

Law Schools and the World outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar

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Both the legal profession and legal education have officially authorized group portraits which are offered to the public. Most lawyers and law professors recognize that a few facial blemishes have been retouched to make the portraits look better, but most of us talk as if we assume that the official picture is a fairly good likeness. In the past decade scholars have begun to offer us a more reliable picture of who lawyers are and what it is that they do.¹ We also are learning more of the reality of legal education.²

Two recent studies of the bar in Chicago—one by Heinz and Laumann³ and the other by Zemans and Rosenblum⁴—suggest that there is an important gap between what is taught in law school and most of the practice of law. Of course, such gaps are characteristic of the entire American legal system, which tends to promise different things than it delivers.⁵ Moreover, concern about a gap between university legal education and the practice of law is longstanding. Indeed, there is something of a ritual here, with actors representing both the profession and the academy declaiming predictable matched sets of opposing arguments.

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1. See Richard L. Abel, *The Sociology of American Lawyers: A Bibliographic Guide*, 2 Law & Pol'y Q. 335 (1980).

2. *Id.* See also the magnificent pair of articles on the law and behavioral sciences movement in American legal education. John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 Buffalo L. Rev. 459 (1979); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 Buffalo L. Rev. 195 (1980).

3. John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Basic Books, 1982). Since I worked from a typed copy of the manuscript of this book, all citations will be only to the chapters in which material appears.

4. Frances K. Zemans & Victor G. Rosenblum, *The Making of a Public Profession* (Chicago: American Bar Foundation, 1981).

5. See Richard L. Abel, *Law Books and Books About Law*, 26 Stan. L. Rev. 175 (1973).

However, the two studies of the Chicago bar suggest that it would be profitable to think about the functions served by what law schools do and do not teach about the legal system and the roles of lawyers in it.⁶ I am using the two studies as a kind of Rorschach test, and the four authors should not be held responsible for what I read into their work. Moreover, I may be wrong about the nature of legal education in the 1980s; I can only guess what is going on in classrooms all over the country.

First, I will report what I see as some of the highlights of the studies. Second, I will ask whether the gap disclosed between classical legal education and this picture of practice matters to anyone. Here I will bring on stage several lawyers and law professors whose views will at least enliven the discussion. Finally, I will draw a few tentative conclusions, some of

6. This is not the place to debate questions of method and analysis. It seems to me that both of the Chicago bar studies are good enough and consistent enough with what we know from other research to warrant asking about the implications for legal education.

However, a few problems should be noted in passing: (1) Both works considered here are studies of the Chicago bar, and we cannot be sure that Chicago lawyers are similar to lawyers in New York, Los Angeles, Milwaukee, or Black River Falls. Howard S. Erlanger, *The Allocation of Status Within Occupations: The Case of the Legal Profession*, 58 Soc. Forces 882 (1980), suggests that Chicago lawyers differ from those in other cities. Heinz and Laumann, *supra* note 3, at ch. 6 n.11, answer Erlanger and challenge his argument. My command of regression analysis is not adequate for the task of refereeing this contest.

(2) Both of the Chicago bar studies ask lawyers questions to which they may not know the answers. It is hard to know whether one puts 20 percent or 30 percent of his time into estate planning; a lawyer's snap judgment today about the relative prestige of business tax work and representing management in labor matters might not be what he would have said yesterday or would say tomorrow; lawyers may act competently but be unable to rank the importance of various legal skills accurately—one may be so competent in legal analysis that one forgets its importance when asked to rank it with other skills. It may be that whatever random variation there was in the responses cancelled out over the fairly large sample used in the study. Nonetheless, it would probably be wise to remember the process by which the data was gathered when reading Heinz and Laumann's tables.

(3) Lawyers' answers may be influenced by their picture of how things ought to be or what they think the researchers want to hear. Both research teams gained access to their respondents by association with the American Bar Foundation. At least some lawyers might want to put their best foot forward to such an audience. For example, if a lawyer thought that litigation was higher-status work than making use of contacts or negotiation, he might claim to do more litigation than he actually did.

(4) Heinz and Laumann differ with some of the arguments in Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 Law & Soc'y Rev. 115 (1979), about lawyers' control over clients and clients' control over lawyers. We may mean something different by the term control; both studies may be guilty of some overstatement; and one study may be right and the other wrong. Far more research and thought is needed to resolve these issues.

It is possible that certain lawyers are in a position to *influence* their clients, either openly or indirectly. Clearly the power of lawyers will differ as we look at various types of lawyers and clients. For example, the senior lawyers of certain kinds of large law firms may have relationships with the chief executive officers and other top officials of some kinds of corporate clients which gives them great influence over business decisions. See, e.g., Marc Galanter, *Megalaw and Megalawyers in the Contemporary United States* in *The Sociology of the Professions: Lawyers, Doctors and Others*, ed. R. Dingwall & P. Lewis, (forthcoming); Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 ABF Research J. 95; Jeffrey S. Slovak, *Working for Corporate Actors: Social Change and Elite Attorneys in Chicago*, 1979 ABF Research J. 465. Of course, there is an important difference between influence and control, and it may well be that most lawyers have less influence over most clients than most doctors have over patients. Nonetheless, it is important to learn more about the lawyer-client relationship for many reasons.

which may rest on leaps of faith that others may not be willing to make with me.

What is the picture painted by the two studies of the Chicago bar? Heinz and Laumann tell us that different kinds of lawyers do very different things and that there is a clear hierarchy in the legal profession. They say that one could posit a great many legal professions, but much of the variation within the profession can be accounted for by one fundamental difference—that between lawyers who represent large organizations and those who represent individuals or the small businesses controlled by those individuals.⁷ Corporate work is likely to involve “symbol manipulation,” while work for individuals will carry a heavy component of “people persuasion.”⁸ Corporate lawyers tend to have far fewer clients a year than those who represent individuals, and corporate lawyers are paid to discover unique legal issues and cope with them rather than mass process routine work for many clients.⁹

How do they arrive at these conclusions? They tell us that lawyers tend to specialize and represent limited, identifiable groups or types of clients and to perform as broad or narrow a range of tasks as the clientele demands. There is virtually no likelihood of co-practice across five distinct clusters of legal work: (1) large corporate business work, (2) specialty corporate business practice such as patent law or admiralty, (3) labor affairs, (4) municipal government work, and (5) service to individuals and their businesses.¹⁰ In brief, a patent lawyer is unlikely to be competent to try a first-degree murder case; corporate lawyers know little about divorce practice; and if you want to get something from City Hall in Chicago, you need a lawyer who knows the right people.

The work some lawyers do is likely to be far more highly regarded by the profession than the work done by others.¹¹ A subsample of the lawyers interviewed by Heinz and Laumann were asked to rate the “general prestige within the legal profession at large” of each of thirty fields. A panel of law professors from Northwestern University and researchers from the American Bar Foundation was asked to rank these same fields as to intellectual challenge, rapidity of change, degree of work done for altruistic

7. Heinz & Laumann, *supra* note 3, at ch. 10.

8. *Id.* at ch. 3.

9. *Id.*

10. *Id.* at ch. 2.

11. *Id.* at ch. 4. Compare Everett Hughes's comments of almost twenty-five years ago: “[T]he system of which the lawyer's work is part reaches down into the nether regions of the unrespectable and outward to the limbo of guile and force, which people may think necessary but do not admire. . . .” “[T]he very demand for highly scrupulous and respectable lawyers depends in various ways upon the availability of less scrupulous people to attend to the less respectable legal problems of even the best people.” “[T]he division of labor among lawyers is as much one of respectability (hence of self concept and role) as of specialized knowledge and skills.” Everett C. Hughes, *Men and Their Work* 71 (Glencoe, Ill.: Free Press, 1958).

motives, ethical conduct, and freedom from client demands. Heinz and Laumann tell us that the general pattern of prestige ranking is unambiguous: fields serving “big business” clients such as securities, corporate tax, antitrust, and banking are at the top of the prestige ranking while those serving individual clients such as divorce, landlord and tenant, debt collection, and criminal defense are at the bottom. That is, the more a legal specialty serves the core economic values of the society, the higher its prestige within the profession. Moreover, the higher the score of a field on service-based, altruistic, or reformist motives, the lower its prestige. The fields with the highest prestige were seen as having the highest intellectual challenge by the law professors and researchers who rated them. Many attorneys do not consider “people persuasion” to be real lawyer's work. However, the income lawyers received from various types of practice was not significantly associated with the prestige of particular fields.

Heinz and Laumann give us a picture of lawyers and clients in various fields by using a type of correlational analysis.¹² A striking U-shaped pattern emerged from the association of nine variables across the thirty fields of practice examined. The variables were: (1) the extent to which a field had business rather than individual clients, (2) the percentage of clients represented by the lawyer for three years or more, (3) the degree to which clients were referred by other lawyers, (4) the freedom lawyers had to select their cases, (5) the degree to which a field involved negotiating and advising clients rather than “highly technical procedures,” (6) the amount of governmental employment in a field, (7) the presence of lawyers in a field who attended local rather than national elite law schools, (8) the number of high-status Protestant lawyers in a field, and (9) the number of lawyers of Jewish origin in a field.¹³

One can describe the associations Heinz and Laumann find by imagining a circle which represents the legal profession in Chicago.¹⁴ First, the circle could be divided horizontally. The top half would represent lawyers who primarily go to court; the bottom, lawyers who primarily counsel clients in their offices. Second, the circle could be divided vertically. The side to the left would be occupied by lawyers whose clients were primarily individuals and their businesses; the side to the right would contain lawyers who represent larger corporations. Lawyers in each quarter of the circle are more alike than those in the other quarters, at least when measured on the nine variables used in the research. However, to

12. Heinz & Laumann, *supra* note 3, at ch. 3.

13. When they published their analysis in the Michigan Law Review, Heinz and Laumann also correlated the volume of clients, the frequency of state court litigation, and the size of practice organization. See John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 Mich. L. Rev. 1111 (1978). These variables were dropped to avoid problems of intercorrelation, but the U-shaped pattern stayed essentially the same.

14. Heinz & Laumann, *supra* note 3, at ch. 10.

reflect the profession more accurately, the circle would have to be pushed apart at the top since lawyers who litigate for individuals are very unlike those who litigate for large corporations. On the other hand, those who counsel wealthy individuals are likely to be somewhat similar to those who counsel corporations. Thus, when they look at the thirty fields of practice, Heinz and Laumann get a U-shaped pattern of association.

Fields closer together in the U-shaped pattern tend to be more similar, as measured by Heinz and Laumann's nine variables, than those further apart. Divorce, representing plaintiffs in personal injury work, and criminal defense involve appearances in court for individuals and are clustered together. Other clusters include: probate and personal tax work, which involve a great deal of office practice for individuals; general corporate and banking practice, which tend to involve office work for corporate clients; and business litigation and antitrust defense, which involve court appearances for corporations. If we start in the upper left corner of the U, we find lawyers who specialize in divorce, personal injury work for plaintiffs, and criminal defense. These fields also have the lowest prestige within the profession; those who specialize in them tend to practice alone or in small firms; and these attorneys almost always attended local law schools. As we go around the U, prestige increases, the law firms become larger, and the lawyers tend to have gone to national law schools.

Interestingly, there is substantial support from all lawyers for normative statements asserting the rights of individuals against concentrations of power in large corporations, labor unions, or the state. Also surprising, perhaps, is the finding that lawyers whose fields had the highest prestige ratings tended to support such civil liberties as free speech far more than nonlawyers or lawyers whose fields are in the personal business cluster. General corporate lawyers, not surprisingly, tend to score fairly low on a scale of economic liberalism used by the researchers.¹⁵

Zemans and Rosenblum's book reports an appraisal of legal education by a sample drawn from the Chicago bar. They asked these lawyers to rank twenty-one skills and areas of knowledge related to the practice of law. They also asked where their respondents had gained these skills, what law schools tell their students about the importance of these skills, and what they perceived as the goals of their law school. They found that lawyers see legal education as valuing and teaching "the ideal symbolic work of the legal profession."¹⁶ However, lawyers also thought that what was neglected in the law schools' self-defined mission were "the very competencies that practitioners find most important to the actual practice of law."¹⁷

15. *Id.* at ch. 5.

16. Zemans & Rosenblum, *supra* note 4, at 163.

17. *Id.* at 164.

Those skills most closely identified with law-school education did surprisingly poorly when the responses of all of the lawyers are considered together.¹⁸ For example, "ability to understand and interpret opinions, regulations, and statutes" ranked fifth, trailing "fact gathering," "capacity to marshal facts and order them so that concepts can be applied," "instilling others' confidence in you," and "effective oral expression." 86.6 percent did rate such understanding and interpretive skill as important, but only 50 percent rated it extremely important. 77 percent said they learned this skill "essentially in law school." "Knowledge of theory underlying law" may seem critically important to law professors, but Zemans and Rosenblum's Chicago lawyers ranked it only thirteenth out of the twenty-one skills and areas of knowledge. 61.1 percent rated it as important but only 23 percent saw it as extremely important. 84 percent said they gained this knowledge in law school rather than in practice.¹⁹ 76.9 percent of the graduates of national law schools saw "providing the theoretical basis of law" as being a major goal of their school, while only 34.5 percent of the graduates of local law schools characterized such theoretical knowledge as a major goal of their education.²⁰

As might be expected, evaluations of skills and knowledge are not randomly distributed among lawyers.²¹ Zemans and Rosenblum conclude that the "lower prestige specialties seem to involve more interpersonal skills, while the higher prestige specialties are more likely to rate more purely 'analytic' skills as important to their practice."²² For example, 62.1 percent of the lawyers practicing in fields ranked as highly prestigious in the Heinz and Laumann study saw "ability to understand and interpret opinions, regulations, and statutes" as extremely important. Only 44.6 percent of those in the fields with medium prestige and 38.5 percent of those in the fields with low prestige ranked these skills as extremely important. Conversely, 41.3 percent of those in the low-prestige fields rank "interviewing" as extremely important while only 18 percent of those in medium-prestige and 16.1 percent of those in high-prestige areas gave it this ranking.

The lawyers were asked whether "law school training indicat[e] the potential value of this [each of the twenty-one skills and areas of knowledge] to the practice of law." Law schools, regardless of their geographic scope or reputation, are highly likely to emphasize the potential value of the more analytic skills such as the ability to understand and interpret laws, knowledge of the substantive law, legal research, knowledge of the theory

18. *Id.* at 125.

19. *Id.* at 137.

20. *Id.* at 62.

21. *Id.* at 128.

22. *Id.* at 132.

behind the law, capacity to marshal facts, ability to synthesize the law, knowledge of procedural law, and writing briefs. Law schools value skills and knowledge that relate closely to the core image of the profession. For example, law schools value litigation skills and writing briefs far more than drafting legal documents or negotiating. Relatively little emphasis is given to the potential value of interpersonal competencies such as instilling others' confidence in you, understanding the viewpoint of others, getting along with other lawyers, or interviewing.²³

The lawyers acknowledged that many skills could not be taught easily in law school, but they criticized law schools for failing even to make their students aware of the importance of these parts of practice.²⁴ Many thought their expectations of the nature of practice upon graduation were more unrealistic than necessary. Zemans and Rosenblum point out that many new graduates are not aware that "the 'best' legal advice in a given instance is dependent upon the client's capability to wait for resolution and to pay the fees involved."²⁵ Law schools seem to identify with the Olympian appellate judge seeking the one right solution, untroubled by crass thoughts of the cost of gaining the decision in question or the cost of trying to apply the rule or standard announced in the opinion.

We can conclude that the two studies of the Chicago bar reveal a gap between legal education and the practice of many lawyers. Generally what is taught seems aimed at the work of those professional specialties with high prestige, what Zemans and Rosenblum call "the ideal symbolic work of the profession."²⁶ Accepting the accuracy of this picture, we can ask whether this gap makes any difference to anyone. On one level, it is easy to conclude that it does. Judges, lawyers, and law professors regularly debate the competence of the bar and the law schools' responsibility for what some see as far too many poorly trained attorneys. On another level, the gap between the academy and the practice is seen as serving important functions. I will sketch some of the polemics before I turn to what I see as more serious arguments.

Elite lawyers have long worked hard to distance themselves from what they see as the lesser members of their profession. Recently charges have been made that large numbers of lawyers do not know how to try cases.²⁷ The proposed reform is an immediate change of legal education so that all future lawyers would have received training in what the reformer sees as critical courtroom skills. Elsewhere, I have pointed out that we only have

weak evidence indicating that there is a real problem.²⁸ We do not know what percentage of what kind of lawyer representing what kind of client in what kind of case does an inadequate job as measured by what standard. Indeed, what appears to be incompetence at trial in some cases may be no more than lawyers doing the best they can in light of what their clients can pay. Perhaps lawyers should turn away clients who cannot pay for complete first-class legal service rather than trying to wing it on their behalf, but this seems to be something other than a question of competence. Moreover, at a time when legal services programs are being crippled or destroyed by a group of elite lawyers, we must look behind the rhetoric of competence and wonder about the actual motives of those pressing training in trial techniques. We know that only a very small fraction of all disputes entering the legal system ever go to trial.²⁹ It is possible, and I think likely, that more damage is done to clients by lawyers who draft inadequate documents, negotiate poor settlements or plea-bargains, and place their own interests before those of their clients, than is done by poor trial lawyers. Even lawyers who are masters in a courtroom may be incompetent if they regularly take cases to court which never should have been tried in the first place. If the reformers deserved to be taken seriously, they would be arguing for an appraisal of what most lawyers do for most clients. Moreover, any such appraisal would have to be concerned with cost barriers to access to justice—qualifications, skill, and the opportunity to do a competent job must be paid for by someone.

All in all, I think we can look with some skepticism at the charges of incompetence in the courtroom and the need for a crash program directed at all law students. Certainly we should note that changes in legal education will not trouble lawyers now in practice—although some or many of them are the ones who are supposed to be incompetent. Moreover, the reformers want someone else to pay for the changes. Law schools are asked to find the money to pay for intensive training in trying cases for all their students. At the very least, we can ask the advocates of this reform to put their money where their mouths are—law-school deans will happily accept cash, checks, or money orders.

Yet the excesses of the bar can always be matched, if not topped, by the excesses of the law professors. For example, a professor at an elite law school recently was quoted as defining the mission of legal education as teaching students "how to think and to obtain critical analytical faculties."³⁰ He continued that "if you want to jump on this bandwagon arguing

23. *Id.* at 143.

24. *Id.* at 141.

25. *Id.*

26. *Id.* at 163.

27. For a critical review of the arguments, see Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 *J. Legal Educ.* 253 (1979).

28. See Stewart Macaulay, *Professional Competence and the Law—What's at Stake: The Educator's Perspective*, in *Professional Competence and the Law*, ed. Leon Trakman (Halifax: Dalhousie Univ. Law School, 1981).

29. See James Willard Hurst, *The Functions of Courts in the United States: 1950-1980*, 15 *Law & Soc'y Rev.* 401 (1980-81).

30. Monica Langley, *More Professors Are Leaving Their Law Schools to Accept Rewarding Jobs in Private Practice*, *Wall Street Journal*, Sept. 1, 1981, p. 52, cols. 1-4.

for more instruction of practical skills such as client counseling and negotiation techniques, then our law schools will become trade schools, and we shouldn't kid ourselves about it."³¹

I've often heard this position taken by law professors; one version talks of teaching students "to think like a lawyer."³² Usually, teachers fail to specify the lawyer they want their students to emulate. Most law professors have few heroes on the bench, and their classes are devoted to scoring points off appellate opinions. Certainly, few law professors are teaching their students to think like most of the lawyers I interviewed in my 1979 study³³—those lawyers were concerned with the costs of gaining the best result they could through bargaining in the shadow of the law. They thought tactically rather than what most law professors would call analytically. Moreover, both my study and the two Chicago bar studies indicated that many lawyers use "critical analytical" skills that are not usually taught in law school. They analyze situations so they can plan transactions and draft documents designed to ward off trouble and to deal with some of the problems which might arise rather than researching the intricacies of case law and drafting briefs with conceptual niceties.

We can wonder whether most law professors really are attempting to teach their students to think like *law professors*—or, more accurately, to think as law professors of a particular type think. Perhaps law professors are teaching their students to think as the professors would have lawyers think in what the professors see as an ideal world. This would be one in which there were no transaction costs in bringing rules into play, all clients could afford first-class legal craft, and all who played legal roles would be autonomous from any influence other than correct legal analysis. Clean reason rather than dirty deals would typify the system. Judges would respond to correct analytical technique and write opinions which would serve as models for both beginning and experienced lawyers. Trial judges, police, and officials of administrative agencies would carry out the law as properly explained. The public would respond with confidence to a legal system where reason rules, and the pronouncements of the courts would affect behavior of all concerned so that there never would be a gap between the law on the books and the law in action.

31. *Id.*

32. Anthony Chase, *The Birth of the Modern Law School*, 23 *Am. J. Legal Hist.* 329, 342 (1979) traces the thinking-like-a-lawyer idea back to William A. Keener, *The Inductive Method in Legal Education*, 28 *Am. L. Rev.* 709, 717, 723-24 (1894); James Brown Scott, *The Study of the Law*, 2 *Am. L. School Rev.* 1 (1906). I am particularly fond of Scott's claim that "[t]he single instance and the myriad of precedent produce[s] the trained mind which is at once the crowning glory and the most individual gift of the lawyer." *Id.* at 6. See also Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived As Clinical Instruction in Law*, 5 *Nova L. J.* 323 (1981).

33. Macaulay, *supra* note 6.

Into this lovely utopian project come agitators urging attention to what lawyers actually do in the real legal system. They are met with concern about becoming a mere trade school. In the real world, however, there would be serious problems if university-based law schools refused completely to perform as trade schools, preferring instead only to develop "critical analytical faculties." On one hand, potential clients and the society have an interest in minimizing the number of incompetents at the bar. Large law firms and government agencies may be able to afford to carry young lawyers for a time while putting them through basic training. Lawyers who represent individuals and small businesses, however, tend to learn by trial and error at their clients' expense. At the very least, law school must not get in the way of this learning. On the other hand, professors of philosophy, history, literature, and the other humanities also claim to be involved in teaching "how to think" and developing "critical analytical faculties" and do it more cheaply. Law-school deans justify the difference in pay by pointing out that law schools—even those at the most elite universities—are tied to the profession. They would never be so indelicate as to call their operations trade schools. Rather they talk of market factors such as the salaries in practice commanded by those with the credentials necessary for professorships. Lower standards for law professors' tenure also tend to be rationalized in terms of connection with the profession.

Putting aside polemics, the gap between practice and legal education raises serious issues. At this point, I will bring on stage Francis Allen and Duncan Kennedy. Both teach at important law schools. Both have thought seriously about legal education. Allen is a former dean and President of the Association of American Law Schools; it seems safe to say that Kennedy is unlikely to play either of those roles. While their differences could be papered over, their views seem strikingly inconsistent. Allen is more or less satisfied with American legal education; Kennedy sees it as an important part of an illegitimate system. Most law professors will be more comfortable with Allen's views, but the two studies of the Chicago bar reviewed here show that serious law professors cannot dismiss Kennedy out of hand. Indeed, it is remarkable how much support Kennedy's position receives from studies sponsored by the American Bar Foundation.

Allen has considered various challenges to legal education in a number of talks.³⁴ He asserts that it is often forgotten that the record of achievement of our law schools is impressive. While there have been failures, the most serious have been the failures of legal education to honor its own

34. See, e.g., Francis A. Allen, *The New Anti-Intellectualism in American Legal Education*, 28 *Mercer L. Rev.* 447 (1977); Francis A. Allen, *The Prospects of University Law Training*, 29 *J. Legal Educ.* 127 (1978); Francis A. Allen, *Humanistic Legal Education: The Quiet Crisis*, 25 *U. Mich. L. School L. Quadrangle Notes* 25 (No. 3, 1981). Allen's ideas have been gathered in a short book. See Francis A. Allen, *Law, Intellect, and Education* (Ann Arbor, Mich.: Univ. of Michigan Press, 1979).

aspirations of "intellectual depth and humanistic involvement."³⁵ Law schools are part of universities. As such, they must be concerned with more than communicating knowledge and skills useful in professional practice. They assume an obligation to discover and communicate new knowledge. They must be deeply concerned with the values expressed in the law. They must be ready to criticize bench and bar as well as society, particularly for failures to implement those values.³⁶ Law schools are the "training ground for leadership in very broad segments of our political and cultural life,"³⁷ and they are the sources of new law and reform.

Having asserted the ideal of humanistic legal education, Allen confronts demands for changes to make the institution more relevant to practice. He argues that a concern with values goes to the essence of technical professional competence. Law cannot be "known" in any fundamental sense apart from its purposes. The future path of the law cannot be predicted without considering how well the purposes of the law are being achieved and how acceptable those purposes remain to the wider society as the community's needs and perceptions change.³⁸ In this way, the agenda of most elite law schools can be seen as practical. It serves a need of at least some of the lawyers studied in the two surveys of the Chicago bar. Indeed, although Allen does not say this, the two studies show that graduates of elite law schools tend to go to elite law firms and represent wealthy individuals and larger corporations. It may be that in such a practice, concern with values is useful—at least in fashioning rhetoric to rationalize the wishes of such clients.

Allen says that he has "no doubt that the essential needs for improved instruction in practical lawyer skills can be accommodated to an educational regime founded on the humanistic ideal."³⁹ "[T]here may be much that is humane and liberating about clinical instruction that aims at something more than elaborating the niceties of professional practice. *Such training can [strengthen] the command of reality which is a leading attribute of sound professional training* (emphasis added)."⁴⁰ At the same time, Allen thinks that it will be difficult to reconcile humanistic legal education with skills training; the turn toward skills training will result in "a diminishment of the humanistic impulse [that] is very nearly inevitable unless our will is strong and our judgment clear."⁴¹

35. Allen, *The Prospects of University Law Training*, *supra* note 34, at 129.

36. *Id.*

37. *Id.*

38. Allen, *Humanistic Legal Education: The Quiet Crisis*, *supra* note 34, at 28.

39. *Id.* at 30.

40. *Id.*

41. *Id.*

Most law professors would probably applaud Allen's defense of humanistic legal education, particularly in light of the more eccentric demands for reform in legal education put forward by the know-nothing factions of bench and bar in recent times. However, Kennedy demands a careful appraisal of what most law schools actually do in the guise of offering humanistic legal education. Rather than critically seeking and communicating knowledge, Kennedy sees law schools serving to indoctrinate key actors in the corporate bureaucratic welfare state to accept their place and play their roles.⁴² In the name of humanism, the law schools offer mystification. I will try to summarize some of Kennedy's position and relate it to the two studies of the Chicago bar.

Kennedy sees law schools as intensely political places despite the appearance of disinterested neutrality. The classroom experience and curriculum inculcate attitudes toward society, the legal system, and opportunities in the profession. First, law professors attempt to teach indirectly a few simple but important skills: (1) Law students must learn to memorize a large number of rules organized into categorical systems. For example, the tort of *X* consists of elements of *A*, *B*, and *C*; (2) They must learn to "spot issues." This involves identifying ambiguities in the rules, conflicts among rules, and gaps where particular situations fail to fit the rules. Once these are identified, one learns to argue clusters of facts into or out of these areas of indeterminacy by clever characterization; (3) They must learn elementary case analysis. This is the art of generating both broad holdings for cases, so that they may be applied beyond their intuitive scope, and narrow holdings, so that they will not apply where it would seem they should; (4) They must learn a list of pro and con policy arguments which often are little more than slogans or formulas currently acceptable in legal discourse.⁴³ These can be used to argue that a rule should

42. The discussion in the text represents my synthesis of Duncan Kennedy's ideas about legal education which seem relevant to the issues raised by the two Chicago bar studies. I have drawn ideas from his many writings and summarized some of the major themes which appear in several of his publications and papers. While I have tried to be a sympathetic reporter, I would not be surprised to discover that Kennedy would have written this part of my paper differently. Only two of his papers have been published. See Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 *Yale Rev. L. & Soc. Action* 71 (No. 1, 1970); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 *Yale L.J.* 1275 (1981). Most of the discussion in the text is drawn from a series of unpublished works: *Towards Understanding the Ideological Context of a Class in Civil Procedure* (Mar. 4, 1976) [hereinafter cited as Kennedy, *Civil Procedure*]; *Talk to SALT Conference on Goals in Law Teaching* (N.Y.U. Law School, Dec. 16, 1979) [hereinafter cited as Kennedy, *Goals*]; *The Political Significance of the Structure of the Law School Curriculum* (Faculty Seminar, Univ. of Victoria Law School, Feb. 1980) [hereinafter cited as Kennedy, *Political Significance*]; *Utopian Proposal or Law School as a Counterhegemonic Enclave* (April 1, 1980) [hereinafter cited as Kennedy, *Utopian Proposal*]; *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Sept. 10, 1981) [hereinafter cited as Kennedy, *Reproduction of Hierarchy*]. [See also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, in this issue of the *Journal*, 32 *J. Legal Educ.* 591.—Ed.]

43. "There's always policy in everything in American legal education. There's no one left who doesn't do at least some of it. But it tends to be just a tag; every rule has a little policy all its own. 'This rule is justified by security of transaction.' 'This rule is justified by the necessity for some equitable

apply to a situation in spite of gap, conflict, or ambiguity or that a case should be extended or narrowed.

These skills serve a number of functions.⁴⁴ They are used in practice, and Kennedy says that they help in thinking about politics, public policies, and ethical discourse. However, he sees their real significance in showing the indeterminacy and manipulability of the ideas and institutions central to liberalism.⁴⁵ Usually, however, legal reasoning explains and validates the great majority of rules in force in the system. The professor's explicit or implicit message is that the court reached the right, or a defensible, result for the wrong reason. Moreover, every legal issue is treated as distinct from every other, and the focus is on particular cases. There is little chance to derive an integrating vision of what law is, how it really works, or how it might be changed other than in an incremental, reformist way. Also, the focus is on the appellate judge seeking a correct rule and a proper application to the facts of the case. It is assumed that if a rule is adopted, appropriate behavior will follow.

The structure of the curriculum, in Kennedy's view, also serves political ends. At their most impressionable stage, beginning law students study contracts, torts, property, criminal law, and civil procedure. However, rules in these courses reflect the values and assumptions of late nineteenth-century *laissez-faire* capitalism. These courses tend to be taught as a core of hard doctrine with a periphery of soft policy exceptions—which are often dismissed with observations about hard cases making bad law.

discretion in the application of even the strictest standards.' If you look at *Prosser on Torts*, that's the way it's constructed. Every rule has a justification but no justification is more than one sentence long." Kennedy, Goals, *supra* note 42, at 11. "There is now policy analysis of every possible stripe, and it's gradually become clear that a skillful person using the policy approach can generate a resoundingly convincing policy rationale for any rule." Kennedy, Political Significance, *supra* note 42, at 12.

Kennedy does not deny that legal rules can play functional roles; whether they do so is a difficult empirical question. His attack is against a shallow style of teaching that finds a policy catch phrase to characterize any result, fails to see contradictions, and is so narrowly focused as to ignore larger patterns.

44. Kennedy argues that legal analysis taught in law school is *no more* than the four concrete activities mentioned in the text. He notes that many faculty members would insist that there is more to it than that, and that it is a "rigorous" procedure. "When asked to be specific about what it is, they tend to hem and haw in imitation of a first year student being skewered by the demonstration that there can be broad and narrow holdings. If definitions of what legal reasoning really is are offered them, they tend to get suspicious, and reject them." Kennedy, Utopian Proposal, *supra* note 42, at 32-33. "The most likely definition to draw a possible assent is that legal analysis or legal reasoning is what Hart and Sacks called 'reasoned elaboration.' Even people who have taught the Legal Process course seem to have a lot of trouble saying what that is. . . . The whole reasoned elaboration approach is a patent failure, and so far as I know no one has made a serious attempt to defend it *in print* for about ten years." *Id.* at 35.

45. Of course, the ideas and institutions central to socialism as practiced in the Soviet Union and Eastern Europe are also highly indeterminate and manipulable. See, e.g., Jacek Kurczewski and Kazimierz Frieske, Some Problems in the Legal Regulation of the Activities of Economic Institutions, 11 Law & Soc'y Rev. 489 (1977). Perhaps the ideas and institutions central to any industrialized large society must be indeterminate and manipulable; I do not interpret Kennedy as saying our ideas and institutions are more indeterminate and manipulable than those of other actual or imaginable societies.

Discussions of individual rights have a core that is individualist, cold, clean, anti-emotional, and logical. The slightly tawdry periphery is soft, emotional, political, collective, and irrational. Consider, for example, the Holmes-Williston view of bargained-for consideration as the core and promissory estoppel as the periphery. Kennedy says that in field after field the periphery tends to swallow the core, but it is not taught that way. Of course, statutes typically remove large numbers of problems from the domain of these traditional courses,⁴⁶ applying what some would deem soft, emotional, political, collective, and irrational norms and solutions. Yet the first year of law school ignores legislation as far as possible.⁴⁷ Students must master the cold logic of the core doctrine, and messy reality would only confuse them.

Then there are second- and third-year courses that expound the moderate program of the New Deal and explain the administrative structure of the modern regulatory state. Sometimes the message is that the system is basically acceptable since any abuses in important areas have long since been remedied; sometimes the message is that the modern regulatory state is an attack on the cold logic of efficiency and thus illegitimate. Students also are likely to take at least one course in which they consider the egalitarian emphasis of the Warren Court and something of the First Amendment. Thus, there is a limited but important place for value-oriented debate, but the debate tends to teach that it is at least possible to take action within the system to achieve reform or to overturn the ill-conceived reforms of past generations. More fundamental questioning is relegated to a few frill courses and seminars usually taken by small numbers of students.

Law schools, Kennedy continues, channel their students into the hierarchy of the bar according to their own standing in the hierarchy of schools. First, students are ranked according to their grades. The most important grades come in the first year, but they are rewards for cleverness in decoding the system. The basic skills of learning rule systems, spotting issues, mastering elementary case analysis, and knowing the accepted policy formulas are within the capability of all but a few students who can make it into a top law school. Yet these skills are taught indirectly in a manner which mystifies many who assume that the game must be more or other than it is. The clever and facile get high grades and are awarded a position on law review where they practice set patterns of discussing

46. See Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (Madison, Wis.: Univ. of Wisconsin Press, 1965).

47. There is probably far more legislation in the first-year courses today than when I was a law student. Nonetheless, my perusal of first-year casebooks suggests to me that the common law is taught as the core while statutes are viewed as intrusions which create "exceptions." Perhaps this is less true of criminal law and civil procedure than contracts and torts. Of course, even contracts can become a statutory course if large amounts of the Uniform Commercial Code are considered; yet it is hardly a typical statute.

appellate cases, master a writing style, and learn to write and rewrite to please another. Those who succeed on law review, in turn, are expected to gain prized jobs with the best law firms or to serve for a year or two as a clerk to an appellate judge. Success is defined as climbing this ladder, and students learn to value the rewards as merit badges. The placement process dangles the bait and makes clear the rules of the game. A perceptive student learns how to dress and talk. One begins to learn how to fit in with one's future colleagues and clients. Recruiters from law firms and governmental agencies send messages about courses to take and those to avoid. Those who do not make law review or who go to "lesser" law schools learn roles appropriate to their status; they are channeled to different jobs which fall at different places on the Heinz and Laumann prestige scale.

There must be a gap between practice and law school if the schools are to play their role in socializing and channeling students into appropriate kinds of practice. A hard look at the real world would upset what Kennedy calls the cozy liberal consensus and would raise disturbing questions about power and distributive justice. When the real barriers to access to the American legal system are considered, the reforms of the past fifty years must be seen as problematic in their impact. It may not be enough to create new legal rights for individuals. Pure hard reason may not triumph over dirty deals. The one who should win may not be able to afford to battle a lawyer who is expert in increasing costs and creating delays by the use of the Federal Rules of Civil Procedure. Nice issues of federalism or the conflict of laws may serve only to deny rights to those who cannot afford to hire a law professor as a consultant. Those who enjoy games and puzzles can continue to play the conventional games, maintaining their sense of doing something worthwhile by closing their eyes to all but the law itself.

Kennedy also asserts that if practice skills are not taught, then few graduating will be foolish enough to consider doing anything other than working for government or a law firm large enough to pay them to learn. If the faculty glorifies analysis of cases and statutes and denigrates negotiating and counseling individuals, then a cultural definition of "real lawyer's work" is reinforced. Law schools, in this way, play a part in creating and maintaining the status hierarchy of the professional reported by Heinz and Laumann. Kennedy asserts that in fact "many of the attributes of top work that are supposed to make it top are mythical: it is often more mechanical, less creative, less socially valuable and less fun than the work done on the next rung down the ladder."⁴⁸ In law school students read cases about the authority of the Securities and Exchange Commission involving fair procedures, the rule of law, and the right of Congress to delegate power. In elite law firms young lawyers actually proofread regis-

48. Kennedy, *Reproduction of Hierarchy*, *supra* note 42, at 25.

tration statements. Yet corporate work is painted as important; it involves famous corporations and large sums of money; and clients usually are willing to invest enough so that something approaching the law-school model of legal research can be done.

Kennedy would say that we should not be surprised that Zemans and Rosenblum find that law school is focused on "the ideal symbolic work of the legal profession." In that way, students learn to accept a role in a profession that "is mainly engaged in greasing the wheels of the economy."⁴⁹ It is not evil. It is fulfilling to help people achieve their objectives, exercise one's skills, make money, and be respected, but that's it. It is not a profession concerned with justice or in the front lines of the class struggle.⁵⁰ Yet one can avoid facing this reality insofar as law school glorifies "ideal symbolic work." Corporate lawyers can serve the ends of those who hold power, gain money and status from their association with such clients, and, as Heinz and Laumann pointed out, take civil liberties cases occasionally to help maintain an idealized picture of themselves.

What, then, are we to conclude? Few law professors, in all likelihood, would take their Duncan Kennedy neat; most would dilute his position greatly before they accepted it or, more likely, they would ignore it.⁵¹ Most law professors probably would accept the picture painted by the two studies of the Chicago bar—perhaps quarreling about a detail here and

49. *Id.* at 24.

50. *Id.*

51. Those offended by Kennedy's position might consider Roger Cramton's *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247 (1978) which avoids Kennedy's "radical" or "left" vocabulary. Cramton finds the unarticulated fundamental assumptions of the American law-school classroom to be: "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place." *Id.* at 248. He makes observations such as "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." *Id.* at 250. "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." *Id.* at 254. "Modern dogmas entangle legal education—amoral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry. We will neither understand nor transform these modern dogmas unless we abandon our unconcern for value premises. The beliefs and attitudes that anchor our lives must be examined and revealed." *Id.* at 262. Recognizing that Cramton and Kennedy are starting from such very different positions, I find the similarity in their views remarkable. But see William Stanmeyer, *On Legal Education: The Selection of Faculty*, 6 Law & Liberty—A Project on the Legal Framework of A Free Society 1-3 (Winter 1981) (describing legal education similarly but arguing students are indoctrinated against property and freedom). I think if one examined the "beliefs and attitudes that anchor our lives" as law teachers in light of the two Chicago bar studies, one would have to grant much of Kennedy's case.

While I find Cramton's case very persuasive, it is interesting that almost twenty-five years ago David Riesman found many of the characteristics of legal education cataloged by Cramton to be

there⁵²—and acknowledge that there is a gap between what lawyers do and what law schools teach. Some, at least, would not be too troubled by this gap, seeing law school as properly specializing in teaching legal analysis. In essence, their reply to Zemans and Rosenblum would be that their lawyer respondents were wrong in rating the importance of analytical skill. These law teachers might see a division of labor, with law school teaching legal analysis while other skills are best learned elsewhere. Many law professors would be pleased by Francis Allen's view of legal education as one of the humanities, as a discipline concerned with the realization of the core values of the society through legal institutions.

My own view is what might be called a liberal straddle—or, in the words of Billy Martin's television commercial, I feel strongly both ways! Duncan Kennedy's views must be faced. In many ways, legal education always risks being a kind of con game—an exercise in mystification, or a process of transforming idealistic students into hired guns. Allen's portrait flatters the subject greatly. His humanistic claim for legal education states an ideal while the reality—at least in others' classrooms—often is lip service to liberal values coupled with little concern for their realization in everyday affairs. Of course, all institutions have a kind of official picture of themselves, a version of their functions that gives them legitimacy. And, given the nature of the world, there always is likely to be a gap between promise

liberating. "[Thorstein] Veblen fell for a Populist and still popular stereotype, too, in supposing that lawyers were invariably wordy, abstract fellows, given to chicane in aid of business sabotage. . . . Thurman Arnold's witty demolition of *The Symbols of Government* and *The Folklore of Capitalism* is gay and amusing where Veblen is bitter, but no one seems to me to have done more . . . to indoctrinate the New Deal generation with an irreverent view of the rituals of law and ownership. The Technocrats made noise but not much else, while the Veblenian law teachers brought up the ablest legal minds with a disrespect for the sanctity of property rights, a pragmatic attitude toward legal forms, and an awareness of the coercions implicit in 'free' contract—attitudes crucial for the creative role of leadership these lawyers played in the New Deal, in OPA, and in other war agencies." David Riesman, Thorstein Veblen—A Critical Interpretation 94–95 (New York: Scribner's, 1953). Of course, Kennedy, Cramton, and Riesman could all be right. A pragmatic attitude toward legal forms might have been essential to cope with the collapse of capitalism in the 1930s but seem shallow and inadequate after Vietnam, Watergate, the role of the United States in overthrowing Allende in Chile, and the discovery that Brown v. Board of Education, whatever its symbolic impact, failed to desegregate the United States.

52. Francis Allen points out that we often overlook the dramatic increase in direct contacts of law students with practice problems. Allen, *The Prospects of University Law Training*, *supra* note 34, at 136. Indeed, my law school is located at the state capital, and the city is well populated by lawyers. As a result, second- and third-year law students regularly march off to be the foot soldiers in the battles between state agencies and the law firms that exist to inhibit action by the agencies. Moreover, we have a number of clinical programs at the law school. Nonetheless, it takes great effort to bring this experience into class and seminar rooms. Law students who have outside legal jobs usually are just too busy doing the work to reflect about contradictions between the model of the legal process implicit in conventional casebooks and the process in which they play a role. At least some of our clinical programs do an excellent job of pushing students to confront normatively what they discover in practice. Nonetheless, unless real efforts are made, students tend to develop all sorts of unexamined tacit assumptions about the legal system during their first year before most of them become involved with clinical programs or work for lawyers.

and performance. It also may be that legal education is trapped in a contradiction between the high ideals it sometimes considers and the inability of its subject matter—appellate cases—to tell us much about whether those ideals have any meaning within society. Whatever the source of the problem, we are unlikely to move much beyond empty symbolism if we are unwilling to reconsider many of our presuppositions and look beyond reported decisions.

Law school, for some students at least, does involve an important transformation of outlook. Some students still come into law school with "rhetorical visions, fantasy chains or organizational frames"⁵³ concerning the profession they want to enter. They see lawyers as well paid in money and status. Moreover, their work is seen as involving defending core American values. The model may be Clarence Darrow, or a modern version taken from a television show. Such a lawyer is seen defending an individual from the bias of a mob that has been incited by powerful manipulators. By pure forensic skill the trial lawyer makes the system honor its own principles. Or the implicit model may be Thurgood Marshall and the other lawyers of the NAACP who, by the exercise of reason, brought about major social change. Of course, almost all of these students "know better," but they hope that their education and future career will be concerned with what they see as justice and will amount to more than training and effort to make the rich richer.

Most of these idealistic students are transformed into apprentice lawyers who will find it acceptable to represent those who are likely to be the best customers of their services.⁵⁴ Kennedy certainly is right that the first year of law school will be hard on students who question capitalism, liberal pluralism, or the existing distributions of wealth, privilege, and status in the society. The curriculum usually begins with a heavy dose of common law and ignores the many statutory rejections of its answers. The discussion in the classroom frequently celebrates individualism, efficiency, an incremental process, and protection of zones of freedom within which those with power can exercise it. A slightly idealistic first-year student often makes a statement in class which the professor can push into the form of "it is just to equalize wealth; X is the poorer of the parties and Y is a large corporation with a deep pocket; therefore X ought to win." When a master teacher is through, the student or one of his susceptible classmates will have asserted the virtues of rewards to the efficient who create wealth for all of us, the virtues of holding individuals responsible for their actions,

53. See Sonja K. Foss, *Equal Rights Amendment Controversy: Two Worlds in Conflict*, 65 Q. J. Speech 275 (1979); Martha Solomon, *The "Positive Woman's" Journey: A Mythic Analysis of the Rhetoric of Stop ERA*, 65 Q. J. Speech 262 (1979).

54. See James C. Foster, *The "Cooling Out" of Law Students*, 3 Law & Pol'y Q. 243 (1981). Some students, of course, do not get cooled out and are willing and able to find jobs involving idealistic elements.

and the evils of paternalism which robs the weaker of their choice and substitutes that of a purported expert. In a well-run class, all will see visions of grass growing in the streets if courts were to yield to softhearted sentiment. Other skilled teachers will drive home the message that the redistribution of wealth may be an appropriate function of legislatures in a pluralistic society but falls out of bounds for courts; however, they seldom examine seriously the likely consequences of this position. While such conclusions may flow from our political outlook, it would be hard to call them neutral or scientific with a straight face.⁵⁵

Even when the message of a first-year classroom is not so openly political, there is another message which is part of the process of transforming entering students into apprentice lawyers. A strong lesson is that there is always an argument the other way, and the Devil usually has a very good case. Heffernan has pointed out that law teaching tends to be Sophist rather than Socratic.⁵⁶ Socrates asked questions in search of an understanding of justice. The Sophists, in contrast, played intellectual games and sought to make the weaker argument the stronger. Many law professors are famous for their skill in responding to whatever their students say by leaping to the other side. When a naive student thinks he can gain favor by joining the professor, the professor turns the argument on its head and leaps back to the original argument, perhaps stating it more persuasively. The successful student learns that there are no answers but just arguments. Of course, the really successful student learns that, as was true of Orwell's pigs, some arguments are more equal than others; indeed, the point may be that while there are few right arguments, there are many wrong ones. Nonetheless, the process is not a Socratic search for justice but a Sophist game. And if one is paid to play a game, it does not make much difference whether he plays for the Yankees, Brewers, Red Sox, or Orioles—or for IBM, General Motors, ITT, or the Department of Justice.

55. Duncan Kennedy is highly critical of this kind of analysis. He describes Winchester Avenue in New Haven, "where speculators blockbusted the life savings of white working-class families into nothingness and black families moved in with mortgage payments they could never meet. . . . [L]egal scholarship is one of the things that creates the world I've just described—creates it, sustains it, legitimates it." Kennedy, *Cost-Reduction Theory as Legitimation*, *supra* note 42, at 1275–76.

I have some difficulty with Kennedy's apparent assertion that legal scholarship has much to do with the kinds of exploitation he describes. A great deal of it was going on long before the law-and-economics movement had much impact on legal education. Efficiency arguments may serve to make young lawyers more comfortable when they are employed to serve land speculators, ghetto merchants, and manufacturers of dangerous consumer products. Law-and-economics rhetoric may support the movement for deregulation which may leave us facing the very problems that prompted regulation in the first place. Undoubtedly, law-and-economics thinking has been valuable in driving home the idea that wonderful reforms in the name of justice are likely to have costs. However, it would seem consistent with the law-and-economics argument itself to note that law-and-economics rhetoric may have costs and legitimating the exploitation of the weak may be one of them. If "there ain't no such thing as a free lunch," then this kind of legal theorizing cannot be free either. Or, once again, did I just fail to understand the point?

56. William C. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 *Buffalo L. Rev.* 339 (1980). Compare Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 *Yale L. J.* 955 (1981).

However, for many it would go too far to see lawyering as only a game. Part of the answer for them is supplied by comforting assumptions and ideas about the adversary system. Everyone involved in a controversy will have a lawyer pressing his case; the excesses of one will be cancelled out by the zeal of another; thus, the unseen hand of competition in the marketplace of ideas will yield truth. If opposing lawyers play the intellectual game, nothing should be overlooked. A wise judge will be able to put aside bias and see all that is involved before making a decision.⁵⁷ Thus, one who works for *any* client is serving an important social process, and, indeed, one has an obligation not to pull punches out of a misguided sense of social responsibility.

Kennedy certainly is right that law school tends to celebrate only part of the work and skills of attorneys and in this way reinforces the status hierarchies of the profession. However, when one looks at the two studies of the Chicago bar and other reports about the top end of the profession, one has to wonder if something else is not also involved. Law school does not track perfectly with the needs of the largest law firms; it offers little training for much of their work. For example, the two Chicago studies suggest that corporate litigation is the highest status work, but, until recently, law schools have done little to teach students the trial techniques relevant to such cases. General corporate practice also has high status, and occupies far more lawyers' time than corporate litigation. Nonetheless, law school tends to neglect training in planning transactions and drafting the needed legal documents to carry out the plan.⁵⁸

Moreover, there is another part of corporate law practice which the two Chicago studies did not capture and which is seldom mentioned in law school. For example, in an article describing what has happened to lawyers who held top positions in the Carter Administration, the following report about Robert Strauss appeared:

He doesn't pretend to be the typical lawyer, buried in the minutiae of cases and versed in arcane points of tax or securities law. It's been years since he was in the firm library. . . .

But . . . Mr. Strauss knows people across the country and abroad, so that when a client in Chicago wants to open a factory in Canada, say, Mr. Strauss can pick up his phone, talk to the Canadian businessman who might be interested in sharing such a venture, and arrange a meeting—all in five minutes of work and five of small talk.

57. See John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 *Harv. L. Rev.* 386 (1972); E. Allan Lind, John Thibaut & Laurens Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 *Va. L. Rev.* 271 (1976); Robert M. Hayden & Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker*, 3 *Law & Hum. Behav.* 21 (1979).

58. Of course, one can point to business planning and office practice courses, but they are hardly common or central in American legal education. Even at schools that have them, if there were no torts teacher, something would have to be done, but if the instructor offering business planning resigned, it would hardly be considered a crisis.

"If you're around people and make a good impression, they think of you favorably and look you up when they need somebody. . . ."

It's not so much a matter of knowing the law as of having common-sense knowledge of people. "I've never been a great intellectual, never a great academic, but I've been a great performer," Mr. Strauss explains. "And clients come to people who get things done."

Mr. Strauss can put together the ingredients for the factory deal and leave it to the contract lawyers to work out the details. He can negotiate takeover tactics for a corporate client; [his firm's] antitrust, securities and contract lawyers worry about the technicalities. . . .

"I just had a man here in my office this morning talking about his estate," Mr. Strauss says in explanation of his sort of practice. "He didn't want my legal advice. He wanted my judgment."⁵⁹

Why does classic legal education avoid teaching such things as trial tactics for corporate clients, planning transactions and drafting documents, and playing roles such as those described in the report about Robert Strauss? These are things done by only a few elite lawyers, and they would be hard to teach—indeed, I cannot imagine teaching anyone in their early twenties in a law-school setting how to gain and keep the contacts, entitlement to favors, and manipulative skills of Robert Strauss. Perhaps, however, law students are not the only ones mystified by legal education. It is worth considering whether law professors fool themselves. Whatever the functions of legal education for students and practicing lawyers, what does it do for law professors?

As Francis Allen observes, legal education is part of a university. In this odd world, people claim status in many ways.⁶⁰ When a university claims support from *outsiders*—taxpayers or alumni—it tends to stress entertainment or utility. The championship football team, the opportunity for upward mobility that comes from holding a college degree, and the useful discoveries of the applied sciences are stressed. Yet *within* the institution and across the international community of scholars, the highest status does not come with providing entertainment or utility. Originally, university scholarship meant what we now call the humanities; then it came to mean an uneasy blend of humanities and what can be labeled as science.

59. Ruth Marcus, What Price Fame—and Who Pays it?, *Nat'l Law J.*, Aug. 12, 1981, p. 1, col. 2, p. 54, cols. 2-3. Compare James Willard Hurst, *The Growth of American Law: The Law Makers* 344-46 (Boston: Little, Brown, 1950).

60. Andrew Abbott argues that "[i]ntraprofessional status is in reality a function of professional purity. By professional purity I mean the ability to exclude nonprofessional issues or irrelevant professional issues from practice. Within a given profession, the highest status professionals are those who deal with issues predigested and predefined by a number of colleagues. These colleagues have removed human complexity and difficulty to leave a problem at least professionally defined, although possibly still very difficult to solve. Conversely, the lowest status professionals are those who deal with problems from which the human complexities are not or cannot be removed. . . . The impure is that which violates the categories and classifications of a given cultural system. . . . [P]roblems that fundamentally challenge basic professional categories are impure and professionally defiling. . . ." See Andrew Abbott, Status and Status Strain in the Professions, 86 *Am. J. Soc.* 819, 823-24 (1981).

For many inside the academy, philosophers and physicists are the true scholars, and only a Philistine would ask what their work was good for. There are many ways to play the status game in academic life, but a department can attempt to have it both ways by offering utility to outside audiences and claiming to be involved with humanism and science when facing inward. Such a department would offer valued training but disown any suggestion that it was but a mere trade school.

To a great extent, legal education has attempted to be all things to all people in order to claim status and rewards from both inside and outside the academy. However it is not easy to have it both ways. Few law professors have substantial experience in practice because universities seldom can afford to hire those who have succeeded at the bar. Young law teachers predictably teach what they know—appellate cases and the approaches honored at the law schools they graduated from. Of course, some of the faculty maintain contact with lawyers in practice, but participation in continuing education programs, alumni relations, and the like is not the highest status work. Paid consulting for law firms has an ambiguous status, both inside and outside the academic world.⁶¹ On one hand, the professor can be seen as selling his scholarly objectivity to the highest bidder. On the other hand, recognition by those able to pay consultant fees indicates that the professor is an "authority." The most scholarly, well-published professors probably know only a few elite lawyers and appellate judges personally, and they tend to be least likely to have consulting opportunities. Yet they may gain a national or international academic reputation from their publications which provoke offers to move elsewhere and counteroffers which push them to the top of the university's salary structure.

Furthermore, dedication to what Zemans and Rosenblum call the ideal symbolic work of the profession helps law professors play to audiences both outside and inside the university community. Historically, legal scholarship has vacillated between claiming to be a science and claiming to be one of the humanities. Most law professors, at least implicitly, attempt to touch all bases. They deal in something at least once called legal science; they are concerned with the core values of the society; and they claim some special understanding of important public events. Even the most

61. Compare Bruce A. Ackerman, *The Marketplace of Ideas*, 90 *Yale L. J.* 1131 (1981) with Andrew Hacker, *The Shame of Professional Schools: How Not to Educate an Elite*, Harpers, Oct. 1981, at 22. Hacker, a political scientist, asserts that "[i]t is a law school tradition that students do not approach professors. . . . While this may encourage self-reliance, it also means the professors only have to show up several hours a week. A few do some research; but many don't do even that. The number of law professors with national reputations is meager. A lot spend their spare time in part-time practice, augmenting their already generous salaries, which are second only to the medical faculty on most university payrolls." *Id.* at 27. It is likely that Professor Hacker would not be impressed by a claim that part-time practice was a kind of research by participant observation. Of course, Hacker's statement may be an exaggeration, but it is interesting to see an attack on professional schools by a political scientist carried on in the pages of a magazine such as Harpers.

cloistered legal academic often is asked to serve on an all-university committee to give it the benefit of "a lawyer's perspective." Similarly, teachers of public law often find themselves on public radio or television pontificating about what would seem to be political events. Of course, such status claims do not always work: professors in the humanities and sciences have been known to consider law schools, the more applied parts of the college of agriculture, and the school of hotel management all as the sorts of enterprises which ought to be advertised on the inside covers of matchbooks.

Attention to the ideal symbolic work of the profession may or may not successfully establish the claims of legal scholarship inside and outside the university, but it does help many law professors see their own careers as worthwhile, as something worthy of people with their talents. If one with the credentials and achievements of most law professors is asked to teach and publish, the work must concern higher things. Legal scholars criticize the craft of the Supreme Court of the United States, our most prestigious institution, and they tell justices of the various state supreme courts what they are doing and counsel them on what they ought to do. Furthermore, law professors have academic title to a great deal of turf. They have a commission to apply ideas from across the humanities and sciences, both natural and social, to vital problems of the society, but if scholars from other disciplines have the temerity to talk about law, they can be repelled by the claim that they do not really understand.

Recognition of what an important lawyer such as Robert Strauss does to earn a living would threaten law professors' pictures of their world. It might deny the claim that legal education deals with reason, values, and a system that is relatively autonomous from the influences of those who hold power in the society. Strauss deals in contacts and influence flowing from years in public life, and his kind of practice relegates experts in legal analysis to the backroom. Strauss plays a commanding role while those who are masters of the law library function much as does the service person from IBM who keeps the office word processors in operation.

Moreover, planning transactions and drafting documents in simulated exercises is pretty dull stuff as compared to reflecting on the Supreme Court's mistakes in dealing with the core values of the society. And at least one function of legal education is to entertain and challenge the professors, if not the students. Plea bargaining, settlement negotiations, contingent fees, barriers to access to justice, and the "need" to cut corners to get things done are the dirty work of the profession and, it seems, fail to offer the intellectual challenge worthy of an elite scholar. After all, many join the academy in order to avoid having to cope with the stuff of messy reality.

A common way of dealing with information which makes us uncomfortable is to deny that it exists. When this fails, we can convince ourselves that it is atypical or trivial. We should not be surprised, then, if many law

professors ignore studies such as the two under consideration here. The two portraits of the Chicago bar and its members' reactions to legal education are likely to be viewed by many as little more than an account of "interesting" quaint native customs with little relevance to their concerns. Such reactions, of course, tell us as much about the speaker as the studies.

Having said all of this, I still think legal education can be something more than a con game or a trade school. Francis Allen certainly is right when he says that law school *attempts* to teach something about the core values of our society—contracts, property, criminal law, constitutional law, and all the rest express some of what most Americans accept as right and proper or just common sense. At times these ideas may be no more than rhetoric serving to rationalize exploitation and oppression. The claims of the liberal state, upon close analysis, may prove to be unsatisfying. Nonetheless, in a world where both left and right-wing nations kill, torture, and repress their citizens in the name of socialism, anticommunism, or the free market, we must remember that debunking the pretensions of law schools does not establish that nothing of importance is going on. Whether by accident or design, most professors tell their students that rules and procedures matter; individuals should have some zone of freedom protected against the power of government; governmental action should be based on more than raw power; and individuals and organizations have a claim to use resources for their own purposes, although power flowing from property rights, perhaps, ought not be used unconscionably. Whether by reasoned elaboration or by body language, law professors tend to communicate their support of free speech and their opposition to torture, police brutality, and cutting corners to get results.⁶²

While it is fairly easy for law professors to have a rough sense of the message they and their colleagues are sending out, it is much harder to establish the impact these ideas have on law students, lawyers and society. First, we cannot assume that students are but clay, just waiting to be molded by professors. We can point to many who have passed through law school without becoming apologists for the outrages of the powerful. On the other hand, many students come to law school, not as idealists who are then cooled out, but as what Willard Hurst calls "bastard pragmatists."⁶³ They demand that everything have a short-run payoff, and they are impatient with what, to them, does not appear practical. At their worst, they sound as if they want courses on how to bribe judges and legislators

62. Of course, this message may be inconsistent with other messages being transmitted as described in the text at notes 54-58, *supra*. Law faculties, in my experience, are characterized by their almost willful ignorance of the contradictory messages delivered to their students in classes, by the administration of the institution, by the student gossip network, and through the placement office and job interviewing process. The statement in the text identifies one major idea that many professors communicate in many ways.

63. See James Willard Hurst, *Law and Social Process in United States History* 122 (Ann Arbor, Mich.: Univ. of Michigan Law School, 1960).

without getting caught. Most professors despair of ever laying a glove on these students. Probably most students pick up some, but hardly all, of the message broadcast by their law school. While their positive attitudes toward civil liberties may be reinforced, we cannot be sure about the extent to which their attitudes will affect their behavior as lawyers.

Whatever we manage to teach young lawyers, we must recognize that they are quickly confronted by the structures and rewards and punishments of practice. This, of course, is a major limitation on the power of legal education to affect the bar. Beginners at large law firms are not in a position to question their seniors or their clients. Those in larger and smaller firms may have to serve clients by mass processing strategies in order to make the cases pay,⁶⁴ and these strategies themselves may undercut a good deal of the values of the adversary system and our assumptions about rights. Also, it is not hard to find examples of questionable behavior by elite lawyers despite their education at fine law schools. Almost a decade has passed since Watergate, but it is hard to forget the performance of so many of the lawyers in the Nixon Administration.

Yet law professors can make a case that their efforts do make a difference. Roberto Unger has observed that:

In societies with a heavy commitment to the rule of law, people often act on the belief that the legal system does possess a relative generality and autonomy. To treat their understandings and values as mere shams is to assume that social relations can be described and explained without regard to the meanings the men who participate in those relations attribute to them. This . . . would be to blind oneself to what is specifically social about the subject matter. . . .⁶⁵

Whatever the reality, Americans think of themselves as a law abiding nation. Painting ourselves as somehow different than other corrupt societies influences behavior. Of course, some people cheat when they think they can, and our culture offers excellent rationalizations for breaking the rules. Yet public officials, those who run large corporations, and the public in general have some feeling for conforming to the law.⁶⁶ At the very least,

64. Geoffrey Hazard has written that people go into corporate law practice because they can "give their technical best to the problems they work on." He continues, saying that the "rest of the bar ordinarily has to slop through the quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate in any given situation." Geoffrey C. Hazard, *Ethics in the Practice of Law* 152-53 (New Haven: Yale Univ. Press, 1978).

65. Roberto M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 56-57 (New York: Free Press, 1976).

66. It would be difficult to prove that important people have some feeling for conforming to the law. Even if one conducted a study where people labeled as important were asked about their attitudes, the results would be inconclusive. We would not know whether those interviewed answered truthfully or gave inaccurate responses. Even if the answers were accurate, there are major questions about the degree to which attitudes affect behavior. Also, people might generally support complying with the law but might be willing to violate laws which seemed to them trivial, stupid or immoral. Others might hesitate to admit to themselves that they were criminals but might be eager and willing to accept a thin legal argument rationalizing their behavior.

The statement in the text speaks only of an influence on behavior and falls far short of asserting that most of those who hold positions of power are totally law abiding. It reflects my judgment

it takes effort to evade and explain behaving as a criminal; sometimes, if not always, it is easier to go along and comply. The press and intellectuals writing essays draw on legal ideas as one of the bases for investigative journalism and muckraking. The fact that exposure of lawlessness can create a scandal is some evidence of the power of these ideas. Americans usually do not react to stories of lawbreaking by those who hold power with cynical amusement—at least, those who hold power cannot count on this reaction.

There is at least anecdotal evidence that in dealing with clients, lawyers sometimes are influenced by their view of the demands of the law. Some lawyers may have the skill and influence to channel behavior from questionable to acceptable forms.⁶⁷ Some may deter clients from violating the law by their posture of respectability. Many lawyers just assume that their clients will comply and sell their services as necessary to meet new regulations. Of course, Heinz and Laumann stress the degree to which clients influence lawyers, and we must note that large corporations that pollute the environment or offer automobiles that incinerate their passengers seldom lack high-powered lawyers to plead their cause. It is romantic to picture a young lawyer thwarting an evil chief executive officer of a multi-

based on experience interviewing business people and their lawyers and on what others who have studied those who hold power in business and government have told me. In light of all of the scandals such as Watergate, the electrical price-fixing conspiracy, the operations of ITT in Chile, and the bribery of officials of foreign governments who influenced the purchase of American products, one might expect those who hold positions of power to give little importance to an obligation to obey the law. Yet I have been told often that people in power do think that they should comply, at least in most instances. Business lawyers, for example, have told me that they have been surprised by how strongly their clients feel about complying with the law. In contrast, I have been surprised by how willing university professors and administrators have been to violate affirmative action laws, to cover up their failure to comply, and use political contacts to ward off enforcement of the law against their institutions. See Jacqueline Macaulay, *The Failure of Affirmative Action for Women: One University's Experience*, in *Rocking the Boat: Academic Women and Academic Processes*, ed. Leonore Hoffman & Gloria De Sole, 98 (New York: Modern Language Assn. of America, 1981). Several professors at my institution recently have been convicted of crimes involving misuse of funds. Still I would say that most university professors I know have some feeling for conforming to the law. All in all, I think the statement in the text is accurate. All it means is that Americans in and out of power tend to think they ought to obey the law, and this is one of many influences on their behavior. Compare June L. Tapp & Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, 27 *J. Soc. Issues* 65 (No. 2, 1971).

67. It is here that I may differ somewhat with Heinz and Laumann. Compare Heinz & Laumann, *supra* note 3, at ch. 10, with Macaulay, *supra* note 6, at 143-51. They stress the *control* clients have over lawyers while I emphasize the *influence* business lawyers have over their corporate clients. The statements in the text are based on what I have been told by business people and lawyers with commercial practices. Clearly Heinz and Laumann are right when they emphasize the power of clients to influence lawyers, but the point is that the influence may be at least partially reciprocal. The matter undoubtedly is complex and worth thought and research. Much must turn on corporate structures and the individual executives and lawyer involved. For example, in the General Electric price-fixing conspiracy in the late 1950s and early 1960s, a decentralized organization structure gave executives interested in compiling a sales record an incentive to conceal from G.E. lawyers the price-fixing activities in which they were engaged. Although the G.E. lawyers did not *control* the executives, the concealment itself constitutes a form of influence. When the conspiracy fell apart, the lawyers' influence expanded greatly, at least temporarily. See Richard A. Smith, *The Incredible Electrical Conspiracy*, *Fortune*, April 1961, p. 132; May 1961, p. 161.

national corporation which is plotting to overthrow an elected government in a third-world country and murder its president. Yet it is also unrealistic to deny some influence for the better of high-status lawyers on how things are done in executive suites.

Legal norms can provide the focus for reform and can affect the means used to exercise power. Trubek says that the "claim by any set of institutions to have achieved universal values [that best solve the problem of satisfying human needs] is empirical and therefore open to challenge; . . . effective demonstration of the falsity of the claim will generate pressure for change."⁶⁸ The promises of our institutions cannot be too far removed from reality as perceived by significant audiences and still serve to legitimate those institutions or the society itself. E. P. Thompson observed that the rhetoric and rules of a society may "[i]n the same moment . . . modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions."⁶⁹

Lawyers often play a role in curbing or checking power. Some are judges or government officials who see failure of the system to live up to its values as troublesome and calling for response. In liberal societies violations of civil rights tend to be covert or elaborately rationalized. Whatever its failings, the United States is not the Soviet Union or Argentina in terms of civil rights. Lawyers here do take test cases, asserting civil liberties claims before the highest courts; their successes may not bring about radical redistributions of wealth and power, but they curb power and check its intrusions. Lawyers may take public stands favoring racial equality, free speech, the rights of women, and limits on police practices. While they are not the only civil libertarians in society, by speaking out as

68. David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 *Law & Soc'y Rev.* 529, 559 (1977).

69. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act 265* (New York: Pantheon Books, 1975). Allan Hunt comments that Thompson's "position is encapsulated in two formulations that take on something of the quality of slogans: 'law matters' and 'the rule of law seems to me to be an unqualified human good' . . . The controversial character of his position derives from its rejection of the almost instinctive response of the Left to regard the rule of law as a prime example of an ideological fiction, to be denounced and exposed along with the separation of powers and judicial neutrality as the most transparent guises of bourgeois constitutionalism. What Thompson defends in the name of the rule of law is not entirely clear or consistent. Certainly he tends to conflate the rule of law and civil liberty; thereby he hangs the defence of the former on the more self-evident defence of the latter. But he also emphasizes the importance of the rule of law as constituting a mechanism of restraint upon rulers. He adds a further dimension by proposing a conception of the rule of law as constituting a framework within which the class struggle can be fought. The implications of Thompson's thesis in defence of the rule of law have not received systematic attention but the need is revealed as soon as the importance of its implications becomes clear; the great importance of his intervention lies precisely in the fact that it is now placed firmly on the contemporary political and intellectual agenda of the Left." Allan Hunt, *Dichotomy and Contradiction in the Sociology of Law*, 8 *Brit. J. L. & Soc'y* 47, 71-72 (1981).

Morton Horwitz objects, saying "I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's

lawyers they have some influence in the battle for common sense. Law professors can be heard in the mass media, challenging those who hold power. Zechariah Chafee and Felix Frankfurter spoke out against the "Red Scare" of the 1920s;⁷⁰ Malcolm Sharp battled to defend civil liberties against the hypocrisies of his own university's administration, an Attorney General of the United States, and the Bar Association of Illinois during the McCarthy era.⁷¹ Chafee, Frankfurter, and Sharp had some access to the press because they were law professors. One does not want to claim too much for legal education and the legal profession in this regard—the Committee on Communist Strategy, Tactics, and Objectives of the American Bar Association still ought to be an embarrassment to that organization, and most law professors have failed to display the courage of men such as Chafee, Frankfurter, and Sharp in times of crisis. Nonetheless, one should not dismiss the contributions of those lawyers and law professors who have championed the Bill of Rights in troubled times. Work at the margin, at the very least, may keep a society less repressive than it might otherwise be.

Law teachers also can serve as relatively independent critics and analysts, commenting on the uses of power in society. Sometimes just their concern about a legislative or administrative matter serves to define issues and prompt decisions based on something other than the wishes of

benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimizes an adversarial, competitive, and atomistic conception of human relations." Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?* 86 *Yale L. J.* 561, 566 (1977).

My favorite statement of the negative side of the rule of law is Ernest Feder, *Counter-reform in Agrarian Problems and Peasant Movements in Latin America*, ed. Rodolfo Stavenhagen, 173 (Garden City, N.Y.: Doubleday, 1970). David Trubek reminds me that in 1970, we heard the positive case impressively stated in Valparaiso by José Antonio Viera-Gallo, then the sub-Minister of Justice in Salvador Allende's cabinet. My translation of Viera-Gallo's speech appears as José Antonio Viera-Gallo, *The Legal System and Socialism*, 1972 *Wis. L. Rev.* 754. Of course, later events in Chile proved that the rule of law is not a very strong barricade against tanks. Yet even the Chilean military justified their takeover on the ground that Allende's claim to have honored the ideal of legality was a sham. The Chilean junta's claim to have overthrown an elected president to save the idea of legality enabled brave Chilean lawyers and outside groups such as Amnesty International to save a few victims and moderate some of the repression in the first years of military rule. The point, of course, is that one should neither claim too much nor too little for the ability of the rule of law to restrain power.

70. See David Williams, *The Bureau of Investigation and Its Critics, 1919-1921: The Origins of Federal Political Surveillance*, 68 *J. Am. Hist.* 560 (1981); Peter H. Irons, "Fighting Fair": Zechariah Chafee, Jr., *The Department of Justice*, and *The "Trial at the Harvard Club"*, 94 *Harv. L. Rev.* 1205 (1981).

71. See Malcolm P. Sharp, *The Conservative Fellow Traveler*, 30 *U. Chi. L. Rev.* 704 (1963); Abe Krash, *Malcolm Sharp and the Rosenberg Case: Remembrance of Things Past*, 33 *U. Chi. L. Rev.* 202 (1966); Gerhard Casper, *In Memoriam: Malcolm P. Sharp*, 48 *U. Chi. L. Rev.* 1 (1981). Compare Philip O'Brien, *The New Leviathan: The Chicago School and the Chilean Regime 1973-1980*, 13 *Inst. Dev. Stud. Bull.* 38 (Dec. 1981); Paul Sigmund, *Chile: Market Fascism or Utopian Libertarianism?*, *Worldview*, Oct. 10, 1981, pp. 4-6. The last two articles offer good reason to recall the decency and integrity of Malcolm Sharp.

special interest or what Willard Hurst calls "drift." Of course, law professors are no more neutral than other people. However, often they have served as advocates for the values bound up in the ideology of our legal education. They can be expected to champion fair procedures, equality of treatment, and the like. In the last two decades many law professors have tried to represent those unlikely to be represented before policy-making bodies. Legislators, administrators, and members of their staffs may not always listen to academic views but, at least on occasion, their behavior may be affected by being reminded of the kinds of values law professors are likely to assert.

In our darkest moods, law professors may talk as if the best we can do is to make some students have a few qualms as they go out to rob from the poor and give to the rich. We may find comfort in making the soldiers of fortune we train aware of normative claims, hoping in that way to blunt some of the worst pressures for expediency. However, insofar as we teach doctrine or humanistic analysis in splendid isolation from the realities of practice, we are making it easier for our former students to dismiss our lessons as irrelevant to their roles as lawyers. Moreover, we may be overlooking or evading the most vital normative problems posed by the American legal system in favor of others, with which we feel more comfortable.

There is a chance to do more than debate whether a rule is phrased in terms consistent with the norm of efficiency, due process, or free speech. The two studies of the Chicago bar suggest that we would profit by having our classes examine both the normative claims and the functioning of the American legal system. If lawyers, by defending civil liberties, affect the consciousness of significant groups who hold power in the society, it is important to consider how such a process might work. For example, most lawyers run or work for small businesses and are concerned about the good will of present and potential clients. As a result, most would risk paying a high price if they took a controversial stand publicly. During the 1960s and 1970s, reformers created and rediscovered many individual rights. Yet in many instances a lawyer who sought to vindicate one of those rights would risk retaliation from those influential in his community. Some lawyers are more insulated from such pressures, but such lawyers are not randomly distributed. Moreover, proposals to end public funding of legal services programs for the less powerful groups in the society often talk of relying on the private bar to donate service as if the consequences were likely to be politically neutral. On the other hand, a normative appraisal of law must also involve recognizing that lawyers regularly undercut the rule of law by manipulating doctrines and procedures to serve those who can and will pay. The actual roles played by all kinds of lawyers raise often overlooked but important questions of values, and at the same time, tap student concern with professional skills training. Only if we look at *both* the normative content of rule structures *and* the legal

system in action can we claim to be involved in a true humanist enterprise. Anything else has elements of an intellectual parlor game.

We have attempted to take this approach in the contracts course taught by a number of us at Wisconsin. Much of what we do is not original,⁷² but our approach serves as an example of a response to the kinds of things illustrated by the two studies of the Chicago bar and our concern with values. Most generally, we try to select problems of some modern importance where contract ideas are relevant, and then we expand the context in which these problems are considered.⁷³ If we are looking at an appellate case, we ask why anyone sued and appealed, stressing that a negotiated settlement is the typical outcome of litigation in this country. We often find a striking transformation or series of transformations as we go from the events which sent the parties to attorneys, to attempts to settle, to the trial, and then to the appellate stage. Almost always, the briefs and record on appeal make the real issues seem quite different than the impressions created by the opinion as it appears in a casebook. Appellate judges regularly suppress both facts and arguments which might get in the way of arriving where they want to go. Often resurrecting the losing argument is instructive. Frequently, the case is a tie in terms of the quality of opposing positions. Then one has to ask how the case was decided. One is challenged to go beyond naive realist answers and see the struggle for common sense and the symbolic functions of law.

Law school stresses case analysis and, occasionally statutory construction. However, if we look at the briefs in many leading cases, we find

72. One can find many of the ideas in our contracts course in Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 *Colum. L. Rev.* 651 (1935) and Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 *J. Legal Educ.* 211 (1948). The others in our group would have to speak for themselves; but I took contracts from Harold Shepherd at Stanford, and he gave us reprints of Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practices in the Construction Industry*, 19 *U. Chi. L. Rev.* 237 (1952). See also Harold Shepherd, *Contracts in a Prosperity Year*, 6 *Stan. L. Rev.* 208 (1954). When I began teaching contracts, the book used at Wisconsin was Lon L. Fuller, *Basic Contract Law* (St. Paul, Minn.: West Publishing Co., 1947), and I made more than Professor Fuller intended of his notes on business practices. The greatest influence on my thinking about the subject was Friedrich Kessler & Malcolm P. Sharp, *Contracts: Cases and Materials* (New York: Prentice-Hall, 1953), which I taught for twelve years. Malcolm Sharp encouraged my research in business practices related to contracts and suggested that I compile a supplement to Kessler and Sharp, putting traditional contracts problems into their commercial context. Later my colleague William Whitford and I adapted that supplement to Ian Macneil's casebook: Ian Macneil, *Cases on Contracts—Exchange Transactions and Relationships* (Mineola, N.Y.: Foundation Press, 1971). In carrying out my part of editing and writing that supplement, I was influenced by Harold C. Havighurst's *A Selection of Contract Cases and Related Quasi-Contract Cases* (Rochester, N.Y.: Lawyers' Co-op Publishing Co., 1934). Finally, our law school adopted a program under which each first-year student took one of the required subjects in a small section. A number of my colleagues were seduced into becoming contracts teachers and joining a group that met weekly and undertook responsibility for developing materials. All of them contributed ideas brought from areas other than contracts, and all asked nasty questions which those who thought of themselves as contracts teachers struggled to answer. Nonetheless, the sources mentioned in this note would be recognizable to anyone familiar with them who looked at our materials.

73. For examples of the approach advocated here, see Richard Danzig, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, N.Y.: Foundation Press, 1978).

approaches quite unlike what gets an "A" on a law exam. Duncan Kennedy stresses that common-law courses usually are taught as hard, rational, and formal matters of doctrine. While some of that may make its way into appellate briefs, usually they tend to stress "common-sense" justifications for a client's position. Indeed, the one weakest on the "equities" tends to make the most technical case. Particularly in trial courts and state appellate courts, lawyers work to broaden issues so that the question before the court is who or which is the most worthy party, judged on some basis apart from narrow doctrines. Of course, cases are cited and discussed, sometimes endlessly. Yet the point of this analysis often seems to be that the court is free to do justice since the prior cases all should be disregarded. Of course, traditional and modern forms of legal argument can be persuasive in some situations. But this argument is a tool, and, from the advocate's perspective, the trick is to know when to use it and how much to use. Law professors who love legal craft might want to see better legal argument, but in many instances they might be counseling a lawyer to be less persuasive. If Heinz and Laumann can divide the bar into those who deal with personal plight and those who represent business, we can suspect that we must also divide the modes of dispute resolution into distinct categories. Law-school-style legal argument may work only in some settings and be less persuasive or inappropriate in others. Perhaps seat-of-the-pants rough justice is better suited to some situations than technical thought which can be understood only by professionals.

Once one reads a case in context, one is prepared to ask what difference the outcome has made to whom. The impact of any decision is problematic. Often a trial court is reversed and the case remanded for new trial. Students tend to imagine that the process is likely to begin again, and that only some time has been lost. Yet we know that an order for retrial changes the tactical position of the parties, and usually the major impact of the decision is on bargaining positions in a settlement negotiation. Even when one wins a great victory before an appellate court, the real outcome is uncertain. One may do little more than prompt bankruptcy. And one must use a wide-angle lens to see the true impact of any decision. Often a private government adjusts to cope with the decision—the appellate court effectively may be reversed by the redrafting of industry-wide form contracts, for example. It is surprising to note how often decisions of a state supreme court are reversed by the legislature, often by a rather casual process when an influential lawyer-legislator pushes through a bill in the chaos at the end of a session.

Of course, expanding the context of thinking about law is only a move which may raise new questions, and one needs some kind of theory to decide what is and what is not part of the context of any legal instance. The story of the battle of the retail gasoline dealers to keep their busi-

nesses in the face of changing economic circumstances serves as an example of what we do and some of the theoretical assumptions underlying our approach.⁷⁴ There are a number of appellate cases decided in the 1970s involving attempts of retail gasoline dealers to block the cancellation of their franchises by a major oil company. Taken one by one, these decisions can be placed in a casebook as examples of the scope of Article II of the Uniform Commercial Code, the application of the Code's "good faith" and "unconscionability" doctrines, an attempted expansion of the idea of a fiduciary obligation, or the duty to read and protect oneself before one signs a contract. Wherever they might fit in a rationally organized catalog of contract rules, notions of contracts of adhesion, equality of bargaining power, doctrine naturally seeking efficiency, and, even, the objective theory of contract also swirl around the cases. We think, however, that it is dangerously misleading to consider only one or a few of these cases in doctrinal isolation; they must be put in their full context to make any sense.

If one looks at the background and full array of these cases, a major lesson is the flexibility of contract doctrine. In case after case the solution was indeterminant under the rules. Lawyers for the large oil companies had crafted elaborate structures which took the shape of a printed form contract. Using the ideas of property, trademark, and contract, they had reserved to the oil companies control of the ongoing relationship and the power to terminate it for good cause, bad cause, or no cause at all. At the same time, representatives of the companies who talked with dealers created the impression that hard work by a dealer would be rewarded—as long as a dealer played by the rules and succeeded in selling enough gasoline, he had nothing to worry about. The companies' advertising to recruit new dealers made the same tacit promise. Once disputes arose, the job of the lawyers working for the dealers was to fashion a plausible legal argument to counter the carefully constructed position of the large firms. It is important to note that it could be done.⁷⁵ As one might expect, the dealers' case rested on newer and less well established theories emphasizing the real deal between the parties rather than the paper deal fabricated by a corporate lawyer and perhaps only understood by him. Usually,

74. For a discussion of the cases in this area, see Ellen R. Jordon, *Unconscionability at the Gas Station*, 62 Minn. L. Rev. 813 (1978).

75. Trubek points out that the law itself is *one* of the filters that determine what disputes will emerge and what forms conflicts will take. See David M. Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 Law & Soc'y Rev. 727 (1980-81). Disputes are social constructs: one must perceive an experience as injurious, blame someone else for it, and decide to make a claim. If the claim is rejected but the victim continues to name, blame, and claim, then there is a dispute. See William L. F. Felstiner, Richard L. Abel & Austin Sarat, 15 Law & Soc'y Rev. 631 (1980-81). Both the rules of law and the entire legal system are involved at all stages of this process. Sally Lloyd-Bostock says that,

the dealers lost before the courts, but not always. This prompts us to ask when courts will and should leave the safe harbor of literally reading printed form contracts and venture into the uncharted waters of reliance, unconscionability, fiduciary duties, and the like. In the mid-1970s the academic response to these cases was to see them as challenges to efficiency, but this position rests on a number of assumptions that should not go unexamined. Our legal system has long responded to the symbols of small business and "real" individual freedom of choice. We can ask why it is that our legislatures so often vote for the inefficient rule. We might even ask whether law professors would be so in favor of efficiency if they did not have tenure?

If we broaden the context of these cases concerning the retail gasoline dealers, we will see them as part of a complex struggle moving back and forth from the courts to the FTC to the state legislatures and to Congress.

In a situation that is unfamiliar, . . . [a victim] . . . lacks specific norms of his own and does not feel competent to generate them for himself from more general principles because there is a range of possibilities. What he *feels* is, therefore, often largely the results of what his lawyer, trades union, the police, friends and others have suggested to him since his accident (Sally Lloyd-Bostock, *Fault and Liability for Accidents: The Accident Victim's Perspective* 24 [Oxford: Centre for Socio-Legal Studies, 1980]).

Trubek suggests that the behavioral system related to processing particular types of disputes—including the relevant legal doctrine—"not only transforms the various individual conflicts: in so doing it 'transforms,' so to speak, a raw conflict of interest into a social process with limited possibilities. The disputes that do emerge are those in which basic economic relationships are not challenged: all other possibilities are filtered out." Trubek, *supra*, at 743.

In the example in the text involving gasoline dealers and the major oil companies, the legal arguments of dealers' lawyers were limited to positions consistent with assumptions about contract and property which are generally accepted. They conceded that the oil companies should cancel franchises if dealers materially failed to perform or if a company ceased doing business in a region of the country. Yet the injury to a dealer, his employees, customers, family, and neighborhood would be the same whatever the reason for the cancellation. One seeking to protect dealers would want, at least, to ask for notice of failure to perform and a reasonable opportunity to cure defective performances and for a transition period after reasonable notice if operations were to be terminated in an area. Moreover, allowing franchises to be cancelled for cause opens the door to problems of burdens of proof and evidence, and the oil companies with their large legal staffs have great advantages in these areas. One might fit broader protections for dealers into the concept of a fiduciary obligation, but this is a much harder argument to sell in a commercial setting.

The contract-property frame of reference excludes other considerations as well. For example, major oil companies have terminated thousands of service station franchises and those that remain are being pushed to sell large quantities of gasoline rather than automotive repairs. This destroys job opportunities for unskilled or semi-skilled young people who formerly could begin by pumping gasoline and washing windshields and then learn to be automobile mechanics. Such destruction of employment opportunities by a change in technology or patterns of marketing is a familiar problem to those who study third-world nations, but, in a law-school context, it is likely to be an unperceived injurious experience—a potential grievance suppressed, at least in part, by legal doctrine. The young people who might have been hired had OPEC not prompted the major oil companies to change marketing patterns in the early 1970s have no property or contract claims against the oil companies, and it is not likely that they will see the oil companies as responsible for their difficulties in finding employment. If legal norms imposed the burden of continuing to provide opportunities for the unskilled and semi-skilled, this would challenge basic economic relationships. It might be a good or a bad idea, but the point is that legal doctrine structures assumptions so that the issue is unlikely to be considered.

Compare Trubek, *supra*, with J. C. Jarvie, *Social Perception and Social change*, 11 J. Theory Soc. Behav. 223 (1981).

Importantly, this struggle illustrates the importance of organization. While occasionally a small town lawyer may have bettered the legal might of a Mobil Oil Company, the gasoline dealers were organized in a trade association and were "repeat players" well able to forum shop and battle on many fronts.⁷⁶ Their lawyers did not have to start from scratch in every case, and arguments were polished over time.

Whatever legal scholars might make of all of this, to the lawyers involved in these cases, all of the arguments were but tools to be used in constructing a solution to a recurrent problem. Their concern was not whether an approach would make the structure of contract doctrine more or less coherent but whether it would sell.⁷⁷ Briefs, legislative memos, and even press releases usually contained both the legal argument and a subtle or not-so-subtle "equities" of the situation case. Dealers painted a rhetorical picture of stations closing, loss of job opportunities for the semi-skilled, loss of service for motorists, and an attack on the Horatio Alger picture of upward and onward in America that many do not want to believe is a myth. The large companies wrapped themselves in the banner of consumer protection. The dealers they wanted to cancel, they said, were the inefficient operators who charged too much, cheated customers,

76. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

77. It is fascinating to watch lawyers attempt to use doctrines as tools to cope with new problems. In *Steelworkers Local 1330 v. U.S. Steel*, 631 F.2d 1264 (6th Cir. 1980), for example, U.S. Steel closed plants in Youngstown, Ohio. This ended the jobs of about 3,500 workers and had a great impact on the city. Officials of the company repeatedly said that the plants would remain open if they were profitable, and the employees had done a number of things to make them profitable. Whether or not the plants were profitable seemed to be a disputed matter of the religion of cost accounting; much of the debate concerned which and how much of the costs of the entire corporation should be charged to these plants. Lawyers for the Steelworkers unsuccessfully asserted doctrines of promissory estoppel and a property right held by the community in the continued operation of the plants. The "new contract" and "new property" ideas developed and fostered in the law schools helped the Steelworkers' lawyers "name, blame, and claim." See Felstiner, Abel & Sarat, *supra* note 75. Although the Steelworkers lost this battle, the Court recognized the effort for what it was. Chief Judge Edwards began his opinion by saying, "This appeal represents a cry for help from steelworkers and townspeople in the City of Youngstown, Ohio who are distressed by the prospective impact upon their lives and their city of the closing of two large steel mills." *Steelworkers Local 1330, supra*, at 2313. He characterized the event as an "economic tragedy of major proportion." *Id.*

In *ALCOA v. Essex Group, Inc.*, 499 F. Supp. 53 (W. D. Pa. 1980), the Court dealt with an escalator clause in a long-term contract under which ALCOA stood to lose "in excess of \$75,000,000." ALCOA's claim for relief, which was successful in the trial court, was based in part on *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887). This is the classic of first-year contracts involving Rose of Aberlone, the cow that one or both parties thought would not breed but which was found to be pregnant after the sale but before delivery.

Of course, lawyers have to have some authority as part of the rhetoric of advocacy. However, these doctrines do not capture the very large political issues involved in both cases. It seems apparent that all of the lawyers and judges involved were aware of these larger issues. Nonetheless, it is worth asking whether channeling decisions through the structures of doctrines based on promises of grandfathers to granddaughters or disputes about the ownership of pregnant cows affected the way all involved thought about the larger issues. Of course, once we see that there are larger political issues involved, we ought to recognize that there are ways of dealing with them other than litigation. Perhaps one lesson is that few contracts cases worth litigating enough to prompt a written opinion really are just contract cases.

and had dirty restrooms. Protecting inefficient dealers would raise prices and thus hurt consumers.

Of course, the story of the retail gasoline dealer is only a part of a larger story about those who play the role of employee in large, bureaucratically run organizations and who assume they have some vague right to their jobs. Other holders of franchises have fought similar legal battles. Fair trade and minimum markup laws were designed to protect those who did not regard themselves as employees but who played that role in distribution chains. More recently, employees-at-will have sought some interest in their jobs with at least a little success.⁷⁸ These battles influence one another, and they may have important consequences. Peter Drucker sees some balance between job security and mobility of capital as the saving of capitalism from Marxist challenges.⁷⁹ Arthur Okun sees the existence of "an invisible handshake" that holds together inefficient relationships across a broad area of the American economy, as one of the causes of inflation.⁸⁰

We cannot stop with the appellate cases. We must look at the impact of all of the legal output. The gasoline dealers' victories and losses in court prompted state legislation. Then, this conflicting state regulation of what was a national marketing problem was a factor prompting a federal statute. Yet, generally, the legislation has not been applied retroactively to protect the franchises of those who held them when it was enacted, despite attempts to write the statutes so that they could be.⁸¹ It may be that the dealers' victories after all this effort over several decades will prove to have been largely symbolic. It is one thing to have a legal right against a multinational corporation; it is another thing to make effective use of it. This story suggests something about the pluralist process of reform, and the rationalizations offered for our system of mediating among conflicting interests. It also should make us think about theories calling on courts to refuse to act because a problem is more appropriate for legislation; the element of fantasy in the views about the legislative process offered by law professors is sometimes spectacular.

Clearly, the Wisconsin approach to contracts makes central the costs of dispute resolution, and the advantages possessed by the haves. All lawyers may be presumed equal when their names are arranged in the yellow pages of the telephone directory, but we know that there are wide differences in experience and skill. Generally, as Heinz and Laumann confirm,

78. See, e.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976); *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Fortune v. Nat'l Cash Reg. Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

79. Peter F. Drucker, *The Job as a Property Right*, Wall St. J., Mar. 4, 1980 at 24, cols. 4-6.

80. See Arthur M. Okun, *Prices and Quantities: A Macroeconomic Analysis* (Washington: Brookings Institution, 1981); Edmund S. Phelps, Book Rev., 19 J. Econ. Literature 1065 (1981).

81. See Annot., 53 ALR Fed. 348 (1981).

the market rations so that those who are able and willing to pay get the lawyers who have the greatest objective indicators of skill and ability. There are even large differences in practical access to necessary law books or the kinds of experts whose potential testimony may be necessary for effective bargaining. Moreover, cost barriers can be used tactically to discourage those who cannot afford to pay large legal fees. Recently we have been coming to see that one of the major functions of pretrial procedure and complicated legal theories such as those found in conflicts of law or federal jurisdiction is to favor those who can afford lawyers able to engage in sophisticated legal analysis and who can cope with the necessary uncertainties as to the outcome when such issues are raised.

Moreover, an expanded context emphasizes that an appellate opinion is likely to be but one battle in a war. Law schools stress the rule-making function of courts, but judicial action may do little more than put an item on the agenda of an administrative agency or a legislature. The litigation following the fires that burned passengers in Ford's Pintos can be viewed as but an example of the interplay of tort and contract ideas in what we now call product liability. But the case also prompted a criminal trial, and the situation has become an atrocity story used in the rear-guard defense of federal regulation against the attacks of the Reagan Administration. One of the important things to see is that the failure of the courts to reach "fair" results often is an argument for legislative action. Arguments similar to those current in contracts or torts cases often are used by lawyers before regulatory agencies and legislatures, and what seldom prevails in court often carries the day as a rationalization for rule making and legislation.

As we widen our lens, we find many things relevant to both evaluation of law and development of professional skills. For example, if a problem is usually handled by mass processing, there may be a conflict between the interests of attorney and client. The client expects to have his case treated as a unique event, but the lawyer can make money only by subjecting it to routine processing. Even the interests of the court system may conflict with the wishes of many clients. Cases must be diverted, and courts today work hard to promote settlement and discourage adjudication. As a result, clients will often be frustrated. The reforms of the past two decades created many new rights, but the legal system appears to many of those supposed to benefit as a conspiracy designed to avoid vindicating them.⁸² Indeed, all in all, this approach raises basic issues of power, domination,

82. See Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven, Conn.: Yale Univ. Press, 1974); Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 Int'l J. Soc. L. 245 (1981); Lawrence M. Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 Md. L. Rev. 661 (1980); Boaventura D. Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, 8 Int'l J. Soc. L. 349 (1980).

and limited-and-unpleasant choice in settings where law is often rationalized in terms of uncoerced consent.⁸³

This broader context ought to force us to confront our assumptions about the neutrality of the American legal system. We should see that many of our concerns are more related to symbolic effects than to instrumental ones. But symbolism can be important. In a sense, we discover that when we look at what different kinds of lawyers do, we raise the most challenging humanistic issues. Rather than condemning ourselves to cookbooks telling young lawyers how to roast, boil, bake, and fry clients, serious thought about practice skills may provoke us to ask why our legal system operates as it does and whether this is the best of all possible worlds. The Heinz-and-Laumann and Zemans-and-Rosenblum studies can be dealt with by the evasive devices cataloged by Robert Gordon.⁸⁴ He suggests that legal scholars avoid the historical and cultural contingency of the law by denial, constructing drastically simplified models of social reality for use in legal analysis, relying on adaptation theories which find an immanent rationality in social life which will be incorporated in legal rationalization, and resignation. But, as he stresses, dismissing reality is unlikely to be a satisfactory strategy. If we would but think about the implications of these studies, law professors might be able to have their cake and eat it, too. We might be able to interest our students in what they would see as practice skills and at the same time confront them with the nastiest and most challenging humanistic issues of all.

83. See Mark Tushnet, Post-Realist Legal Scholarship, 1980 Wis. L. Rev. 1383, 1398; Mark Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L. J. 1205, 1220-23 (1981).

84. Robert W. Gordon, Historicism in Legal Scholarship, 90 Yale L. J. 1017 (1981).