern Europe on Wilson's appeal to law and reason] demonstrates in hard facts . . . that freedom of thought is rendered pointless and must disappear, where reason and morality are deprived of their status as a force in their own right. When the judge in court can no longer appeal to law and justice; when neither a witness, nor the newspapers, nor even a scientist reporting on his experiments, can speak the truth as he knows it; when in public life there is no moral principle commanding respect; when the revelations of religion and of art are denied any substance; then there are no grounds left on which any individual may justly make a stand against the rulers of the day. Such is the simple logic of totalitarianism. A nihilistic regime will have to undertake the day-to-day direction of all activities which are otherwise guided by the intellectual and moral principles that nihilism declares null and void. Principles must be replaced by the decrees of an all-embracing Party Line.

*Id.* at 107-08. He adds a thought that nihilism threatened to engulf ancient Greece when brilliant young men adopted a philosophy of "smash-and-grab" which they got from the pursuit of unfettered inquiry introduced to them by Socrates and his educational method. As a reaction to this, Socrates was impeached and executed. *Id.* at 109.

Socrates had a world-view—he was a citizen of the world and had "virtue" in his actions which the young nihilists had rejected by turning the Socratic method on itself. Neorealism in modern law threatens the same for the brilliant young men and women of the Socratic case method. A more adequate world-view, whether through clinical education or some other method, is essential to maintain the function of legal education I have proposed—preparing the new generation to the possibility of principled action.

#### IV. INTELLECTUAL AND WORLDLY PERSPECTIVES

To complete my thesis that the function of legal education requires the possibility of action based on principle, I shall propose two sets of perspectives. These are drawn mainly from my interpretation at this point, but are hardly original. One introduces intellectual perspectives which are possible to learn; the other suggests worldly perspectives which are possible to experience. Each set, however, must be seen from the other's point of view. Together, they are whole. If my thesis is correct, both sets are necessary to prepare the new generation for the possibility of principled action in the law. If I have followed my own perspectives well enough—which is, of course, the most difficult task of all—each perspective should strike a note of recognition in the other.

##### A. *Intellectual Perspectives for Inquiry*

The cultivation of skills of inquiry requires intellectual competence which becomes one with skills of practice or action. To this end, there are a limited number of skills which law schools ought to promote in preparing novice lawyers. The most basic of these are (1) analysis, (2) criticism, (3) creativity, (4) artistry or craft, (5) restraint, and (6) systematic comprehension. None of these is new; each presumes action. No attempt to be all-inclusive is required nor is any school of jurisprudence preferred over any other.

Analytic skill is developed through objective and skeptical reduction of facts and law into the simplest conceptual parts. Most law schools take pride in this highly important process. To state the question in context with the clearest and most economic use of language is a skill essential to conscious decisions. Analysis of legal relations permits the most aware introspection. Indeed, analysis turned on itself can lead to paralysis of decision—as in nihilism—or to triviality of decision. Skillful analysis does not stand apart from context or from the action required. The chief perspective of analysis is skepticism—doubting from many points of view until the end of doubting is called up from other more worldly depths and the action resulting is only that which is consciously necessary according to principle.

Critical skill requires the appraisal or the evaluation of a legal decision or process in relation to criteria which each person identifies and clarifies explicitly. This intellectual skill is particularly necessary in avoiding the dangers of blind commitment to action as a participant—for example, as an advocate or decision-

maker. At some point it is essential to appraise an appellate decision, a piece of legislation, a government action, or a position in defense of a client according to external criteria. Is the decision logically necessary? Is it sound? Is the legislation designed to meet demonstrated need but no more? Is the defense believable as well as logical? Does the action have intellectual integrity? Does it hide emotion in verbalism either wittingly or unwittingly? Is the reasoning internally consistent? Is the process comprehensive? This judgmental skill is among the most difficult to learn and among the most valuable for principled action. Even if disagreement over this or that principle emerges, the capacity for independent appraisal free from ideology or imposed criteria is imperative in holding worldly action accountable to explicitly defined standards. More often than not these standards are law, and more likely basic or constitutional law. Critical thought also implies the evaluation of the various alternatives for action.

Creative skill requires more than analysis or criticism. It suggests synthesis, the construction of alternative modes of handling problems, the ability to foresee and ameliorate future problems of law and society, and ingenuity in inventing legal structures to advance the public good. Law schools, being of a skeptical mold, do not easily expose themselves to the risks of creativity. Lawyers cannot afford to be fancy in their client's interests. The skill of creativity I refer to, though, is the nurturing of those inner resources of ingenuity and the use of all relevant knowledge and discipline in the solution of important legal problems. The release of open ended, highly disciplined speculation in law schools is one appropriate approach. The construction of alternative legal systems, with incentives and disincentives and a long term view, might be another, for survival-organized society may need to create alternative systems of property, criminal law, wealth, family, organization, obligation, and liability. Creativity in law also requires the focus of action. Many draft statutes or private arrangements have been brilliant creations but have died for want of roots in the world where they must survive. Legal innovation requires a healthy respect for the world as well as a spirit of venture. It also demands use of all the sciences and other disciplines in the creative work of construction.

Legal artistry requires the conscious cultivation of worthy intellectual traits, as well as flair. There are many of these traits. They are unique to the intellectual tradition of law and find kind reception in the practical world. Freund captures the most essen-

tial of these:<sup>68</sup>

- a. *Dialectic thinking* about two conflicting principles and the art of getting inside the conflict.
- b. *Contextual thinking* which requires asking what one means by a question.
- c. *Ethical thinking* about the meaning of just expectations through concepts such as the law of contracts and public policy.
- d. *Genetic thinking* about how the law responds to change in the modes of production and distribution, labor, "progress," and negligence, and to the changing patterns of life.
- e. *Associative thinking* by metaphor and adaptive or assimilative processes using concepts and legal fictions, with the aim of categorizing ideal types in order to assimilate change and continuity.
- f. *Institutional thinking* about the central position of a procedural framework and the interrelation of ends and means, such as in negotiating and drafting contracts, which can serve in illuminating international disputes and constitution-making.
- g. *Self-critical thinking* by abandoning the old in favor of a fresh formulation, or by preferring change over continuity by a process of overruling, deciding whether to continue the process of assimilation or to abandon precedent.

The skill of restraint is rooted in the tradition of law. It contains the most valuable of the culture's human experiences. It includes the notion of a reasoned limit, knowing where to draw the line and how to limit the exercise of excessive public and private power. The notions of liberty, due process, and criminal and civil liability require fixing standards of conduct beyond which the sanctions of law are brought to bear. The tradition of restraint through standards set by reason and experience or through legal process requires proportionality and balance, the ability to limit action and response to necessity, the test of reasonableness in context. The skill of restraint is needed for preserving civil liberties, framing legislation, and maintaining the rule of law. It pervades all substantive law.<sup>69</sup> The skill is essential for

<sup>68</sup>P. FREUND, *The Law and the Schools*, in ON LAW AND JUSTICE 108, 110-15 (1968).

<sup>69</sup>C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 182-88 (2d ed. 1963). "The criteria for determining whether law is right law are very general rules of

all action which claims the practical effect of saying, "here is the limit of your authority: and, hither shall you go, but no further."<sup>70</sup>

The skill of systematic comprehension is the means by which we observe the doctrinal analysis of legal concepts and processes as a coherent whole. This skill is aided by legal scholarship, saving the task of comprehension for the bulk of law school courses. Comprehensive doctrinal analysis thus requires perspectives derived from systematic thinking. A professional should be able to clarify assumptions and be capable of the coherent construction of appropriate legal theories through which sustained action may flow. Systematic legal thinking is necessary if the strategy of action is not to lose its connection with the underlying principles in the process of implementation. While all other intellectual skills are elements of the comprehensive process, we are concerned at this point with the skill of comprehensive inquiry itself as represented in the work of such major figures as Pound, Ross, Bodenheimer, and Friedmann. The skill of agreeing or not with the various works falls within the critical evaluation skill.

### B. *Worldly Perspectives*

The search for competence in the practical or professional world implies a range of intellectual skills through which principled action is shaped. Worldly perspectives call for, rather than shape, action. The law is usually passive and always requires initiative or response. Competence in legal action, as much of this essay has suggested, requires a healthy view of the world beyond the clinical methodology. Holmes first pointed out that people are willing to pay skilled professionals to employ the power of the state on their behalf or to predict how it will be used against them.<sup>71</sup> A large portion of legal education is implicitly concerned with such professional competence. I have tried to show that clinical approaches lead inevitably to the concern for a healthy world-view, to the capacity to act according to principle in a world which gives few favors.

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procedure, and these rules of procedure do claim for themselves general validity in the sense of the old natural law." *Id.* at 183.

<sup>70</sup>*Commonwealth v. Caton*, 8 Va. (4 Call) 5, 8 (Ct. App. 1782). This represents one of the first attempts by an American judge, George Wythe, to enunciate the doctrine of judicial review. Wythe held the first law professorship at William and Mary College and followed the Jeffersonian academic tradition, providing theoretical lectures and moot court arguments dealing with practical matters. See Letter from John Brown, a student at William and Mary College, to William Preston, his uncle, July 6, 1780, in 9 *WM. & MARY COLLEGE Q. HIST. MAG.* 79, 80 (ser. 1, 1900).

<sup>71</sup>O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920).

The most effective worldly perspectives that may be offered in law schools are skills derived from (1) vicarious participation, (2) human relations and psychology, (3) clinical participation, (4) observation of ethics, (5) specialization, and (6) observation of functions of order, change, and justice. While these skills may all be viewed as in the clinical mode, I have previously tried to show why the traditional clinical approach is an insufficient response to the concern for legal education's function.

The method of vicarious participation places a student in a mock situation or role through which the experience imitates the action of law without the risks. The vicarious approach to the world of practice may be a simple classroom experience where all students may see themselves on the other end of a Socratic dialogue. It may be a mock situation of trial or appellate practice. It may be identifying with various roles which a professional will fill, especially interviewing, negotiating, mediating, counselling, and advocacy. In a controlled environment the forms of ritual conflict can be analyzed and understood with minimum harm. In the mock setting a student may come to understand the effectiveness of argument through withdrawal and reflection. Intellectual skills, especially criticism, analysis, and craft, are a counter-point to the vicarious method and necessary for full value of reflection.

Human relations skills and psychological competence provide an introduction to the complex world of human emotion. Integration of personal identity with various professional roles opens worldly skills well beyond advocacy or gaming or combat by trial. By increasing role perceptions to interviewing, mediating, counselling, negotiating, persuading, cooperating, planning, and arbitrating, the capacity for effectiveness of principled decision is greatly enlarged. The need for integration of a lawyer's self-perception within the context of human interaction should be introduced in law school. For the same reason, it is essential that novice lawyers begin to learn early how to achieve personal security in dealing with human emotions professionally. Not only will inner security increase professional confidence, it will surely reduce unintended hostility, eliminate unnecessary aggression, and avoid needlessly provoking other strong emotional responses in others. Much of the worldly skill of any great lawyer includes such self-mastery. Human relations skills are an especially fruitful product of clinical methodology, either through simulated or real experience. They appear to be essential to a healthy professional view of the world.

Participation in traditional clinical action in which a student handles an actual case for a client under professional supervision gives limited practical experience. Being on the line or at risk, the student is motivated to be particularly self-conscious. The intellectual skill of analysis finds use in the careful dissection of a case, from the first interview to the final judgment. Criticism is required for increasing professional performance, and criticism frequently—and properly—takes place independently after the experience has concluded. The experience can be an important introduction to the practical world for some students. A worldly connection is made which demonstrates how principles of law in action are skillfully used. It may for some become the symbol of entry to the professional world. For others, it may represent integrative jurisprudence in which law is action and action is a living fusion of fact, idea, and value. For the broad function of legal education, however, it is a world-view in embryo, for a student is required to take a case, act on it consciously, and sustain and defend that position at risk. The resulting understanding of action, risk, commitment, and responsibility is the beginning of a healthy professional world-view.

The observation of ethical consciousness in actions planned or taken is a worldly perspective requiring intellectual skills. It is nonetheless reflective in that it requires understanding the consequences of actions and the meanings of practical choices. This perspective is not a study of ethical rules except as the Code of Professional Responsibility defines ethical professional conduct. It is the process by which choices are illuminated. Consequently, though its perspective is distinctly worldly, its function requires the skills of analysis, criticism, and alternative thinking.

The substantive rules of law and specialization are worldly, not intellectual matters. A professional competence requires knowledge of the basic rules as well as the intellectual skills of systematic comprehension, criticism, and conceptual analysis. Until better ways are found, the extraction of rules from appellate cases, the restatements, statutes, administrative actions, treatises, and other legal reference materials will be required. The perspectives of the clinical and the case methods are similar, which clarifies considerably the criticism of the former by proponents of the latter. The critics suggest that learning abstract rules bears little relation to practice, while advocates of rules stress the necessity of knowing the rules prior to entering practice. Both methods need to rely on the intellectual skills of reasoning, evaluation, and comprehension. It would be foolish indeed and neither



practical nor realistic to forego learning rules with the best intellectual skill available in favor of the purely clinical approach.

A functional or structural perspective is most often confused with intellectual speculation about public policy, the role of law in society, and political or economic theory. The perspective is in fact worldly because it covers complex action based on structure of order, change, and justice. The perspective seeks to work with institutional relationships. The professional must not only work within existing structures and science, but must conceive of the possibility of change. He must understand the meaning of commitment to such action and how such commitment is sustained with skill and integrity. Legislation, policy changes, treaty negotiations, rulemaking by the regulatory agencies, and the administration of the courts all require understanding of the processes through which social interests are adjusted and values expressed. Especially insightful is the practical reality of the process of claim and response, of reciprocity, of action, and the intellectual tradition of restraint. In this perspective we also find the idea of sanctions or coercion brought to bear for the purpose of ordering or changing legal relationships or for giving effect to the demands of justice. Sanctions are the final exercise of power according to law, and there are many types to be considered.<sup>72</sup>

Many individuals, groups, or institutions participate in the process of legal education: law students and faculty (as individuals and groups); other students and faculty; administrators; trustees; the American Bar Association; the Association of American Law Schools; other accrediting agencies; state governments; state and local bar associations; law school admissions testing agencies; publishers of law books and suppliers of other educational materials; research institutes; legal services agencies; law school alumni; and the general public. While law faculties undoubtedly represent the most powerful group among these participants, they are subject to pressures of other participants affecting the study of law.

I have attempted to show that a central function of legal education is to promote the possibility of principled action in the

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<sup>72</sup>M. BARKUN, *LAW WITHOUT SANCTIONS* 166 (1968). Barkun's conclusion returns us to the beginning thesis that preparing the new generation in law is essential for survival:

Law provides a means for maintaining change within humanly acceptable limits, for allowing innovation by increments while keeping the general scheme of things within accustomed tracks—for perpetually altering the status quo while perpetually preserving it.

*Id.*

professional world. Since the main concern is that the new generation of lawyers avoid both the nihilism of pure act and the fantasies of cynical withdrawal, a healthy world-view must be sought in law schools. Through both intellectual and worldly perspectives, I believe we can offer to the new generation the possibility of action based on principle. The role of clinical education in this process should be extended well beyond its practical origins. In our journey, I think we shall be joined by our old familiar travelling companions—the case method and scholarship. Refreshed by the journey, I think the new lawyers will find it possible to act for others in the common good according to principles called law. It is not convenience but necessity which leads us to this hopeful conclusion.

