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LOVE, PROFESSIONAL RESPONSIBILITY, THE RULE OF LAW, AND CLINICAL LEGAL EDUCATION

STEVEN H. LELEIKO*

I. INTRODUCTION

RATIONALIZATION IS A LAWYER'S STYLE AND PRETENSE, and thus a way to live under the shadow of the awesome word law. It is a defense. Perhaps with love the lawyer can lower his defenses long enough to be useful to the community.

. . .

Part of the truth within a human being is that much of his deepest life, a depth the law reaches rarely and lawyers reach often, is not rational. . . .¹

The primary purpose of this article is to explore the tensions which arise in persons who come to law school because they view the practice of law as an expression of their love and concern for people. In examining the underlying causes of these tensions, six related factors will be looked at: (1) the relationship between the values of traditional legal education and the support or lack of support which these values afford to the affective characteristics of students;² (2) the role of one's job as a means of expressing love; (3) the role of job satisfaction in one's life; (4) the tensions between expressing love and the requirements of the rule of law; (5) the tensions between expressing love and the requirements of the Code of Professional Responsibility;³ and (6) the opportunity which

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¹ Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 720, 750-51 (1975).

² "Affective" characteristics refer to emotional elements. One of the major developments in clinical legal education during the past decade has been a recognition of the importance of lawyers understanding their affective characteristics. See generally G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1978); L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* (1978); H. FREEMAN & H. WEINHOFEN, *CLINICAL LAW TRAINING: INTERVIEWING AND COUNSELING* (1972); T. SHAFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976); A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

³ ABA, *CODE OF PROFESSIONAL RESPONSIBILITY* (1978).

clinical legal education affords students to learn how to integrate objective⁴ and affective values.

Underlying this discussion is the author's belief that legal education is the primary professional "socialization" process for lawyers. The professional values which legal education emphasizes appear, and often are, antithetical to the motivating desires and needs of many students who focus on the "helping" and "loving" roles of the lawyer. At first this problem may seem to require the focus of this commentary to be on these students; however, the author's thesis is that the successful fulfillment of professional responsibility requires a balancing of the tensions between affective and objective values for *all* lawyers. The student whose disposition is skewed to the objective, needs to be challenged to confront affective feelings and values, just as the student who is brought to the law primarily because of affective feelings needs to be assisted with developing objective methodology and integrating objective and affective values.

II. THE LAW SCHOOL AS "SOCIALIZER"

Socialization is the process by which the primary values and knowledge of a group are inculcated in those who are or seek to become members of the institution.⁵ In this case, the institution is the American Bar. Access to membership is controlled by the law school admission⁶

⁴ "Objective" qualities and values refer to the use of sharp, clear reasoning based on the analysis of specific facts and specific legal principles. This avoids reliance on intuitive feelings and emotional factors which are perceived as "soft." See T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 52-63 (1976).

⁵ The socialization process can be defined as: "The process by which people selectively acquire the values and attitudes, the interests, skills and knowledge—in short, the culture—current in the groups of which they are, or seek to become members. It refers to the learning of social roles." MERTON, *READER & KENDALL, STUDENT PHYSICIAN* 287 (1957).

⁶ ABA STANDARDS AND RULES OF PROCEDURE: APPROVAL OF LAW SCHOOLS 16-18 (1979) (as amended) (standards 501-506). While the question of law school admission standards has been explored in the context of minority student admissions, little consideration has been devoted to admission standards for all students. For an exception, see Liacouras, *Toward a Fair and Sensible Policy For Professional School Admission*, 1 *CROSS REFERENCE* 156 (1978).

Recently, the Task Force on Lawyer Competency made the following recommendations:

In admitting students, law schools should consider a full range of the qualities and skills important to professional competence. Those law schools that admit students almost exclusively on the basis of a relatively mechanical index of Law School Admission Test score and undergraduate grade point average should give greater weight to factors as writing ability, ability in oral communication, work habits, interpersonal skills, dependability, and conscientiousness.

ABA, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS* 3 (1979).

and graduation processes. With insignificant exceptions, a person can only become a lawyer if he or she has graduated from law school.⁷

The focus in the law school admissions process is weighed very heavily in favor of "objective" skills—the student's Law School Admission Test (LSAT) score and his academic record.⁸ These objective criteria do not provide insight into motivation or affective characteristics. The admissions process reflects the primary set of values which law school holds out to students as indicia of academic and professional success. This set of values includes the capacity for clear, concise and logical analysis of legal principles. It focuses on the capacity to distinguish cases within a given framework of existing law. The teacher rewards what he or she considers tough, rigorous analysis which may either be based on the capacity to make fine distinctions within the boundaries of existing law or may involve sorting out and applying a series of inter-related legal principles of considerable complexity.

Students who succeed at these skills are rewarded with membership on the law review where the student is required to excel at a process of editing and citation checking which inculcates the value of careful, meticulous professional work. Success with this set of skills—rigorous analysis of legal principles, careful and meticulous work products, and a strong focus on style and form—is rewarded by employment in large law firms and judicial clerkships, in which these qualities are of primary value. This picture of the lawyer's "ideal" traits not only emerges, but is hallowed before all students indicating what qualities they should strive to develop. The problem for many students is not with these qualities in and of themselves, but with the qualities and concerns which are ignored. Some may argue that these "ideal" qualities were first identified with the practicing Bar and that the methodology of legal education has evolved to accommodate these values. In terms of this article's analysis, however, this does not matter. The consequence is the same. What is important is the law school's role in developing these professional values.

III. EMPLOYMENT AS A MEANS OF EXPRESSING LOVE

Many students come to law school because they care about and love people and view the legal profession as a means to express these feelings. For these students, what happens to the client is more important than the logical consistency of the law.

This perspective focuses on the result and its consequences for the client. However, traditional law school study is based on appellate case

⁷ See ABA STANDARDS AND RULES OF PROCEDURE: APPROVAL OF LAW SCHOOLS 1 (1979) (as amended) (standard 102); Mavity, *State Rules Governing Admission to the Bar: Comparisons and Comments*, in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 12-21 (F. Klein ed. 1978).

⁸ The LSAT is generally viewed as an accurate predictor, along with a high academic record, of a student's success.

analysis. Such analysis does not lead to discussions of the case's significance in the client's life. There is usually no analysis of whether traditional legal processes afford a viable answer to the client's fundamental problems, or whether the lawyer's responsibilities extend beyond traditional roles of advocacy in judicial or administrative proceedings. It is the exceptional law teacher who focuses on whether a case's outcome is just or unjust; and if the result is unjust, discusses what responsibility, if any, the lawyer may have to assuage or negate the law's result.

For the student who comes to law school with more "affective qualities," alienation may start as this gap in his or her studies begins to develop. This void may not be significantly ameliorated by the study of constitutional due process requirements because class discussions tend to assume that due process results in just decisions, while ignoring what the lawyer's responsibilities are when due process does not produce a substantively correct result.

Most law teachers do not recognize the importance of these differing perspectives for each student's intellectual, emotional, and professional development. For many students, ignoring these factors is a major link in a chain which suggests that lawyers are not concerned about the morality or ethics of the legal system. To some students this does not matter, for their attraction to the study of law lies in its logical development and the intellectual challenges this presents; for some, the omission helps to suggest a role model which they silently adopt, but for others, the omission only further contributes to their sense of alienation. Often there is a strong relationship between one's sense of ethics and one's love of others. The continuing expression of love in human relationships is based on a strong sense of ethics.⁹ The elimination or diminution to insignificance of the ethical foundation of the legal system, which can only be tested by the results the legal system yields,¹⁰ undermines some of the strongest feelings possessed by individuals struggling to use their profession as a means to express their love.

The social consequences of this apparent lack of concern with morality are significant. An unjust or unresponsive legal system may lead to lawlessness on the part of clients who will refuse to abide by legal decisions, or to a failure on the part of result-oriented lawyers to abide by the rule of law. Even a favorable decision or outcome may not affect the basic social, economic, or political conditions which generated the legal

⁹ See E. FROMM, *THE ART OF LOVING: AN INQUIRY INTO THE NATURE OF LOVE* 26-33 (1956).

¹⁰ See F. Cohen, *Modern Ethics and the Law*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 17 (L. Cohen ed. 1960); *Hook Comment- THE LAW SCHOOL OF TOMORROW: THE PROTECTION OF AN IDEAL* 41-43 (N. Haber and J. Cohen ed. 1968).

action, with the consequence that the client is no better off in the long-term perspective.

IV. THE ROLE OF JOB SATISFACTION IN ONE'S LIFE

What is job satisfaction and why is it significant? While there are different theoretical and applied approaches to defining job satisfaction, primarily it is concerned with the individual's emotional reactions to a particular job.¹¹ Favorable emotional reactions include an assessment that one is able to grow psychologically or achieve worthwhile aims, and receive recognition for such achievements.¹² In its simplest terms this would mean, for some law students, an ability to use their professional training to assist individuals. This assistance would culminate in public and professional recognition of their work. If an individual is not achieving job satisfaction, he or she often has the option to seek a position which hopefully will provide the missing ingredients required for satisfaction. The legal profession's organization and values, however, do not provide enough jobs for the number of students for whom job satisfaction is achieved by helping people.

In the major urban areas there are more students interested in legal services than there are legal services positions. Legal services and legal aid organizations usually operate under severe pressures of high caseloads and limited resources. Pre-paid legal service programs are designed to handle a limited range of cases. Consequently, lawyers who do not have the opportunity to provide quality representation or to fully develop interesting cases are often frustrated. These frustrations contribute to job dissatisfaction, which in turn can affect one's professional performance, overall respect for the legal profession, relationships with family and friends, and overall sense of well-being.¹³ This situation is aggravated by the complex societal structure of our government regulated, urban technological society that makes it difficult for lawyers to engage in quality solo practice representing individual clients.

For some students, working for certain government agencies may satisfy the desire to help people. Unfortunately, there are more students interested in such jobs than there are available positions. Extremely crucial dynamics are involved in these students' values, but for the most part law schools and the legal profession have not recog-

¹¹ See R. HOPPOCK, *OCCUPATIONAL INFORMATION: WHERE TO GET IT AND HOW TO USE IT IN COUNSELING AND TEACHING* 74-111 (1957); P. KLINE, *PSYCHOLOGY OF VOCATIONAL GUIDANCE* 174-204 (1974). See generally R. HOPPOCK, *JOB SATISFACTION* (1935).

¹² See D. SUPER, *A THEORY OF VOCATIONAL DEVELOPMENT IN CAREER COUNSELING: THEORETICAL AND PRACTICAL PERSPECTIVES* 144-153 (S. Weinrach ed. 1979).

¹³ *WORK IN AMERICA—REPORT OF A SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE* 1-10 (1973).

nized how important it is to many students to use their professional training to help people, and that government service is perceived by some students as a means to fulfill this need. Rather, most law teachers and members of the Bar value government service because of the lawyering experience and substantive expertise to be gained, and the opportunity to influence policy formation.

A lawyer who desires to use his or her skills to help people is faced with an outlook which is not promising. The paucity of jobs, unsatisfactory working conditions, and comparatively low remuneration and prestige, reflect the lack of societal value for such a role. Legal education reinforces this by emphasizing "policy development" or "law reform" work as more appropriate goals for the best law students, including those who are people-oriented.

For the legal profession and society, a great deal of human energy which could be devoted to achieving a more just society is lost in this process. Through love and concern, a fuller and richer sense of professional responsibility to people can arise to help establish new definitions of quality representation. This human energy is stifled in the traditional lawyer's roles. Usually, it is not allowed to focus on the client as a person, for the definition of the service to be provided is confined by a traditionally restrictive framework that is expected by lawyer and client alike.¹⁴ This framework reflects the professional premium on corporate and institutional representation and high volume specialized individual representation.

V. LOVE AND RULE OF LAW

One of the most difficult problems for lawyers is reconciling one's feelings of concern and sense of justice with the rule of law. The rule of law is one of the primary attributes of the Anglo-American legal system. The rule's basic tenet is that no one is above the law and that disputes should be settled within the law's processes.¹⁵

There are times, however, when an ordinary person's well-being and the law's requirements are inconsistent. A person who does not have enough money to adequately feed and clothe his or her family may not be eligible for sufficient public assistance to satisfy these needs. People may be forced to pay rent for apartments which are unfit for human habitation. A family may lose their home through foreclosure because

¹⁴ See D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 7-28 (1974); Shaffer, *supra* note 1, at 730-740.

¹⁵ Professor Bernard Schwartz has summarized the rule of law as including three essential principles: (1) the absence of arbitrary power; (2) the subjection of the state and its officers to the ordinary law; and (3) the recognition of basic principles superior to the state itself which the state, though it may be the sovereign power, cannot abrogate. 1 B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 25-26 (1963).

the adults were unable to find employment during a recession. In situations such as these and countless others, if the lawyer was concerned only with the correct application of the law, no problem of professional responsibility would arise in terms of a personal desire to be of assistance to the client.¹⁶ Lawyers, however, may care about their clients as people. As this concern grows, the question arises as to whether the lawyer, of his own volition or in response to his client's inquiries, should counsel the client to take actions that mislead the decision-making body in order to produce a favorable result or that frustrate the enforcement of an adverse decision. This is a problem for lawyers who feel they are acting out of a greater social good, as well as for lawyers representing a client who wishes to "win at any cost."

An example of a problem which arises in representing low income clients is the concealment of income or assets which would affect eligibility for public assistance.¹⁷ In such circumstances, the consideration of both the client's needs and the profession's responsibilities requires an environment in which students are led to explore the societal values which underlie the rule of law. This requires equal time to consider the deeply held personal values which may lead to lawlessness. How many students or teachers feel comfortable enough to exclaim that counseling lawlessness is based upon a "concern" or "love" for those people who do not have enough to eat, or the "shame" of being part of a system which endures such results? Exploring the concepts of justice requires discussing the possible deprivation of aid to minimally eligible public assistance candidates who may be administratively squeezed-out because of a diminution of government resources resulting from payments to ineligible applicants. It requires discussing the fairness of forcing taxpayers to pay more to cover the costs due to these legally "ineligible" applicants.

Similarly, it is not unheard of for individuals who are comparatively well-off to improperly seek benefits. Such problems arise when students and their parents lie on financial aid applications. Should a lawyer prepare or assist a client in providing income tax information which is misleading in order to conceal parental income or assets? How many students or professors explore the relationship between such conduct and a student's ultimate sense of professional responsibility as a lawyer?¹⁸

¹⁶ This does not mean that other problems of professional responsibility may not arise. Some lawyers cannot stand losing and may take actions independent of their client's interests to assure victory.

¹⁷ See Bellow & Kettleon, *The Mirror of Public Interest Ethics: Problems and Paradoxes*, in *PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS* 219, 247-258 (D. Ream ed. 1978).

¹⁸ The question has two prongs: (1) analysis of the impact of parental conduct on the formation of a sense of ethics in children; and (2) the relation between a student's personal conduct and his or her professional conduct.

When considering the business client who pressures his or her lawyer to win at any cost, how many students or teachers are prepared to discuss whether the client has a right to expect the lawyer to disregard the law or Code of Professional Responsibility? Are they prepared to discuss how a lawyer works with such a client when the lawyer's sense of professional responsibility conflicts with the client's conduct?

Students and teachers are often reticent about exploring the reasons for looking the other way, communicating to a client that lying is permissible, telling a client that the law or Code of Professional Responsibility prohibits certain conduct, or examining the responsibility of lawyers for the disciplining of unethical members of the bar. This reticence occurs in part because law school does not encourage or provide a conducive atmosphere for exploring deeply held feelings.¹⁹ On the contrary, the expression of feelings may be greeted with embarrassment. Important principles, however, are rooted in significant human experiences which by their nature involve strong feelings, concerns and values. A full discussion of these issues has to invite conflict which may be resolvable only through consideration of actual cases in the course of which each lawyer must ultimately decide how to conduct himself.²⁰ The foundation for these ultimate decisions should be established in law school.

When the situation arises, a lawyer should be able to decide whether he or she will disobey the law and risk disbarment for the principle that a family should have enough to eat. A lawyer must be able to determine whether he or she will engage in unnecessary actions to delay a proceeding in order to provide the landlord or business client with an opportunity to harrass the opposing party through extra-judicial actions. For many these are not happy choices and often they are not considered. More often, there is an inability or unwillingness to recognize the seriousness of the issues. Perhaps this unwillingness to face the issues squarely contributes to the legal system's harshness and the lack of public respect for the legal profession.

How does one resolve the conflict of conscience or self-aggrandizement and the rule of law? The lawyer as a person must be able to come to an individual answer, fully aware of the choices and

¹⁹ See Watson, *The Quest For Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 131 (1968).

²⁰ Lawyers value order. One hypothesis is that lawyers, including law teachers, have a difficult time controlling aggressive instincts. The definiteness of a rational legal system provides a strong counterbalance to aggressive behavior and establishes definite rules for control of human conduct. Discussion of feelings threatens the order established by a rational legal system. See Eron & Redmount, *The Effect of Legal Education on Attitudes*, 9 J. LEGAL EDUC. 431, 438-90 (1957); Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 13-16 (1963); Watson, *supra* note 19, at 101-103, 114.

their consequences. The lawyer deals with a wide spectrum of gray areas where as long as the parties act within the law's processes, the risk is limited to the cases' end result. There is a point, however, where a course of action approaches the extreme end of the spectrum, where the consequence can be a loss of one's self-respect, professional reputation, license, or all of these. One goal of studying professional responsibility should be to help all students identify these situations so that if a lawyer is to risk all, he or she can do so consciously. Interestingly, it is at this junction that the divergent paths of the lawyer who believes he or she is acting from conscience and of the lawyer who is "indifferent" to the societal effects of the client's actions, converge.

It is in the crucible of painful choice that innermost feelings are touched. In order to better administer the laws and dispute-resolution processes, it is necessary to study the dimensions of the lawyer's professional responsibilities and the tensions which result. The temptations and painful choices lawyers will face must be revealed and examined in law school. The lawyer's human reactions must be confronted. Without considering the impact of the lawyer's personal feelings and reactions on the legal process, it is impossible to understand fully the challenge of designing and administering laws to govern human beings.

VI. LOVE AND PROFESSIONAL RESPONSIBILITY

There is a significant overlap between the problems of a lawyer's personal feelings and his or her respect for the rule of law, and a lawyer's personal feelings and his or her response to the Code of Professional Responsibility. There is, however, also a significant difference between them.

Although the Code of Professional Responsibility for the jurisdiction in which a lawyer practices has the effect of law so far as the members of the bar are concerned,²¹ most lawyers do not view the Code as law. There are several reasons for this. First, many of the provisions of Codes of Professional Responsibility are general in nature and open to various interpretations.²² Second, there is a feeling that ethics are not serious considerations. The Code is there, but everyone winks at it. Stated another way, the real world is tough, and lawyers are expected to do what is necessary to represent their clients, if for no other reason than the other party and opposing counsel are not going to "play nice." Third, only a very small percentage of lawyers are charged with

²¹ The ABA Code of Professional Responsibility has been adopted in 49 states and the District of Columbia. Many states have made substantial modifications when they adopted the Code. California has not adopted the ABA Code. See R. WISE, *LEGAL ETHICS* xv (Supp. 1979).

²² The failure to develop standards of acceptable conduct in practice means that general provisions in the state codes of professional responsibility do not have agreed meanings.

violating the Code.²³ Usually the areas of discipline relate to uncontroversial misconduct, such as misappropriation of client's funds. Lastly, in some respects, a code of professional responsibility is similar to religious or personal ethical systems which may be deviated from at convenience. The real penalty for violating the Code depends upon individual conscience. For the lawyer who is acting out of love of his client, the problem becomes a conflict between two sets of ethical values, rather than between an ethical system and the law. Since little consideration is given in law school or law firms to the nature of professional responsibility, the professional codes at best represent weaker value systems. For many lawyers, an appreciation of the need for standards of professional conduct arises only after years of experience in practice. For many, it never arises.

The dilemma in part, then is whether by becoming a lawyer an individual must accept a professional code of conduct which may conflict with his or her personal ethical system? The legal status of codes of professional responsibility and the public interest in professional responsibility answer affirmatively. The fundamental difficulty with this is that it conflicts with the twentieth century diminution of externally enforced codes of conduct, historically epitomized in religious behavioral proscriptions. The dominant spirit in western culture today evidences an antipathy toward the societal imposition of binding moral or ethical standards on individuals. Does society, however, have a right to impose ethical or moral restraints on people acting in a professional capacity? Lawyers resist external regulation as do members of other professions. Are the claims to freedom by professionals a derivative of the profession's legitimate needs, or are they the desire of people to be free of restraint as they conduct themselves while earning a living?

The significance of these inquiries is manifested when considering behavior which strikes at fundamental notions of ethical conduct. Why is fraudulent conduct, traditionally considered morally reprehensible, also prohibited by the Code of Professional Responsibility?²⁴ In order to explore such questions, the student and teacher must be prepared to analyze the relationship of ethics to human and organizational conduct, and the factors which promote human and societal health.

This requires that students and teachers be willing to probe their feelings about topics such as lying and deception.²⁵ For the student who has come to law school because of its intellectual challenge, this value

²³ See J. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 151-155 (1966); Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 ABF RESEARCH J. 919 (1976). In part this situation results from inadequacies in the administration of disciplinary processes. See ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT: PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Preliminary Draft Jan. 15, 1970).

²⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102 (Misconduct).

²⁵ See S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

laden and "feelings" component of professional responsibility can present a different and difficult challenge.²⁶ The security of being able to derive one's answer from positive law is absent. One must come to his or her own conclusion. In such discussions, logical distinctions usually do not suffice, for an individual's response is rooted in a combination of intellectual understanding, experience, and a personal sense of right and wrong. Here, the emotional sense of right and wrong is a component of the response.²⁷ Sufficient time may have to be taken to demonstrate the relationship of ethical feelings to the law in order to establish a foundation for students to see the relevance to their future clients, society, and themselves, of the lawyer's feelings about the powers and responsibilities lawyers exercise. Unless the class explores the relationship of ethics to societal health, the students may have difficulty correlating the lawyer's conduct with the legal system's effect on societal health.²⁸

²⁶ See generally T. SCHAFFER, *supra* note 4.

²⁷ Most men whose judgment I respect take plenty of time on major problems and make time if possible. They do not decide until it is necessary to do so. They "think it over" carefully but not necessarily logically. What I have tried to emphasize is the insufficiency of logical processes for many purposes and conditions and the desirability of their development in intelligent coordination with the non-logical, the intuitional, even the inspirational processes, which manifest mental energy and enthusiasm. This is by no means easy. To rely upon "feeling," to give weight to first impression, to reject logical conclusions and meticulous analysis in favor of an embracing sense of the whole, involves an inconsistency of attitudes, it means developing the artistic principle in the use of the mind, attaining proportion between speed and caution, between broad outlines and fineness of detail, between solidity and flexibility. As in other arts, the perfection of subsidiary techniques and their effective combination both require constant practice.

Bernard, *Mind In Everyday Affairs*, Cyrus Fogg Bracket Lecture before the Engineering Faculty and students at Princeton University (Mar. 10, 1936), reprinted in *THE FUNCTIONS OF THE EXECUTIVE* 322 (1968).

²⁸ Modern ethics rejects all formal standards of justice as the end of law, and subjects all supposed canons of justice to the final standard of the good life. The good life, conceived as a system of concrete human values (not all of them achieved, to be sure, in any single human life), has a clear meaning for the practice and the study of the law: It brings to bear upon the problem of the law the full wealth of human wisdom in the realms of the law's effects upon men's desires, joys, and sorrows. Where such wisdom exists, the gain for the law is clear. Where such wisdom does not exist, the gain is less clear but may be as weighty. To know the limits of past knowledge is the needed prelude to useful research. No doubt the breadth of viewpoint which the concept of the good life as a standard of law entails will filter only slowly into our day-to-day judgements upon legal case and doctrine, but in the end it must deeply transform both the study and the practice of the law.

F. Cohen, *supra* note 10, at 32.

Basic ethical and moral standards rooted in Judeo-Christian tradition are intended to secure a level of human understanding which holds a promise that the basic needs of the individual and the community can be assured. Such principles are not based on a "do good" philosophy, but on the highly practical purposes of promoting communication between people, securing the physical integrity of the individual and maintaining the community's peace by avoiding conflict between individuals under circumstances where violence is likely to occur.²⁹ These goals are rooted in human experience and the reactions of people. Theft, adultery, murder, false testimony, and disruption of the family³⁰ are each likely to arouse strong human reactions which undermine the community's peace and stability and further result in injury to the community's members. In this context, false testimony or deception constitutes an act of violence against the community's social fabric. Truthful communication is necessary to establish and maintain trust between people.³¹

²⁹ The domain of ethics has not always been as narrow as that to which modern moral discourse has been chiefly confined. The social order in which we live today, in which certain rather petty questions are thought of as "moral" and other questions of conduct, such as the question of how one ought to vote or spend his money or decide a case at law, are thought of as "not moral," would no doubt seem very strange to those who have lived in a more stable and compact world.

In the Books of Moses, for instance, all the basic problems of human conduct that a given social order raised are dealt with as parts of the same life, subject to the same sanctions, and marked by a constant set of human values. There is no hint that problems of hygiene are less "moral" than problems of sex, or that a man's conduct ceases to be moral when it affects vast numbers of his fellows. The moral system which the Books of Moses reflect is a system which seeks to guide men in the field of law, art, commerce, hygiene, and all other realms in which men seek to achieve the valued ends of life. All conduct of course, involves questions of technique, as to which such a moral code may have little or nothing to say, but all conduct also involves a choice of human ends, and to that extent falls within the field of a complete moral code.

Id. at 20.

³⁰ *Exodus* 20 & 21.

³¹ See S. BOK, *supra* note 25, at 18-21.

Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. Most harm that can befall victims through violence can come to them also through deceit. But deceit controls more subtly, for it works on belief as well as action. Even Othello, whom few would have dared to try to subdue by force, could be brought to destroy himself and Desdemona through falsehood.

The knowledge of this coercive element in deception, and of our vulnerability to it, underlies our sense of the centrality of truthfulness. Of course, deception—again like violence—can be used also in self-defense, even for sheer survival. Its use can also be quite trivial, as in white lies. Yet its potential for coercion and for destruction is such that

The role of the lawyer in society must be understood within this framework. The strong condemnations which false testimony and deception raise in biblical standards reflect how such conduct is traditionally viewed. It is these considerations which mandate that when fraud or lying are involved, no distinction can be made between the lawyer acting out of love for a client, and the lawyer acting out of greed.

The lawyer who is respected is a lawyer who can be trusted. Much of the public dissatisfaction with lawyers stems from the feeling that lawyers are not trustworthy—that their daily work involves manipulation and deception.³² It is with these practical realities that the law student and teacher must morally grapple.

VII. THE ROLE OF CLINICAL EDUCATION

Clinical legal studies examine the lawyering process and require the student to confront the attorney-client relationship. The student may experience direct responsibility for a client and this in turn requires the student to make decisions which effect the client's best interests. It is the experience of relating to clients and having the power to affect another human being which invites the student to analyze the nature of the lawyer's responsibilities, and in particular, his or her own reactions to exercising such responsibility.

In organizing the study of professional responsibility there are three crucial educational variables: the teacher, the curriculum and the student. Teachers must be genuinely interested in professional responsibility, be prepared to become specialists in the field, and be willing to have their feelings and attitudes tested by their colleagues and students. To become specialists, clinical teachers must (1) acquire an understanding of religious and philosophical ethical principles; (2) study human development to have a basic comprehension of how an individual's ethical sense develops; (3) study the body of law which has developed around issues of professional conduct; (4) review the Code of

society could scarcely function without some degree of truthfulness in speech and action.

Imagine a society, no matter how ideal in other respects, where word and gesture could never be counted upon. Questions asked, answers given, information exchanged—all would be worthless. Were all statements randomly truthful or deceptive, action and choice would be undermined from the outset. There must be a minimal degree of trust in communication for language and action to be more than stabs in the dark. This is why some level of truthfulness has always been seen as essential to human society, no matter how deficient the observance of other moral principles.

Id. at 19.

³² Clients also share responsibility for the ethical tone of society. If the public desires trustworthy lawyers, then the public must not apply a double-standard where individual self-interest is involved.

Professional Responsibility and record their own reactions to the Code's provisions; and (5) engage in collegial dialogue with other clinicians and practitioners about the Code.

Such discussions should include individual analyses of how each teacher conducts himself in practice as compared to the Code's standards and those of other practicing lawyers. Such self-analysis is important in preparing to discuss professional responsibility with one's students. Teachers may be assisted by maintaining their own journals to record feelings and reactions to problems in professional responsibility which they encounter, and by sharing these journals with colleagues and students. A teacher needs to be able to confront and express his own values in order to understand his reactions to students' values. Particularly with respect to strongly held feelings, a teacher must be able to clearly indicate his position and offer supporting reasons.

The professional responsibility curriculum should integrate consideration of specific problems which arise in the clinical setting with specifically prepared problems for class discussion. To foster in-depth exploration of such problems, selected materials which combine Code provisions, case law, articles and excerpts from basic ethical writings should be compiled. It is the teacher's responsibility to assure consideration of the readings in class and in individual discussions with students. Additional reflection can be elicited by requiring students to maintain journals recording their questions and their reactions to problems which arise from client representation and class reading assignments. Depending on the scope of clinical study, a course can be designed to explore the relationship of professional standards of behavior to the essential elements in the attorney-client relationship.

Underlying this discussion is the need to establish an environment which tolerates and encourages students to explore the full range of their reactions to lawyering. Individual conferences between student and teacher can help the individual student discuss feelings which he is reluctant to bring up in class because such feelings may suggest that the student is unethical or might not be reacting in a professionally appropriate manner. Based on both past and current class experiences, teachers can protect anonymity while presenting for class discussion problems which privately concern students. Class discussion can help reveal that an individual student is not alone in his feelings.

For some students, particularly those interested in helping people, there may be periods of painful discussion and self-reflection about whether the law can satisfy this inner need without extracting too great a price in terms of one's integrity. For example, is being a criminal lawyer and participating in plea-bargaining a meaningful or ethical way to express one's self professionally? The student may ask, "what did I accomplish if a person constantly returns to the clinic with new criminal problems?" Likewise in other areas, the student may ask, "How have I really helped a plaintiff who constantly requires the court's assistance

to force her ex-husband to make alimony payments when the former husband doesn't earn enough to support himself and his family?"

The student needs to become conscious of the conflicting pressures which besiege each practicing lawyer. Clinic practice should provide students with a sense of the power the lawyer exercises over his client's life. The student should examine the significance of this power. The law is an elite profession and many, if not most of the people who come to it, assume that they should exercise this power, often controlling their clients. Usually this power is not questioned. The student, however, must be helped to understand the nature of this power, to understand what responsibilities are the client's and the interest of society in how the lawyer exercises power.³³ To do this requires study of the ethical as well as legal bases of the client's and society's interests. The student should concentrate on the implications of these interests in the context of his professional motivations and expectations.

For the students who are attracted to the law because of the challenge of rigorous legal analysis, study of the inter-personal dynamics between lawyer and client can provide a crucial introduction to the role of "affective" qualities in lawyering.³⁴ This can be done regardless of whether the clinic caseload is composed of individual client cases, or cases or problems involving governmental or corporate entities.³⁵

While this discussion seems to suggest that attorneys interested in individual representation emphasize "affective" qualities and attorneys interested in corporate practice emphasize "objective" qualities, it would be a mistake to assume such stereotypes.³⁶ It is because of the individuality of each student that it is vital to attempt to develop curricula which confront each student with the "objective" and "affective" sides of lawyering and to stimulate each student to analyze how these characteristics help determine his or her sense of professional responsibility. Unless students have a firm understanding of all the qualities required of a lawyer and what qualities are stressed in different types of practice, students may not be able to make conscious decisions about career direction and the lawyering roles in which they would be most comfortable.³⁷

³³ See generally D. ROSENTHAL, *supra* note 14; Shaffer, *supra* note 1.

³⁴ See note 2 *supra* and accompanying texts cited therein.

³⁵ See Leleiko, *Project Director's Notes*, in CLINICAL LEGAL EDUCATION: REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 72-74 (1980).

³⁶ There are students who express a great desire to help people, but are insensitive to the affective qualities of both themselves and others. Conversely, students interested in corporate representation may be strongly motivated by affective elements.

³⁷ See Leleiko, *Can Ethics Be Taught to Law Students*, 182 N.Y.L.J. (Feb. 6, 1979) at 2, col. 3.

It is important to recognize that clinical legal study can endanger as well as contribute to the development of the lawyer's sense of professional responsibility. There is nothing in clinical methodology which guarantees that teachers and students will confront and analyze basic questions in professional responsibility. Clinics do not necessarily force students to confront and develop their affective qualities in a professional context. In fact, it is possible that clinical study will inculcate indifference to standards of professional conduct in order to pursue the client's objectives.

While the study of the lawyering process seeks to help lawyers understand the interpersonal dynamics between attorney, client, and other participants in the legal system, such understanding can be presented for the purpose of achieving manipulation, and not as part of the knowledge required to understand the functioning of people within the legal process. Clinical teachers may not have given considerable thought or study to legal problems in professional responsibility. They may not have undertaken an analysis of their feelings towards professional responsibility. To avoid these dangers requires a planned and conscious effort on the part of those responsible for conducting the clinical legal studies curriculum.

In schools which have existing clinical courses, such planning may require the allocation of additional credit hours or the deletion of other areas of study from the clinical course. For many schools which do not have clinical classroom components, this will require allocation of teaching time for such purposes. Regardless of where a school starts, the development of the student's sense of responsibility requires students to be challenged by teachers who present role models which express that professional responsibility is important. For students to accept the importance of professional responsibility they must be confronted with views expressed by people who are or have significantly engaged in the practice of law. When professional responsibility is taught in a theoretical manner by teachers who have not confronted such issues in real life, it reinforces student inclinations that professional responsibility is of secondary, if any, importance. Furthermore, people who have not personally faced applied professional responsibility are less likely to have confronted the affective factors which influence the development of their own beliefs. As a result, these people are less likely to challenge their students to do so.

VIII. CONCLUSION

How can the legal profession become a more effective instrument to help people?

First, the Bar has to establish standards for acceptable legal practice within traditional frameworks, including both dispute-resolution forums and law offices. It is up to the legal profession to assume the leadership

in establishing what are acceptable levels of competency.³⁸ More effective standards can provide the lawyer with the feeling that he is engaged in quality work.

In this context, clinical legal study should play a major role. Analyzing training of law students can contribute significantly to the profession's understanding of the abilities of lawyers and how these abilities develop. Clinical practice provides data on the professional patterns of people engaged in the practice of law. Such practice allows teachers and students to study their own behavior as well as that of other lawyers and decision-makers. Analysis of this behavior can contribute significantly to the profession's understanding of attorney conduct and its relationship to procedural law, how laws are actually administered and enforced, and the standards of professional conduct actually exhibited by lawyers. Presently such research is, however, difficult to plan because it requires a long-term perspective. Researchers need several years to design, implement, analyze, and report results. The instability in the status of clinical teachers and their programs will have to cease before research becomes a realistic possibility.³⁹

Second, it is essential for clinical teachers to become involved in the creation and teaching of continuing legal education programs which focus on the lawyering process and professional responsibility. The absence of a traditional educational framework in this area means that evaluation of one's own standards of competency and actual lawyering skills is very limited in law firm or government practice.⁴⁰ There is a need to provide lawyers with the opportunity for professional self-study after they have developed a basic level of proficiency. Presently, there is no institutional framework within the profession for this to occur. The process of studying practice by experienced lawyers can also contribute to the clinician's insight. Such study programs can be conducted within the law school or within the established law firm.

Third, new conceptions of what is a lawyer need to be considered. New roles need to be firmly defined. Standards of practice affect the attorney-client relationship; central to an evaluation of that relationship is the exercise of power by both parties. Underlying the exercise of power is the approach to defining the client's problem. It is natural for lawyers to approach a client's problem in terms of the legal structure which relates to it. This has two significant consequences. First, it

³⁸ An example of an effort in this direction is the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Tent. Draft March, 1970).

³⁹ See generally Tyler and Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693 (1980).

⁴⁰ To the extent that law firms and government offices conduct training programs for their attorneys, they are usually limited to ensuring that new attorneys have basic skills.

places the lawyer in the dominant position since the lawyer's legal expertise is central to consideration of the client's problem. Second, it may fail to explore alternate nonlegal approaches. Exploration of the full dimensions of the situation, however, has the affect of affording the client the opportunity to choose the method of resolving the problem, thereby maintaining greater client control. There is an important need to train and prepare lawyers to assist their clients in identifying the various nonlegal as well as legal approaches to a problem.

While lawyers have joined with members of other disciplines to provide fuller attention to the client, the lawyer is usually restricted by training and tradition to the customary advocacy roles. For some people, however, there might be greater career satisfaction if they performed the role of lawyer and psychologist, or social worker, or counsellor. It would more fully develop the concept of counsellor-at-law by focusing on the counseling as well as advocacy roles. Inherent in this broadened role are dynamics which counter-balance traditional attorney traits.⁴¹ The counsellor seeks to help the client to define his own concerns and to determine the approach necessary to resolve the client's needs.⁴² In these circumstances, the needs defined by the client determine the lawyer's response and advice that will be offered.

The challenge of such a role for attorneys requires the application of qualities which are often perceived by lawyers as being in contradiction with each other.⁴³ At a minimum, this role definition suggests that a traditionally legal approach, such as litigation, may not be the most suitable approach to a client's problem. In so doing, it weakens the traditional ingredient in the lawyer's background which provides the lawyer with "power." The lawyer-counsellor, however, maintains professional involvement with the client in ways which professionals have usually been unable to because of their limited role definition and lack of expertise.

In considering the question of the appropriate role for lawyers who desire to assist individuals, it is important to recognize that such a role relates to representing "middle-class" clients as well as assisting the poor. Basic problems in human relations and survival, such as family disputes, juvenile delinquency, drug and alcoholic addiction, criminal behavior, debt, dangerous working and environmental conditions, illness, injury, and aging occur in the lives of all people. For some law students it may be more consistent with their interests and abilities to represent people with whom they can more easily identify. While many students wish to assist the poor, others may not be comfortable in such roles. It is important that the interests of all students to help all people be recognized.

⁴¹ See T. SHAFFER, *supra* note 2, at 56-63.

⁴² See C. ROGERS, *CLIENT-CENTERED THERAPY* (1965).

⁴³ See T. SHAFFER, *supra* note 2, at 52-63.

A fundamental professional problem is that lawyers whose practice involves them in the essence of human affairs, such as domestic relations, personal injuries, or legal services for the poor, are viewed professionally as being involved in less prestigious work.⁴⁴ To remedy this unfortunate view, a professional ethic which focuses on the value and importance of the lawyer in the process of assisting people who have serious personal crises is necessary. Such an ethic can contribute to the study of the full nature of assistance which people require and the lawyer's role in assuring comprehensive aid. The appreciation and development of this role can lead to greater professional satisfaction and public prestige.

Similarly, the experience of the last twenty years with human service programs designed to help the needy indicates the importance of cooperation, coordination, and effective networking of resources and professional aid to maximize programmatic effectiveness.⁴⁵ There are opportunities for lawyers to develop creative professional roles as members of interdisciplinary teams. The capacity to bring to bear a knowledge of the law, a capacity to advocate, an understanding of the overall non-legal needs of the client, and the willingness to work with the client and other professionals to develop comprehensive approaches to the client's problems should be exciting. For lawyers to work as members of a team, rather than as the "boss", is a new role. It presents a challenge to be a pioneer seeking to forge new methods which are effective in helping people.

Ultimately, love and moral beliefs present a challenge to conduct one's self above and beyond recognized minimum standards. The ultimate expansion and growth of ethical conduct and the health of the community are intertwined and dependent upon people seeing and responding to individuals living in crisis. The choice and challenge to see and to respond confront each of us. Regardless of the requirements of the law and codes of conduct, responsibility arises in the process of living.

The twentieth century dilemma for the individual is rooted in how to assure a decent community which promotes human freedom. In defining the ingredients necessary for freedom, there has been a strong reaction against imposed conceptions of morality or ethics. History, unfortunately, presents horrendous examples of murder, physical or psychological destruction, and tyranny resulting from efforts to enforce moral and ethical codes on individuals, groups, or countries.

⁴⁴ See Laumann and Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 A.B.F. RESEARCH J. 155.

⁴⁵ See generally S. SARANSON, C. CARROLL, K. MATON & S. COHEN, *HUMAN SERVICES AND RESOURCE NETWORKS: RATIONALE, POSSIBILITIES AND PUBLIC POLICY* (1977); S. SARANSON & E. LORENTZ, *THE CHALLENGES OF THE RESOURCE EXCHANGE NETWORK: FROM CONCEPT TO ACTION* (1979).

The value of freedom to the individual and the community, however, is greatly diminished when the majority of individuals define freedom to mean an absence of responsibility to contribute to the well-being of others and the community. The challenge as we approach the twenty-first century is to establish a consciousness that freedom used to gain personal individuality, devoid of involvement and commitment to others,⁴⁶ ultimately undermines the health of both the individual and the community. As we resist the tyrannous imposition of moral and ethical standards, we have a commitment to consciously confront the development of our own sense of responsibility.⁴⁷ Ultimately, "a person's morality . . . defines his or her existence."⁴⁸

⁴⁶ Without it—call it intimacy,
 your intimate connection—
 how do you stand vis-a-vis
 the multiplicity of things,
 a tree, fence, grass, person in you path?
 Unless you find in them
 that quality no one defines,
 how do you love, what do you
 whisper, what song
 do you share in the dark?

A. Gregor, *The Likeness*, in FIGURE IN THE DOOR 3 (1968).

⁴⁷ Each of these great moral codes (of the Hebrews, the Christian worldview of the Middle Ages, and of Plato) faces clearly the basic problems of a given social science. Each looks upon the whole field of human conduct as the proper realm of ethics. There is no hint in any of these worldviews of the modern "Sunday School ethics" which restricts its outlook to a small part of men's day-to-day life and leaves major problems of conduct to be dealt with in terms that are supposed to be non-moral. None of these worldviews would permit a lawyer or judge to deal with basic problems of human conduct while shutting his eyes to the doctrines of ethics which had been evolved in an attempt to throw light upon these problems. In each of these systems of thought, the jurist must be a student of ethics and may be a teacher of ethics.

F. Cohen, *supra* note 10, at 21.

⁴⁸ Shaffer, *supra* note 1, at 755-56. A celebration of the value of moral involvement is found in a book by MARTY KENT JONES, *THE STREAM OF CONSCIOUS REFLECTIONS* (1972). One of his reflections entitled "Public Apathy Starts With Me," reads:

constant surveillance
 balance built from 'do's' and 'don'ts'
 keeps the boat from rocking
 balance bought at my expense
 a system to control the tides of change
 'don't do'
 'don't make waves'
 the voices say
 insidious commands
 encouraging trained reaction
 I become a tool

wrought for automation
crushing the inward consecration of a soul
denial of my need to be
I let myself become an instrument
my own action's all inside
listening
spellbound by the demon Fear
my inwardness is mine
my outwardness, a mask
I wait for someone else to save me
'someone else will do it'
denial of morality
inner stream of my own life
supporting by my reticence
the kind of world from which I hide

