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The Ordinary Religion of the Law School Classroom

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THE ORDINARY RELIGION OF THE LAW SCHOOL CLASSROOM *

ROGER C. CRAMTON **

INTRODUCTION †

A professional discipline necessarily shares a constellation of beliefs, values and techniques. This common intellectual framework defines the boundaries of the discipline (*e. g.*, what is "law" and what are "lawyers' problems"), identifies subsets of problems with which the discipline is concerned, delineates models for behavior and action, and supplies concepts and values through which members of the profession understand what they observe.[1]

This paper is a preliminary look at part of the intellectual framework of law and the legal profession in the United States: the unarticulated (and usually unexamined) value system of legal education. What is the "ordinary religion" of the law school classroom? What are the sources of this value system? Viewed from a moral and religious perspective, what are its implications? A clear understanding of the value system that permeates the educational enterprise is a prerequisite to its change and improvement.

I. WHAT IS THE ORDINARY RELIGION OF THE LAW SCHOOL CLASSROOM?

A sophisticated observer of the typical classroom in most American law schools would hear a variety of views, and see many differing methods. But he could also detect certain fundamental value assumptions unconsciously presupposed by most faculty and student participants. This intellectual framework is almost never openly articulated, but it lurks behind what is said and done. As Whitehead noted, fundamental assumptions "appear so ob-

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† I have benefited from discussions with a number of colleagues in the preparation of this paper, especially Robert S. Summers, Ronald Dworkin, John Lee Smith, and Richard Baer. Needless to say, they are not responsible for my conclusions or my errors.

1 See Comment, "Legal Theory and Legal Education," 79 Yale L.J. 1153, 1156 (1970) for a good discussion of the influence of theories about law on legal education.

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vious that people do not know what they are assuming because no other way of putting things has ever occurred to them." Occasionally, cardinal tenets of this normally unarticulated value system are stated in a fashion suggesting that they are the common framework of the entire discipline. The process of socialization by which a law student becomes a lawyer involves the identification and acceptance of these accepted truths about law and lawyering.

The "ordinary religion of the law school classroom," of course, serves as a shorthand expression for this value system.[2] It includes not only the more or less articulated value systems of law teachers but also the unarticulated value assumptions communicated to students by example or by teaching methods, by what is *not* taught, and by the student culture of law schools.

The essential ingredients of the ordinary religion of the American law school classroom are: 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.[3]

In the paragraphs that follow I attempt to summarize the intellectual framework that would be perceived by a sophisticated observer of legal education today. For rhetorical convenience, this effort at a coherent and explicit statement of what is usually tacitly assumed is put in the form of a direct statement, as though from the mouth of my sophisticated classroom observer. The reader should not assume that I agree with the views stated, but only that I believe the statement is a fair summation of today's orthodoxy.

A. *A Skeptical Attitude Towards Generalizations, Principles and Received Wisdom*

There was a time when law was viewed as a body of "rules" to be taught *ex cathedra,* learned by rote, and administered in a semi-religious way. During the nineteenth century, influenced by the scientific method, law came to be viewed as a system of "principles" that could be ferreted out of cases by an inductive process. Modern thought has liberated us from the blinders imposed by these earlier approaches to law. There is no "brooding omnipresence" from which principles or rules can be derived. Law is not a logical system in which a rule to be applied to a new situation is deduced by

[2] The term "ordinary religion" should be viewed as a rhetorical device. The current intellectual framework of legal education is not a developed philosophy of life, much less a theology. And religion, which is concerned with the ultimate meaning and purpose of life, is artificially circumscribed if it is limited to ethics.

[3] Other important aspects of the lawyer's intellectual framework could be added. Lawyers, for example, are concerned with forms and processes in a way that invests them with primacy and reality. A strong tendency toward formalism and legalism—taking forms and language more seriously than others do—continues in modern times to distinguish the lawyer and to cloak him in an aura of specialized and technical mystery.

The analogy between religion and law suggests a broader effort to analyze the legal profession as a secular priesthood. The *priestly* function, analogous to the administration of the sacraments, is found in the authenticating rituals of the law (oaths, robes, trials, formal decisions); the *prophetic* function is found in the call for, and elaboration of, justice; and the *pdstoral* function is found in the counseling and helping of individuals.

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logic from some fundamental, preexisting principle. The primitive conception that in some way men can arrive at true propositions and by reasoning logically from these premises arrive at new legal truths or specific decisions by deduction alone, is a false and mischievous way of looking at the legal universe.

Because law students and lawyers are constantly tempted to invest generalizations with reality and to assume that law is more preexisting, certain and stable than it really is, the foremost task of legal education is to inculcate a skeptical attitude towards generalizations, principles, concepts and rules. When the universe is looked at honestly, without the preconceptions that emanate from our childish yearning for security, it is apparent that " 'concepts' and 'interpretations' and 'methodological premises' are simply our man-made, custom-built tools for organizing 'facts' or the data of 'nature' ".[4] "Legal rules are but the normative declarations of particular individuals, conditioned by their own peculiar cultural milieu, and not truths revealed from on high."[5]

The categories and classifications we use in communication are conveniences and not objectively valid truths; they are slippery and prone to misuse. The good lawyer will be suspicious of them; he will view them as working hypotheses "to be tested by results and altered if those results are not satisfactory." Every classification must be tested by its consequences, since "the essential characteristic chosen as the basis of our classification will vary with our purpose and must be relevant to it."[6]

On this view, a lawyer must learn to distinguish between the generalizations that state his desires and the facts that dominate the real world. Care should be taken to insure that affirmations of value (our desires concerning what *ought* to be) do not intrude upon thought and knowledge and fact concerning what *is*. From a realistic standpoint, law is merely what officials of the law do. As Justice Holmes put it, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[7] Young lawyers, he advised, should "look at [the law] as a bad man, who cares only for the material consequences which such knowledge [of the law] enables him to predict."[8] "General propositions do not decide concrete cases."[9] "The life of the law has not been logic, it has been experience."[10]

Whether or not a "value-free" jurisprudence can be evolved, care must be taken to distinguish between facts and values, between realities and theories. Any true knowledge requires agreement on a mode of proof or verification. In the absence of such verification, an assertion cannot be taken as true. Since it is apparent that people differ in the values they hold and that there

4 M. McDougal, "Fuller v. The American Legal Realists," 50 Yale L.J. 827, 833 (1941).

5 *Id.* at 834.

6 W. W. Cook, "Scientific Method and the Law," 13 A.B.A.J. 303, 306 (1927).

7 Holmes, "The Path of the Law," 10 Harv.L.Rev. 457, 461 (1897), in Holmes, Collected Legal Papers 167, 173 (1920).

8 *Id.* at 171.

9 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

10 Holmes, The Common Law 1 (1881).

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is no rational way to resolve these differences, a practical person will not waste time worrying about unanswerable questions. In short, the good lawyer cultivates a skeptical attitude towards generalizations, principles, and received wisdom.

B. *An Instrumental Approach to Law and Lawyering*

A second basic feature of the ordinary religion of the law school classroom is that law is an instrument for achieving social goals and nothing else: ". . . law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves." [11] "[H]uman laws are devices, tools which society uses as one of its methods to regulate human conduct and to promote those types of it which are regarded as desirable. . . . [Hence] the worth or value of a given rule of law can be determined only by finding out how it works, that is, by ascertaining, so far as that can best be done, whether it promotes or retards the attainment of desired ends." [12]

Since the lawyer is engaged in the implementation of the values of others —a client or a government agency or the general society—he need not be concerned directly with value questions. His primary task is that of the craftsman or skilled technician who can work out the means by which the client or the society can achieve its goals. He should concern himself with the choice of means and the relationship of means to ends, not to the choice of ends, which can safely be left to personal choice or democratic decision.

The lawyer also should be aware that things are not always what they appear to be. Primitive yearnings, irrational sentiments and unstated economic factors *do* influence (and sometimes determine) how officials behave. One of the tasks of the lawyer is to penetrate beneath the surface of the rationalizations of judges and other law officials in order to determine what is really going on and to identify the factors that actually motivate decisions.

Law is not so much an independent influence on society as a result of social desires and pressures. As Holmes put it, "The felt necessities of the time, the prevalent moral and political theories . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed." [13]

C. *A "Tough-Minded" and Analytical Attitude Towards Lawyer Tasks and Professional Roles*

It follows from what has been said that a good lawyer will have a "tough-minded" and analytical attitude toward lawyer tasks and professional roles. The law teacher must stress cognitive rationality along with "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.

[11] McDougal, *op. cit. supra* n. 4, at 834.

[12] Cook, *op. cit. supra* n. 6, at 308.

[13] Holmes, The Common Law 1 (1881).

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Two models of professional behavior are presented to law students: the "hired gun" and the "social engineer." The former is the skilled craftsman of the discrete controversy, while the latter is the technician and applied scientist of the use of legal tools for broader social change. Both are technicians who are trained in the dispassionate use of legal skills for the instrumental purposes of those they serve. The hired gun gets his goals from the client he serves; the social engineer either prefabricates his own goals or gets them from the interests he serves. Involvement in the messy reality of human feelings is to be avoided by both in favor of an analytical detachment that gives preeminence to a rational calculation of alternative strategies of aggressive action.

The task of the lawyer, in this view, is to use legal arguments to influence decision-makers to decide in favor of his client or interest. Inquiry begins with predictions based on study of the past behavior of judges or other decision-makers: "what will a number of more or less elderly men who compose some court of last resort . . . do when confronted with the facts of his client's case?" Their past behavior can be described in certain generalizations that we call rules or principles. If the situation is novel or difficult, there will be doubt about their application to the case. "The lawyer urges competing analogies and rules on the judges. . . . [H]is job is, not to find the preexisting meaning of the terms in the rules or principles which he wishes the court to apply, but rather to induce the court to give to those terms for the first time a meaning which will reach the desired result." [14]

In any case worth talking about, "judges do and must legislate, that is, make a policy decision. . . ." [15] There is no right answer to a difficult case, discovered by the reasoned elaboration of preexisting principles, but a conscious act of choice on the part of the decider. "His task is not to find the preexisting but previously hidden meaning of the terms in these rules; it is to give them a meaning. . . . He must legislate, whether he will or not. . . . His choice will turn out upon analysis to be based upon considerations of social or economic policy. An intelligent choice can be made only by estimating as far as possible the consequences of a decision one way or the other." [16]

D. *A Faith that Man, by the Application of His Reason and the Use of Democratic Processes, Can Make the World Better*

The ordinary religion's approach to law and lawyering releases lawyers from the confines of outmoded conceptions and allows them to pursue social justice more openly. A concern for consequences—for justice in the individual case and for justice in social policy—can properly be result-oriented. Result-orientation in the pursuit of values on which there is general agreement (such as civil liberties, more goods for more people, and the alleviation of hardship and poverty) is not unworthy, especially as contrasted with the more formal and mechanistic "slot machine" jurisprudence of earlier days—a jurisprudence that often produced intolerable results.

[14] Cook, *op. cit. supra* n. 6, at 308.

[15] McDougal, *op. cit. supra* n. 4, at 834.

[16] Cook, *op. cit. supra* n. 6, at 308.

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In a pluralistic and tolerant society it is impossible to expect that individuals or groups will agree about many basic values. What we do agree on is a mechanism for handling social conflict and resolving disputes: representative democracy to establish priorities among substantive goals; an independent judiciary to adjudicate particular disputes; and the Supreme Court of the United States to implement and defend the general values of liberty, equality and due process embodied in the Declaration of Independence and the Constitution.

If we use our heads and follow these established decision-making mechanisms, the ordinary religion concludes, society will get better and better. There has been steady progress towards the good life throughout history. Good will and good sense, combined with reliance on the institutions of representative democracy, offer the best hope for salvation on this earth.[17]

II. WHAT ARE THE SOURCES OF THE "ORDINARY RELIGION OF THE LAW SCHOOL CLASSROOM"?

The intellectual framework just summarized is a somewhat impressionistic collage of ideas, attitudes and values that seem to me to be dominant motifs of legal education today.[18] I believe it is essentially accurate, if only in the way that a good political cartoon portrays essential features through exaggeration and the elimination of detail.

The sources of the world view represented by "the ordinary religion of the law school classroom" are threefold: intellectual trends in the general culture surrounding the law schools; the formal law school curriculum; and the informal or hidden curriculum that encompasses what students learn apart from the formal curriculum.

General ideas current in our culture shape values and structure patterns of thought and thus influence the ordinary religion of the law school classroom. The prevalent orthodoxy of legal education, of course, is a blend of legal positivism, sociological jurisprudence, legal realism, and "the functional approach." In the larger society, the intellectual currents emanating from the scientific method, logical positivism, and pragmatism have had enormous influence. They have become part of the intellectual woodwork of the law school classroom even though rarely discussed.

The formal curriculum of the law school encompasses what the law faculty purports to teach to law students. Its informational content is bounded by the standard first-year curriculum, required of all students, and by the marked tendency of law students, influenced by the student culture and by bar examination requirements, to select a fairly standardized set of upperclass electives.

[17] Errol Rohr comments that the "ordinary religion" deals more with the intellectual assumptions of legal education than with underlying values. I agree with him that the underlying values are those of today's democratic and materialistic society: self-realization of the individual, which usually involves such goals as success, wealth, winning, and status.

[18] I am not arguing that this assemblage of prevalent notions is a comprehensive and consistent philosophy. It deserves conscious examination in part because it contains inconsistencies and contradictions. Thus there is a tension, if not contradiction, between the assertion that values have no ultimate or objective reality and

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Most law school courses, in each year of law school, emphasize a related set of cognitive skills and provide only limited opportunities for learning other skills that are of great importance to the good lawyer. Identification of these skill competencies, however, other than by general rubrics such as "thinking like a lawyer," has not proceeded very far. Concerning processes, the formal curriculum emphasizes the adjudicative process in the settlement of private disputes. The equally or more important tasks of law creation—arranging private affairs, creating a legal regime to regulate behavior or implement social goals—receive less emphasis.

As in other educational settings, the "hidden curriculum" may be as important as the formal curriculum. While teachers naturally emphasize what they are attempting to teach—the formal curriculum—the total learning environment influences what students learn. Ethics, in particular, is primarily taught by example. Professor Etzioni cites the example of a high school superintendent dealing with a black gang that required payment of protection money by other students; the superintendent first ignored the situation and then, in response to conflicting pressures, equivocated. Unwillingness of an institution to take a moral stand communicates a powerful lesson that it is risky to stand up for moral principle.[19]

The development of ethical attitudes is probably more affected by the hidden curriculum than by the formal curriculum: the example of teachers and administrators in the handling of issues and people; the implication by students that matters *not* included in the formal curriculum are unimportant to lawyers; and the powerfulness of the student culture in affecting attitudes toward grading, examinations, competition, status and "success."

III. MORAL IMPLICATIONS OF THE LAW SCHOOL EXPERIENCE

I have outlined the basic tenets of the "ordinary religion of the law school classroom" and have summarized its three sources. The balance of my remarks is concerned with some of the moral implications of this way of looking at law and lawyering.

A. *The Inculcation of Skepticism*

A skeptical attitude toward generalizations, principles and rules is doubtless a desirable attribute of the lawyer. But skepticism that deepens into a belief in the meaninglessness of principles, the relativism of values or the non-existence of an ultimate reality is dangerous and crippling. Tendencies toward moral relativism and value nihilism are pervasive in the general society. My colleague Robert Summers has catalogued some of the factors, other

the emphasis on the lawyer's role as the implementer of his own values or those of others. Similarly, there is a contradiction between an approach which asserts that irrational factors, motives or desires influence much judicial and other behavior, but neglects to study them in a systematic way as part of legal education. The emphasis on cognitive rationality in legal training assumes either that emotional and other factors of human consciousness aren't important or that they can't be taught in the law school setting.

[19] A. Etzioni, The New York Times Magazine pp. 45, 65 (September 26, 1976).

than those distinctive of the law school milieu, that contribute greatly to value skepticism or nihilism:

"1. *Ethical positivism*—the doctrine that the espousal of given values is not rationally defensible. Value judgments, unlike judgments of fact, are merely 'boos' (if negative) or 'hurrahs' (if positive).

"2. *Crude relativism*—the doctrine that 'since values vary the world over, no values are really the best or even have any kind of special claim on us.'

"3. *Deterministic futilitarianism*—the doctrine that the values we hold are the result of social conditioning and it is futile to try to do very much about improving on them for they are among our most basic 'can't helps.'

"4. *Pseudo-Freudianism*—'we really don't know what our real values are, so they cannot figure very importantly in our conscious planning.'

"5. *Misplaced libertarianism*—'a person is free to adopt any value position.'

"6. *Misplaced egalitarianism*—'one person's values are equal to the values of another.'

"7. *The possessory theory of truth*—'my values are right because I hold them.' "[20]

Of these general factors, all of which are frequently encountered in legal education, one of the most insistent notions is that there is an unbridgeable chasm between "facts" (which are "real" or "hard" or "tangible") and "values" (which are "subjective" or "soft" or "intangible"). The distinction between the *is* and the *ought*, the legal realists said, was temporary and was designed merely to free legal scholars so they could take a fresh and critical look at how officials actually behaved, all as a preliminary to the main task of reforming legal institutions in the light of the suspended goals. This ideal was rarely achieved; since the divide between *is* and *ought* could not be narrowed by compelling the *is* to conform to the *ought*, the *ought* was permitted to acquiesce in the *is*.[21]

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.

In addition to these general cultural factors, the law school milieu involves some special features which feed value skepticism or discourage explicit discussion of values:

First, the steady diet of borderline cases. Legal problems that have a routine and easy solution are not considered in law school. The student is faced with a steady diet of hard cases—borderline situations that might reasonably have been decided either way. Since there is a good argument both ways, and the case could reasonably have been decided either way, the student is led to believe that life is that way, that law is

[20] R. S. Summers, "Mimeographed Materials on Jurisprudence and the Legal Process," Cornell Law School (January 1977), pp. 4–5.

[21] L. Fuller, "American Legal Realism," 82 U.Pa.L.Rev. 429, 461.

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that way—there are no *right* answers, just *winning* arguments. This diet of borderline cases thus contributes to value skepticism.

Second, the perceived arbitrariness of categories and line-drawing. The ideas that modern lawyers have about the meaningfulness and relationship of legal categories influence our perception of values. Walter Wheeler Cook expressed today's prevalent view when he argued that legal categories are subjective conveniences that arbitrarily stake out portions of reality for certain purposes: "observations in many fields show one [classification] gradually fading off into another through all the intermediate stages, so that the line between them must be drawn more or less arbitrarily, the only test being that of convenience for the purpose in view."[22]

Basic attitudes toward law are affected if everything is perceived merely as a matter of degree, with all distinctions drawn more or less arbitrarily for purposes of convenience. Matters of degree tend to displace polarities that involve basic differences of kind. The very metaphor of "drawing a line," a phrase often on the law professor's lips, suggests a deep arbitrariness of law—an arbitrariness beyond the rule of genuine reason and therefore beyond values.

Third, an overemphasis on the uncertainty and instability of law. The beginning law student tends to exaggerate the certainty and stability of law. His transformation into a lawyer includes an extensive exposure to the malleability and uncertainty of law. He can not operate successfully as a lawyer unless he becomes aware of the opportunities for advocacy, movement and change that are presented by our legal system. As with the more general inculcation of skeptical attitudes, however, too much of a good thing is possible. Stability, permanence, an appropriate degree of predictability and certainty are important aspirations of a legal system. Does the emphasis on flux and change undermine the stability of the system and the meaningfulness of precedent? Does the barrage of hypothetical cases have the effect of unmooring the law student from durable values?

Fourth, a tendency of advocates to take goals for granted. Most law school teaching places the law student in the position of an advocate who is asked to work with existing rules and arguments. The goals underlying the competing rules are adverted to in passing, but are evaluated only rarely. One of the factors which makes it easy to avoid explicit discussion of values and goals in law school is "the often less than consciously held idea that the proper role of the lawyer is always merely to take someone else's goals and values—those of the private or public client and 'go from there.' "[23]

Fifth, the relative neglect of law creation and planning. In individual courses and in the law curriculum as a whole the dominant emphasis is on lawyers as appliers of law rather than as creators of law. The student generally is cast in the role of an advocate involved in litigation. The planning and creation of private or public affairs, activities which

[22] Cook, *op. cit. supra* n. 6, at 305.

[23] Summers, *op. cit. supra* n. 20, at 4.

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bulk far larger than litigation in the careers of most lawyers, are neglected. Values are much more easily taken for granted in law application contexts than in law creation, since the lawyer involved in establishing a private or public regime of law from scratch must evaluate and refine values as part of his task. In creating a legal regime, the lawyer cannot take values for granted; they must be explicitly identified if the lawyer is to know what he creates.

Sixth, the avoidance of explicit discussion of values. The law teacher typically avoids explicit discussion of values in order to avoid "preaching" or "indoctrination." His value position or commitment is not thought to be relevant to class discussion; students are left to decipher his views from the verbal and non-verbal cues that he provides. The teacher, moreover, has strong interests in the substantive niceties of his subject and is concerned about "coverage." There is so much law to study! Exploration of value positions on particular questions has a lower priority. This would not be troublesome if the priorities of other instructors differed, but it is likely that systematic neglect of values results from similar choices being made by most instructors.

B. *The Wilfulness of Choice*

The now conventional law school view of the process of adjudication has important moral implications. The conventional view is that the process of law discovers a legally "right answer" only in easy cases. In a hard case, *i. e.,* one in which a legal rule does not supply a clear answer, the judge exercises discretion and applies new law retrospectively to the parties.[24] The opinion may attempt to persuade its readers that it states a rule that was the law all along, but hardheaded students of the law teach that this is a fiction.

This view of the adjudicatory process suggests a degree of freedom and discretion on the part of the decision-maker that invites willful and unprincipled decisions. If there is no right answer and if the search for one is fictitious, the decider may be tempted to apply his own preferences.

Ronald Dworkin espouses a different position on the decision of hard cases, both empirically (how they are in fact decided by judges) and normatively (how they should be decided by judges). A hard case, in his view, is decided not by an act of lawmaking, but by a process of reasoning from the principles which underlie all relevant rules. There *is* a right answer, even though we cannot always be certain what it is. This claim that there is a right answer relates to the fundamental ground rules of what the law enterprise is about—its purpose and inner morality. The fact that we cannot get outside the system we are in, that we cannot ultimately know even what these ground rules are, does not mean that they do not exist or that we should not aspire to serve them.

The now conventional view that judges are engaged in discretionary lawmaking trenches on important policies: that new law not be applied retrospectively to persons who had no way of conforming to its provisions; that judges exercise a lawmaking role that is subordinate to legislatures; and that

[24] R. Dworkin, "Hard Cases," 88 Harv.L.Rev. 1057 (1975).

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the decision of cases should be a search for rational and neutral principles, not an exercise of personal preference.[25]

The "ordinary religion" also has a harmful tendency to view judicial opinions as rationalizations that conceal rather than express the real motive or underlying explanation. This tendency approaches a deterministic view of things: one's actions are determined by conditions of the temporal order, not by truth discovered through active reason. Looking beneath the surface for hidden motives, usually expressed in popularized versions of Marxism, Freudianism or positivism, is a form of simplistic reductionism that invites wilfulness rather than the responsibility of rational decision-making. One or another form of these all-purpose explanations of human affairs is encountered in the law school classroom on a daily basis.

Resolving problematic situations involves moral responsibility and must be faced with resources other than reason alone.[26] "Steadfastness of spirit and, at the same time, a keen awareness of personal unworthiness for final moral evaluations are attributes of judicial greatness fully as important as the attribute of reason. Our institutions demand a great deal of the more or less ordinary human beings to whom judicial power is entrusted. Can the judge be better armed for the task of responsible decision," Harry Jones asks, "than when he possesses a sense of divine judgment upon all human institutions and all human history?"[27]

C. *The Instrumental Nature of Law*

Today law tends to be viewed in solely instrumental terms and as lacking values of its own, other than a limited agreement on certain "process values" thought to be implicit in our democratic way of doing things. We agree on methods of resolving our disagreements in the public arena, but on little else. Substantive goals come from the political process or from private interests in the community. The lawyer's task, in an instrumental approach to law, is to facilitate and manipulate legal processes to advance the interest of his client.

Modernism, of course, has its good side. Law was previously viewed as mysterious and mystical; it was thought to have a degree of certitude and omniscience that did not comport with realities; and it was overly concerned with formal logic and insufficiently concerned with social justice. Modern law brings humanitarian and egalitarian aims to center stage; there is a heightened concern for just results.

The instrumental view of law, however, has its debit side. One deficiency is a failure to recognize that the legal enterprise has moral principles of its own, wholly apart from the substantive goals of society. Professor Fuller has called our attention to the inner morality of anything worthy of being called "law."[28]

The instrumental approach to law also implies a dependent relationship of law to society. In this view, the conscious, creative power of change comes

[25] See L. Fuller, The Morality of Law c. 2 (1964).

[26] H. Jones, "Law and Morality in the Perspective of Legal Realism," 61 Col.L. Rev. 799, 800–02 (1961).

[27] *Id.* at 805.

[28] L. Fuller, The Morality of Law c. 2 (1964).

from social needs and pressures; law is a responsive instrument lacking a conscious, creative power of its own. Professor Fuller argues that we have moved from one simplification—that law actively shapes society—to the reverse position without taking account of the middle position of mutual action and reaction.[29]

The functional approach also tends to assume an underlying harmony of values in which there is broad agreement: civil liberties, more and better material things, the alleviation of poverty, etc. These values are closely identified with those of a materialistic, democratic society. The task of the lawyer as social engineer is that of the technician and craftsman who can assist in the choice of means necessary to implement these values.

The religious experience of Western man—confirmed by the events of the 20th century—has demonstrated that this was a somewhat naive faith. Social problems are more intractable than was initially recognized, and an effective attack on them involves conflicts with other values. Thus, for example, pursuit of equality threatens important aspects of liberty, and the elimination of poverty requires measures which may create a dependent class or undermine incentives for self-improvement. The deification of these partial values also involves a more serious loss of perspective. A desire for reform is one thing and a good thing: a naive belief in the creation of a heaven on earth is unreal to the demonic potential of man's nature and runs the risk of idolatry.

The instrumental approach also involves a technocratic perspective which elevates power and control at the expense of other values. The social engineer is an individual whose reason and skill are employed in order to predict and control social and natural behavior. Knowledge is not sought for its own sake, but primarily for the control it gives over man and nature.

Richard Baer, in a discussion of the teaching of environmental values, says:

> "When we insist on being in control, on gaining power over the world, the world remains the object of our manipulation. Other modes of relationship would open us to new forms of understanding. Contemplation, awe, silence, for example, all make it possible for the world to speak to us, to change us. The development of . . . the appreciative consciousness demands that we become less aggressive, more sensitive to the multitude of subtle stimuli from our enviroment, more willing to listen, more open to mystery. Some kinds of knowledge are essentially qualitative and are largely unobtainable apart from a context of love, trust, and the refusal to manipulate." [30]

The decline of the mysterious in law, Calvin Woodard suggests, has the paradoxical effect of reducing the appeal of the "rule of law" at precisely the time when law is most worthy of respect. Secularization has removed most of the element of mystery from law, but it may not be as effective as the older, more sacred, conception of law for commanding the respect of the people:

> "Modern man, no longer *sub deo et sub legi,* feels himself morally free of the demands of externally imposed law that clash with his own

[29] L. Fuller, "American Legal Realism," 82 U.Pa.L.Rev. 429, 448–52 (1934).

[30] R. Baer, "Our Need to Control: Implications for Environmental Education," The American Biology Teacher 473, 476 (November 1976).

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innermost convictions. Predictably, the result is a generation of law teachers who find it difficult to believe—by this I mean profoundly believe—in the existence of law beyond what fallible courts say it is; a generation of law students who consequently do not learn to be restrained in any essential way by the law; and a generation of laymen who are markedly uninhibited by, and indeed contemptuous of, the sanctions of law. . . . [D]oes the functional approach not teach all manner of men to look to law as an instrument for their private or personal disposal? Surely no 'social problem' could be more critical, or chronic, as that of people regarding law first as a means of gratifying their own wants, and only incidentally as imposing upon them responsibilities towards their fellow men and their society."[31]

D. *The Two Models of Professional Conduct: The "Hired Gun" and the "Social Engineer"*

One of the consequences of a skeptical age is that all the heroes are killed off one by one. Law is no exception. The great men of American law in recent times—men such as Holmes and Brandeis—come off poorly in the critical atmosphere of the law classroom. Their wisdom is seen as partial, their decisions frequently short-sighted or wrong, and their greatness blurred.

Yet the young professional hungers for mature professionals on which he can model his conduct. In certain aspects of thinking and feeling—such as careful use of language, cognitive rationality, and a skeptical attitude—law teachers may serve as models. But they have forsaken the profession that the law student plans to enter; and their attitude toward practitioners is often touched with an air of superiority and disdain. Inevitably there is a "do as I say, not as I do" problem for the law student in viewing a law teacher as a model.

The two abstract models of professional conduct—the "hired gun" and the "social engineer"—are specialists in manipulation, and are consistent with the instrumental approach to law. But they present serious moral difficulties for many law students.

If reasons are merely rationalizations for hidden motives, and if there is no way to choose one set of reasons over another, "then the purpose of offering reasons, in all nonscientific domains, cannot be to change men's minds in the sense of showing that one view is genuinely superior to another. It can only be to trick or sway or condition or force or woo men to believe or to do what the persuader desires."[32] Reasons, then, become instruments in the service of warring preferences, and legal training involves arming advocates with the aggressive and defensive skills that are useful in persuading others. Suspicion, distrust, and skepticism are appropriate attitudes.

The role of the "hired gun" forces the potential lawyer to visualize himself as an intellectual prostitute. In law school he is asked to argue both sides of many issues. It is common for a student to respond to the question,

[31] C. Woodard, "The Limits of Legal Realism: An Historical Perspective," reprinted in H. Packer & T. Ehrlich, New Dimensions in Legal Education (1972), at pp. 329, 379.

[32] W. Booth, Modern Dogmas and the Rhetoric of Assent 87 (1975).

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"How do you come out on this case?" with the revealing reply, "It depends on what side I'm on." If the lawyer is going to live with himself, the system seems to say, he can't worry too much about right and wrong. Many sensitive students are deeply troubled by the moral implications of this role, and law school generally provides little help in resolving the problem.

The "social engineer" model is cast on a larger scale, dealing with issues and interests rather than with individuals, but this role has a somewhat lifeless, bureaucratic and technocratic flavor. There is also a moral tension between the instrumental character of the role and democratic values. If the social engineer provides the goals for his own effort, he contradicts the values of democratic self-determination. On the other hand, if he takes his values from the interests or groups he represents, he suffers from the same subservience to values of others that is characteristic of the hired gun.

> "Modern secularism," Robert Bellah says, "while releasing human beings from one kind of tyranny, often imposed a new, more terrible tyranny, however—the tyranny of the pragmatic world of every day, of the givenness of immediate reality with all its constraints. It has resulted in the rise of the bureaucratic, technological, and manipulative man, who rejects all transcendance, who has what Blake called 'single vision.' There is something deeply demonic in the single vision of modern secular consciousness with the vast range of human experience that it tends to shut out." [33]

E. *The Neglect of Non-Cognitive Aspects of Behavior and Thought*

Near the end of his long term as dean of the Harvard Law School, Erwin Griswold concluded that legal education concentrates too much on producing the sound craftsman, "puts a premium on verbal manipulation," and breeds "excessive caution" among lawyers and law teachers. Legal education is too much absorbed with the internal mechanics and consistency of the legal system and too little concerned with its effects on people: ". . . there is more truth than we have been willing to admit [to the adage that legal education sharpens the mind by narrowing it]. The methods of legal education . . . have a tendency to exalt dialectical skill, to focus the mind on narrow issues, and to obscure the fact that no reasoning, however logical, can rise above the premises on which it is based." [34]

Law students, Griswold stated, bring a larger measure of idealism to law school than they leave with. Partly this is because of the "exaltation of rationality over other values which are of great importance to our society." Imagination in a broad sense is stifled rather than encouraged. And the emphasis of the curriculum on business and finance, the areas in which there are the greatest opportunities for remunerative private practice, conveys the impression, unintended or not, that law students' "future success and happiness will be found in the traditional areas of law." [35]

A vicious circle tends to perpetuate these characteristics. Students are admitted to law school on the basis of aptitude in the reasoning qualities em-

[33] R. Bellah, "The New Religious Consciousness and The Secular University," Daedulus 110 (Fall 1974).

[34] E. Griswold, "Intellect and Spirit," 81 Harv.L.Rev. 292, 299 (1967).

[35] *Id.* at 300–02.

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phasized by "the drily logical mill" through which the faculty have been recruited. "[T]he continual inbreeding that is involved [may] be producing even narrower law students than [the faculty] were themselves." [36]

Cognitive rationality in the broadest sense—that of immersion in the process of inquiry itself, of a lifelong process of learning to learn—is a vital aspect of all education. But the narrower emphasis on knowledge and rationality as a tool for the control or manipulation of the world tends to make of the law school "a kind of universal filling station where students tank up on knowledge they will 'need' later . . . . [Its] only purpose is to help [atomized, individualistic] students attain their goals by communicating to them certain discrete skills and certain bodies of fact about the external world which they can 'use'." [37]

A growing literature supports the thesis that law students are more "tough minded" and less "tender minded" than other non-lawyer groups, and that law school tends to accentuate this bias.[38] According to William James, the "tough minded" person differs from the "tender minded" in a number of respects: [39]

Tough Minded	Tender Minded
Empiricist (going by "facts")	Rationalistic (going by "principles")
Sensationalistic	Intellectualistic
Materialistic	Idealistic
Pessimistic	Optimistic
Irreligious	Religious
Fatalistic	Free-willist
Pluralistic	Monistic
Skeptical	Dogmatical

The utility of "tough minded" characteristics in many settings is not in issue. The question is whether the selection and training of law students does not neglect humane aspects of personal development and experience, the emotional aspects of the professional relationship, and the development of capacities of imagination, empathy, self-awareness, and sensitivity to others. Are law students encouraged to be indifferent to character, insensitive to human problems, lacking in human concerns? Are they educated in accordance with an unreal professional model of detachment, non-involvement, and insensitivity?

Whether or not legal education is harmful in these respects, little guidance and help is provided to the law student who is attempting to cope with the moral and personal problems of detachment and objectivity in the professional role. Some distance is required for a professional role; a lawyer can-

[36] *Id.* at 302.

[37] Bellah, *op. cit. supra* n. 33, at 111.

[38] See the survey of the literature on the effects of law school on law students in B. Boyer and R. Cramton, "American Legal Education: An Agenda for Research and Reform," 59 Cornell L.Rev. 221, 235–82 (1974).

[39] W. James, "Pragmatism" (Meridian Books, ed. 1955), quoted in Woodard, *op. cit. supra* n. 31, at 335–36.

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not help his client merely by passionate and subjective involvement in the client's problem, nor can this degree of involvement be sustained without "burn out" unless there is a strategy for handling it. Too often the young lawyer must grope alone toward an effective strategy for mingling humanism and professionalism in the lawyer-client relationship.

The atomistic character of the student's work in law school accentuates this difficulty. Much professional work involves cooperative activity, but law school does little to assist a law student to work effectively as a member of a team. The competitive environment of law school tends to pit each student against all others and, not surprisingly, feelings of isolation, suspicion, and hostility develop among students.[40]

Knowledgeable observers comment that law students become more isolated, suspicious, and verbally aggressive as they progress through law school; their aptitude for verbal articulation increases, but they rarely stop to listen to others. If so, will they be good counselors? Will they need to unlearn a number of things in order to operate successfully as a professional? The sharing, helping and serving aspects of human endeavor, especially important to future professionals, are not recognized adequately in the law school experience.

Human civilization of both the East and the West, Robert Bellah observes, views education as:

> "a process of initiation in which the individual is transformed and takes on a new status . . . It is a radical process involving the whole person in relation to his whole environment; it differs sharply from the idea of a closed, atomized individual manipulating an equally closed, objective world. Traditionally education was involved in the formation of a new person ideally more perceptive than when he began, one more aware of the whole of existence, including its tragic dimension, and more responsive as a human being. Such education involved not only cognitive skills but a discipline of body, of feeling, of imagination, as well as of mind. Its aim was to eventuate in a morally and religiously transformed person." [41]

IV. CONCLUSION

Modern dogmas entangle legal education—a moral 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.

Our indifference to values confines legal education to the *"what is"* and neglects the promise of *"what might be."* It confirms a bias deeply engrained in many law students—that law school is a training ground for technicians who want to function efficiently within the status quo.

[40] The work of Andrew Watson and Alan Stone, dealing with these matters, is discussed in Boyer and Cramton, *op. cit. supra* n. 38, at 258–70.

[41] Bellah, *op. cit. supra* n. 33, at 111.

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The aim of all education, even in a law school, is to encourage a process of continuous self-learning that involves the mind, spirit and body of the whole person. This cannot be done unless larger questions of truth and meaning are directly faced.

If all law and truth are relative, pressing one's own views on others would be arrogant and mischievous. But if there is really something that can be called truth, beauty or justice—even if in our finiteness we cannot always agree on what it is—then law school can be a place of searching and creativity that aspires to identify and accomplish justice. If ethical relativism reigns supreme, law will become ever more complex and detailed, and finally boring, and law school will merely be a dull and unpleasant place on the gateway to a supposedly learned profession. At least the scientist, even if he is an ethical relativist, has something new to discover about the world of nature. If truth and justice have no reality or coherence, what does the lawyer have to do? And why should a trade school—for that is what it would be—occupy space on the university campus?

Law schools and legal educators are inevitably involved in the service of values. For the most part they serve as priests of the established order and its modern dogmas. The educator has an obligation to address the values that he is serving; and there is room for at least a few prophets to call the legal profession and the larger society back to a covenant faith and moral commitment that it has forsaken. The New Testament, Paul Tillich reminds us, speaks of "doing the truth." "Truth," he says, "is hidden and must be discovered. . . . Truth is something new, something which is *done* by God in history, and, because of this, something which is *done* in the individual life. . . . [T]ruth is *found* if it is done, and *done* if it is found. . . . Saving truth is in him that does the truth." [42]

[42] P. Tillich, "The Shaking of the Foundations," 116–17 (1948).