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LAW SCHOOL: A MORTUARY FOR POETS AND MORAL REASON

DAVID R. CULP*

The study of law will train you for many different fields, but it will not train you to embark upon one endeavor: It will not equip you to become a poet.

At Columbia University Law School on an oppressively hot August day, Professor Jack Kernochan greeted approximately 150 first year students in his Legal Methods section with the statement quoted above. In doing so he struck upon a subject which has received little attention: the extent to which legal training represses or increases an individual's creative powers. This article partially focuses on that subject, on the effect legal education has on the ability to think and write creatively, not only as a poet and novelist but as an attorney serving her¹ clients. It is, of course, not suggested that the purpose of the law school is to turn out poets, but to the extent that the article touches upon whether law schools are graduating rigid technicians, or attorneys who bring a measure of creativeness to the solution of their clients' problems, it focuses upon a proper subject of legal education. A major thrust of this article, however, has a broader vision, focusing on how we, as attorneys, become indoctrinated into the "legal culture" and the effect of that assimilation on our personalities and our sense of morality.

In the 1970s Duncan Kennedy and Paul Savoy² were two of the principle legal scholars that led attacks on legal education, noting the stifling effect of the Socratic method and the psychological toll it takes on students.³ Students shared in the assault.

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1. Unless "his" or "her" refer to a specific person, the use of "his" or "her" is meant to refer to both sexes.

2. Professor Kennedy is a Professor of Law at Harvard University, and Professor Savoy is a Professor of Law, University of California at Davis.

3. See Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOCIAL ACTION 71, 85 (1970); and Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 460, 484 (1970).

Robert Stevens, in a study conducted in 50 interviews with the Yale class of 1972, summarized some of his findings:

[S]tudents who seem to obtain positive reinforcement of their classroom performances from professors appeared to some of their peers to have done so by mechanical learning alone. Imagination and creativity, supreme achievements by most educational standards, seem to have been demoted in favor of attaining legal tools.⁴

Five of 50 respondents interviewed after their first ten weeks of law study objected to the traditional method of teaching in law school based on its failure to encourage creativity. Stevens notes: "Perhaps this feeling of lost creativity wanes in later semesters; but the reaction after ten weeks of law school is significant."⁵

Student attacks on the law school have more often focused on the abuses of the Socratic method and the effect of legal training on the students' personal lives and relationships with people outside their chosen profession⁶ than it has lost on creativity. For example, Sonia Mentchifoff, law professor and dean, advised wives of first-year male law students that their husbands' personalities will become "more aggressive, more hostile, more precise, more impatient."⁷

Although writers have more often focused on the effect of legal training and the Socratic method on the students' personal lives, other observers of the law school experience, in addition to Stevens and his studies, have noted the lack of creativity in the study of law.⁸ Thus, in a study done in 1975-76, students report-

4. Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 561, 610-11 (1973).

5. *Id.* at 640.

6. See Anthony J. Mohr and Kathryn J. Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 405 (1973). Among comments made by students in the Mohr & Rodgers article are the following. One student talked about the way law school has changed his interactions with others, that when he listens to people he picks out the major flaws. "I listen to people I've known since I was a child, and yet it is with a completely different set of eardrums. . . You become impersonal; I'm very troubled by it." *Id.* at 413.

Another stated: "I see people now who knew me when I was in college. They don't know me anymore! My mind has changed. I find myself in a conversation picking out the facts and if they don't hang together, I ask the probing questions that slice up somebody's psyche." *Id.* at 413.

7. Audrey J. Schwartz, *Law, Lawyers and Law School: Perspectives from the First Year Class*, 30 J. LEGAL EDUC. 437 (1980).

8. "A law student at the University of Wisconsin, after a series of in-depth interviews with first year law students, tentatively concluded that the 'century

ing on their law school experience stated that "they were more articulate, smoked more; but felt they had lost some of their spontaneous common-sense; and were less creative."⁹ Some have asserted that the Socratic approach and the case method exalts "criticism over imagination."¹⁰ And another has noted that "[i]mpressionistic studies of law school have identified a narrowing of interests toward the analytic skills used by practitioners and away from a broader concern with social values and creative use of intelligence."¹¹

Despite the dearth of creativity in the study of law some have noted that legal training appears not to have harmed an impressive list of attorneys who have become men of letters, including John Galsworthy, author of the *Forsyte Saga* and the recipient of the Nobel Prize for literature in 1932. Two poets were Harvard law graduates: James Russel Cornell, an 1840 graduate, wrote poetry "in order to forget law which he could not stand,"¹² and Archibald Macleish, who graduated in 1919, practiced law for four years, and has since won two Pulitzer Prizes for his poetry. Other eminent writers include Erle Stanley Gardner, a practitioner in Ventura, California and creator of Perry Mason; Arthur D. Voekler, who was a justice of the Michigan Supreme Court for three years and authored the murder mystery *Anatomy of a Murder* under the pen name Robert Traver; and of more recent vintage, John Osborn, Jr., the law student who wrote humorously and chillingly of the perils of the Socratic method and competition at Harvard Law School in *Paper Chase*, and Scott Turow who has written two novels about the legal profession, *Presumed Innocent*

old method of legal instruction. . . causes unnecessary stress and underachievement. . . [and that] testing procedures already employed deprive the profession of creative, energetic and valuable personalities." Savoy, *supra* note 3, at 444, n. 4 (citing Lawrence Silver, *Anxiety and the First Semester of Law School*, WIS. L. REV. 1201, 1218 (1968)).

9. James B. Taylor, *Law School Stress and the "Déformation Professionnelle"*, 27 J. LEGAL EDUC. 251, 259 (1976).

10. Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School*, 13 LAW & SOC'Y REV. 11, 14 (1978).

11. Thomas A. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 338 (1981).

12. Lewis L. Laska, *You Mean, He Was a Lawyer?* 78 CASE & COM. 36, 40 (July-Aug. 1973).

and *The Burden of Proof*, as well as a book, *1L*, on his experiences as a first-year student at Harvard Law School.¹³

At first blush, that the legal profession has cranked out a number of good fiction writers does not seem surprising. Both the attorney and the novelist rely on their ability with words and the use of the English language for their livelihood. That some lawyers become literary writers does not, however, provide much insight into the question this article poses any more than a few student criticisms offer an answer, and we turn hopeful to more fruitful inquiry.

Researchers have adopted definitions of creativity which include such terms as original, unique, novel, and imaginative.¹⁴ Under such definitions the response must at least be unusual, and it should be appropriate to the situation.¹⁵ This definition is a *qualitative* one, and it is not our purpose to study creativity by making decisions on how imaginative the end "product" is; a focus of this sort would raise more questions than can be answered. The focus, instead, is on the *process* of creativity, on how creativity takes place, on the conditions that foster it, and on the type of personality that is more likely to be creative.

In defining the creative process, Maslow¹⁶ and other psychologists¹⁷ have distinguished between primary creativeness and secondary creativeness.¹⁸ Primary creativeness is the inspirational stage, where the individual allows himself the freedom to think wild thoughts, to fantasize, to let loose, and to be a little crazy. This primary stage must be separated from the working out and the development of the inspiration. This is so because the latter phase stresses not only creativeness but also relies very much on just plain hard work and discipline. The secondary kind of creativeness, the creativeness "which results in the actual products, in the great paintings, the great novels, in the bridges, the new inventions, and so on, rest as heavily on other virtues; stubborn-

13. For a more complete listing and many surprises, see Laska *supra* note 12.

14. See Robin Yeamans, *Creativity and Legal Education*, 23 J. LEGAL EDUC. 381 (1971).

15. JACOB W. GETZELS & PHILIP W. JACKSON, *CREATIVITY AND INTELLIGENCE - EXPLORATIONS WITH GIFTED STUDENTS* 128 (1962).

16. See ABRAHAM H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* (Stuart Miller ed., 1971).

17. See, e.g., ALEXANDER F. OSBORN, *YOUR CREATIVE POWER, HOW TO USE IMAGINATION* 92 (1940); GEORGE SHOUKSMITH, *INTELLIGENCE, CREATIVITY AND COGNITIVE STYLE* 104, 142 (1970).

18. MASLOW, *supra* note 16, at 59-60, 83, 86-89, 94.

ness and patience and hard work and so on; as they do upon the creativeness of the personality.”¹⁹

In the primary stage, one needs to improvise on new insights and, for a moment, not worry about what becomes of it, recognizing that many ideas will eventually be discarded. The primary process is non-intellectual, non-judgmental. It is a letting go, a fascination with the matter-in-hand, a getting lost in the present and a detachment from time and place.²⁰ It calls for one’s total attention and absorption. To the extent that one becomes self-conscious in a situation, one’s capacity to think creatively becomes stifled. For this reason, small children are generally much more creative than adults; they are more natural, more playful and less critically aware of themselves.²¹ “This kind of creativeness is [that which] any healthy child had which is then lost by most people as they grow up.”²² Most people as they grow older give up their poetry, their flights into imagination and drown all healthy childness. Although this maturity leads to what we call a “good adjustment,” and what has been described as getting along well in the world- being realistic, having common sense, and taking on responsibility, certain aspects of these adjustments involve a turning one’s back on other parts of the personality, such as emotion, fantasy, and childishness, which heighten creativity.²³

In the primary stages of creativity, one must be capable of brainstorming and entertaining wild thoughts. Every really new idea looks crazy at first. Similar to a child, one must allow oneself the freedom to be unrealistic, undisciplined, unscientific, speculative, and uncritical. There must be an ability to play with ideas, a “resistance to idea reduction.”²⁴ Judgment and rules of logic are not applied at this time. Osborn’s theory concerning creative problem solving placed imagination above judgment and encouraged free association of ideas.²⁵ If you attempt to become rational and controlled and orderly in the first stage, you will never be creative. You must be capable of free association, of letting ideas “come out on the table, in profusion, and then only later

19. *Id.* at 60.

20. *Id.* at 61-62.

21. See, e.g., VIKTOR LOWENFELD & W. LAMBERT BRITAIN, CREATIVE AND MENTAL GROWTH, 187-88, 216 (6th ed. 1975); MASLOW, *supra* note 16, at 64.

22. MASLOW, *supra* note 16, at 94.

23. *Id.* at 86.

24. CREATIVITY: PROGRESS AND POTENTIAL 22 (Calvin W. Taylor ed., 1964)[hereinafter CREATIVITY].

25. See generally OSBORN, *supra* note 17, at 92.

on, tossing away those ideas which are bad, or useless, and retaining the ones which are good. If you are afraid of making this kind of crazy mistake, then you'll never get any of the bright ideas either."²⁶ Maslow describes the primary processes as very, very different from the laws of common sense, good logic, of what the psychologist calls the 'secondary processes,' in which we are logical sensible and realistic."²⁷

With its emphasis on rationality, logic, and critical analysis, legal training closely approximates a description of the secondary process of creativity. It does not approximate the primary process. I do not know of a law school class that allows such flights into free association, into bringing forth all the ideas on the table before subjecting them to critical analysis. In legal training the critical analysis starts immediately, and the imagination is not allowed time to roam. Psychologists have noted the clash between the judicial mood and the creative.²⁸ Unless properly coordinated, each mars the working of the other. The tendency, however, is to criticize too soon, thus seriously threatening creative effort.²⁹ Lowenfeld believes that "adults, because of their critical awareness toward their imaginative activity, generally lose their creative ability."³⁰

The dichotomy between critical thinking and primary creative thinking is noted by Osborn. "[T]he mood for judicial thinking is largely negative. 'What's wrong with this? . . . No, that won't work.'"³¹ In contrast, the primary process of creativity calls for a more positive attitude. Experiments have been conducted which show that a positive or "constructive attitude" toward prior information compared with a "critical" attitude toward prior information compared with a "critical" attitude produced solutions, on both related and unrelated problems, which were rated significantly more creative.³²

26. MASLOW, *supra* note 16, at 94.

27. *Id.* at 86-87.

28. OSBORN, *supra* note 17, at 91.

29. *Id.* at 88, 90.

30. LOWENFELD & BRITAIN, *supra* note 21, at 188.

31. OSBORN, *supra* note 17, at 91.

32. CREATIVITY, *supra* note 24, at 125. Taylor also discusses the experiments that Torrance and his associates have conducted at the University of Minnesota. The researchers concluded that "students who read research articles creatively excelled those who read research articles critically, in the quality of their original projects and in their ability to make creative applications of the subject matter of the course." *Id.* at 124.

Nowhere is this critical, negative attitude more prevalent than in a law school classroom. Most law students develop a reluctance to place their ideas before the class until they have very cautiously and carefully already considered as many counter-arguments and possible qualifications as they can. They fear the risk of subjecting their ideas to the ridicule and critical analysis of their peers and their professor.³³ Relying too much on reasoning and attempts at perfection also results in caution among law professors and may cause atrophy of creativity as well. Stone claims a "startling lack of productivity [among law professors] if one measures productivity by quantum of written work . . . they almost all suffer from an occupational malaise. They have internalized a legal standard of perfection which requires that they anticipate every possible counterargument before they advance a positive thesis of any sort."³⁴ This norm discourages innovation which risks provoking criticism and produces an intensely conservative atmosphere.³⁵

Former Harvard Law Dean Griswold mirrors Stone's analysis, arguing that, as a result of legal training, excessive thoroughness becomes a fetish: "[i]n its impact on professors it leads to the legal academic disease which involves excessive caution, with resulting inability to bring things to a conclusion for fear that there might be some error in detail, which in much academic thinking has become the deadly sin."³⁶ Stone and Griswold were not addressing themselves to the effect this norm of perfectionism has on creativity. Is there an effect?

Gifted fiction writers are not necessarily any more productive than the gifted law professor. Joseph Heller, author of *Catch 22*, waited 13 years to publish his second novel, *Something Happened*.

33. See Glenn Stover, *Kennedy's Classroom a Model of Humanized Legal Education*, HARVARD LAW REC., Dec. 1, 1972, at 8. Stover talks about the hostility at Harvard and the fear "of venturing an incompletely formed thought. *Id.* at 8. He states that students are afraid of taking risks due to "the rapier-like criticism that is expected to follow student rejoinders" on class questions. *Id.* at 9. This atmosphere conveys to students "that they are unworthy to make comment without elaborate equivocation. It leads to the frequently heard and carefully constructed 'on the one hand, . . . on the other hand arguments. It also leads to the disastrous drop-out and freeze-up of large segments of students who do not care to put their ideas under the knife." *Id.*

34. Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 403 (1971); accord Kennedy, *supra* note 3, at 88.

35. Stone, *supra* note 34, at 404.

36. Erwin N. Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 299 (1967).

In the interval, besides working on his novel, he wrote a play, *We Bombed in New Haven*, which took two and one half years to write. Even if Stone and Griswold are correct in their analysis, and this author thinks to a large measure that they are, they have not proven that the creative processes have atrophied along with productivity. No attempt has been made to suggest that creativity is based on superficial thinking.³⁷ In one sense, attempts at thoroughness and perfection would be very beneficial in polishing and honing the final product. It would be invaluable in the secondary process of creativity.

Although this meticulous, painstaking care can be beneficial in the secondary stage, it may inhibit the primary processes from functioning. The intellectual cautiousness of attorneys described by Stone and Griswold is partially a product, as they suggest, of the fear of having their ideas subjected to the knife in class, and for a similar reason Stone describes professors as cautious. This dread of external evaluation by others in turn leads to a reserve in taking intellectual risks. The ability to take risks and an internal focus of evaluation are two characteristics which psychologists find necessary for creative functioning.³⁸ To the extent that the Socratic method fosters external evaluation,³⁹ and legal training causes one to be overly careful, to see all sides of the issues, to leave no stone unturned in one's analysis, they may also inhibit risk taking. Many professors using the Socratic method prefer to remain neutral in class. So that students will develop their own standards of judgment, every student's reply and question is greeted with another question.⁴⁰ And yet it is paradoxical that the use of the Socratic method in this way, since the student's ideas are subject to continuing critical analysis in class, may leave the student with no standards, external or internal by which to judge. They learn only that every idea can be qualified, every statement refined. I am not suggesting that this is a poor technique or that it is unrealistic. I am suggesting that such a tech-

37. See CREATIVITY, *supra* note 24, at 21 ("Certainly in science, and perhaps in other fields, it seems unlikely that creative or profound contributions will come from superficial thinkers.").

38. See E. PAUL TORRANCE, GUIDING CREATIVE TALENT 143-44 (1962); CARL R. ROGERS, ON BECOMING A PERSON 353-54 (1961).

39. Savoy argues that the Socratic method does foster external evaluation and states that the "roads to creativity" are "systematically dynamited in the classroom." Savoy, *supra* note 3, at 467-68.

40. Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 13 (1963).

nique leads to fear of external evaluation; even well thought out answers are continually qualified, and this does not give the student an internal evaluation system which she feels can be trusted.

Watson is one writer who questions a puristic use of the Socratic method. He notes that little overt reward is given for good performance by the use of this method: "Since most professional responses are questions, they are perceived as never ending demands, and hoped for relief never comes into sight. Such a technique runs counter to all learning theory."⁴¹ Because the student receives little feedback during the first semester,⁴² he does not understand how well he is functioning in law school, and he can only sit and wait for the return of first semester exams. If his grades are good he has been reinforced that his ideas have merit also; he is one of the gifted few who understand the myriad working of the law. If his grades are mediocre, he loses a great deal of self esteem and confidence, with a corresponding loss of trust in the validity of his own ideas.⁴³ For the student whose grades are mediocre, he or she is highly likely to begin to phase out on the law school experience and lose interest in the educational process, since the process has not reinforced the student's worth in his chosen professional field.

Creativity studies indicate that the grading and assessment processes are not conducive to the formulation of new ideas. As previously mentioned, external evaluation of one's work inhibits the creative process. Torrance stresses that people need periods in which they can learn without being evaluated. "External evaluation is always a threat and creates a need for defensiveness, and prevents some portion of the child's experiencing or sensing from achieving full awareness. What is lost is the openness that is so necessary to the production of new ideas."⁴⁴ Even though the law

41. Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 123 (1968).

42. See Mohr & Rogers, *supra*, note 6, at 416. One student noted that "[i]n law school the feedback comes at the end, and there is nothing you can correct. For this reason I think the true function of grades is to aid firms in hiring. They don't serve what I understand to be the educational notion of feedback."

43. See Kennedy, *supra* note 3, at 76.

44. E. PAUL TORRANCE, *EDUCATION AND THE CREATIVE POTENTIAL* 57 (1963); accord Ralph J. Hallman, *Techniques of Creative Teaching* 1 J. CREATIVE BEHAV. 325, 326 (1967). LOWENFELD & BRITAIN, *supra* note 21, at 216 ("Only the child produces in a straightforward fashion, projecting this total personality into his work without inhibitions. The adult usually wants to conform to certain standards. These standards do not exist for the child. It is for this reason that

school student is normally graded at the end of the semester, the final examination is a pervasive threat and one not easily forgotten. Students listen half-heartedly to their classmates and then take notes furiously when the professor speaks, for fear they will miss something that will find its way into an exam question. One former student⁴⁵ who made straight A's in law school said he took down virtually everything the teacher said on the theory that what the teacher thinks is important will be important for examination purposes. Although he is obviously correct, this kind of preoccupation is not conducive to generating ideas in the classroom. Instead of thinking about the problem, the student's concerns are elsewhere.

One answer might be that students do much of their thinking about the material during their preparation for class, that they generate their "new" ideas at that time. Although this statement is partially correct, for the most part it is unrealistic: Students may read the assignments for class, but except for the first semester, class preparation is not intensive. Most students are pleased if they have read the material for class, let alone sat down and really thought about the problems generated by the materials. Equally unrealistic is the view that students learn more from their classmates after class than in class, that much learning takes place in "informal" bull sessions. Students seldom find time for these informal sessions, and to the extent they do, the session is generally involved in clarifying points made in class.⁴⁶ That students may learn from these informal sessions is clear. That the sessions are turned into intellectual flights concerned with new approaches to the law, I think unlikely. The competitive atmosphere of most law schools, even the smaller law schools, is

the child gives us a true picture of himself. The more the child becomes aware of external standards, the less will his work directly reveal his personality.").

45. The student's name is John "Topper" Johntz, Jr. In four years at Harvard, he made one "B", and is the only student to have graduated from Kansas University Law School with all "A's".

46. One student, Michael Sirkin, a 1972 Columbia Law graduate, offers a different explanation:

On orientation day three years ago, the Dean said that most of what we would learn would come from our fellow students. That was the last we heard of that. In the first semester people helped each other. We talked about the law and worked through cases together. But after the first set of grades appeared, all people would do is fight to see who got the book first and hid it the longest. The grades created an elitism and people began to weigh their own advantages. Mohr & Rogers, *supra* note 6, at 420.

intense,⁴⁷ and students grub for grades as much in Poverty Law as they do in Corporations and Federal Income Tax.⁴⁸ The competition and the fear of the almighty evaluator, the grade, cripple creative functioning in the classroom. At Yale, students believe that the move to a credit-fail system in the first semester has lessened competition and had a beneficial effect in the classroom. "Students . . . credited the elimination of first semester grades with improving classroom atmosphere and allowing a freer exchange of ideas among students."⁴⁹

Grades and competition are closely, if not inseparably, inter-related. Undue competition is at least partially, if not in the main, the result of the premium placed on grades. To the extent that grading systems discourage creativity, a competitive atmosphere where one is consciously trying to outthrustle another would also lead to dampening the creative spirit. Both grading and competition are based on a common component: evaluation. As a result of one study, Adams concluded "that the related variables of evaluation and competition inhibit and are detrimental to the divergent thinking necessary for creativity productivity."⁵⁰ In his study, tests of creative thinking were administered to ninth graders in a Florida high school in three testing atmospheres: competitive; noncompetitive; and a noncompetitive, openly receptive atmosphere. The latter group registered the highest performance, and the competitive group, the poorest.⁵¹ The researcher concluded that "the competitive-evaluative atmosphere commonly found in the classroom does not allow for flexibility in thinking but requires rigidity and conformity toward *right* answers if approval

47. Kennedy describes the intensity of the law school experience as follows: The Law School *is* intellectually stimulating. But when you have been competing in dead earnest since the age of ten, submitting constantly to your own fear of the teacher's disapproval, . . . there is a point at which *is* amount of intellectual interest will overcome your fear and revulsion at the spectacle of the professor smiling quietly to himself as he prepares to lay your guts out on the floor, yet once again, paternally. Withdrawal, no matter how painful for one's carefully nurtured sense that one is 'a success' is less difficult than to submit to another time.

Kennedy, *supra* note 3, at 80.

48. Savoy, *supra* note 3, at 486.

49. Stevens, *supra* note 4, at 673.

50. John C. Adams, Jr., *The Relative Effects of Various Testing Atmospheres on Spontaneous Flexibility, a Factor of Divergent Thinking*, 2 J. CREATIVE BEHAV. 187, 188 (1968).

51. *Id.* Adams concluded that the differences in the performance of the three groups was significant. *Id.*

and reward are to result.⁵² The intensity of competition present in the conditions above are minute when compared to the competition in law school.⁵³ The grueling three-year long fight for grades and class ranking is more intense among the "better" students, but no one in law school escapes unscathed from the competitive atmosphere. "It seems safe to infer that if the small amount of competition introduced in the research situation inhibited creativity, the overwhelmingly competitive atmosphere at many law schools must utterly crush it out."⁵⁴

In the law school context, Kennedy has echoed the argument made by Adams, pointing out the similarities of pre-legal education to the law school experience. Kennedy stated that an increase in competitiveness has brought into focus a characteristic of pre-legal education: "a terrific emphasis on convergent reasoning (what is *the* right answer to this question?) as opposed to a divergent reasoning (*how many* right answers or valid approaches can you think of for this question?)"⁵⁵ In law school, the decline of rote learning is of ambiguous value, since the emphasis shifts only slightly. "(M)emorization is replaced by the investment of staggering amounts of energy in the quest for *the correct solution* which will satisfy the teacher, and in avoidance of *the wrong answer* which will provoke argument of 'ice cold indifference."⁵⁶

On balance, Kennedy argues that the change may be for the worst. Savoy has described several games that are played by professors and students in the name of the Socratic method, with the result that many students stop playing in the second and third year. Although Kennedy and Savoy wrote of the use of the Socratic method in the early Seventies, law school teaching and the use of the case method and Socratic technique remain essentially the same today as it did in the Seventies or for that matter as it did when it was first introduced at Harvard Law School in 1870.⁵⁷ It is not my desire to argue that law school should be taught in a different way. I am too old and too tired to be con-

52. *Id.* at 191-92.

53. Although the competitive atmosphere was experimentally imposed, Adams speculated that this atmosphere most closely approached the one usually found in the average classroom situation. *Id.* at 191.

54. Yeamans, *supra* note 14, at 391. This statement by Yeamans is an inference he draws from Adam's study. *Id.*

55. Kennedy, *supra* note 3, at 79.

56. *Id.*

57. Sherry L. Hartwell & Steven Hartwell, *Teaching Law: Some Things Socrates Did Not Try*, 40 J. LEGAL EDUC. 509 (1990); see Paul F. Teich, *Research*

cerned with that question, and I suspect that law schools will be using the case method and Socratic dialogue for the next millennium. I desire only to describe the Socratic process.

One "popular pastime of professors that often passes for Socratic dialogue is the game of 'Guess What I'm Thinking,'"⁵⁸ a game similar to the search for "the correct solution." This description of the Socratic method presupposes a search for the correct answer. To the extent that the teacher is not leading the students down a predetermined path, this description is inaccurate. The Socratic method takes many different forms, depending on the professor using it, and it would be incorrect to accept totally one particular description of the Socratic process. At times the law classroom is a place where many different and competing ideas are shared and argued, with little seeming attempt to converge the thinking but merely to bring out as many ideas as possible that bear on the issues. Nevertheless, students commonly answer question by stating, "I think what you are driving at." While the teacher did not always seem to be driving at any particular answer, on many other occasions he did. Used in this way, the Socratic method does lead to less flexibility in thinking. Also, to the extent the student perceives the teacher as looking for a particular solution, then the result is the same, a stifling of divergent thinking.

But competition and the Socratic method do not always presuppose a search for one answer. Competition in a classroom does, however, limit creative thinking in a different manner: it inhibits creativity by causing a fear of external evaluation by teachers and classmates, leading to less flexibility in thinking and to conformity in thought. "[C]ompetition implies winners or at least that some will achieve in excess of others and in order to determine winners or losers evaluation is necessary."⁵⁹ In a competitive atmosphere one continually wonders how well he is stacking up against his colleagues. This analysis is not the same, however, as stating that competition leads to a search for one answer.

The "examination" itself is a noncreative endeavor for the student. Law school examinations, except for the take-home, put students in a pressure cooker. Too many law school examinations are

on *American Law Teaching: Is there a Case Against the Case System?* 36 J. LEGAL EDUC. 167 (1986).

58. Savoy, *supra* note 3, at 459.

59. Adams, *supra* note 50, at 188.

four-hour exams given in three hours. The student does not have time to be creative, nor would she probably take the risk if she had the time.⁶⁰ The student writes furiously, regurgitating all of the theories and maxims culled from the classroom. While through a complicated fact situation the student must display the knowledge to apply these theories, this is not much different from applying math theorems to a new hypothetical. The creative person needs time. She produces a large number of responses to problems and continues to produce responses over a longer period than the uncreative person.⁶¹ The process of generating alternatives would continue for longer periods of time than is presently allowed during law school examinations.

Most law teachers, in deciding the amount of time needed in answering examination questions, no doubt consider how long it would take to "play-back" the concepts brought out in class. As a teacher, I certainly have often done this. But this approach penalizes those students who have thought about the problems presented in the course and have their own input for solutions. In a pressure examination, they simply will never have the time to relate their own ideas. When I was a second year law student in 1968, one of my classmates failed to complete more than one-half of a Constitutional Law final examination because he simply had so much to say about the issues presented by the course in great depth. I spoke to our law professor, who stated that he felt compelled to give my friend and colleague at least a "B" for the course simply because the questions he had answered had been so beautifully thought out.

I applaud the verve of my law student friend and admire him for charting his own course on the examination; he simply developed more responses on the issues than his colleagues. In failing, however, to finish more than one-half the questions he ran the risk of receiving a grade much worse than a "B." Unfortunately, most students in a pressure examination will have to content themselves with replaying the material presented in class. When the teacher reads the examinations, his own ideas will be staring back at him. While the exam may test those who know and understand the material, it breeds sterility in answers. From that

60. See Yeamans, *supra* note 14, at 383.

61. *Id.*

standpoint, the approach of a few teachers in recent years to give non-pressure examinations and take-homes are laudatory.⁶²

The law school affects creative functioning in other ways. First year students have complained of the fear engendered by the Socratic method. In Stevens' study of first year students at Yale in 1970, 40 of the 50 interviewees noted that law school teaching methods created classroom anxiety for themselves and others.⁶³ Twenty students reported a high level of personal anxiety, characterizing the classroom atmosphere as hostile, combative, and tense. A number of law students at Yale and Columbia have pointed to the psychological fear of being called on in class, "the fear of being exposed as an intellectual weakling in from of a lot of people you don't know."⁶⁴ One student stated that the "Socratic method basically amounts to teaching the principles of fear."⁶⁵

Others have echoed the refrain of the fear and stress inherent in the Socratic method. Professor James Taylor noted the general agreement "that emotional stress is high in law school and especially during the first year."⁶⁶ He added that students most often "cite the 'Socratic method' as the major cause of student stress."⁶⁷ One recent graduate of the University of Texas School of Law discussed the stress and fear inherent in the Socratic method: "In class we were called upon to speak before more than 100 other

62. Professor W.K. Jones at Columbia Law School has tried a novel approach to examinations, which apparently has met with student praise. At the end of one semester in his trade regulation course, Professor Jones handed out three fact situations. He told the students this was essentially the final exam and that they were to discuss the problems with others in the course. One student in his course commented on the procedure:

So after reviewing a bunch of us met and talked over the questions for several hours. I learned a tremendous amount from doing that, and apparently it worked quite well. This procedure solves two problems. It eliminates all the talk about cheating that allegedly occurs on take-home exams, and at the same time it gives you a chance to communicate with your fellow students in a very constructive manner. It is just too bad this system is not used more often.

Mohr & Rodgers, *supra* note 6, at 420 (statement by Pamela McGuire, a 1973 Columbia Law School graduate).

63. Stevens, *supra* note 4, at 640.

64. *Id.* at 641. Over half the students at Yale characterized their emotional reaction in their first year as "tense." *Id.* at 643.

65. Mohr & Rodgers, *supra* note 6, at 410 (comment by Clifton Leonhardt, a 1972 Harvard graduate).

66. CREATIVITY, *supra* note 24, at 253, 260.

67. *Id.* at 612.

students" before the "professor's assaulting questions."⁶⁸ She discusses her first day in Contracts class when the professor "promptly identified his first victim."⁶⁹ She learned that "the Socratic method of teaching meant I would be driven into a corner by my professors' endless questions in response to my black-letter answers."⁷⁰

The Socratic method of teaching, with its endless questions and never-ending demands, places the professors in charge as the power-brokers. In that climate law professors "can be aggressive with little possibility of counterattack," since "in contrast with the adversary situation in a courtroom, the professor may carry on an essentially one-sided battle, always able to be the ultimate judge and decision-maker."⁷¹ Even defenders of Socratic teaching "concede that the law faculty has 'almost total power' over the students."⁷² This power is sometimes misused, as one law professor has stated, noting that "as students and as professors we watch the verbal violence that occurs in some classrooms."⁷³

While great debates in legal journals over the use of the Socratic method have criticized, delimited, and extolled the value of the Socratic method, to the extent that fear is its byproduct, it inhibits functioning of the creative processes. The absence of serious threat to the self and the ability to transcend self-consciousness are necessary precursors for creative functioning.⁷⁴ In the anxious person adaptable cognitive processes tend to become more inflexible; he becomes more strongly fixated upon habitual modes of perception and thought.⁷⁵ In one sense this detrimental effect of the Socratic method on creativity is short-lived. The paralyzing fear that many students feel in their first semester classes does not last for most students. By the fifth semester of law school, Stevens notes that almost 75% of the students feel relaxed in

68. Margaret F. Uhlig, *The Making of a Lawyer*, 38 J. LEGAL EDUC. 611, 611 (1988).

69. *Id.* at 611-12.

70. *Id.* at 612.

71. Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 283 (1973-74) (quoting Watson, *supra* note 41, at 114).

72. *Id.* at 266.

73. Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 148 (1988).

74. MASLOW, *supra* note 16, at 61, 66; TORRANCE, *supra* note 38, at 143.

75. RICHARD S. CRUTCHFIELD, *Conformity and Creative Thinking*, CONTEMPORARY APPROACHES TO CREATIVE THINKING 123 (H. Gruber ed., 1964).

class, as compared with only 12% of the students in the first semester.⁷⁶ On the other hand, the cautiousness and critical judgment a student learns to exercise before answering questions remains an element in the classroom through all three years. In its effects, this still paralyzes the creative process.

In teaching law students to exercise "critical judgment," to "analyze," and to "think like an attorney," the law school process not only affects creative functioning but indeed exacts a toll in a different way. One of the dramatic effects of legal education is to produce a division between thought and feeling.⁷⁷ Kennedy has described two kinds of law school students. One type ends his first semester with distinctively mediocre grades, causing a loss in self-confidence and a change in attitude. The student quickly becomes a law school dropout, adopting a pose of total indifference to the law school and waiting only for the day he or she can leave school to tack up a shingle. The second type is the top quarter of the class and is likely earning her spurs on law review. The student's developing law school personality contains both a "public" and "private" self. The public self is "controlled," "modulated," and "willing to banish fluid emotional response from his face-to-face relations with a large part of the people he knows."⁷⁸ As a reaction he builds a "private" self as a counter-model. He sees himself as having "a talent for creative writing," or "an instinctive feel for music that would be incomprehensible to his classmates," or "perhaps an unprecedented warm and emotional family."⁷⁹ The two sides are diametrically opposed: The private side is emotional, and the public side, controlled. Although Kennedy feels the private side may often be as rich as the student perceives it to be, he adds that polarizing the two leads to deformations in both areas.

Law school, then, is a continual attempt to suppress one's emotions, and this has an effect (and perhaps a profound effect) on the development of the attorney's persona. In my own experience, I am not familiar with many attorneys who I could comfortably say possess both the public and private self that Kennedy describes. Often, the "control" exercised in professional life, the tendency to intellectualize everything, spills over into the private

76. Stevens, *supra* note 4, at 656.

77. See Kennedy, *supra* note 3, at 76-79; Savoy, *supra* note 3, at 470-71; Watson, *supra* note 40, at 13.

78. Kennedy, *supra* note 3, at 77.

79. *Id.* at 78.

life as well. My wife and I are both attorneys, and on some occasions, when we become heated and the tempers flare, one of us will say to the other, "Don't cross-examine me!" Our legal training to take data and construct examination questions, instead of just listening, has filtered through to our private life. When I was still a law student, I met a very outstanding trial attorney who laughingly told me that at the dinner table while his wife was talking to him he would mentally make evidentiary objections to what she was saying, noting, for example, what was admissible and inadmissible hearsay.

That Kennedy has correctly described the underplaying of emotions in legal education (and for that matter throughout the legal profession) seems clear. In law school, "[p]ersonal values and feelings are brought into rational discourse rather than acknowledged."⁸⁰ Legal education, at least in the professional role, leads to a highly controlled personality and distrust of feelings. For example, the concept drummed into law students that they must learn to "think like an attorney" is an attempt to divorce emotion from logic. This fact has been noted by others. Savoy writes: "Neither the legal tradition nor the liberal temperament, which feeds a large part of contemporary legal theory, has been very hospitable to the life of feeling."⁸¹ Education anchors a dualistic vision of a man that forces the splitting and polarization of "intellect" and "feeling."⁸² To be rational and controlled and objective is good; to be irrational, to lose your head, to be emotionally involved or subjective is bad.⁸³

Lawyers and law students are especially resistant to efforts to get them in touch with their feelings. In class, a student is openly ridiculed for an emotional reaction to a case, instead of the professor's probing for the intellectual underpinnings that form the basis for the student's strong, gut-level, soul-based reaction to the case. "Most members of the law teaching profession today believe that an emotional approach to the law is not appropriate."⁸⁴ I would agree, with reservation, that an emotional approach to the law is not appropriate. Law is an attempt at rationality, at logic (whatever those terms may mean), but without doubt emotional reactions in law school are camouflaged by an attempt to intellec-

80. *Id.*

81. Savoy, *supra* note 3, at 461.

82. *Id.*

83. *Id.* at 456.

84. *Id.* at 502.

tualize rather than acknowledge them. An emotional response to a case is verbalized through principles of logic; as such, the underlying basis for most of the law, its moral and emotional underpinnings, becomes distorted.

For example, the common law that developed in England and continues to change is judge-made law, based on what judges believed to be a "fair" or "moral" resolution of the cases before them. But what is "fair" or "moral," or "just" to one judge may not be "fair" or "just" to another, and the decisions inevitably rest on a judge's value system and less on principles of "logical" thought. For example, being "outraged," or "righteously indignant," or "emotionally involved" is often based on one's innate sense of "fairness." The reaction can certainly be "emotional," but this same search for fairness and justice is what guided the judges in forging the common law. And it continues to drive judges today. The "judge" or individual may well be able to articulate "reasons" for his/her "emotional" reaction to a given situation; in so doing, the response would be a coordination of the emotion and the intellect. And it seems to me that much of the underpinning of the law is a marriage of the emotion and the intellect. For example, deeply embedded in my legally-trained cranium is the adage, "Win the case in equity and give the judge a peg to hang his hat on." This statement, adopted by many of the same attorneys and professors who ridicule "emotion," is a recognition of the need to appeal to a judge's sense of "moral" outrage, to have him or her exclaim, "Unfair!" Thus, as a law student, I was instructed that the attorney needs to win the case on equitable principles and then give the judge legal theories so that he has a "peg" to which to hang his "emotional" or "value-laden" decision.

But the law school experience teaches students to ignore and obscure the feeling side of life, to divorce emotion from logic, as if they were incapable of peaceful coexistence. Students apparently exalt over their learning to "think like a lawyer," as if it were some special, select club and different from all other forms of rational thought. Students undergoing the experience of legal education often state that the most important skill learned in law school was the "ability to think like a lawyer [and to] reason formally and logically. . . and unemotionally."⁸⁵ In contrast, one writer noted that the

85. Willging & Dunn, *supra* note 11 at 335 (quoting Erlanger & Klegon, *supra* note 10, at 30).

concept and practice of "thinking like a lawyer" is one of the ungraspable carrots that is continually dangled in front of students. However, despite its status as one of the organizing principles of legal education, the teaching community has left the concept remarkably underdeveloped. Could this be because "thinking like a lawyer" is more myth than reality; because lawyers — and this includes the judiciary—think as . . . the rest of us; and because the only difference is in the rationalization or obfuscation, not in the processes?"⁸⁶

A glaring example of how thinking like an attorney is more myth than reality, of how values and subjective thought are rationalized away by judges and attorneys and law professors in the name of "analysis" is Justice Blackmun's majority opinion in *Roe v. Wade*,⁸⁷ in which the Supreme Court held that women have a Constitutionally protected right of privacy that, in essence, allows pregnant mothers to abort a "fetus"⁸⁸ during the first two trimesters of pregnancy.⁸⁹ In *Roe v. Wade*, Justice Blackmun tells his audience that he will decide the case by resorting to "thinking like an attorney." Thus, he writes:

One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection.⁹⁰

That sounds simply marvelous, but of course it means nothing, and Justice Blackmun decided *Roe v. Wade* not by logically and objectively "thinking like an attorney" but by calling into play his value system and his emotional and subjective base. For example, in the opinion Justice Blackmun holds that the right to privacy is a fundamental right which can only be infringed upon

86. Richard F. Devlin, *Legal Education As Political Consciousness - Raising or Paving the Road to Hell*, 39 J. LEGAL EDUC. 213, 216 n. 18 (1989).

87. 410 U.S. 113 (1973).

88. See *Roe*, 410 U.S. at 159 ("She carries an embryo and, later, a fetus"). In my opinion, Justice Blackmun uses the word "fetus" throughout his analysis in an attempt to gain support for his decision and to mask the emotion involved, as the word "fetus" has an impersonal tone in comparison with discussing the abortion of "life."

89. *Roe*, 410 U.S. at 164-65 (summary of the holding).

90. *Id.* at 116.

by a “compelling state interest.”⁹¹ All well and good, but then Justice Blackmun and his judicial brethren in the majority hold that there is a “compelling state interest” to protect the “fetus” in the third trimester, since at that point the “fetus,” or child, or baby, is viable and can live outside the mother’s womb.⁹² But was the case decided on Constitutional analysis, “free of emotion and predilection”? Of course not. It would have been just as “constitutionally-correct” for the Court to hold that the state has a “compelling state interest” at the moment of conception,⁹³ since at that point human life begins and the embryo has all the genetic characteristics he or she will ever have.

In regard to Justice Blackmun’s “viability” argument (that there is a compelling state interest only when the fetus can live outside the mother’s womb), the fact is that a seven month old fetus, or for that matter, a new-born or a one year old, can live outside the mother only with the aid of others. Just as a two-month old fetus need the nourishment from the mother to survive, similarly a fetus in the last trimester can survive outside the mother’s womb only with the aid of others. The child will not be feeding himself or hunting wild game for his meals. Thus, the growth process is continual, from the moment of conception until adulthood. And Justice Blackmun could just have easily held that the state has a compelling state interest at that moment of conception, because that is the point at which human life begins and the rest is merely the maturation and growth of that tiny creature until adulthood. My point is not to argue whether *Roe v. Wade*

91. *Id.* at 155.

92. *Id.* at 163 (“[T]he fetus then presumably has the capability of meaningful life outside the mother’s womb[.]”).

93. Justice Blackmun makes the absolutely absurd argument that no one, not theologians nor doctors, can agree as to when life begins, that “conception” is a process over time. *Roe*, 410 U.S. at 160. He then argues that the morning after pill proves his point. *Id.* at 161. But of course the morning after pill is unnecessary unless one is pregnant and life has begun. The point of the morning after pill is to kill the fertilized egg. Justice Blackmun mischaracterizes his argument. We know that life begins at the moment of conception, as at that point that tiny organism has all the genetic characteristics he or she will ever have. It is not “conception” that is a process over time, but maturation and growth. “Conception” is the moment in time when we say the woman is “pregnant,” if she is not carrying “life” at that point, what is she carrying, something “dead”? It is maturation and growth that takes place over time, from the moment of conception through birth to adulthood; that whole continuum is a matter of maturation and growth, but to say that we do not know when life begins seems to be an ingenious argument designed to mask and obscure.

was wrongly or rightly decided, but only that Justice Blackmun and his brethren made their decision based on their value systems and their subjective and emotional reactions to abortion. "Thinking like an attorney" had little to do with the decision.

And yet attorneys invariably pride themselves on the ability to divorce logic from emotion and to "think like an attorney." While observers of the law school and professional experience have noted this gulf or polarization that occurs between logic and feeling in law, Watson explains why the polarization takes place.⁹⁴ The typical first year law student plunges zealously into learning about the law. He eagerly prepares for class, usually studying long and arduously. In class, however, "regardless of how well he presents his material, the teacher will inevitably ask more questions that either directly or by implication indicates that he does not understand the case."⁹⁵ Even for a student who has done an excellent job of dealing with the questions put to her, she has little tangible evidence of this fact. Though it takes some time to make full impact, the students become progressively confused and panicked by their awareness that they do not know what is being demanded of them nor how to meet the pressure. As a result of the anxiety produced by this process, students are forced to make some kind of psychological defense adjustment to avoid and diminish ongoing pain.⁹⁶

The anxiety-muting defensive maneuvers, instead of settling on the specific stress situations of the classroom, will be generalized progressively to block emotional awareness. Many law students will progressively surround themselves with a suit of armor that makes them more and more impervious to emotional aspects of most, if not all, situations.⁹⁷

Watson is describing one factor that leads to the emotionally depleting law school experience: the continuous and powerful motivation for erecting psychological defenses as a result of the extensive use of the case method, with its attendant pressures. Kennedy and Savoy describe, as a second factor, the traditional approach in legal instruction to exalt rationality and stifle emotional feelings.

This gulf between "feeling" and "logic" not only permeates the law school and professional experience, this constriction in the

94. Watson, *supra* note 40 at 13.

95. *Id.*

96. *Id.*

97. *Id.*

range of emotional experience and a resulting over-intellectualization are also negatively related to the processes of creativity.⁹⁸ Studies of creative people have shown them to be more open than most to the whole range of experience, to their feelings and emotions; they tend to be more intuitive, more feeling than thinking.⁹⁹ This does not comport with the law school (or professional) experience.

Stone appears to accept the premise of Kennedy and Savoy that legal education divides rationality and emotion. He answers by explaining that the same criticism has been levelled at the medical profession;¹⁰⁰ his own observations of current graduate school socialization experiences suggest to him "that Kennedy and Savoy have been too ready to accept phenomenon as unique to legal education which are in fact fairly general."¹⁰¹ We can further expand Stone's analysis: The phenomena is not only common in other graduate school programs but is part and parcel of our whole educational system. A.S. Neill, author of *Summerhill*, indicts most educational systems: "Such an education almost surely ignores the emotions of life. Only the head is educated."¹⁰²

Another leading educator, John Holt, adds that public education in the United States stifles the creative capacity of children.¹⁰³ In fact, Torrance states that "many of the children who stand out as highly creative in the second and third grades, especially boys, will not be highly creative as fourth graders."¹⁰⁴ Many highly creative children will simply never survive to be creative adults. From kindergarten on, imagination and reason are held in conflict with each other.¹⁰⁵ While many experiences of the child may lead to a retardation of his creative powers, including his peer relationships outside the classroom and his interaction with his immediate family, the educational process adds to the toll.

98. See TORRANCE *supra* note 38, at 66-67, 82; CRUTCHFIELD, *supra* note 75, at 125.

99. See FRANK X. BARRON, I.Q., PERSONALITY AND ORIGINALITY 241 (1963) (Barron's description of the creative writer).

100. Stone, *supra* note 34, at 422-23.

101. *Id.* at 425.

102. ALEXANDER SUTHERLAND NEILL, *SUMMERHILL: A RADICAL APPROACH TO CHILD REARING* 100 (1960).

103. See JOHN HOLT, *HOW CHILDREN FAIL* 208 (1964).

104. TORRANCE, *supra* note 38, at 76.

105. *Id.*; accord Savoy, *supra* note 3, at 461. Savoy believes our educational systems split "intellect" and "feeling" and encourage people to experience life in substantially the same way as everyone else.

But legal education is not just one more brick that walls off creativity. In law's heightened sensitivity to rational thought and rigors of logic, and corresponding insensitivity to emotions, its costs are likely greater.

A separate question that may be asked is whether in the study of law emotion and logic should be integrated. The question is how much emotion a lawyer can handle optimally while performing her professional work objectively and efficiently. One recent graduate, for example, has stated that in law school, "I learned that it would be my responsibility to represent my clients zealously, whether or not I believed they were right. . . and realized it was not my job to judge."¹⁰⁶ While I do not necessarily agree with the student's assessment, in that we are not just hired guns and whores,¹⁰⁷ perhaps lawyers and doctors, as well as some other professionals, need a certain amount of psychological armoring.¹⁰⁸ However, as Watson writes: "[i]t seems clear . . . that we have gone too far in the armoring process. Whatever the ideal balance may be, we can surely develop a greater sensitivity for emotional problems than is being encouraged and utilized in contemporary law students."¹⁰⁹ Moreover, whether or not there should be greater integration of the emotion and the intellect in law school, the allure to integrate is detrimental to creative functioning.

Not every facet of a legal education, however, is harmful to creative functioning. Hopefully, three years of legal training make one more verbally fluent with an increased ability to conceptualize, both of which are affirmatively linked to creativity.¹¹⁰ The creative person has also been described as possessing a desire to excel, having determination, being energetic, industrious, thorough, and unwilling to accept anything on a mere say-so.¹¹¹ Three years of law school surely make one more thorough and questioning than before he or she entered, and the other characteristics named would seem to describe most lawyers. Thus, in one aspect

106. Uhlig, *supra* note 68, at 616.

107. One attorney I have litigated against one day said that as attorneys "we are all whores." To the extent that other attorneys also feel this way, it is a sad commentary on our profession.

108. Watson, *supra* note 41, at 218, 241.

109. Watson, *supra* note 40, at 14.

110. See BARRON, *supra* note 99, at 218, 241.

111. CREATIVITY, *supra* note 24, at 20; see also TORRANCE, *supra* note 38, at 66-67.

law school makes the student more perceptive than before. He or she certainly sees with different glasses.

This different perception and increased awareness may be helpful in one sense; a creative writer or poet is one who perceives things more sharply than the average person. Yet the difference between the creative writer and the attorney is that the creative writer perceives with a total awareness, while the attorney wears blinders. One aspect of the attorney's personality, the rational, logical part, becomes sharply sensitized, while he becomes blinded to a second part of his awareness, his emotional sensitivity. In some ways the attorney is more perceptive, in other ways, less. Legal training would be of greatest help to creative functioning in the second stage of creativity, where the emphasis is on critical evaluation, determination and thoroughness. Legal education, for the most part, is not conducive to the primary stage of creativeness. The competition and grading systems, the focus on an external evaluation system, the constant critical evaluation in law school, and the tendency to divorce thought from feeling all are inconsistent with the proper functioning of the "idea stage" of creativity. The short three years of law school is a noncreative experience.

The implication of the arguments that have so far been made is that people are less creative after three years of law school than when they first heard the law dean's welcoming speech to their freshman class. It could very well be that law school actually has little effect on the creative potential or personality of the person entering law school, that those who choose law as a profession are not usually very creative people. In one study on creativity, it was found that the lowest risk scores among college sophomores at the University of Delaware were those who were undecided about their vocational choice;¹¹² the researcher concluded that indecision and risk-taking involves making decisions on the basis of inadequate and incomplete information.¹¹³ Since risk-taking is one aspect of creativity, implied in the results of the study is that those students who are unable to make vocational choices may be less creative. Law school for many is a means of keeping career options open and "attracts many who are still undecided about their vocation."¹¹⁴ That law school for many is a means of avoid-

112. See TORRANCE, *supra* note 38, at 75.

113. *Id.*

114. Stone, *supra* note 34, at 392, 400. Edward Levi and David Reisman have characterized law as a "career for the uncommitted." It is a career that preserves

ing a decision about a vocation has been documented in studies comparing law and medical students: "Law students generally decide on their career later, have more ambiguous role models, and are much less sure even when they reach law school that they will in fact become lawyers."¹¹⁵ The correlation between the study of creativity and the law student personality is tentative, but may offer some insight.

Other studies have shown that the noncreative person is "more anxious, insistent on securing a safe and stable environment, desirous of avoiding ambiguity and uncertainty at any cost."¹¹⁶ Those persons having higher originality appear to feel less need for discipline and orderliness.¹¹⁷ By contrast, Watson, in discussing the psychodynamics of legal education, has found among law students a greater than average need for order and security, a factor which plays a critical role in their functioning both in the academic environment and later in their professional lives.¹¹⁸ Additionally, at least two legal scholars believe that law students develop an intolerance for ambiguity and are afflicted with indecision and self-doubt.¹¹⁹

Studies have been made of the vocational choices of creative people. In studies of adolescents 62% of the group listed as creative chose such unconventional occupations as adventurer, inventor, writer and the like.¹²⁰ Only 16% of the highly intelligent but noncreative people chose such professions, while 84% of the latter group "chose 'conventional' occupations, such as doctor, lawyer, engineer."¹²¹ Whether the students eventually went into the profession they named is unknown. A separate study showed different results. A finding obtained in a study of graduate students

options rather than requiring them to be taken up. David Reisman, *Observations on Legal Education*, 1958 Wis. L. Rev. 63, 65 (1968).

115. Stone, *supra* note 34, at 400.

116. CRUTCHFIELD, *supra* note 75, at 135.

117. ROGERS, *supra* note 38; *see also*, *e.g.*, TORRANCE, *supra* note 38, at 66-68.

118. Watson, *supra* note 41 at 101. Stone has further expanded on the identity problems of law students. He states the one unfortunate aspect of traditional Socratic teaching is its reliance on challenging the value system and moral assumptions with which students approach the law. This approach "is seen as a serious threat to convictions which are central to the students' personal identity." With the student's occupational identity unresolved and his values attacked by the professor, the result is a loss of security. Stone, *supra* note 34 at 415.

119. Kennedy, *supra* note 3, at 75; *see also* Savoy, *supra* note 3, at 484.

120. *See* TORRANCE, *supra* note 38, at 54-61 (citing Getzels and Jackson studies from 1958-61).

121. *See generally id.*

and repeatedly confirmed in investigations of other groups showed that individuals who rated high on "originality" reveal a characteristic pattern of scores on the Strong Vocation Interest Blank.¹²² The more original subjects, with slight variations from sample to sample, rate high on such scales as architect, psychologist, author-journalist, and specialization level;¹²³ and low scores on such scales as purchasing agent, office person, banker, farmer, carpenter, veterinarian policeman and mortician.¹²⁴ MacKinnon interprets these findings as indicating that creative individuals are less interested in small details and the practical and concrete aspects of life, and more concerned with meaning, implications and symbolic equivalents of things and ideas.¹²⁵ The highest values stressed by all the highly creative groups are the theoretical and aesthetic scales.

What all this means is impossible to determine without studies directed specifically at attorneys. One study directed to attorneys provides evidence, however, suggesting that people prone to intellectualizing approaches are drawn in disproportionate numbers to legal study, and once in law school are least likely to drop out; of the "thinking" types, 11 per cent dropped out compared to 20 per cent of the "feeling" types. What this means in terms of creativity is not entirely clear, and whether one who enters law school is necessarily less creative than other groups remains unknown. On the one hand, attorneys seem less interested in the practical and concrete aspects of life and more concerned with the abstract world of concepts, ideas and values. By the same token, attorneys seem much more creative than bankers and farmers and generally less creative than architects. Although some legal scholars have stressed the need of law students for order and security, what quantitative effect these traits have on a creative functioning is impossible to determine. A further problem is that psychologists are not in full agreement on the necessary factors in the personality that enhance creativity. In fact, Shouksmith suggests that, just as creative products may differ in level and in kind, "so may different personalities be regarded as being poten-

122. The study was conducted by MacKinnon in 1960 at the California Institute for Personal Assessment and Research; the study is discussed in TORRANCE, *supra* note 38, at 68.

123. *Id.* The term "specialization level" was not defined.

124. *Id.*

125. *Id.*

tially creative in different ways and in different situations.¹²⁶ Although the results of one study indicate that entering law students are much more aggressive people than found in other professions,¹²⁷ no study has been done to gauge the creative abilities of the entering law student, and not even tentative conclusions can be drawn. Whatever can be gleaned from the studies and arguments by others listed above will have to be done by the reader alone. I offer no conclusions in such tenuous territory.

Just as law students generally may be more aggressive than other professional groups, entering law students may place greater emphasis on rationality and logic than others, as one study has suggested.¹²⁸ The importance the law places on these intellectual processes may well be a prime motivating factor in the student's decision to enter law school, and the student may therefore be more likely to divorce emotion from thought than the average person, even without law school instruction. The law school atmosphere and teaching, however, also force a sterile, clinical approach to law. Legal education sharpens the mind by narrowing it; "talents are turned toward relatively sterile approaches and are impoverished by the demands of a particularly emotionally depleting kind of success."¹²⁹ The over-emphasis on rationality in law school makes it unique from any other graduate school experience or educational endeavor.¹³⁰ Listening to a good legal mind at work is fascinating, as argument after argument is decimated in the face of logical analysis; it is also cold and impersonal. In a discussion of the effects of a law school education on the creative processes, the analysis must be separated into two parts: whether the law school graduate is imaginative and creative in his work as an attorney and whether he is creative in the other aspects of his life.

Even if law school is not a particularly creative experience, and the attorney not a prime candidate to win the Pulitzer Prize for literature, one can argue that attorneys, on the whole, use imagination and creativity in their work and handling of their client's problems. Griswold suggests this is not so, that again and

126. SHOUKSMITH, *supra* note 17, at 144; *accord*, CREATIVITY, *supra* note 24, at 28.

127. See Barbara Nachmann, *Childhood Experience and Vocational Choice in Law, Dentistry and Social Work* 7 J. COUNS. PSYCHOL. 243 (1960).

128. See Willging & Dunn, *supra* note 11, at 340-41.

129. Kennedy, *supra* note 3, at 85.

130. See, e.g., Griswold, *supra* note 36, at 300.

again logic is stressed in law school as the ultimate objective.¹³¹ Imagination is encouraged in small ways and perhaps in analogical reasoning, but imagination is not encouraged "to devise new premises, to start out on whole new lines of reasoning, to come up with new solutions."¹³²

What is needed is a feeling that for once a piece of doctrine will be challenged in a *new* direction rather than confronted the thousandth time with some well known countervailing principle. The law school classroom is strewn with the corpses of ideas that did not succeed, of new approaches that no one took up.¹³³

Although law exercises abortive flights into imagination and analogical reasoning, the really novel idea is quickly and emphatically shut down. Having been groomed for three years in a certain approach to the law, the lawyer is unlikely suddenly to become highly creative. Precedent and former doctrine guide much of the lawyer's work. While making policy arguments and drawing distinctions between cases involves some exercise of imagination, the exercise in many instances is more technical than highly imaginative. Although in one study Carlin found that many lawyers neither have nor feel the need for such creative skills,¹³⁴ a good lawyer should be more than a technician applying the rigors of logic and theories learned in law school.

Because of the complicated problems, value judgments, and skills involved in the practice of law, Watson asserts a very high order of creativity is essential.¹³⁵ Others have agreed with Watson. For example, a recent analysis describes six standard goals relating to legal instruction and the development of law students' abilities, and one of the goals listed was "the ability to 'synthesize' and build original legal theories, frameworks and systems."¹³⁶

131. *Id.*

132. *Id.* at 301.

133. Kennedy, *supra* note 3, at 84.

134. See JEROME. E. CARLIN, *LAWYERS ON THEIR OWN* 3 (1962). MacLeod stresses the need for creative skills for attorneys:

Aside from the possibility, of course, that a "wild" idea could trigger a practical one—even in law—in creative problem-solving, we strive for the practical ideas, but permit the "crazy" ideas for what they might lead to . . . the more ideas we have, the more likely we are to find the best ones.

Gordon A. MacLeod, *Creative Problem-Solving — For Lawyers?!*, 16 J. LEGAL EDUC. 198, 200 (1963).

135. Watson, *supra* note 40.

136. See Teich, *supra* note 57, at 167 n. 2.

Watson has argued that to move toward solutions for the many problems encountered in practice, the lawyer must have a "willingness and capacity to cast off fixed notions temporarily because they would limit the scope of his exploration and narrow the synthesis of new information. He must be able to drift freely through real and fantasied solutions to the problems, knowing in the end, he can choose the best one and apply the tough logic of legal reality."¹³⁷

Every lawyer will receive opportunities to be an engineer on many matters in his or her practice, and numerous lawyers will also have a chance at some time during their careers, perhaps in a period of public service, to try their hand at even more sweeping flights of innovation, imagination and creativity.¹³⁸ As Toffler notes in his book, *Future Shock*,¹³⁹ the increased rapidity with which technical changes are occurring in our society is causing corresponding changes and stresses in our social structures. As our society changes more rapidly, the law will also be forced to change; to keep pace, this will call for new approaches and solutions to our legal problems and will tax the creative powers of attorneys more than ever before.

On the whole, law schools may do a very good job of teaching students about substantive areas of the law, but the schools have done little to foster the blending of the students' emotions and subjective values with the intellect. In a similar manner they have done little to foster the development of morality or ethical behavior,¹⁴⁰ as can be gleaned from the graduate's statement that in law school she learned she must represent her clients with zeal, whether or not she believed they were right and that she "realized it was not my job to judge."¹⁴¹ But such teaching and such learning means that attorneys can rationalize some very unethical behavior, on the basis they never allow their emotions or values to enter into representing a client, that we are just expensive "hired guns." The concept that we are "hired guns" in intellectualization to the extreme is a complete shutting down of one's own emotional yardstick, one's value system and sense of morality. The view

137. Watson, *supra* note 40, at 5.

138. See Griswold, *supra* note 36, at 297.

139. ALVIN TOFFLER, *FUTURE SHOCK* (1970).

140. The author intends to write a second article discussing in depth the extent to which law school and the practice of law fosters or impedes one's moral and ethical judgment and behavior.

141. See Uhlig, *supra* note 68, at 616.

that we are “hired guns” and that if we want morality, we should go down the street to the school of religion¹⁴² is a disservice to the profession and fosters unethical behavior. In addition, although law schools may teach students to be rigid technicians, or “intellectual plumbers” as one student called it,¹⁴³ law schools do not foster the creative awareness of students.

Stone believes that a call to the side of creativity is displaced. Stone refutes critics of traditional legal education who argue that the law school should assist with the student’s self-actualization and proceed in an atmosphere of openness to the entire range of human experience in order to allow creativity to flourish.¹⁴⁴ Stone comments that the role of the teacher would become identical with the role of the therapist, “allowing the student-patient to get in touch with the wellsprings of creativity, his unconscious and repressed emotion.”¹⁴⁵ To perform this function properly, the teacher would have to abandon her traditional authoritarian and judgmental role, including her accouterments of testing and grading. This approach would ignore all the pedagogical advantages and group control functions of the Socratic method; it gives exaggerated emphasis on creativity in law school.¹⁴⁶

Few law students, Stone explains, will achieve a sense of creativity during their first year at law school. Creativity cannot occur until a student first masters the mass of information necessary to inform his creative efforts. “Most of professional training, but its very nature, demands the acquisition of large amounts of cognitive data. This learning task is essential to professional competence and does not allow for instant creativity.”¹⁴⁷ Mastering a series of legal cases can be an exciting intellectual challenge, but this sort of learning cannot be a discovery of something unknown to others nor can there be instantly creative experiences in this process. “The realities of a generalist professional education are

142. See Taylor, *supra* note 9, at 265.

143. The former law student, a graduate in the top twenty percent of a well respected East Coast law school, scathingly described law school as “power-broking, ball-busting, humiliating, mind-twisting and in between that, people were learning to put the pipes together. It had nothing to do with the pursuit of the truth. It is a mean-spirited plumber’s school.”

144. See Stone, *supra* note 34, at 418-19.

145. *Id.* at 419.

146. See *id.* at 420.

147. *Id.* at 421.

for most people incompatible with being creative; to suggest otherwise is a cruel hoax."¹⁴⁸

Radically changing the pedagogical approach will not alter this fact. Stone's analysis that creativity cannot flourish in a field such as law when one possesses only a superficial knowledge of that field has ample support in research.¹⁴⁹ In the second and third years of law school, however, some changes in teaching approach could promote the creative processes. For three years of one's legal education, except for a few seminars and the entrance of the clinical programs, law classes are taught in predominantly the same manner. As Stone points out, the Socratic method has many educational benefits, but not every course needs to be taught by this method. Moreover, creativity can be fostered without drastically altering the Socratic method.

The evidence indicates that lost creativity can be renewed, at least to some degree, at any age. Most studies show that "even brief periods of training and the establishment of certain optimal conditions in higher education can improve the quantity and quality of creative thinking."¹⁵⁰ Just as originality can be improved, a hostile environment threatens creativity, and law schools need to become more cognizant of how teaching methods and law school policies affect creative functioning. Removal of a grading system in the first semester, as Yale has done, or a refusal to rank students or to release grades to employers are methods some law schools have adopted. These lessen the tremendous pressure in law school, make for a more relaxed environment and facilitate the freer exchange of ideas.

If creativity is to flourish, the law school would also have to create an atmosphere that is more neutral, one that is openly receptive to creative answers.¹⁵¹ Students in the classroom should be encouraged to try out new approaches, to "think up tentative solutions to problems at hand, make wild guesses, hitchhike ideas, build on the ideas of others and point these ideas in new directions."¹⁵² The attitude of the professor has a great bearing on

148. *Id.*

149. *See, e.g.,* CREATIVITY, *supra* note 24, at 21. Taylor believes that in science and perhaps in other fields it is unlikely that creativity or profound contributions will come from superficial thinkers. *Id.*

150. *Id.* at 126. (citing studies by Mearns in 1941 and Osborn in 1957).

151. *See* Yeamans, *supra* note 14, at 385-86. Yeamans reports on studies which indicate that subjects will not respond with creative answers to neutral instructions. *Id.*

152. Hallman, *supra* note 44, at 328.

whether students will take the intellectual risk of responding with a novel idea. This is not a suggestion that law schools become less intellectually rigorous, but at times, at least, the intellectual, critical analysis should be postponed until after the class has been given freer reign to juggle improbably related events, to express theories which appear to be ridiculous, and to speculate on the basis of inconclusive information.¹⁵³ Although this approach would not be used in every class period, at times it could be used effectively.

One of the problems in studying a discipline like law is that in becoming steeped in a field one also becomes steeped in the ideas current in the field, and as a result, existing ideas tend to blind creative insights.¹⁵⁴ The suggested approach would be an attempt to jog set patterns of thinking. The approach could be used consistently with the Socratic method. As a starter, however, it requires that teachers treat imaginative, unusual ideas with more respect than is commonly allowed in many law classes. While studying law, Franz Kafka, in a letter to his father, gave his account of legal education: "(I)n the few months before the exams, and in a way that told severely on my nerves, I was positively living, in the intellectual sense, on sawdust, which had, moreover, already been chewed for me in thousands of other people's mouths."¹⁵⁵ The suggested approach is an attempt to see law through new lenses and not just from the bifocals of our past.

Another way to increase the creative potential of the law student would be to experiment with either new teaching methods in the second and third year or to change the emphasis on those already utilized. Although one mark of the highly creative person is her self-starting ability,¹⁵⁶ law students are forced to rely on the judgment of others. After the first year, students are allowed to choose which courses they wish to take and the topics for papers they will write, but the judgment for the curriculum, examinations, and number of papers is left to the teacher. Torrance writes: "It is quite possible that too much reliance is placed upon

153. *Id.*

154. MARY HENLE, *The Birth and Death of Ideas*, CONTEMPORARY APPROACHES TO CREATIVE THINKING 43 (H. Gruber ed., 1964).

155. FRANZ KAFKA, DEAREST FATHER: STORIES AND OTHER WRITINGS 181 (Ernst Kaiser & Eithne Wilkins trans. 1954) (quoting letter from Franz Kafka to his father, November, 1919).

156. E. PAUL TORRANCE, ROLE OF EVOLUTION IN CREATIVE THINKING 76-77 (1964).

prescribed curricula and we need to exercise more effort to appraise and credit growth resulting from the student's own initiative."¹⁵⁷ Encouraging and crediting self-initiated learning frees students to learn things which they are anxious to know and which they find exciting. "Generally, graduate students are too afraid to learn the things that are important to them for fear they will not learn all that they will be graded on."¹⁵⁸ As much as possible we should allow students to exercise their own initiative for their learning, to develop their own judgment.

Research papers are one way in which law students in the second and third years are encouraged to learn the material on their own and develop their own judgments and insights. Other approaches are possible; not every course in the second and third year curriculum needs to be taught by the traditional Socratic method. One suggestion is to have students share with teachers in the decision-making about courses, on both the content and manner of evaluation. This approach has been tried successfully in undergraduate courses and could hold greatest promise in seminars. In some college classes, students are allowed to make "contracts" with their instructor. For example, in a course where the professor gives three examinations and requires a paper, the student could assign any weight to the requirement as he desires; he might decide he would benefit more from doing an intensive paper, assign a weight of 70 percent to it and contract that each examination will be 10 per cent of his final grade. Because of the sheer number of students any attempt to individualize "contracts" would work better in smaller sections. In some small way, the student is allowed to place an emphasis where the student feels she will best benefit.

Other more individualized contracts are possible, to the point of allowing the student a voice in the material she will read for a course and the number of papers she will write. For example, a student could decide he would prefer to read from a selected list on different topics and write critical summaries of the material he has digested; this approach follows independent study programs of undergraduate schools. While the number of law students per professor would limit the use of this approach, it could be more frequently used than at the present time. Further, research allows students to learn subjects deeply enough so that they have

157. *Id.*

158. *Id.*

the requisite knowledge to competently toy with the materials and restructure them.¹⁵⁹ To this end, mini-courses or shortened seminars could be given, at the end of which a long research paper would be written. Nothing is sacrosanct about having a seminar meet 14 times a semester for two hours a session. The seminar could meet for eight weeks, after which the student would prepare a research paper of greater depth than the usual seminar paper. Many approaches could be tried in the second and third year to allow the student to exercise greater flexibility and initiative. Such self-initiated learning facilitates creative responses: self-activity encourages students to explore, to experiment and hypothesize. It maintains the spontaneous, self-starting quality of learning and keeps the motivational forces for learning within the individual learner.¹⁶⁰ It gives the person a chance "to proceed at his own pace, to cogitate on the issues in his own way, to play with his own ideas in his own fashion."¹⁶¹

A more direct attempt to reawaken the creative potential of law students was undertaken by Buffalo Law School. A New York attorney, Gordon MacLeod, started an eight-week, no credit course at the law school on creative problem-solving.¹⁶² The results were favorable. Eleven of the 19 students returning questionnaires said it should be a required course either in college or the first year of law school.¹⁶³ The practitioner spends large portions of his time thinking of practical ways for the client to avoid legal problems. For this reason, MacLeod believed that the lawyer who can use his imagination to come up with the greatest number of ideas for possible solutions is, after using his critical judgment, most likely to come up with the best final answer to the problem. In their answers to the questionnaires, all the students saw some relationship between the class and the study and practice of law. In fact, in the experimental group taking the course, the grades of 13 out of 20 improved, while in the control group eight out of 20

159. The suggestion of several psychologists is that one has to know his subject well in order to be creative. See, e.g., Stone, *supra* note 34, at 420; CREATIVITY, *supra* note 24, at 28; HENLE, *supra* note 154 at 43 ("Our creative thinking tends to be in fields and in relation to problems that we know a good deal about.").

160. Hallman, *supra* note 44, at 327. Hallman states that self-initiated learning is indispensable in inducing creative responses.

161. GETZELS & JACKSON, *supra* note 15, at 132 (1962).

162. For a full analysis of his study see MacLeod, *supra* note 134.

163. *Id.* at 201.

improved.¹⁶⁴ The questionnaire also indicated that the course has helped the students outside the area of the law. Sixteen found the concepts somewhat helpful or very helpful in life's activities in general. Eighteen felt the course had developed their creativity to some extent; and most of the students stated their attitudes, self-confidence and sensitivity to problems had been improved.¹⁶⁵ Courses in creative problem-solving have been conducted with other types of students, with significant effects. A study by Parnes and Meadow in 1960 has shown that the effects produced by such a course persist, at least from eight months to four years after the course.¹⁶⁶ While such a course is beneficial, the effects apparently dissipate with time, unless other environmental conditions facilitate creative growth. What, then, are the long term effects of law school on one's creative processes? Do the effects last, and do they carry over into the attorney's creative process in general, and if so, what is the loss to the self?

Arguably, in some respects the effects of three years in law school on one's capacity for the imaginative may be short-lived. From the standpoint of creativity, the law school is primarily a threatening experience. After one graduates, however, the fears of being stripped intellectually by the Socratic method are gone, the intense competition and threat of examinations are pleasantly past, and the graduate can turn his attention to his profession. If law school was an unpleasant experience (and few seem to enjoy it), the graduate has the sweet victory of knowing he has survived¹⁶⁷ and need never return. Whether the law school experience only temporarily affects creative functioning may be difficult to determine; the effects of the educational process in hampering creative functioning probably start in kindergarten, and these

164. *Id.* at 202. I cite these figures only to raise the question of whether increasing creativity affects grades. MacLeod's study is not extensive enough to be of any real benefit on the question; also, he does not state how much grades increased, whether the increase was substantial or very slight.

165. *Id.* at 201.

166. CREATIVITY, *supra* note 24, at 124.

167. See William T. Braithwaite, *Hearts and Minds*, 76 A.B.A. J. 70, 73 (Sept. 1990) ("Too much of law school as presently constituted encourages a survival instinct rather than a yearning for genuine education. This does not conduce to professionalism.").

effects are cumulative.¹⁶⁸ Few survive through graduate programs in most fields with creativity in tact.

But it seems likely that in one's professional role, the toll that a legal education takes on creative functioning does last, simply because in the attorney's every waking moment she is indoctrinated with (and buys) the theory that the attorney's intellect and emotion should be isolated from each other. The indoctrination into "thinking like an attorney" starts in law school and becomes a part of the very fiber of the attorney in her professional life. In her every waking moment, the attorney will strive to separate the head from the heart so that no one can berate her for, God forbid, not "thinking like an attorney." I cringe when I hear that meaningless phrase. The point is that we have accepted the indoctrination and think that we are members of a select intellectual club, and that our hearts are, and should be, separated from our intellect. Creativity is not likely to flourish in such an atmosphere.

In his professional life, the attorney continually criticizes, edits, picks apart, rejects and constantly evaluates. Due to the emphasis on being rational, the attorney divorces emotion from the logical thought processes and assumes they are incapable of coexistence. This approach is likely to detrimentally affect the lawyer in all his creative endeavors, whether in the professional role or as a novelist. In law, the critical judgment is exercised too quickly without giving the imagination its freedom. While an attorney's clinical, surgical approach may be very beneficial in the secondary stage of creativity, it blocks the primary stage from functioning properly. In a similar way, the division of emotion and thought deprives one from a total awareness of any situation and is not conducive to creativity.¹⁶⁹ Griswold argues that by sanctifying purely logical reasoning we "are not giving sufficient weight to other elements in the situation which are equally relevant in any truly intellectual evaluation."¹⁷⁰ The creative person tends to use all his senses in gathering data, in playing with constructs and trying out new approaches. The blocking of emotional sensitivity curbs this process.

As a result of the law school experience, as well as the subsequent interaction with attorneys after graduation, the neophyte's

168. The forces of higher education that inhibit and facilitate the development and expression of creativity appear to be cumulative. *CREATIVITY*, *supra* note 24, at 125.

169. *Id.* at 137.

170. Griswold, *supra* note 36, at 300.

indoctrination into the legal profession is likely to take a permanent toll not only on creative functioning but also on other aspects of one's life. According to Aristotle, "the most virtuous human being feels passions, pleasures and pains 'at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way.'"¹⁷¹ But in law our indoctrination into our secret cult is that we should not "feel," and I am concerned about how this mind-bending affects our functioning as attorneys and as human beings. I do not see how beings can be virtuous when they have lost the capacity to feel.

A recurrent theme of the sociology of occupations is that a man's work affects his outlook on life.¹⁷² Legal instruction teaches students to exercise rational, critical judgment and exalt logic over other values, such as emotional sensitivity.¹⁷³ These attitudes are so deeply embedded by three years of law school and reaffirmed by the attorney's every professional day that they are not likely to be severed. Stone, Kennedy and Savoy are among those who argue that legal education "is an important socialization experience which can have long-term effects on the personality, the attitudes, and the values of those who are exposed to it."¹⁷⁴

In his book, *The Legal Imagination*,¹⁷⁵ James White quotes a passage from Mark Twain's *Life on the Mississippi*, in which the narrator describes how years of being a river pilot had changed the way he defined himself and the way he "saw" the river. Although as a pilot, Twain learned every "trifling feature" and secret that the river holds, he had also been diminished: "I had made a valuable acquisition. But I had lost something, too. I had lost something which could never be restored to me while I lived. All the grace, the beauty, the poetry had gone from the majestic river!"¹⁷⁶ White suggests that learning to speak and think like a

171. Braithwaite, *supra* note 167, at 73 (quoting ARISTOTLE, NICHOMACHEAN ETHICS 43 (Martin Ostwald ed. & trans., 1962)).

172. See EVERETT CHERRINGTON HOUGHES, MEN AND THEIR WORK 42-55 (1958).

173. See Griswold, *supra* note 36, at 300.

174. Stone, *supra* note 34, at 422. Stone reiterates the assumption of such critics of legal education as Kennedy and Savoy that legal training has long term effects on personality. Stone shares in the assumption, although he points out "it, has never been adequately proven in any empirical sense and, thus, represents no more than a sophisticated psychological formulation confirmed in a n impressionistic and intuitive fashion." *Id.* at 422, n. 109.

175. JAMES WHITE, THE LEGAL IMAGINATION (1973).

176. See *id.* at 11 (quoting MARK TWAIN, LIFE ON THE MISSISSIPPI 65 (John Seelye ed. 1990) (1883)).

lawyer similarly entails both a gain and a loss, that the romance and beauty are gone from the river, and that a legal education causes similar changes, and dangers, in the way one defines himself. After one trains to see the world through the lenses of an attorney, White implies that at the end of a day or year or a decade of such a professional life, one could simply go home and be the same old fellow one always was.¹⁷⁷ "Certainly you are different from the person who came to law school not so long ago, and very different indeed from people who have never been to law school. You may find it disturbing, or elating, but your experience of education, if it is anything at all, must be an experience of change."¹⁷⁸

One law student who was elated by the changes in her life noted, "My interactions with strangers became couched in terms of potential torts, breaches of contract, or infringements of constitutional rights."¹⁷⁹ Another individual, Professor David Richards, also noted that changes occur: "Certainly, professional education transforms the identities of our students: a student in my first-year law classes is a different person than the one I teach as a third-year student."¹⁸⁰ Professor Richards argues that some of these changes are benign, and others, malignant. One malignant form is "the psychology of the Watergate lawyers for whom professionalism meant ultimate team loyalty at the expense of clear ethical obligation."¹⁸¹ The psychology of the Watergate lawyers is not in principle different from the psychology of many American lawyers for whom legal education has meant mastery of an autonomous body of law and identification with a profession that strives to be cold and impersonal.¹⁸² For in truth, "ethical behavior is much more of an emotional than a rational matter,"¹⁸³ and by striving to be impersonal, we strive to kick the daylights out of our sense of morality. "[P]rofessionalism means not detached and coldly impersonal and vacuous alienation, but the more . . . powerful fulfillment of one's moral nature and satisfaction of the appetite in life for meaning and significant service."¹⁸⁴

177. *Id.* at 21.

178. *Id.* at 43.

179. Uhlig, *supra* note 68, at 616.

180. David A. J. Richards, *Moral Theory, the Development Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 361 (1981).

181. *Id.*

182. *Id.*

183. Boyer & Cramton, *supra* note 71, at 268.

184. Richards, *supra* note 180, at 361.

The changes that occur through legal education and assimilation into the profession affect not only creativity but all aspects of one's life. In reading numerous articles on legal education, this reader has been struck by the number of times authors have considered the effects of legal education on the quality of life. Psychologists have noted the effects of repressing creative awareness: "[S]cattered evidence from a variety of sources leaves little question but that the stifling of creative desires and abilities cuts at the very roots of satisfaction in living and ultimately creates overwhelming tension and breakdown."¹⁸⁵ Law students generally have taken a broader view, expressing distress "by what becoming an attorney does to their personal lives and relationships with people outside their chosen profession."¹⁸⁶

Legal education may fair no better with students outside the law schools. At a conference on Education Reform at Dartmouth College in 1967, Savoy discovered the "feeling shared by many students that law schools are places where old men in their twenties go to die."¹⁸⁷ Legal institutions were seen as the deep-freeze of the emotional life of the university.¹⁸⁸ In the introduction to the Harvard Law Review, volume 84, the editors to the Review succinctly capture similar concerns. The editors comment that on Sunday mornings hundreds of young people gather in the Cambridge Commons. "A band plays, . . . sailing frisbees define the perimeter of the group."¹⁸⁹ In the law school, work proceeds as usual. "An editor and an author dispute the most effective way of countering a troublesome argument, drop it to a note or meet it head on in text? A quick glance at the *Sunday Times*; a cold Pepsi at eleven in the morning; a glance out the window into the Commons, and back to work."¹⁹⁰ For the editors, Cambridge Sundays will never be the same and represent a deeply disturbing realization of the gulf between life and law. The eight to ten years in which a young person attends law school and makes his or her way into partnership ranks of a firms are "years of intense and virtually exclusive involvement in acquiring the lawyer's skills of rationality and judgment."¹⁹¹ The editors acknowledge that they

185. CREATIVITY, *supra* note 24, at 52.

186. Mohr & Rodgers, *supra* note 6, at 405.

187. Savoy, *supra* note 3, at 462.

188. *Id.* at 462.

189. WHITE, *supra* note 175, at 41.

190. *Id.*

191. *Id.*

would probably not abandon their intense way of life for a home on the Commons, but they are deeply concerned by the sacrifices inherent in a diligent apprenticeship:

[Few] believe that the slow seepage of personal vibrancy which follows from single-minded devotion to legal studies is worth whatever additional skills may be exercisable upon "arrival" at the unknown point of aspiration. Not only is there no sharp vision of reintegration to sustain us, but we also wonder whether it will every be possible fully to reawaken our aesthetic and emotional dimensions after they have fallen into disuse during the long period of legal development.¹⁹²

The authors question how to "explain to newly chosen editors why they must become library fixtures at age of twenty-two."¹⁹³ Entering classes to law school are told of the rigorous, exacting and uncompromising demands law will make on their lives during the three years of law study. Usually the demands last much longer, as the Harvard editors note. The adage that the law is a jealous mistress hits dead center.

A great deal is gained and many benefits inhere in the study of law, but it also exacts a price — in time and in closing off and deadening certain parts of the personality and in destroying certain values:

[L]aw school teaches students to deal with every conceivable loss, that of an arm, a leg, five dollars, a wife — everyone, that is, but the most important, the loss of one's self, which may pass off as quietly as if it were nothing. . . .¹⁹⁴

In a passage that is appropriate to lawyers, Mark Twain, in *Life on the Mississippi*, muses about the education of a river boat pilot: "And doesn't he sometimes wonder whether he has gained or lost most by learning his trade?"¹⁹⁵

192. *Id.*

193. *Id.* at 42.

194. Savoy, *supra* note 3, at 502 (passage adapted from SOREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* (Walter Lowrie ed. & trans. 1954)).

195. MARK TWAIN, *LIFE ON THE MISSISSIPPI* 66 (John Seelye ed. 1990) (1883).