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Is Thinking Like a Lawyer Enough?

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We could actually train legal minds here —A Student

Every year that I attend meetings of the Law School's Committee of Visitors I ask members of the committee how the school might improve the training that we give to our graduates. Every year until this one the lawyers who have responded to this question have given a standard answer: the young lawyers are smart, they say, smarter in many respects than their seniors, but they don't know how to write well. This response usually leads to a discussion of the proper place of skills training in the law school curriculum; lawyers and professors engage in a little jousting over the relationship between theory and practice, and all together lament the literary deficiencies of law students, compared, presumably, to ourselves.

This year, however, when I asked the visitors how legal education might be improved, I heard a new observation, one that strikes more plainly at the heart of the enterprise of legal education. One of the visitors, a senior partner in a distinguished eastern law firm, remarked straightforwardly that his new people are competent enough at doing legal analysis, but lack judgment, indeed resist being asked to exercise judgment, when it comes to actually devising a course of action to recommend to a client. Other visitors listening to the answer nodded agreement.

Lack of judgment? Is that not the standard complaint of the mature against the young, even the talented young? Is not judgment exactly the quality that is acquired through experience and reflection—in practice? Should not the humility and reticence of recent graduates be regarded as a virtue rather than a defect, in light of the legendary brashness of youth? In any event, is it not reasonable to assume that the judgment problem, if there is one, will just work itself out over time? Should the law schools take to heart this kind of criticism?

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It would be tempting to say that training young lawyers to have judgment is not the bailiwick of the law schools, just as intensive skills training is not; but a suggestion that a lawyer lacks judgment amounts to an accusation of professional incompetence, which surely reflects, even at some remove, on the quality of his or her training. The central purpose of formal legal education should be to equip young graduates with the techniques of inquiry and reasoning that make them fast learners, persons to whom professional responsibility comes naturally and in whom sound judgment develops without strain. Although it has traditionally been understood that even the most academically talented beginning lawyers must rely on their first employers to provide the apprenticeship that makes them fit to represent actual clients, it has been assumed that the drill in case analysis that is the heart of legal education bestows the basic cognitive tools that young lawyers need in order to learn quickly on the job.

Viewed against this history, the visitor's observation is troubling, because it hints that the standards by which young lawyers are judged by their employers may be becoming less generous. This may seem a large speculation to found on a random remark, but the remark fits all too well the emerging competitive reality of law practice. It is only to be expected that lawyers who themselves must meet increasingly stringent market tests will have less time to teach, less time to provide feedback, and less patience than was the case in more leisurely and prosperous times.[1]

At the same time, the conditions of advancement within law firms are likely to become more complicated. Law firms are becoming large complex organizations. During the last decade a large number of firms have grown to have more than 150 lawyers; it has become common for the largest firms to have offices in several cities. The path to success in these enterprises is uncharted; however, some strains and contradictions are already becoming apparent. The very size of the firms points toward increasing routinization of tasks and standardization of product, implying specialization, hierarchy, and internal dynamics of the sort associated with bureaucracy; yet a consulting law firm survives only by the personal entrepreneurship of its lawyers. Young lawyers may thus find that by the time of the partnership

1. For a parallel observation, see AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, ENHANCING THE COMPETENCE OF LAWYERS 77 (1981) [hereinafter cited as ENHANCING THE COMPETENCE OF LAWYERS].

decision they are expected to have achieved an ideal combination of technical mastery, professional judgment, success within the organization itself, and ability to attract and retain clients. The fulcrum on which all these evaluations must turn is whether the lawyer has good judgment, which is the foundation of other professional virtues.

Viewed in this light, standard legal education appears problematic. Law schools do not convey to the students vividly enough the truth that an intellectually disciplined astuteness about institutions and people contributes as much to the actual craft of lawyering as does the ability to do technically sound legal reasoning. In fact, the latent message of the instructional program may be that the hallmark of the lawyerly mind is precisely its singleminded focus on the law and legal issues—that is, on those issues that may be the occasion for litigation—to the exclusion of all else.[2] What is not conveyed with sufficient clarity is the fact that the lawyer must be engaged intellectually with the world in order to appreciate what legal issues may arise and how they might be dealt with. We might improve legal education, then, by giving students more opportunity to exercise their reasoning abilities in contexts that allow them to understand how the specific skill of "thinking like a lawyer" fits into what one student of practicing professionals has called the "reflective conversation with the situation"[3] that is the larger task of active lawyering. While we cannot teach students to exercise the arts of the practicing lawyer, we could do more to help them develop the wider range of thinking skills that they must exercise as lawyers.

In the process, we might do well to take a harder look at just what happens to students intellectually while they are in law school. Consider the mental skills and mindsets that are characteristically induced by law school training. First, there is the absorption with courts, specifically the appellate courts. Relentless exposure to appellate opinions has the beneficial effect, much like intensive language training, of giving students an opportunity to acquire a feel for the rhythms and cadences of the conversations in which they will later participate. However, missing from the texts is a sense of what that actual conversation is like, how the parties shape the discourse. The judicial opinions do

2. *See* Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 597-99 (1984).

3. *See* D. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).

not convey a vision of the lawyer, or for that matter the judge, as a storyteller, creating legal stories from the raw stuff of actual disputes, sculpting arguments from texts, making usable history in the process of fashioning "precedent" out of prior cases. A good law teacher will of course reach around the appellate opinion to encourage students to imagine the parties, the transaction, the actual dispute, the process;[4] but the time available for such speculation is limited and the supply of suitable materials sparse. By default of critical views and alternative sources of information, therefore, the student may come to accept the versions of reality that are placed before him every day by the authorities even though in theory he knows that there is something more to these documents than meets the eye. Indeed, a certain willingness simply to absorb the judicial view is functional, since the student must train himself or herself to see the world as judges see it in order to anticipate correctly how judges will behave. One must learn the language of judicial discourse, even if it means putting aside one's own world view.

The further sacrifice that one makes in the first year, from which one may never recover, is the sacrifice of one's common sense, or general intelligence. Indeed, it is essential in the first year of law school to separate the students from their unexamined views and values, in the interests of inculcating habits of analytic rigor. I suppose that we assume that there will be time later for the students to recover what is valuable of their old selves and to integrate their previous lives with their lives as lawyers; but the institution gives them little enough encouragement or opportunity to do so, and very little indication of how that task can be accomplished consistent with the professional detachment that is induced in the first year. These are not insignificant sacrifices: not every profession requires its practitioners to relinquish so much of themselves in order to undergo basic professional socialization. The payoff is supposed to be that one emerges from the first year having acquired the widely touted skill of "thinking like a lawyer."

The consensus of generations of lawyers is that the person who has actually learned to think like a lawyer and who has used his or her legal education as a window onto the world has developed a set of thinking skills that can be turned to any practical intellectual task with impressive results. Certainly my own observations are consistent with the collective wisdom. Whether

4. There is no more eloquent affirmation of the teacher's role in doing just this than K. LLEWELLYN, THE BRAMBLE BUSH (1930).

law schools are entitled to claim the most versatile members of the profession as representative, however, is questionable. I would think that the true measure of law training is the impact that it has on the thinking apparatus of the middling student who wants only to get reasonably good grades in law school and to acquire what preparation he or she can for the conventional private practice of law. Viewed from this perspective, it must be pointed out that the effects of a legal education may not be wholly salutary. One can graduate from law school not quite having acquired the full benefit of skill in legal analysis[5] but having had one's spirits and general intelligence depressed and one's vision narrowed. It may take one some time to recover from legal education.

The folklore is otherwise. Past successes of the legal profession have given legal educators reason to believe that the skill of "thinking like a lawyer" fits comfortably into general intelligence, indeed may even augment that intelligence with analytical skills of special sharpness. In their more grandiose moments, enthusiasts of legal education[6] —law school deans, for example—may even claim that lawyers are smarter than other kinds of people, better at solving problems, more to be entrusted with matters of importance, omnicompetent. And in real life most law graduates have learned to use the kind of judgment that is exercised routinely by intelligent people doing tasks at which they plan to succeed.

This intellectual integration has historically been achieved, however, not during formal schooling but during the first years of practice. There is therefore cause to worry. If the quality of the average apprenticeship yields to the galloping commercialization of law practice, law schools may have to take on more responsibility for educating students to exercise professional intelligence. Even the major firms are asking for students who can "write better," by which they plainly mean that they want graduates who can not only construct a paragraph but also shape an argument. There is also a growing demand for more clinical education and skills training, which can be understood as a response to the perception that entering lawyers need more systematic instruction in basic practice skills, particularly if they are not likely to have the benefit of an apprenticeship. Although the law

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5. *See* Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479 (1984).

6. For an unusual twist to the argument, see Llewellyn, *The Crafts of Law Re-Valued*, 15 ROCKY MTN. L. REV. 1 (1942), *reprinted in* K. LLEWELLYN, JURISPRUDENCE 316 (1962).

schools' responses to demands for expensive training of this sort have been deliberate, the current weight of informed opinion certainly leans toward accommodating the demand in a manner consistent with the institutions' basic academic mission.

My own reason for favoring such programs, however, is not that they enhance students' technical competence as lawyers, but that they engage the students' general intelligence in the doing of tasks in which the students are responsible for outcomes. In clinical and skills courses, students must engage in a continuous process of thinking and learning from their own activity, integrating intellect with performance, theory with practice. The most beneficial of such courses are those that combine active learning with organized instruction to help students gain systematic, theoretical understanding of why some actions succeed and others fail;[7] but even if the courses do not offer much in the way of theory they can provide opportunities for students to use their own heads and exercise their own courage.

Perhaps I should make it clear here that I am hunting small game. This is not a radical critique of the legal profession, nor a proposal for wholesale reform of legal education. I assume that most students of this and other major law schools will continue to find employment with law firms or conventional public sector institutions and that the students desire mainly to be regarded upon entry into their jobs as good technical lawyers with adequate general judgment. The kinds of deficiencies in lawyers' training that I am focusing on are, therefore, those that may lead to inadequate representation of clients, including regular commercial clients. They may also lead to other objectionable behaviors, but those are beyond the scope of this essay.

My thesis here is that formal legal education, in addition to being by no means an education in lawyering, affirmatively inculcates in law students a characteristic pattern of blind spots that a good lawyer must overcome if he or she is to represent clients competently, assuming that the goal is to serve clients and not to exploit them (exploitation being one of the topics that is beyond the scope of this essay). Examples of inadequate lawyering are not difficult to find; I shall use only two (real) anecdotes for illustration. Both were told to me by the clients, who fortunately knew better than their counsel. The first example is that of the lawyer who, being unaware of the existence of the California Coastal Commission, advised his client to take ad-

7. *See* Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

vantage of an apparent bargain price on a piece of undeveloped real estate fronting on the Pacific Ocean just south of Big Sur. The second example is that of the lawyer who, not bothering to find out that his client's financial stability depended on the continued patronage of a large firm with a wide choice of suppliers, attempted to persuade the client to sue that firm over a contract dispute arising out of a minor transaction.

Lawyers in good firms would probably doubt even the basic competence of lawyers who made such errors; however, mistakes of judgment of this kind ought not be regarded merely as random failures, personal to the lawyers involved. They are errors of a certain type, symptomatic of the style of analysis that is affirmatively taught in law school. Take the example of the lawyer who did not know about the California regulatory scheme. As a student the lawyer would have had the standard course in property law, in which he would have learned a little about land use regulation, probably through reading appellate judicial opinions involving constitutional challenges to local zoning ordinances. Most of his property course, however, would have been taken up with the study of private-law doctrines. So, for that matter, would have been most other first-year courses in which the substantive "law" that is studied has been established mainly by courts settling disputes among private parties. Other kinds of law being off to one side in the law school courses, it is too easy to infer that they are also off to one side in life. The first-year "law" curriculum does not condition students to think instinctively of statutes and regulations as sources of law, nor alert them to the fact that public law systems blanket the legal landscape and are responsible for many arrangements that the students may take for granted in the social order. Although the students' mental model of the lawmaking system may be corrected later either in law school or in practice as they gain exposure to or experience in public law areas, the unexamined basic model acquired during that crucial first year of law school may remain latent, with the potential to induce error, sometimes dramatic error, as the example suggests.

The second example, that of the lawyer who advises his client to invoke the judicial process inappropriately in the contract dispute, exemplifies another characteristic intellectual failure of lawyers that must be blamed on legal education. In the context of the law school classroom, students are trained to narrow their vision, to see legal issues rather than disputing persons. Although it is essential to curb the students' responses to the identities of the disputing parties or their actual relationships to one

another where such matters are legally irrelevant, the hazard is that successful law students may acquire a disciplined habit of disregarding the human or transactional contexts of legal disputes, a habit that must be unlearned in practice.

Some of these undesirable effects of legal education can be counteracted while the students are still in school. For example, in order to accustom students to the use of non-judicial sources of law we might introduce more statutory material into the first-year curriculum, and use as examples of reasoned decisionmaking the opinions of non-judicial bodies such as administrative agencies, whose output is often of a higher intellectual quality than that of the judiciary. It would be useful, in other words, to introduce first year students to something like the full range of legal texts that they will have to be able to use as lawyers, as a way of keeping before their eyes the full range of lawmaking institutions of which they need to be aware.

Simply teaching students about public law would not, however, cure the more pervasive deficit in legal education, which is the almost entire lack of training in or even exposure to the exercise of situational judgment. Such judgment cannot be taught; but formal education can lay the intellectual foundations for its exercise. It is therefore appropriate to ask whether the particular objects on which the lawyers' practical intelligence must be engaged are susceptible to being understood systematically and can be explored in a classroom format.

Asking the question points out, however, how little we know about what practicing lawyers do, or how they evaluate professional competence. The vocabulary in which peer judgments are made is underdeveloped and unstandardized; and it is probably the case that what good lawyers recognize in one another is a quality of mind rather than mastery of some set of specific technical skills or subject matters. If as law teachers we were to take seriously the task of growing good legal minds, we might do well to identify and foster deliberately the development of the mental qualities that good lawyers regard as indicators of high professional ability in other lawyers.[8]

Some of these qualities are not difficult to identify, and perhaps to stimulate through formal education.[9] One such quality is

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8. My suggestion echoes that of former Dean Bayless Manning. *See* ENHANCING THE COMPETENCE OF LAWYERS, *supra* note 1, at 417, 432-33 (address of Bayless A. Manning).

9. I am assuming, somewhat against the evidence, that the traditional law school courses are doing an adequate job of teaching legal analysis. While this kind of core training could be improved vastly, the problems of the core curriculum are beyond the scope of this essay.

peripheral vision, an ability to perceive what is going on in the total environment, to understand how things connect. Lawyers with well-developed peripheral vision can be awesome in their ability to look at problems from many different perspectives, to see not only what is presented but what is not presented, to think across doctrinal categories, to spot threat or opportunity originating from outside of what seem to be the boundaries of a problem. Another outstanding quality of good lawyers is an ability and willingness to appreciate a client's problem in the full context in which the client experiences it. A third, which is less a quality than a capability, is an ability to design successful courses of action that accomplish the client's legal objective in a satisfactory manner in the context of the client's total situation.

To a substantial extent the talent that underlies these abilities is simply that of being a fast learner. Good lawyers are quick studies. But even learning is learned behavior—that is, we learn to think. It therefore ought to be possible to help law students acquire mental habits that will enable them to learn quickly and systematically from experience. There are two points to be made here, both of which derive from the fact that fast learning is based on pattern recognition. The first is that some of what lawyers need to know about the world can actually be taught in law school. In light of the quantity of academic energy that has been devoted over the past several decades to the study of major institutions and social sytems, it is not necessary for students to go out into the world of commercial law practice knowing nothing about, for example, the banking system, or the telecommunications system, or the systems through which energy and natural resources are brought into the economy and distributed; nor is it necessary for students to enter worlds based on standard social institutions such as private ordering through contract without the benefit of the systematic insights into contracting behavior now available in the scholarly literature. Even students who can learn rapidly on their own can profit from being given a disciplined analytical framework on which to hang their own insights, or against which to test their own learning. The second point to be made is that quite apart from any specific information that might be taught, law schools would do well to encourage students to develop habits of systematic inquiry into and analytical thought about subjects other than legal doctrine. The sooner the student is exposed to the need to act in the wider world the sooner he or she will realize that there is considerable professional payoff to having the intelligence "on" at all times.

It should be clear by now that I am suggesting that we add a

different sort of learning to the law school curriculum, one that helps the lawyer exercise his or her role not mainly as lawyer but as smart generalist, as counselor, problem-solver, and transaction builder. These tasks are at the heart of many lawyers' practices but they are tasks for which lawyers receive no training, and in which lawyers have no particular comparative advantage.[10] For the task of putting together a major business deal, for example, there may be little intrinsic reason to prefer a smart lawyer to a smart person trained in management or finance, particularly if the strictly legal aspects of the transaction are not its most complicated or problematic. Historically, law firms have claimed this type of work because they could plausibly maintain that the skill of legal analysis made lawyers better than other professionals at managing difficult and complex problems that cut across disciplinary lines. Partly for this reason, partly because law has always been a path to public service, the law degree has for the past half-century been the credential of choice for the intelligent, ambitious generalist, who could be reasonably assured that armed with a lawyer's mind he could find his way to the most interesting problems in any field that he touched.

Relative to this tradition, however, some of the changes in the structure of the legal profession ought to be read as warning signs. The prospect of law practice in the gargantuan multicity law firms that have risen in recent years may be less attractive to the adventurous mind than were the prospects for practice in even the largest law firm of two decades ago. Law firms may come to be challenged in their transaction-making function by other entities such as management firms or multidisciplinary organizations, in which lawyers are members of professional teams that may be headed by persons with other backgrounds. Some of the creative generalist side of lawyers' business may shift to other types of generalist professionals. Since very bright young people can be expected to seek the degree that will lead them to where they think the action will be, any shift away from law as the center of action in the real world must have a negative effect on law schools' ability to attract the most promising lights of rising generations.

What do I suggest? Not, for the moment, a wholesale revision of the law school curriculum, although I think it likely that substantial changes may finally prove inescapable under the press of outside challenge. In the short term, the kind of improve-

10. For an elaboration of this theme, see Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 241, 294-313 (1984).

ments that I am advocating can be accommodated by the traditional device of inserting into the curriculum some additional second- and third-year elective courses, designed however on a new principle. That principle is that the training of lawyers includes the systematic study of the organizations and institutions that populate the working lawyer's actual environment—not the "law" governing them, but the things themselves. Why institutions? Because the study of organizations and institutions really is the path to understanding how the contemporary world works.

This is not an exotic suggestion, only a bow in the direction of acknowledging the realities of contemporary law practice. Most lawyers spend most of their professional lives dealing with organizations and persons playing organizational roles—representing them, putting together deals for them, arguing or bargaining with them, or litigating against them. For the majority of our students who intend to have careers as outside counsel to business firms, "the client" who must be satisfied is likely to be a particular corporate manager or inside lawyer whose perception of the value of the consulting lawyer's services, or of the quality of the lawyer's judgment and advice, may hinge in large part on how usefully the outside lawyer complements the insider's own role within the organization. Some lawyers live in worlds in which virtually all the actors are members of complex organizations.

Legal education presently provides students with virtually no understanding of organizations and of the behavior of persons acting within or on behalf of organizations. Organizations are discussed mainly as juridicial entities, seen from the outside through the eyes of courts or legislatures. In nearly all law contexts except those in which we are specifically trying to decide whether to hold an organization responsible for the acts of its agents, we speak of governments or of corporations as though the actual actors were the corporate entities, not the people within them, and as though the organizations worked on a command-and-control model of internal governance.[11] We thus ignore much of the real complexity of organizational behavior. The practical effect is to leave students with an incorrect mental model of the actual world of organizations that they will encounter as lawyers, a model that they will have to lay aside in order to function intelligently. The current fashion of bringing microeconomics into the law school classroom only compounds

11. For further discussion, see Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

this problem, since most microeconomic theory treats the business firm as a singleminded profit-maximizer, a construct that is controverted by nearly all students of actual business behavior.

Insight into the behavior of individual organizations needs to be coupled with insight into how the total system functions. Students graduate in ignorance even of the legal system. It seems odd that law students gain in their ordinary courses virtually no systems-level insight into the workings of official lawmaking institutions and the relationship between law of all types and private ordering. For example, despite the fact that American law is virtually incomprehensible without some appreciation of the complexities of the federal system, law students typically do not even learn enough about federalism or the separation of powers in government to be able to give a comprehensible explanation of the theoretical underpinnings of the American system of government to a group of high school students. Law schools even teach them little or nothing about the active functioning of the court system viewed as a system, and naturally nothing about how courts work as institutions. When it comes to non-judicial public ordering law students are typically helpless: they regularly enter the practice of law knowing nothing of the workings of non-judicial official lawmaking institutions such as legislatures and administrative agencies and so little about constitutional structure that they would not know where to begin in drafting a set of by-laws for a voluntary organization, much less a charter for a government. On the side of private ordering, lawyers characteristically are unfamiliar with the inner workings of the numerous private governments that control items of high economic value such as institutional accreditations, sports franchises, professional certifications, and seats on stock exchanges. And ironically in view of the fact that many of our students intend to become the plumbers and electricians, even the architects and builders, of the capitalist order, they learn little of how capitalism works, or of the organization of industry, or of the relationship between business and the state.

It can of course be argued that smart people catch on to how the world works once they enter practice. That is true to a point, indeed has always been the case. However, the type of learning that occurs in any active setting tends toward the anecdotal—that is, a lawyer may achieve specialized mastery of a particular institutional terrain without ever achieving the kind of integrated understanding that makes knowledge transferable. There is therefore reason to acquire understanding of basic structures while one has leisure to do so, in order to know what

questions to ask when one finds oneself in unfamiliar territory. Systems-level understanding is what gives good lawyers their resourcefulness and peripheral vision, their feel for context, their ability to anticipate the full range of legal issues and arguments that might be available to a client and to understand how a client's cause should be positioned to enhance the likelihood of favorable outcomes.

It can be argued that I am echoing the traditional urging that law school become a form of education in the liberal arts, including the liberal art of governance, and I think that would be a fair characterization of my position. However, my main concern is for the development of competent professional minds; and that sets some limits both on what I would try to teach and how I would try to teach it. The beginning of wisdom in this area is probably that what needs to be known cannot be taught, at least not to the young. Aristotle pointed out that one cannot appreciate lectures on political science unless one is "versed in the practical business of life from which politics draws its premises and subject-matter."[12] The same observation applies to lawyering: one cannot be taught it until one has done it. And neither can a person learn in the classroom all that he or she will ultimately need to know about the systems through which our collective lives are ordered.

What we can do, however, is to introduce students to the traditions, ideas, and styles of thinking that are embedded in various institutions. I would be more interested in enhancing students' repertoires of thinking styles than their stores of information. What is important is to introduce law students to the ways in which the people who manage the non-judicial institutions think, how they use information, how they regard incentives and assess risks, how they view themselves in their own environments.

Here we come back to the main theme of this essay, which is the problem of ensuring that the law school experience promotes rather than hinders the process of developing good professional judgment. At the point at which students graduate from law school they ought to be able to think, not just "think like lawyers"; the way to get them into the habit of thinking is to introduce them to responsible, purposive reasoning wherever possible.

The key adjective is "purposive." Nearly all institutional

12. THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS (J.A.K. Thomson trans. 1953, H. Trednnick rev. trans. 1976).

thinking is done with some purpose in mind. Business corporations, private voluntary associations, and government administrative agencies engage in willed, deliberate action directed toward the achievement of ends that are explicit and often measurable. A business sets out to develop and market a product; a sorority sets out to build a complicated national network of membership organizations; the federal Environmental Protection Agency sets out to give the nation clean air; the local park and planning commission sets out to create an integrated system of parks. In each case, the organization must acquire, usually through its own resources, the information it thinks it needs in order to act; it must devise a plan of action; it must reach stable agreements over ends and means with those who have the power to obstruct or delay action; it must take action or achieve a correct blend of action and inaction; and it must be judged on the results. In both the private and public sectors, organizations with purposes must achieve a proper fit between ends, means, and resources if they wish to succeed on the terms in which their success is measured.

When we speak of a purposive decisionmaker as having "judgment" we really mean to say that he or she has an ability to see the likely future consequences of present actions; this kind of judgment translates into an ability to design and implement successful courses of action. When we speak of a lawyer as having "judgment" we mean much the same thing. Considered as actors in the world, lawyers are purposive decisionmakers who have a great deal more in common with other purposive decisionmakers than with the courts, which are decisionmakers with authority but not purposes. One reason for putting law students in contact with competent purposive reasoning therefore, is to expose them to good models of the kind of thinking they will have to do themselves.

Law students who spend their professionally formative years studying appellate decisions may gain a peculiar view of how competent thinking is done. Courts are not purposive institutions, and consequently judges are unusual among mature decisionmakers. The judiciary does not, or at any rate claims that it does not, set out to achieve goals other than those of deciding the cases that come before the courts in accordance with correct legal principles appropriately ordered. Nor do judges behave as though they had institutional purposes. The law moves forward on the individual case. I do not mean to deny that some individual judges have coherently purposive agendas, nor to imply that judicial lawmaking is not informed by considerations of policy,

only that the judicial institution as a whole cannot be accused of having systematic objectives that it seeks to achieve in its development of legal rules. Certainly the judicial branches of the fifty state governments do not set out for themselves purposes and protocols for designing systems of laws. It is nearly inconceivable, for example, that a state supreme court might issue directives to the lower courts instructing them on how to decide tort cases in a manner that contributes to reducing the incidence of drunk driving.

In addition to not having explicit purposes, courts do not set their own agendas nor gather information with respect to the disputes that come before them, but rather must rely on the parties to define the issues and to come forward with information that meets judicial standards. Courts also have institutional autonomy, constitutionally conferred: they do not have to negotiate in advance with other institutions or with the public over what to do in a particular case or in a line of cases, having only to defend themselves against post hoc criticism. Finally, and perhaps most importantly, courts do not for the most part even know what happens to disputes or parties after the case has ended, and would be shocked to be evaluated on the "success or failure" of their legal principles.

Judicial reasoning is consequently a special type of reasoning, designed almost exclusively around the tasks of dispute resolution, more akin to moral philosophy than to management. Purposive decisionmaking, by contrast, is generally concerned with prospective action, therefore with uncertainty, risk, and consequence, and with the ordering of principles under pressure; the decisionmaker is generally less concerned with "applying standards" or "weighing evidence" than with projecting and predicting. I do not mean to suggest that purposive decisionmakers are superior to judicial decisionmakers, only different from them. I do suggest, however, that without some appreciation of purposive decisionmaking it is very difficult to understand what is going on in the world or to participate intelligently in shaping action.

This set of perceptions leads me to suggest that law students ought to be exposed to courses the subject matter of which is an institution or set of institutions (e.g., financial institutions or hospitals) studied as a system of ordering in its own right and not simply as the fodder for judicial analysis. Let me make some suggestions for course design based on areas with which I am familiar. A course on health law is an appropriate forum for an institutional approach, since the health care sector is governed

through an elaborate network of interrelated private associations and public agencies that accredit institutions, credential professionals, allocate hospital staff privileges, set standards of practice, insure patients against medical expenses, and the like. The health care arena also involves leading-edge issues of law in areas as diverse as antitrust and bioethics.

There are two main methods of proceeding in designing a health law course. The first, which has been standard, has been to organize the course as an exploration of those areas in which courts have decided to make "law" to govern the behavior of health care providers.[13] In such a course, hospitals, nurses, and doctors are seen through a set of vignettes narrated by judges. The vignettes may lead to judicial discussion of malpractice liability, or the allocation of hospital staff privileges, or price-fixing among doctors, or the like; but the topics selected for discussion are those that have found their way into appellate opinions. The health care institutions themselves are in the background.

The other method of designing the course, which I prefer, is to approach the health care institutions as an interlocking system of private and quasi-public governments, with their own purposes, intra-industry relationships, dispute resolution forums, and decisional standards. From this vantage point, health care providers' encounters with the judicial system are experiences with an external sovereign; judicial standards are foreign elements to which internal adjustments must be made. The institutions' need to deal with judicially imposed medical malpractice liability, for example, relates to their internal management problem of assuring adequate medical quality control; and the question to be asked about the current system of malpractice adjudication is whether it stimulates or retards the health care industry's own efforts to raise the quality of care. Likewise, the problem of health care financing and regulation through health insurance programs presents opportunities for students to think about designing and financing social programs that create incentives for desired performance on the part of beneficiaries and providers. The question of how far courts should go in overseeing the allocation of hospital staff privileges becomes an issue of epistemology as well as fairness: is it appropriate to ask medical people to translate their way of "knowing" whether a practitioner delivers adequate quality care into lawyers' ways of "knowing" in order to comply with courts' notions of due pro-

13. *See, e.g.*, W. CURRAN & E. SHAPIRO, LAW, MEDICINE, AND FORENSIC SCIENCE (3d ed. 1982).

cess or fair consideration? What is the strength of the legal principle that would force wholesale judicialization of the staff allocation process?

The study of decisionmaking by nonjudicial institutions presents good opportunities for students also to learn about purposive dispute resolution—that is, dispute resolution that is part of a process of management or governance, in which the most decisive considerations may be not the rights of the parties or the ordering of abstract principles considered apart from their consequences, but rather the degree to which various possible outcomes are likely to contribute to some purpose such as preserving the health of an organization or an ongoing relationship between the parties. In the staff privilege area, the hospital staff is frequently called upon to decide not so much whether the doctor seeking privileges is "qualified" but whether, knowing how he or she has performed in the past, the staff is confident of his or her ability to perform competently in the future, and to play the role within the institution that the institution desires. The problem is not one of applying standards but of predicting behavior, which is a different matter.

Perhaps the most important aspect of this kind of learning is the opportunity it provides for students to imagine themselves playing roles in decisionmaking under the normal conditions that obtain in nonjudicial settings, in which the information available to the decisionmaking process is less abundant in quantity and less circumscribed in type than the information typically made available to courts, and the decisionmaker must bear the cost of gathering the necessary information and the risk of making an erroneous decision on inadequate information. Finally, the study of decisionmaking in purposive institutions would help students to appreciate the difference between exercising retrospective judgment, that is, allocating praise, blame, gain, or loss arising out of past actions, and exercising prospective judgment, that is, making predictions of future events and recommendations for future courses of action.

At the bottom of all of this, my interest is in having law students gain respect for the intelligence exercised by responsible persons who are not lawyers. Because the courts have the last word, and because the judgments they render are based on sometimes painstaking analysis of past events, it is too easy for law students who are immersed in court decisions to assume the role of critic. Legal analysis is characteristically negative and critical, sometimes in picayune respects, leading students to believe that the smartest person is the person who most success-

fully identifies the defects in the other person's argument. Negative judgment taken at leisure without responsibility is, however, a great deal easier to exercise than positive judgment made under pressure with responsibility;[14] law students see too much of the first and not nearly enough of the second, though much of the judgment that they themselves will have to exercise in their professional careers is of the second type. If I have a central purpose in making these suggestions, it is to get law students out of their enforced passivity and into the mode of exercising active intelligence while they are still in law school. At least, we could start them more securely on the road to professional competence.

14. *See* Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1 (1984).