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Articles

*753 THE LAW PROFESSOR AS FIDUCIARY: WHAT DUTIES DO WE OWE TO OUR STUDENTS

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Law professors play a wide variety of roles. As scholars, we are the stewards of the law. Our solemn obligation is to examine the way the law works, both in theory and practice, and to report fully and faithfully on what we discover. Many of us would expand on those duties by including an obligation to propose what we believe are fairer and more workable solutions to the legal problems that we examine. Because we generally do not conduct our scholarly work for clients, we are not restricted in our work, as are practicing members of the bar, by professional obligations to select and to advocate legal positions designed to advance our client's interests to the fullest extent possible within the bounds of the law. Thus, we pride ourselves on being able to provide more diverse if not more balanced analyses on the questions we choose to examine. At the same time, especially with the recent increase in the number of minorities and women on our law faculties, we are better able to give voice to a wider variety of perspectives on legal (and closely related societal and politic-

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al) ***754** questions than ever before. [FN1] We often perform our most valuable work by giving voice to those who heretofore have been silenced in the society in which we live.

The freedom to conduct such searching inquiries is one that all of us treasure. On most law faculties, there are a fair number of professors who, if they could, would do nothing else. In our system of legal education, however, that is not possible. Instead, all of us are entrusted with another obligation, one that, I submit, is equally solemn, one that we assume as teachers: the stewardship of the practice of law. [FN2] It is our job, and it is an enormously important one, to orient entering law students, most of whom are completely unfamiliar with both the law itself and the incredibly complex task of practicing it, into reasonably competent, ethical practitioners. As I have written elsewhere, this requires inculcation of a number of broad competencies and habits, among which are the ability to recognize, analyze, and research legal problems; the ability to communicate concerning such problems cogently and persuasively; the ability to perform a variety of lawyering tasks in a minimally competent fashion; and a broad range of temperamental competencies, featuring the ability to exercise good judgment, especially when under stress. [FN3] In addition, of course, we hope that we manage to convey a certain minimal amount of legal information to our students in broad, foundational areas of the law, such as torts and contracts, and a substantially more in-depth knowledge with respect to those areas in which the students choose to specialize. [FN4] ***755** In this paper I will be focusing on this second dimension of our professional lives. In a nutshell, I argue that, as institutions, law schools do not take this second mission very seriously, indeed they are doing a rather bad job of it, and, to the extent that they are even aware of those facts, don't care all that much. [FN5] I also believe that, albeit with many notable and admirable exceptions, law professors suffer from many of the same shortcomings of the institutions that they dominate, but because they do not see constructive change as being in their best interests (or, in fairness to many of them, as being in the best interests of their respective institutions or of legal education in general), [FN6] they are unwilling to either make substantial changes in the status quo or support efforts by others to make such changes. [FN7] ***756** As virtually all of us know, there is a raging debate in legal education concerning whether law schools do enough to train their charges to be competent and ethical practitioners. [FN8] This debate in turn tends to devolve into one over whether there should be more “skills” or “simulations” or “clinical” offerings, either in addition to or at the expense of traditional, subject-matter-specific courses and seminars, and to degenerate from there into laments--often little more than crocodile tears, in my opinion--on the fiscal impossibility of doing anything along those lines that differs very much from what we are doing now. That discussion, while very important, is not the focus of ***757** this paper. [FN9]

My focus here is on the destructive impact of the current dominant legal education pedagogy on vast numbers of law students who pass through our hands, the causes of that devastation, its continuing consequences on our students' abilities to lead productive and fulfilling professional lives after law school, and how that destructive impact might best be eliminated or at least significantly ameliorated. Because virtually all clinical professors and other “lawyering skills” professors at least recognize that the adverse effects I describe would be detrimental to students' ability to practice law effectively--and, to some extent, their courses tend to surface and, hopefully, to ameliorate, those detrimental effects--they are my natural allies, and I theirs. Those professors teaching “traditional” courses but who go beyond that to recognize the central role played by students' character and values in the ethical practice of law should also be interested in these issues. However, there is a danger in exalting the ameliorative effects of a clinical experience. This danger is the leap from recognizing the benefits that clinical courses potentially offer to those students afflicted by the problems arising elsewhere in the curriculum to using their existence as an excuse for not attacking those harms directly. [FN10] It is the latter task, however, that ***758** should be the focus of our attention. Even before addressing the central tasks of deciding, “What do our students need and how can we fill those needs?”, [FN11] we need to ask ourselves a different question: “What are we doing to harm our students and how can we stop doing it?” Unless we stop inflicting needless pain, all of our other efforts at reform will be only a shadow of what they could be. [FN12]

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While I will outline a broad agenda for reform, I believe that it would meet with intense resistance due to current law faculty compositions and attitudes, even though it would not be very difficult to implement within the strictures imposed by current law school budgets. [FN13] Because that broader agenda might not be attainable, I conclude this paper with suggestions for teaching large traditional classes in a way that furthers many of those broader reform objectives and discuss a course offering that directly addresses some of the harms caused by current legal education pedagogy.

I. A Beginning: The Professor-Student Relationship

One way to begin an inquiry into the difficulties that I see with legal education is to examine the relationship between law professors and law students as it plays itself out in American law schools. What is the proper way to conceive of the relationship between law professor and law student? It has so many dimensions as to almost defy characterization. For one, it is intensely hierarchical, if not in an oppressive, bullying sense, then in the more benign but still certainly potent one of "natural authority." We law professors know far more about the law than our students do and, by confining ourselves to relatively narrow areas of specialization, we can manage to keep it ***759** that way throughout their tenure at our institutions. We neglect at our peril, however, the fact that most of us do not know very much about how law is practiced, even in the substantive areas in which we specialize. This is a truly unfortunate missed opportunity--for us, for our students, and for the practicing bar--because, in overwhelming part, our students are focused like laser beams on a single goal: becoming practicing lawyers. Our failure to show a greater interest in the actual workings of the law inevitably works to cut us off from our students, and to cut us off from the richness of experience that inevitably arises from studying the application of abstract legal propositions to complex social interactions.

Another aspect of the law professor-law student relationship--one far less exalted and seldom dwelt on--is that of gatekeeper. [FN14] Whether or not we impart any useful information to them, students are obliged to put up with us for the length of time necessary for them to complete a prescribed course of study. Moreover, they must put at least enough effort into their studies to pass the courses that they take, and we have the power to decide whether they have done so. We should not forget that the fact that we are unavoidable has a tendency to make us unlikeable, even to students who do well, and, of course, many will not do well. At first, we are novel and perhaps even interesting and exciting, but with their passage through law school, students often find that novelty has worn very thin, and we come to be viewed more and more as a distraction from their dominant developmental task: becoming competent to practice law. This tendency makes teaching upper-class students (at least in large-section, required courses), a more unpleasant experience, both for law professors and law students, than either might like, but both camps seem largely resigned to the status quo.

A third aspect of the law professor-law student relationship, but one that is sadly neglected and underutilized, in my opinion, is that of **mentor**. There are innumerable ways in which we could **mentor** our students. Many of us already see ourselves in that light by virtue of our teaching them the substance of our respective areas, and, more generally, how to read cases, how the law grows and develops, and "how to think like a lawyer." What I am proposing, however, goes far beyond that. We could take an interest in them as nascent lawyers, who need to be taught not just "the law" and not just "legal skills," ***760** but also legal values, legal traditions and legal culture. [FN15] We could take an interest in what drew them to the law, [FN16] and what careers they would like to pursue. We could openly and enthusiastically do what we could to foster their success in the practice of law, not just in a material sense, but in the sense of helping them to achieve personal satisfaction and well-being in their chosen craft. We could sound them out on the education that we are offering them, and how they think that it might be improved, and we could take their responses seriously. [FN17]

But we could do more than that. We could take an interest in them as persons. We could ask how are they doing, and mean by that something other than what their grade point average is. We could openly discuss the difficulties created for

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many students by the law school experience, and enlist them in efforts to ameliorate those difficulties. Once such approaches were settled on, we could adopt them, even at some inconvenience to ourselves. [FN18] We could acknowledge as part of our education mission acquainting our ***761** students with the stresses of the practice of law and devising strategies with them for coping with those inevitable difficulties. In short, we could be persons who are sympathetic to their professional aims and concerned with both their personal and professional well-being. [FN19]

II. Law School from the Bottom Up, or The Way Things Are for a Lot of Law Students for Much of the Time

While individual faculty members often provide heroic counterexamples, law schools, as institutions, do not encourage broad faculty **mentoring** in the sense described above. They do not hire people willing to do it, and they do not reward it should it occur anyhow. Why not? I think there are many reasons, so many, in fact, that I can only outline them as part of this paper. Here they are:

• Law schools are run primarily for the benefit of law professors--not for the benefit of law students, not for the benefit of the legal community, and most certainly not for the benefit of the public at large.

• Law schools are run primarily by law professors and former law professors (now deans), who generally consider that arrangement to be benign, and certainly do not wish to change it. [FN20]

***762** • Law professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1L's, and preferably ones taken at elite "national" law schools. [FN21] Nothing else matters nearly as much as such achievement. Neither practice skills nor "real world" experience matter. Indeed, apart from judicial clerking, they may even be seen as detrimental. [FN22] Communication skills relevant to teaching--or, for that matter, even a demonstrated interest in teaching--do not matter; they can be learned on the job. Interpersonal skills do not matter either, because, as the king or queen of the classroom, such skills will not be necessary.

***763** • Once they are hired, law professors are rewarded primarily for scholarship. [FN23] Teaching and service are commonly evaluated as part of the tenuring process, and I do not wish to suggest that those assessments are not taken seriously; but the only unforgivable sins, in my experience, are those related to scholarship; and if they are present, no other positive qualities can save a candidate for tenure. [FN24]

***764** • Most law professors are not familiar with the ever-increasing literature documenting the extreme levels of mental illness and substance abuse that develop among law students while in law school, with the instances of students suffering from one or more of clinical levels of depression, alcohol abuse, or cocaine abuse rising from 8-9% prior to matriculation to 27% after one semester, 34% after two semesters, and 40% after three years, [FN25] ***765** and persisting after students pass the bar and begin practicing law. [FN26]

***766** • Many of those who are familiar with this body of work either do not believe that it is true or else attribute it to causes outside of law school and therefore, beyond our control. [FN27] They are wrong, but that is what they think.

• Law professors, as beneficiaries of the present legal education system--indeed, by and large, its anointed superstars--are, from a psychological perspective, understandably very unwilling to even consider the possibility that the present approach to legal education could have any significant bearing on these levels of distress (even assuming, as I have often found not to be the case, they are willing to accept the results of this research as valid). A related defense is to see any stress resulting from a legal education as necessary to prepare students for the demands of a law practice. From that perspective, they see protective efforts as interfering with the Darwinian process of "unnatural selection" that would other-

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wise operate in law school to weed out those obviously unfit to practice law, and so, in the long run, a misguided and counterproductive effort. [FN28]

***767** • Many law professors do not like the practice of law, and consistently denigrate it to their students. [FN29]

• Many law professors do not like practicing lawyers, and consistently denigrate them to their students. [FN30]

• As a corollary to the foregoing, many law professors denigrate the value and talent of "legal research and writing," "lawyering skills," and "clinical" professors, both at their own institutions and elsewhere. [FN31]

• Many law professors tried to practice law, but were not very good at it, [FN32] which results, unconsciously or otherwise, in more ***768** venomous criticisms of the profession and its practitioners than would otherwise be the case. As a result of these professorial actions and attitudes, law students find the prospects of becoming a lawyer and practicing law much more discouraging than they otherwise would. [FN33]

• As a further result of the foregoing, law students come to the conclusion that their professors neither like nor respect them, a conclusion that, insofar as their professional personae are concerned, too few of us realize follows logically from that condemnation of the profession and those who choose to practice it. [FN34] Indeed, if the truth be told--and it certainly should be--all too often, students are right to come to that conclusion. Such a belief on students' parts, especially if justified, leads to their disengagement from the learning process to the fullest extent feasible, an obviously undesirable result for all concerned.

• As a further result of the foregoing, students tend both to overly personalize and to exaggerate the abusive nature of any instructional methods employed by their professors that appear to be at all confrontational. [FN35] Those assessments, of course, lead to anger, resentment, and stress on their parts, emotions that, given the existing power relationships in law schools, are difficult to relieve. Perceived abuses seldom have a remedy, ***769** even in theory; and the instances in which a professor's actually abusive behavior actually leads to effective remedial action being undertaken are minuscule.

• As a further result of these professorial attitudes and actions, and much to our dismay, law students tend to minimize the effort they put into their law school studies and maximize that devoted to their law clerk activities. [FN36] While we consider such students "lazy" at worst and "unprepared" at best, their decision is entirely rational. Legal practitioners give them what they desperately want and need, but which we in academe seem dead set against offering to them: validation of their career choice, validation of themselves as budding young professionals, and wholehearted encouragement in their efforts to become competent practitioners--all absolutely essential to the developmental task they have set for themselves.

• Unfortunately, there are also many instances of professors employing instructional methods that I have elsewhere referred to as the "Protagorean Method"--that is a method employed not by Socrates, although the professors involved would put his name to it, but rather by Socrates' great rival, the sophist Protagoras, [FN37] who reveled in his ability to make the true look ***770** false and the false look true. [FN38] Practitioners of this perverted art mystify and belittle their students, and, in their heart of hearts, revel in the confusion and dismay they have sown. [FN39]

***771** • Even where such pathological purposes are absent, however, (as they are for the overwhelming majority of us) we fail to realize that for many law students the traditional "stand-and-recite" method employed in large law school classes is a genuinely traumatic experience, no matter how benignly conducted. [FN40] Research shows that, unlike the population at large, a substantial majority of all law students are introverts, many strongly so. [FN41] Few experiences

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are more unsettling to introverts than speaking before large groups of people, especially strangers, and most especially strangers who might benefit--psychologically or otherwise--from having the speaker do a poor job. [FN42]

***772** • Many law students are also adversely affected, often in a very deep and long-lasting way, by the over-intellectualization of the traditional law school approach to legal problems. Law students are taught, over and over again, that "thinking like a lawyer" makes how they "feel" about a legal problem at best utterly irrelevant. [FN43] Feelings get in the way of "sound legal analysis," and, for that reason, are to be suppressed, if not discarded outright. [FN44] Moreover, overt displays of feelings--at ***773** least negative ones--are bad, because once your adversary--and there always seems to be an adversary--sees that you are in trouble, they will exploit that weakness to inflict even more harm on you and your client than they have already done. There are three main difficulties with this approach:

• Feelings can be ignored, but they cannot be suppressed. If they are not consciously acknowledged and dealt with constructively, they will be expressed destructively, through untreated depression or substance abuse, to name two very common responses. [FN45]

• The suppression of feelings leads to isolation, and a generalized decrease in the ability to communicate with others in meaningful ways. [FN46] If heartfelt concerns are ***774** placed on a "banned topics" list, whatever communication that does occur will be conducted at a superficial level and involve only superficial topics.

• Destructive coping mechanisms and isolation from others rapidly lead to a greatly diminished sense of self-worth, a belief that cyclically reinforces itself through increased vulnerability to negative experiences and decreased ability to mount a constructive response to the negative feelings generated by those experiences.

• Over-intellectualized "thinking like a lawyer" is also destructive for two other closely-related reasons:

• It is often accompanied by a systematic attack on law students' value systems, whatever they might be, or at least is commonly perceived as such; [FN47] and

• The law professor offers nothing to replace those values, but instead seems to reward most highly an ***775** ability to make a plausible case for a position that, outside the classroom setting, would be "laughed out of court" as utterly ridiculous. [FN48] In other words, a legal education hones--to a razor keenness--the twin skills that many law students seem to already have in abundance when they arrive: rationalization and denial. Girded for battle with those over-developed attributes, young lawyers are able to excuse the most egregious misconduct as being well within the bounds of propriety, to the great damage of not only their own careers but also to the interests of their own clients and of the public at large. [FN49]

***776** • The final and potentially most devastating problem created by the overly intellectualized "thinking like a lawyer" approach, while not directly attributable to either the doctrine itself or how it is employed in legal discourse, is nonetheless very real: an inability, especially among those newly acquainted with it, to confine it to its proper sphere.

• "Thinking like a lawyer" is, at best, a series of logic-driven reasoning skills that should be a part--but only a part--of every good lawyer's repertoire for addressing legal problems. [FN50] For a variety of reasons, however, the tendency of those newly acquainted with these skills is not to confine them to that area but instead to employ them in all of their daily activities. Indeed, it is primarily this tendency that results in the story that almost all of us--and virtually every law student--can tell of having relatives or pre-law-school friends say that "you've changed since you went to law school."

• This change, however, frequently is not a change for the better. To see this, one need only consider the elements of

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the think-like-a-lawyer “skill” and reflect on how they would apply to a close interpersonal relationship in a moment of discord: (1) defend your own position with tenacity, (2) concede nothing to your “opponent's” position, (3) declare that any “feelings” that your “opponent” might have about the situation are “irrelevant” or “unimportant,” (4) find fault and assign blame for the controversy to your “opponent,” and (5) assess an appropriate punishment for your “opponent” due to his or her misdeeds. A more destructive course of conduct for resolution ***777** of interpersonal conflicts between intimates is, of course, difficult to envision.

• Students experiencing all of these stresses and dislocations in so many areas of their lives are, understandably enough, distracted from the legal issues presented by course materials by the basic human issue of finding a way to survive as a functioning adult. There are, however, six additional factors that heighten their anxiety still further:

• Students will be graded on a curve. This is tremendously important because it severely undercuts the only method that most students have ever known for surviving in troubled educational waters: banding together and pooling their knowledge. With a curve in place, it is inevitable that one person's success is another's failure, so the gamesmanship response is to pretend to be cooperating with others while secretly withholding critical information. [FN51] Deceit and dissembling are set loose among our students, and elevated by many to an art form. [FN52]

***778** • The entire grade for the course rides on a single final examination. [FN53]

• No one knows what that final exam will be like.

• Professors seldom bother to explain to law students the many differences between a law school final exam and those that they have taken in undergraduate school; differences that make many of their former studying and exam-taking techniques useless. [FN54]

***779** • Professors seldom provide any feedback prior to the final exam, such as by giving (and grading, or at least carefully evaluating) a midterm; [FN55] and

• Only those who do very well will be given the “plum” academic opportunities (e.g., a chance to be on a law review) and the lucrative clerkships given out by the “elite” law firms.

• As a consequence, law school becomes “a ruthlessly competitive environment,” [FN56] one in which, as one participant mordantly observed, “Class standing is what saves law school from being a boring, cooperative learning experience and makes it the dynamic, exciting, survival-of-the-fittest, cutthroat, competitive, grueling treadmill of unsurpassed joy that it is.” [FN57]

• While law school pays lip service to law students developing a wide variety of competencies, only scholarship gets a major play. Success in lawyering skills (interscholastic competitions, for example) are given some attention, but exceptional performance in clinical programs or in pro bono activities are almost always completely ignored. This treatment, which mirrors the career history, competencies, and principal ***780** activities of most of us, sends our students a loud and clear message of what really matters to us, as institutions: we matter to us, students who are like us matter to us, and other students are just ships passing in the night.

III. Some Modest Proposals for Reform

Are these harsh judgments about how well we are doing? They sure are. Are they fair judgments? Certainly not at every law school, and even more clearly, certainly not in every classroom or in every law professor's interactions with his

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or her students. However, as broad generalizations, I stand by them. What would I do instead? Unconstrained by human nature, [FN58] I have a few suggestions, many of which would not cost a dime:

• All of us should read the literature documenting the deleterious effects that law school has on many law students. [FN59]
• Then we should read it all again.

• All of us should ask ourselves what could be causing such high levels of distress, and we should keep asking ourselves, until we think that we have some answers that involve the way legal education is conducted, where we happen to be currently conducting it, as opposed to the way someone over whom we conveniently have no control is mismanaging the world at large.

• All of us should search our hearts to see if we personally are contributing to those problems, and to consider how we could alleviate the adverse consequences of our own actions in pedagogically sound ways. [FN60]

• All of us should endeavor to curb our expressions of disdain for lawyers and the practice of law. I am not suggesting lying, but a recognition on our parts of several salient facts:

• Being a good lawyer is very difficult, involving a far wider range of competencies than law professors are commonly called on to demonstrate. [FN61]

***781** • While many lawyers are flawed, so are many of us. Greater humility would become us.

• While the practice of law, like every other human endeavor, is also flawed, a more positive way to address those flaws is to discuss why they have arisen, how our students can avoid being drawn into them, and, ideally, what remedial measures could be taken to alleviate them. In short, there are constructive and destructive ways to examine such issues in an intellectually honest way, and the choice of how to proceed is up to us.

• Unbridled cynicism is not a necessary attribute of legal scholarship. [FN62]

• Our opinions matter to our students. Let's be sure we are right before we condemn the profession they have decided to enter, and the lawyers they will interact with there.

• Law schools should abolish grading on the curve and replace it with a system involving floors only. [FN63] It should be possible to tell students that, if they all band together, work hard and master the course materials, they can all get “A's” in the course. Imagine the positive energy such a simple change would induce. Students would become partners in learning with one another, as well as with their professors, united in bringing everyone to the highest level of achievement possible, instead of being pitted against one another in a cutthroat competition for a scarce resource. [FN64] It worked in college. It can work in law ***782** school as well.

• Law schools should stop hiding the final-examination ball. They should require professors to give midterms in every first-year class, at least, and require all professors to post a specimen final exam in every course in which such a test is given. [FN65] We should grade the midterms that we give, even if the grades do not count towards the final, so that students have an idea of how they are doing (or, perhaps more accurately, how we assess how they are doing) before going into a semester's worth of final exams and making the same (often entirely remediable) mistakes on fifteen credit hours worth of tests. We should commit ourselves to explain to the class as a whole what a good answer would have entailed, and what were the most common mistakes made. If we must schedule an extra class or two to do this, let's do so. Let's make sure that at least the bottom 25 % of the students understand why their tests were problematic and what they

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need to do to do better on the final, by scheduling appointments with them individually to go over their answers. And finally, we should go out of our way to make clear to them that law school exams are different from those most students took as undergraduates, that to do well requires different techniques than those they had employed successfully in college, and that they can do better --much better--if they change their studying and exam-taking strategies. Be sure they leave those meetings knowing that they are not stupid. [FN66]

***783** • All of us should recognize the critically important role played by law school legal research, lawyering skills, and clinical programs in making our students into the kinds of professionals of which we can be proud, and acknowledge that professors in those fields are full partners in our educational enterprise, if not the managing partners. Those of us who are traditional, tenure-track professors may be responsible for our students' heads, but those I've just mentioned are responsible for their hearts and souls. How our students will practice law does not depend primarily on how much legal knowledge they acquire in law school. It does depend, however, on their ability to candidly assess their own strengths and weaknesses; [FN67] to conscientiously strive to acquire any missing legal skills or knowledge, and to refrain from undertaking representations where that is not possible; to view their clients as human beings rather than paychecks; to give their best efforts in representing their clients, all of them, day in and day out; to recognize ethical dilemmas; and to respond appropriately to such concerns. [FN68] All of these attributes, however, are primarily character traits, not cognitive ones; and where those traits are honed are in lawyering skills and clinical offerings, not traditional courses. From these observations, I draw the following conclusions:

• Virtue can be taught. [FN69] Socrates thought so, and he was ***785** right.

• Virtue needs to be taught, at least professional virtue does. Most students come to law school--at least my law school--without any idea of what it means to be a lawyer. [FN70] In one recent class, more than 80% of my students were going to be the first lawyer in their families. Their knowledge of lawyering was entirely inspired by media portrayals. Even more importantly, none of them knew what it feels like to be someone's ***786** lawyer--to have another human being, often in desperate trouble, relying on them for protection from looming harm. That is the one lesson law schools should aspire to teach above all others, for once you have had that experience, it never leaves you. Never.

• Teaching virtue is hard, and persons who can do it well are a lot scarcer than traditional law professors. [FN71] It is not done just by inculcating knowledge of the rules of ethics. It is not done by preaching about how a lawyer ought to behave to a captive student audience in a professional responsibility course. It is done by having a lawyer living out the rules of ethics in the actual practice of law before students' eyes, and then insisting that those students live them out before hers. Those of us who can do that for our students in a lawyering skills or clinical setting deserve the highest professional accolades that our institutions can bestow, not a marginal, begrudged existence on the fringes of our academic communities. [FN72]

***787** • The best way to ensure that students take legal ethics seriously is to completely integrate it into all lawyering skills and clinical course offerings at our institutions, so that it becomes an integral, living part of the way law is practiced there. [FN73] Legal ethics issues can be introduced as early as the first year in a suitably modified case-file-focused, legal research and writing program, [FN74] and carried forward in succeeding years in a variety of lawyering skills, simulations, [FN75] externships, and clinical offerings. [FN76] The goal is to have students, at the level of ***788** feeling, simply not separate the ethical practice of law from the practice of law simpliciter. [FN77]

• There should be a much greater emphasis on providing law students with clinical educational experiences than there is in most law schools today. The importance of such experiences in molding students into competent, ethical practitioners cannot be overstated, a fact that we should make clear to them at every opportunity. It should be possible for every

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student to have a clinical experience who wishes to do so. [FN78]

• In hiring new faculty, efforts should be made to recruit persons who have practiced law, and not just for legal research and writing, lawyering skills, or clinical teaching slots. Other qualifications being equal, such persons should be preferred over those who have not practiced law.

• Law schools should actively seek to involve those judges and members of the practicing bar with established reputations for a high level of competence and integrity in their schools' educational efforts. [FN79] Of course, most law schools now make some use of such persons as adjunct professors, primarily in lawyering skills and bar courses, but I am suggesting a deeper involvement. I believe that experienced and able veterans of our legal system should be consulted regarding the full range of educational and pedagogical issues confronting our schools on a sustained and systematic basis. So, too, should a committee of recent graduates be consulted, who can provide invaluable ***789** feedback on what we did right and what we could improve on from their perspective as "baby" lawyers. We do not have to do everything they recommend to us, but where is the harm in asking, and listening attentively and seriously to what we are told?

• Law schools should de-emphasize the importance of good grades, especially good first-year grades, in the allocation of institutional "perks," particularly membership on their law review(s). Good grades carry their own rewards, especially when it comes to securing lucrative clerkships and jobs, and I certainly do not begrudge students who have earned those benefits. I believe, however, that those benefits are sufficient unto themselves, without gilding the lily and automatically dispensing law review slots to academically successful students as well. Instead of using grades as the primary criterion for extending offers of candidacy to law reviews, we should use write-on competitions or other devices that give more students an opportunity to participate. There is no reason to believe that the same skills that permit certain persons to excel on timed law school exams are good predictors of performance on law reviews, which require entirely different skill sets. Students who are willing to take the time to participate in a write-on competition are more likely to have a genuine desire to do the work required of a law review candidate, and, by virtue of having participated in the competition and received meaningful feedback on their efforts, will be much further down the road to actually producing a worthwhile article, than those chosen purely on the basis of grades. Moreover, by adopting such an approach, we might well significantly expand the number of our students who would be perceived by outsiders, and by themselves and by us as well, as "winners." Surely, that cannot be bad.

• In that regard, law schools should work very hard at honoring the many competencies that our students exhibit over the course of their legal education. Excellence in legal seminars should be publicized. [FN80] Excellence in intramural and interscholastic lawyering skills competitions should be ***790** rewarded. Exceptional commitment to pro bono activities should be honored, and not just with a brief note from the dean. Such achievements should be BIG DEALS. There should be honors assemblies at least once a semester, by class in school, to tout such achievements, held at times that would make it convenient for students and faculty to attend. There should be titles developed and conferred on such exceptionally able persons. There should be recognition for such achievements in law school graduation programs, just as there is for students of exceptional academic achievement. Demonstrations of exceptional promise as nascent practitioners, bar leaders, or reformers should be given every bit as much prominence as scholastic successes. They should, that is, unless we want to convey to our students that only a few of them really matter. [FN81]

The reforms that I have suggested would go a long way towards making law schools more humane, more fulfilling, and more uplifting institutions, while enhancing the quality of education our students receive. I harbor no illusions, however, about the likelihood of achieving such reforms any time soon. Given their commitment to free inquiry, law schools have demonstrated an extraordinary degree of resistance to criticisms of all types, and a reluctance to embrace new pedagogies that borders on the pathological. As I enter what, in all likelihood, are the later stages of my law school

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teaching career, I grow pessimistic about the likelihood of real change in my professional lifetime.

While waiting for the revolution to occur, however, there are things that all of us can do to improve at least our own portions of our academic worlds. Here are two ideas for your consideration.

IV. A Collaborative Learning Approach to Teaching A Traditional Large Law School Class

For the past two years, I have been experimenting with an approach to teaching a large law school class that addresses many of ***791** the problems I have with traditional methods of law school instruction, as well as with many aspects of the classroom dynamics in a large class. This method appears to result in greater student satisfaction than any other method I have used, it does not seem to impair students' comprehension of the material involved, and it has renewed my once faltering conviction that a legal education can be offered in a constructive, uplifting manner.

The basic approach is simple. On the first day of class, I have students organize themselves on the basis of friendship into law firms comprised of two to four students. [FN82] Each group must pick a name for their firm (the results of which can be very interesting) and turn in the name of their firm, their own names, and their school-based electronic contact information to me. [FN83] Thereafter, when I want class participation, I only call on law firms, not individual students. [FN84]

***792** There are a few simple rules on how this works. I have reasons for each of these rules. If you don't think my reason is a good one, you should delete or modify my rule accordingly.

- I do not announce in advance which firms will be called on to respond. Thus, this method differs significantly from a “panel” approach. I have always been concerned that telling a few students that they will be responsible for particular materials, while improving the quality of class discussions, has the effect of telling the rest of the class, which is the overwhelming majority in most cases, that they will not be responsible for those materials. I prefer keeping the pool of potential respondents as large as possible, and mitigate any stress that might be caused by other means.

- A law firm cannot “pass,” unless only one person from the law firm is present in class on the day the firm is called upon. If that happens, the firm's name goes to the top of the stack to be called on at the next session. The “no pass” rule is designed to put minimal, albeit collective, pressure on every law firm to have at least one student ready to go at all times. The “top of the heap” rule discourages gamesmanship, such as strategic absences by all but one firm member if it suspects it is about due to be called on soon. [FN85]

- If a member of a law firm is comfortable responding to a question upon hearing it, they may do so. If none is, they are encouraged--required, really-- to consult with one another about what a right answer might be, after which the firm can select a spokesperson to give its response. [FN86] This is not ***793** considered “cheating.” It is considered “helping out.” This is the key feature of the law firm approach, and it has many very important benefits: [FN87]

- It greatly reduces the tension involved in professor-student interchanges.

- It completely restructures the source of what tension there is, transforming it from a destructive, hierarchical one, laden with at least the threat of professorial intimidation or humiliation, into a constructive one, based on the desire not to let one's friends down. [FN88]

- It lets people be vulnerable within their firms, and to atone for any shortcomings that they might have on a particular day, all without fear of any adverse consequences. A statement like, “I was up all night last night with two sick chil-

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dren. I can't pull my weight today, but I'll make it up to all of you when we're called on again some other day," can be made in complete safety within a firm, and with the assurance that an opportunity for redemption will arise.

• It introduces acts of kindness and mutual support into the learning process.

• It immensely improves the quality of classroom discussion overall. I've never had the problem in my law-firm courses that all of us can recall when we ask a student, paralyzed by fear, a question like, "If those are the facts, what defense do you think X might have?", only to receive an answer like, "Asparagus?" .

• If the firm is still perplexed, those seated nearby are ***794** encouraged to offer suggestions, either quietly to the firm or to the class as a whole. This, too, is not considered "cheating." It is considered "camaraderie." Very few firms need such assistance, but if they do, once they get it, I return to them for follow-up questions. In all the time I have been doing this, I have never had a firm not recover and do well after being prompted. Once again, acts of mutual support and redemptive second chances to demonstrate competence are introduced into the learning process.

• Responding firm members are required to identify themselves. I keep track of who responds for a firm. Over the course of a semester, every member of a firm must respond in person at least once, an understanding that I make clear to them at the outset. I have never had a problem enforcing this, indeed; I have never even had to prompt anyone to take their turn. [FN89]

• Questions are welcome at any time, from any source. Some I take myself, but others are referred to the firm that has just dealt with the related issue. Generally, the firms do quite well at answering them. It can be empowering for students to realize that their analysis of the classroom materials has left them perfectly competent to answer the questions posed to their professors.

• There are a number of other more traditional pedagogical objectives that are furthered by the firm approach. For one, a substantially larger portion of the class becomes actively involved in the learning process each class hour because each person in any given firm that is called on is being asked to contribute to the firm's response, either actively or passively. Thus, calling on six to seven firms per hour covers about four times that many students. In addition, the traditional technique of pitting one student against another in arguing the pros and cons of a given case or policy issue seems to me to work far better with law firms as the protagonists. Several heads really are better than one, as different firm members spark off of their colleagues' arguments, or find themselves able to respond to an opposing point of view that seems to stump an earlier-responding member of their firm. ***795** The "law firm" method is readily adaptable to any traditional course, and to a very wide variety of teaching styles. Only two changes are required: (1) calling on law firms rather than individuals; and (2) being prepared to fill in consultative silences with relevant descriptive or background materials. The benefits, in my experience, have been enormous. I urge all of you to give it a try.

V. A Collaborative Approach to Examining the Causes of Law Student and Lawyer Distress

The approach outlined above of dividing a larger class into small groups also provided a useful starting point for a special course developed nearly ten years ago at the Law Center by Professor John Mixon, and subsequently taken over by me, entitled "Personal and Professional Ethics." This course, an early version of which has been reported on elsewhere, [FN90] explores the root causes of professional misbehavior. Its basic premise is that lawyers do not misbehave because of some cognitive deficiency--that is, because the applicable disciplinary rules are either unknown or too difficult to understand. Rather, it posits that such misbehavior occurs because of individual pathologies-- mental or emotional illness, substance abuse, or rampant excesses of the "lawyering skills" that every law student manages to acquire, namely

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rationalization and denial--that leave them either unable to discern their true ethical situation or unable to conform their conduct to known standards of professional behavior.

The applicable ethical standards are not the subject of this course. The causes of human frailty are. Unlike many of us, I believe that issues of that kind can be addressed to a beneficial effect. The approach taken in the latest iterations of the course explore three basic determinants of students' character and personalities, both personal and professional: (1) their family of origin; (2) their unique personality profile, as measured by the Myers-Briggs Personality Inventory; and (3) their experiences in law school. Obviously, these issues can, and inevitably will involve highly sensitive personal matters. The paramount issue for the course, then, becomes how one develops a classroom environment that is considered by the students--or at least a substantial majority of them, with respect to most issues--to be "safe" enough to discuss such matters openly and ***796** honestly.

We begin this process by removing external factors that might lead students to consider the class material to be "unsafe." The first of these is grades. Both to do away with the barriers to cooperation engendered by a curved, graded course and to eliminate the absurdity of offering grades to people based on papers discussing their personal feelings about a variety of topics, the course is taught on a pass-fail basis, with a grade of "pass" given to anyone who attends 90% of the classes and turns in all of the written assignments. [FN91] There is no final exam as such, but students are required to complete a number of special evaluations of the course, together with a small group paper addressing similar issues in narrative form.

The second step is to give students the opportunity to "pass" on any given assignment, rather than respond to the questions asked of them. There are almost daily short written assignments in the class, most of which ask students to describe their feelings about subjects that may mean a great deal to them. Students may be asked, for example, to describe the most humiliating experience they have had or witnessed in law school. They may be asked to write about the ethical dilemma that they most fear encountering in practice. They may be asked to describe instances of substance abuse in their family of origin. They may be asked to describe the aspects of their own upbringing that, in their opinion, pose the greatest threat to their ability to practice law in an ethical manner, or pose the greatest threat to their ability to balance their work lives and their most important intimate relationships. Obviously, some of these topics may prove to be too painful to write about (or just too personal to reveal to me, even under a solemn promise of confidentiality). For those persons, the option of turning in a single sheet of paper saying "pass" is sufficient to give them credit for that assignment. Interestingly, despite the temptation the "pass" option might present to avoid virtually all of the work in the course, I have not ever found that to be a problem. Only one student out of the hundreds that I have taught chose a "pass" option more than twice out of the twenty-odd assignments in the course and, given the many assignments that she did write about with exceptional candor and courage, I have no doubt that her three "pass" assignments were entirely justified. [FN92]

***797** With those matters resolved, the question became how to make the classroom discussion of sensitive topics itself "safe." The answer that we have developed has three main components: (1) have all of the most sensitive discussions in which a student reveals his or her own views, occur in small groups, with only views of otherwise unidentified "members of the group" reported to the larger class; (2) develop a set of "safety guidelines" governing the discussion of such issues, both in the small groups and in the larger class; [FN93] and (3) establish a rule of absolute confidentiality with respect to discussions occurring in both the small groups and the larger class, with nothing said in a small group attributed to the speaker individually in the larger class without his or her permission, and nothing said in either the small group or the larger class repeated outside of class without the permission of the person making the statement.

The formation of the small groups in this course has undergone a metamorphosis over time. Initially, I followed the

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same “affinity” or “friendship” model for this course as I later used in all of my other courses. However, over time, I reconsidered and ultimately abandoned that approach for one in which I make random assignments that assure a mix of men and women in each small group. [FN94] I did this because I discovered that there were two groups of people who tended to be attracted to this class. One group consisted of generally disaffected law students, many of whom had not done well academically, and harbored serious doubts about their future ***798** legal careers. The other group consisted of law review students, many of whom were perfectly happy with law school and had careers lined up that were exactly what they wanted [FN95] and, so they felt, deserved. [FN96] Left to their own devices, however, neither of these two factions wanted anything to do with the other. Each saw the other as having negative opinions about them and, to a certain extent, each was right to feel that way. The law review students, in particular, tended to form small, often single-sex, groups consisting entirely of their “own kind,” groups that often and openly expressed their disregard for class activities and objectives.

These hierarchy and gender-based groupings were among the negative aspects of the law school experience that I wished to confront, but their reconstitution in my class was thwarting that objective. Believing that those developments were beginning to seriously impede the classroom dynamics that I wanted to achieve, I consciously decided to break up those cliques and at least expose persons from these two factions to the perspectives of the other, as well as to possible gender-based differences in students' assessment of their law school and clerking experiences. I have been very happy with those changes overall. I have found that within small groups, these two factions developed increased levels of understanding and respect for one another, a development that in all likelihood would not have occurred if each had not had to listen and to respond to the views of the other--and to do so in a restrained and civilized way, within the governing ambit of the safety guidelines. [FN97]

With these preliminary matters in hand, we begin to examine the three major vectors of personal exploration involved in the early stages of the course. Course sessions consist of two two-hour sessions per week. After the organizational efforts of the first week (an ***799** overview of the course, the formation of small groups, some group-member familiarization exercises, and the development of and commitment to safety guidelines), one session each week is developed to purely personal exploration issues and the remaining one to law school related ones. Thus, for example, week two of the course might see a presentation by a counselor in the University of Houston's student center of the Myers-Briggs Personality Inventory and its interpretation. Students will have taken this test prior to the presentation and have their results in hand. The counselor discusses what those results mean in terms of the students' own preferred learning styles, the common misperceptions that people strongly committed to particular learning styles have of those equally committed to the opposite ones, and the benefits and burdens created by having to work with persons having very different learning profiles. Students discuss their own profiles in their small groups and a series of exercises reinforce those anecdotal recitations by having the students apply particular learning styles, typically not their own, to resolving problems posed to them. All of these activities strengthen the bonds between students within the small groups and facilitate their ability to collaborate on more sensitive tasks that will arise later in the course. Students will be given homework of an essay to be turned in to me, in which they discuss their learning profile, whether they think the description of that profile in class accurately describes them, whether they think that profile has changed since they entered law school, and what they think have been the most helpful and least helpful aspects of their learning style in terms of coping with the demands of law school. [FN98]

The second day of week two might be devoted to a series of articles offering a specific critique of law school. I usually lead off with the literature documenting the tragic and enormous increase in the incidence of depression, alcohol abuse, and cocaine abuse among law students over the course of their law school studies. Two or three of the small groups will each have been assigned to summarize different articles, and offer that summary to the class. Since the articles in question typically do not claim to understand exactly why those changes occur, the discussion moves naturally into spec-

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ulation on those causes, topics that are explored in greater detail in succeeding ***800** weeks. These discussions occur in the small groups, and their results are reported to the class as a whole as opinions voiced within those groups, rather than being identified with particular individuals. Thereafter, the discussion moves into what could easily be a more "dangerous" phase: which, if any, of these possible causes of distress has affected each student individually? This discussion generally occurs entirely within the small groups, which are advised that they need not disclose their intra-group results to the class as a whole, although many choose to do so. That day's written assignment asks the students to answer the questions posed in that final round of small group discussions, and, if they feel that they have not been adversely affected by law school, why they believe that to be so. [FN99]

The third week is used to initiate a series of three or four lectures on "family of origin" psychological theory, offered by a practicing psychologist who has a considerable number of lawyers and a few law students among his clientele. His discussions of the problems that confront his patients (in general terms, of course, individual identities are protected) and his relation of those sorts of concerns to his patients' families of origin prove compelling, and serve as the springboard of intense discussions among the students, some of which occur in the large group, but the more sensitive of which are reserved for the small groups and the students' follow-up written assignments. The second day of each of these three weeks is devoted to a different critique of the law school experience, [FN100] each of which requires submission of individual papers discussing what appear to be the most emotion-laden issues that grew out of the class discussion. This discussion often continues into weeks six and seven, still continuing to occupy only one day each week.

By the sixth or seventh week of the course, I conduct a session with students which is designed to segue into a series of topics that will cover the rest of the semester. This aspect of recent iterations of the course is very similar to that described by Professor Mixon and me ***801** some years ago, and I will not repeat that treatment here. Basically, this phase of the course is designed to present students with a variety of ethical and personal dilemmas that they may confront in the practice of law. These sessions are presented through speakers drawn from the author's acquaintance, as well as from persons suggested by past or present students in the course. Generally the presentations offered by these persons take about half of the two-hour class period, after which the presentations become the subject of a mix of small or large-group discussions as seems appropriate.

The two topics that I raise with the students in the segue class session are: (1) which of a listed set of topics do they believe merit further treatment in this course, and how enthusiastic are they about them; and (2) what is the personal or ethical dilemma that they most fear encountering in the practice of law? The first of these instruments generates group feedback on particular topics, [FN101] a number of which, based on past experience, are generally quite popular. The second vector, personal fears, is reported to me on a small-group basis (but with every member of each group who expressed an opinion having that view noted) and is backed up with an individual paper on that same topic. It serves both as a check on the group-based response to the first instrument and as a source of additional topics that may have been left off that instrument altogether or not revealed in the small-group discussions. [FN102] I continue to find that students are impressed by the fact that they "own" the course to this extent--that issues that they think are the most important ones to discuss will be the ones that get top billing. Of course, it is only fair that they have that power. After all, it is their personal and professional lives that we are talking about.

Based on the feedback that I receive and my familiarity with local judges, practitioners and others, I arrange for a series of speakers who will cover the topics selected for further treatment. Working through that list occupies most of the remainder of the course. Speakers are informed of areas of student concern that they might be particularly well-qualified to address, but they are encouraged not to have set ***802** speeches that they read to the class. Speakers are encouraged to address their topics from the viewpoint of their personal experiences, rather than offer the sort of scholarly treatment that might be appropriate for a CLE program or a more traditional academic presentation. [FN103]

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The topics covered by these presenters vary widely. For example, I have had several suspended or disbarred lawyers make presentations to the class. Their stories are riveting, as they take students through the rationalizations that led them to engage in the conduct that cost them their right to practice law, the difficulties they have experienced since losing that right, and how they have come to think about the practice since being forced to leave it behind. Some have since regained their right to practice, and discuss the changes in their attitudes towards being a lawyer, as well as in the ways that they balance that work and their personal relationships. Presentations are followed by questions placed on the board by various groups, and selective issues raised by those presentations and responses are discussed in the small groups and in student "homework" papers.

A wide variety of other topics are covered as well, but often with unique twists designed to focus on the mind-set of lawyers who get in trouble of one kind or another. Attorney tort and grievance defense lawyers tell the class not just what kinds of conduct most frequently result in tort claims or disciplinary actions, but also what attitudes on the parts of lawyers tend to lead to those kinds of mistakes. A lawyer from Dallas who has become very well known for innovative, collaborative lawyering activities, but who once was a rather notorious hell-raiser, candidly discusses the problems in his own life that led him to behave as he once did, and the forces that led to the constructive changes that he has made in his behavior. Lawyers who are currently battling mental illness or substance abuse talk about their struggles, the personal issues they had that led to those problems, and the steps that they are taking to lead happier, more productive, and more balanced lives. All of these presentations follow the same general format just discussed, and key points are reinforced through "homework" assignments.

Both lawyers and non-lawyers get called on to deal with the ***803** topics on the students' "greatest fears" lists. Students worry about what to do if a superior demands that they do something that is clearly unethical. We talk about that from a variety of perspectives, by bringing in lawyers who have found themselves in that situation, or who have had to deal with its aftermath. They worry about whether they can avoid humiliation and defeat at the hands of unethical opponents if they are not willing to "fight fire with fire." We bring in lawyers and judges who deal with misconduct, who explain ways for lawyers to protect themselves and their clients in such situations. We bring in senior members of law firms, who stress the importance of getting help from within the firm when confronted with such behavior, and how it will not be held against them if they do. [FN104] They worry about how they will balance their professional and personal lives. We bring in (usually younger) lawyers who are wrestling with those kinds of issues, some successfully and others not, who are willing to talk about such sensitive topics, as well as older ones who may have changed careers within the law in order to re-balance their lives. We also bring in lawyers who have abandoned the practice of law to pursue an alternative career, often in large part for that very reason, so that students who have reason to do so can consider that option. The discussions, both in the large and the small groups, are very serious, focused, and moving, as are many of the follow-up "homework" papers.

Some groups are interested in negative structural forces at work within the bar and perhaps within law school as well, and when they are, we generate speakers on such topics. Students may want to know if discrimination against minorities or women is a problem in the profession and, if so, to what extent. Speakers representing various points of view discuss those issues. They may view particular areas of the law as posing special problems for lawyers who wish to be ethical, and if they do, we bring in practitioners from those areas to speak to them about such matters. They may want to know how to enhance the legal careers of those not destined for large law firms. Lawyers working in smaller firms are available to answer those question, as are speakers, both in and out of the active practice, who are familiar with law office management, and setting up and running solo or ultra-small (less than five-person) law firms from scratch. Students may want to explore the possibilities for engaging in public interest legal service. ***804** Speakers familiar with such opportunities come to class and discuss them. Again, the standard model of using small groups to generate follow-up questions for speakers and, thereafter, to develop particularly interesting points in greater depth, coupled with "homework" papers to

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get students' personal perspectives on such matters, drives those key points home.

We also focus on good lawyering. Special efforts are made to attract attorneys to speak to the class who have been recognized for outstanding performance in some area of the law. Knowledgeable speakers talk about such topics as the many good things that lawyers do, model programs they may have developed for improving the quality of life within their law firms, major public interest initiatives that have recently been undertaken within a number of larger law firms in the Houston area, and the opportunities for service to the profession presented by state bar activities and other law reform efforts going on around the state. We find lawyers who are happy with their practices and with their personal lives, who explain how they have managed to achieve that desirable state of affairs. In short, while covering topics that could endanger our students as attorneys, we also seek to instill hope and resolve for a better life in them. We seem to be doing something right, as student satisfaction with this course remains very high.

VI. Conclusion

Law is an intrinsically interesting subject. Its study should be interesting as well. For many of our students, however, it is a thoroughly demoralizing and debilitating experience, one that, in some cases, can leave them scarred for life.

Why is that so? In sections I and II of this paper, I have tried to give the perspective of students on that situation, by focusing on the relationship between law professors and law students, its failed potential, and the results of that failure. It is not happy reading.

What can be done about it? Here, it seems to me, the answer potentially is much more positive, provided we have the courage to examine the consequences of our positions of privilege on the welfare of our students and to renounce those of our traditional perquisites that have contributed to the difficulties that so many of our students experience. Section III details those reforms, almost all of which are costless from a monetary perspective, although their psychological toll on some of us may be high. Whether enough of us are willing to pay ***805** that price, however, remains to be seen. [FN105]

Even if comprehensive reform in legal education is problematic, there are still things that each of us can do to improve present practices. In section IV, I have sought to provide you with examples of how each of you, within your own classrooms and without substantially altering your basic teaching style, can develop a more nurturing and productive atmosphere for your students. I hope that you avail yourselves of that opportunity if you have not already done so. In section V, I have provided you with an update on how many of the same principles developed in section IV can be used to explore issues normally excluded from the traditional law school curriculum, namely the potentially traumatic effects of both law school and the practice of law on our students' well-being, and how those effects can be minimized or avoided. I hope that some of you will experiment with such a course in your own institutions, and let me know what you think of it.On the issue of institutional reform, I would like to take one more try at helping you envision where I think we need to go. I do so by imagining a short speech given by the dean of a “reformed law school” to its entering class: [FN106]

> Welcome to XYZ Law School. We are really glad you are here, but, truth be told, we are a little scared, too. Our job is to turn you into competent and ethical attorneys who will be a credit to our profession, and we only have three years to do so. It is a very difficult task, even though you are exceptionally eager and able, because being that kind of lawyer is so daunting. In order for us to succeed, you will have to learn a great deal of law, and you will have to learn how to find whatever law we don't teach you ourselves. There's plenty of that, believe me, and every year there will be more and more. You will need to become skilled in analyzing legal questions and in developing creative solutions to legal problems. You will also have to learn a wide variety of other legal skills. All of you will need to become good listeners, skilled communicators, and able negotiators, facilitators and mediators.

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Those of you going into trial work will need to learn many more skills related to that very demanding craft. All of these skills need to be melded with a rock-solid commitment to conduct yourselves at all times in accordance with prevailing professional norms, and to insist on such conduct on the part of those with whom you will work.

***806** But there are many other, more subtle skills that you will need, skills that I like to describe as "temperamental competence." Empathy is one. You will need to be able to relate to your clients and their troubles, and without empathy, that will be difficult at best. At the same time, it often will be your lot in life to deliver bad news to your clients. How effective you are at doing that will depend, once again, on being able to empathize with them. Good judgment, along with the courage to exercise it, are other qualities that you will need in abundance. Good judgment is a skill based on experience. [FN107] We can only give you a decent start along that road, but we will do the best we can. Courage is something that many of you came here with. In that case, our goal is to support your efforts to sustain and enhance that quality. For those of you who wonder whether you have it, our goal is to help you discover or instill it in yourselves. Finally, we need to give you the experience of being someone's fiduciary. Most of you have not had the responsibility for the welfare of another, experienced the duty to put that person's interests ahead of your own, felt the weight of the solemn obligation that comes from being responsible for protecting someone else from harm or for vindicating that person's legitimate interests. That relationship and those feelings, however, lie at the heart of the burdens you assume in becoming a lawyer.

This is a great deal to fit into three years. In fact, it is such a broad range of knowledge, skills, and competencies that few of us possess them all, at least not to the extent that we would need to in order to be good enough to teach them to you. Thus, we divide up the task of instructing you. Some of us specialize in teaching you the substantive law in our various areas of interest. Others will specialize in providing you with the research and other lawyering skills that you will need in your practice. Still others, especially those working in our clinical and other lawyering skills programs, will focus on how you actually conduct yourselves in the practice of law from a professional ethics perspective. All of us are here to help you succeed in your dream, to be the very best lawyers that you can be. All of us on the faculty are equal partners in that endeavor. Everyone's role is important to your ultimate success.

You may wonder from time to time whether we really care about you and about your dreams. Now and again, we will be critical of your performance, and you can count on us always to ***807** be demanding. We will make you work harder than most of you have ever worked before, at least in an academic setting. We act that way, however, because there is so much that you need to learn in order to be the kind of lawyer that you want to be, and, if the truth be told, the kind of lawyer that our society desperately needs you to be. How well you fulfill your professional obligations will have a profound influence on whether our nation remains strong, not just in economic or military terms, but, even more importantly, in terms of living up to its ideals, its principles, and its heritage. Lawyers played a major role in the founding of this nation; they have helped guide it through its many troubles over the centuries, and they will continue to do so throughout your lifetimes and beyond. While I will not deceive you by saying that everything that each of those lawyers has done was admirable, I do feel confident in saying that, far sooner than you can imagine now, you will be joining a profession that, for millennia, in its finer moments, has stood as a bulwark against tyranny and oppression. Whether it continues to do so will, in large part, be up to you.

And so we press you, and we press you hard. What should you do about that? Band together, I say, band together. You've all heard your share of lawyer jokes, maybe even told a few. Undoubtedly you've laughed at a few, too, as I have. The truth, however, is different. Generalities are only that, and I would not want to leave you with the impression that every lawyer you will ever meet is honorable and trustworthy, but I do believe that you will find that overall lawyers are a fascinating group of people. Lawyers are doers. Lawyers are problem-solvers. Lawyers are advocates if need be, their clients' champions, but they are also comforters, mediators, and conciliators. Lawyers are firm and unyielding if need be, but they are also caring and compassionate. Lawyers have empathy. Lawyers have sound judgment. Lawyers are creative. Lawyers are smart. Lawyers are funny. Lawyers work hard

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and play hard. Lawyers are boon companions. Lawyers make wonderful friends. At least some lawyers will be wonderful friends to you, as you will be to them.

Right now, in this law school, in this very room, you are surrounded by such people. They are your classmates. Make friends with them. Rely on them for support in the tough times, and provide such support in return. You will be rewarded many-fold for that effort. While you are here, many of you will also find faculty members to whom you are drawn. If that happens, seek them out. They are here primarily to teach you those aspects of the law that they know the best, but they are also here ***808** to help you if they can in other ways. You will not become the kind of lawyer you want to be in isolation. No one does. Work together, support one another, and there is no limit to what you can accomplish. And unlimited success, both personal and professional, is what we wish for all of you. Again, welcome to our school, and good luck. What if your own deans could truthfully tell this to new students entering your law schools? What if, upon leaving your law schools three years later, your graduates thought that your deans had told them the truth? If you believe those would be worthwhile developments, then work to make them come true.

***809** APPENDIX 1

PERSONAL AND PROFESSIONAL ETHICS CLASS AND SMALL GROUP SAFETY GUIDELINES

These guidelines are intended as a distillation of the class's suggestions at our last meeting. I have not included any suggestions that related "safe" discussions to "safe" topics, because most of the topics we will be discussing will not have been chosen because they are safe ones.

I want to reiterate the point I made in class last time. I consider these guidelines to be very important. This class is not about impressing anybody or scoring against anybody. It is about self-expression and self-exploration among equals. It will be much more difficult to engage in that behavior in a competitive, dangerous, or hostile atmosphere.

Here we go.

1. Respect one another. Let each person who wishes to speak do so. Do not interrupt another speaker.

2. Really listen to what other speakers have to say. Pay attention not only to what words they speak but also to the emotional content of those words. If a speaker says something that appears troubling to you, give them the benefit of the doubt. Try to understand what experiences have led the speaker to hold the view he or she holds.

3. Respect each person's right to "pass"--that is, to decline to participate in a particular discussion. Remember that active listening to others as just described is a worthwhile activity in itself. If the work of the group is carried out as intended--with caring, compassion, and kindness--the requisite trust to speak may develop later. And even if it never does, bear in mind that each person is the best judge of what is and isn't safe to surface.

4. If you wish to respond or react to the remarks of another, so in a way that is not accusatory, judgmental, or confrontational. One way to accomplish this is to avoid statements that attribute a particular state of mind to the person making the statement. That is, avoid statements "you've got to be--to feel like that" or "only a--would say ***810** that." Instead, response in terms of your own feelings and reactions to the statement, and do so in ways that reveal something about you instead of ascribing traits to the previous speaker. For example, you might say, "when you said that, I felt--because I was raised --," or "what you said was just the way things were done in my family, but I always resented that because it made me feel --." Statements like these show that you accept the value of the other person's views even if you

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disagree with them, and it does so in away that will tend to deepen the intimacy of the group rather than inhibit it. Remember: the difference is not simply between “you” statements and “I” statements. Responses like “I think you're an idiot” are not what we're looking for.

5. Discussions should not turn into debates. Understanding another is the goal, not conversion to your point of view. Agreeing to disagree is fine. Along the same lines, resist the temptation to “fix” the problem identified by another speaker unless that person has specifically asked for help with it. It can be very irritating to be told that something that has been a big deal for you for a long time could be handled very easily by following a certain course of action. Maybe other persons want to hear that, but maybe not. Let them ask. Then you'll know.

6. Maintain absolute confidentiality concerning matters brought up in class. Statements made in small groups should stay there, unless the person making them indicate it is all right to share them with the large group (either specifically or anonymously). Statements made in the large group should not be shared with others not in the group. I fell very strongly about this, in part for selfish reasons. There may come to be times in the class when I'll want to make statements about my personal life because I think they will contribute to the overall discussion or the progress of the class. I will not want to hear about those remarks from someone who is not part of the process we'll be undergoing.

Following these guidelines can take some getting used to. When we have conducted this class in the past, I have asked for someone to volunteer to be a “facilitator” for the group--that is, to be a person whose job it is to make sure that others follow the rules by calling violations to their attention. Some groups have felt that such a position is unnecessary. Others have felt that it works against the idea of equality among group members. My suggestion is that you talk ***811** about the need for that position and, if you decide to institute it, that you have it rotate among group members on a regular basis.

N.R., R.P.S.

***812** APPENDIX 2

Personal and Professional Ethics Possible Speaker Topics

Below is a list of possible topics for guest speakers. You may believe that you have additional topics that you believe are as or more important than some of these. Please give your feedback on what you believe would be most important with a rating from 0 (discard) to 5 (be sure to do this). If you believe that two or more topics can be combined, please indicate which ones and the priority you would assign to the combination. We will be making a final solution towards the end of this week or the beginning of the next.

____ 1. What's wrong with lawyers-their client's perspective

____ 2. What's wrong with lawyers-lay staff's perspective

____ 3. What's wrong with lawyers-the Texas Lawyer's Assistance Program's perspective

____ 4. What's wrong with lawyers-the disciplinary system's perspective

____ 5. The basics of conflicts of interest

____ 6. The basics of malpractice-the “do's” and the “don'ts”

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____ 7. Ethical duties within law firms

____ 8. Ethical dilemmas of law clerks

____ 9. Ethical issues in billing

____ 10. Ethical dilemmas in particular areas of law practice (if so, which ones?)

____ 11. Ethical issues presented by clients who ought to lose

____ 12. Ethical issues presented by client perjury or obstruction of ***813** justice

____ 13. Ethical and effective responses to Rambo litigation

____ 14. Ethical issues in ADR

____ 15. Lawyer life style-personal satisfaction or burnout?

____ 16. Lawyer life style-stress and how to deal with it, balancing career and family

____ 17. Lawyer life style-help for the afflicted

____ 18. Honesty in the practice of law: milestone or millstone?

____ 19. Compassion and empathy: do they have a role to play in the practice of law?

____ 20. Other

[FNa1]. Professor of Law, University of Houston Law Center. I wish to thank Professors Edward C. Brewer, III, Timothy Floyd, Kathy Hessler, and Lawrence J. Krieger for their helpful and supportive comments on earlier drafts of this article and law librarians Harriet Richman and Michelle Wu for their extensive research assistance.

[FN1]. For a now somewhat dated discussion of the contributions made by these scholars, as well as an analysis of whether their assertions that minority scholarship has either been ignored or undervalued in the past, see generally Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989) (discussing writings that explore the effect of racial differences on the distribution of scholarly influence and prestige in legal academia); Richard Delgado, When a Story Is Just a Story: Does Voice Really Matter?, 76 Va. L. Rev. 95 (1990) (responding to the Kennedy article and arguing that "voice" in legal scholarship should not be the primary focus).

[FN2]. .See Letter from Felix Frankfurter to Mr. Rosenwald 3 (May 13, 1927), quoted in Rand Jack & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers 156 (1989) ("In the last analysis, the law is what the lawyers are. And the law and lawyers are what the law schools make them.").

[FN3]. See John Mixon & Robert P. Schuwerk, The Personal Dimension of Professional Responsibility, 58 Law & Contemp. Probs. 87, 90-92 (1995).

[FN4]. Some professors have denied any such responsibility. In a letter to Paul D. Carrington, Professor Owen Fiss bluntly stated: "Law professors are not paid to train lawyers, but to study the law and to teach their students what they

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happen to discover." Letter from Professor Owen Fiss to Paul D. Carrington, quoted in Peter W. Martin, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. Legal Educ. 1, 26 (1985). On a personal note, this is certainly ironic, as Professor Fiss was the one professor at my law school who was most interested in me as a person and as a budding professional, and who was far and away the most influential in shaping my views on what it means to be a committed advocate for justice and fairness. From everything I have heard and seen over the intervening decades he remains as devoted to his students today as he was to me more than thirty years ago. See Kirsten Edwards, Found! The Lost Lawyer, 70 Fordham L. Rev. 37, 70-71 (2001).

[FN5]. It is worth recalling that this was not always the case. As one scholar has noted,

> From their very beginning, the law schools were essentially practitioner institutions, separate and apart from their universities. Their "principal responsibility... [was] to turn out adequately prepared practitioners; cultivation of legal science [was] in a sense a side-activity, and adequately trained teachers and researchers a by-product." ... For most of the nineteenth century, too, the law teachers were, in the main, practitioners. The full-time law professor was a long time in coming. It was these attributes that led Thorstein Veblen to say that "the law school belongs to the modern university no more than a school of fencing or dancing."

Carl A. Auerbach, Legal Education and Some of Its Discontents, 34 J. Legal Educ. 43, 66 (1984) (footnotes omitted) (alterations in original); see also Mark Bartholemew, Legal Separation: The Relationship Between the Law School and the Central University in the Late Nineteenth Century, J. Legal Educ. 368 (2003).

[FN6]. Walter Gellhorn, "Humanistic Perspective": A Critique, 32 J. Legal Educ. 99, 101 (1982).

[FN7]. I am far from the first person to come to these conclusions. Among my many illustrious predecessors are Roger C. Cramton, whose pioneering article, The Ordinary Religion of the Law School Classroom, 29 J. Legal Educ. 247, 262-63 (1978) [hereinafter Cramton, Ordinary Religion], can fairly be taken as setting the stage for the modern phase of the debate over the soul of legal education that rages to this day. The best short summary of that article that I have found is contained in Professor Stewart Macaulay's article, Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar, 32 J. Legal Educ. 506 (1982), which is set out in pertinent part below:

> Cramton finds the unarticulated fundamental assumptions of the American law-school classroom to be: "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place." He makes observations such as "The law teacher must stress cognitive rationality along with the 'hard facts' and 'cold logic' and 'concrete' realities. Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable-these soft and mushy domains of the 'tender minded' are off limits for law students and lawyers." "Instead of transforming society, the functional approach tends to become dominated by society, to become an apologist and technician for established institutions and things as they are, to view change as a form of tinkering rather than a reexamination of basic premises. Surface goals such as 'efficiency,' 'progress,' and 'the democratic way' are taken at face value and more ultimate questions of value submerged." "Modern dogmas entangle legal education-amoral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry. We will neither understand nor transform these modern dogmas unless we abandon our unconcern for value premises. The beliefs and attitudes that anchor our lives must be examined and revealed."

Id. at 521 n.51 (internal citations omitted). The features of a legal education so presciently observed and catalogued by Professor Cramton remain the dominant ideology in American legal education today. Many of the others who have viewed that hegemony with dismay in succeeding years are discussed in succeeding sections of this article.

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[FN8]. This debate goes back to the origination of the case method of instruction at Harvard, and has continued up to the present day. I do not propose to recount it here. Among the older advocates for a clinical or "realist" approach to legal education are the late professors Jerome Frank and Karl Llewellyn. See Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L.J. 1303, 1321 (1947); Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Pa. L. Rev. 907, 917-18 (1933); Karl N. Llewellyn, On What Is Wrong with So-Called Legal Education, 35 Colum. L. Rev. 651, 652 (1935). For those interested in a fuller account of this struggle, see generally Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983) (presenting a more thorough exploration of every school of thought involved in the debate about types of instruction); Laura G. Holland, Invading the Ivory Tower: The History of Clinical Education at Yale Law School, 49 J. Legal Educ. 504 (1999) (addressing the history of clinical legal programs at Yale and in other United States law schools). For a summary of recent literature chastising law schools for their perceived shortcomings in inculcating high ethical standards in students, see Robert Granfield & Thomas Koenig, "It's Hard to Be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice, 105 W. Va. L. Rev. 495, 497-504 (2003).

[FN9]. I do have strong views on that topic, which I intend to explore at a later time. In the meantime, I commend my favorite articles on that topic to the interested reader. See generally Timothy W. Floyd, Legal Education and the Vision Thing, 31 Ga. L. Rev. 853 (1997) (offering an explicit reform agenda, the excuses that will be made for not following that agenda, and why those excuses are insufficient); Steven Lubet, Is Legal Theory Good for Anything?, 1997 U. Ill. L. Rev. 193 (1997) (questioning the primacy of grand theory in the legal academic hierarchy). The best short statement of what should be done in this regard is from Professor Menkel-Meadow's article:

> The education of lawyers should deal with the cognitive, behavioral and experiential, affective, and normative aspects of being and learning as a professional.... I aim for a statement about legal education that recognizes all of these constituent elements of being a lawyer and a human being and acknowledges that they are intertwined and related to each other, not necessarily in any particular linear or hierarchical order.

Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report--Of Skills, Legal Science and Being a Human Being, 69 Wash. L. Rev. 593, 596 (1994) [hereinafter Menkel-Meadow, Narrowing the Gap].

For an article recommending an end to this feud and a uniting of the two warring factions around "a structured progression toward a general practice of law informed by a traditionalist understanding of the [practice of law]... as an enterprise with an ethic," see Jack L. Sammons, Traditionalists, Technicians, and Legal Education, 38 Gonz. L. Rev. 237, 246 (2002).

[FN10]. There are many reasons for this. For one, the fact that a harm may be remedied to some extent by a clinical experience does not excuse its initial infliction. Rather, at a minimum, it must be shown that some greater off-setting good is achieved by inflicting that harm, and the case for that minimal showing seems to me not to have been made. For another, the "remedy" of a clinical experience often would be partial at best. Indeed, it might well be entirely illusory for many students because, at most law schools, it is not possible for every student--or even just every student who wants one--to have such an experience, at least with live clients. Then, too, those fortunate enough to have a live-client clinical experience would reap far greater benefits from it if they were able to begin it in an "undamaged" state.

[FN11]. Nancy L. Schultz, How Do Lawyers Really Think?, 42 J. Legal Educ. 57, 57 (1992).

[FN12]. One of the very few articles that I have come across that explicitly argues that, as part of our professional obligations, we have a duty to try to ameliorate these conditions is B.A. Glesner, Fear and Loathing in the Law Schools, 23 Conn. L. Rev. 627, 641-45 (1991). Professor Glesner's (now Glesner-Fines) article remains both the clearest and the most exhaustive treatment of the etiology of stress, and is particularly noteworthy for pointing out the adverse effects that ex-

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cessive levels of stress have on the learning process.

[FN13]. It is for this reason that I leave other reforms that would have such budgetary implications for a later day.

[FN14]. . Indeed, one author has posited that this is the central purpose of a modern law school. See Bethany Rubin Henderson, Asking the Lost Question: What Is the Purpose of Law School?, 53 J. Legal Educ. 48, 56 (2003).

[FN15]. In my most recent Professional Responsibility class, I found that over 80% of my students would be the first attorney in their families. Few of that 80% had any experience with the life and work of attorneys. Who can doubt that all of them would benefit from having a professor like Professor Edward D. Re, who, on the occasion of his recent retirement, had this to say about his fifty-plus-year career as a teacher:

> I have always regarded the role of a law professor to be more than merely that of a teacher who would teach principles of substantive law and procedure. I have regarded the role of the law professor, in addition to teaching principles of law, as being that of a **mentor**, whose mission is more than merely teaching principles of law but also whose mission is to inculcate the ethical and moral values, as well as the responsibilities, of a great profession.

Edward D. Re, The Lawyer as Counselor and Peacemaker, 77 St. John's L. Rev. 515, 518 (2003).

[FN16]. In my most recent Personal and Professional Ethics class, I found that the most common reason given by my students for coming to law school was that they "had nothing better to do." This reason was given by nearly 40% of the class. The implications of this are staggering. Simply put, our students are professional virtue "blank slates" when they come to us and, whether we like it or not, we do write on those slates for the three years that they are in our care.

[FN17]. For a very interesting and insightful article discussing the role of professor-as-**mentor** and the difficulties that can arise in that context, see John W. Teeter, Jr., The Daishonin's Path: Applying Nichiren's Buddhist Principles to American Legal Education, 30 McGeorge L. Rev. 271, 275-78 (1999) [hereinafter Teeter, The Daishonin's Path]; see also Edward D. Re, Professionalism for the Legal Profession, 11 Fed. Cir. B.J. 683, 697-99 (2002) [hereinafter Re, Professionalism for the Legal Profession] (discussing the many benefits of law professors choosing to mentor their students).

[FN18]. As will become clear later, I am not proposing "dumbing down" law school or converting it into a "competition-free" zone, only eliminating sources of law student distress that are, in my opinion, purely gratuitous and, in any event, contrary to sound pedagogy.

[FN19]. It might be argued that law students do not want a mentor-mentee relationship with their law professors. I confess to having thought so myself at one time. The last two times that I have taught my Personal and Professional Ethics class, however, have changed my mind on that topic. In each of those classes, I asked my students how many of them had a **mentor** on the faculty. In discussing the roles of a faculty **mentor**, I was careful to exclude getting their mentees jobs. As so described, about ten percent (a little under that figure in one class and a little over in the other) stated that they had a **mentor**. I then asked them how many wished that they had such a **mentor**. In each class, more than 85%--over 90% in one of them--said that they did. I confessed my surprise--my total astonishment was more like it--and said that I expected my colleagues would be surprised as well, because students seemed so focused on getting out into the "real world." In response, one student raised her hand and said, "We know you don't know that, professor. Would you please tell them that? Would you please just tell them?" I did tell them, by e-mail, that very day. And now I am telling you.

[FN20]. Professor Rhode discussed one noted academic's candid response to the resiliency of the legal academic community to criticism in a recent article:

> One professor, when asked by a New York Times reporter why current educational norms persist despite rampant criticism, put the point candidly: "The present structure of law school is very congenial to us [the faculty]....

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We're not indifferent to the fact that our students are bored, but that to one side, law school works pretty well for us."

Deborah L. Rhode, Missing Questions: Feminist Perspectives on Legal Education, 45 Stan. L. Rev. 1547, 1549 (1993) [hereinafter Rhode, Missing Questions] (footnote omitted) (alteration in original).

Professor Resnik has raised a related and clearly valid point, namely that "law professors tend to teach what they themselves have been taught." Judith Resnik, Ambivalence: The Resiliency of Legal Culture in the United States, 45 Stan. L. Rev. 1525, 1525 (1993). Professor Resnik does not offer an explanation for this tendency, but at the risk of being accused of rank speculation, I would point out that by doing so, a professor is engaging in an act of self-validation: after all, it was by mastering what one was taught that a professor achieved his or her exalted status. Since that status must be deserved, what better way of searching out the next generation of similarly deserving persons than to expose them to the same materials?

[FN21]. The two leading studies on the demographics of law professors are somewhat dated, but nonetheless instructive. The first, published in 1980 and surveying all of the professors listed in the American Association of Law School's (AALS) 1975-1976 directory, found that "[n]early 60% of the 1975-1976 sample graduated from one of only twenty law schools, yet these 'top producers' comprised only 15% of the nation's accredited law schools." James R.P. Ogloff et al., More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education, 34 Creighton L. Rev. 73, 130 (2000) (citing Donna Fossum, Law Professors: A Profile of the Teaching Branch of the Legal Profession, 1980 Am. B. Found. Res. J. 501, 507 (1980)). The second study, involving a representative sample of professors listed in the 1988-1989 AALS roster found that "54% of the law teachers came from one of those same twenty law schools." Ogloff et al., supra, at 130 (citing Robert J. Borthwick & Jordan Schau, Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors, 25 U. Mich. J.L. Reform 191, 209 (1991)).

[FN22]. As one author pithily put matters:

Since [Christopher Columbus] Langdell hired [James Barr] Ames, the accepted measure of a law teacher has been "not experience in the work of a lawyer's office, nor experience in dealing with men, nor experience in the trial or argument of cases-not, in short, in using law, but experience in learning law" through the reading and analysis of judicial opinions. Thus, for many faculty members the road to teaching has been short and narrow: a brilliant record in an Ivy League law school, a clerkship for a distinguished judge or judge of a distinguished court, and then straight to the classroom.

Judith T. Younger, Legal Education: An Illusion, 75 Minn. L. Rev. 1037, 1041 (1990) (footnotes omitted). According to Professor Younger, Ames, who succeeded Langdell as dean at Harvard Law School in 1895, "had not practiced law for a single day." Id. at n.13 (citing Woodward, The Limits of Legal Realism: An Historical Perspective, in H. Packer & T. Ehrlich, New Directions in Legal Education (1972), App. B, at 360).

[FN23]. Interestingly, one astute observer has concluded that "judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy." Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 35 (1992). Judge Edwards' article resulted in an entire issue of the Michigan Law Review being devoted to responses to his article, none of which really disputed his central point, and several of which argued that such a state of affairs was entirely proper. See generally Symposium, Legal Education, 91 Mich. L. Rev. 1921 (1993) (involving seventeen different responses to Judge Edwards' article). All of this prompted a reply from Judge Edwards, in which he stated that he "had been overwhelmed with oral and written responses to his article from law school deans and faculty members, students, and members of the bench and bar," and that "[a]lmost all those from whom I have heard agree that the legal community faces a significant problem." Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 Mich. L. Rev. 2191, 2193 (1992).

This state of affairs might be defended to some extent were this torrent of scholarship really good. However, numer-

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ous eminent authorities have concluded that much of this scholarly output is mediocre at best. In summarizing current legal scholarship some years ago, Judge Richard Posner had this to say:

> How good is this scholarship? Some of it is good, but much of it is embarrassingly bad, and the overall impression is of enormous variance.... It would be unfair to quote many of the silly titles, the many opaque passages, the antic proposals, the rude polemics, [and] the myriad pretentious citations... in which this literature abounds.... Every academic field is populated mainly by drones... and can easily be made to look arid or even comical.... But there are reasons to expect the problem of quality to be more urgent in legal scholarship than elsewhere in the university, once law professors cut loose from their moorings in legal doctrine.
>
> ....
>
> My concern is with the new legal scholarship, which borrows its ideas and methods from other fields, such as economics and philosophy, but does not subject itself to evaluation by the trained specialists in those fields, the real pros.
>
> ....
>
> Given all that I have said--and I have not exaggerated--the wonder is not that so much legal scholarship nowadays is slipshod, amateurish, outlandish, or worse, but that much is quite good and, perhaps, more is excellent than thirty years ago.

Richard A. Posner, Legal Scholarship Today, 45 Stan. L. Rev. 1647, 1655-57 (1993). For a long list of similarly negative assessments by other eminent scholars, see Gary L. Blasi, What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. Legal Educ. 313, 316 n.5 (1995). Reviewing these assessments by one of the preeminent legal scholars of modern times and his illustrious colleagues, one can only wonder whether we wouldn't be better off devoting some substantial portion of the time, energy and resources dedicated to the production of legal scholarship to the humane and sensible education of our students.

[FN24]. See John D. Copeland & John W. Murry, Jr., Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 Mo. L. Rev. 233, 241 (1996) (claiming that scholarship is the weightiest factor in faculty retention and promotion decisions, with significant publications more than making up for minimally adequate teaching); Bethany Rubin Henderson, Asking the Lost Question: What Is the Purpose of Law School?, 53 J. Legal Educ. 48, 65 (2003) (stating that law schools “neither offer incentives for good teaching nor even define it”).

[FN25]. See G. Andrew H. Benjamin et al., The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, 1986 Am. B. Found. Res. J. 225, 240-47 (1986). For just a few of the other most noteworthy studies, along with articles that discuss them and their implications, see Matthew Dammeyer & Narina Nunez, Anxiety & Depression Among Law Students: Current Knowledge and Future Directions, 23 Law & Hum. Behav. 55, 64-67 (1999); Lani Guinier et al., Becoming Gentlemen: Women's Experiences in One Ivy League Law School, 143 U. Pa. L. Rev. 1, 3-4 (1994) (focusing on the adverse impact of a legal education on women students); Ann Iijima, Lessons Learned: Legal Education and Law Student Dysfunction, 48 J. Legal Educ. 524, 525 (1998); Sandra Janoff, The Influence of Legal Education on Moral Reasoning, 76 Minn. L. Rev. 193, 237-38 (1991); Lawrence S. Krieger, Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence, 52 J. Legal Educ. 112, 114-15 (2002) [hereinafter Krieger, Institutional Denial]; Lawrence S. Krieger, What We Are Not Telling Law Students--And Lawyers--That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing The Profession From Its Roots, 13 J.L. & Health 1, 4-5 (1999); Lawrence S. Krieger & Kennon M. Sheldon, Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being, 22 Behav. Sci & L. 1, 1 (2004); Mixon & Schuwerk, supra note 3, at 95-96 n.30; Stephen B. Shanfield & G. Andrew H. Benjamin, Psychiatric Distress in Law Students, 35 J. Legal Educ. 65, 68 (1985); Janet Taber et al., Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law School Students and Graduates, 40 Stan. L. Rev. 1209, 1251-53 (1988). For a review of some of this work, see Ogloff et al., supra note 21, at 125-27.

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In addition to these studies of this issue, there are many other narrative accounts of the acute levels of distress experienced by many law school students, particularly women. See generally John J. Bonsignore, Law School: Caught in the Paradigmatic Squeeze, in John J. Bonsignore et al., Before the Law 257 (1984) (documenting the growth of the legal profession as a whole from 1951-1984, with emphasis on the increased number of women attorneys); Faith Dickerson, Psychological Counseling for Law Students: One Law School's Experience, 37 J. Legal Educ. 82 (1987) (chronicling the use of psychiatric services by law students); James R. Elkins, Reflections on the Religion Called Legal Education, 37 J. Legal Educ. 522 (1987) (modernizing an earlier essay of the same subject by another author); James R. Elkins, Rites de Passage: Law Students "Telling Their Lives", 35 J. Legal Educ. 27 (1985) (describing experiences of law students using excerpts from student-written journals); James R. Elkins, The Quest for Meaning: Narrative Accounts of Legal Education, 38 J. Legal Educ. 577 (1988) (narrating accounts of students' experiences at multiple law schools); Catherine Weiss & Louise Melling, The Legal Education of Twenty Women, 40 Stan. L. Rev. 1299 (1988) (documenting the experiences of twenty female law students at Yale Law School from 1984-87).

Nor does it appear that these difficulties are attributable to not doing well in law school, as some might suggest. Describing her own experience in law school, the author of one of these studies said:

> When I started law school, I was thirty-two years old and relatively secure. I already had experienced some success, both academic and professional. I was unprepared, therefore, for the emotional toll taken by the next three years. Despite my successful law school experience, I came out feeling like I had been run over by a steamroller. I had found law school to be isolating and ego-destroying. The fact that I enjoyed most of my classes and participated frequently made my emotional response even more inexplicable.

Ann Iijima, The Collaborative Legal Studies Program: A Work in Progress, 12 Kan. J.L. & Pub. Pol'y 143, 143 (2002); see also id. at 144-45 (explaining the sources of her difficulties).

[FN26]. The data on lawyer distress are every bit as bleak as those for law students. A 1990 Johns Hopkins study found that "practicing lawyers ranked highest in major depressive disorders among 104 occupational groups." Krieger, Institutional Denial, supra note 25, at 114-15 (citing William Eaton et al., Occupations and the Prevalence of Major Depressive Disorders, 32 J. Occupational Med. 1079, 1085 tbl. 3 (1990)). For a few of the many other important articles and studies discussing lawyer distress, see generally Rick B. Allan, Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?, 31 Creighton L. Rev. 265, 266 (1997) (discussing the relationship between lawyers and alcohol abuse); Connie J. A. Beck et al., Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers, 10 J.L. & Health 1, 44 (1995) (examining the impact of psychological distress on attorneys); G. Andrew H. Benjamin et al., The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers, 13 Int'l J.L. & Psychiatry 233 (1990) (discussing studies on depression, alcoholism, and cocaine abuse with regards to legal professionals); Eric Drogin, Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions, 15 Law & Psychol. Rev. 117, 127-28 (1991) (discussing the psychological environment in which attorneys practice, and the nature of alcoholism among legal professionals).

It is a commonplace sport among some academics to criticize lawyers or the practice of law in general for their lack of civility and integrity. As Professor Krieger points out, however, it is "wholly unrealistic to expect that depressed or highly distressed lawyers will exemplify professional behavior, no matter how well schooled they are in their obligations." Krieger, Institutional Denial, supra note 25, at 116. He continues:

> It is almost too obvious to state that if our operant paradigms, teaching methods, or other practices exert pressures that undermine the physical health, internal values, intrinsic motivation, and/or experience of security, self-worth, authenticity, competence, and relatedness of our students, we should expect the negative results that studies of law students (and lawyers) consistently demonstrate: major deficits in well-being, life satisfaction, and enthusiasm, and flourishing depression, anxiety, and cynicism.

Id. at 125-26.

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Professor Susan Daicoff also has made very significant contributions to issues of lawyer--and, to a somewhat lesser extent, law student--distress. In a series of articles she has examined various causes of lawyer misconduct as well as causes of lawyer distress, together with proposed ways to ameliorate them, with a special emphasis on the emerging field of therapeutic jurisprudence. Based on that examination, she is concerned that the methods by which we select who should be a law student may result in choosing persons who are unduly predisposed to the difficulties that afflict the profession, and that many proposed ameliorative measures might actually aggravate the problems those persons exhibit. See generally Susan Daicoff, Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law and the Psychology of Lawyers, 5 Psychol. Pub. Pol'y & L. 811 (1999) (analysis of the integration of therapeutic jurisprudence and preventative law in an effort to improve the quality of the practice of law); Susan Daicoff, Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism with Reference to Empirically-Derived Attorney Personality Attributes, 11 Geo. J. Legal Ethics 547 (1998) (examining the "tripartite crisis" of professionalism, public opinion, and lawyer dissatisfaction with regards to the legal profession); Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 Am. U. L. Rev. 1337 (1997) (examining the personal attributes of law students and lawyers).

[FN27]. Not that they take the time to look at those materials and seriously consider their arguments before rendering judgment. To the contrary, as one perceptive article noted:

Most legal educators are anti-intellectual about the area of their primary professional concern: the content and method of legal education. The anti-intellectualism is characterized by an unwillingness to reflect on the goals of legal education, the content of the curriculum, the methods of teaching, and the ability of law school graduates to practice law competently. At most law schools, the purposes and methods of teaching are regarded as unfruitful, if not unfit, topics of conversation. Of almost 200 journals of legal scholarship, only one regularly addresses legal education itself. The little discussion and sparse literature that does exist is mostly anecdotal or platitudinous.

Jay Feinman & Marc Feldman, Pedagogy and Politics, 73 Geo. L.J. 875, 875 (1985).

[FN28]. This is a shameful self-delusion. As Professor Teeter has observed:

Professors who delight in humiliating students cannot pretend that this "prepares" them for practice. Such assaults merely drive the student into a neurotic shell of self-doubt or, alternatively, begets a demon who will disparage subordinates throughout his legal career. There is simply no excuse for questioning a student's intelligence or encouraging his peers to delight in his confusion.

Teeter, The Daishonin's Path, supra note 17, at 289 (footnote omitted). This is not to say that we have to avoid calling our students' shortcomings to their attention. Professor Teeter observes that "[o]ur compassion [for them] must be rooted in a genuine concern for our charges and their future clients." Id. at 291 (alteration in original). This requires us not to overlook our students' errors but rather to correct them in a spirit animated by "a profound appreciation of our students' professional potential and future perils rather than [by] a pathetic effort to ape Kingsfield." Id. (alteration in original). Our students will know the difference. Even a dog knows the difference between being tripped over and being kicked.

[FN29]. See Floyd, supra note 9, at 854 (observing that many law professors criticize the practice of law as either academically uninteresting or morally corrupt). Professor Wiseman points out that, in their more extreme forms, various reductionist criticisms of the legal system view it as irredeemably flawed. See Patrick Wiseman, Legal Education and Cynicism About the Law: Practicing Ethical Jurisprudence in the Classroom, 25 Cumb. L. Rev. 1, 11-16 (1994). He contrasts this view of lawyering, which he considers as "deluded or disingenuous," with that of "the ethical jurisprude's notion of lawyering as a principled endeavor, the lawyer seeking always to assist the legal system in becoming more just, and avoiding and redressing the distortions of prejudice." Id. at 16. The former position, he observes, promotes a cynical view of the law, one in which the principled practitioner is "mock[ed]... as a fool." Id.

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[FN30]. See Floyd, supra note 9, at 854; Harry T. Edwards, Another “Postscript” to “The Growing Disjunction Between Legal Education and the Legal Profession”, 69 Wash. L. Rev. 561, 563-64 (1994).

[FN31]. While there has been some progress in giving clinical professors the protection of either tenure or long-term contracts, in my personal experience, there are many traditional professors who view such perquisites as a wholly unjustified concession to “political correctness.”

[FN32]. The reason that they were not very good at it is that, to be an effective lawyer, one must have not only well developed cognitive abilities, but also behavioral, experiential, affective, and normative competencies. See Menkel-Meadow, Narrowing the Gap, supra note 9, at 596. Of course, since none of these latter competencies were tested for by traditional law school written examinations, their absence was of no consequence in that setting, and may not have even been known to the budding professor involved until he was called upon to exercise them.

[FN33]. For an excellent discussion of the problems created by those professors who prefer the “justifiably notorious” method of “teaching by humiliation,” see Wiseman, supra note 29, at 8. As Professor Wiseman points out, “the teacher who humiliates promotes cynicism about the law, because such disrespectful treatment of students conveys the message that it is appropriate for lawyers to treat people with disrespect.” Id. at 9.

[FN34]. The epitome of this lack of respect for the prospect of educating law students--at least among those remarks that have made it into print--still remains Professor Byrne's statement that “[t]eaching law school would be unbearably puerile without the intellectual challenge and gravity of scholarship.” J. Peter Byrne, Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education, 43 J. Legal Educ. 315, 328-29 (1993).

[FN35]. On the other hand, one should not forget the marvelous piece of dialogue from Catch-22, when Yossarian had fled to the hospital in terror after being exposed to enemy anti-aircraft fire, where he is asked by one Clevinger why he is there. Yossarian tries to explain, resulting in the following exchange:

> “They're trying to kill me,” Yossarian told him calmly.
> “No one's trying to kill you,” Clevinger cried.
> “Then why are they shooting at me?” Yossarian asked.
> “They're shooting at everyone,” Clevinger answered. “They're trying to kill everyone.”
> “And what difference does that make?”
> Joseph Heller, Catch-22 25 (Simon & Schuster (reprint 2003)).

[FN36]. See E. Gordon Gee & Donald W. Jackson, Current Studies of Legal Education: Findings and Recommendations, 32 J. Legal Educ. 471, 474-76 (1982) (discussing studies documenting a decline in the amount of time that law students devote to attending and preparing for class from their first year through their third year).

[FN37]. See Mixon & Schuwerk, supra note 3, at 102 n.60; Richard K. Neumann, Jr., Preliminary Inquiry Into the Art of Critique, 40 Hastings L.J. 725, 728-739 (1986). At the time that Professor Mixon and I prepared our article, we were unaware of Professor Neumann's superb and definitive comparison of a true Socratic dialogue with what he referred to as one conducted by the “Protagorean” or “Langdellian” method. On behalf of both of us, I apologize for not giving him his proper due. See also Catharine A. MacKinnon, Mainstreaming Feminism in Legal Education, 53 J. Legal Educ. 199, 212 (2003) (“What is called the Socratic method in law school is more often a humiliation ritual of adversarial interchange....). Professor MacKinnon added:

> At its worst, the process embodies all the vices of inequality. Students are motivated by fear; infantilized, they learn the opposite of respect for their own thoughts. In this tacit curriculum, law students are schooled in hierarchy,

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taught deference to power, and rewarded for mastering codes for belonging and fitting in. By imitation, they learn to inflict the same when their chance comes.

Id. For more discussion on the flawed "Socratic" method, see generally Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education, or "The Fem-Crits Go to Law School, 38 J. Legal Educ. 61, 77 (1988) ("[T]he Socratic method (or what passes for it today) [is]... a hierarchical notion that the teacher knows all but refuses to share it."); Martha C. Nussbaum, Cultivating Humanity in Legal Education, 70 U. Chi. L. Rev. 265, 272-73 (2003) [hereinafter Nussbaum, Cultivating Humanity] ("The so-called Socratic Method is not very Socratic: Emphasis is placed on the ability to give quick answers, and to admit being puzzled--a Socratic virtue--will not get the student very far.... The classroom culture usually values assertiveness, quickness, and confidence--qualities we associate more with Socrates interlocutors... rather than with Socrates himself."); Rhode, Missing Questions, supra note 20, at 1555 (stating that in what passes for a Socratic exchange, "[t]he professor controls the dialogue, invites the inhabitants [of his classroom] to 'guess what I'm thinking,' and then finds the response inevitably lacking," resulting in "a climate in which 'never is heard an encouraging word and the thoughts remain cloudy all day.'") (footnotes omitted) (alterations in original); Susan E. Williams, Legal Education, Feminist Epistemology, and the Socratic Method, 45 Stan. L. Rev. 1571, 1575 (1993) (calling for a revision of the "Socratic dialogue, in which knowledge and challenges to knowledge flow in both directions. The nature of the questions should also change. The questions should seek to engage not only rational analysis, but also emotional responses--like empathy and moral outrage--because knowledge creation occurs through all of these capacities.") (footnote omitted).

[FN38]. See Martha C. Nussbaum, The Use and Abuse of Philosophy in Legal Education, 45 Stan. L. Rev. 1627, 1641 (1993) [hereinafter Nussbaum, Philosophy in Legal Education]. It is also worth noting that an aggressive, hide-the-ball approach has the additional psychological advantage for the professors who tend to employ it of validating their views of law students as a sort of "lumpen proletariat," a group of generally "second-rate minds" with a few members possessing "star qualities" that the professor's tried-and-tested methods will unearth over the course of the term. After all, those methods unearthed him, didn't they?

[FN39]. The same approach can be adopted for far more benign reasons. In his defense of the Socratic method, Professor John O. Cole described what he meant by it as follows:

The approach that I am suggesting does not focus on 'content' or a 'true understanding' of the law because no 'true understanding' of the law is assumed and thus it does not attempt to pass on any 'content' to the student.... In this method, the student is questioned so that he understands the generative process by which a particular reading of the case or cases is constructed or created. In this process, the student realizes that his own answer is a creation and is not an answer that can be matched against some external standard and graded as true or false. The entering student seeks, often desperately, to match his understanding with that of the professor so that he can feel certain that his reading of the case is the correct one. The professor at his best refuses to certify.

John O. Cole, The Socratic Method in Legal Education: Moral Discourse and Accommodation, 35 Mercer L. Rev. 867, 869 (1984). Professor Cole refers to this method as "moral" education, "in the sense that its goal is to instill in the student the clear idea that all content (for example, a particular rule of law) is created or generated by the student... and thus the student is ultimately responsible for that content." Id. I can only say that I find these concepts of what the law "is" and how it should be studied to be utterly unsustainable outside the confines of a law school classroom, and, within that room, as certain to maximize student frustration and distress as any technique I can imagine.

Nonetheless, the Socratic Method has its defenders, although virtually all of them acknowledge that it is capable of abuse and that its abusive perversions are indefensible. For a representative sample of such articles, see James R. Beattie, Jr., Socratic Ignorance: Once More into the Cave, 105 W. Va. L. Rev. 471, 471, 483-85 (2003); Elizabeth Garrett, Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools, 1 Green Bag 199, 200-01 (1998) [hereinafter

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Garrett, Becoming Lawyers] (reviewing Lani Guinier et al., Becoming Gentlemen: Women, Law School, and Institutional Change (1997); Jennifer L. Rosato, The Socratic Method and Women Law Students: Humanize, Don't Feminize, 7 S. Cal. Rev. L. & Women's Stud. 37, 37, 39 (1997); Teeter, The Daishonin's Path, supra note 17, at 280.

[FN40]. In his pioneering and, regrettably, much-neglected work, Professor Andrew S. Watson described some of the negative aspects of that method. See Andrew S. Watson, The Quest for Professional Competence: Psychological Aspects of Legal Education, 37 U. Cin. L. Rev. 93, 119-125 (1968). As summarized by Professor Mudd, Professor Watson concluded that this method "increas[ed] a student's feelings of inadequacy in the face of even gentle questioning, turn[ed] the teacher into an adversary, offer[ed] little reward for good performance, distort[ed] the importance of intellect over emotion and foster[ed] an unemotional response," when an emotional one was clearly called for. John O. Mudd, Academic Changes in Law School: Part I, 29 Gonz. L. Rev. 29, 39 n.31 (1994). For a more extensive discussion of Professor Watson's views in this regard, together with some of the evidence supporting them, see Mixon & Schuwerk, supra note 3, at 93-100.

[FN41]. See Larry Richard, The Lawyer Types: How Your Personality Affects Your Practice, 79 A.B.A. J. 74, 74-75 (1993) (noting that, on the Myers-Briggs [Personality] Type Indicator, 57% of lawyers in sample population were classified as introverts, even though less than 25% of all adults have that profile).

[FN42]. See David R. Culp, Law School: A Mortuary for Poets and Moral Reason, 16 Campbell L. Rev. 61, 75-76 (1994); Anthony J. Mohr & Kathryn Rodgers, Legal Education: Some Law Student Reflections, 25 J. Legal Educ. 403, 410 (1973) (reporting that one student characterized the Socratic Method as a vehicle for "teaching on the principle of fear"); Robert Stevens, Law School and Law Students, 59 Va. L. Rev. 551, 641 (1973) (reporting widespread anxiety among students at two nationally ranked law schools due to "the fear of being exposed as an intellectual weakling in front of a lot of people you don't know"); Margaret F. Uhlig, The Making of a Lawyer, 38 J. Legal Educ. 611, 611 (1988) (recalling being required to speak "before more than one hundred other students" and respond to "the professor's assaulting questions"). In my experience, many law professors tend to dismiss these accounts as "anecdotal" or "atypical" or as "transient," and therefore not worthy of serious consideration. There are two responses to this position. The first is that there is widespread empirical evidence suggesting that such problems are severe, commonplace, and enduring. See sources cited supra notes 25-26. The second is that, as a matter of personal and professional morality, we should be interested in even isolated instances of severe psychic pain produced by behavior that is totally within our control. We may decide that such pain is an inevitable by-product of a process leading to a greater good for the "victim" involved, or for others (although I have grave personal doubts about that, at least in the overwhelming run of cases); but even then we should not be indifferent to its infliction, and we should certainly be willing to go out of our way to minimize and remediate any suffering that we nonetheless choose to inflict.

[FN43]. As one famous scholar put matters:

> The hardest job of the first year is to lop off [students'] common sense, to knock [their] ethics into temporary anesthesia. [Their] view of social policy, [their] sense of justice-to knock these things out of [them] along with woozy thinking, along with ideas all fuzzed around their edges.

Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 116 (1960) (alteration in original). While Professor Llewellyn thought that these discarded attributes should be restored later in a student's education, he felt that teaching a student to "think like a lawyer" was "almost an impossible process to achieve without sacrificing some [of the student's] humanity first." Id. As Professor Mudd has wryly observed, "the approach described by Llewellyn has been challenged as being too successful, at least insofar as the goals of the first year are concerned, and not so successful regarding the reinstating of the humanity that Llewellyn says must be sacrificed." Mudd, supra note 40, at 52. For a similar assessment, see also Cramton, Ordinary Religion, supra note 7, at 247-48.

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[FN44]. In criticizing this idea, I am not suggesting that feelings should replace legal analysis, but rather that feelings should enrich legal analysis by providing a fuller context in which to analyze the purely legal issues presented by a particular scenario and the alternative ways for resolving those issues. See Harvey M. Weinstein, The Integration of Intellect and Feeling in the Study of Law, 32 J. Legal Educ. 87, 87-88 (1982). Even when feelings do not have a great deal to contribute to a particular legal analysis, they remain endemic to the actual practice of law. See Nussbaum, Cultivating Humanity, supra note 37, at 277 ("[T]he imagination of human distress, fear, anger, and overwhelming grief is an important attribute in the law. Lawyers need it to understand and depict effectively the plight of their clients. Judges need it to sort out the claims in the cases before them."); Marjorie A. Silver, Love, Hate, and Other Emotional Interferences in the Lawyer/Client Relationship, 6 Clinical L. Rev. 259, 260 (1999). How many times have lawyers mishandled their clients' cases because of an inability to see the likely actual outcome of a plausible legal position on the judge or jury who has to resolve it or, for that matter, on the client herself?

In addition, an ability to deal with the feelings of the participants to a legal controversy as constructively as possible is absolutely necessary both to practicing law effectively and to coping with the stresses of that practice. However, as Professor Rhode observes:

> Also absent [from a modern legal education] is any sustained effort to address the emotional and interpersonal dimensions of legal practice. Thinking like a lawyer, typically presented as the functional equivalent of thinking like a law professor, is rational, distanced, and detached. The affective dimensions of lawyering are largely relegated to clinical courses, which are still treated as poor relations in most academic communities.

Rhode, Missing Questions, supra note 20, at 1558-59 (alteration in original); see also Marjorie A. Silver, Emotional Intelligence and Legal Education, 5 Psychol., Pub. Pol'y, & L. 1173, 1174 (1999).

Moreover, there is clearly "reason" to question whether emotional responses are properly viewed as the antithesis of reasonable ones. As Professor Nussbaum has stated:

> There is a remarkable degree of consensus in recent philosophical works--and in anthropological and psychological works as well--that emotions are not just mindless pushes and pulls, but forms of perception or thought, highly responsive to beliefs about the world and changes in those beliefs.

Nussbaum, Philosophy in Legal Education, supra note 38, at 1634. Professors Angela P. Harris and Marjorie M. Shultz have added:

> In our view, the dominant ideology about the relationship of rationality and emotion contributes directly both to the alienation and malaise of students and the dissatisfaction of teachers with the process of legal education. The polarization of reason and emotion prevents either from enriching the other, resulting in emotion that is undisciplined, unexamined, and unowned, as well as thinking that is arid and shallow.

Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 Stan. L. Rev. 1773, 1779 (1993).

[FN45]. These responses would be untreated, of course, because one should never reveal one's true feelings or vulnerabilities to others. Commenting on this point, after noting the prevalence of alcoholism and depression in the practicing bar, Professor Meltsner observed:

> [W]hat professional norms, combined with personality factors and family circumstances, produce them? One cause seems to lie in those aspects of the profession that encourage us to suppress our real feelings and then reward us for doing so.... But suppressed feelings go somewhere, often to our private lives, where they arrive with unexpected and unpleasant consequences.

Michael Meltsner, Whither Legal Education, 30 N.Y.L. Sch. L. Rev. 579, 585 (1985) (footnote omitted).

[FN46]. As Professor Peters has observed:

> This almost exclusive emphasis on analysis and rational thinking dismisses the importance of information that

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comes through emotions. Such a separation between intellectual analysis and emotions may block uncomfortable feelings that emotions evoke, but the same separation acts as a barrier to clients and others. The multitude of angry anti-lawyer jokes reflects this one-sided thinking, typically casting lawyers as cold and uncaring burdens on society.

Martha M. Peters, Bridging Troubled Waters: Academic Support's Role in Teaching and Modeling "Helping" in Legal Education, 31 U.S.F. L. Rev. 861, 864 (1997).

[FN47]. One of the better short descriptions of this process is set out in Pedagogy and Politics, an article by Feinman & Feldman, supra note 27:

During their first semester of law school [law] students encounter a rude shock. Their teachers demonstrate that certainty is illusory and that law is an indeterminate process rather than a determinative body of knowledge. Questions elicit answers, but the answers only elicit more questions. In this context intuitive arguments about justice and fairness do not seem sufficiently well-developed or authoritative to be persuasive. Any moral or logical position a student takes in class discussion of a legal issue will be immediately countered by an apparently equally compelling argument from the teacher or another student.

At a certain point, however, a role reversal takes place. Having learned the techniques of case and doctrinal criticism from their teachers, the students become skeptical at best, cynical at worst. This experience is deep and dispiriting, subjecting students to a "dark side of the soul." It causes many students to abandon preexisting beliefs as naive and idealistic. For their belief in objective law, students substitute a perception of law as hopelessly indeterminate, with a counter-rule for every rule, where the uniform answer is, "It depends" -with the critical factor as often the caprice of the judge as the justice of the claim. They now believe that law embodies not a common-sense morality but an infinite set of conflicting "policy arguments" that reduces ethical discourse to a meaningless game in which lawyers' craft and guile, not a sense of justice, determine the outcome.

Though we resist the notion that law is a meaningless jumble, many students simply never recover from their dark night of the soul. They find themselves unable to move to any higher ground in constructing a more hopeful or affirmative theory of law and legal practice.

Id. at 878 (footnote omitted); see also Culp, supra note 42, at 68 (stating that Socratic process leaves students with "no standards, external or internal, by which to judge" the soundness of legal positions). Professor Culp also criticizes the Socratic method for stifling primary creativity. See id. at 62-70.

[FN48]. I have found that discussion of this point almost inevitably bleeds over into the distinct issue of whether we should be "indoctrinating" our students. Of course we should not be doing that. Professor Sandalow was correct when he observed long ago that "[t]he task of legal education is not to lead students toward particular answers respecting socially controversial issues, but to enable them to think about the issues more deeply than they otherwise might." Terry Sandalow, Two Views of the Question: Are Law Schools Doing Their Job?, 37 Rutgers L. Rev. 581, 592 (1985). However, nihilism is not the only way to avoid indoctrination. Moreover, as Professor Eisele has observed:

The concern about indoctrinating our young into the evils of our culture and society mistakes the real dangers, and the real possibilities.

....

Criticism of a culture (or of a profession) does not begin from a clean slate.... Rather, criticism begins from within a system of thought and expression, and it proceeds by way of the tools and materials (norms) that such a system affords the critic.... To teach our children and students the norms of our system is not to indoctrinate them, but rather to equip them to become critics of their own culture.

Second, once inside the system and so equipped, our children and students are very much on their own, and it is arrogant to think that they will not make out of the world and our culture something other than whatever we have managed to make out of them.... Hence, whether a child or student embraces or rejects, compliments or criticizes, his or her cul-

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ture, is not a matter determined by teachers.

....

Identification with a culture is not indoctrination; nor need it be debilitating. It can be rehabilitating-for both the culture and the critic. To ask others to accept a particular legal culture is as much an invitation for them to accept the internal criticisms generated by that culture as it is an invitation to accept its internal claims of merit.

Thomas D. Eisele, Must Virtue Be Taught?, 37 J. Legal Educ. 495, 503 (1987).

[FN49]. In an important article, Professor Fejfar discusses the impact of a traditional legal education, which he characterizes as involving "the authoritative lecture, practical clinics, or, a style of socratic method or lecture which is dominated by abstract logical analysis" on a student's ability to practice law. Anthony J. Fejfar, A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education, 26 Gonz. L. Rev. 327, 371 (1990). He concludes that such a "non-integrative, non-experiential education stunts personal cognitive growth in areas such as creativity, judgment, affectivity, and willingness to act authentically in the face of inauthentic authority." Id. at 372.

[FN50]. Surprisingly, there is wide variation in the descriptions of the skills involved in "thinking like a lawyer." For a representative sampling, see David T. ButleRitchie, Situating "Thinking Like a Lawyer" Within Legal Pedagogy, 50 Clev. St. L. Rev., 29, 29-30 (2003) (stating that there has been "a tremendous amount of scholarship devoted to exactly what the phrase means" and that "there is little agreement as to what exactly 'thinking like a lawyer' means"); Feinman & Feldman, supra note 27, at 892 (stating that the elements involved are the acquisition of a legal vocabulary; categorizations of legal rules systems, together with an ability to manipulate the gaps and inconsistencies in such systems; the ability to read and use judicial opinions; and understanding the systematic nature of legal argumentation, as well as the recurrent categories of such argumentation and their uses). For a debate on the effect that an emphasis on "thinking like a lawyer" has on law students' willingness and ability to give due weight to moral considerations, see James R. Elkins, Thinking Like a Lawyer: Second Thoughts, 47 Mercer L. Rev. 511, 540-41 (1996) (positing such a connection); Peter R. Teachout, Uneasy Burden: What It Really Means to Learn to Think Like a Lawyer, 47 Mercer L. Rev. 543, 551 (1996) (denying such a connection exists).

[FN51]. Among the more thoughtful treatments of the adverse effects of the rampant competition created by grading on the curve are Barbara Glesner Fines, Competition and the Curve, 65 U. Mo. Kan. City L. Rev. 879 (1997); Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation": Reflection on Collaborative and Cooperative Learning Theory in the Law School Curriculum, 31 Ariz. St. L.J. 957, 971-75 (1999). See generally Deborah Waire Post, Power and the Morality of Grading--A Case Study and a Few Critical Thoughts on Grade Normalization, 65 U. Mo. Kan. City L. Rev. 777 (1997) (discussing competition among students as a problem at institutions of higher education). The present system, of course, has its defenders. See Daniel Keating, Ten Myths About Law School Grading, 76 Wash. U. L.Q. 171 (1998) (supposedly discrediting the negative beliefs about the law school grading system).

[FN52]. It is fascinating to contemplate what might happen if this practice were abandoned. Would average student performance improve? In an important article discussing just such an experiment Professors Feinman and Feldman recounted the standards that they would employ in a multi-graded-paper "Contorts" course, with each graded assignment having clearly articulated standards of performance:

1. The student will be graded solely on the basis of his summative examination performance.

2. The student will be graded against predetermined performance standards and not in relation to the performance of his peers.

3. All students who attain a particular level of performance will receive the corresponding grade (hopefully an A), and there will be no fixed number of A's, B's, C's, D's, or F's.

Feinman & Feldman, supra note 27, at 923 & n.120. In both the contracts and torts components of that course,

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“25-30% of the students did A work; 75% of the students did B+ or better work.” Id. at 924 n.122. No students received a grade below C+. Id. The institutional responses to these developments are fascinating. The grades involved were seen as unfairly high, leading to a quota being imposed on Contorts students who were permitted to grade on to the law school's journal and the instructors involved were forbidden to give grades in later iterations of the course on that same basis in the future. Id. at 926-29. Thus, no good deed goes unpunished.

[FN53]. For criticisms of both the form and validity of law school examinations, as well as of the process of ranking students in general, see generally Douglas A. Henderson, Uncivil Civil Procedure: Ranking Law Students Among Their Peers, 27 U. Mich. J.L. Reform. 399 (1994) (discussing the negative effects of ranking law students); Philip C. Kissam, Law School Examinations, 42 Vand. L. Rev. 433 (1989) (exploring both the benefits and adverse effects of law school grading). For a spirited debate on the form such an examination should take, see generally Norman Redlich & Steve Friedland, Challenging Tradition: Using Objective Questions in Law School Examinations, 41 DePaul L. Rev. 143 (1991) (analyzing the negative results of the current system); Michael S. Jacobs, Law School Examinations and Churchillian Democracy: A Reply to Professors Redlich and Friedland, 41 DePaul L. Rev. 159 (1991) (critiquing colleague's analysis of law school examinations); Norman Redlich & Steve Friedland, A Reply to Professor Jacobs: Right Answer, Wrong Question, 41 DePaul L. Rev. 183 (1991) (defending authors' original article against Jacob's critique). The authors all point out that there is an extensive body of literature calling the validity of law school essay exams into question, although Professor Jacobs does not see these criticisms as a reason to abandon the essay examination format. See Michael S. Jacobs, Law School Examinations and Churchillian Democracy: A Reply to Professors Redlich and Friedland, 41 DePaul L. Rev. 159 (1991). None of these articles, however, address the issue of whether students should be given more than one evaluation during a course of study, nor whether a concerted effort should be made to familiarize them with the type of examination they will receive and how best to answer it prior to its administration. With respect, those seem to me to be the more important issues before the house.

[FN54]. This is a topic worth considerable discussion in its own right, but one that can only be touched on briefly here. An example will have to suffice. An undergraduate course in child psychology might give a final examination with a question such as, “Compare and contrast the views of Jung, Freud, and Adler on the development of the child up to the age of three.” Students confronted with that question may not know the answer, but at least they know what the professor is looking for. That is, by reading the question, they are made aware of the aspects of the course that they are being called on to discuss.

By contrast, a typical final exam question in, for example, criminal law will recite a fairly complex fact pattern and then say something like, “Discuss the criminal liability of the participants growing out of this episode.” This kind of phrasing, however, is not a question at all, at least in the sense discussed above. To make it into one, we would have had to ask our students instead a series of questions like, “Is A guilty of burglary? Is B guilty of felony murder? Are A and B guilty of a conspiracy, and, if so, to commit what crime? or Does A have a valid defense of insanity?” But, of course, we do not ask such questions. Instead, we expect students to do that for themselves before writing an answer. From our own experience, we know that most really bad law school exams stem from a breakdown at this stage (the one we call “issue spotting”). Yet we do not tell this to students, much less bother to explain to them how to do well at that stage of the examination process.

[FN55]. Here, again, I can only touch on what would be a worthwhile topic for extended treatment in its own right. Several years ago, I began giving midterms in all of my first-year courses, consisting of what would be a question worth about 30% of the final, but artificially decreased in importance to count as 10% of the grade. I graded those efforts and commented on many of the exams extensively. As a group, students did as badly as one might expect, with people getting scores 10-35% of a “perfect” score fairly often. Of course, those who did that poorly were very unhappy with the outcome. I went over the exam in class, outlined a model answer, discussed the most common types of mistakes students

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had made (explaining why they were mistakes), and also made those getting below a certain score make an appointment with me to go over their exam individually. This was a lot of work, but it was worthwhile. For one thing, scores class-wide rose dramatically on the final over what they had been in previous years, which certainly made me feel better on how successful I had been in communicating course materials to my students in an understandable form. Of greater interest to me, however, was the number of students whose performance increased dramatically between the midterm and the final exam. Nearly one-half of these weaker students finished in the top one-third of their class, with a fair number making grades of "A" or "A-." This was certainly a sobering lesson for me, for, until that time, I had been among the benighted faculty who believed that my final exams, unmediated by a midterm, were separating real sheep from real goats.

[FN56]. Roger E. Schechter, Changing Law Schools to Make Less Nasty Lawyers, 10 Geo. J. Legal Ethics 367, 390 (1997).

[FN57]. See James D. Gordon, How Not to Succeed in Law School, 100 Yale L.J. 1679, 1685-86 (1991) ("Class standing does irreparable psychic injury and scars bright and creative people for the rest of their natural lives.").

[FN58]. As noted earlier, by and large, these particular reforms do not raise fiscal concerns.

[FN59]. See authorities cited supra note 25.

[FN60]. See infra section IV.

[FN61]. As one article put the matter, "To become an able counselor and adviser... you must first nourish and develop your humanity. A legal technician without a heart and soul, without feelings, is a fool who will end up serving fools." Michael I. Swygert & Robert Batey, The Opportunities of Lawyering and the Demands of Law School, 12 Stetson L. Rev. 567, 575 (1982). Among the non-intellectual skills one must acquire to be an outstanding practitioner are "courage," "personal integrity," "an innate sense of right and wrong, and a strong sense of fair play," "openminded[ness] and receptiv[ity] to new ideas," and "car[ing] for one's fellow man;" being "diligent," "a good listener," "able to accept the criticism of others," and "able to communicate in writing and orally in such a way as to persuade rather than antagonize;" and acquiring and exercising "common sense and good judgment." Bruce R. Jacob, Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities, 12 Stetson L. Rev. 577, 578-79 (1983).

[FN62]. See, e.g., Wiseman, supra note 29, at 11-16 (discussing the dangers and delusions of professors preaching an unbridled, reductionist cynicism towards the practice of law).

[FN63]. I believe in retaining a "floor" as a protection against the curmudgeons among us who decide that the exam answers received are pitiful and that most of the class should be "flunked."

[FN64]. Obviously, I am a believer in the notion that grades are something more than a relative ranking among those students taking a given exam. I realize that many law professors would disagree with me. I would note, however, that I do not believe that the possibility of everyone getting an "A" would be realized in fact. For a variety of reasons, students' ability to master course material (or their interest in doing so) as well as their ability to present what they have learned to their professors in cogent, effective ways will vary widely, resulting in grades that will vary widely as well.

[FN65]. First-year professors of my acquaintance claim that this would be devastating pedagogically, because once one professor gives a midterm, students simply stop studying in their other courses to get ready for it, and that they do this even if it does not count. To the extent this phenomenon is true, it only serves to demonstrate how much exam anxiety is present in the first year, and therefore how beneficial offering a midterm would be. Nonetheless, the existence of such a

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phenomenon clearly presents legitimate pedagogical issues. These problems could be minimized by having professors announce in advance what portion of the first part of the semester's work would be tested on, thus minimizing the time diverted from other courses for midterm cramming. Another possibility would be to have a “dead week” near the middle of the semester, during which all midterms would be given, with classes either before or after that week lengthened slightly so that the requisite instructional minutes per credit hour were met. Other solutions are no doubt possible.

[FN66]. Is this a lot of work? Yes, it is. Is it worth it? Definitely. Moreover, those professors who are willing to have their midterm count may exclude materials tested on it from the final examination; thereby shortening the test which can be graded more quickly than the longer examination that otherwise would be given, but only to the extent work is merely redistributed rather than increased.

[FN67]. See Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35 (2003); Ann Juergens, Rosalie Wahl's View of Legal Education: Clinics at the Heart, 30 Wm. Mitchell L. Rev. 9 (2003); Steven D. Pepe, Clinical Legal Education: Is Taking Rites Seriously a Fantasy, Folly, or Failure?, 18 U. Mich. J.L. Reform 307, 327-28 (1985) (stating that clinical legal education should permit students to go beyond “‘issue spotting’ the pervasive ethical problems of legal practice” to provide “an open environment for discussion and debate about what behaviors are appropriate for a lawyer and how appropriate behavior is commonly sabotaged by psychological blind spots” and to “assist each student to gain self-knowledge” by encouraging them to discuss “how their emotions, personality, and behaviors may limit their effectiveness with clients, opponents, or the institutions in which they operate”).

[FN68]. See Edwards, supra note 4, at 59-60 (discussing how clinical professors serve as role models for their students).

[FN69]. For thoughtful discussions of this topic, see Paul Brest & Linda Krieger, Teaching Professional Judgment, 69 Wash. L. Rev. 527, 530 (1994) (advocating clinical courses as the most suitable for teaching “professional judgment,” which the authors describe as involving “character traits and deep knowledge that one would not characterize as ‘skills' at all-- personal integrity, an inner moral compass, and a perception of one's work as embedded in broad social, economic, political, historical, and for some, spiritual contexts”); Roger C. Cramton, Beyond the Ordinary Religion, 37 J. Legal Educ. 509, 511 (1987); G.M. Dickinson, Moral Development Theory and Clinical Legal Education: The Development of Professional Identity, 22 U.W. Ontario L. Rev. 183, 186-96 (1984); David R. Dow, Advocacy, Truth, Fairness, and Law, 39 J. Legal Educ. 443, 451 (1989); Edwards, supra note 4, at 68-78; Eisele, supra note 48, at 499; Mary Jo Eyster, Clinical Teaching, Ethical Negotiation, and Moral Judgment, 75 Neb. L. Rev. 752, 780-96 (1996) (discussing how clinical courses can seek to train students to exercise mature moral judgment); Amy Gutmann, Can Virtue Be Taught to Lawyers?, 45 Stan. L. Rev. 1759, 1768 (1993); Paul C. Haskell, Teaching Moral Analysis in Law School, 66 Notre Dame L. Rev. 1025, 1031 (1991); Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report, 33 Gonz. L. Rev. 1, 48-50 (1997) (clinical setting as promoting “ethical decision making” which encompasses “far more... than reading the rules of professional responsibility”); Re, Professionalism for the Legal Profession, supra note 17, at 696; Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. Legal Educ. 31, 42-50 (1992) (arguing for an important place for professional ethics education in law school, and responding to those who argue that it is either inappropriate or unlikely to be worthwhile). See generally James R. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. Legal Educ. 11 (1982) (all advocating the inclusion of moral values and moral choices, variously defined, in legal education, but not focusing on law clinics as a preferred setting for imparting them); Lorie M. Graham, Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education, 20 J. Legal Prof. 5 (1995) (positing clinic as preferred venue for engaging in moral education leading to students acquiring Aristotlean “practical reason” among other virtues); Thomas L. Shaffer, On Teaching Legal Ethics with Stories About Clients, 39 Wm. & Mary L. Rev. 421 (1997) (legal aid clinics as centers for student moral development); cf. Robert V. Stover, Making It and Breaking It: The Fate of Public Interest Commitment During Law School

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(Howard S. Erlanger ed., 1989) (discussing the decline in the interest in and value ascribed to public interest legal work as students progress through law school).

In addition, there are numerous articles that stress the ability of a clinical education to provide students with certain habits, abilities, or qualities of mind or temperament that, to put the matter delicately, are clearly unlikely to emerge from the hurly-burly of a rough-and-tumble "Socratic" dialogue. See Laurel E. Fletcher & Harvey M. Weinstein, When Students Lose Perspective: Clinical Supervision and the Management of Empathy, 9 Clinical L. Rev. 135, 144-55 (2002) (discussing how clinical programs can manage difficulties created when students inappropriately identify with their clients through the creation of appropriate professional boundaries); Joy, supra note 67, at 36-38; Eleanor W. Myers, Teaching Good and Teaching Well: Integrating Values with Theory and Practice, 47 J. Legal Educ. 401, 409 (1997) (discussing the use of simulations focusing on trusts and estates, coupled with a debriefing component conducive to "moral growth," namely one that is "public, bilateral, critical and cooperative") (quoting Robert Condlin, The Moral Failure of Clinical Legal Education, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 317, 326 (David Luban ed., 1984); see also authorities cited infra note 73 (collecting authorities extolling the benefits of teaching professional responsibility in a clinical setting). See generally Joseph A. Barrette, Self-Awareness: The Missing Piece of the Experimental Learning Puzzle, 5 T.M. Cooley J. Prac. & Clinical L. 1 (2002) (focusing on the ability of a properly designed clinical experience to teach self-awareness); Paul S. Ferber, Adult Learning Theory and Simulations--Designing Simulations to Educate Lawyers, 9 Clinical L. Rev. 417 (2002) (discussing how to design simulations that will permit law students and lawyers to become more reflective practitioners); Alex J. Hurder, The Pursuit of Justice: New Directions in Scholarship About the Practice of Law, 52 J. Legal Educ. 167 (2002) (discussing the need to help law students to transcend differences of race, gender, class, religion, and the like as part of their competent representation of clients); Laurie Morin & Louise Howells, The Reflective Judgment Project, 9 Clinical L. Rev. 623 (2003) (discussing how clinical programs can use various theories of problem solving and cognitive processes to teach reflective judgment to students); Donald A. Schon, Educating the Reflective Legal Practitioner, 2 Clinical L. Rev. 231 (1995) (discussing the ability of clinical education to develop reflective judgment).

Closely related to the teaching of virtue is the nourishing of spirituality. Spirituality may or may not be associated with a recognized set of religious beliefs. See Calvin Pang, Eyeing the Circle: Finding a Place for Spirituality in Law School, 35 Willamette L. Rev. 241, 254-55 (1999); Lucia Ann Silecchia, Integrating Spiritual Perspectives with the Law School Experience: An Essay and Invitation, 37 San Diego L. Rev. 167, 171 (2000). As defined by Professor Pang, "spirituality" is "the animating dimension of our humanity... point[ing] us to something higher, orienting us toward virtue and the search for transcendent meaning and purpose. It moves us toward connections with others and, for many, with a deity." Pang, supra, at 259-60. Professor Pang believes that spirituality has an especially important role to play in connection with clinical legal education, and his article movingly demonstrates its utility in that setting. See id. at 260-61. Other teachers, however, have seen such spiritual considerations as relevant to traditional classroom instruction as well. See Laurie A. Morin, Reflections on Teaching Law as Right Livelihood: Cultivating Ethics, Professionalism, and Commitment to Public Service from the Inside Out, 35 Tulsa L.J. 227, 263 (2000); John W. Teeter, Jr., Teaching Tips from the Lotus Sutra, 77 Tul. L. Rev. 443, 453 (2002); Teeter, The Daishonin's Path, supra note 17, at 272. What is most striking to me about all of these writers is the emphasis they place on the talents and abilities that law students already have when they come to us, and the need to treasure, nurture, and strengthen those talents and abilities.

[FN70]. 0.I thus disagree with Professor Sandalow and others who maintain that "it is naive to suppose that three years of legal education will have a decisive influence on the behavior of most law school graduates" because they "come to law school as adults" with "personalities, the ways in which they deal with other people, and their attitudes toward human conflict is a good deal less malleable than seems to be supposed by those who look to legal education to shape students to a particular professional mold." Sandalow, supra note 48, at 592. I see two flaws in his position. The first is his failure to consider the severe negative effects of a legal education on the moral values that students already have when they come

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to law school. Clearly, the elimination of those negative effects is a worthwhile objective, even if professional virtues cannot be inculcated. The second is his conflation of students' pre-existing non-profession-centered morality with their at best nascent professional personae. In fairness to him, however, elsewhere in his remarks, Professor Sandalow appears to acknowledge at least the first of these points, when he states that law schools "do have some capacity to reinforce--and, it should be acknowledged, to weaken--traits of character that students bring with them." Id. at 595. He continues, "[w]e need to do what we can--more, I believe, than we have been doing--to assist students in strengthening those traits that are necessary to the moral life, which is not quite the same as attempting to fashion the students in our image of moral persons." Id. at 595-96.

[FN71]. 1.This point is made very well by Professor Eisele:

Those who fear "indoctrination," who see the teaching of the appreciation of virtue as threateningly easy, have not tried it. It is difficult to get people to do things the right way. To stand for virtue in what one does, in how one acts, and to attract people (or their attention) to this stance, are not easy tasks. But they are ours.

....

To ask someone to follow you is to ask him or her to make a choice, to make a commitment, to follow you rather than someone else. It is, at least implicitly, to claim a value for yourself, to say that you are more worth following than someone or something else available to the student. To turn the student loose, without example and without direction, in the name of neutrality or tolerance, so that these students can find themselves on their own, if and when they can, is not a better or truer alternative to setting an example for them. It is an abdication of our responsibility for leadership. They will follow someone, something; and they will become acculturated, if not to our culture, then to another.

Eisele, supra note 48, at 504-05.

[FN72]. 2.See Nina W. Tarr, In Support of a Unitary Tenure System for Law Faculty, 30 Wm. Mitchell L. Rev. 57 (2003). Lest we think that such negative attitudes towards clinicians are a relic of the distant and deeply regretted past, see Philip C. Kissam, Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reform of Legal Education, 60 Ohio St. L.J. 1965 (1999):

The basic instincts of the university law school have been to resist, limit, and incorporate clinical education into itself in fragmented, compromised ways.... In essence, the university law school has constrained clinical education by separating clinics from the core curriculum, by marginalizing clinics in terms of its space, budget allocations, prestige, and conceptualization and by infiltrating clinical programs with traditional techniques of the university law school.

Id. at 1994.

[FN73]. 3.Because of the intimate association between the competent practice of law and legal ethics, the familiarity with that association of any such instructors that our law schools would want to hire, and their willingness to impart and model that association to our students, such instructors provide ideal vehicles for transmitting the more uplifting traditions of our legal culture to our students. This is why there is such a strong movement to teach professional responsibility in a clinical setting rather than as a free-standing course. See Edwards, supra note 4, at 65-68; Peter A. Joy, The MacCrate Report: Moving Toward Integrated Learning Experiences, 1 Clinical L. Rev. 401, 402 (1994); James E. Moliterno, An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere, 60 U. Cin. L. Rev. 83, 113 (1991); James E. Moliterno, Teaching Ethics in a Program of Comprehensive Skills Development, 15 J. Legal Prof. 145, 163 (1991) [hereinafter Moliterno, Teaching Ethics]; Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 Loy. U. Chi. L.J. 719, 724 (1998); see generally Robert P. Burns, Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism, 58 J.L. & Contemp. Prob. 37 (1995) (proposing simulation as the most powerful way to teach some aspects of ethics); Robert P. Burns, The Purposes of Legal Ethics and the Primacy of Practice, 39 Wm. & Mary L. Rev. 327 (1998) (arguing for simulation in professional responsibility curriculum); Lorie M. Graham, Aristotle's

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Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education, 20 J. Legal Prof. 5, 28 (1995) (discussing opportunities for students to learn values for the profession in clinics); Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35 (2003) (arguing clinical teachers should make clinics a model ethical law office); David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 Geo. J. Legal Ethics 31, 40 (1995) (proposing a hybrid method of teaching ethics to convey to students they are responsible for their choices). For a fascinating discussion of the moral issues involved in live client counseling and the various schools of thought that have arisen for addressing them, see Robert F. Cochran, Jr. et al., Symposium: Client Counseling and Moral Responsibility, 30 Pepp. L. Rev. 591, 593 (2003).

[FN74]. See Moliterno, Teaching Ethics, supra note 73, at 163; Franklin M. Schultz, Teaching "Lawyering" to First-Year Law Students: An Experiment in Constructing Legal Competence, 52 Wash. & Lee L. Rev. 1643, 1648-50 (1995).

[FN75]. For a primer on simulations, see generally Jay M. Feinman, Simulations: An Introduction, 45 J. Legal Educ. 469 (1995) (describing the basic framework for creating simulations).

[FN76]. See James E. Moliterno, Legal Education, Experiential Education, and Professional Responsibility, 38 Wm. & Mary L. Rev. 71, 109-11 (1996); John Sonsteng et al., Learning by Doing: Preparing Law Students for the Practice of Law, 21 Wm. Mitchell L. Rev. 111, 148 (1995); Lloyd B. Snyder, Teaching Students How to Practice Law: A Simulation Course in Pretrial Practice, 45 J. Legal Educ. 513, 514-15 (1995).

[FN77]. This is a limited, but more highly focused, variation of "ethics by the pervasive method," as proposed by Professor Deborah Rhode. See generally Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method (1994) (describing the importance of ethics and morals in the practice of law); Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. Legal Educ. 31, 50-56 (1992). While I have my doubts about the efficacy of her approach as applied to integrating ethical issues into traditional substantive courses, for reasons that I need not go into here, I believe that the more limited and focused one I advocate is workable. A desire to mold competent, ethical practitioners is part of legal research and writing, lawyering skills, and clinical professors' stock in trade.

[FN78]. Unless I am mistaken, this is the first and only one of my recommendations that would cost anything to implement. As a compromise, many of these benefits could be approximated through the creative and sophisticated use of simulations and externships.

[FN79]. As to why this is so valuable, see infra note 103 and accompanying text. See also William Prewitt Kralovec, Contemporary Legal Education: A Critique and Proposal for Reform, 32 Willamette L. Rev. 577, 585 (1996) (stating that the starting point for any reform of legal education "must be to regain our shared sense of what it means to be an attorney").

[FN80]. One practice along these lines, from which the author benefited while in law school, is having seminar professors refer what they consider to be outstanding seminar papers to a suitable law review at the school for possible publication, with the decision whether to accept those papers being left to the review involved.

[FN81]. I date my personal epiphany in this regard from the day that my daughter, now a college senior, but then in the first grade, came home from school one day with a huge smile on her face and said, "Daddy, I learned the most wonderful thing in school today!" When I asked her what it was, she said, "Everyone's special, Daddy. That's what our teacher told us." She then continued, "And here's the best part! You don't have to do anything to be special. You just are!!" She has lived her entire life in accord with that truth ever since, and I have done my level best to do the same.

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[FN82]. Were this approach to be tried in a first-year course, and I think that it should be, some other approach to picking groups might have to be tried. Depending upon the length of your law school's orientation and the opportunity for socialization that it presents, friendship groups might be possible, but it is likely that in many instances they would not be. Random assignments, perhaps within other pre-existing small groups created within first-year sections for other purposes (such as legal research and writing groups), might suffice. So, too, might groups in which you sort students by anticipated career paths (expect a lot of "undecideds" !) and have them pick their firms from within those groups.

[FN83]. At our school, all students have school e-mail accounts, and I use the information given to me by them to create a class listserv. This activity, however, is not essential to the subsequent conduct of the class.

[FN84]. I have only been able to find a handful of references to teaching large classes by organizing students into smaller groups in this fashion, although the method enjoys widespread use in skills courses and, apparently, in upper division courses (in my experience, almost exclusively in the form of panels designated in advance of a particular class, a method that I reject). See Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 29-30 (1996); Roark M. Reed, Group Learning in Law School, 34 J. Legal Educ. 674, 674-75 (1984). The accounts of these approaches either demonstrate that they differed from mine in substantial respects, or lack sufficient detail to permit a comparison. This is a commonly bemoaned problem. See Ogloff et al., supra note 21, at 181-82.

For example, Professor Mattis has reported using small groups in her larger classes but the students were "selected... at random during the minute before class began." Barbara Taylor Mattis, Teaching Law: An Essay, 77 Neb. L. Rev. 719, 721 (1998). The students, however, were permitted to consult with one another before responding to questions from the professor, as in my model. See id. at 722. Another professor reports that a single professor at Harvard organizes his students into law firms and has the firms, rather than individuals, debate the issues presented by the materials under discussion. See Orin S. Kerr, The Decline of the Socratic Method at Harvard, 78 Neb. L. Rev. 113, 123-24 (1999). Exactly how those groups are selected and how they operate in practice, however, are not discussed in that piece. The approach reportedly followed by a professor at another law school appears to be very similar. See Sarah E. Thiemann, Beyond Guinier: A Critique of Legal Pedagogy, 24 N.Y.U. Rev. L. & Soc. Change 17, 28-29 (1998). Another professor has suggested a model for such group activities that resembles the one I use, but it lacks sufficient detail to tell whether it would work in the same way. See M.H. Sam Jacobson, A Primer on Learning Styles: Reaching Every Student, 25 Seattle U. L. Rev. 139, 168-69 (2001); see also Thomas Michael McDonnell, Joining Hands and Smarts: Teaching Manual Legal Research Through Collaborative Learning Groups, 40 J. Legal Educ. 363, 365-67 (1990). The bias against collaborative learning in traditional courses and the reasons for rejecting it have been explored in detail in Zimmerman, supra note 51.

I confess to remaining in pristine ignorance of all of these materials until after I had formulated the approach that I am about to discuss.

[FN85]. On the other hand, a person can respond for his or her firm even though no other firm members are present that day. Not entirely tongue-in-cheek, we call such a person a "hero."

[FN86]. I offer one cautionary note in this regard, an example of the hoary adage, "Be careful of what you asked for. You might just get it." The first couple of months I used this method, I was surprised by how often students took me up on my "chance to consult before speaking" option. Of course, they were doing exactly what I wanted them to do, but the time involved, even though seldom as long as a minute, seemed much longer. It was awkward and unproductive, and often was experienced as somewhat embarrassing by the firm involved. Over time, I have become very good at having a few lines of background information relevant to the issue at hand in reserve to fill in those silences. Development of that skill has markedly improved this process.

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[FN87]. It also provides at least a partial answer to persons who are frustrated by how to respond to criticisms of the current system of legal instruction within the constraints proposed by large classes. For example, in reviewing Professor Guinier's work on the adverse effects of law school on women students, Professor Garrett stated:

My frustration with this [remedial] part of Professor Guinier's project is that she suggests very little in the way of concrete curricular changes, nor does she advance the debate significantly. How would she encourage cooperative learning in, say, a corporations class of 150 students?

Garrett, Becoming Lawyers, supra note 39, at 207 (alteration in original). My approach, I believe, provides a way to do just that.

[FN88]. It also takes the "sting" out of being perplexed. After all, if two, three, or four people do not know the answer, it must be a hard question. Indeed, in the period of consultation I often realize that the question was not just hard; rather, it was outright bad, and I re-ask it in a much more intelligible fashion, to the benefit of all concerned.

[FN89]. The person giving the initial response for a firm, however, is not required to answer follow-up questions. In my experience, it is not unusual for two, three, or even more members of a firm to divide up a series of related questions among themselves and discharge everyone's duty to respond personally in a single class period.

[FN90]. See Mixon & Schuwerk, supra note 3, at 92. For an earlier effort to explore such issues--one that we were not aware of at the time we began our own efforts--see Harvey M. Weinstein, supra note 44, at 93-98.

[FN91]. The normal attendance requirement for a class at the Law Center is 80%, but it is higher for this class, because almost the entire benefit of the class derives from "showing up" and experiencing the presentations and personal interactions that occur.

[FN92]. I encourage, but do not require, students who "pass" on an assignment, to prepare a substantive response for their own benefit. Many have told me that they chose that option, because they wanted a written record of how they felt about the questions that I posed to them, even though they did not wish to share those feelings with me.

[FN93]. These guidelines are developed over the course of a discussion that often takes the better part of a two-hour period, in which we discuss at length what makes a conversation with another person either "safe" or "unsafe" to have. A recent set of "safety guidelines" growing out of such discussions is set out as Appendix 1 to this paper.

[FN94]. The precise method I employ works as follows. If I have, say, fifty-eight students and want groups of four or five, I would have all of the men line up on one wall and count consecutively from one to twelve, repeating the process until everyone has a number, while all of the women would line up on the opposite wall and count down from twelve to one, again repeating the process until all of them have a number. All persons with the same number end up in the same group.

The one-group-counts-up, one-group-counts-down approach serves two purposes. First, it makes it harder for the students to arrange themselves so that they end up in the same groups whose formation I am trying to disrupt. Second, it assures that the maximum number of groups end up being the size that I want them to be. In a class of twenty-eight men and thirty women, for example, if both men and women counted up from one to twelve, there would be four groups of six (Groups 1-4), two groups of five (Groups 5-6) and six groups of four (Groups 7-12). On the other hand, using the same numbers but having the men count up and the women count down, there are ten groups of five (Groups 1-4 and 7-12) and only two groups of four (Groups 5-6). Try it and see!

[FN95]. Many, but not all. I have found that in every law review subset of the class there will be a number of students who have serious reservations about their law school experience and how it has affected them personally, most especially

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in terms of their ability to form or maintain intimate relationships, or who harbor concerns about the likely impact of their chosen legal career on them in those respects.

[FN96]. The main attractions for this group are that the class is taught on a “pass-fail” basis and has no final examination. Thus it poses no threat to their GPAs, and parlays that benefit with leaving them additional time to study for their other courses.

[FN97]. I knew I had made a good deal of progress along these lines when, in an effort to confront the stereotypes involved, I asked the groups to provide positive and negative stereotypes of persons who were not successful in law school as measured by grades alone, and several absolutely refused to do it. Through their spokespersons, those groups told me in front of the entire class that my exercise was demeaning to such persons who were in the class, that I should never has asked that the exercise be undertaken, and, in essence, that I had committed a massive violation of my own safety guidelines by choosing to do so.

[FN98]. Homework assignments are given almost daily. They are due no later than one week after they are given. I try to read them more or less as I get them, and have them back in students' hands by the week after they are turned in. Because I frequently find something in them worth commenting on, as opposed to merely checking them off as turned in, this can be a fair amount of work.

[FN99]. I urge contented students to divulge their “secrets to success,” which I keep track of, because their approaches to keeping law school stresses in perspective might prove to be beneficial to others. In subsequent classes, I make a point of announcing these factors or techniques, without attributing them to the particular students involved.

[FN100]. The mix of perspectives that I use varies from year to year, but often includes classes focusing on the impact (and frequent misuse) of the Socratic Method, the use of a grading curve, the effect of gender on the law school experience, student-on-student abuses, the disjunction between legal education and the practice of law, legal education as a perpetuator of hierarchy, and a wrap-up session on what changes the students would make in legal education if they had the power to do so. Most of those readings are mentioned in footnotes to this article.

[FN101]. A recent topic list for this question is set out as Appendix 2 to this paper. The group can rate each topic from “0” (skip it, PLEASE!) to “5” (emphasize it heavily). I require a group consensus on these topics, so that I do not have to review and collate sixty-odd responses.

[FN102]. One problem with the group-consensus vote is that stark individual differences within the group can be concealed. A topic might get a “3,” for example because three people thought that it was worth a “5” but the other two rated it as a “0.” The separate individual preference tabulation reveals this.

[FN103]. These speakers can be viewed as providing a “borrow[ed] experience,” that students can use to begin structuring their own professional personae, rehearsing possible responses to ethical dilemmas and buttressing their own moral defenses to those presented in class. See Jamison Wilcox, Borrowing Experience: Using Reflective Lawyer Narratives in Teaching, 50 J. Legal Educ. 213, 213 (2000) (discussing one professor's use of non-fiction accounts of the legal profession for a similar purpose).

[FN104]. This is another great fear of law students. They assume that they should be able to handle everything that comes up in their practice themselves, and that they will be seen as ineffectual and weak if they cannot.

[FN105]. What law school might look like if we did is reprised briefly below.

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[FN106]. For another such speech, see generally Joel Jay Finer, Finding Yourself in Law School, 37 Clev. St. L. Rev. 585 (1989) (containing an address given by Professor Finer to an entering class in 1989).

[FN107]. Hence the old saw: Q: How do you develop good judgment? A: Bad judgment.
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