

## Thinking like a Lawyer: Second Thoughts

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What does it mean to have a law-trained mind? What kind of purposes and achievements are held out to those who seek schooling in law? What kind of failures are associated with those who adopt a legal mind-set? What happens to the moral sensibilities of those who follow the path of teachers who claim to teach you to “think like a lawyer”?<sup>1</sup> How does a law education form one’s ethics and how is this education put to work in the practice of law? What do we become as a result of an education in law? These are difficult questions because they are at once simple and complex. The questions may look simple, but simple, straightforward, noncontroversial answers are not readily forthcoming.<sup>2</sup>

When we try to say exactly what qualities we want those with a “legal education” to have (using quotation marks now to indicate that we are trying to be self-conscious about matters that

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<sup>1</sup> The difference between an education in law, from the teacher’s perspective, and an education in law, from the student’s perspective, is worked out by way of a “hidden curriculum.” Many of the lasting lessons taught are implicit. The moral lessons of legal education are most often of the implicit kind.

<sup>2</sup> What is a law school? Few would argue it is a building. We are more likely to say of law school that it is a place of education. Even with so simple a statement we move from consensus to complexity and disagreement.

On first appearance, the goal of legal education seems to be obvious. A law school is an educational institution that provides an education to those who seek to become lawyers. The goal of a law school is to educate and train lawyers to be effective, competent professionals in their work. The graduates of a law school are expected to have law-trained minds. The stated goal belies the contested terrain on which each premise of the goal is founded.

we rarely consider) we find ourselves facing a set of questions that do not lend themselves to simple answers. We have different kinds of education in mind when we speak of “legal education.” It is a matter of continuing concern among some law teachers that legal education should involve qualities that set it off from vocational or on-the-job training.

Defining the goal of the law school and how this goal is achieved is a good place to start. One might say the goal is to educate lawyers. Calling anything education makes reference to historically defined practices and problems, struggles and resolutions. Legal education, like all education, is contested terrain.

Many, if not most, law teachers will define the goal of law school without resorting to metaphysics. How do they do it? An often repeated statement, one sufficiently common to have become a cliché among law teachers, is that we teach our students to “think like lawyers.” I want to explore whether this is an appropriate goal for a law school teacher; a goal worth trying to achieve, a goal worthy of the law school as an institution of learning, a goal appropriate to those who view themselves as educators.

The idea that our goal is to teach students to “think like lawyers” has a weighty history and consequently deserves to be taken seriously. We can assume that a colleague who resorts to such an expression is trying to say what she does and to use conventions of speech and expression that will be readily understood. The assumption is, of course, that we all know how lawyers think and how an education can be turned to the purpose of forming a legal mind. The underlying, unexamined assumption is that lawyers think in a particular and stylized way that is worth passing on as an essential part of legal craft and heritage.

One wants to believe that something of value exists in the pedagogical philosophy that we

teach law students “to think like lawyers.” But when we subject the multiple assumptions built into this stock, conventional notion to the kind of inquiry that Socrates would have conducted (at least as his inquiries are passed on to us in Plato’s versions of the Socratic dialogues), the notion may turn out to be more puzzling, confused, contradictory, mistaken, or incoherent than it first appeared.

### *A Quality of Mind Called Seriousness*

The law is a serious business. Those who practice law are expected to be mature, serious, careful, and thoughtful adults. There is generally too much at stake to be lighthearted about legal work. Those who seek out lawyers are usually troubled in some serious way: some clients are in pain, others grieve, and still others experience intense anger or rage at the harm or wrong that has befallen them. Lawyers, like physicians, deal with human suffering, and lawyers must therefore be aware of the seriousness of the client’s cause and that the outcome does matter (indeed it may seem to the client, and perhaps even to the lawyer, to be all that matters).<sup>3</sup>

Many law teachers have practiced law, whether in a legal aid office or a large urban law firm, giving them first hand knowledge of the seriousness of legal work. Knowing that lawyering work is serious business, law teachers set out to impress upon students the responsibility associated with legal work. We do this by explicit exhortations, in and out of the classroom, and perhaps more importantly, by the attitude and cast of mind (what might be called a “character of mind”) we bring to classroom discussions. However, skill and ability alone do not make us

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<sup>3</sup> This brief, highly selective description of the work of lawyers does not mean that lawyers do not, like other professionals, “play” in their work, or that humor does not make its way into the law office and the courtroom.

serious. It is the way we think about legal moves, strategies, materials, and rhetoric of law that give to law teaching its vent.<sup>4</sup>

There is yet another way in which law teachers take their teaching and their relationship with students seriously. Virtually every student admitted to law school is capable of learning enough legal rules and enough about how to apply these rules in particular problem cases to make his way into the profession. Most law teachers would argue that passing examinations is not enough. There is a character of mind, a seriousness of purpose, and a desire for competence found in better students that draws the attention and admiration of law school professors.

The serious nature of the teaching enterprise is also reflected in the idea that good teaching and good learning can be identified. Students and teachers share a mutual concern about quality<sup>5</sup> in the mastery of lawyering skills. Law teachers, I would argue, care about how things are done because they know that law, when practiced well, requires a close attention to detail, precision, and clarity. The way a lawyer works and the care with which she crafts a legal brief or a courtroom argument are essential to producing a quality product. Law teachers admire quality

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<sup>4</sup> I use the term “we” when I talk about the serious cast of a law-mind and the teaching that follows from this seriousness. I use “we” with some trepidation, knowing that law teaching is not a homogeneous activity, that all teaching is political and that our politics differ, and that our politics show up as fundamental differences about the basic role of lawyers and the future of law in our society. I use the term “we” to imply that law teachers comprise a community. I think we can talk about law teachers in the sense of a common “we” in the same way that we can talk about judges, lawyers, doctors, or nurses. I assume, for the moment, that there is enough common ground to make the use of “we” both appropriate and provocative.

<sup>5</sup> This essay is about Quality. One of the implicit, working features of legal discourse is Quality. We need more efforts to think about Quality and how it works. *See, e.g.*, Tracy Kidder, *HOUSE* (New York: Houghton Mifflin, 1985) (exploring the Quality of builders and architects) and Robert PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES* (New York: William Morrow, 1974) (on the philosophical basis of Quality).

and seek to instill it in their students. Therefore, law teachers take teaching seriously because acquiring the kind of mind that will appreciate the craft is necessary for quality.

This seriousness of purpose causes law teachers to expect a great deal of students. We expect students to develop a quality of mind that tracks the seriousness of law and its consequences, by demonstrating that only with serious, rigorous effort can one attain the skills necessary to be competent and professional in the practice of law. When we impress upon students the value and the difficulty of what we ask them to do, the student begins to see that there is more to being a lawyer than meets the eye. Being a lawyer involves more than going to law school, learning how to read judicial opinions, and making arguments before judges.

Learning the basics of law, as many law teachers will admit, is a relatively simple matter. We could, if we focused on the mechanics of learning, teach the basics of law in one year rather than three. However, most law teachers will not admit that their teaching is limited to conveying information about substantive legal rules. They assert that teaching constitutes more than the transmission of substantive law and legal principles. Law teachers who believe they are doing something more than teaching legal rules may have some or all of the following notions in mind:

- Learning the law is simple, understanding the law is difficult. Knowledge of the law must be combined with skills of performance (reading, writing, argumentation, negotiation, counseling, rhetoric and narration) and it is in the interplay of knowledge and skilled performance that mastery becomes difficult.<sup>6</sup>
- Law and its practice has both a public and private dimension. Some of our work is done in public view, while other aspects are surrounded by a contract and covenant of confidentiality. In this sense, the practice of law is like a restaurant. The food is eaten by patrons in the public dining area, but the real “work” of a restaurant is done behind closed doors. Serious law teachers are concerned about what goes on behind closed doors.

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<sup>6</sup> For a practicum on mastery, see George Leonard, *MASTERY: THE KEYS TO LONG-TERM SUCCESS AND FULFILLMENT* (New York: E.P. Dutton, 1991).

- Law, and the practice of law, involves more than law schools now teach, or one might argue, even attempt to teach. Law is closely related, by even the most superficial of observations, to society and those who hold the reins of power. Yet, law schools do not attempt to teach students how to deal with power and those who wield it.<sup>7</sup> Law schools do not, with notable exceptions, attempt to teach how the power of law is used to maintain a particular social order and what the alternatives to the prevailing order might be.

Every law school probably has some teachers who puzzle over the troubled relation of law and justice with students, but students know this is not what law school is all about. The point is that law implicates justice, and the implications are often assumed to be beyond the limits of what law schools can, or should, try to teach.

When we teach students to “think like lawyers” we do not set out to do an easy thing. The qualities of mind of the good lawyer are difficult to acquire and difficult, sometimes impossible, to teach. To say that what we do is not a simple task, that it has difficulties and complexities, twists and turns that are not easily reduced to programmed learning, means that the teacher makes an appeal to the subtlety and magnitude of what can and should be done in the name of education. If there is more to legal education and “legal thinking” than legal rules, the serious teacher will seek to be aware of it and make her students aware of it.

### *From Seriousness to Illusion*

Law teachers who seek to teach their students to “think like lawyers” should be honest with their students: legal thinking may not be a distinctive form of thought, and to the extent that it is a distinctive way of thinking, it may be a dangerous one. Law teachers who teach “legal thinking” should warn their students of the known hazards of legalistic thinking. When law

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<sup>7</sup> There is, it is true, some talk of making arguments to public policy makers. We do teach our students, albeit in a limited fashion, how to deal with the formal power of judges.

teachers fail to warn their students about the questionable nature, limits, and dangers of “legal thinking,” they lead them astray.

Sanford Levinson has suggested that although one is tempted to dismiss the phrase “learning to think like a lawyer” as “ritual cant,” the idea is actually “central to the ideology of legal education.”<sup>8</sup> Thus, thinking like a lawyer is vested with far too much meaning to treat it in a dismissive way or as “ritual cant.”

Levinson makes clear that exploring the meaning of the expression is not without difficulties. He warns against the simplistic assumption that only one way of thinking like a lawyer exists. Levinson questions the assumption that legal education fosters a single, unitary, autonomous mode of thinking. Law professors are no longer dominated, Levinson contends, by a uni-dimensional, positivistic, case-oriented, legalistic worldview. Indeed, Levinson points out that even the judicial opinions presented to students reflect diverse modes of thought:

For instance, one type of “thinking like a lawyer” is illustrated by the opinions of Roger Traynor, who has helped to revolutionize tort law by applying the analytical techniques of modern economics, with its emphasis on internalization of costs and efficient risk-spreading. Traynor typifies the lawyer-judge as an effective public-policy maker, for whom “thinking like a lawyer” is the ability to weave together strands from economics, sociology or other preferred social sciences into effective tools for managing social life in a complex modern society. For Traynor the traditional order of examining rights and remedies tends to be reversed; a right is sometimes found precisely because a remedy can be designed.

Countering Traynor’s model is the view that judges have no business engaging in policy analysis: their task, and presumably the task also of lawyers who appear before the bench, is to articulate the basic legal principles that will enable them to reach a proper adjudication between the parties to a particular lawsuit. Ultimate social goals are no part of this model of legal thinking. One starts thinking of remedies only after determination is made that the plaintiff has

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<sup>8</sup> Sanford Levinson, *Book Review, Taking Law Seriously: Reflections on “Thinking Like a Lawyer,”* 30 Stan. L. Rev. 1071, 1071 (1978).

been deprived of a legal right.<sup>9</sup>

While Levinson accurately describes multiple perspectives on legal thinking, one suspects that students learn law in a more homogenized form. Yes, law students are exposed to a variety of forms of thinking about law. This does not mean that they hold in mind's eye Traynor and non-Traynor approaches, or that law students are made aware that multiple approaches to legal thinking exist and that lawyers consciously (and unconsciously) choose between them. Students are not instructed in the political and moral philosophies that accompany various approaches to legal thinking. Too few Traynors sit on the bench and teach in our law schools to make pluralistic legal thinking a reality for most students.<sup>10</sup>

Levinson's comments about diversity in the teaching of "legal thinking" is a warning to the wise: the idea of legal thinking is not a single way of thinking. More importantly, legal thinking may not be the exclusive property of lawyers and to the extent that it is, it may not turn out to work as well as we assume.

Some law teachers believe they know what to "think like a lawyer" means. The injunction

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<sup>9</sup> *Id.* at 1072 (footnotes omitted).

<sup>10</sup> To learn what Traynor has to teach would require an education far different than the education many law students have received. There are educational, social, political, and psychological constraints that minimize the Traynors we have in legal education.

If legal thinking turns out to encompass diverse, complementary ways of seeing and resolving problems, then the diversity of legal thinking would constitute a challenge to the idea that to think like a lawyer one uses only "legal thinking" to solve problems. Whether there is one or many ways to engage in legal thinking and legal discourse, the stories of students suggest that something more than legal thinking is at stake in law school. To listen to students describe their law school initiatory experience, what they are learning, and what it means to them, one begins to wonder whether it is safe to view thinking like a lawyer as the innocent, shorthand code for what is taking place.

to “think like a lawyer” has meaning to the student because law teachers are serious about their rhetorical claims. The reality of the claim sets in when students come to believe that thinking like a lawyer is different from ordinary thinking. We are reminded of this distinction most clearly when students put the rhetoric of law to work to compartmentalize legal and moral discourse. It is in leaving the ranks of the uninitiated to become a lawyer that students first learn to believe in the reality of the proposition that we know what we are doing when we think like lawyers.

One student described this belief as she learned it through her Torts professor’s explicit attempt to teach just this lesson:

In Torts class last year, Professor Lawson would sometimes force us to examine a situation in the way we would have perceived it before coming to law school. This was the scenario: Lawson would come off the platform and saunter up to the front row. He’d put his foot up on the front row desk, loosen his tie, and light up a cigarette. He’d instruct us to think about this in the way we would have a year ago, to forget the things we’ve learned since. “Picture yourself at a bar discussing the law with some of the regular patrons. You’re all having a beer and talking about whether someone has grounds for a lawsuit or not.” The idea was to get you to admit that before you came to law school you believed that a particular behavior would be illegal. “Of course,” he would say, “anyone would think that this action is illegal. It has to be, doesn’t it?” He’d look at you and smile reassuringly. Everyone smiled back, tentatively at first and then confidently. All over the room, heads would be nodding in agreement. Then he would lean forward, squint, point his finger and SHOUT, “Well, boys and girls, that’s not true. It is legal. They don’t know over there at the bar what is and isn’t legal. And neither did you, before you came here. That’s why you came to law school. Those people who think something is legal or illegal because it’s right or wrong don’t know what they’re talking about. They’re practicing ‘bar stool law.’ Law school is where you learn what the law is. This is where you find out what is and isn’t legal--what you can and can’t do. What the law really is.”

“Bar stool law” became the catch-phrase to describe that uneasy feeling that something should be illegal, but you didn’t quite know why. Many of us came to law school with “bar stool ethics.” Some things are just wrong, immoral, and unethical. They’re just plain wrong and everyone knows they’re wrong. After a short time in law school, you find yourself defending the very things that in pre-law school days you knew were immoral, unethical, and just plain wrong. But this is where we find out what is or isn’t right. This is where we find out what we

as lawyers can and cannot do. Surely lawyers can't do it if it isn't legal, or right, or ethical. Right?

Legal education, Professor Lawson teaches his students, is the place where you find out what law is, the place you begin to distinguish law from what bar stool pundits profess. Lawyers know the law, in contrast to bar stool pundits who think they know the law. Becoming a lawyer is a matter of dislodging your bar stool ethics and the fuzzy thinking that goes along with it. Thus, Lawson teaches the seriousness of legal discourse through dramatic metaphors. Lawson also teaches that law carries its own ethics and that those outside the law, bar stool pundits, do not "know" law in the insider, serious way the lawyer must know it. Central to Lawson's lesson is the idea that knowledge of law is reserved for insiders, and ethics come into play when outsiders talk about law.

A now infamous experiment in social psychology conducted by Stanley Milgram<sup>11</sup> presents an interesting perspective on the possibilities for a student's independent judgment about legal thinking when confronted with a strong authority figure like Lawson. Milgram brought unsuspecting persons into a room where they were introduced to a scientist/experimenter. The subject was told that another individual would be asked a series of questions. If the individual's response was false, the subject would be instructed to "punish" the individual by administering what the subject falsely believed was a shock. During the course of the experiment, the subject was instructed to shock the individual with increased amounts of voltage. Milgram found that many subjects would deliver what they believed to be fatal shocks

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<sup>11</sup> Stanley Milgram, OBEDIENCE TO AUTHORITY 13-26 (1974).

simply because they were instructed to do so by someone in “authority.”<sup>12</sup>

While I do not mean to suggest that law school and Milgram’s experiment are analogous, law and legal discourse are prototypes of a discourse of authority. Students commonly experience confusion and anxiety during their first exposure to law school and are therefore vulnerable to attempts to simplify the complexity of the world they are about to enter.

The analogy between scientists/experimenters who give orders to administer lethal shock and law teachers who help the student suspend concepts of everyday thinking (e.g., their lay sense of justice) and adopt the idea of legal thinking and an adversarial ethic of lawyering may be a crude one, but one worth contemplation.<sup>13</sup> The students who buy into the idea of legal thinking assume that thinking like a lawyer is part of an idealized professional self-image, a prominent feature of a desired legal *persona*, and an essential ingredient for success. Thinking like a lawyer, ephemeral as it is, becomes a part of one’s thinking and one’s moral universe.

Law teachers advance “legal thinking” by teaching their students that everyday thinking is inadequate and that images of law held by outsiders are naïvé. These teachers abhor “fuzzy,” soft thinking and tender feelings (or for that matter, emotions generally), and romantic views of the world. Thus, students are encouraged to abandon their fuzzy notions about human nature,

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<sup>12</sup> *Id.*

<sup>13</sup> I do not mean to suggest that it is on the sole authority of teachers who think they are teaching legal thinking that brings about a student’s suspension of everyday thinking. A student must be “ready” for legal education and accompanying changes in moral sensibilities for legal education to “fit” and take hold in the psyche. There are other “authorities” that make the fit possible: the authority of formal education, the authority of media images of lawyers, and the authority of our own purposes and needs shaped as they are by culture and social and political ideologies. There are, for reflective students and lawyers, opposing authority, authority found in legal education, prior schooling, and popular culture that warns against “thinking like a lawyer.”

society, and justice. (Fuzzy being defined as unrealistic ideals that one cannot hope to achieve in our society or that society will not permit to be achieved). This powerful myth of law holding together an imperfect world gains acceptability because it fits with a student's need to be "realistic"—to finally put aside naiveté and romantic, idealistic thinking that has survived years of schooling, experience, and work. Law teachers devoted to "legal thinking" believe that with the use of the case-method and so-called Socratic teaching, they shake up their students' fuzzy thinking by requiring them to focus on a new reality, an order imposed by law. Under this view, law school is good reality training. For students without a strong grip on reality, or pre-existing firm ideals, it is possible to find in law both reality and ideals.

### *Making Legal Discourse Real*

Professor Lawson's lesson, crude as it may be, is what every traditional law teacher teaches that law has its own language, methods, and way of thinking. Students begin learning this lesson the first day of law school and continue to learn it until the day they depart law school. The story of legal education is the story of how one learns legal discourse, and how the world and its problems can be seen through the prism of linguistic categories and rhetorical strategies known to law. Seeing the world in this way is relatively easy, and with encouragement and time (always a problem), the student begins to learn the skill of legal discourse.

The student's first assignment—to read a series of judicial opinions—is an introduction to legal discourse.<sup>14</sup> The teacher asks, "What are the facts of the case?" The students—some

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<sup>14</sup> For an earlier presentation of these fundamental rudiments of legal discourse, see James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11 (1982).

quickly, some painfully—learn that some facts are relevant and that others are not, distinguishing that which belongs to law from that which does not.<sup>15</sup> In many ways the lesson is no different than one taught to small children: this stove is hot. Hot is different from cold. In this way the child is taught the difference between hot and cold. Legal education too, begins in a simple and rudimentary way, but like the learning of any difference, the lesson can be subtle and powerful. The act of selection, of seeing and valuing “facts” that count toward a judge’s decision, while dismissing other facts that will not count, is an act of perception, at first simple, but then complex and profound.

Legal education begins in this simple, subtle, and powerful act of selection, accompanied by a powerful lesson. This lesson is taught as a legal one, but it is equally a moral one. It is a lesson that ends up being fought over in the classroom when we take up moral discourse as a corrective to a narrow, one-dimensional version of legal discourse practiced as single-minded devotion to an adversarial ethic. Thus, the first lesson of legal discourse is simple, like learning the difference between hot and cold, yet complex, like learning the difference between right and wrong.

Next, without reference to the implications for one’s moral sensibilities in the discovery of law-relevant facts, the student is taught that each case has a holding. To find the holding of the case is to learn that each case stands for something: a rule or principle of law. The search for the rule of the case, like the search for the facts, involves paring away non-essentials until one is left with a simple, unadorned, and descriptive statement, sufficiently general in nature to be

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<sup>15</sup> Even the most simple matter of “reading,” something we already know how to do, must be done in a special way if one is to gain approval of teachers of legal discourse.

applicable to future, particularized, conflict situations.

The law student learns that isolating this authoritative holding statement is not an easy task. Sometimes the judge in the case opinion will say explicitly the rule or holding of the case. Law teachers confound their students by showing that the judge's statement of the legal rule of the case is not necessarily a good one and cannot always be trusted. In this instance, the law teacher seeks to move the student from a simple view of law to a more complex one.

Since there are different possible readings or interpretations of the case, finding the rule of the case is an art. The implicit lesson in the search for holdings, and for law itself, is that law presents a surface, but meaning is more elusive. At a still deeper level, the student is confronted with the idea that law is not always definitive and readily knowable. The apparent ease with which we resort to loose language about "the law" disguises an underlying anxiety about its uncertainty. As the various lessons in legal discourse follow one upon another, a tension appears in the study of law as the student moves between poles (the poles themselves constantly moving and shifting) of certainty and uncertainty.<sup>16</sup>

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<sup>16</sup> Donald Schön, in his study of how professionals think, argues that every view of professional practice "represents a way of functioning in situations of indeterminacy and value conflict" and that our present state of knowledge requires professions to choose "among competing paradigms of practice." Donald A. Schön, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 17 (New York: Basic Books, 1983). The claim that professionals operate from a positivist stance of technical rationality is challenged by real-world professional practice:

In real world practice, problems do not present themselves to the practitioner as given. They must be constructed from the materials of problematic situations which are puzzling, troubling, and uncertain. In order to convert a problematic situation to a problem, a practitioner must do a certain amount of work. He must make sense of an uncertain situation that initially makes no sense.

*Id.* at 19.

In the adoption of legal thinking other tensions begin to appear: between the technical apparatus of law and the fair application of law, between law and justice, between the reality of

Learning how some facts are relevant to law and how some are not, and that a judicial opinion has authoritative weight in the future, sets the stage for an education in legal discourse. Through legal discourse one acquires the intellectual attributes associated with a legal mind: the ability to ground legal pronouncements in the “facts”; the ability to discern fact and opinion that is significant for judicial decision-making; the ability to argue a position and urge an outcome based on selection of facts and interpretation of legal opinion; and the belief that judicial opinions establish the “law.” These abilities bring with them the sense that the student has deepened her ability to reason, advocate, counsel, defend, and legislate. When this education takes hold, the student feels more sensible, objective, rational, and purposeful. The student believes she has become a person capable of “legal thinking.”

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The complaints about the results of an education in legal discourse are widespread. We do not, for the most part, consider it an accolade to be called legalistic.<sup>17</sup> When thinking like a lawyer is invested with crude meaning, as a syndrome, a map, a miniature worldview, or simplified amoral adversarialism, the result is injustice. Legal discourse becomes a route to

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law and the ideals expressed in law, and between law as a set of objective rules and law as means of service to those who need help.

<sup>17</sup> Legalism is a practical, as well as social and political problem. The sense of omnipotence we teach our students (both explicitly and covertly) is directly related to the fact that law is so pervasive in our culture. We teach omnipotence indirectly when we teach law as an independent, autonomous discipline that has no regard for its neighbor disciplines. We teach omnipotence indirectly when we hold out arrogance as a virtue. We teach omnipotence indirectly in a dozen different ways, from the first day of law school until the last.

When legal discourse is viewed as autonomous and independent of other social institutions--divorced from economics, politics, history, sociology, psychology, and separated from its moral and ethical foundations--legal thinking is transformed into legalism and moral discourse is driven to the far margins of consciousness and concern.

injustice when we allow its functional operation to crowd out the political, social, philosophical, and spiritual perspectives that legal education teaches us to push to the margins of legal discourse.<sup>18</sup>

Therefore, the basic lessons in legal discourse conveyed in the first weeks and months of legal education have implications for how we imagine our ethics as lawyers. One student, near the end of her legal education, reflected on the relationship between moral and legal discourse:

I am only now beginning to see what it means to “think like a lawyer.” It’s not always meant as a compliment, is it? There really is a certain mindset which one adopts and then adapts to in the legal environment. It struck me as curious when students tried to define moral dilemmas in legalistic terms. It seemed to make everyone more comfortable in solving them with reasoned but dispassionate answers that fit into some legal classification governed by some legal principle.<sup>19</sup>

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<sup>18</sup> Thomas Shaffer reports the following classroom incident which provides an example of how moral discourse and legal discourse are conflated:

Professor: Brown, what’s a trial?

Brown: An adversary proceeding.

Professor: For what purpose?

Brown: To discover the truth. (There is silence in large class for five seconds, then laughter.)

Professor: (after waiting just long enough for the laughter to help him make his point): Who cares what truth is?

Brown: I care. (Loud laughter.)

Professor: Well, in your conversations with God, you can take those questions further. (Pause. Then, to another student) Smith, what’s the purpose of trial?

Thomas Shaffer, *Moral Moments in Law School*, in Luther Hodges (ed.), 4 SOC. RESP.: JOURNALISM, LAW, MED. 32, 33-34 (Lexington, Virginia: Washington & Lee University, 1978), reprinted in Thomas Shaffer, ON BEING A CHRISTIAN LAWYER: LAW FOR THE INNOCENT 165-76 (Provo, Utah: Brigham Young University Press, 1981). The exchange that Professor Shaffer reports between one law student and one law professor might on first appearance be viewed as unusual and idiosyncratic. I suspect that it is not. Virtually every law student has a similar story to tell when they recount their own rites of passage in law school.

<sup>19</sup> The same student commented on her puzzlement “when books and library assignments suddenly became the most important thing in this world, especially to students who declared they didn’t like competition.” She goes on to say:

Students feel a wonderful sense of achievement when they learn to think the way their teachers think, the way they have been asked to think, but it is not, as this student reflects, “always meant as a compliment” if what one learns is to think like a lawyer. Legal discourse is the key to thinking for successful, competitive students and they are, as another student observes, “the first to adopt a legalistic approach to all phases of life.” The end result of this process is that legal thinking becomes a worldview.<sup>20</sup>

### *The Prevailing Reality*

To appropriate an identity for oneself out of the ongoing cacophony of legal education is difficult. The story of legal education from which you begin to construct a professional identity and a future begins like an ancient Greek drama, with much of the action having taken place before the play begins.<sup>21</sup> However, the real story of “legal thinking” happens in the law school classroom through the methods used to teach close reading of judicial opinions.

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I vividly remember torts and criminal law classes during my first semester. Doggedly dissecting violent murder cases and tragic accident cases with the same cold precision, the professors “got through the material.” Strict analysis and cynical attitudes seemed to be the goals of the students. Professors demanded the holding of the case and logical analysis and got it. Since we were taught to be valueless and scientific in our first year, it is almost impossible to resist the temptation to use this logic and technique to make moral choices or not to make them at all.

<sup>20</sup> We now think like lawyers without quotation marks. The absence of quotation marks indicates that a way of thinking is now habit, done without conscious concern.

<sup>21</sup> Legal education takes place within the context of stories, stories you bring with you to law school, and stories about legal education told by teachers. There are various stories told about law and how law works. With all these stories floating about, told and retold on every possible occasion, it is still possible, when you become a student of law, to feel like you have entered a medieval fortress, a world unto itself.

The rigors and cynicism of classroom conversation between teacher and student follows a perverted script version of a Socratic dialogue. At first, students find the method exciting, but also confusing and a bit mystifying. Some find law teachers electrifying, but over months and months of study, the mystery of the case-method is expelled and the law school version of the Socratic method gives way to boredom.

Although familiar with the Socratic method, law students enter and leave law school without learning much, if anything, about the patron saints of legal education: Christopher Columbus Langdell and Socrates. Law students hear nothing of Socrates, what kind of man he was, what kind of teacher he was, and why he taught the way he did, or how he died. Although law teachers identify Socrates with their pedagogy, most have not read Plato's accounts of Socrates. They claim affinity with Socrates, without knowing themselves who Socrates was and what kind of philosophy he embraced. To compound the irony, these same teachers who pride themselves in Socratic questioning, readily adopt other practices (e.g., in their testing and in their relation to students) antithetical to Socratic teaching. Thus, what most teachers mean by the Socratic method is that they ask students questions.<sup>22</sup>

Both law teachers and students make an effort to keep legal education as simple as possible. Maintaining this simplicity requires some work when the tension between simplicity based on practical concerns collides with those who have a hopeful view of law (seeing in law the means to an ideal society). Modern law teachers advance a pragmatist view through proficiency in problem-solving skills. In the practical skills of reading cases, writing legal

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<sup>22</sup> For an account of law school teaching true to the spirit of Socrates' teaching, see Thomas D. Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 Mercer L. Rev. 587 (1994).

documents and briefs, and making arguments, both teacher and student take pride.

The controlling ideology and dominant narrative in legal education mediates the conflicted life of one caught between practical realities and the promise of law as a foundation for a democratic and just society. The tension, seldom explicitly expressed but always present, sets up the opposition between law practiced as a set of practical skills and law as an expression of lived ideals. The implicit lesson of the failure to address this tension in legal discourse is uncertainty—the feeling that law strands us between two moving, unstable polarities. The result is that we can never be clear when we have done enough, when we have reached our destination.

Legal education is further unsettled by social context: the public does not hold the legal profession in high regard and there are ample news accounts reporting the decline of professionalism in law practice. Law students must, therefore, reconcile legal thinking the legal professor demands of them with accounts of how lawyers make a mess of things in their community and in their own professional life. The pacifying logic to this incongruence of public regard and professionally approved way of thinking goes something like this: the lawyers who go astray are a minority. They did not learn their bad ways in law school. Law is a tool that can be used for bad or for good. Law schools cannot teach virtue and should not try. Legal education takes place in society and, therefore, cannot create a bastion of decency and honor in a world where these virtues have become secondary. The important thing to remember is that most lawyers do more good than harm. The public lashing out at lawyers is misdirected because the public does not understand lawyers and their role in society. Lawyers have historically been vilified, and that they will continue to be held in disdain should not disturb us. Lawyers live in a world of conflict, a world where literally two sides exist to every story. You can fuss around

about truth all you want, but lawyers know or learn that truth is elusive. Therefore, one can easily understand why lawyers are not popular with the general public, but we, as lawyers, should not be overly concerned by our lack of popularity.

This rhetoric, or some version of it, permeates the law student's effort to explain the tensions in her life as a legal actor. The rhetoric justifies legal education (fashioned for the practice of law a hundred years ago) and even purports to express humility. Mischievous in its modesty, the claim also makes legal education highly resistant to change. The significance of this rhetoric is that it already contains a beginning and an ending that frame, and hence, enable us to interpret the present. It is not that we initially have a body of data, the facts, and we then construct a story or a theory to account for them. Rather, the rhetoric of justification is itself the outlines of a narrative structure that establishes what is to count as data.<sup>23</sup>

In legal education, the dominant rhetoric depends upon stories that justify legal discourse. Legal discourse requires that law teachers get bar stool law and ethics out of the heads of their students so they can learn to think like a lawyer. Before new narratives and new meanings can be found in legal education, it will be necessary to see how the dominant ideology and rhetoric of legal thinking is established, and who it works for, and who it works against.

Law teachers, some more consciously than others, make explicit their goal of teaching the student to think like a lawyer. If the goal is to be adopted by the student, if it is to be more than pedagogical whimsy, then the rhetoric must be reinforced with powerful stories and metaphors. The teacher must be able to convince an audience of students that thinking like a lawyer is

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<sup>23</sup> See Edward M. Bruner, "Ethnography as Narrative," *in* Victor Turner & Edward Bruner (eds.), *THE ANTHROPOLOGY OF EXPERIENCE* 139-55, at 142-43 (Urbana: University of Illinois Press, 1986).

different from what an uninitiated lay person does. The moral lesson that Professor Lawson teaches about “what law really is” and how law is confused by bar stool ethics is the kind of pedagogy (and the kind of legalism) that makes the rhetoric of legal thinking real.

How can the law teacher ridicule what the student already knows about law (and about the world)? The ideology and rhetoric of legalism (legal thinking) takes root because it is more “realistic” than the unarticulated and unfocused ideas and ideals so many students carry with them into legal education. It does not matter to the teacher hell-bent on teaching “legal thinking” that the student cares or knows something worth knowing about the world. Legal thinking makes personal spheres of caring irrelevant. Law teachers do not, of course, directly teach that caring does not matter. Rather, they expect all caring to be prefactored into law and legal thinking. Caring is left to the legislature or the judge. Caring gets in the way of law; it impedes the manipulations and applications of law.

Law takes on objective reality when it claims itself as its own form of truth. The law as truth explains its imperfections (and their constant exposure), as a reflection of the fact that the law does not purport to be perfect. It is ever moving toward the ideal it represents. In law, we may not always get it right, but we are better off, mistakes and all, than without it. Without law, flawed as it may be, we would have anarchy and chaos. A world without law is a world without order. In this brief defense of law, we see the making of ideology, in which law becomes the shining embodiment of progress and the most active, prominent, and established social force for a progressive society. To question legal thinking and move against the dominant legal ideology is to invite chaos.

Legal thinking is akin to a blueprint or house plan for legal education. The blueprint of

legal discourse turns out to be as much ideal as lived reality. Legal discourse is not lived according to plan or as we imagine it. The house actually built and lived in—one’s life as a lawyer--will be far different than the blueprint seems to promise.<sup>24</sup> In other words, we have tried to build a grand house with a bad blueprint.

### *An Oppositional View of Legal Education*

The phantasy account of legal thinking continues to dominate legal education. It does so in the face of serious and sustained criticism. There is another narrative, a different story, and a competing ideology that offers what anthropologist Edward Bruner refers to as a “new vocabulary, syntax, and meaning” for the study of law.<sup>25</sup>

The competing narrative is not a grand, all encompassing story of a world in which a dominant ideology is encoded in the quest for an elusive but privileged way of thinking, but a world firmed in terms of human success and failure. In writing about their experience of law school, students often focus on aspects of their life that are driven underground as they try to understand and master legal thinking. The following excerpts from student writings make this point repeatedly:

i.

In the first year of law school, professors attempt to make you believe cases and situations can be analyzed without regard to your own or society’s morals and ethics. After a while, students come to view cases in this way: they learn to disregard their own feelings.

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<sup>24</sup> For an exploration of how different it turns out to be, see Benjamin Sells, *THE SOUL OF THE LAW* (Rockport, Illinois: Element, 1994).

<sup>25</sup> *Id.*

ii.

Most law professors look askance at a student who relies on his heart rather than his head. In one of my first-year classes, a student backed up his position by saying, "It just seems right." The professor replied, "You can get into trouble thinking like that."

iii.

Law school changes one's way of thinking and viewing problems. Someone said in class that law is a philosophical profession. It could be, but generally it isn't. Law forces one to be practical and realistic while at the same time stripping our idealism away. It can form people into cold, calculated individuals.

iv.

In the first year of law school, I had no class in which a solitary word was ever said about right or wrong, should or ought, or the ethical responsibility of lawyers. Such matters are stuck away in a course called Professional Responsibility.

Legal education imbues its victims with a sense of importance of intellect, rationalism, and logic to the exclusion of feeling and caring. When we become aware of emotional stirrings we immediately strike out to rid ourselves of the transgressor, the intruder in our intellectual realm. We are unable to utilize both cognitive and emotional skills. From the first day one attends his first law school class, the relationship between head and heart is severed. We are brainwashed into believing that education is neutral, and knowledge can only be pursued and acquired when moral scrutiny and personal values are quieted.

Law school teaches a system of devices for promoting the manipulation of power and people, not the development of character. It is no wonder that my soul is so often a battlefield. To acknowledge emotion in law school is to invite pain. The refusal to become an amoral technician is dangerous.

I am angry and disgusted with a legal education that attempts to brainwash me into thinking like a lawyer and that is not at all concerned with who I am as a person and what I bring to the profession. Legal education is so unconcerned about who we are as whole human beings that we sometimes forget about the whole person that constitutes self.

I catch myself desiring to be a good player. I work hard at the cases, try to understand what I am being taught, and struggle with learning how to think. I fear this makes me part of the process I so much despise.

v.

The orchestration of the typical everyday class under the famed "Socratic method"

is nothing more than a barrier to understanding the human aspects of the law. Under the Socratic method, students are badgered, and in some cases completely humiliated by the professor, in an attempt to make them think like lawyers. From what I gather, thinking like a lawyer means we deal with problems in a finely tuned, rational manner. Emotional reaction to problems is unnecessary, unwanted, irrelevant, and unlawyer-like. How the rules and principles apply to people is unimportant.

vi.

Thus far, legal education has gone to incredible lengths to isolate us from our own beliefs and feelings. We are taught that it is easy to take any case and disregard whether or not it is a “good or bad” one. We are not permitted to have a personal belief in the guilt or innocence of a client.

vii.

In the beginning, you react, “That’s just not right” or “That’s unfair.” As a law student, you begin to set yourself apart from lay persons and learn to think like a lawyer. When you do not think like a lawyer, you are made to feel foolish and inadequate. There is perhaps nothing so bad as saying what you feel.

As a law student, you can always disassociate yourself knowing that what you are doing is not for real and you are just doing what you have to in order to get through law school. As a lawyer, the problems become real, but you have become so used to disassociating yourself with your moral/ethical self that you can no longer distinguish the real you from the lawyer you. It is frightening.

These brief student commentaries on legal education suggest that legal thinking becomes the basis for a legal world view that crowds out other perspectives and ways of speaking, seeing, experiencing, and understanding the world. The ordinary progress of learning legal thinking requires a “psychic numbing.” The numbing blunts insight and blinds us to the choices we make. We move through life, and law school, by numbing ourselves to what goes on around us. We lose touch with the center of our own existence, and the ideals and images which bring one to law school are blocked, deflected, or deformed.

When law teachers explain that they teach legal thinking, they rely upon conventions that

are thought to embrace all students and all teachers. The conventional rhetoric and thought do not, however adamant the claim, comport with the experience of all students, or all law teachers. When law students reflect seriously on their initiation into law, they provide a different, competing, antinomian perspective on legal thinking.

The reality of legal thinking (the felt-sense that it is different from ordinary thinking) is true enough to be plausible and plausible enough to legitimize itself in the classroom. But legal thinking also distorts and deforms the lives of students (and no small number of law teachers) in enough ways to make it less than the whole truth about becoming a lawyer. Students of law know first-hand the cost of their initiation of learning to think like a lawyer. In their underground, antinomian narratives, students articulate what traditional legalists deny that legal thinking is not the final prize. When we break through the dominant ideology, we find stories that put legal discourse in a new light.<sup>26</sup>

One need not look far to be reminded that legal thinking leads to legalism. Driven by legalism, we make a fetish of rules and view with suspicion those ideals and beliefs rules can never fully embrace. The problem with legalism is that it shuts out moral, political, and social discourse. It leads to a belief that legal skills are:

synonymous with analytic power--the capacity to clarify complex problems and communicate to others the range of choice open to those in search of solutions . . . . The legal system takes on the trappings of a kind of overall regulator in that it assures us of a single authoritative rule for each dispute as well as an internally

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<sup>26</sup>Legal discourse does, it should be made clear, serve a variety of functional purposes. A mode of discourse, law among them, permits one to speak of the world from a particular perspective and is thus, a way of seeing and imagining the world.

consistent system of rules.<sup>27</sup>

As Stuart Scheingold notes, “[l]egal education imparts a sense of efficacy which leads to a belief in problem-solving abilities far beyond the obvious skills learned in law school.”<sup>28</sup> One danger of legal thinking is that it breeds arrogance. The domain of law extends to virtually every realm of human activity and increasingly becomes the preferred way of resolving conflict. The sense of the law’s omnipotence easily extends to the teachers and students of law (both explicitly and covertly) a process directly related to the pervasive role of law and lawyers in our culture.

Beyond legal thinking, law teachers, in the seriousness they impart to law and the qualities of mind essential to its practice, play a crucial role in leading students to develop not only legal skills, but professional identity. Inherent in the concept of professionalism is the sense that law is more than an occupation and that one must develop an identity—a particular kind of self—to be a professional. While law teachers are influential in shaping this identity, they do not explicitly offer a program for its formation. By listening to students and knowing something of their stories, and the story of legal education as told from their perspective, one comes to see identity as a function of concerns and expectations, hopes and dreams, fears and failures.

However, the way a student lives as a lawyer and the kind of lawyer the student becomes will be determined as much by individual ideals and beliefs—the very ones law teachers studiously ignore—as anything the law teacher does in teaching contracts or torts or even the teaching done in the name of teaching the student to think like a lawyer. The values and beliefs

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<sup>27</sup> Stuart Scheingold, *THE POLITICS OF RIGHTS* 159 (New Haven: Yale University Press, 1974).

<sup>28</sup> *Id.* at 158.

of a student and the conflicts they generate as they are lived out in the world constitute a second level of formative influence that flows beneath the traditional rhetoric and cover stories told in legal education.

Ann Scales offers a view of legal education that hints at how training for legal thinking becomes ideology. Scales, a law teacher at the University of New Mexico, writing with one of her students, describes law school this way:

Law schools are like medieval monasteries. We seclude our novices from the world, give them the sacred texts . . . . We give them ritual incantations . . . to perform when their faith flags. Unlike other monasteries, however, we have no holy songs, for our faith holds that everything significant can be said. Our students take the vow to think like lawyers. As if in perpetual meditation, they must exclude from consciousness their prior lives and thoughts, their opinions, their outrage. We provide no spiritual room for their doubts. If they continue to have them, they will simply fail—in law school, and in the profession. There is no way to impart the calling to those who are not blessed. The exam will tell whether the incantations are working or whether they are tainted by doubt.<sup>29</sup>

Scales directs attention to the dominant ideology of legal education conveyed by stories directed from the front of the classroom by those teachers with whom students identify and associate their future success.<sup>30</sup> The story that Ann Scales excavates is a story found in students' reflective writings, a story told outside the classroom. Scales seeks out a story told only as it is encoded in classroom silence, a story told away from the hearing (and the teaching) of law

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<sup>29</sup> Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433, 438-39 (1986).

<sup>30</sup> For one version of the law school success story, see Calvin Woodard, *Progress and Poverty in Law and Legal Education*, 37 Syracuse L. Rev. 795, 797 (1986) (“The law of the contemporary law school has become . . . one of the richest textured, most sophisticated subjects in the world of higher learning.”) (arguing that legal education is both a story of progress and poverty, but that the poverty ascribed to American legal education is more apparent than real).

professors—a back of the bus story. (It matters, as any traveler will tell you, where you sit on the bus. Getting the right seat in the right part of the bus, on the side of the bus with the views means all the difference. Obviously, the experience is different for the driver and the passenger.)

The relationship of the two narratives—one the highly-touted effort to think like a lawyer and the other that of students who suffer the dominant ideology and experience its limits first hand—is driving apart with neither student nor teacher finding an opportunity to address them as left and right hand of the same body. For one who stands in front of the room, as I do when I teach, it is difficult to find ways to hear and then understand the second. The question is whether law teachers can ever be persuaded to bracket their own justifying rhetoric long enough to hear the stories of those who construct disputations accounts of what it means to think like a lawyer. In listening for the antinomian narratives of our students, the question is whether we will be willing to turn these narratives into a critique of teaching legal thinking.<sup>31</sup>

### *Law-Mind and Moral Discourse*

We are pulled first one way and then another when we try to think about the moral dimension of legal education. On one hand, it is increasingly difficult to find anyone who claims that legal education does not have a moral dimension and that law schools must attempt, in some fashion, to teach ethics as well as law.<sup>32</sup> The recognition that lawyers need ethics is countered by

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<sup>31</sup> It may be difficult but it is not beyond doing. *See, e.g.*, C. Roland Christensen, David A. Garvin & Ann Sweet (eds.), *EDUCATION FOR JUDGMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP* (Cambridge, Massachusetts: Harvard Business School Press, 1991) (arguing that the second narrative—the world of student learning—must be made an explicit part of teaching).

<sup>32</sup> For a Socratic inspired response, see Thomas D. Eisele, *Must Virtue Be Taught?*, 37 *J. Legal Educ.* 495 (1987).

a strand of thinking in legal education, going back to Holmes and Langdell, that we can and should teach, talk, and think about law as if it were an autonomous discipline independent of moral concerns.<sup>33</sup>

Holmes, in his classic work, *The Path of the Law*, writes:

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law .... [B]y ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.<sup>34</sup>

Holmes, in this instructive passage, may not be arguing that law is, or can ever be, separate from morality, but his lament over the failure to successfully separate law and morality for the purpose of “a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines”<sup>35</sup> lingers in our imaginations and brings confusion to our efforts to understand the moral context of legal education. Holmes’ desire to banish moral language from legal education is shared by many legal educators today. They feel, with Holmes, that law and morality considered together results in “confusion”—a confusion that impedes “clearness of our thought.” The assumption is that those who have the ability to think straight law have an advantage over those who muddle law with thoughts of ethics.

Holmes, abetted by Christopher Columbus Langdell, godfather of legal education and

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<sup>33</sup> For an earlier effort to bring Holmes and Langdell back into the picture and explain their role in contemporary legal education, see *Moral Discourse and Legalism in Legal Education*, *supra* note 15, at 31-35.

<sup>34</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897).

<sup>35</sup> *Id.* at 459.

father of the law school case-method of instruction, feared that the close relationship of the legal and moral perspective (legal and moral language) would imperil the academic (scientific) study of law. Holmes and Langdell sought a philosophical foundation and a pedagogy that would make it possible to study law as if it could be temporarily severed from the muddle of moral concerns. Holmes knew that what he proposed was costly. To banish moral language from the study of law will, he said, result in the loss of “the fossil records of a good deal of history and the majesty got from ethical associations.”<sup>36</sup> A century later, the relation of moral and legal discourse is still debated.

This Holmesian and Langdellian jurisprudential view can be juxtaposed against decades of educational literature and theory, including the scholarly literature on legal education, that claims all education, including all professional education, to be a form of moral education. Holmes asked us to assume, for the purpose of getting on with the “business” of the study of law, that law could be studied independent of its moral features. Holmes created an educational “fiction.” Like any fiction, a novel, or even one of those fictions we adopt in our own lives, we can ask: Is it “good” fiction? Does it “work”? What can we do with the fiction that we could not do without it? Some fictions are wonderful, useful, and necessary. Fictions find a place in the most rational of activities. The law abounds with fiction and metaphor: “free” speech, the corporation as person, and intent in criminal law.

A fiction is a feature of reality and develops a life of its own. Many novelists describe the characters in a novel as having developed, during the course of the writing, a life of their own. We begin to speak and act as if the fiction were etched on some remote god’s list of necessary

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<sup>36</sup> *Id.* at 464.

things.

Fictions, both those in law and those in our lives, have a moral bent. That is, they help us create and maintain an ordered moral universe. A fiction is a metaphor, a useful cognitive bridge to get us from where we are to where we think we want to be. The Holmesian/Langdellian premise that morals make for muddled confusion in the study of law led to still another fiction—that law could be studied as any other science. The fiction of legal education without morals and ethics may have been prudent rhetoric for the time in which it was espoused. The legacy of this fictional premise—the continued necessity of a separation of legal and moral language—has become more pernicious over time. The separation of law and ethics is at once real and powerful, as it is fictional, false, and impoverishing.

Following Holmes, one might imagine moral discourse in relation to becoming a lawyer the way interior decorating is related to the building of a house. You become a Holmesian lawyer like carpenters build a house—from the ground up. When you lay the foundation, you do not worry about the roof, the tile floor in the bathroom, or the finish of the interior walls. Those concerns wait for another day. For Holmes, moral discourse in legal education is like the personal, idiosyncratic, and subjective features that the occupants of a new house impose on the underlying structural reality of their new dwelling.

The best builders are concerned that the house will be one the owners will want to live in and take pride in inhabiting. This concern must be present from the moment work begins.<sup>37</sup> Someone must think about how the house fits the contours of the land and how it will be

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<sup>37</sup> This element of what I am calling subjectivity takes a decidedly moral turn as the building of the house proceeds—a “turn” beautifully exemplified in Kidder, *supra* note 5.

positioned so that windows can be placed for best effect. Building a house, one to live in or a house of law, component by component from the ground up may get the house built, but it may not be a house we want to live in.

Like the builder who fails to consider the homeowner, Holmes' banishment of moral concerns from the study of law has created a dysfunctional effort at compartmentalization. Our language and practices as lawyers and students of law are so thoroughly entwined and entangled in moral concerns that ignoring their relation, or postponing inquiry into moral concerns until the foundation of legal thought is completed, distorts legal thinking and sets up lawyers for a host of problems.<sup>38</sup> An understanding of moral sensibilities in the practice of law is not equivalent to interior decorating. We can no longer afford a legal education that teaches students to think like lawyers without engaging their moral imagination for what lies ahead. Moral discourse should be an explicit focus of teaching in the earliest stages of legal education. Law is not now, nor has it ever been, a discipline that can survive without a moral bearing.

### *Fiction in Action*

The law school classroom is a laboratory of the legal mind. The legal mind at work in the classroom is a functioning prototype of the legal mind-set of future lawyers and law teachers. By looking closely at the way students of law grapple with the language, rhetoric, psychology and philosophy of moral discourse, one can see how law-trained minds work.

Consider as a preliminary, crude example the fact that many students object, immediately

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<sup>38</sup> On the pathologies found in contemporary legal life, see Sells, *supra* note 27.

and vehemently, to the use of the word “moral” when they take up a study of legal ethics.<sup>39</sup> Some students are willing to talk about what law schools call ethics, but not about morals. Following Holmes, some seek to minimize (if not banish) moral discourse from the law school classroom.

Given the widespread uneasiness with the word “moral,” student objections to moral discourse should be taken seriously. Some students argue that ethics can and should be talked about, but not morals. In this view, the use of the word moral, rather than the word ethics, is objectionable. Students of law make the distinction of morals and ethics sound simple:

i.

Our morals are for the most part learned. What we need is an education in ethics.

ii.

Ethics to me are moral standards of a profession. When I speak of morals, I think of personal morals or those standards continuously developed by a person during his lifetime.

iii.

I have difficulty in viewing ethics and morals as one and the same . . . . Morals are associated with religious beliefs, and ethics are somehow more objective.

iv.

I believe that morals are very personal, whereas ethics are the morals of a profession or group. Ethics are not necessarily the representation of the morals of the individual group members. They are decided upon either expressly or by implication.

v.

To be ethical is to conform to a set of reasonably defined standards. These standards are determined by an analysis of the system under which one operates, particularly with respect to the history and evolution of the system. To possess legal ethics, if that is indeed possible, one must conform to the standards of the

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<sup>39</sup> It is important to note that the objection takes place in the context of a law school course on legal ethics. If we do not talk about the moral dimension of lawyering in legal ethics, then where could such talk take place? In the law firm? Between client and lawyer? One can indeed imagine ethics talk in a law firm and in a law office, but I know of no argument or claim that it is more easily performed in those settings than in a law school classroom.

legal system. Morality seems to go beyond the scope of the reasonably defined standards. Morals, as opposed to ethics, are based more on personal opinion.

vi.

Ethics is the term which defines a set of principles which provide guidance for what ought to be done. Some ethical considerations have evolved from religious notions, while others have developed out of philosophical notions. Morals, on the other hand, represent a set of personal values, attitudes, and beliefs through which the individual views the world in which he lives. Morals are thus more particular to the individual. One's set of moral standards determines how one views his ethical responsibilities. Each person's make-up affects the way in which he interprets certain principles.

The objections reveal something about the legal mind. The rhetoric in these claims highlights how lawyer ethics divorces legal thinking from the moral foundations we observe in everyday life. When lawyers pursue ethics and not morals, they put their imagination to work in the most crude and subtle way. The distinction between morals and ethics leads directly to a compartmentalization between professional and personal morality.<sup>40</sup>

Holmes sought only to compartmentalize law and morality for the purpose of studying law. Yet students in legal ethics do it for the purpose of studying lawyer ethics! The Holmesian fiction of banishment (compartmentalizing morality and law) is recast in yet another fiction: that legal ethics can be engaged without reference to our morals. There is a faulty, and potentially dangerous, logic in the progression of distinctions here. The fiction, once functional, becomes a fiction both false and pernicious.

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<sup>40</sup> Some students of law, lawyers, and law teachers may be sufficiently trained in the philosophy of positivism to argue that words like morals and ethics have no objective meaning, and in the absence of objective meaning such words do not aid in the constructive project of imagining how we are to live together with our diverse views and values. The positivist objection to the language of morals and ethics is rarely made in the law school classroom. It is not a conscious philosophy of positivism that grounds objections to the word "moral," but the restrictive workings of legal thinking.

The effort to distinguish morals and ethics, when challenged, is said by those who make the distinction to be just a matter of semantics. This defense attempts to shield the moral/ethics distinction from the philosophical implications that accompany it. Unchallenged, the distinction between personal morals and professional ethics has an intuitive appeal which falters when subjected to analysis and reflection. Such challenges make students uncomfortable by revealing adverse implications lurking in a cherished and readily accepted convention.<sup>41</sup>

Like so many conventional premises of legal thinking, distinguishing morals from ethics applies a brake to moral discourse and deters inquiry into moral concerns. Thus, the legal mind, the mind devoted to legal thinking, begins to look like the lord of a substantial manor.<sup>42</sup>

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<sup>41</sup> Thomas Eisele argues that when the law student's understanding of a law case is subjected to Socratic challenge, the result is disillusionment. The insight that follows the failures made known in Socratic dialogue leave us with "bitter knowledge." *See* Eisele, *supra* note 24.

<sup>42</sup> The following justifications for compartmentalizing personal morals and professional ethics indicate the boundaries of the major properties:

- ▶ Morals are personal, private, and subjective. They are not matters for public discussion, debate, and argument and are not an appropriate part of legal education. Corollary: The purpose of legal education is the pursuit of "objective" knowledge—knowledge that transcends subjectivity.
- ▶ There is no meaningful way to talk about morals. Corollary: There is no common ground—no common language for moral discourse. We will, when we talk ethics, waste our time.
- ▶ Each person has her own morals. Corollary: No one believes her moral point of view to be mistaken or open to sustained questioning that could result in a different moral point of view. Consequently, there is no reason to believe anyone will change her mind about moral matters, and so we must leave personal morals as we find them.
- ▶ Since there is no meaningful ("objective") way to talk about morals, moral discourse can only lead to unproductive disagreement and conflict. Corollary: There is no way to resolve true moral conflicts, and consequently the conflict we

To talk about the legal mind at work, one must chart the ploys of a legal mind framed by the rhetoric of compartmentalization—a rhetoric and psychology that puts legal ethics and personal morals at odds. The distinction between morals and ethics is essential for those who split off their character and common sense from the ethics they envision for themselves as lawyers. The distinction between morals and ethics is a prelude to the tension and struggle over a set of contradictions: Person and role; home and office; law and justice; ordinary morals and professional ethics.

The distinction between morals and ethics offered by those who think like lawyers raises a host of pedagogical and philosophical questions:

- ▶ Is a professional’s view of what is right and wrong a private matter when the professional acts by public license on behalf of others?
- ▶ How do we mark the “personal” and the “public” for purposes of public discourse?
- ▶ Do the morals and the constellation of character outside the law office have any bearing in the law office?
- ▶ What moral concerns in the practice of law cannot be made appropriate subjects of study and inquiry?

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generate when we talk about morals serves no useful purpose in the education of lawyers.

- ▶ The futility in talking about morals comes not only from the fact that we cannot change another person’s moral point of view, but from the fact that we get our morals “growing up,” which means they are embedded in “personality” and inaccessible to easy examination. Corollary: It exposes too much of who we are as persons (and is thus embarrassing, painful, and produces too much guilt/shame) to engage in moral discourse.
- ▶ Our education does not prepare us for moral discourse. Corollary: We do not have the formal cognitive skills or public language to talk about morals the way we talk in the classroom about legal matters.

- ▶ Can the sole purpose of education be the learning of “objective” knowledge?<sup>43</sup>

These questions are obscured in the readily offered rhetoric of law teachers who claim to teach their students to think like lawyers. The notion that the legal mind can be occupied solely by legal matters without reference to moral concerns arises from a set of assumptions, philosophical premises, and underlying theories of society that are shaped by personal, educational, and cultural narratives that devalue moral concerns.

One danger of legal thinking is that we let our law-trained adversarial minds go to battle before the war begins. (The rhetoric of war is common to lawyers and I use it here with that recognition.) We pick fights with each other about moral matters without testing the nature and extent of the common ground we might share. We assume that ethics talk and moral discourse lead inevitably to serious, intractable moral disagreement. When the assumption becomes a reality, we have a self-fulfilling prophecy.

We need ways to talk about lawyer morals and ethics that recognize areas of moral disagreement and avoid the fictional banishment that Holmes and Langdell practiced. One of the things we know about moral discourse and ethics talk is that it takes us, all too quickly, into the quicksand of controversy. Ethics talk introduces us, in a crude, abrupt way, to the fear that we have no common ground—no place to stand together; we have no way to think about or talk ethics—that will extend, expand, and deepen our understanding of our work and the moral

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<sup>43</sup> My reading of scholarly literature on the philosophy of science, sociology of knowledge, feminism, literary criticism, and jurisprudence suggests that all knowledge begins and ends in subjectivity. Every body of knowledge is laced with subjectivity. For two dramatically different accounts of this subjectivity, see Michael Polanyi, *THE TACIT DIMENSION* (New York: Anchor Books, 1967) and Pirsig, *supra* note 5.

dimensions of our professional practices. This fear becomes manifest in the psycho-pedagogical conspiracy of law students and their teachers to confine the study of lawyer ethics to a study of the profession's ethical rules. If we cannot banish moral discourse from legal education, we can transform it into the kind of talk with which we are most familiar—law talk.

Looking for common ground is itself controversial. Consider, for example, the long-standing dispute over what place moral discourse and moral sensibilities have in legal education. It is difficult, although possible, to imagine a legal profession and an education of lawyers that is not tainted with “moral” influence. Holmes encouraged the fantasy. Yet, no one argues that lawyers can practice law without their “moral sensibilities” intact, and indeed one of the current concerns about the legal profession is that we have displaced far too much of our ethical concerns during the course of our education as lawyers. If there are any among us who do not have a regard for the civic and ethical responsibilities that lawyers assume and the necessity of a moral bearing to guide us in seeing to these responsibilities, they tend to maintain their views in silence. It is when we ask ourselves what we might do together as students and teachers of law, to convey, educate, and empower moral sensibilities (whatever they may turn out to be) that we slip dangerously close to accepting the solace in Holmes' fiction.

I assume that the law teacher is always, by the nature of the teaching, knee-deep in moral concerns. I think the vast majority of the general public would agree that lawyers must concern themselves with ethical matters, and when they do not they undermine our faith in the hope of civic virtue. But put the matter to fellow law teachers and law students, and they register alarm at the notion that anyone should engage them in moral discourse. There are fears of dogmatism, indoctrination, and absolutism.

Here, I present only one of several rhetorical moves of the law-trained mind to bend law to fit a small box—a box that contains an amoral approach to legal practice. I contend that a legal mind divorced from ethical foundations is sheer folly. We compound the folly when we talk and teach legal ethics as if it were simply another body of law-like rules. Therefore, we must, if we are to help students survive the moral numbing that accompanies law schooling, bring the “moral” and “ethical” assumptions about who we are, how our lives work, and how we are going to locate ourselves in the world as lawyers and as human beings into their legal thinking. Excavation of assumptions about legal mind and legal thinking is essential to the future well-being of lawyers who know, if they know anything at all, that a legal mind is never enough in the daily practice of law.

### *Epilogue*

We convey and inculcate some variety of moral and ethical sensibilities when we induce our students to take up a legal thinking. We are always teaching more than law when we teach students to think like lawyers. The legal mind, devoted to a set of practices involving other human beings, has a moral dimension.

In answer to the question, “Is there such a thing as a value-free education?,” the unequivocal answer is no. When law teachers strive to train students in the skills of interpretation, reading and applying rules of law, writing legal briefs, and making arguments for clients before legal tribunals, they teach an adversarial approach to justice, partisan advocacy, and the use of law to resolve disputes and maintain order. Law, even in this most narrow and conventional view, is a set of inter-related philosophical claims. In holding itself out as pragmatic, problem-oriented, and anti-philosophical, it embodies a set of values and a way (one

way) of seeing the world. In seeing the world through the prism of legal thinking we are asked to embrace a reality of law that cannot account for law as an ideal. Even when legalism attempts the complete banishment of moral concerns (as Holmes fantasized), there is an array of ideals and ethical values left as residue.<sup>44</sup> Consequently, legal education is always moral education, better or worse for the moral images and precepts found in its teaching.

Many students acquire a taste for professionalism and for the “special” status that is conferred on those in our society who learn to think like lawyers.<sup>45</sup> Some will fall prey to legal thinking and the power it confers. Others will try to retain as much of their old self and old ways of thinking as possible. When the friends of law students tell them they have changed, some are surprised while some are pleased and willing to admit it. Some are concerned by the changes that have taken place to acquire a legal mind.

Most students accept the moral transformation that takes place in legal education because they assume it is necessary and integral to preparation for the practice of law. It is, they are promised, the profession, and the professionalism we demand of ourselves, that requires that we learn to think, talk, and act like a lawyer. We learn that the practice of law requires a legal mind

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<sup>44</sup> One meaning of array is to deck in finery; to adorn in splendid attire. One convention of ethical thinking is that one’s values and ethics are finery—the impressive and splendid attire we use to clothe ourselves on special occasions.

<sup>45</sup> The image that we are “special,” set-apart members of an elite inner circle begins with “selection” to be a student. The student knows that others have sought admission and have been denied. The student’s inner voice says, by merit of work, credentials, persistence of conviction, and fate have become one of the chosen. The student is “marked” by feeling and conviction that she has been chosen and is “special.”

The shadow to this sense that one has been chosen and is special is that you are actually an imposter. On lawyers and the imposter syndrome, see Sells, *supra* note 29, at 130-33.

and that we are entitled to think highly of ourselves<sup>46</sup> when we put legal mind to use and avoid old ways of thinking. If we are to understand the legal ethic and the values expressed by lawyers and their legal minds, we must look carefully at the rhetoric of law teachers who seek to teach students to think like lawyers.

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<sup>46</sup> The following speech by a Federal judge to law students at the University of Iowa is an example of the kind of rhetoric that lends support to the felt-sense and growing belief that law school provides the kind of education that can make you a better person in the very process of making you into a lawyer. Judge Rosenn told the students:

My personal experience has been that the practice of law is an inspiring and noble profession. Of course, there are some unprincipled and incompetent lawyers. But for the most part lawyers are decent, dedicated, and honorable persons who make an important and lasting contribution to society. Lawyers frequently plead the causes of those who depend upon them for family, reputation, worldly goods, and even life itself. They conscientiously and sincerely advocate and defend civil rights and humanistic causes. They preserve confidences with utmost fidelity . . . .

By and large, I believe the profession has made, and continues to make, a meaningful contribution to government and society. The enormous multiplication in the number of lawyers and the extraordinary growth of litigation in this country seem to demonstrate that the public—individuals, business, and industry—does have confidence in the legal profession and the administration of justice, and that courts are readily accessible . . . .

Lawyers, educated in the humanities and history, trained in the power of analysis of issues and the logical formulation and expression of ideas, are natural community leaders . . . . Your knowledge of philosophy, history, and literature, and your studies in the law, have aptly prepared you for service in the larger world, with its moral and humanitarian obligations.

Max Rosenn, *The Social Conscience of a Lawyer*, 69 Iowa L. Rev. 319, 321, 322, 324, 326 (1984).

With moral sugar plumbs like those offered by Judge Rosenn dancing in their heads, students learn to accept as function and necessary the rituals of legal education. Others find little to celebrate in their law school rites of passage and eagerly await the day when law school rituals can be put to the test in the practice of law.