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1. *Introduction*

One of the central issues in regard to legal education during the past half century has been whether law faculties ought to have a theoretical or practical character. The debate has been an intense one. It has taken on many forms and grown from many diverse circumstances. Law societies periodically resurrect the issue. Professional law faculties interminably debate it. Positions are taken, factions are formed, and the unresolved outcome of the debate has left curriculum and initial assumptions relatively unchanged.[1]

This essay questions one of the most important assumptions of that debate — namely, that a practical legal education is a non-evaluative, non-philosophical one. Sometimes a practical legal education is conceived to be non-philosophical in that it is believed to be bound up with the discovery of legal rules as opposed to some normative evaluation of those rules. More recently, a practical legal education has been conceived to be non-philosophical in that it has been believed to be bound up with experience (most notably presumed to be found in a law clinic). And experience has been bound up with feelings or preferences rather than ideas.

The debate about legal education, unfortunately, has not taken the form of a dialogue. The starting point for the protagonists in the debate over legal education has been either the theoretical or practical position. Sometimes the protagonists have sought to justify why their respective starting points ought to be preferred to those of their competitors. More often, they have implicitly assumed the validity of their starting point and then gone on to elaborate the curriculum and teaching methodology appropriate to satisfying that

*Professor, University of Windsor, Faculty of Law and Editor-in-Chief, *Windsor Yearbook of Access to Justice*. An earlier draft of parts of this paper was presented at the Annual Windsor-Wayne Lecture on February 23rd. 1981. It was also presented to the members of the Friday Afternoon Club at the University of Windsor during the Fall of 1980. I have benefited from their criticisms and, in particular, those of Professor Leon Lysaght of the Detroit Law School.

1. See generally E. Veitch, "The Vocation of Our Era for Legal Education" (1979), 44 Sask. L. Rev. 19, 31 ff; Susan Campbell, "Toward an Improved Legal Education: Is there Anyone Out There?" (1979), 44 Sask. L. Rev. 81, esp. 89-96.

starting-point. I shall take a different slant. I shall assume, for argument's sake, that legal education ought to be a practical one. My starting point puts to the sidelines such crucial, complex issues as 'what historic role has a university played in Western civilisation?', 'does a law faculty within the university community possess collective social duties?', 'ought issues of social or political justice to be a part of the future lawyer's education?', 'what implications lie for the position of power exercised by lawyers?', and the like. I assume that these issues have been resolved in favour of a practical legal education. I only wish to consider what such a practical legal education would entail.

What does the word "practical" mean? There appear to be at least three connotations of the word. One suggests that "practical" means "close to reality" or "in tune with the way the law really is", empirically speaking. A second meaning suggests that something is practical if it is the appropriate means to an end.[2] Usually, legal educators, practitioners and students have assumed that legislative and judicial rules are the ends. A third account of the word "practical" suggests the notion of judgment or "intuitive reason" as opposed to the rational derivation or independent justification of conclusions.[3] No doubt, the advocates of a practical legal education use the term "practical" in one or a mixture of these three senses. Each sense opposes the concept of a normative

2. One assumes the end and considers by what means it is to be attained, and if it seems to be produced by several means he considers by which it is best and most easily produced, while if it is achieved by one only he considers how it will be achieved by this, and by what means that will be achieved till he comes to the first cause, which in the order of discovery is last. For the person who deliberates seems to investigate and analyse in the way described as though he were analysing a geometrical construction (not all seeking is deliberation but all deliberation is seeking), and what is last in the order of analysis seems to be first in the order of being brought about. And if one comes on an impossibility, he gives up the search, e.g. if he needs money and this cannot be got; but if a thing appears possible then he tries to do it.

From Aristotle, *Nicomachean Ethics* 1112 as quoted in D. Wiggins, "Deliberation and Practical Reason" in Joseph Raz, ed., *Practical Reasoning* (Oxford: Oxford U. Press, 1978) at note 3.

3. That practical wisdom is not deductive theoretical knowledge is plain. For practical wisdom is, as I have said, of the ultimate and particular — as is the whole subject matter of action. In this respect practical wisdom is the counterpart or dual of theoretical intuition. *Theoretical* intellect or intuition is of the ultimate in the sense that it is of ultimate universal concepts and axioms which are too primitive or fundamental to admit of further analysis or of justification from without. [At the opposite extreme] practical wisdom [as a counterpart of theoretical reason] also treats of matters which defy justification from without. Practical wisdom is of what

philosophic education, because to question how the law ought to be, to question the ends of the legal system and to justify legal conclusions by an appeal to independently-derived criteria is a very theoretical enterprise indeed. Such an enterprise would place the student in the 'ought' world of ideas, moral dilemmas, and moral-political argument.

I wish to question whether the above assumed dichotomy between a practical legal education and the 'ought' world of ideas, moral dilemmas and moral-political argument exists. I shall do so initially by examining the claim that a practical legal education would be about the discovery of legal rules. I shall suggest that it is not. My argument will make two unorthodox claims — first, that there are no clearly understood, pre-established legal rules, and second, that there must be an intellectual basis for experiential forms of legal education substantiating these claims. I shall then elaborate a model of legal education which I shall call the reflective model.[4] I shall show why the reflective model is a practical model in that it is in "tune with the way the law really is" and in that it is the "most appropriate means" for judicial officers to come to grips with issues of formal justice, substantive justice and other crucial concepts in a democratic state. I shall then flesh out the content of the reflective model of a practical legal education. By so doing, I hope to meet the challenge raised by Professor Rod MacDonald in his important essay "Legal Education on the Threshold of the 1980's: Whatever Happened to the Great Ideas of the 60's".[5]

II. *Discovering the Legal Rule*

What I wish to suggest is that the very process of finding the "ratio

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is ultimate and particular in the different but analogously basic sense of needing to be simply perceived. By perception here I do not mean sense perception but the kind of perception or insight one needs to see that a triangle, say, is one of the basic or ultimate components [of a figure which is to be constructed with ruler and compass]. [For there is no routine *procedure* for analysing a problem figure into the components by which one may construct it with rule and compasses]. The analysis calls for insight and there is a limit to what one can say about it. But even this sort of insight is more akin to sense perception than practical wisdom is really akin to 'sense perception'.

From Aristotle, *Nicomachean Ethics* as quoted in D. Wiggins, "Deliberation and Practical Reasoning" in Joseph Raz, ed., *Practical Reasoning* (Oxford: Oxford U. Press, 1978) at 148.

4. See Section V *infra*.

5. (1979), 44 *Sask. L. Rev.* 39.

decidendi'' of a judicial decision does not allow for the existence of pre-established, clear legal rules. This claim is a very difficult one to support. It would be much easier to focus upon the many manipulative techniques available to the competent lawyer in his construction of a statutory provision. It would also be easier to emphasize the many circuitious routes available to a competent lawyer in avoiding an old precedent or creating a new one. But the ''ratio decidendi'' is the heart of the common law system. And if I can show that even the ''ratio decidendi'' does not allow for the existence of pre-established, well-understood legal rules in some cases then I shall have partially eroded the claim that the real world of law is about legal rules and that a practical legal education should be bound up with the discovery of legal rules. For how could the real world be about legal rules if the rules are neither pre-established nor well-understood and if many conflicting, equally authoritative rules may be chosen from any judicial decision.

The heart of the common law system is the binding quality of the rule in an earlier judicial decision. Although other, non-philosophical reasons may have caused its development, its justification lies in the principle of formal justice. Formal justice requires that like cases be treated alike.[6] All persons who possess the same likeness must be brought under the same rule. The problem is to ascertain the likeness criterion. And for this, the common law has provided us with the notion of the ''ratio decidendi'' of a case. This is what is supposed to bind later courts. And it is the ''ratio'' or the ''reason for the decision'' which possesses the force of law.

The question is, however, how does a lawyer find the ''ratio'' of a previous judicial decision?

Unfortunately, the common law courts have not devised one sure-fire method of finding the ''ratio''. Several methods have been proposed and used. Sometimes a judge or lawyer follows one method; sometimes another. The choice of the method directly

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6. See generally, Brian Barry, *Political Argument* (London: Routledge & Kegan Paul, 1965) at 100-102.

7. See generally, J. L. Montrose, *Precedent in English Law and Other Essays* (Shannon: Irish University Press, 1968) at 151-152; R.W.M. Dias, *Jurisprudence (London: Butterworths, 1970, 3rd Edn.) at 63-72; A. L. Goodhart, ''The Ratio Decidendi of a Case'' (1934), 50 L.Q.R. 40; A. Rupert N. Cross, Precedent in English Law* (Oxford: Clarendon Press, 1977, 3rd edn.), c.2; G. W. Paton, *A Textbook of Jurisprudence* (Oxford: Clarendon Press, 1972) at 209-210; Julius Stone, ''The Ratio of the Ratio Decidendi'' (1959), 22 M.L.R. 597.

delimits the scope and content of the rule. Indeed, the choice of the method can determine whether a rule of law even exists, for one method may direct the lawyer to one rule, whereas a second method may direct him to a conflicting rule. Consequently, I shall argue that the very heart of the common law leads the competent lawyer to unclear, uncertain, ambiguous and, sometimes, conflicting rules of law.

Common law courts find a "ratio" by at least three different methods.[8] The first, known as the classical method, states that the "ratio" is the principle of law which the court declared in its original judgment to justify and explain its outcome.[9] This requires that the lawyer return to the original precedent in order to ascertain what the judges considered necessary to their own decisions.

Under the second method, which could be labelled the "Goodhart approach",[10] the lawyer tries to connect the fact category in the original precedent to the legal consequences as reflected in the eventual decision. If a future case falls within this fact category, then the lawyer and judge are bound to advise that the same legal consequence will ensue. Accordingly, the "ratio" of a case is found by taking account

a) of the facts treated by the judge as material, and
b) his decision as based upon them.

If the original judgment considered certain facts as immaterial then they must be excluded from the fact category. But if there existed facts which the judgment impliedly considered material then, according to the Goodhart method, they must be part of the fact category of the rule.

The third method of ascertaining the "ratio" of a judicial decision might be called the "retrospective" process.[11] Under this test, the "ratio decidendi" is the rule of law for which later judges (and, possibly, scholars) consider the case to be of binding authority. Accordingly, it is not to the original judgment that one looks. Nor to the express nor implied material facts. Rather, we go to the later (often many) judicial decisions which have made a

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8. See *id.* Actually, the literature indicates modifications and additions to the three methods. This fact only strengthens the following argument.
9. This method is adopted by G. W. Paton, *supra*, note 7 at 209-210.
10. This method is elaborated by A. L. Goodhart in *supra*, note 7. See also Rupert Cross, *Precedent in English Law*, *supra*, note 7 at 66-76.
11. The term is my own. It best describes the method adopted, for example, by Montrose in *Precedent in English Law*, *supra*, note 7.

statement about the rule of law in the original precedent.

In order to demonstrate that the heart of the common law system does not necessarily bring pre-established, well-understood rules of law for future lawyers and judges, I shall briefly recount how the Canadian Supreme Court proceeded to find the "ratio" in three series of cases. In the first two series the Court consciously concerned itself with the doctrine of "stare decisis". In the third, we shall take a deeper look at the implications which the operation of the "ratio decidendi" has for the real world of law.

1. *The "Rule" in Binus*

Chief Justice Cartwright set out two issues which faced the Supreme Court in *Binus* v. *The Queen*.[12] The first issue was whether it was necessary for the tribunal of fact to be satisfied that the accused's conduct went beyond inadvertent negligence and amounted to advertent negligence in a charge of dangerous driving under the *Criminal Code*. Cartwright, C.J., who delivered the majority judgment in *Binus*, held that proof of inadvertent negligence was insufficient because of the "ratio decidendi" of the Supreme Court in *Mann* v. *The Queen*.[13] Interestingly, he discovered the *Mann* "ratio" by the retrospective method. That is, Cartwright C.J. did not go to the original legal proposition enunciated by the *Mann* Court itself. Rather, he restated the *Mann* "ratio" "which was [in hindsight] a necessary step to the judgment pronounced." In contrast, Judson J. discovered a very different rule in *Mann* by employing the classical method. He concluded that the *actual* judgment in *Mann* dealt with a very different issue from *Binus* and that Cartwright C.J. had simply collected "obiter" observations in *Mann* to create a legal rule.

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12. [1967] S.C.R. 594,]1968] 1 C.C.C. 227, 2 C.R.N.S. 118.

13. [1966] S.C.R. 238, [1966] 2.C.C.C. 273, 47 C.R. 400, 56 D.L.R. (2d). Cartwright C. J. expressed his opinion about the *Mann* rule in this way in *Binus* v. *The Queen* [1967] S.C.R. 594 at 600-601:

> but it appears to me that in *Mann* v. *The Queen* at least five of the seven members of this Court who heard the appeal decided that proof of inadvertent negligence is not sufficient to support a conviction under s.221(4) and that in so deciding they were expressing a legal proposition which was a necessary step to the judgment pronounced. I find it impossible to treat what was said as 'obiter' and, in my respectful view, that proposition should have been accepted by the Court of Appeal under the principle of 'stare decisis'. The binding effect of a proposition of law enunciated as a necessary step to the judgment pronounced is not lessened by the circumstance that the Court might have reached the same result for other reasons.

In the later Supreme Court decision of *Peda* v. *The Queen*[14] the judges again reached different statements about the rule in *Binus* by employing different methods for discovering that rule. Judson J., who delivered the majority judgment, used the classical method of finding the *Binus* rule.[15] By going to the original majority judgment in *Binus* Judson was able to conclude that the so-called "advertent-inadvertent proposition" of Cartwright C.J.'s "was not a necessary step to the judgment pronounced, and [was] not binding".[16] Pigeon J., in a separate majority judgment, also employed the classical method for discovering the *Binus* rule.[17] By so doing, he could conclude that he was not bound by the *Binus* rule because it was too narrow to apply to the circumstances in *Peda*.

Interestingly, Cartwright C.J. replied to Judson and Pigeon J.J. that he was "prepared to assume that on an application of the principle of 'stare decisis', *Binus* is not a binding authority . . . ."[18] But as in his earlier *Mann* decision, Cartwright C.J. used the retrospective method to discover his *Binus* rule. By going to "the combined effect of the judgments of this Court in *O'Grady* v. *Sparling*[19] and *Mann* v. *The Queen*[20]", Cartwright C.J. restated the legal rule which he believed himself compelled to follow.[21] He could "find no ground sufficient to warrant . . . refusing to follow the carefully considered judgments of this Court in *O'Grady* and in *Mann* on the point now under consideration. . . ."[22] Nor, for that

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14. [1969] S.C.R. 905, [1969] 4 C.C.C. 245, 7 C.R.N.S. 243, 6 D.L.R. (3d) 177.
15. *Id.*, at 916-917.
16. *Id.*, at 917.
17. *Id.*, at 920:

> because 'a case is only an authority for what it *actually* decides', one should not read what was thus written as if it was an enactment [as the retrospective method encourages] but ascertain what was actually decided. It seems clear that the actual decision was . . . .

18. *Id.*, at 910.
19. [1960] S.C.R. 804, 128 C.C.C. 1, 33 C.R. 293, 25 D.L.R. (2d) 145.
20. [1966] S.C.R. 238, [1966] 2 C.C.C. 273, 47 C.R. 400, 56 D.L.R. (2d) 1.
21. After re-stating the *O'Grady* and *Mann* decisions in his own words, Cartwright C.J. proceeded to affirm that, notwithstanding the fact that a provincial statute was at issue in *O'Grady* and *Mann* in contrast to *Binus* and *Peda*,

> the conclusion appears to me to be inescapable that the decision that Parliament has not defined "inadvertent negligence" as a crime was the enunciation of a legal proposition which was a necessary step to the judgment pronounced in each case. It follows that unless we are prepared to depart from the 'ratio decidendi' of both these cases we cannot say . . . .

Peda v. *The Queen*, [1969] S.C.R. 905 at 910.
22. *Id.*, at 911.

matter, would Judson J., had he not chosen the classical method of discovering a common law rule.

2. *The Rule in Harrison* v. *Carswell*

The second case in which the Supreme Court of Canada has dealt at length with the doctrine of precedent is *Harrison* v. *Carswell*.[23] Peter Harrison, manager of Polo Park Shopping Centre, had swore informations against Sophie Carswell for unlawfully trespassing upon the premises of Fairview Corporation Ltd. (the owner of Polo Park Centre) contrary to the Petty Trespasses Act, R.S.M. 1970. Mr. Justice Dickson, whose judgment was concurred in by four others, believed himself bound by the rule in the 1971 Supreme Court of Canada decision of *Peters* v. *The Queen*.[24] Dickson J. discovered the *Peters* rule by following the classical method of going directly to the legal proposition considered necessary for the decision in the original *Peters* judgment. Because the Supreme Court had responded to the legal issues in *Peters* in the negative without reasons, Dickson J., having chosen the classical method, fell back upon Gale C.J.'s legal proposition in the original Court of Appeal decision of *Peters*.[25]

In contrast, Laskin C.J.C. reached a very different conclusion about the "ratio" in *Peters* by choosing Goodhart's method of finding the "ratio". According to Laskin C.J.C., any judicial statements, such as Gale's, must be read in the light of the material facts and issues before the judge. The Goodhart method of discovering the *Peters* rule influenced Laskin C.J.C.'s conclusion.[26] Both the material facts and the issues in *Carswell* differed from those in *Peters*, and therefore Laskin, C.J.C. had little difficulty in holding that "the *Peters* case is neither in law, nor in fact a controlling authority for the present case."

23. [1976] 2 S.C.R. 200 (1976), 62 D.L.R. (3d) 68.
24. (1971), 17 D.L.R. (3d) 128.
25. Namely,

> "With respect to the first ground of appeal, it is our opinion that an owner who has granted a right of entry to a particular class of the public has not thereby relinquished his or its right to withdraw its invitation to the general public or any particular member thereof, and that if a member of the public whose invitation to enter has been withdrawn refuses to leave, he thereby becomes a trespasser and may be prosecuted under the *Petty Trespasses Act* . . ."

26. "The oral reasons of Gale, C.J.O., for the Ontario Court of Appeal, were undoubtedly geared to the specific facts before him, and it is therefore unfair, in my view, to read, without that context, his general statement [quoted above]."

Harrison v. *Carswell*, [1976] 2 S.C.R. 200 at 204.

3. *The "Rule" in Drybones*

We have examined the two most authoritative statements in Canada concerning the doctrine of "stare decisis". Notwithstanding the fact that each judge[27] acknowledged the importance of the binding quality of the "ratio decidendi", each chose to find the "ratio" in a different manner from his colleagues with significant implications for the scope, meaning and, indeed, the very existence of respective legal rules. I shall now look at a classic case with which all Canadian lawyers are familiar, *R* v. *Drybones*.[28] As above, I shall show how the choice of the particular method of finding the *Drybones* "ratio" is directly connected to the very existence, meaning and scope of any rule of law for which *Drybones* could be said to be of binding authority. Second, this treatment will provide a hint about the issues with which the real world of law is concerned.

The *Drybones* court faced two issues. First, did section 94(b)[29] of the *Indian Act* contradict section 1(b)[30] of the *Canadian Bill of Rights?* Second, if there was a conflict, what was its legal effect? The second issue did not have to be faced unless the first issue had been resolved affirmatively. Interestingly, all of the Justices explicitly or implicitly held that the two statutory provisions contradicted each other in the *Drybones* case.[31] Given that

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27. It is significant that before he went into his wider discussion of the history and social conditions surrounding the social interests at issue in the case, Chief Justice Laskin worked within the traditional framework of legal analysis by presuming himself bound by the "ratio" of earlier decisions.

28. *R* v. *Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355.

29. 94. An Indian who
(a) has intoxicants in his possession,
(b) is intoxicated, or
(c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine or not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

30. 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
(a) the right of the individual to equality before the law and the protection of the law.

31. Ritchie J., speaking for himself and four others (the majority), examined the first and second issues in turn. He held that there was a conflict with equality before the law and, secondly, that the legal effect of that conflict was to render s.94(b) of the Indian Act inoperative. Hall J., who affirmed the majority opinion, focused upon the first issue. Cartwright C.J., dissenting, asserted that "[i]n approaching

outcome, it is all the more intriguing to discover the rule of law for which *Drybones* authoritatively stands with respect to the first issue.

The *Drybones* decision involved one judicial decision and the meaning of one statutory enactment. We begin with the commonly accepted working hypothesis that there exists a rule of law for which we can say that a case is binding. But if we look for the rule in *Drybones* we shall find that there is none. Nor could there be. Even when one works within the conventional hypothesis, we have to be doubtful that there is one rule identified with any one judicial decision because there are several, equally legitimate methods for finding a "ratio decidendi", and because the various methods will likely lead to different rules, varying in their meaning, scope and sometimes their very existence.

If we choose the classical method and go to the rule of law which the original *Drybones* Court considered necessary for its decision, we would be bound by two rules. The one would arguably look to unequal sentences ("more harshly") and the other would relate to dissimilar criminal offences between races:

1. equality before the law is violated if one individual or group of individuals is treated *more harshly* than another under the law;[32]

2. equality before the law is violated if *an offence* (for example, of being intoxicated in a private place) exists for one individual *on account of his race* but does not exist for another individual in similar circumstances.[33]

On the other hand, if we applied the Goodhart method to the Ritchie judgment alone, the conclusion would be warranted that the rule of law would be obscure and uncertain in its scope because of the uncertainty as to what the three judges deemed to be material

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this question I will assume the correctness of the view that s.94(b) infringes the right of the respondent to equality before the law declared by s.1(b) of the Bill . . . ." *Supra*, note 28 at 285. He proceeded to face the second issue. Abbott and Pigeon J.J., dissenting, also posited the second issue as the critical one, implicitly accepting that s.94(b) offended s.1(b) of the Canadian Bill of Rights.

32. *R.* v. *Drybones*, [1970] S.C.R. 282 at 297. Emphasis added.

33. *R.* v. *Drybones*, *id.* at 297. Emphasis added. Ritchie J. used similar terms in concluding his judgment at 298: "[i]t appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made *an offence* punishable at law *on account of race*, for a person to do something which all Canadians who are not members of that race may do with impunity . . . ." Emphasis added.

facts. The conclusion would also be warranted that one could authoritatively derive several conflicting rules from the one decision by using the Goodhart method. There were at least six possible material facts in *Drybones:*

(a) There exists a difference in minimum — maximum sentences for Indians and non-Indians found intoxicated in a public place;[34]

(b) Criminal rather than civil law is involved;

(c) The *Indian Act* affects Indians *off a Reserve* and thereby triggers a possible conflict with the laws for non-Indians.[35]

(d) Whereas there exists an offence for an Indian to be intoxicated in a private place off a Reserve, no such offence exists for a non-Indian.[36]

(e) Drybones was found intoxicated in the "Old Stope Hotel". This is presumed to be a public place.

(f) The different treatment was on account of race.[37]

Because Mr. Justice Ritchie expressly included fact (d)[38] and impliedly included fact (f)[39] in his fact category, *Drybones* could be said to stand for rule two which we derived above by using the classical method. But this rule could be either expanded or narrowed by adding or subtracting facts (a),[40] (b)[41] and (f)[42] to the

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34. The penalty for an Indian convicted of being intoxicated in a public place was a minimum fine of $10 and a maximum imprisonment of 3 months. The penalty for a non-Indian being convicted for the same offence was a minimum fine of $10 and a maximum imprisonment of 30 days pursuant to s.19(1) of the Liquor Ordinance which was of general application in the Northwest Territories (R.O.N.W.T. 1957, c.60). Consequently, the Indian was subject to a harsher penalty than a non-Indian for committing the same offence.

35. That is, there would be no possible conflict if there were one set of laws for Indians on a Reserve with a different set of laws for non-Indians. Only when the Indian ventured off his Reserve would the potential for conflict arise.

36. The Liquor Ordinance reads that "No person shall be in an intoxicated condition in a public place. . . ." [R.O.N.W.T. 1957, c.60, s. 19(1).]

37. By inference, it would be legitimate for there to be an offence for an Indian from one particular tribe but not from another.

38. In Ritchie J.'s words, "[t]he important question raised by this appeal has its origin in the fact that in the Northwest Territories it is not an offence for anyone except an Indian to be intoxicated otherwise than in a public place." See *R.* v. *Drybones*, [1970] S.C.R. 282 at 289. Both of Ritchie J.'s statements of his ratio (see supra, notes 32 and 33 and accompanying text)

39. See his second statement of his "ratio" in text, *supra*, note 33 and accompanying text.

40. If "more harshly" means a difference in sentence.

One should note that immediately after isolating fact "d", as "the important question", Ritchie J. went on to emphasize fact "a", (that is, the difference in

fact category. The latter possibility would create three further rules:

3. equality before the law means equality in the sentences (''penalties'' or ''sanctions'') imposed against two or more individuals who commit the same offence;
4. equality before the law means equal treatment in the criminal law only;
5. discrimination by reason of race, national origin, colour, religion or sex in whatever manner it manifests itself is grounds to violate equality before the law.

Ritchie J. did not identify fact (e) (being intoxicated in a public place) as material. Had he done so, the second rule could be rejected since the same offence (intoxication in a public place) existed for both Indians and non-Indians.[43]

According to the retrospective approach towards finding a ''ratio'', the issue is 'what rule of law is *Drybones*, in hindsight, of binding authority?'. This requires that we go to all later higher court decisions which have defined the *Drybones* ''ratio''. If we confine ourselves to only one such decision, *Attorney-General for Canada* v. *Lavell,*[44] we find that each of the three judgments in *Lavell* vary in their statements of the *Drybones*' ''ratio'' with respect to the meaning of Section 1(b) of the *Canadian Bill of Rights*. Each judgment clings onto different facts as material in *Drybones*. *Drybones* could not be said to stand for rule five set out above (according to Ritchie J. in *Lavell*[45]) nor rule one,[46] two,[47] three[48] or

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sentences). His first statement of his ''ratio'' (*supra*, note 32) might also be read as adding fact ''a'' to his fact category in that he makes reference to Indians being treated ''more harshly'' than others under the law. Of course, Indians are also treated ''more harshly'' where an offence exists for an Indian but none exists for a non-Indian. Accordingly, it is difficult to know whether Ritchie J. considered fact ''a'' as material in his original *Drybones* judgment.

41. Although he referred to the difference in offences, he did not consciously address the possible dichotomy.

42. See *supra*, note 37.

43. The Goodhart approach only looks to the facts which the judges in the original precedent considered material. The retrospective approach would allow later judges and scholars to isolate any fact as relevant and thereby alter the legal rule.

44. *A-G. Canada* v. *Lavell; Isaac* v. *Bedard,* [1974] S.C.R. 1349; (1973), 38 D.L.R. (3d) 481; 23 C.R.N.S. 197; 11 R.F.L. 333 (S.C.C.).

45. Mrs. Lavell had married a non-Indian. Pursuant to s. 12(1) (b) of the *Indian Act* her name was struck from the Indian Register because her marriage to a non-Indian disentitled her to Indian status. Mrs. Lavell claimed discrimination on the grounds of sex because an Indian male would not lose his Indian status if he married a non-Indian female. *A-G. Canada* v. *Lavell, id.*, at 1363.

After approvingly quoting Laskin C.J.'s assessment in *Curr* v. *The Queen*

four[49] (according to Laskin J. in *Lavell).* More affirmatively, *Drybones* would stand for rule four (according to Ritchie J.)[50] or rule five (according to Laskin[51] and Abbott J.J.[52]). Hall J. had

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[1972] S.C.R. 889 as to what constituted the *Drybones'* "ratio" (but not necessarily consistently), Ritchie J. asserted that (again relying upon his interpretation of Laskin J.'s *Curr* statement) the Canadian Bill of Rights "cannot be invoked unless one of the enumerated rights and freedoms has been denied . . . ." Discrimination by reasons of race or sex alone (that is, fact "f" above) could not be a ground to strike down federal legislation. "When, as in the case of *Regina* v. *Drybones,* denial of one of the enumerated rights is occasioned by reason of discrimination, then, as Laskin J. has said, the discrimination affords an 'additional lever' " in the sense of an added weight. *Id.,* at 1364.

46. See *infra,* note 50.

47. *A-G for Canada* v. *Lavell, id.,* at 1383. In Laskin J.'s words, "It would be unsupportable in principle to view the *Drybones* case as turning on the fact that the challenged s.94 of the Indian Act created an offence visited by punishment. The gist of the judgment lay in the *legal disability* imposed upon a person *by reason of his race* when other persons were under no similar restraint." (Emphasis added).

48. In his first statement of the *Drybones* "ratio" Laskin J. expressly excluded fact "a" (the difference in sentences) from his *Drybones* rule.

49. In his first statement, again, Laskin J. expressly excluded fact "b" (the criminal vs. civil law dichotomy from his *Drybones* rule).

50. Ritchie J. made five statements in *Lavell* about his *Drybones* decision. In his second statement Ritchie J. distinguished *Drybones* on the grounds that *Drybones* involved criminal rather than civil law and, secondly, that the offence at issue in *Drybones* affected Indians *off* a Reserve. As he stated at 1370,

> The section of the *Indian Act* at issue in *Drybones* was "the only provision therein made which creates an offence for any behaviour of an Indian *off* a reserve, and it will be plain that there is a wide difference between legislation such as s.12 (1) (b) governing the civil rights of designated persons living on Indian reserves to the use and benefit of Crown lands, and criminal legislation such as s.94 which creates an offence punishable at law for Indians to act in a certain fashion when *off* a reserve. The former legislation is enacted as a part of the plan devised by Parliament, under s. 91(24) for the regulation of the internal domestic life of Indians on Reserves. The latter is criminal legislation exclusively concerned with behaviour of Indians off a reserve.

Ritchie J. then followed this by emphasizing the difference in minimum — maximum sentences as material.

51. The crucial fact for Laskin J. was the existence of "a legal disability" by reason of race. The common fact category in *Drybones* and *Lavell,* according to Laskin in his first re-statement of the *Drybones* rule, was the "statutory excommunication" or "the invidious distinction of race or sex".

In his second re-statement of the *Drybones* rule Laskin J. again isolated the racial discrimination in opposition to the enumerated rights as the crucial factor in *Drybones.* Seeing his own statement in *Curr* very differently from Ritchie J., Laskin J. stressed that he had "made it clear" in *Curr* that legislation could be rendered inoperative "if it manifests any of the prohibited forms of discrimination". *Id.,* at 1387. That is, *Drybones* had made the "without discrimination" clause (see *supra,* note 30) an independent source for rendering federal legislation inoperative.

supported the latter rule in his separate majority judgment in *Drybones*.[53] What complicates the matter even further is that the statements by Ritchie and Laskin J.J. in *Lavell* would be of equal weight on this issue because their respective reasons were equally supported by other members of the Court (Pigeon J. resolving the case on a different issue). In addition, Mr. Justice Ritchie made five statements in *Lavell* about his *Drybones* decision. From these statements one can derive two further rules as to the *Drybones'* ratio:

6. equality before the law only arises as an issue when Indians journey *off* a Reserve thereby triggering a possible conflict with the laws of non-Indians;
7. equality before the law means the equal application and enforcement of a law to whomever the particular law relates.

Interestingly, the common rejection of the seventh rule under the classical analysis was adopted as the "ratio" under the retrospective method.[54] Of course, in order to use the retrospective method properly, we would be required to examine the many later (and future) judicial decisions which have claimed to lay down the rule in *Drybones*.

II. The Preference Model of Legal Education: herein of Cynical Realism[55]

There are at least two problems which immediately arise in regard to

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In his final paragraph of the *Lavell* judgment, Laskin J. rejected "the spurious contention" of the "*off* the Reserve" proposition.

52. Abbott J., also in dissent, affirmed Laskin J's reasons. He also rejected Ritchie J's resurrection of the *Gonzales* rule (see *supra*, rule 7 in text).

53. Hall J. considered the fifth rule as necessary for his decision:

> "*discrimination* in every law of Canada *by reason of race*, . . . in respect of the human rights and fundamental freedoms set out in s. 1. in *whatever way that discrimination may manifest itself* not only as between Indian and non-Indian but as between all Canadians — whether Indian or non-Indian" is "repudicated".

R. v. *Drybones*, [1970] S.C.R. 282 at 300. (Emphasis added).

54. In Ritchie J's words,

> equality before the law under the Bill of Rights means equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary Courts of the land . . . ."

A.-G. for Canada v. *Lavell, id.*, at 1373.

55. The word "preference" I take from John Stuart Mill, *On Liberty*, Mary Warnock, ed., (London: Fontana, 1962) at 131:

the above argument. The first is that it seems to follow that the lawyer's lawyer may legitimately "pick and choose" whatever rule of law he *feels* he ought to follow. He may "play the game" of analyzing rules but that process, it would seem, merely camouflages his own feelings about the parties, justice, power or whatever. Or, alternatively, he may outwardly disclaim loyalty to the binding quality of legislative or judicial rules and openly state his preference as to what the social policy of the rule ought to be. In either case, the implication would seem to be that the rule of law in *Binus*, *Peters* or *Drybones* is whatever the lawyer, judge, law teacher, law student or politician wants it to be. It is *feelings* which are crucial. Justice would seem to exist whenever our feelings coincide with what the legislature or the court declares the law to be at a particular point in time. This critical appeal to feelings underlies what I shall call the "preference model" of legal education — a model for the cynical realist.

Let us return to my initial description of the meaning of "practical". I suggested that there were three connotations to the phrase "practical legal education": first, that "practical" means "close to reality" or "in tune with the way the law really is rather than the way it ought to be"; second, that a practical legal education means that the goals and values of the law are given and that legal education ought to focus upon the most appropriate means of achieving those goals and values; third, that it means "intuitive reason" or judgment rather than the rational derivation or independent justification of conclusions. Contrary to our initial hypothesis that a practical legal education would be bound up with the assertion and elaboration of rules of law, the above discussion would seem to suggest that a practical legal education would be oriented towards the preferences underlying the analysis of the rules. It is the preferences which are the reality of law. They are the givens. They are the basis of our judgments — not any rational derivation or appeal to independent principles. Accordingly, a practical legal education would create the environment where the

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> . . . but an opinion on a point of conduct, *not supported by reasons*, can only count as one person's *preference;* and if the reasons when given, are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one. (Emphasis added).

I use the term "model" in the same sense as Noel Lyon in "Modelling as an Approach to Judicial Reform" (1981), 1. *Windsor Yearb. Access to Justice* 281.

student would become conscious of his feelings as well as the feelings, presumably, of his fellow citizen. Having become more aware of his inward feelings, the law teacher and student would go on to translate those feelings to concrete problems. A mixture of psychology, group therapy and experience outside the university would appear to be indispensable guides to a practical legal education. No doubt some advocates of clinical legal education have considered the law clinic as the suitable environment to carry out the preference model of legal education. To the extent that one would study judicial decisions, one would examine them as reflectors of social history or psychological generalisations. And legislative rules would be examined for the purpose of identifying the politically stronger pressure groups in contemporary society.

I now wish to suggest that although the preference model of legal education might *prima facie* be the implication of section one of this paper, the preference model inadequately serves a constitutional democracy. Before I argue such, however, a distinction between the discovery of a legislative or judicial rule and its justification[56] will be made.

1. *Discovery vs. Justification*

The initial discovery of a rule in any concrete case may very well be the outcome of internal impulses, hunches, beliefs or inarticulate assumptions on the part of the decision-maker. A study of the discovery process would consider the psychological, physiological, social, economic, political, and other internalised pressures which motivate a judge or lawyer. Although Hume may have been correct that these pressures constitute the "natural" as opposed to the "artificial" world of reason,[57] Hume's claim does not preclude the possibility that reasons for rules, once articulated, become internalised into one's belief system just as any other factors external to the person's psyche may become internalised under certain circumstances over time. Nor does Hume's claim foreclose an inquiry into whether any given rule, once discovered, is justifiable. The latter inquiry raises an entirely different set of questions from the discovery of a rule. The justificatory process appeals to a standard or set of standards external to and independent

56. This distinction is raised by Richard Wasserstrom in *The Judicial Decision* (Stanford: Stanford U. Press, 1961) at 25ff.

57. See generally, David Hume, *A Treatise of Human Nature* (Oxford: Clarendon Press, 1978, 2 ed.), Bk III, Part II, Sect. 1-6.

of the person's psyche or belief system.

This distinction is an important one. With respect to the discovery process we are content with mere assertions of rules, policy or principle. But as regards the justificatory process one is required to pry behind the assertions. Mere assertions are not enough.

The point to note here is that the commitment to reasoned justification is not part and parcel of a properly decided judicial decision within the preference model of legal education. Nor is it expected of the student. Quite the contrary.[58] There is no obligation on the part of judge, lawyer or student to appeal to reasons because the preference model of legal education does not allow for the existence of an independent criterion of justice separate from and prior to the innate feelings of the parties (including judge and lawyer) to the case. Rather, the preference model of legal education considers a legislative or judicial decision just if the decision accurately reflects the strongest feelings on the issue before the legislature or court. Usually, we assume that the latter condition is satisfied when the majority of the legislature makes the decision.

How, then, does a student evaluate a legislative or judicial decision in the preference model of legal education? The process of evaluation, it would seem, involves a very different dialogue with a very different criterion of knowledge than that of a commitment to principled reasoning as an end in itself. When the student must evaluate the soundness or correctness of a legislative or judicial decision on the preference model, he need not be concerned with the internal consistency, truthfulness, the moral content, or the consistency of the reasons with independently derived principles of justice. Rather, the student must question whether the immediate decision accurately reflects the more intense or, possibly, the more numerous preferences towards the issue in dispute. The student within the preference model of legal education need only concern

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58. How, then, do we ascertain a sound legal opinion or judicial decision under the preference model of legal education? The intensity and numerical weight of the preferences are what count. Ultimately, a disputant wins out if she is more powerful than her competitors. But power does not logically necessitate a commitment to reasoned argument. Reasons may be foresaken for other means to power at any time in any circumstance. As one shifts from the pole of influence to the pole of domination, force, violence, brutality and terror serve as threshold techniques. Although reasoned justification may be a means to power in some circumstances, the preference model of legal education assumes a very different dialogue with a very different criterion of knowledge from any commitment to reasoned justification.

himself with discovery of legal rules rather than their justification. Indeed, to suggest that one could characterize the student's endeavour in the preference model in terms of his analysis of the character of the argument supporting any judicial or legislative decision wrongly assumes that argument would ever be required. Judges and legislators need only decide under the preference model of legal education. Mere assertions are adequate.

2. *The Preference Model and Its Implications.*[59]

Why are mere preferences not a strong enough foundation upon which to design a legal education? Why ought we not to be content with the mere discovery of legal rules? Why is the competent lawyer obliged to justify the rules? And why must the justification be in terms of some independent standard rather than in terms of his own or someone else's preferences?

(a) *Formal Justice*

In the first place, if judges and lawyers were content to discover legal rules without any attempt to justify them or, alternatively, if judges and lawyers did attempt to justify decisions but by reference to their own or the parties' preferences rather than to principled reasons, then formal justice would be an extraneous consideration to the judiciary's and lawyer's frame of reference. What is more, if formal justice were implemented, it would evolve only by chance.

Formal justice is admittedly a primitive type of justice.[60] Its precept is that like cases be treated alike. It is a primitive type of justice because it leaves unanswered any evaluation of the distinguishing criterion by which one is to measure likeness. The criterion could be racial. It could even differentiate slaves from non-slaves on grounds of race, intellect, colour, status, military defeat or whatever. Formal justice only requires that all persons who possess the likeness criterion be brought under the application of the rule. That is, the likeness criterion must be applied impartially and consistently.

If a legal rule were simply asserted without any attempt to justify why it ought to be applied in any particular case, how could the

59. The arguments in this section are drawn from William E. Conklin, "Clear Cases" (1981), *31 U. of T.L.J.* 231.

60. See Brian Barry, *Political Argument,* (London: Routledge & Kegan Paul, 1965) at 100-102.

legal rule be applied impartially and consistently unless the judge consciously asked himself why a distinguishing trait in the legal rule ought to be considered relevant in a clear case, and whether the party before the court possessed that distinguishing trait. The later question requires some rational process on the part of the judge. The judge may conceivably be able to make the connection unconsciously or subconsciously. But unless he does so in a conscious, articulate fashion, we will not know whether the judge has even addressed his mind to the issue of likeness. Law-making by discretionary fiat does not assure us that the judge has addressed the question of who possesses the distinguishing trait and why the trait ought to be considered relevant in any particular case. Furthermore, to the extent that reason has an effect upon one's decisions, a conscious articulate justification of the application of the likeness criterion will increase the chance that like cases will be treated alike.

As in the instance of a judge who asserts a legal rule without entering into any justificatory process, a judge who does justify his decision but by reference to the parties' preferences rather than principled reasons will not apply the likeness criterion impartially and consistently. The outcome of any dispute will be partial to whomever the judge perceives to represent the politically stronger interest group in society at the time. To the extent that he accurately assesses or predicts the power relationship, his decision will be "sound". Similar cases will be treated similarly only if the power situation remains relatively stable over time. One interest group could conceivably be consistently powerful. If the power situation varied from one case to another and the judge accurately assessed that variation, however, the likeness criterion would be overruled in each case in favour of a new likeness criterion. There would no longer be formal justice.

(b) *Substantive Justice*

A second implication flows out of the preference model of legal education: namely, there would be little possibility for a coincidence of substantive justice with the law. In contrast to formal justice, issues of substantive justice go to the content rather than the equal application of legal rules. Issues of substantive justice usher forth a plethora of end-state or entitlement theories about the organisation of social institutions. Such theories involve independently argued principles — independent, that is, of the feelings of

one, two, a few or even many persons in society. Even if one were to argue in support of a preference theory of substantive justice (that is, that social institutions are just if they coincide with the innate feelings of the members of society at any particular moment in time), the very process of attempting to make such an argument marks a departure from the preference model of legal education. For it brings the advocate into a justificatory dialogue where reason and evidence as opposed to mere preferences or assertions of feeling are the criteria for a sound claim. Indeed, if one were to be consistent with the preference model of legal education, the moral content of legal rules would be resolved by the psychic intensity of the assertions, the power of the claimants or, ultimately, their instrumentalities of manipulation and violence.

(c) *Liberty*

An additional implication would arise if a judge were not prepared to justify a legal rule or its application or if he were prepared to do so but by an appeal to preferences rather than principled reasons: namely, there would be no theoretical limit to the possession of liberty. The politically stronger could take away a minority's right to speak on political issues, to practise a religion, to join a political party, or even to think certain thoughts. Conceptually speaking, the politically stronger could legitimately discriminate or enforce segregation according to race, sex, colour, creed and national origin. Indeed, the politically stronger could metaphysically create the existence of a racial, religious or political group toward which the stronger could focus its hate and violence much, as Sartre argued, the anti-Semites had done with respect to the Jews.[61] A judicial decision or legal opinion, without reasons, would leave no assurance that any one individual would even be considered in the resolution of any dispute before the court. Without the expectation that opinions be explained and justified through reason and evidence, conflicts before the court could only be resolved by the psychic intensity, loudness, or numerial support with which a litigious party shouted out his claims. Ultimately, force would become the determining factor and tyranny the resulting norm. Party would oppose party, belief would oppose belief without any ultimate reference point for resolving a dispute except force. Only if minority groups or individuals can expect that courts and lawyers

61. Jean Paul Sartre, *Anti-Semite and The Jew* (N.Y.: Grove Press, 1962).

will appeal to principled standards external to the judge's or lawyer's psyche can they possess any minimal hope, although by no means a guarantee, that a party (including the state) could be brought to an accounting.

The only issue for a judge, lawyer or law student who is content to resolve disputes by appealing to preferences is whether he has accurately assessed and responded to the actual "power realities" in the case or in society at large. This assessment and response would be brought into play in his choice and application of a pre-established legal rule. Often, as in the case of Mr. Justice Holmes,[62] the liberal judge would rely upon a legislative rule precisely because the legislature most accurately reflected the more powerful interests in contemporary society.

Of course, one may not object to the existence of tyranny. And it may be necessary to carry on a third level justification as to why liberty ought to be valued. But if we assume for the point of argument that there is something objectionable to tyranny, then a law student who appeals to preferences rather than reason in his discovery and application of legal rules gives cause for concern because mere preferences allow for no theoretical limit to the repression of liberty. This is not to suggest that preferences ought to be relevant in the legislative realm. Rather, only if there exists a ground rule in the legislative or judicial process such that a minority or an individual may confidently appeal to reason rather than to mere preferences for the resolution of disputes can there be any long term assurance that his liberty will be respected and protected.[63] A commitment to innate preferences does not, of necessity, require a justificatory process. Nor do preferences, of necessity, require a justification in terms of independent principled reasons.

(d) *Guidance to Lawyers*

There is a utilitarian reason why the justificatory process is such an important element in legal education: namely, unless a judge or lawyer can offer a justification in terms of "neutral" and "general" principles as to why a distinguishing trait in the legal rule ought to

62. See *eg.*, *Lochner* v. *N.Y.*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905); *Buck* v. *Bell*, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1042 (1927); *Gitlow* v. *N.Y.*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

63. Again, an appeal to reason does not guarantee liberty. But it does allow that an individual's interests will be considered and that the State will be brought to an accounting.

be considered relevant and unless he can justify why a particular person in fact possesses that distinguishing trait, future lawyers will possess little guidance to confront a novel set of facts. What facilitates a lawyer's ability to advise a client in an original fact situation is that some earlier court, particularly at an appeal level, has rendered a principled reason for a decision in a similar case; and, secondly, that that reason is sufficiently "neutral" and "general" as to transcend the immediate circumstances.

This latter point seems to have been foremost in Herbert Wechsler's mind when he argued that judges should support their value choices by a "type of reasoned explanation" which is "genuinely principled."[64] A decision was principled, Wechsler argued, if it rested "on grounds of adequate neutrality and generality" — neutral in that the judge would be prepared to follow the reason for the decision in other hypothetical facts to which it applies,[65] and general in that the reason would transcend the immediate facts so as to connect the immediate decision with past and future cases which presented potentially similar issues. That is, a decision would not be formulated with reference to some proper name or a fact category appropriate to only one person. The neutrality and generality of a decision, according to Wechsler, must inhere to every issue to the case.[66] And why are neutral and general principles so important? Because the act of judging is framed and tested "as an exercise of reason and not merely as an act of willfulness or will." A court of law is an institution of reason rather than "a naked power organ."[67]

Some weight should be given to the ability of a legal system to guide lawyers in their advice to clients. For, without principled reasons to guide lawyers, the social and economic costs would be extraordinarily burdensome both for potential litigants and for society as a whole. Society is involved even in private litigation because society must finance the institutional structure to resolve

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64. Herber Wechsler, "Toward Neutral Principles of Constitutional Law" (1959), 73 Harv. L. Rev. 1.

65. Wechsler, *id.* at 15. Note that Wechsler does not use the term "neutral" to connote political neutrality. Quite to the contrary. Judicial decisions are "inescapably political", he claims, "in that they [i.e. the issues] involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone." *Id.*, at 65.

66. Wechsler, *id.* at 23.

67. Wechsler, *id.*, at 24.

the dispute. Litigation, to the extent that the parties could afford it, would abound. And to the extent that the parties could not afford litigation, disputes would remain unresolved, expectations frustrated, reasons for earlier clear cases hypothesized, and pre-trial agreements transitory. For, why should a party to any dispute remain content when the "resolution" out of court has been made without reference to any "neutral" and "general" standard which transcends the issues in any one case?

(e). *A Majoritarian Political System*

The justificatory process is required of judges and lawyers for one final reason. The majoritarian model of a political system posits the legislature as the institution which can be trusted to make the best political decision. Because judges are appointed, the argument goes, they cannot be trusted. Whereas the electorate can, theoretically at least, rid itself of politicians, it cannot oust judges. Consequently, majoritarianism presumes that legislators are accountable to the people, but judges are not. In addition to accountability, majoritarian theory generally assumes that because legislators are elected, they are more closely in tune with society's contemporary values. Further, the background principle of majority rule gives added weight to the legislature's role. Because the legislature alone is assumed to represent the will of the majority, majority theory requires that courts act as passive deputies to the legislature. For these reasons, majoritarian theory considers the legislature as the most suited institution to render political decisions.

Each of these arguments is, of course, debatable for its empirical and normative content.[68] Nevertheless, they have molded the self-image of the judiciary in common law countries. One consequence is that it is deemed offensive to majoritarian theory for a judge to allow his feelings and intuitions to discover legal rules without some attempted justification of the rule, and without some attempted justification as to why a party before the court ought to be brought under the rule in the clear case. As an "undemocratic" institution in a "democratic" society, a higher degree of

68. See, e.g., William R. Bishin, "Judicial Review in Democratic Theory" (1977), 50 Sourthern Calif. L. Rev. 1099; Jesse H. Choper, "The Supreme Court and the Political Branches: Democratic Theory and Practice" (1974), 122 U. Penn. L. Rev. 810; George Mace, "The Anti-democratic Character of Judicial Review" (1972), 60 Calif. L. Rev. 1140.

justification is demanded from the judiciary than that expected of politicians. In addition, in order to remain consistent with the majoritarian premises posited above, the judiciary must remain cautious and restrained when counsel requests the court to choose some value in opposition to that chosen by an elected institution. The judiciary alleviates the latter dilemma in which it finds itself by justifying its decisions and by doing so in a manner which defers to standards external to the judge's will. It is the latter two requirements which legitimize judicial decisions in a majoritarian society.

III. *The Problem of Clear Cases*

In Section One of this paper I argued that the very heart of the common law system — the "ratio decidendi" — did not allow for the existence of pre-established, well understood legal rules. Many conflicting equally authoritative rules could be chosen from any judicial decision. Consequently, a legal education which was "close to reality" or which focused upon "the most appropriate means of achieving given ends" would not be bound up with the elaboration of legal rules. This conclusion, as I suggested, raises two problems. The first is that it would seem to provide the basis for a preference model of legal education. I have just shown why such a model of legal education is inconsistent with second-level arguments about formal justice, substantive justice, liberty, guidance to lawyers and majoritarianism. The second problem is that although many conflicting, equally authoritative rules may emanate from hard cases, that conclusion is inconceivable in clear cases. A clear case, by its very nature, involves a case in which one pre-established, well-understood legal rule appropriate to the circumstances exists.

Indeed, student, law teacher and practitioner alike sometimes claim that ninety-eight per cent of a practitioner's case-load involves clear cases. The lawyer has been able to sort out the material from the immaterial facts with a much envied ability to determine the criterion of materiality. He has discovered the rules, somehow rejecting some as legally irrelevant and adopting others as legally relevant. Accordingly, a practical legal education would only need to teach a student how to deduce a conclusion from the application of the relevant rule to the material facts.

Although the diverse methods for discovering the "ratio decidendi" of a case would make a clear case a conceptual rarity for

judicial rules and even for legislative rules, as the *Drybones* discussion demonstrated, let us assume that clear cases do exist. We need not debate over percentages. What implications do clear cases pose for a practical legal education? In particular, would a practical legal education require anything other than the deductive process of applying the relevant rule to the material facts? That is, are there other standards, possibly implicit, to which a competent lawyer must be prepared to appeal even in clear cases? And if so, why?

1. *The Justificatory Process*

The simple deductive process usually considered to be the essence of the legal officer's function in a clear case leaves critical issues unanswered. How is the law student to ascertain which facts are material and which are not? What is it about a party to a dispute which is sufficiently distinguishing to connect him to the fact category? And why does the student reject some rules as legally irrelevant and accept others as legally relevant? These crucial issues cannot be answered without a justification which goes beyond the mere assertion of a rule of law. The issues require a justification in terms of independent principles which are sufficiently neutral and general so as to transcend the immediate facts in the clear case. Without such a justification, we will have no possibility of formal justice, liberty, guidance for future lawyers, nor will we remain consistent with the majoritarian theory of the judicial function.

Until now, the claim that we ought to have a practical legal education has assumed that the law student's task in a clear case is complete when he asserts a material fact as the reason for his decision. But such an assertion is of an explanatory rather than a justificatory nature. To explain why something has occurred is a descriptive enterprise. When we explain that a particular material fact is the reason for a judge's decision we implicitly assume that the judge's decision-making is a rational process; that is, that the material fact caused the conclusion. We could also have explained the conclusion in terms of the judge's intuition, his personality, his socio-economic class or whatever. We might look inwardly at his psyche or outwardly at external factors influencing his conduct. These are empirical claims which may or may not be true.

But they are a part of an enterprise which is very, very different from a justificatory one. To explain why a decision has been made is distinguishable from justifying whether a particular rule of law is

the right or just one. The latter inquiry requires that we push behind the rule to a second level where consideration is given to reasons why the rule ought to be followed. The one is a descriptive enterprise; the other is a normative one. To explain something is not to justify it.

A rule of law, by itself, is a mere assertion. If, when pressed, a judge is content to stop with the assertion of a rule, he fails to perform his proper function even in a clear case. By stopping his analysis with the assertion of a rule, the judge becomes entrapped in the very appeal to preferences which we just found so unbecoming of a law student in the preference model of legal education for reasons of formal justice and the like. Rather than appealing to reason as the criterion of a sound judgment, such a student implicitly adopts the position that "this assertion of the law is correct because I feel it is so". Only if the student is prepared to go on to ask the normative question "why ought this rule be applied here," can he consistently escape from the trap of appealing to preferences. And this requires that he be prepared to articulate and weigh arguments in support of the rule, withdraw some arguments for the rule in the light of the weight of counter-arguments, revise the rule, and, by going back and forth amongst the arguments, arrive at a provisional statement of why the rule ought to be the appropriate legal standard in the circumstances.

One possible explanation why law students have found it adequate to arrest their analyses by merely asserting a legal rule is that the principled reasons for justifying any particular rule are so commonplace that they need not be re-stated. The implicit reason why students are justified in adopting a statutory rule, for example, is that the legislature ought to be the supreme law-making institution in the body politic. Accordingly, law students ought to subordinate alternative rules, however meritorious, to the rules of the elected legislature. One can push behind this principled reason, however, in order to uncover further second level arguments along the lines suggested in the reflective model of the judicial function.

The justification for the student's adoption of a legislative rule could be grounded, for example, in the pivotal liberal principle that there ought not to be an independent criterion of justice separate from and prior to the procedure by which public authority is constituted. Given that the procedure used to choose legislators is fair, the substantive outcome of the process will likewise be considered fair — or so the liberal argument goes. Consequently,

the lawyer's adoption of a legislative rule will produce a just outcome according to liberal theory. Presumably one could go on to raise counter-arguments as to why a fair procedure would not necessarily lead to a just outcome. Indeed, one could root the judicial function in some competing political theory of justice. The original legislative rule might be revised. And, by going back and forth amongst the arguments, we could arrive at a principled argument as to why the lawyer ought to consider the original legislative rule legally relevant, why he ought to revise the original rule, or why he ought to substitute some alternative rule in the circumstances.

Similarly, the crucial reason why law students are justified in applying a pre-established, legislatively — or judicially — created rule in a clear case is that by doing so the students can be assured of treating similar cases similarly. Formal justice ensues. However, as demonstrated above, formal justice is a very primitive form of justice in that it does not allow for any evaluation of the moral content of the rule by which similar cases are to be treated similarly. When one examines the substantive content of both statutory and common law rules, however, one can often find principled justifications for the rule other than formal justice.

These justifications can be framed in terms of tradition, contemporary values, or the goals of society. The content of the rule represents a choice which has been made amongst competing values which, in turn, possess corresponding justifications. Once again, the door is opened for the articulation of the justifications of competing values, the weighing of formal justice vis-à-vis the latter, the possible withdrawal of the original rule in favour of arguments which go to the justice of the content of the rule, and the possible revision of the original rule or the substitution of a new one. When the function of a lawyer is seen in this light, one can appreciate how it is that "ought" questions are the basis of a practical legal education even in clear cases.

IV. *The Reflective Model of Legal Education*

Neither the preference model of legal education nor clear cases create insurmountable problems to the general conclusion in Section One of this paper that conflicting, equally authoritative legal rules emanate from any one judicial decision. Formal justice, substantive justice, liberty, guidance to lawyers and accountability require that

the competent lawyer and law student not stop with the mere assertion of his preferences. And the mere assertion of a rule of law in a clear case, without more, entraps the student in the very appeal to preferences which we have found so unbecoming of a lawyer for reasons of formal justice and the like. I wish now to elaborate briefly an opposing conception of legal education which I shall call the reflective model.

The reflective model of a practical legal education presupposes that there may exist an independent criterion or criteria of justice separate from and prior to the process by which the court, the issues or ultimate decisions are constituted. When the law student in the reflective model discovers, construes, applies or elaborates rules of law, there is presumed to be some source of knowledge from which one can ascertain whether the legal rules are correctly chosen or applied. The law student, law teacher or lawyer claims to possess legal knowledge. To that end he proceeds to justify his opinion. This process of reasoned justification is the source of knowledge for law students in the reflective model. It lies at the heart of Herbert Wechsler's claim that courts ought to seek

> . . . criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will. Even to put the problem is, of course, to raise an issue no less old than our culture. Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind.[69]

The reflective model of legal education requires that the student consciously articulate and weigh arguments. Students must propose competing rules, policies and principles, withdraw existing judgments in the light of the weight of arguments, revise others and, by going back and forth amongst the arguments, arrive at a provisional statement of the appropriate legal standard in the circumstances.

The reflective model of legal education leaves little room for binding rules of law whether the rules be judicially or even legislatively created. The weighty principle of formal justice suggests that clearly-established, well-understood legal rules, assuming that they exist, possess persuasive authority. But, once we understand legal education in its wider institutional role in terms of

69. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law " (1959), 73 Harv. L. Rev. 1, at 11.

formal justice, substantive justice, liberty, social and economic costs and accountability, we can appreciate why law student, lawyer and judge alike must be prepared to question and, if necessary, to justify why a particular court *ought* to follow or disregard a pre-established, well-understood legal rule. In both the hard case where the "ratio decidendi" proves indeterminate and in the clear case, the "is-ought" distinction collapses. The competent law student is the one who perceives that collapse and can judge when compelling normative or "ought" justificatory arguments require that the provisional rules of law must, at a minimum, be brought to an accounting and possibly even be revised.

If the student of law truly wishes to understand the law as it really is in a democracy, he will have to be prepared to look backwards into the legal and political tradition of his or even other societies in order to appreciate the implicit or explicit theories, conceptions and assumptions which have provided the justificatory basis of any particular legal rule or series of rules. He will also be required to carry on an "ought" or normative dialogue about the nature of justice, liberty, moral and political obligation, and the ideal state. The competent lawyer must be capable of shifting back and forth between the competing conceptions of the law and the more mundane world of alternative legal rules to arrive at a provisional statement of the law.

In contrast, the procedure by which the student can evaluate judicial and legislative decisions under the preference model is very different. The commitment to reasoned justification is not part and parcel of the student's role in the preference model. Quite to the contrary. There is no need for the student to appeal to independent reasons in a justification of the legal rule because the preference model does not allow for the existence of a criterion of justice separate from and prior to the feelings of the student himself or, alternatively, the parties to the immediate dispute. The just decision under the preference model of legal education is deemed to be that decision which best reflects the strongest feelings at any particular point in time. Consequently, the correctness or soundness of any judicial or legislative decision in the preference model is evaluated by reference to the gain or loss of the power of autonomous interest groups or the gain or loss of power of particular individuals. This frame of reference contrasts sharply with that of the reflective model of a court.

The clash of the two models of legal education does not of itself

establish why the criteria for evaluating a sound judicial or legislative decision ought to be grounded in the reflective model. But once we introduce the crucial concepts of formal justice, substantive justice, liberty, guidance to lawyers and accountability, we can better appreciate why the reflective model ought to constitute the goal of a practical legal education. The argument in support of the reflective model of legal education is grounded in these five concepts, although the reflective model itself would require that we be prepared to go on to justify why a legal education ought to be grounded upon these five concepts rather than their converse (unequal treatment, *ad hoc* justice, tyranny, greater social and economic costs, and non-accountability). Suffice it to suggest at this point in time that four of the latter five notions seem to be anathematic to a democratic state.

A reflective model of legal education is also a practical legal education. By taking account of the very heart of the common law system — the 'ratio decidendi' of a case — it can be said to be "in tune with the way the law really is" or "close to reality". By being grounded in the concepts of formal justice, substantive justice, liberty and accountability, it is "in tune with the way the law really is" in a constitutional democracy. Indeed, the reflective model of legal education is the most appropriate means of achieving certain identifiable goals: namely, the goals of formal justice, substantive justice and the like. And the reflective model of legal education is practical in the third sense of the word practical: namely, Aristotle's notion of judgment. The reflective model of legal education may well be labelled a theoretical education in that it insists that the student work with ideas at the highest intellectual and moral level and depth. If such is its label, then a practical legal education is a theoretical education.

V. *A Practical Legal Education*

The real world of discovering the "ratio decidendi" by adopting a preference model of legal education raises serious questions for a practical legal education in a democratic state. We have seen why the competent law student ought to identify the justificatory theories, concepts and traditions embedded in legal rules, principles and policies. The competent law student ought also to be prepared to ask normative questions concerning the nature of justice, liberty, the state and moral conduct. Both sets of questions have serious

repercussions for the content of a practical legal education. I shall now raise two such implications

1. *A Political Education*

First, both sets of inquiries possess a political character. Consequently, there is a sense in which a practical legal education would also be a political education. What would be the nature of this political education?

The usual sense of "political" refers to the context of party politics. It is used to describe a person who represents a certain political party or political interest group. Although the judiciary in a country such as Canada is invariably appointed in return for years of service or financial aid to the governing political party, this paper has not substantiated why one could justifiably claim that, after they are appointed, judges retain party allegiance and are motivated according to the contemporary line of the Party. This clearly is not the sense in which we can describe a practical legal education as having a political character.

A second possible sense of the word "political" is that the judge or lawyer should be viewed as a political actor much as a politician is. Accordingly, we would examine the judge's behaviour in much the same manner as we would the behaviour of other political actors. This line of inquiry would focus upon the behaviour of the court rather than the rule of law which the court applies. Our focul point would be the actual vote in the case rather than the express or implicit justifications which the rule typically invokes. Once again, however, there is little in this essay which warrants that we describe a judicial decision as political in this sense. For, as I have argued, it is the justificatory process which characterizes the judicial function, not the discovery process of the rules. A focus upon ultimate votes in a series of cases underplays the importance of the justifications invoked by a rule of law.

A third sense of describing a legal education as political is that legal standards emanate from a political institution. Our focus, in this sense, would be to perceive the court as we would any other political institution such as the legislature, a political party or the bureaucracy. One would empirically examine what particular functions or role the court plays generally in society. Any outcome in a hard or clear case would be connected and explained in terms of that institutional role. One would bear in mind the similarities and

differences which characterize the court and other institutions in the structure of government. And one would question whether the courts rather than other institutions are particularly suited to deal with certain types of disputes. Once again, however, we must reject this sense of the word "political", for this line of inquiry examines the structure of government, whereas the justifications rooted in rules of law involve ideas.

The sense in which a practical legal education ought to be characterized as political is that there are justificatory ideas and conceptions which are rooted in legal standards.[70] Those ideas and conceptions are political because they make statements about the distribution of power within society. For one thing, the distribution of power can be analyzed in terms of ideas about the relationship or role between one decision-making structure and another. Also, the rules of law or competing "ratios" result in the distribution of power by assignment of rights and duties, powers and immunities and the like to certain categories of persons. Moreover, the alternative "ratios" or rules affect the distribution of power by permitting certain social practices or forms of conduct whereas others are proscribed. Consequential defences and penalities are posited when violations of the proscriptions occur.

Moreover, a practical legal education would have a political character because hard and clear cases explicitly or implicitly employ concepts which pose political issues. Concepts such as private property, markets, parliaments, trials, free expression, libel or the like pose normative issues as to how power ought to be distributed in society. The concepts do not provide the answers to those issues, nor do they report nor describe set patterns of conduct. They pose political issues for which there may be many rival conceptions as to how the issues ought to be resolved. Finally, competing "ratios" or legal rules often try to incorporate a particular conception which tries to answer the issue posed by the concept. Accordingly, a rule of law is inescapably political in that it states what choice has been made between rival conceptions or

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70. For examples of how I have tried to connect justificatory ideas and concepts on the one hand and specific legal rules or alternative "ratios" on the other, see generally William E. Conklin, "The Origins of the Law of Sedition" (1973), 15 Cr. L. Q. 277; "The Utilitarian Theory of Equality before the Law" (1976), 8 Ott. L. Rev. 485; "The Political Theory of Mr. Justice Holmes" (1978), 26 Chitty's L.J. 200; and "Constitutional Ideology, Language Rights and Political Disunity in Canada," (1979), 28 U.N.B. L.J. 39.

models for distributing power. It works out political ideas at a concrete level.

When one understands the word "political" in this sense one can better appreciate why a judge, lawyer or law student makes a political decision even when he strictly applies a rule or leaves changes in it to the legislature. Such a decision invokes political ideas about the institutional arrangement of power as between the courts and the legislature. The content of such a decision or non-decision distributes power by proscribing some conduct or permitting other conduct. Such a decision or non-decision poses political issues concerning majoritarianism, rights, interest groups, popular sovereignty, the nature of the state and the like. And a judicial non-decision tries to answer such concepts by choosing a conception of majoritarianism over competing conceptions of how power ought to be distributed in society. A rule of law merely transposes the choice of conceptions into an institutional setting in a concrete case.

2. *An Education about Substantive Justice.*

The reflective model of legal education has a second implication for the content of a practical legal education. It would be an education about substantive justice. The word 'justice' is carefully chosen over the word 'law' because the former connotes a normative or 'ought' enterprise whereas the latter does not necessarily do so. I have made a case why a practical legal education involves an 'ought' world. Justice rather than virtue, goodness, harmony, liberty, property or some other concept provides the focal point of that education, although virtue, goodness and the like may well be intimate elements in any one particular conception of justice. The subject of justice, in turn, concerns at least two critical inquiries: the first goes to the justice of the major institutions of society, and the second goes to the justice of the content of the laws which the institutions create.

With respect to the justice of the institutions, one would examine major institutions as the source of the overall distribution of rights and duties in the structure of society. For example, what institutions process disputes, what institutions make general rules for society, how do they operate, who are their clients, and how do the various institutions interrelate? Another set of issues goes to the personnel of the institutions: for example, the career structure of the judiciary,

legislator or bureaucrat; the social distance between office holder and client; the role self-image of the office holder; and the like. Finally, do the institutions lend themselves to equal access by relevant parties? Can the institutions produce a fair outcome if wealth and power are unequally distributed? Will the alleviation of the scarcity of legal services ensure a just society? If not, why not? Are institutions unjust to the extent that, due to social or economic circumstance, all members of society cannot effectively participate in the institutions of law creation? These are some of the issues which a practical legal education would entail.

The second line of inquiry concerns the justice of the statutory and judicial rules. I have argued above that justificatory ideas and conceptions are rooted in legal rules. Because the nature of justice has been and will likely continue to remain the subject of debate, so too the justifications of the ideas embedded in the rules will be open to study. Consequently, a practical legal education would provide the student with a curriculum which examines competing conceptions of justice. It would also teach the student how to connect particular justificatory ideas embedded in the rules to more philosophic arguments about justice.

For example, if one were to analyze a Rawlsian conception of justice, the following issues might arise:[71] are Rawls' objections to the liberal principles of careers open to talents and fair equality of opportunity convincing? Has Rawls adequately distinguished between the redress and difference principles and, if so, what are the implications of his distinction for the individual's or group's access to justice? How ought we to define the "worst-off" persons and the "representative equal citizen"? Is Rawls right that we do not have justice issues if society has no limited scarcity? Does Rawls provide an adequate justification as to why his principles of justice would be chosen over egoistic conceptions in the original position? How can Rawls support basic liberties, and yet adhere to his common interest principle? Can we weigh and restrict the most extensive system of basic liberties without reference to outside standards? What implications lie for his argument about an unequal worth of liberty? What effects would a transfer system in income taxes, a guaranteed annual income and a proportional expenditure tax pose for claims for justice from all groups in society? And do

71. See generally William E. Conklin, *In Defence of Fundamental Rights* (Alphen aan den Rijn/Germantown, Maryland, Sijthoff & Noordhoff, 1979), c.5.

social and economic inequalities involve inequalities in power, in social status, in income, in wealth or in some other factor? Who is owed the guarantee of justice?

If one were to examine substantive justice from a Marxist point of view the curriculum might raise the following sorts of issues: in what sense are people equal, according to Marxist thought? What did Marx mean by "to each according to his needs", how would one accurately determine and measure "needs", and what role is played by desert? What did Marx mean by "to each according to his work"? How does distributive justice fit into Marx's scheme of society? In the Marxian model, does justice mean the legal process, the legal institutions or legal rules? If not, why not? Would justice require a genuine social revolution which could destroy the existing legal structure and place the true relations of production in a coincident position with the forces of production? Must it be a genuine social revolution as opposed to a mere political revolution? What implications of a Marxist conception of justice would lie for the content and methods of community legal education?

Finally, if one were to choose a utilitarian conception of justice, one might question the importance of formal justice in utilitarian theory.[72] For example, are the notions of impartiality and protection of the law peculiar only to utilitarian theory? Does utilitarianism focus upon justice after rather than before the rules are made? Do rule and act utilitarianism provide different responses to this question? What sorts of issues would each type of utilitarianism pose for particular hard or clear cases? Does utilitarianism require universal, effective openness in the institutions of power? Does utilitarian theory contemplate that all persons are to possess the social and economic capacity to exercise their formal rights effectively? Can more categories of persons (say, children, human vegetables or animals) be guaranteed access to justice under utilitarian theory whereas other conceptions of justice fall short in this respect?

The above lines of questions concern only three conceptions of justice. There are others. What is more, a reflective legal education requires that the student be capable of setting the one conception against the other. Furthermore, it requires that he be capable of doing so not as an ideological enterprise which would be more to the liking of a preference model of legal education but rather as a

72. See generally *id.*, c.4.

reflective enterprise where compelling arguments of evidence and reason are ushered in support of the competing conceptions. What makes the above line of questions worthwhile is the modest prospect of enlarging the student's and future lawyer's capacity to isolate and question the justificatory ideas embedded in legal rules. They are background questions designed to stimulate thought. The task of connecting the questions to concrete cases remains the challenge for the future teacher and student alike.

VI. *Conclusion*

The claim that a practical legal education would enumerate legal rules and teach the student how to apply the rules can no longer be sustained. The diverse methods of finding a "ratio decidendi" prevent the existence of pre-established, clearly understood legal rules in most, if not all, cases. Rather, the very heart of the common law seems to allow the lawyer to pick and choose whatever "ratio decidendi" he believes ought to be the law. But what characterizes a properly decided judicial decision in any case is, first, the justification of the decision and, secondly, a justification in terms of independent, principled reasons rather than a preference. Accordingly, the student who wants to understand the law "as it really is" is the person who can carry on a second level normative dialogue as to why we ought to follow one "ratio" or rule rather than another. In contrast, an educational system which directed itself to legal rules and the deductive process would be a misdirected legal education — if what one wanted was a practical legal education.

It is not enough for the law student to be able to "pick and choose" the "ratio" which suits his own preferences. Nor is it adequate for him to stop his analysis once he has somehow discovered the relevant legal rule even in the clear case. The inadequacy of an education which trains such a student stems from the justificatory as opposed to the discovery element in a properly decided judicial decision. And the latter flows from arguments about formal justice, substantive justice, liberty, guidance to lawyers and the majoritarian theory of political institutions. I have argued that, embedded within the competing "ratios" and rules of law themselves, there rest second-level political conceptions and justificatory arguments which connect the rules of law to normative issues of justice. Because of this intimate connection a practical legal education would possess a political character. The connection,

in addition, establishes why a practical legal education would focus upon issues of *substantive justice*.

But these conclusions assume that what one really wants is a practical legal education. And that, as suggested initially, is itself questionable.

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