

# Is Learning To “Think Like a Lawyer” Enough?

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## I. INTRODUCTION

In 1850 Abraham Lincoln offered the following advice to new law students:

There is a vague popular belief that lawyers are necessarily dishonest. . . . [T]he impression is common, almost universal. Let no young [person] choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.<sup>1</sup>

Many law professors would claim that such moral instruction is either unnecessary or inappropriate in a graduate program for adult students. Yet, most law school graduates today seem to be entering the profession with only the vaguest sense of their ethical obligations to the public. The duty of lawyers to contribute to the social good has been eclipsed by self-interest and the desire for financial security.

The training of students to “think like lawyers” may very well have contributed to the erosion of professional values by implicitly authorizing students to become amoral, technically proficient advocates—“knaves” in Lincoln’s term—who practice law without regard for the human, social and moral implications of their choices and actions as lawyers.

Are law schools educating students for technical proficiency, but failing to inculcate in them a proper sense of their social and public responsibilities as members of the legal profession? What should law students be taught about the relationship between income and wealth distribution, and their professional responsibility as members of the legal profession to those unable to pay for legal services? Have legal educators been sufficiently explicit about the duty of lawyers to provide and support free or low-cost legal services for those who cannot afford to pay for

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1. Abraham Lincoln, *Fragment: Notes for a Law Lecture*, July 1, 1850 in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 82 (Roy P. Basler et al. eds., 1953). Thanks to Herbert Mitgang for bringing this lecture to my attention.

them? These are questions that have acquired added immediacy in an era of increasingly scarce legal services for the poor.

Of course, merely preaching to law students from time to time that, as lawyers, one day in the future, they will have some ill-defined professional responsibility to provide pro bono legal services to the poor can accomplish little. Moral exhortation alone is not effective education, legal or otherwise.<sup>2</sup>

Virtue, like proficiency in legal analysis and advocacy, comes from understanding, insight and practice. It must be incorporated in the educational process by which law students become lawyers.

## II. LEGAL SERVICES FOR THE POOR: A CRISIS IN THE LEGAL PROFESSION

It is beyond dispute that there are not enough lawyers providing legal services to the growing numbers of the poor among us. At a time when the number of Americans living in poverty is at an all-time high, when income equality in the United States is the most extreme in the Western World, and when the United States has the highest child poverty rate of any industrialized nation,<sup>3</sup> most poor people are forced to deal with their legal problems without the benefit of any legal assistance, and are therefore deprived of the ability to defend or pursue effectively their lawful personal, economic and social interests.<sup>4</sup>

The assistance of competent lawyers offers economically disadvantaged people the possibility of equal justice when confronting the government and other powerful or affluent legal adversaries. The unavailability of publicly funded or private pro bono lawyers to represent clients unable to afford counsel has become a national crisis.<sup>5</sup>

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2. See Lon Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189, 202-03 (1948).

3. The United States has the highest incidence of poverty of the 17 industrialized nations (Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Spain, Sweden, United Kingdom, and United States). See generally United Nations Human Development Report 1998, UN Development Programme, 28-29 (1998); Richard Freeman, *Toward an Apartheid Economy*, HARVARD BUSINESS REVIEW (Sept./Oct. 1996); Daniel H. Weinberg, *A Brief Look at Postwar U. S. Income Inequality*, in U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, HOUSEHOLD ECONOMIC STUDIES 60-91 (1996); Timothy Smeeding, LUXEMBURG INCOME STUDY, Syracuse University (1991), cited in Jean Hopfensperger, *In France a Security Blanket for All Families with Children*, MINNEAPOLIS STAR TRIB., April 14, 1996, at 1A.

4. See ABA Consortium of Legal Services and the Public, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 37 (1989). Recent and current reductions and restrictions in federally funded legal services programs can only have made matters worse.

5. See, e.g., Symposium, *Crisis in the Legal Profession: Rationing Legal Services for the Poor*, 1998 ANN. SURV. AM. L. (forthcoming).

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In the current political climate, and for the foreseeable future, there is no prospect of increased government financial support for legal services for the poor. Notwithstanding limited resources and government-imposed restrictions, existing legal services programs must make the most of what is available and continue to attract lawyers to perform the low-paid demanding legal work that needs to be done. In addition, and now more than ever, there is a need for the private bar to assume the professional responsibility of providing pro bono legal services to the poor.

Law schools have an important role to play in addressing the crisis in legal services. They must seek to attract and admit applicants who are idealistic and committed to social justice, and law faculty must teach and nurture the professional obligation of providing legal assistance to the poor.

### III. HAVE WE TAUGHT CIVIC RESPONSIBILITY?

In his presidential address to the Association of American Law Schools in 1933, Dean Charles Clark of the Yale Law School observed that although financiers and businessmen bore the primary responsibility for the Depression, “at their right hands as counselors and advisors stand the ablest of the men we have instructed and we ourselves are not too far away . . . Have we,” he asked, “taught civic responsibility?”<sup>6</sup>

More than a half century later, the incoming president of the AALS, Professor Deborah Rhode of the Stanford Law School, has taken up the gauntlet thrown down by Dean Clark and called upon legal educators to make the teaching of professional responsibility an educational priority. While she acknowledges that many law teachers are uncomfortable “venturing into value-laden discussion” and prefer not to express opinions on ethical issues, not doing so, she argues, “risks fostering relativism and cynicism,” with the result that “an atmosphere meant to foster tolerance can undermine commitment.” “We cannot,” she insists, “be value neutral on matters of value. What we choose to discuss itself conveys a moral message, and silence is a powerful subtext.”<sup>7</sup>

With respect to the availability of legal services Professor Rhode’s message is unequivocal: “[P]ro bono service should be treated not simply as a worthwhile philanthropic option, but as a central priority in professional life.”<sup>8</sup>

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6. See JERALD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL JUSTICE IN MODERN AMERICA* 164 (1976) (quoting Clark).

7. Deborah Rhode, *Professional Education and Professional Values*, AALS NEWSLETTER, Apr. 1998, at 1, 4.

8. *Id.*

In her call for demarginalizing the teaching of professional responsibility and the duty of public service, Professor Rhode has boldly advocated a transformation of the educational culture of American law schools from an almost exclusive preoccupation with the teaching of students to “think like lawyers” to a “pervasive” focus on educating future lawyers to act as socially responsible professionals.<sup>9</sup>

Law school clinics must be involved in this transformation. At present, clinical legal education often includes several contradictions. Clinics are not integrated into the mainstream curriculum. Their presence in law schools insulates other faculty from dealing with issues of law practice and of quality and equality in the administration of justice. And clinical programs represent too small a percentage of law school budgets, include too few faculty. Because these programs are available to few students, they do not have a significant enough impact. In effect the law school division between clinical and non-clinical education replicates the dual system of justice: law for the affluent as distinct from law for the poor, the mainstream curriculum as distinct from the clinical curriculum.

#### IV. RE-THINKING LEGAL EDUCATION

##### A. *Learning to “Think Like a Lawyer”*

“[O]ne pays a price for thinking like a lawyer.”<sup>10</sup>

In his classic lectures to new law students, Karl Llewellyn set forth the objective of legal education:

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice - to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.<sup>11</sup>

It is through this process, Llewellyn wrote, that legal education aims to get the law student “thinking like a lawyer.”<sup>12</sup>

9. See generally Deborah L. Rhode, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD*, (2d ed. 1998).

10. Daniel Greenberg, *Reflections on the New Mexico Conference: What Would You Have Said Before You Came to Law School?*, 19 N.M. L. REV. 171 (1989).

11. K.N. Llewellyn, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 116 (1960).

12. *Id.* Sallyanne Payton notes:

The . . . sacrifice that one makes in the first year, from which one may never recover, is the sacrifice of one's common sense, or general intelligence. Indeed, it is essential in the first year of law school to separate the students from their unexamined views and values, in the interests of inculcating habits of analytic rigor. I suppose that we assume that there will be time later for the students to recover what is valuable of their old selves and to integrate their previous lives with their lives as lawyers; but the institu-

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Anyone who has attended law school will recognize Llewellyn’s description. The not-so-hidden message that law professors give to their students is that to be a lawyer one must “think like a lawyer,” even if that means suppressing one’s compassion, idealism, and concern for truth and justice.

To “think like a lawyer” means adopting an emotionally remote, morally neutral approach to human problems and social issues; distancing oneself from the feelings and suffering of others; avoiding emotional engagement with clients and their causes; and withholding moral judgment.<sup>13</sup> To think like a lawyer one must be dispassionate in analyzing a client’s legal problems and options, and in developing a legal strategy for achieving the client’s goals.

Thinking like a lawyer requires analytical rigor, logical reasoning, the ability to recognize and draw distinctions, and an ability to advocate either side of an issue logically and persuasively, whether or not one agrees with or believes in the position one is advancing. Professor Thomas Shaffer reports the following exchange between a law professor and a first-year law student:

Professor: “Brown, what’s a trial?”

Student: “An adversary proceeding.”

Professor: “For what purpose?”

Student: “To discover the truth.”

(There is silence in class for five seconds, then laughter.)

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

Student: “I care.”

(Loud laughter.)

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tion gives them little enough encouragement or opportunity to do so, and very little indication of how that task can be accomplished consistent with the professional detachment that is induced in the first year. These are not insignificant sacrifices . . . the payoff is supposed to be that one emerges from the first year . . . “thinking like a lawyer. Sallyanne Payton, *Is Thinking Like a Lawyer Enough?*, 18 U. MICH. J.L. REFORM 233, 236 (1985).

13. See James Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 523 (1996). Professor James Elkins offers the following reflection by one of his students:

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

Professor: "Well, in your conversation with God, you can take those questions further." (Pause. Then to another student) "Smith, what's the purpose of a trial?"<sup>14</sup>

Law students come to believe that thinking like a lawyer means adopting a kind of moral neutrality regarding the means they will employ and the ends they will pursue on behalf of clients, and towards the choice of clients whom they will serve. It is only a short step from there to the conclusion that it really makes no moral difference what work one does as a lawyer, or for whom.

But something of fundamental importance is missing from this description of what it means to be a good lawyer. Llewellyn himself acknowledged the danger of teaching law students to "think like lawyers":

It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer . . . . None the less, it is an almost impossible process to achieve the technique without sacrificing some humanity first.<sup>15</sup>

### B. *Learning To Be a Good Lawyer*

Learning to "think like a lawyer" can be emotionally and morally disabling.<sup>16</sup> By teaching law students to put aside their emotional responses to the facts of cases and the circumstances of the parties and to focus their attention solely on the "legal" implications of the facts, law teachers communicate to students the implicit message that as lawyers they should respond to human situations and experiences as "lawyers," not as human beings.

Similarly, by teaching law students to separate the "moral" from the "legal," to focus on the "legal" aspects of a case and put aside its moral dimensions, law teachers communicate to students the implicit message that as lawyers they should not be concerned with the moral implications of their choices and actions as lawyers.<sup>17</sup>

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14. Thomas Shaffer, *Moral Moments in Law School*, 4 SOC. RESP. JOURNALISM, LAW, MED. 32, 33-34 (L. Hodges ed., 1978).

15. See *supra* note 11; cf. Elkins *supra* note 13 at 511 ("What happens to the moral sensibilities of those who follow the path of teachers who claim to teach you to 'think like a lawyer'? How does a law education shape one's ethics and how is this education put to work in the practice of law? What do we become as a result of an education in law?").

16. See Peter R. Teachout, *Uneasy Burden: What It Really Means To Learn To Think Like a Lawyer*, 47 MERCER L. REV. 543, 550 (1996).

17. Aside from the difficulties in discovering the one particular way that lawyers do or should think, the desirability of that mode of thought is open to question. "Thinking like a lawyer" often has been challenged as an invitation to amorality, to the cynical manipulation of concepts in behalf of one's client. See Sanford Levinson, book review, *Taking Law Seriously: Reflections on 'Thinking Like a Lawyer'*, 30 STAN. L. REV. 1071, 1072 (1978).

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These dehumanizing and amoral tendencies in legal education should cause us to think critically about the concept of “thinking like a lawyer.” Why do we accept “thinking like a lawyer” as a given—as not only a necessary, but even a sufficient goal of legal education?<sup>18</sup> Is it not possible to discourage fuzzy thinking and sentimentalism, and to teach “abstract hypothetical-deductive critical thinking skills,”<sup>19</sup> while at the same time raising and addressing moral issues and encouraging humane responses to human experience?

One need not accept fully Felix Frankfurter’s observation that “the law and lawyers are what the law schools make them”<sup>20</sup> in order to acknowledge that the education students receive in law schools not only teaches them the craft of law, but also inculcates professional values, explicitly or implicitly.

Insisting that students learn to “think like lawyers” encourages them to suppress feelings, like compassion, and moral concerns, like the desire to work for social justice—feelings and moral concerns that they brought with them to law school, and that may, in fact, have brought them to law school.

The implicit message authoritatively conveyed by many law teachers is that idealism and a commitment to social justice are not part of “thinking like a lawyer.” Instead of encouraging students to struggle with and think intelligently about feelings of empathy, compassion, moral indignation and unfairness, law teachers demand that students set aside such feelings and learn to construct and criticize arguments in a hard-headed, analytically rigorous manner. Soft-heartedness, sympathetic views of human nature and human potential, idealistic beliefs about the “good society,” and concern about injustice in the world, often are ridiculed as “fuzzy,” unrealistic, or naive. James Elkins reports that:

In writing about their experience of law school, students often focus on aspects of their life that are driven underground as they try to understand and master legal thinking. The following excerpts from student writings make this point repeatedly:

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

In the first year of law school, I had no class in which a solitary word was ever said about right or wrong, should or ought, or the ethical responsi-

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18. See generally John O. Mudd, *Thinking Critically About ‘Thinking Like a Lawyer’*, 33 J. LEGAL EDUC. 704 (1983).

19. Gail A. Jaquish & James Ware, *Adopting an Education Habit of Mind: Modifying What It Means To Think Like a Lawyer*, 45 STAN. L. REV. 1713, 1714 (1993).

20. See AUERBACH, *supra* note 6, at 149.

bility of lawyers. Such matters are stuck away in a course called Professional Responsibility.

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

In the beginning, you react, "that's just not right" or "that's unfair." As a law student, you begin to set yourself apart from lay persons and learn to think like a lawyer. When you do not think like a lawyer, you are made to feel foolish and inadequate. There is perhaps nothing so bad as saying what you feel.<sup>21</sup>

Yet law schools have an obligation to educate students not only to be technically proficient, but also to be professionally responsible, to see and reflect on the contradiction between the pursuit of professional self-interest and the public interest, and to reject materialism as the sole motivating force in human relationships.

Members of the bar have a professional duty to engage in public service, to be involved in law reform, and to provide free legal representation to the poor. But if law schools fail to inculcate these professional values in law students in a meaningful way, and in fact implicitly commend a very different professional stance for students to adopt, students are unlikely to absorb and feel those professional obligations, or to act on them when they are lawyers.

In 1935, Llewellyn gave a talk to law students at Harvard entitled *On What Is Wrong with So-Called Legal Education*.<sup>22</sup> He gave the talk at Phillips Brooks House, the university center for student public service volunteers, because he was refused permission to speak on the subject at the law school. In his talk Llewellyn took note of those law students who struggled to reconcile professional self-interest with public responsibility.

Surprising to one who has watched the Wall Street flocking . . . is this number of youngsters who now show hunger to make law do something . . . The spontaneous gathering . . . of [students] who plan organized inquiry into what a lawyer *can* do and how he can shape his work to be more of a person, and more of a citizen . . . Now have we no obligation in the engendering, in the guiding, of such ideals?<sup>23</sup>

Llewellyn's question was obviously rhetorical. In his view, law professors do have an obligation to engender and guide such ideals in their students.

Law students need to be reminded that "justice" is not something that emerges *ipso facto* from the existing legal system. They need to be taught that law is not simply a value-free or value-neutral mechanism for dispute resolution and the protection of private interests, but a political mecha-

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21. Elkins, *supra* note 13, at 527-28.

22. 35 COLUM. L. REV 651 (1935).

23. *Id.* at 662.



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nism for the acquisition, exercise and defense of power—individual, social, economic, and political power. As Jerald Auerbach has observed: “The issue is not whether law promotes political ends, but whether the political ends that law inevitably promotes are democratic, fair, and just.”<sup>24</sup>

Alexis de Tocqueville, in his classic study *Democracy in America*, observed that in the United States the power of lawyers “enwraps the whole of society.”<sup>25</sup> Law teachers must expose their students to the ways in which legal power is distributed and exercised in American society, to what ends, and in whose interests. And they must resist tendencies in legal education to devalue students’ concerns about social justice and social change.

A central goal of legal education should be to provide professional education in the public interest, not simply to train students to “think like lawyers.” Among a law school’s pedagogical objectives should be teaching students to employ legal skills and legal theory to meet individual and social needs, to expose students to the ways in which law can work either to advance or subvert public welfare and social justice, to instill in students a professional commitment to public service, and to “challenge tendencies in the students toward opportunism and social irresponsibility.”<sup>26</sup>

### V. CONCLUSION: WHAT IS TO BE DONE?

Jerome N. Frank once argued that “students should be encouraged to consider than an important part of their future task is to press for improving the judicial process and for social and economic changes through legislation, and wise administration . . . .”<sup>27</sup> Law schools, and particularly law teachers, have a “moral responsibility” to democratize our legal culture. They must teach and inculcate in their students the professional obligation of providing and supporting legal services for the poor.

For law schools to fulfill this responsibility, Deborah Rhode’s proposal to teach professional responsibility pervasively throughout the cur-

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24. AUERBACH, *supra* note 6, at 365 n.81.

25. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., 1969).

26. Duncan Kennedy, *How the Law School Fails: A Polemic*, *YALE REV. L. & SOC. ACTION* 71, 80 (1970); see also Jane Harris Aiken, *Striving To Teach ‘Justice, Fairness and Morality’*, 4 *CLIN. L. REV.* 1, 10 n.6 (1997) (“If all I can do in law school is to teach students skills ungrounded in a sense of justice, then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.”)

27. Jerome L. Frank, *Why Not a Clinical Lawyer-School?*, 81 *U. PA. L. REV.* 907, 921 (1933).

riculum must be implemented. Clinical programs and courses must be fully integrated into the mainstream curriculum. Law schools must commit—intellectually and financially—to teaching, research, writing, and practice aimed at exposing and addressing issues of social justice.

But first, we need to be explicit about the political implications of how law is practiced, of the maldistribution of legal services, and of how professional legal power is exercised, to what ends, and in whose interests. We also need to challenge the disdain for public interest and legal services and civil rights practice displayed by many legal academics, including critical legal theorists.

We need to develop a new “critical legal realism” that not only incorporates legal practice into the law school curriculum, but exposes ways in which prevailing practices, and the distribution of legal services, fail to promote and even subvert public welfare and social justice. We need to propose and advocate systemic pro bono representation and other systemic reforms to ameliorate these conditions. Finally, we need to emphasize in our teaching and by our example, that lawyers have a professional and moral obligation to serve the poor, the vulnerable, the disempowered, and to democratize the legal system.