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THE DAUER-BROWN LETTERS: TOWARDS A COMPREHENSIVE LEGAL EDUCATION

EDWARD A. DAUER* AND LOUIS M. BROWN**

[Edward A. Dauer is President of the National Center for Preventive Law at the University of Denver. Louis M. Brown developed and advocates preventive law jurisprudence. In this dialogue, drawn from an exchange of correspondence between them, Dauer and Brown focus their insights on how best to gear law school curricula to train lawyers to handle the complexities of a “real life” practice.]

I. DAUER TO BROWN—JULY 1, 1988

It occurred to me recently, as I was viewing my inventory of unmet obligations and unachieved ambitions, that we are about to enter that new academic year which will be my twentieth as a legal educator. There is a roundness to that number, which attracts reminiscences even beyond its numerical symmetry, and so I have given in to the temptation to review some of the high and low points of these past two decades. While my observations would not withstand scrutiny as empirical findings, having been a student of the sixties myself I can insist that they be accorded value merely because I care deeply about them.

Even then, as a law student, it occurred to me that there was something fundamentally wrong with clinical legal education. Mind you, I am a big fan of clinical legal education. I mean, therefore, not to criticize it, but rather to criticize the way in which we have used it—or not used it. In particular, there is in most law schools in the United States an equation: Clinical education equals skills training equals litigation skills. Perhaps that equation first began with the legal services model of clinical training,¹ wherein service opportunities to the disadvantaged came only in the areas of advocacy representation and even then only in a limited

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¹ R. Condlin, *The Moral Failure of Clinical Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* at 332-35 (1983); Grossman, *Clinical Legal Education: History and Diagnosis*, 26 *J. LEGAL EDUC.* 162, 173-80 (1974).

range of topics such as entitlements, landlord tenant, criminal matters and the like. But whatever its cause, it led then and does now to an exploitation of clinical teaching methodologies which is depressingly narrow in at least two dimensions. The first dimension has to do with the subject matters of clinical education. The second has to do with the subject matters of legal education as a whole.

Even if we were to adopt skills training as the entire ambition of clinical methodologies, it seems particularly unfortunate that the advocacy model has so dominated that field. Indeed, I have often thought it rather odd that law school curricula include both substantive courses *and* separate courses on trial lawyering skills,² but do not include substantive courses and separate courses on non-trial lawyering skills. That suggests that we believe either that non-trial lawyering skills will be taught perforce in the substantive courses, or that there is no coherent body of skills knowledge outside the advocacy area. Since both of those propositions are nonsense, the anomaly remains unexplained.

And on the other score, as Robert Gorman³ taught us many years ago, clinical legal education can do vastly more than teach skills. It is, to pick just one example, a wonderful opportunity for students to do some participant observation⁴ in the sociology of legal institutions in addition to their skills training—to observe how courts and agencies behave under stress, to observe the linkage between institutional constraints and substantive evolution, to develop a more refined and useful jurisprudence of the legal process as a whole. But to do that, students would need to know two things—first, that that is what is expected of them during their clinical placement; and second, something about how actually to *do* participant observation.

The long and the short of it is that clinical teaching modalities have a great deal to offer the substantive curriculum in addition to (not in

² At the two law schools in Colorado, 39 courses deal exclusively (or nearly so) with litigation: Administration of Criminal Justice, Advanced Litigation, Advanced Trial Advocacy, Civil Procedure, Complex Litigation, Complex Civil Litigation, Criminal Procedure; Criminal Procedures: Adjudicative Process, Criminal Procedure Practicum, Evidence, Federal Courts, Federal Jurisdiction, International Human Rights Clinic, International Moot Court Competition, Internship/Externship Program (primarily litigation oriented), Lawyering Practice Courses (student run law office); Legal Aid: Civil Practice I & II, Legal Aid: Criminal Practice I & II, Legal Representation of the Poor, Natural Resource Litigation Clinic, Post Trial Procedure, Pre-trial Practicum, Pre-trial Procedure, Public Interest Litigation, Rothenberg Moot Court Competition; Seminar: Exclusionary Rule, Trial Advocacy, Trial and Evidence, Trial and Evidence Practicum, Trial Competition, Trial Tactics. At a quarter system school (D.U.) students typically enroll in 35 to 40 courses to earn their J.D. degree. At a semester system school (C.U.) the number is much smaller.

³ Gorman, *Clinical Legal Education: A Prospectus*, 44 S. Cal. L. Rev. 537, 555 (1971).

⁴ I. Robertson, *SOCIOLOGY* at 42 (3rd ed. 1987) defines participant observation as "a method in which a researcher becomes directly involved and interacts with other participants in the social processes and behavior being studied or examined."

substitution for) their ability to teach what we often call skills. And that, even within the arena of skills, the conventional clinical focus is a narrow vision of what lawyers do and simply does not reflect reality. While litigation skills remain as an essential part of the lawyer's competence, and should not be diminished in our law school curricula, we must also recognize that much of what many lawyers do has little to do with being an advocate in a courtroom.

The past twenty years have seen no changes in that regard. It was not possible for me as a law student in the middle 1960's to take a clinical "laboratory" course in Commercial Law as an adjunct to my Commercial Law classroom; and at virtually every law school in America it is not possible to do that today. Why has there been no change? One possibility is that these thoughts simply represent a bad idea. (But since this is my reminiscence I shall ignore that possibility.)

Some of the resistance, at least at one or two of the schools with which I have been associated, comes from the most astonishing quarter. In many law schools the clinical law office operates like a rugby team. Not a football team. A rugby team. The difference, which I hope the metaphor will capture, is this: At most colleges football is a varsity sport. The players are officially chosen, they wear clean uniforms, and what they do is at or near the heart of the life of the institution. Rugby, at most universities, is not a varsity sport. It is a club sport. Which means that the players do not get clean uniforms; they have a coach only if they can con somebody into it; they play on the fringes of the school's traditions (and on the fringes of civility); there is a camaraderie of the beer keg in rugby which comes partly from the very recognition that it is different from and separated from—and not entirely loved by—the mainstream of more delicate people who refuse to have anything to do with it.

Clinics in many law schools behave just like that. There is an elan and an esprit (the only two French words I know) in the typical clinical law office, which comes at least in part from the idea that the law office is separate from and an antidote to the ordinary day of the classroom. Integrating the clinic into the mainstream of the law school curriculum might therefore remove (some may fear) much of its attraction, and its constituency. That is, if true, unfortunate.

Maybe this is all sour grapes. It was in 1972 that I first wrote in the *Journal of Legal Education*⁵ an essay calling for the application of clinical teaching strategies beyond their traditional advocacy confines. And it was in 1978—ten years ago—that you and I together published a set of teaching materials which we had hoped would show the way for

⁵ See Dauer, *Expanding Clinical Teaching Methods into the Commercial Law Curriculum*, 25 J. LEGAL EDUC. 76 (1973).

combining notions of lawyer skill with notions of lawyer philosophy.⁶ Why is it, do you suppose, that with all of the pages written on the psychology and on the past and the future of legal education that the two decades during which I have been engrossed by legal education have seen virtually no change in these very important areas? Ah, will the world ever change, to conform to my expectations of it?

II. BROWN TO DAUER, JULY 10, 1988

Before plunging into an effort to answer the questions as you put them, I want to make sure that I have the correct questions in mind. I do not think you are suggesting that there have been no advances in clinical legal education in the past two decades. There have been.⁷ There is more of it now. And there have been developments in the techniques of teaching in at least two directions: an increase in simulation as a way of presenting material and the use of audio-visual techniques. Perhaps also a third technique: the use of the computer in the design of self education possibilities.⁸

What you are saying to me is that all of those developments have occurred in the area of litigation and dispute. I must agree. So that your question is why has there been a neglect of that aspect of lawyering and justice which occurs in the nonadversarial process. Or, in my terms, and yours too, why has the area of preventive law been so long neglected?

I prefer to approach the answer in two ways. Law school education has been severely influenced over the years by the so-called case method. I say "so-called" because the material for teaching has not been the whole case but rather only the legal end result of an item of litigation. I would prefer to call it the "appellate court opinion method." These materials for teaching are attributed to C.C. Langdell⁹ starting in 1870. There may be some doubt about the attribution to Langdell, but such doubt is not material to our discussion. The fact that these materials for teaching were not immediately accepted is an interesting bit of the history of law school education that really points out that some good things take a great deal of time to become recognized.

What is important to our present discussion is that the so-called case

⁶ L. BROWN & E. DAUER, *PLANNING BY LAWYERS, MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978).

⁷ Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L.Rev. 1025, 1026 n.2.; Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L.Rev. 695 (1977).

⁸ Brown, *Strategies for Legal Education: Creative Presentation in Bankruptcy*, 21 LAW & Soc'y REV. 913 (1988), reviewing two books by L. LoPucki, *PLAYER'S MANUAL FOR THE DEBTOR-CREDITOR GAME* (1985) and *STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS* (1985).

⁹ C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871).

method is a wonderful tool for teaching, in depth, the rules and principles of law as applied and developed by the appellate courts. And because court decisions arise out of the pro and con presentations of opposing lawyers, court opinions lend themselves, rather easily, to that wonderful mind sharpening tool we call the questioning dialogue. One point to bear in mind is that it is so good as a teaching methodology that it is difficult to make room for other materials. In recent decades legal education materials have deepened and extended the opinions of the courts by including in teaching texts and in the classroom discussion some non-legal materials that bear upon the reasoning of the court and the consequences to society of the court decisions.¹⁰

These teaching materials and teaching methods are often referred to as "thinking like a lawyer." That simple statement is not a correct description. I prefer to call it "thinking like an appellate court judge." Furthermore, I would prefer that the "case method" be really a total case method. Cases do not start in the appellate court, nor even in the trial court. They start before the court process is invoked. They start in the lawyer's office and even before that. If we were really teaching "thinking like a lawyer," we would start when the lawyer is first involved and carry on the thinking process from that starting point.

For me, and for preventive law, the process of "thinking like a lawyer" happens even where the court process is of no direct concern. A lawyer who counsels a client about the client's will and family property is engaged in "thinking like a lawyer." A lawyer who is engaged by a client to assist in the start of a business and to determine whether or not to incorporate, and if so how, is lawyering and thinking and deciding. The lawyering that takes place is far more complex than knowledge of law. The lawyering concerns clients, human relations, applied law, the creation of alternatives that may be legal alternatives or extra-legal alternatives, and all of the techniques that come within the scope of preventive law.

Why are we so slow in putting all this into law school education? You put your fingers on one important factor—participant observation. The materials of this aspect of lawyering are not readily available in the law library. The materials are out in the world of lawyering—in law offices, in lawyers' minds, in law office files, in client experiences—in short, in decisions that lie hidden from view. It takes participant observation, and other kinds of research, to turn up the materials. It is much harder than finding appellate opinions. Published opinions are too readily available, easy to find, and come already indexed and organized in traditional categories.

The excuse that students will learn about these lawyering things after

¹⁰ See generally E. BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* (1948).

they get out into the world and therefore these things are not worth teaching is a poor excuse. Everything can be learned "outside." I find it unfortunate that, as I have often said, "[L]egal education in this country began in the law office and then forgot it."¹¹

You and I have worked together for several years in this area of nonadversarial law or preventive law. Would you say that there are general principles worthy of law school teaching time in this field? Would you say there is any less intellectual fulfillment in preventive law than in adversarial law? And why is it that some in the academic world regard this as only "clinical" education? Or if you do not care to address these questions at this time, would you go beyond these questions and get into some observations about the content of the teaching? Or maybe, just maybe, you can treat all these questions together.

III. DAUER TO BROWN, AUGUST 5, 1988

I am, as usual, tardy in my reply to your most recent letter. I would insist, though, that I am not the perpetrator of sloth, but rather the beneficiary of the rather peculiar role which a professional school dean plays. Unlike deans in the arts and sciences, who tend to devote all if not most of their time to the framing of intellectual adventures and the fashioning of curricular visions, the interest of the bench and bar in the doings of a law school make a very close involvement of the school in the doings of the bench and bar a virtue and a necessity. This is something about which we might exchange thoughts in the future—the relationship between the bar and the academy, and the way in which some academies (not ours) have created defenses which they mistakenly thought necessary to preserve their academic aspirations. But that is for another time.

Your letter has raised a number of ideas, and caused me to think about a number of views—some trivial, some less so—to which I have come from time to time. Perhaps I can weave them together into a single theme by focusing on a bit of the intellectual history of American legal education from which we have not to this day been rescued.

You mentioned Christopher Columbus Langdell.¹² There are some interesting aspects of the period in which Langdell was working, which I believe had an impact on the design of legal education at Harvard in the middle of the nineteenth century. That time was a "scientific" time—an age during which faith in the progress of science was beginning to sound like a religion. It was the age of Darwin and Huxley and Wallace¹³ and

¹¹ Brown, *Law Offices for Middle Income Clients*, 40 CAL. ST. B.J. 720, 731 (1965); M. MAYER, *THE LAWYERS* 71 (1967).

¹² See *supra* note 9 and accompanying text.

¹³ Dauer, *Law and the Life of the Mind*, YALE L. REP., Winter 1980, 13 at 16.

many of the great physicists whose names are still revered by our brethren in the hard sciences. It was almost as if a field could be respectable only if it was a science—only if it proceeded by way of the scientific method.

Simultaneously, that same period of time was an era during which the idea of a university law school was first coming to be widely shared. The profession was in need of that validation which a university degree would provide to the law, as a defense to a very corrosive and populist anti-lawyer sentiment then rampant. The universities, for their part, recognized that the bar was a powerful influence in the state legislatures, which could be used to the advantage of higher education. And so the notion of a university law school, operating at the graduate (rather than baccalaureate) level, became a marriage of considerable convenience for both sides.¹⁴ The difficulty, of course, was how to factor the study of law as a professional matter (rather than as a branch of philosophy) into the life of a university and make it sophisticatedly “respectable.” The solution was obvious—law had to be a science.

Thus was born the Langdellian method. Indeed, the introduction to Langdell’s own casebook in *Contracts*,¹⁵ where the method was first given its shape, speaks in the language of the laboratory man as clearly and unambiguously as could be imagined. The upshot is that law needed to be a respected academic discipline, and it therefore in 1873 needed to be a science. Perhaps if the social sciences had been mature by the 1860’s, law might have been rather a different science than the one it became. We might then have been interested in the actual behavior of its practitioners and other important actors, rather than focusing only on the outputs of a rather selective slice of its institutions, namely appellate courts.

To Langdell, scientific method required both deduction (in applied reasoning) and induction (in deriving general principles from the masses of unruly data.) Appellate opinions were the data. It could be, so he must have thought, no less scientific to draw general principles of the behavior of law from its manifestations in numerous appellate opinions, than it would be to draw principles about stellar physics from observations of countless numbers of stellar spectra. But in saying that some cases were “better” than others, Langdell made a most unscientific mistake—he threw out data which did not accord with his preselected hypotheses. That is, of course, absurd, and in any real science would not be tolerated

¹⁴ W. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES*, at 21-22 (1978); REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA*, at 7-8 (1928).

¹⁵ C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vi (1871). “Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer: and hence to acquire that mastery should be the business of every earnest student of law.”

for a moment even by the most untutored and easily forgiven graduate student.

The presence of law in the universities during that period, to put it succinctly, had to be attended by an assertion that law enjoyed the same degree of academic integrity and respectability that other disciplines within the university were accorded. And there the seeds of dissent were sown. With very few exceptions (engineering being one), the most academic of the academic disdain the daily applications of their work, protesting instead that they find their reward in pursuing understanding for its own sake. The notion of academic remove is integral to the prestige of the pure academician. Law, however, is simply not capable of being studied at a remove from its operations.

All this heritage, therefore, has created a very serious schism in legal education which is both historically understandable and presently inexcusable. Some think of this as the “practice/theory” distinction; others think of it as the difference between “substance” and “skill.” To the extent that clinical legal education has been seen as the tool for teaching skill, it was inevitable that it should be ostracized from the dinner table where the “real” academicians found their nurture. Its place on the curriculum was left to an occasional after-dinner scrap. It became rugby rather than football.

Now then, litigation provides an opportunity for an appellate court to do a little philosophy—to think about the internal dynamics of legal principles, to do some economics and sociology and political science along the way, and to announce ideas about the fabric of the law (which just happen to have the effect of resolving a dispute between two people whose real problems will probably never be known to anyone reading the opinion). That is very much the stuff of an academic sort of inquiry. What you and I have called “preventive law” — essentially a mode of lawyering addressed to the solution of those problems faced by real people under real circumstances and with real constraints—may require enormous degrees of ingenuity and good judgment and intelligence, but it does, to those who would be at High Table in the university, appear to be more like engineering than physics. It is not pure science; to its critics it is, at worst, technology.

As I have suggested, that schism has its roots not only in the nature of the subject but also in the nature of the times during which law and legal education and intellectual culture in general were being formed. Our legacy is two words (skill and substance) to describe education in the law rather than one. As I tried to suggest in my earlier letter, I find that distinction—which also takes its toll on the litigation/prevention issue—very unfortunate and dysfunctional.

There is another point, which I am not entirely sure relates closely to what we have been discussing thus far. But it, too, was prompted by some of your observations and deserves a moment’s attention. This thought can be described best with a single word: “complexity.”

One of the things that the case method of legal education does is deprive the student of the opportunity to understand the complexity of the operations of lawyering. That complexity exists along two different axes. The first is substantive. While we present students with appellate opinions (I shall not call them cases either, for they are not) in a given course, all of the opinions offered in that course have to do with that one subject matter. Some of the factual circumstances and some of the law may indeed be complex, in a different sense of the word, but there is a taxonomic simplicity to the issues being presented in any given appellate opinion.

Problems don't exist that way in the world. They may in some kinds of litigation, where the issues are boiled down to one or two jugular questions, but in forward-looking planning, or preventive law, the categories do not provide constraints at all. We have only to think about the development of a small shopping center to realize just how many things come together all at once in potentiating and sometimes inconsistent ways: real property law, commercial finance, taxation, securities law (if it is to be a widely-held partnership), contracts, and so on. (And if the development is for a project in natural resources, it becomes vastly more complex even than that.) And then something about the business of real estate development. Not many law schools require that the students ever put it all together in a way that is the daily stuff of the lawyer's *preventive* law job.

Complexity has a second dimension. It is the interrelation between what you have previously called the "legal" and the "extra-legal."¹⁶ Considering again the example of a shopping center development, there are a number of constraints which come not from law but from the economy; from the client's own financial experience and wherewithal; from the interests of others, both competitive and collaborative which raise problems and issues that are not amenable to strictly legal analyses. Here the difference between litigation and preventive law is at its brightest; and here is where, I believe, we may find some explanation for legal education's relative disregard of the latter.

A lawsuit is a process by which a set of human problems are translated into a language which legal institutions can understand. The law does not ask people whether they are happy or sad or feel injured or have problems or have had hopes and ambitions dashed. It asks very different questions, questions like, "Was the buyer's act of providing the specifications a sufficient involvement to effect a disclaimer of the implied warranty of fitness for a particular purpose otherwise mandated by the

¹⁶ The contrast of the terms "legal" and "extralegal" first appeared in Brown, *The Educational Aspects of Preventive Law: A Lawyer Suggests Integration of Study of Avoiding Litigation in Law Courses*, 1949 HARV. L. REC. 20.

Uniform Commercial Code?" What the parties really care about, in contrast to all of that, is money and goods that work. But in every case litigation changes people problems into legal issues so they can be processed by legal institutions. It therefore simplifies those issues enormously—what is left of them are the legal components. In planning, however, analyzing the legal issues as if they existed apart from the matrix of hopes and fears and money and needs and *purposes* and personalities, is a perfectly useless way to think about law. It's a messy business, festooning our principles with the sordid ambitions of people trying to scratch out ever larger fortunes, or more satisfying lives.

In other words, by teaching adversarial law, we can teach law. When we strive to teach preventive law, we must teach both far more and far less than law. Preventive law requires a great deal of additional complexity.

Now, there are some places in some law schools where this complexity is explored—we, for example, have been experimenting with the idea of a "master class." In this, a practitioner would be in residence at the law school for a two- or three-week period, and would take a small group of students through a project—something drawn from his or her practice, perhaps, though not necessarily so. This would truly be a "case" method of teaching—a focus on a matter which has all of the complexity, in both the dimensions I have just described, which characterizes most of what law really does outside of courts, in real life. We and other schools do have courses in "business planning"; and sometimes even "estate planning" pays attention to love and greed as well as to the rule in Shelley's Case and the Doctrine of Worthier Title. But those are exceptions and even in those cases we do not very often see clinical teaching strategies being factored in with the classroom in any serious way.

Lest I be misunderstood, let me say that this much is not sour grapes, nor criticism for its own sake. For legal education has before it an enormous opportunity. That it has not been exploited until now may be a gift to us which I, for one, believe is ready to be realized.

IV. BROWN TO DAUER, AUGUST 11, 1988

I have the luxury not afforded a Dean, or other activists like busy lawyers. Life has presented me with the opportunity to devote myself to intellectual ventures like this one. Yes, at another time, I would welcome an exchange with you on the relation between the bar and the academy. Even so, there is a bit of that now.

The notion that I have expressed from time to time about the birth of the so-called case method is perhaps more simplistic than your explanation. An explanation which, I confess, I had not considered. Yours concerns the embodiment of the scientific method of the middle of the nineteenth century into the use of court opinions in a sort of scientific

manner. Mine comes closer to the relation of the bar and the academy. It seems to me that C.C. Langdell was a practicing lawyer specializing in appellate litigation before he became a teacher of law. He brought a portion of his experience as a lawyer into the courtroom. The direction that you and I would like to see is to continue bringing lawyering experiences into the classroom. That may seem evolutionary; actually the change would be a considerable leap. We need to bring to the academy more of the lawyering environment than Langdell brought.

A way must be found to accomplish that sort of goal. The bridge that I have felt could do the trick comes with the concept of "decision." Law school education is built around the process and substance of the decisions made by appellate courts. The concept of decision seems to be an acceptable academic exercise. The practicing lawyer side of me tells me that lawyers make decisions. The fact is that in the preventive law area, the law office is the place and the lawyer is the person established by our society as the authoritative source of decisions concerning matters of law.

The inquiry becomes: what decisions are made by lawyers, how are such decisions made, what factors are, or should be, taken into account in making those decisions, and what is the effect of those decisions? If we desire to stick to the philosophic beginnings of law school teaching materials we might be concerned with the science of decision making. Frankly, I have not been able to tie my thoughts to the mathematics or science of decision or game theory largely, I believe, because of lack of knowledge of that sort of theory. If, as I believe, there is decision, there must be theory, there must be general principles, there must be intellectual challenge.

Your example of the shopping center is fine. There must be a decision to go forward or not with that project. The ultimate decision involves the client as well as the lawyer. The factors that go into such a decision include legal and extra-legal factors. The techniques of arriving at that decision include the creative process of suggesting and evaluating various methods of accomplishing the goal. As to the law, one of the realities is that the planning lawyer seeks to determine a body of law that helps accomplish the goal with as much legal certainty as is attainable. Law school education as currently constituted is not designed to think in those terms. The shopping center is expected to conform to the normal requirements of law and society. The objective is to get the planning done so as to accept as much "normal," "clear" and "certain" law as possible. The objective in law school education seems to be to train students to deal with the "abnormal," the "unusual," and the "borderline" situations. The skill of working with the abnormal (the hard case) is, I believe, a different skill from working with legal certainty.

But I hear it said that appellate courts lay down the law. What the courts do becomes a rule of conduct for all persons and legal entities. Appellate court opinions affect all of society. Even if that be true (there

is some doubt as to "all" such decisions), I plead that many decisions made in law offices affect all of society. A clause in a document may swing through lawyering habits and vitally affect the way things are done. A kind of "common law of lawyering" takes place. I dare say that the way that the shopping center arrangement is structured is derived, in part, from the experiences of lawyers who structured previous shopping centers. And the way this new one might be structured, if it be novel in some respect, will affect the way future deals are structured. The simple example I have used in teaching concerns my speculation as to the origin of the attorney fee clause in negotiable instruments. Certainly such a provision did not arise in an appellate court opinion. It arose in a law office either at the suggestion of a lawyer or a client. The significant point is that the clause has swept through society, has affected and influenced society and has become as strongly embodied in the conduct and habits of people and financial institutions as any appellate court opinion ever has. The challenge is to identify law office decisions that have been creative and influential. The challenge is to explore the decision-making process, to find the general principles, and to examine the factors that cause such decisions to take place. Or, I can put the project less dramatically, or maybe more dramatically, by pointing out that more decisions affecting human conduct are made in law offices than are made by all the trial courts of the land.

You are correct in your recent letter in pointing out that the parties (persons who act and live in our society) care less about law than they do about "money and goods that work." I cannot let that comment stand without pointing out that later in that same paragraph you expanded that guiding principle into, "the matrix of hopes and fears and money and needs and *purposes* and personalities. . . ." Competent lawyers are, but appellate courts are not, concerned with this entire field of vision. The hopes, the fears, the personalities of litigants or clients are not legal issues. Preventive law is concerned with the whole; not only with the "law."

A "master class" seems to me to be an excellent method of getting at the teaching of the decision processes of the lawyer in the planning context. There may have been some earlier efforts in somewhat the same direction. I recall the first edition of a book by the late Addison Mueller¹⁷ which was devoted to the construction of an apartment building. Professor Mueller, by the way, had been in the lumber business before he became a law teacher. (I, too, had several years of business experience before becoming a law teacher.) I participated, some years ago with Tom

¹⁷ A. MUELLER, *CONTRACT IN CONTEXT* (1952).

Shaffer¹⁸ and David Link¹⁹ in a course on the practice of law. We used examples but did not have the idea of a master class project in planning. Legal education might now be better equipped for a master class in a planning venture than in prior years. Preventive law is beginning to arrive as a separate field of study with its own techniques and approaches and its own thought processes.

Your first letter to me called attention to clinical legal education and to the limited scope of its endeavors: the litigation process. It has been a challenge to find clinical (actual, live, current) teaching material in preventive law. It may be that you hit on a gem.

Your observation that a university degree in law was considered "a defense to a very corrosive and populist anti-lawyer sentiment then rampant" deserves reconsideration. Roscoe Pound addressed the subject "The Causes of Popular Dissatisfaction with the Administration of Justice" in an address to an annual meeting of the American Bar Association.²⁰ Karl Llewellyn wrote strikingly in 1937 of the "Bar's Troubles, and Poulitices—and Cures."²¹ Little has changed; certainly the university degree in law has not staved the tide of dissatisfaction. I am not sure what will so long as the function of lawyers is pictured as dealing solely or even principally with trouble, with conflict, and with dispute. There is inherent dissatisfaction in trouble, conflict and dispute. Yet, it may be that the adverse sentiment stems from a deeper source: a resentment regarding those aggravating and costly dispute situations in life that need never have occurred. It is at this point that preventive law may offer a different approach to the public awareness of a constructive function of the profession. Might it be that preventive law will go a bit of the way to rescue the public image by showing a deep interest in problem avoidance, in the prevention of legal trouble, and in providing a legally healthier way of life?

I cannot end this letter without reference to a poster that hangs on my wall in my law office and stares at me constantly.

The society which scorns excellence in plumbing as a humble activity and tolerates shoddiness in philosophy because it is an exalted activity will have neither good plumbing nor good philosophy. Neither its pipes nor its theories will hold water.

¹⁸ Robert E.R. Huntley, Professor of Law, Washington and Lee University; author, *FAITH AND THE PROFESSIONS* (1987), *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

¹⁹ Dean and Professor of Law, Notre Dame University School of Law.

²⁰ See Brown, *The Role of the Law Office in the Administration of Justice*, 67 A.B.A. J. 1127 (1981).

²¹ See Llewellyn, *The Bar's Troubles and Poulitices—and Cures*, 5 *LAW & CONTEMP. PROBS.* 104 (1938).

When I told John O. Mudd, then Dean of the School of Law at the University of Montana about this poster he wrote, "Thank you for a copy of the philosophy/plumbing quotation. I've thought it might be modified slightly to come closer to home:

A legal profession which scorns excellence in practice as a humble activity and tolerates shoddiness in jurisprudence because it is an exalted activity will have neither effective lawyering nor sound scholarship."

V. DAUER TO BROWN, AUGUST 20, 1988

Thanks for the philosophy. I don't know much about pipes or plumbing, yet I would suggest that John Mudd's epithet is enticing but incomplete. Indeed, the position I have been trying to articulate in this exchange of letters is precisely that the distinction between "plumbing" and "scholarship" is false. Let me try it another way: The breakthrough which legal education as a whole must achieve before it can capture the benefits of a comprehensive mode of professional training is the proposition that we must regard, as being worthy of serious intellectual investigation, the activities of practicing lawyers. If I wanted a trope for my tripe, that would be it.

This concept also embraces the notion of lawyer decision-making, which you outlined in your letter. I would again steal a phrase that you have used in the past, and suggest that we in the law schools should set about building what we have not heretofore recognized as being in need of being built, a jurisprudence of the lawyering process.²²

I take the word "jurisprudence" to mean the study of the behavior of decisional institutions. As you have pointed out, lawyers *are* decisional institutions. While this feature of their activity may not appear so readily in their litigation roles, it clearly does in their preventive, planning efforts where there is no authoritative decision-making provided by the state. It was Tom Shaffer who once said, "... a law office decision will probably affect the life of the client . . . more than any decision of any court."²³

What are the forces which shape the ways in which this authoritative yet low visibility decision process takes place? Clearly the economics of the practice present some constraints and forces; the culture of the profession and the learning of that culture which law students endure is another; perhaps even the sociology of the ways in which the practice is

²² See Brown & Shaffer, *Toward a Jurisprudence for the Law Office*, 17 AM. J. JURIS. 125 (1972).

²³ Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 727 (1975).

organized and its practitioners recruited have something to do with it. There is, in a study of the jurisprudence of lawyering, as much opportunity for broad-scale theory building as there is in the construction of a jurisprudence of the appellate court process.²⁴ Perhaps that notion could be the common ground, or the linkage between those who would exalt philosophy and those who would solder the plumbing.

A very nice example of this possibility occurred just last year at the Cleveland-Marshall College of Law, where our colleague Wilton Sogg²⁵ undertook to work with his students on a problem which I, at least, had not previously heard being addressed. That problem concerns the ways in which lawyers behave under conditions of legal uncertainty—when, for example, an area of law is in flux, or a statute or common law principle is about to be addressed and revised by a court or a legislature, or where there has just built up some stress in an area of doctrine which suggests that an evolutionary step is not far away. What do lawyers do under those circumstances? Do they become protective, in the sense of being risk averse? Do they (and for whom) increase their involvement in law-making activities at the legislative or rule-making level, so they can have a hand in shaping the outcome rather than merely waiting for it to happen? How does this uncertainty affect the process of counseling? And with what effect on the translation of law into human behavior? The work in that course by Wilton's students is the first of which I am aware on that range of questions, and others related to the general theme. That might give a flavor of what it means to talk about a jurisprudence of lawyering operations.

Underlying this exchange of letters between us, there is an assertion which we have both been acting on but have not made explicit. That is, that some of what we see as being inadequate in legal education is attributable to the focus of legal education being placed almost exclusively on the litigation mode of lawyering. Yes, litigation is good and important; but it can't be *all* of what is good and important in the practice of real world lawyering. It is only when we begin to think as well about the nonlitigative activities of lawyers that many of these other issues begin to arise. We might, therefore, take the additional step of suggesting that an emphasis in legal education on the preventive would be useful not only for its own sake, but for the sake of elucidating many other themes as well.

Again an example comes to mind, and that is the circumstance of professional responsibility and legal ethics.

There are in the litigative contexts ethical problems of delicious subtlety. But the conventional conversations about those problems begin with an important leg up, in that the lawyer who is acting as an advocate

²⁴ See generally, L. BROWN AND E. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978).

²⁵ See Sogg, *Coping with Change: The Lawyer's Role*, 36 CLEV. ST. L. REV. 547 (1988).

can explain the consequences and ethics of his or her zeal by pointing to the existence of a neutral manager of the process, and by reciting the litany that good advocacy is causally related to "truth." All of that is very difficult, really, even though it may be easy to state, but it does not begin to describe the additional difficulty present when we consider ethical problems in the nonlitigative setting. The ways in which lawyers deal with clients, with each other, and with the public who are affected by the activities of their clients, when they are not dealing with a matter then (or likely to be) in court, are more complex than many which occur in the litigation realm.²⁶ (And, again, by no means do I believe that the latter are easy.) The absence of the neutral tribunal removes an important source of ethical safe harbor.²⁷ The moral weight is more intensively ours.

One final thought as well about the "skills" aspect of contemporary legal education. Think again about the fact that the typical law school curriculum includes substantive courses, and courses in advocacy skills. Most law schools' curricula do not include courses in "planning." Yes, there are courses in Estate Planning and Business Planning and sometimes one or two other things, but very seldom do you see something in the planning realm akin in its generality to the collection of courses developed over time in the realm of litigation skills. This suggests that we must believe that litigation skills can be abstracted from individual substantive areas and taught as a coherent whole, but that planning skills cannot. We have theories about adjudication; we even engage in arguments about which way of teaching it is best; we talk about the litigation "process" as if it has (which it may) a coherence even when divorced from the particulars of substance and person. Yet by contrast, and for all the reasons which we have rehearsed, legal education in general must believe that there are very few coherent principles—apart from the particular substance—in those operations which make up the greatest bulk of lawyers' time. Nonsense.

We could, you and I, go on and on in this way as we have on those many delightful occasions when we have spent time together, up close and personal. But perhaps for the present we can say that we have succeeded in getting into this exchange of correspondence at least the core elements of the things that have motivated our own work and perceptions of what we see around us.

If I may, I would like to return briefly to where I began, with a somewhat personal note. More than I would have guessed, a position in the administration of a law school is an extraordinary opportunity to see the quiltwork of forces and constituencies which regard the school as

²⁶ See generally Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RES. J. 519.

²⁷ Dauer & Leff, *The Lawyer as Friend*, 86 YALE L. J. 573, 580 (1977).

having some importance to them. It provides equally well a chance to watch law as a discipline claim a place as of right at the trough of intellectual self-assertion. We care too much about that, I think. Because we have no need to apologize for the intellectual depth of what our practitioners do, we in the universities have no need to distance ourselves from what our practitioners do, even as we grapple, in our reflective moments, with issues the cerebral complexity and “scientific” rigor of which are rivalled by few if any other disciplines.

As a law professor, I have for the past twenty years been living two lives. I earnestly hope that in the next twenty years I may live one.

EDWARD A. DAUER AND LOUIS M. BROWN

