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Thomas L. Shaffer
Notre Dame Law School, thomas.l.shaffer.1@nd.edu

Robert S. Redmount

LEARNING THE LAW—THOUGHTS TOWARD A HUMAN PERSPECTIVE*

*Robert S. Redmount*** and *Thomas L. Shaffer****

The history of American legal education is notable for a sparsity of ideas on how to convey learning about law. There has been even less focal understanding of what learning is and what it takes to establish a process which will prepare lawyers for their profession. A window on this history was provided in historical survey by Alfred Z. Reed in 1921 and, more recently, by Professors Preble Stolz and Calvin Woodward.**** It is principally their accounts of eighteenth and nineteenth century developments that we here briefly integrate and summarize. The perspective—a consideration of legal education in terms of social change and, especially, educational theory and practice—is, of course, our own.

I. American Legal Education Before 1870

In the Spartan society of early nineteenth century America the stern business of personal, social, and political survival left little possibility for thought and the cultivation of institutions of professional education. America had a number of aging, English-trained barristers, but it had none of the developed traditions of the Inns of Court in Britain for the training of lawyers in Anglo-Saxon law. It did, of course, have Blackstone's *Commentaries,* but that provided an assemblage of law; Blackstone did not address the means for the dissemination and learning of law.

In understandably homespun fashion, and following a procedural tradition of medieval craftsmen, one sought to learn law by going to the well of the lawyer. This was the lawyer's office. Here one sat and "read" the law. In effect, the neophyte served an apprenticeship. He observed what the lawyer did, learned when instructed to "look up" the law, and carried out some of the more perfunctory or mechanical operations of lawyering assigned to him by his mentor. After a decent interval of reading the law he could proclaim himself a lawyer or qualify for certification if his state provided certification. This was perhaps the truest instance of "learning by doing" or, more accurately, learning by imitation, in the history of American legal education. It meant learning good as well as bad practice; learning was mostly self-taught, copying from whatever model was available. There was clearly no consciousness of a formal educational process, and little sense of teaching or learning.

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** Ph.D., J.D.; member of the Bar in Connecticut; clinical psychologist, Hamden, Connecticut.

*** Professor of Law, University of Notre Dame; Visiting Professor of Law (1975-76), University of Virginia.

**** References appear in the appendix.

Judge Tapping Reeve, an enterprising law practitioner in Litchfield, Connecticut, recognized the benefits and the patronage to be gained from congregating students of law in one place and giving them group instruction. He founded what is claimed as the first American law school in a small backyard building next to his home in Litchfield in the 1780's. The Litchfield School prospered for several decades, mostly on the strength of the monopoly of instructional material that Reeve carefully nurtured. He prepared a system of lectures about the law, much in the manner of Blackstone's treatise, and was careful not to publish or freely disseminate them. His daily lectures, student notetaking, and examinations were combined with practical experience to form the first systematic approach to legal education in the United States. Here for the first time one finds the virtue of economy in learning the law. Reeve demonstrated that many could be taught simultaneously with a minimum expenditure of time, money, and energy. This economy became a buttress and a curse to Reeve's descendants; it is a hallmark of American legal education which has survived into the late twentieth century and which entraps its potential for growth and initiative in learning.

By the middle of the nineteenth century two discernible philosophies about legal education had developed in this country, both of them associated with universities which had begun programs in lawyer-training before 1820. One, closest to the daily pragmatism of living that characterized the economic and social life of New England and the middle Atlantic states, was epitomized by the education (training) offered at Harvard University. It took into acount its provincial competitor, a flourishing system of law office apprenticeship. Harvard University lent its name and its facility for legal education, but there was little requirement of general or university scholarship. The proper education of a lawyer was to be vocational, though not narrowly vocational. It was to prepare him, though not in all its practical detail, for the practice of law. A discrete professional school of law had been established. One needed to learn the common law and judicial decisions. There was no serious attempt to look at law as an intellectual discipline—no attempt to transplant the European-university tradition in law. Law at Harvard was divisible in terms of traditional Blackstonian subjects, and, as at Litchfield, lecture was the conventional mode of instruction. There was then no unifying principle of study and no analytical system to reduce the mass of decision. Law learning was a busy enterprise—busier, perhaps, then it needed to be—since there was so much detail to learn. It remains, today, a busy enterprise.

The second educational philosophy of legal education bore the mark of the country squire from Virginia, Thomas Jefferson: it was the "southern strategy." It reflected the intellectual cultivation of gentlemen in the Roman tradition. Law, as an aspect of culture and learning, was to be comprehended as an intellectual pursuit; its substance was, essentially, philosophy, politics and rhetoric. Jefferson was, in this as in most of what he did, influenced by Europe. At the University of Virginia and, subsequently, at other like-minded, mostly Southern schools, law became a learned pursuit, with the accent on "learned." Preparation was that of a gentleman who might become a politician, legislator, or states-

man, as well as or instead of a lawyer. Professorial chairs were assigned with incumbents to lecture on such subjects as "Moral Philosophy and the Law of Nature and of Nations," "Political Economy and Government," "Ethics and Moral Science," and "Law and Politics." A blend of the practical and the theoretical in subject matter was encouraged as legal education became, or remained, allied to a more general university education.

II. The Langdell Experience

The alternative and competing philosophies were exemplars of "not seeing the forest for the trees" (Harvard), on the one hand, and "not seeing the trees for the forest" (Virginia), on the other. Both were ultimately consumed by a new Harvard approach as the mass of legal decision put more stress on the necessity and feasibility of a parochial mastery of the law. In 1871, Christopher Columbus Langdell, Dean of the Harvard Law School, articulated not so much a new philosophy of legal education as a new methodology. Aristotelian in his educational character, he saw the need to enunciate principles of law and to find these in analytical exercises relating to cases—that is, written opinions—as these were published by courts of distinction (notably appellate courts). He said that:

> [The common] law, considered as a science, consists of certain principles or doctrines . . . the growth [of which] is to be traced in the main through a series of cases; and much the shortest and best, if not the only, way of mastering the doctrine effectively is by studying the cases in which it is embodied.

Langdell was essentially an educational theorist but he had a fine sense of relevance to learning experience and the law: he saw the need for abstraction from the mass of law, to principles which could be carried over and applied to a variety of legal situations. In effect, he enunciated the principle that learning in one law condition or situation could be related to similar and other conditions and situations by searching for and knowing appropriate principles. He also recognized, perhaps more intuitively than consciously, that effective learning and professional skill require mental exercise. Langdellian exercises were mostly historical analysis. Those of his teaching colleague, Ames, were characteristically in Aristotelian logical analysis. The good student at Harvard inevitably became proficient in dialectics and forensics. The cathedral of learning or—as Langdell himself, Jerome Frank, and others have put it—the laboratory of learning, became the library. The classroom was a mere adjunct. "The library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist," Langdell said. That seemed ironic to Frank, and seems ironic today, but Langdell's intent was to make the learning of law as close to the practice of law as good educational principles would allow.

The dominant objects of American legal education, then and now, and looking always to Harvard, are analysis and argument.

III. The Law Schools and the Bar—Narrowness in Legal Education

The Langdellian approach and the Ames application of the "case method" is the tradition of legal education that remains with us today, a century later, in spirit and substance. The citadel of legal education has remained largely immune to the currents of intellectual and social development which have swept American and Western society in the past 100 years. John Dewey and Sigmund Freud are little noted and their influences, though large in the society around us, have barely distracted the legal education enterprise. A near century of self-consciousness and struggle for personal and social self-improvement has barely touched legal education, and only then because the clamor for better lawyers sometimes has implied the need for better legal education. The age of science had stimulated a few intellectual eccentrics in law school, who contemplated methods that would make law more scientific, or possibly make of law a science, but these experiments left no visible mark. They were tolerated as diseases unlikely to be contagious. If anything, the ineffectiveness of the eccentrics seemed to confirm the view emanating over the years from Harvard that legal education, at least fundamentally, could not be improved upon.

It is the lack of humanism, more than the lack of technique, which shames legal education. By today's standards of psychological and educational sophistication, and given the urgency of current ethical dilemmas, the learning of law is a retarded enterprise. First, and most of all, the twentieth century allows us to see that it is students who learn, that the learning of law is an activity for people. Learning derived from narrow intellectual drill is not sufficient. The cultivation of emotional and moral sensitivities, along with intellectual development, is the mark of thorough professional preparation for the lawyer. Without the cultivation of self-consciousness and people-consciousness, as well as law consciousness, preparation for the practice of law becomes sterile and, inevitably, the practice itself tends to become sterile. Lawyers are often insensitive to the society they purport to serve. (Could it be, even, that personal injustice is *perpetrated* by law and lawyers where these sensing mechanisms are not developed? Maybe lawyers do not appreciate as well as they should where personal injustice exists and how best to deal with it.)

The stodgy educational enterprise of law is one barrier to ameliorative professional development. Another cooperative barrier is in the hallowed traditions and the insular, self-protective character of the organized bar itself. Legal education trains its own allies. The Bar, controlling the instruments of power which protect and regulate the legal profession, has enunciated the requirements for acceptable legal education. Supported by court and statute it has jurisdiction over who is acceptable for the practice of law. In the exercise of this power, the organized and unitary Bar is a conserving and conservative force. With less consciousness than most legal educators of what is required to develop professional attitudes and capacities, the Bar, through its authority to accredit and disaccredit law schools, has focused on residence, length-of-study, and implicit subject matter requirements for learning and certification. The requisite subjects, also reflected in demands of bar examinations, are essentially

traditional categories of law for which there is presumed to be adequate casebook and textbook instruction and preparation. There is also recognition of something called an attitude of "professional responsibility" and for this a measure of "good moral character" has been developed. The "measure" is often one or two or three recommendations as to "character" from those asked by applicants to the bar to support their candidacy, and in a few states, separate examinations on the American Bar Association's *Code of Professional Responsibility.*

In times of mounting criticism of lawyers and, implicitly, the preparation of lawyers, the inclination of the organized bar is to seek more stringency in legal education. It leans on the legal education enterprise by specifying more detailed or specific course requirements. The benign function of overseeing legal education translates itself into a greater concern with the planning and administration of the law school curriculum. Because the organized bar has a vested interest in the maintenance of the practice of law in a form and manner that are comfortable, safe, and familiar, almost all change—and most innovation—in educational policies and practice are disfavored. There is little room for success in experiments with new means of professionalizing lawyers, especially since most curricula are elective and students are quick to learn that it is bar authorities rather than academic authorities that must ultimately be satisfied. The student seeks bar-related and bar-significant courses. He cannot afford to pursue legal education as an adventure in learning, and an opportunity for self-learning, because there appears to him to be no tangible reward or secure professional preparation in these choices. In a literary image cherished by law professors, the law student is between the Scylla of the organized bar and the Charybdis of his law school.

IV. The Educational Influence of American Legal Realists

The sameness and monolithic structure of American legal education affords only a very limited possibility for freely undertaken experiment and modification. It is the exceptional law professor, journeying outside the mainstream, who catches a novel current and rides it. Where some degree of variation has occurred it has been, historically, in response to intellectual ferment concerning the law and not because of new insight into educational philosophy and method. One notable experiment was that generated by the American legal realists in the second, third, and fourth decades of the twentieth century. Essentially a critical movement, legal realism stressed the distinction between the lofty purport of law and its highly palpable operation. The crudities of the judicial process, especially at a time when the examples of a scientifically gained knowledge and scientific method were in the ascendancy, created a wave of dissatisfaction with conceptual law. At the intellectual centers of Yale and Columbia, curious minds were at work devising more scientific legal practice. Underhill Moore copied the experimental method of an embryonic scientific psychology to show that legal sanctions could (should) be based on the experimental study of social behavior. He and his students observed the traffic parking patterns and sanctioning procedures in New Haven and analyzed the association between the two.

Robert Hutchins, then the dean of the Yale Law School, working with

Donald Slesinger of Yale and Mortimer Adler and Herbert Wechsler at Columbia, sought to infuse the rules of evidence with behavioral criteria drawn from the experimental study of psychologists. Others, such as Jerome Michael and Herbert Wechsler, both at Columbia, sought to consider and teach law, notably criminal law, as responsive behavior in a social context. The culmination of efforts to infuse law with the methods and findings of the social sciences occurred in the now largely forgotten Johns Hopkins experiment, notably under the direction of Walter Wheeler Cook. The commitment of this new law study venture was to the idea that law could and should be scientific, that it was a science in its own right.

The introduction of radical thinking and new perspectives to the understanding of law, at least in intellectual circles, likely contributed a new excitement to the learning of law, at least at Yale and Columbia, in the twenties and thirties. Inquiring and challenging minds are infectious to learning, especially when they invite and direct efforts to investigate existing assumptions, and to extend knowledge. The climate of learning is likely to be replete with curiosity, expectation, and drive. Commitment to a larger search for justice intensifies interest and dedication. It is a sort of aphrodisiac to learning.

The buoyant expectations of the legal realists failed and their new educational enthusiasm fizzled. The dreariness and sameness of legal education recurred, or remained, in most places. In retrospect, the novelties of American legal realism were an incomplete educational experiment. These were merely a by-product of a more fundamental assault on the methodology of judicial decision, implicating legal education because most of the realists were law teachers and because, thanks to Langdell and Ames, judicial decision was still the stuff of legal education. But the educational interest in legal realism was eccentric in most cases, and the substance and procedure of law learning remained unchanged. Conceptualism prevailed, though perhaps concern for justice was noted more frequently than it had been. Still remote from consciousness was the view that law, or law learning, dealt intimately with human beings. The humane aspects of legal instruction and legal ministration were eclipsed, if they ever shone at all, by the emphasis on the need to learn law and by the teacher's single-minded concern for legalities and the student's single-minded concern for legalism. Legal education remained no more than a library of doctrine and theory about law—to be assimilated at all costs.

One of the more outspoken and irrepressible legal realists, Jerome Frank, flayed at the gaps he perceived—not only between the theory and practice of law, but also between legal education and professional legal experience. He was a humanist seeking to close the distance between law and intimate human experience, an advocate of "clinical lawyer schools." Frank said that law schools ought to more nearly prepare students for the practice of law by exposing them to experience and association with lawyers in practice. An advocate more than an educator in the formal sense, Frank objected to legal education in the Langdellian tradition which was then, and is now, pervasive. In Frank's view, it was like "prospective dog-breeders who never see anything but stuffed dogs." His brief espoused the spirit that sought to make law, in all of its aspects, more

sensitive to actual experience and more humane. He wanted students to learn from the events and experiences that were the subject of litigation, not from the "tail end of cases," in which a few essential facts were stipulated for the sake of legal discussion in appellate courts. He wanted teachers to speak from legal field experience, at least five years of it. He decried the conceptualism of law teachers who eschewed concern with the social experience and social context in which law occurred. He proposed, as further antidote to law teaching practice, that each law school have its own "live" clinic. He wanted students to become familiar with raw experience through exposure to fact-finding and to an analysis of facts which he did not find in the tower of concepts students climbed on in law school.

V. Clinical Legal Education and Other Recent Innovations

Jerome Frank's advocacy was a voice in the wilderness for nearly 40 years until, recently, "clinical legal education" acquired a small foothold in the universal and traditional sancta of law learning. Beginning in the late sixties, and facilitated by the philanthropy of the Ford Foundation, many law schools undertook small programs of student exposure to the legal contexts of office, courtroom, and people. Most students now spend time in programs of this sort at some time during the course of their professional legal education. They seek to learn there how to interview clients, write briefs, file motions, and even represent clients in court. They are exposed to real clients in live situations and experience firsthand the anguish, uncertainty and need that characterize consultation with live persons.

It is precise, though, to say that clinical legal experience, with very limited exception, is permitted and tolerated in legal education as a peripheral enterprise. It is at most adjunctive to the traditional core of legal training and is afforded limited credibility (in fact, limited credit) toward educational completion. This tenuous commitment to clinical legal education may reflect a feeling that clinical work lacks intellectual character. As Professor Edmund Kitch of the University of Chicago Law School observes, in prefacing the report of a conference on the subject, "the central argument for clinical education is compelling but deceptive in its simplicity." Clinical education is seen to be practice without theory, the antithesis of a traditional reliance on and bias for concepts in learning law. It has, in any case, yet to establish that it is self-supporting, or that it will be supported, even in its current, limited manifestation, once its philanthropic underwriting disappears.

Innovation in legal education comes hard, is limited in scope and permission, and generally dies young. Temperament and environment appear inimical. Nonetheless, there is an increasing consciousness among law teachers that they should reflect to students, in tangible ways, the facet that law is a force in society and not merely an event in a time and place measured by legal history, or a subject whose essence is dialectical inquiry. There has come to be, for example, a tradition of searching for the policy of law at Yale Law School, first suggested by the resident legal realists and then given a fuller theoretical treatment by the conjoining efforts of the legal scholar Myres McDougal, and the political

scientist Harold Lasswell. The essentials of legal education remain, in the work of McDougal and Lasswell, in conceptualism, but there is elaborate empirical inquiry and the framework of inquiry is, for them, characteristically broader than the most recent decisions of appellate courts or prescriptions of legislatures.

In other examples, the University of Denver and Northeastern University law schools show an almost unique commitment to clinical legal education in the larger diversity and broader compass of their programs of clinical experience for students. Student experience more nearly approaches the traditions of apprenticeship in those schools, with both practitioners and pedagogues serving as mentors. A commitment to clinical legal education as an instrument for social consciousness and social change characterizes the new Antioch Law School in Washington, D.C. There advocacy of social reform, especially in regard to the interests of minority groups, is paramount. The Stanford University School of Law, reflecting indirectly influences from Willard Hurst and others, who regard law in terms of its social and historical development, has broadened the scope if not the methodology of legal education to serve a variety of social functions. There even appears to be at Stanford a stronger commitment to infusing law learning with systematic social inquiry as a means for determining impact and direction in the law. We doubtlessly neglect similar examples. But, even considering what we neglect, there is not in any of these developments, or all of them, a clear trend. They seem mostly to be evidence of restlessness.

The mainstream of legal education is substantially unaffected and unchanged since the ingenuity of Langdell transformed the educational enterprise in 1871. Even the current experiments in law learning mentioned in the last paragraph appear to have a temporal quality that belies, or at least as yet fails to establish, the substance and permanence of discrete novelty in legal education. This state of affairs is remarkable when seen in the perspective of (1) humanistic consciousness since Sigmund Freud and William James and the advent of psychological awareness and self-consciousness as a commonplace experience; (2) developments in educational theory and method first stimulated by John Dewey and pervading in some measure nearly all of American education; and (3) the development of science and scientific method as the instrument for refinements in knowledge and as a means of more nearly approximating and communicating truth. These, along with the dramatic impact of Marxian economics, are the dominant intellectual and social events of the past century. They have left an indelible mark on consciousness and experience. They have doubtlessly affected the law, but not—or at least not very much—legal education.

VI. "Learning the Law" and "Thinking Like a Lawyer"—Limitations in Legal Education

This is benign neglect indeed. It suggests the presence of palpable attitudes about human experience and an absence of fully formed knowledge about the learning process as ways to account for the lack of educational growth and maturation in law schools. To begin with, it is our premise (our hypothesis and our empirical conclusion) that the learning of law, more than the practice of

law, is task-oriented rather than person-oriented. Law students, their teachers, and many lawyers are infused with the idea that the subject matter of law is textual. They insist that this is so, whether it is or not. Their relation to clients is secondary. "Learning the law" and "thinking like a lawyer" are primary. Consultative and counseling relationships are incidental occurrences; they happen as a matter of course. This is a remarkable disposition if, in fact, the lawyer is concerned with justice. It invites the inquirer to guess that it is justice in the abstract, or justice as the product of law, rather than a personal *sense* of justice, that occupies the lawyer. It may be, too, that lawyers are too busy in the "administration of justice" to take much notice of their personal impact on clients. The study of law, insofar as it is task-oriented and fails to realize or conceptualize human experience, helps to insulate the student and practitioner from real people and from their experiences.

We believe that the context of learning law is intellectually competitive and emotionally desensitized. The impact of this emotional climate and learning environment blunts human sensibility. The disposition to help clients, as distinguished from finding and implementing the law for clients, is reduced. There is a larger reward for aggression than for empathy. The young lawyer is rewarded for heeding his traditional image of fighter and champion of causes. If he purports to counsel clients it is mostly in a narrow, paternal way; he gives advice but fails to employ mutual sensibilities that are the essence of a shared and supportive human relationship. This relationship, we think, is often the real goal and basic need of the client in search of counsel.

The structure of law learning is, it seems to us, singularly narrow. It is incredibly opaque in its contempt for good learning principles. Cases are added on to cases to cover legal concepts in a given subject matter of law (something Langdell in proposing a few cases as storehouses of principle did not foresee). Statutes and administrative holdings are often, now, engrafted onto the process. Content is given the appearance of modification, and modernization, by the occasional introduction or reorganization of course labels. What is lacking is a sense, and a knowledge, that learning is sequential; it generally moves from simpler to more difficult inquiry and application. Most of the difficult stuff in law school is taught in the first year. Lacking, too, is the recognition that adequate but not excessive reinforcement, support, and encouragement are economical learning experience and essential for good retention. There is a further failure to note that it is essential and transferable principles that form the scaffolding on which is engrafted details and applications. Thus one learns, or should learn, how to function mentally in a sea of detail more than one seeks to learn the mass of detail itself. The whole concept of instruction as a formal discipline is ignored. Few law teachers know of the contributions of such distinguished educational and psychological theorists of the learning experience as Jerome Bruner and Jean Piaget. Law teachers, even when they innovate, "fly by the seat of their pants." Lifetimes of experimental and theoretical inquiry in the learning and educational process, not to mention inquiry into the teaching and learning experience over several generations, do not reach across the seminary wall created by the insular and often self-satisfied conceptualism of law

schools.

The method(s) of legal instruction are equally as narrow, though better defined, than the structure of learning material. Traditional law school dialogue is characteristically and repetitively in the dialectical mode, where it is inquiry rather than information that is generated. There is a honing of oral and analytical skills to the exclusion of other skills essential to professional competence. The rationale is that "thinking like a lawyer" (and talking like a lawyer) is all that counts; other skills will be acquired by extension. There may be some dilution of this exclusive mode of instruction, and it may be attended with less vitriol than in the past. There are even a few inventive law teachers who try new teaching procedures, mostly as contrast to their more practiced habits. However, there is little inclination and probably limited competence to distinguish different teaching-learning methods for different learning purposes. Examples would include cooperative, group learning-and-doing experiences; individual programmed instruction using modern electronic aids; demonstrative and participant learning as in role playing; empirical inquiry that generates curiosity and findings about experiences; and directed or supervised self-observation and individual learning. These are now occasional and exceptional methods of instruction in law school. It is as though there is neither time nor tolerance for teaching and learning methods that are presumed to offer a diminished intellectual content, and even that assumes an awareness that these methods exist.

Finally, and most critically, legal education seems to lack the consciousness that learning is an intimate personal and psychological experience. The accumulated clinical insight of generations of psychological, psychoanalytic, and psychiatric experience illuminates as well as complicates our understanding of human behavior, but it is lost on those who tune themselves out, who protect themselves from involvement with other persons. Tuning out on the personal experiences of students in learning is a doubtful luxury that, in any event, teachers can ill afford. The failure to accord dignity and sensitivity to students as individuals and as learners compounds the learning task. It frustrates learning because it does not recognize the importance of motivating and supporting the student. The student has intrinsic mechanisms which spawn interest and curiosity, and fear and doubt, and concern and decency. The teacher plays on these dispositions and tendencies; in doing so he helps or harms the student, both as a person and as a learner. He sets a precedent, knowingly or not, for the young lawyer's professional behavior by the sensitivity or insensitivity he shows in the critical human relationship of education. He has these influences whether he realizes it or not; his failure to recognize them probably makes his influence worse.

VII. The Neglected Students and Studies of Learning— Bruner, Piaget and Others

On a more positive note, it is instructive, we think, to mention here some of the ideas and concepts of education that law teachers might learn from Bruner and Piaget. They are seminal figures who increase our consciousness that ed-

ucational end values are served by an educational process which it behooves law teachers to understand. Bruner evolved a theory of instruction which "is in effect a theory of how growth and development are assisted by diverse means." He set about to inquire into the origins of human cognitive activity, that activity which includes problem solving, conceptualizing, thinking and perceptual recognition. He also concerned himself with a theory of knowledge, a theory that recognizes education as *social invention*: "Each generation must define afresh the nature, direction, and aims of education."

Through this inquisitorial process Bruner developed a theory of instruction with four cardinal elements. One element concerns itself with the kinds of experience that will generate or reinforce curiosity and interest in the learner. Translated, it may ask: *What approaches to law, what experiences in law, are likely to stimulate the interest of the student in how law works and how to use it or deal with it?* To some extent, the student, by expressing a preference to learn law, ostensibly brings to learning his own patterning of law-related interests, but we find that most law students have very little exposure to law, knowledge of how it operates or conception of law prior to law study. The experience of law that the student receives in law school, be it ethical, social, psychological, economic, or historical, is usually the first experience of law he has. It clearly directs, or misdirects, his curiosity and interest.

Bruner's second element concerns the structuring of knowledge in a given field. The value of structure is in its ability to "simplify information, generate new propositions and increase the manipulability of a body of knowledge." To do so in law, and still maintain relevance for the humanistic and social serving purposes of law, the structure of teaching and learning requires that *person, experience, and law all be formulated adequately and in relation to one another.* There has to be an appropriate and consistent way to deal with the constancies and change that characterize not only law but also human beings in diverse settings. In effect, law is relational, and it is the motivations and purposes, and needs and dispositions, in relation to others, which characterize the behavior of people. Law cannot be merely a body of principles attached to history—even legal history—which is detached from immediate experience. Bruner further emphasizes that there must be a transferable character to learning, "the continual broadening and deepening of knowledge in terms of basic and general ideas." Learning should be both pleasurable and utilitarian; it should give the learner a means to deal with the present and also to anticipate how to deal with the future.

A third element focuses on the sequence of instruction. It recognizes that there are methods of learning and teaching for individuals and subjects. These methods foster in the learner a sense of organization, direction, and pacing in the learning experience. Learning may be *intuitive or analytical, incremental or whole; but it is mostly progressive.* Law learning should be the development of empathy and intuition, of analysis and understanding, and of belief and preference, through measures and means that carefully assess all available human and legal material for its learning potential. Law learning could be, in effect, experimentation with different kinds and styles of learning for different subjects

and for different people.

A fourth element identified by Bruner is the system of paced rewards and punishments that act to stimulate and direct the learning experience. Here one is more directly dealing with the student and what makes him or her responsive. *An awareness of the law student as human being contributes to empathy and understanding so that one can best judge, for instance, whether to use tutorial methods; whether to use examinations; whether to develop formal or informal modes of instruction; and whether to be supportive or demanding in teaching.* This "reinforcement" factor also relates to how many different ways a given set of materials should be presented and how often and in what ways it should be repeated.

Students, as Bruner notes, have predispositions to learn based on culture and motive. The student is not an instrument but a human being. Different kinds of student-instructor relationships—authoritarian, noncontrolling, detached, warm, and engaged—are all relevant to learning. Each in its way jogs learning capacity. Knowledge may be characterized by the mode in which it is represented as well as by its content. And here one may speak of instructional style and focus on the uses of language, whether informative, argumentative, artistic, or scientific. Knowledge involves an economy in knowing and in learning which should lead teachers to avoid pedantry, fatuity, and irrelevance. There are distinctions in importance. It is not enough that one case or set of principles merely add to another. Finally, knowledge is power. Clear comprehension and skillful use provide the means for clarification, implementation, and change in the circumstances in which people live. Persons and knowledge have many different dimensions, in law as elsewhere, and an understanding of these dimensions is clearly a condition for how to teach law well, and for how to learn it without excessive pain.

Bruner also speaks of "coping and defending" as mechanisms by which a person comes to terms with and struggles with a task or situation he or she must face. Students cope by seeking to meet the requirements and conditions of a learning situation without having the integrity of their personhood compromised or "wiped out." They defend against encroachments—and these can be encroachments from instructors, from the learning experience, or from the demands of topic or teacher—that seem to offend or threaten a sense of well-being and offer less than enough communication. Personal relationship—some source of understanding of the person—is important in appreciating the possibilities for learning and the limitations which make learning unlikely.

Piaget teaches teachers about the intrinsic characteristics of individual mental and social development. From him we learn, we should know, that there is both communality and uniqueness in the ways in which individual thinking and conceptual capacity develop. Piaget, interestingly, is also a pioneer in inquiry about the development of moral attitudes and a sense of justice in children —and from him we can derive much of value about the psychological impacts of law in operation.

Approximating Piaget's theory, thinking evolves in stages, from a sensing experience to an operational or more practical experience, to an abstract, con-

ceptualizing experience. Piaget explores the foundations in each stage of thinking that prepare the individual to use a larger or broader intelligence in the next stage. He investigates the role of language, its semantic components, and the importance of a sustained motivation to inquire as a basis for more developed thinking ability. He also reflects on creative thinking, social thinking, and other kinds of thinking. Piaget may be less relevant for direct application to instruction about law than Bruner but his unified theory of human mental development and function is a desirable requisite for understanding the nature of the subject (student) and how to proceed in the instructional process. Piaget discourses on "the thinking man"and that, after all, is a primary concern even in the most conventional approach to legal education.

There are others, renowned educators, whose insights about the educational process are instructive, if one cares to notice. Dr. James Conant speaks of two modes of thinking, the empirical-inductive and the theoretical-deductive: "Both modes of thought have their dangers . . . above all, intellectual freedom requires a tolerance of the activities of the proponents of one mode by the other." Professor Israel Scheffler identifies three philosophical modes of teaching, the "impression model" based on Locke's idea that the teacher is inscribing on a "white paper, void of all characteristics"; the "insight model," in which the instructor helps to create a "vision" and the student provides the details; and the "rule model," after Kant, in which reason is the arbiter of what is right. Professor David Ausubel, incorporating insights from the empirical inquiries of many students of the teaching and learning process, including his own, notes that some students need to affiliate (learning is important if it gives acceptance); some need ego enhancement (learning helps to increase one's status among others); some need dependence (they prefer to be spoon-fed and will be accurate reflectors of existing practice); and some need independence (they need to establish their own competences in terms that provide separate identity).

These and other conceptions and findings illuminate the educational process. However, none of the contributions from leading educational thinkers and researchers is conclusive as to the "right" way to learn, to think, or to teach. As is common in psychology—and this may be a clue to why law teachers find psychology frustrating—each of these notable theorists has a point of view, a methodological insight or some specific information that illuminates the educational process. To most lawyers and legal educators, discourse on educational theory as a means to learning how to teach, and how to understand professionalization, is esoterica. It is seen as "noise," as verbal obscurantism; it hardly seems worthwhile. This is the sort of know-nothingism which lawyers rightfully condemn elsewhere. It may help explain why legal education is inert. It may account for the dearth of inquiry and experiment among law teachers.

The clearest message is that education, in this instance legal education, is a complex pedogogical process. It should consciously rejoice in social philosophy, methodology, and an exquisite consciousness of teachers and students as varieties of human beings. Anything less is simply inadequate to the dignity of the enterprise.

Learning the law is, now, we believe, too primitive an experience. It lacks

mental, moral, emotional, and social development and therefore does not serve the best interests of society or, for that matter, the best interests of the legal profession. It lacks humanistic concern, probably because it lacks the appropriate means and conditions which would ameliorate and improve the learning experience. To prove our point we have set about to demonstrate empirically failures in the making of lawyers. Our intent is to stimulate an interest in significant change in legal education, a change in the direction of greater humanism, and greater contact with interpersonal and social reality.

SELECTED BIBLIOGRAPHY

A.B.A. Approval of Law Schools: Standards, Procedures, and the Future of Legal Education, 72 MICH. L. REV. 1134 (1974).

AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES: REVIEW OF LEGAL EDUCATION (1935-).

Association of American Law Schools, *Training for the Public Professions of the Law,* PROCEEDINGS, 1971 ANNUAL MEETING, PART 1, Sec. II (1971). This is also incorporated as an appendix in Packer and Ehrlich, *infra.* It is frequently referred to as the Carrington Report.

ASSOCIATION OF AMERICAN LAW SCHOOLS, PRE-LAW HANDBOOK (annual editions through 1975).

D. AUSUBEL, EDUCATIONAL PSYCHOLOGY: A COGNITIVE VIEW (1968).

R. BEARD, AN OUTLINE OF PIAGET'S DEVELOPMENTAL PSYCHOLOGY FOR STUDENTS AND TEACHERS (1969).

Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education,* 26 J. LEGAL ED. 449 (1974).

Boyack & Flynn, *Conceptual Approach to Legal Education,* 6 SW. U. L. REV. 592 (1974).

Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform,* 59 CORNELL L. REV. 221 (1974).

J. BRADWAY, CLINICAL PREPARATION FOR LAW PRACTICE (1946).

Brown, *Recent Trends in U.S. Legal Education,* 26 J. LEGAL ED. 283 (1974).

Brown & Shaffer, *Toward a Jurisprudence for the Law Office,* 17 AM. J. JURIS. 125 (1972).

J. BRUNER, THE PROCESS OF EDUCATION (1960).

J. BRUNER, TOWARD A THEORY OF INSTRUCTION (1966).

CARNEGIE COMMISSION ON HIGHER EDUCATION, NEW DIRECTIONS IN LEGAL EDUCATION (1972) (referred to here as the "Packer-Ehrlich Report").

Cavers, *Non-Traditional Law-Related Legal Studies and Legal Education,* 50 Denver L.J. 395 (1974).

Cavers, *"Non-Traditional" Research by Law Teachers: Returns from the Questionnaire of the Council on Law-Related Studies,* 24 J. LEGAL ED. 534 (1972).

CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917 (1918).

Christenson, *Studying Law as the Possibility of Principled Action,* 50 DENVER L.J. 413 (1974).

A.-H. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965).

CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE, University of Chicago Law School Conference Series, No. 20 (1970).

J. CONANT, TWO MODES OF THOUGHT: MY ENCOUNTERS WITH SCIENCE AND EDUCATION (1970).

Conard, *Letter from the Law Clinic,* 26 J. LEGAL ED. 194 (1974).

Cook, *Scientific Method and the Law,* 15 The JOHNS HOPKINS ALUMNI MAGAZINE, March, 1927.

L. CRONBACH, *The Psychological Background for Curriculum Experimentation,* in MODERN VIEWPOINTS IN THE CURRICULUM (Rosenbloom ed. 1964).

Currie, *The Materials of Law Study,* in ASSOCIATION OF AMERICAN LAW SCHOOLS, *Training for the Public Professions of the Law, supra.*

Cutright, Cutright, & Boshkoff, *Course Selection, Student Characteristics, and Bar Examination Performance,* 27 J. LEGAL ED. 127 (1975).

Dauer, *Expanding Clinical Teaching Methods into the Commercial Law Curriculum,* 25 J. LEGAL ED. 76 (1973).

Dente, *A Century of Case Method: An Apologia,* 50 WASH. L. REV. 93 (1974).

Dewey, *Logical Method and Law,* 10 CORNELL L.Q. 17 (1924).

J. DEWEY, DEMOCRACY AND EDUCATION (1916).

J. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC (1916).

J. DEWEY, EXPERIENCE AND EDUCATION (1938).

J. DEWEY, HOW WE THINK (1910).

J. DEWEY, PHILOSOPHY AND CIVILIZATION (1931).

J. DEWEY & TUFTS, ETHICS (rev. ed. 1932).

DONNELL, THE CORPORATE COUNSEL: A ROLE STUDY (1970).

Dutile, *Criminal Law and Procedure—Bringing It Home,* 26 J. LEGAL ED. 106 (1973).

Eron & Redmount, *The Effect of Legal Education on Attitudes,* 9 J. LEGAL ED. 431 (1957).

Frank, *A Plea for Lawyer-Schools,* 56 YALE L.J. 1303 (1947).

J. FRANK, COURTS ON TRIAL (1949).

J. FRANK, LAW AND THE MODERN MIND (1949).

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

FRIEDMAN & MACAULAY, LAW AND THE BEHAVIORAL SCIENCES (1969).

Fuller, *What the Law Schools Can Contribute to the Making of Lawyers,* 1 J. LEGAL ED. 189 (1948).

Gellhorn, *The Second and Third Years of Law Study,* 17 J. LEGAL ED. 1 (1964).

H. GINSBURG & S. OPPER, PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT (1969).

Goldstein, *The Unfulfilled Promise of Legal Education,* in LAW IN A CHANGING AMERICA (Hazard ed. 1968).

Grismer & Shaffer, *Experience-Based Teaching Methods in Legal Counseling,* 19 CLEV. ST. L. REV. 448 (1970).

Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL ED. 162 (1974).

O. HANDLIN, JOHN DEWEY'S CHALLENGE TO EDUCATION (1959).

Hazard, *Interdisciplinary Courses and Programs in Law and Social Work—A Survey,* 6 FAM. L.Q. 423 (1972).

J. HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (1950).

Hutchins, *The Autobiography of an Ex-Law Student,* 1 U. CHI. L. REV. 511 (1934).

Hutchins & Slesinger, *Some Observations on the Law of Evidence,* 28 COLUM. L. REV. 432 (1928).

Hutchins & Slesinger, *Some Observations on the Law of Evidence—Consciousness of Guilt,* 77 U. PA. L. REV. 725 (1929).

Hutchins & Slesinger, *Some Observations on the Law of Evidence—Family Relations,* 13 MINN. L. REV. 675 (1929).

Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory,* 41 HARV. L. REV. 860 (1928).

Hutchins & Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act,* 38 YALE L.J. 283 (1929).

Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses,* 37 YALE L.J. 1017 (1928).

Hutchins & Slesinger, *State of Mind in Issue,* 29 COLUM. L. REV. 147 (1929).

THE JEFFERSON CYCLOPEDIA (Foley ed. 1967).

Kahn, *Proposal for a Modified Casebook Technique,* 25 J. LEGAL ED. 475 (1973).

Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy,* in LAW IN A CHANGING AMERICA (Hazard ed. 1968).

Kershen, *Humanization of Lawyers at Harvard,* 61 A.B.A.J. 223 (1975).

Kitch, *Clinical Education and the Law School of the Future,* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE, University of Chicago Law School Conference Series, No. 20 (1970).

Krumboltz, *Behavioral Counseling: Rationale and Research,* 44 PERSONNEL & GUIDANCE J. 383 (1965).

Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH REFERENCES AND CITATIONS (1871) (prepared for use as a textbook in Harvard Law School).

Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L. J. 203 (1943).

H. LASSWELL, POWER AND PERSONALITY (1948).

K. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951).

J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690).

Maggs & Morgan, *Computer-Based Legal Education at the University of Illinois,* 27 J. LEGAL ED. 138 (1975).

Macaulay, *Non-contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55 (1963).

Manning, *Law Schools and Lawyer Schools—Two-Tier Legal Education,* 26 J. LEGAL ED. 379 (1974).

Manning, *A Socio-Ethical Foundation for Meeting the Obligations of the Legal Profession,* 5 CUMBERLAND-SAMFORD L. REV. 237 (1974).

McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community,* 56 YALE L.J. 1345 (1947).

Meyers, *Education of Present and Future Lawyers,* in LAW AND THE AMERICAN FUTURE (B. Schwartz ed. 1976).

J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES (1940).

Mixon, *T-Grouping at the University of Houston's Bates College of Law,* 1 HUMAN RELATIONS IN LAW NEWSLETTER 1 (1969).

MOORE, THE LITCHFIELD LAW SCHOOL: CATALOGUE OF SCHOLARS; INTERESTING MEMORANDA (1902).

MOORE, LAW AND LEARNING THEORY: A STUDY IN LEGAL CONTROL (1943).

Moulton, *Clinical Education: As Much Theory as Practice,* HARV. LAW SCHOOL BULL., October 1972, at 16.

Nader, *Ralph Nader Asks Law Students to Change,* HARV. LAW SCHOOL BULL., April 1973, at 28.

PACKER & EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972).

PIAGET, SCIENCE OF EDUCATION AND THE PSYCHOLOGY OF THE CHILD (D. Coltman tr., 1970).

Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation,* 109 U. PA. L. REV. 972 (1961).

Redmount, *A Clinical View of Law Teaching,* 48 S. CAL. L. REV. 705 (1975).

Redmount, *A Conceptual View of the Legal Education Process,* 24 J. LEGAL ED. 129 (1972).

Redmount, *Humanistic Law Through Legal Counseling,* 2 CONN. L. REV. 98 (1969).

Redmount, *Humanistic Law Through Legal Education,* 1 CONN. L. REV. 201 (1968).

Redmount, *Transactional Emphasis in Legal Education,* 26 J. LEGAL ED. 253 (1974).

Reed, *Training for the Public Profession of the Law* (1921) in Association of American Law Schools, *Training for the Public Professions of the Law* (1971).

Riegert, *Max Planck Association's Institutes for Research and Advanced Training in Foreign Law,* 25 J. LEGAL ED. 312 (1973).

C. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY (1961).

Rombauer, *First-Year Legal Research and Writing: Then and Now,* 25 J. LEGAL ED. 538 (1973).

D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

Sacks, *Human Relations Training for Law Students and Lawyers,* 11 J. LEGAL ED. 316 (1959).

Savoy, *Toward a New Politics of Legal Education,* 79 YALE L.J. 444 (1970).

Shaffer, *Christian Theories of Professional Responsibility,* 48 SO. CAL. L. REV. 721 (1975).

Shaffer, *Collaboration in Studying Law,* 25 J. LEGAL ED. 239 (1973).

Shaffer, *Dean's Reports, Notre Dame Law School,* 48 NOTRE DAME LAWYER 232 (1972); 49 NOTRE DAME LAWYER 214 (1973); 50 NOTRE DAME LAWYER 168 (1974).

T. SHAFFER, DEATH, PROPERTY, AND LAWYERS (1976).

Shaffer, *Estate Planning Games,* 47 NOTRE DAME LAWYER 865 (1972).

Shaffer, *Lawyers, Counselors, Counselors at Law,* 61 A.B.A.J. 854 (1975).

T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976).

Shaffer, *On Making Lawyers More Human,* THE STUDENT LAWYER, September 1972, at 16.

Shaffer, *What Most Lawyers Do for a Living Law Students Are Seldom Taught,* LEARNING AND THE LAW, Fall 1974, at 40.

Smith, *Academic Aloofness: Stimulant or Depressant to Legal Education?* 21 J. LEGAL ED. 89 (1968).

Sommer, Classroom Ecology, 3 J. APPLIED BEHAVIORAL SCIENCE 489 (1967).

Spring, *Realism Revisited: Clinical Education and Conflict of Goals in Legal Education,* 13 WASHBURN L. J. 421 (1974).

Stevens, *Law Schools and Law Students,* 59 VA. L. REV. 551 (1973).

Stolz, *The Two-Year Law School: The Day the Music Died,* 25 J. LEGAL ED. 37 (1973).

Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392 (1971).

Strong, *Pedagogic Training of a Law Faculty,* 25 J: LEGAL ED. 226 (1973).

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

Watson, *Some Psychological Aspects of Teaching Professional Responsibility,* 16 J. LEGAL ED. 1 (1963).

Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease,* 26 J. LEGAL ED. 441 (1974).

White, *Legal Education: A Time of Change,* 62 A.B.A.J. 355 (1976).

Willrich, *Law School as a Base for Interdisciplinary Studies in a University,* 26 J. LEGAL ED. 213 (1974).

Woodard, *The Limits of Legal Realism: An Historical Perspective,* 54 VA. L. REV. 689 (1968).

York, *The Law School Curriculum Twenty Years Hence,* 15 J. LEGAL ED. 160 (1963).