Vanderbilt Law Review

Volume 33
Issue 3 *Issue 3 - Symposium: In Honor of Dean John W. Wade: Current Developments in the Law of Torts*

Article 10

4-1980

Products Liability and Safety, Cases and Materials / Law, Intellect, and Education

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BOOK REVIEWS

PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS. By W. Page Keeton, David G. Owen, and John E. Montgomery. Mineola, N.Y.: The Foundation Press, Inc., 1980. Pp. xlv, 1033. $24.50.

*Reviewed by Richard E. Speidel**

In the preface to this casebook, the authors assert that the "time has come for products liability to assume its place as a full 3 hour course on [*sic*] the law school curriculum."[1] Why? Because in the last fifteen years there has been a marked increase in products liability litigation, a rapid evolution in the theory of liability and a substantial growth in the quantity of government regulation. These events have triggered what has been called a "products liability crisis."[2] Whatever phrase is attached, these events have revealed a legal and social problem of genuine importance. Accepting these developments as true, do they justify offering a course in products liability and safety as an integral part of the modern law school curriculum?

Conceding that the problem should not be ignored in law school, the answer, in my judgment, turns upon the nature of the course and the quality of the teaching materials. Clearly this course is fated to be positioned somewhere in the second or third year of law school. It should not be just another survey course whose primary objective is simply to integrate materials readily available for study in other courses, such as torts, commercial law, remedies, trial practice, or insurance. It must not be just another barren outpost in the wasteland of the third year. Beyond confronting a problem of significance, the course must also be justified because it is professionally relevant and educationally sound. The more clearly the teacher and the teaching materials can identify the professional roles involved and the intellectual and operational skills required to perform them and to make explicit the educational methods employed to further learning, the better. More specifically, it is preferable after the first year of law school to develop courses which focus upon pervasive problems, relate them to a carefully planned curricular structure and try fully to develop the different lawyerly roles

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1. W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY, CASES AND MATERIALS XIX (1979) [hereinafter cited as W. KEETON].

2. *See id.* at ch. 10 (entitled "Crisis and Reform").

and skills within the problem area. These roles and skills are as varied and complex as the social problem under consideration. The cardinal, deadly sin of legal education after the first year is the seemingly endless repetition of survey courses where narrow analytical skills are repeatedly honed on a "casebook" in a fairly large class where variety, close supervision, and "feedback" are at a minimum. If you doubt this, simply look around. Without question, the survey course, characterized by a medium- to large-sized class, use of a case book, and a one shot examination, still dominates legal education.[3] Products liability and safety is an important and pervasive problem in a highly industrialized, market-oriented society. A course built around this area could be an exciting event. How have Messrs. Keeton, Owen and Montgomery packaged their product? Are these materials professionally relevant enough and educationally sound enough to justify a lasting place in the law school curriculum?

The authors' stated objectives in the casebook are to present a logical framework built upon court doctrine on questions of liability, to emphasize the policy choices that courts must make, and to provide through detailed notes a mini-textbook within a casebook.[4] Fully fifty-five percent of the 1024 pages consists of edited appellate materials and another thirty percent consists of extended notes and questions. The balance consists of text by the authors and excerpts from the published work of others. There are few if any variations in this unrelenting style. Case is piled upon case and note is stacked upon note. There are no problems for solution[5] and no deviations from the major theme. This is, therefore, a highly traditional casebook with a predominant focus upon the work of appellate courts in adjudicating products liability cases.

The possibilities for a broader approach have not eluded the authors. Chapter One starts by exposing the student to the incidence and social costs of defective and dangerous products, and concludes with a "case litigation study" of an especially dangerous product (a circular saw), that illustrates the separate and overlapping provinces of products liability and products safety law. The authors, however, draw a sharp distinction between liability (litigation) and safety (regulation) and make it clear that the book will emphasize the former rather than the latter. Thus federal and state regulatory efforts to prevent accidents are treated interstitially throughout a book otherwise devoted to questions of liability.[6]

3. This contributes, no doubt, to what Dean Roger C. Cramton calls "a bias deeply engrained . . . that law school is a training ground for technicians who want to function efficiently within the status quo." Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEG. ED. 247, 262 (1978).

4. W. KEETON, *supra* note 1, at xix.

5. There is perhaps one exception. *See id.* at 576-77.

6. Without question, this interstitial treatment provides important information and

Moreover, the time frame for the liability analysis is circumscribed by what is termed the beginning of modern products liability law—the 1916 decision of *McPherson v. Buick Motor Co.*[7] and current efforts, both state and federal, to impose legislative restrictions upon courts in the development of liability theory. The history before 1916 is given a light touch[8] and the possibility of future legislative compensation systems in this area, while noted, is not developed.[9]

Accepting this emphasis and constraint, the key question is how the liability issues are developed in the balance of the book. Chapter Two assumes that a manufacturer has manufactured and sold defective goods which have injured a purchaser, user, or consumer and traces the development of four possible theories of liability—negligence, misrepresentation, warranty, and strict liability. Each theory is given separate treatment and there are ample opportunities in the materials to contrast the various difficulties that bar imposition of liability. The victor is, of course, strict liability, which within its purview has overcome many of the traditional obstacles to individual protection, such as the requirements of "privity," proof of negligence and timely notice, and the enforceability of contractual disclaimers and of limitations on remedies. This excellent development is capped by a separate section on the policy assumptions underlying strict liability. These materials will help the student evaluate liability development and the possible extension of strict liability to parties in the distributive chain other than the manufacturer and to those who sell land or services rather than goods. More importantly, the analysis facilitates a preliminary inquiry into the strengths and weaknesses of the judicial process in developing and administering a regime of strict liability or a liability theory that probes further into the realm of a products compensation system.

On balance, this chapter is well done. In terms of pedagogy, selected problems placing the students in a particular state and requiring the development of liability theories in that setting would drive home the point of overlap and choice. Each state has a different pattern of development and students should realize that under-

perspective. For example, there are materials on the Consumer Product Safety Commission, *id.* at 1-17, 250, 305-07; the Magnuson-Moss Warranty Act, *id.* at 116, 175-78; the Federal Food, Drug and Cosmetic Act, *id.* at 290-93, 307-12, 346-59, 396-99; the Federal Hazardous Substance Act, *id.* at 296-303; the Federal Aviation Administration, *id.* at 365-73; and the Federal Flammable Fabrics Act, *id.* at 372-73. Although much of this material focuses upon the impact of state and federal regulation in liability litigation, at least one section considers the reliability of the government decision to regulate in the interest of safety. *Id.* at 481-91.

7. 217 N.Y. 382, 111 N.E. 1050 (1916).

8. W. KEETON, *supra* note 1, at 19-26, 117-22.

9. *Id.* at 212-14.

standing theories in the abstract is no substitute for careful research and advocacy within the state whose law applies.[10] I wonder, however, whether it was wise to postpone until later in the book[11] the question whether strict liability should be extended to other than manufacturers or providers of services. Although the issue is close, the student might profit at this point from wrestling with such questions as whether the policy assumptions justify extension of strict liability to, say, a non-negligent dentist who provides defective services or a non-negligent manufacturer who sells sound goods that cause harm to an ultimate purchaser. In terms of substance, an important mistake in this chapter is the failure to address the range and variety of damage which can be caused by a defective product. In the usual way, theories of liability are treated early and the scope of remedial protection is postponed.[12] This causes difficulty when the authors in Chapter Two explore the extent to which contractual arrangements can disclaim warranties or limit remedies for breach.[13] It is one thing to discuss the effect of agreements limiting liability, whether it be through disclaimers of warranty or exculpation of negligence, and another to discuss those limiting the remedies available to aggrieved parties. It is easier to do the latter, especially where economic loss rather than damage to person or property is involved.[14] More importantly, the scope of the liability theories, particularly strict liability, may be limited in nonprivity cases where the loss is economic.[15] Without reploughing the tedious ground around the proper scope of the Uniform Commercial Code and strict liability,[16] the incongruity that the nature of the loss may control the scope of liability forces another look at the theory itself. Despite some very interesting materials, little effort is made to confront this problem or to integrate the four theories into a more

10. For example, Massachusetts has not adopted strict liability but the same result is achieved by a warranty theory under a special version of U.C.C. § 2-318. *See* Swartz v. General Motors Corp., 378 N.E.2d 61 (Mass. 1978); Note, *Massachusetts Strict Liability Law: Alternate Route, Same Destination,* 14 NEW ENG. L. REV. 237 (1978).

11. These problems are addressed in Chapters Six and Seven.

12. *See* W. KEETON, *supra* note 1, at ch. 9.

13. The discussion is limited to enforceability under the Uniform Commercial Code. *Id.* at 150-73.

14. Whatever the considerations of efficiency and fairness in tort law, contractual arrangements allocating various risks associated with product accidents do not occupy much space or a very high priority in this book. *Id.* at 196-98. *See also* Speidel, *An Essay on the Reported Death and Continued Vitality of Contract,* 27 STAN. L. REV. 1161 (1975).

15. *See, e.g., State v. Campbell,* 250 Or. 262, 442 P.2d 215 (1968), *cert. denied,* 393 U.S. 1093 (1969).

16. There are, however, some diligent Ohio farmers. *See* Shanker, *A Reexamination of Prosser's Products Liability Crossword Game: The Strict or Stricter Liability of Commercial Code Sales Warranty,* 29 CASE WES. RES. L. REV. 550 (1979).

cohesive theme.[17]

Chapter Three, some 280 pages in length, confronts in massive detail the requirement that a product which causes damage be defective before liability under any theory can be imposed. Defectiveness is another way of asking whether an adequate level of safety has been achieved for the particular product or marketing process involved. In direct contractual relationships, this issue can be resolved by ascertaining the level of quality required by the contract, aided by applicable express or implied warranties.[18] Even without a direct contract, consumers frequently rely upon express representations by remote sellers made through various modes of advertising.[19] But in the absence of contract or express representations and regardless of whether the theory of liability turns on negligence or not, a retroactive examination of whether the product was "defective" will occur after every accident. What are the tests?

The authors start by exploring two approaches to "defect"—the "consumer expectation" test and the "risk-benefit" analysis. The former aims at determining minimal levels of safety from the reasonable expectations of consumers and the latter is directed more to the aspirational question "can greater safety be achieved without incurring costs deemed to be excessive?" Neither approach is entirely satisfactory, and the authors conclude with an inquiry into an alternative test for defectiveness that is premised less on defect and more on the degree of danger created. With this groundwork laid, they pursue the elusive tests for defect in several different settings—(1) the manufacturing process, where the final product may contain flawed components or may be improperly assembled; (2) the marketing process, where the product is dangerous if not defective and the seller has failed to provide adequate warnings or directions for use; and (3) the design process, where the "how safe is safe" question is asked as part of the "risk-benefit" analysis. These materials are well organized, exhaustive, and richly illustrated with product varieties and competing tests for defect. Then follow sections on the extent to which assembly and design obligations can be delegated by the manufacturer, fundamental limitations on the concept of defectiveness (for example, the danger was "useful," the product deteriorated, the danger was undiscoverable and unavoidable, and the product met the state of the art), and the obligation of

17. W. KEETON, *supra* note 1, at 222 n.3.

18. *Id.* at 102-45.

19. The core of this idea has been elevated into a pervasive theory of products liability. *See* Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment,* 60 VA. L. REV. 1109 (1974).

the manufacturer to warn or recall after the product has been marketed. The massive chapter concludes with a section entitled "Perspectives on Defectiveness and Governmental Intervention" which reconsiders risk-benefit analysis in the light of government safety regulation and the role of the courts in light of the continuing controversy over the proper test for design defects.

It is difficult to imagine a more thorough, well organized collection of materials on defectiveness. The chapter is a veritable gold mine for the persistent miner, although the nuggets are not always readily apparent. But is it teachable? Will anyone but the most diligent have the persistence and patience to dig through it? The answer, in my judgment, will be "no"; the difficulty will be complicated by the absence of variations in approach or visible author preferences. There is no time or opportunity to reflect or to "try on" ideas in the unending barrage of cases, notes, and questions.[20]

The balance of the book, in my judgment, tells us in a very traditional way more than we need to know about some well-understood problems. Chapter Four treats defenses of the defendant based upon the plaintiff's conduct, such as contributory negligence, assumption of risk, product misuse, and comparative fault. Chapter Five explores the requirement that the plaintiff establish that the defective product caused the loss, with an important distinction drawn between the necessity for causation in fact and the limitations on liability inherent in the idea of "proximate" cause. The causation requirement is closely tied to the plaintiff's general burden of proof—a problem addressed in Chapter Eight. Chapters Six and Seven treat two related areas involving the scope of liability: the extent to which liability extends to other sellers of goods in the distributive process (including idemnification); and the extent to which commercial parties other than sellers of goods—for example, providers of services and sellers of real property—are liable for defective performance.[21] Chapter Nine presents a survey of remedies

20. For example, § 104 of the proposed Uniform Products Liability Act defines defective product exclusively in terms of whether it was "unreasonably unsafe" in construction, design, or other aspects. The consumer expectation test is rejected in favor of a pervasive requirement that risk be balanced against utility. Is this a sound approach? Or, as Professor Jeffry O'Connell suggests, should the defect requirement be rejected for a test imposing liability "for bodily injury to any human being resulting from the operation of typical risks associated with the activity of the enterprise?" *See* O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973). Key questions like these are frequently buried in the detail.

21. In my judgment, Chapters Six and Seven on the scope of liability beyond the manufacturer of goods should be condensed, integrated and combined functionally with Chapter Two, "Theories of Manufacturer Liability." The current separation reduces the potential of the excellent section on "Policy Issues Underlying Strict Liability," W. KEETON, *supra* note 1, at 205, as a staging ground for testing the extension of liability.

available to the plaintiff, emphasizing the problems of choice. The casebook concludes with a chapter entitled "Crisis and Reform," which contains excerpts from articles on the "crisis" in products liability and a copy of the proposed "Uniform Product Liability Act," a model for state legislation which emerged from the United States Department of Commerce Task Force on Product Liability and Accident Compensation. It should be noted that the reforms contemplated here do not encompass movement toward a legislative compensation system for product accidents. Rather, they reflect pressure to retreat from the full implications of the regime of strict liability as unevenly administered by courts to the uniform and balanced perspective of a statute under which the role of the courts is controlled.

In this brief review, I have attempted to determine whether this casebook makes the case for installing products liability and safety as an integral part of the law school curriculum. Admittedly, defective products pose an important social and legal problem with which lawyers are deeply involved. The question is, however, whether the casebook is, within the broader framework of contemporary legal education, both professionally relevant and educationally sound to a sufficient degree. It is my grudging conclusion that, on this basis at least, the case has not been made.[22] The casebook is a period piece which examines a relatively narrow slice of products liability life through the microscope of the appellate court. Although that slice has been exhaustively and skillfully prepared, it gives neither the student nor the teacher a sense of the rich common-law past, the challenges of the "compensation system" future or a full picture of the complex roles played by contemporary lawyers both inside and outside of the litigation process. The unrelenting collection of cases and notes strongly suggests that the only skills worth cultivating in this area are the analysis, synthesis, and evaluation of liability decisions by the courts. When this occurs in any course after the first year, the result, no matter how superb the organization and analysis, is predictable. Even a musical director with the talent of Seiji Ozawa would have trouble livening up this score.

The critical question is whether a book that stakes out such a narrow compass can ever justify a claim that products liability has arrived? Assuming, as the authors do, that the products liability

22. This conclusion is weakened by the fact that I have not had a chance to "teach" the book. Also, the conclusion about this book may apply equally to most "casebooks," including those with which I am associated. The time has come, however, for a rigorous reexamination of what passes for teaching and teaching materials in the law schools, with a view toward broad based improvements.

world began in 1916 with *McPherson v. Buick Motor Co.*,[23] ended in 1980 with the Uniform Products Liability Act, and featured liability in the courts, the claim is difficult if not impossible to justify. How, then, could the claim be supported? I have no single prescription. An obvious approach within that compass would be to cut the size of the book and sharpen the focus through more analytical text by the authors, fewer cases, and shorter notes. Also, the educational terrain might be varied by problems and exercises which reflect the different roles played by lawyers in the litigation process. Thus, exercises where students are expected to predict results in subsequent cases, prepare the draft reform legislation, plan trial strategy, or negotiate settlements could easily be devised. Additionally, problems in drafting complaints where alternate theories of liability exist, in organizing class actions, in joining elusive drug manufacturers, and in insuring that all of those responsible in contribution or for indemnification have been joined could be added. At a time when law schools are being pressured to improve their skills training, specifically the preparation for trial advocacy,[24] the challenge of products liability litigation offers an unparalleled opportunity to integrate intellectual and operational skills in a conventional course. Changes of this sort would, in my judgment, improve the teachability of this course and its relevance to a wider variety of lawyer roles.

But is this enough? Recently, Dean Michael Kelly has argued that the "scandal" of legal education is that the analytical exercises in which we engage are more practical than intellectual and too narrowly based to be much help in critical evaluation and problem solving.[25] If our objective is to develop attorneys who understand and can critically evaluate the operating system and who are prepared to learn while confronting the range of uncertainty that arises over a lifetime of practice, much of the time invested in conventional law school courses is either wasted or misplaced. A course in products liability, if the sights were raised and the perspectives broadened, might answer this fundamental objection.

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23. 217 N.Y. 382, 111 N.E. 1050 (1916).

24. *See, e.g.*, ABA LEGAL EDUCATION AND ADMISSIONS TO THE BAR SECTION: LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3 (1979):

> Law schools should provide instruction in those fundamental skills critical to lawyer competence. In addition to being able to analyze legal problems and do legal research, a competent lawyer must be able effectively to write, communicate orally, gather facts, interview, counsel, and negotiate . . . . Law schools should also offer instruction in litigation skills to all students desiring it.

25. Kelly, The Scandal of Legal Education, 1979, Report of the Dean of the University of Maryland School of Law. *See also* McGowan, *University Law School and Practical Education*, 65 A.B.A.J. 374 (1979); Allen, *The Prospects of University Law Training*, 29 J. LEGAL ED. 127 (1978).

This solution is complex and much of the work has not been done. With the focal point upon either preventing accidents or assessing responsibility for products which cause harm to people and property, the first inquiry would be to determine what more could be done with the history of products liability before the *Escola*[26] case in 1944. More is involved than tracing the evolution of doctrine in the elaborate common law process.[27] What can be learned from the interaction of doctrinal evolution, economic development, and social concern for the injured consumer that precedes and helps to explain strict liability? Was the Anglo-American experience different from that in civil law countries? What was the influence of products liability insurance for manufacturers and the paucity of private plans outside of workman's compensation for injured victims? What pressure was developed by an organized plaintiff's bar with contingent fees in mind for a simpler and more direct theory of liability?

Once the seed of strict products liability had been sown in California, the next period for understanding and assessment is the rapid growth of that plant over the next thirty years in a federal system of government. The courts, as the initial seed planters, found support in the egalitarian vibrations of the consumer protection movement and the private lawmaking efforts of the American Law Institute's *Restatement (Second) of Torts*. The restraint, if any, was asserted by more traditional notions of contract and the Uniform Commercial Code, which aimed primarily but not exclusively at commercial warranties. The tension between these two sources of law and the ultimate victory of strict liability over the "intricacies" of the law of sales represents one of the more interesting legal developments in the last quarter century. Legal niceties aside, what really explains an ineluctable development that transcended the limitations of post-realist thinking, outflanked the efficiency trap of microeconomic analysis, and emerged on a platform that was supported more by assumptions than reliable data on such questions as the cost and effectiveness of insurance, the deterrent effect of liability, and the adequacy of private insurance to absorb the first shock of an accident? In the aftermath, with increasing legislative pressure to restrict the scope of strict liability, one must be both intrigued and concerned about how this private law development with such a macro-impact could occur.

The retreat and increased control reflected by such proposed

26. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

27. A task done with distinction in E. LEVI, AN INTRODUCTION TO LEGAL REASONING, 9-25 (1949).

legislation as the Uniform Products Liability Act provides an addendum to the development of strict liability. Has reality caught up with aspiration and do the actual costs of administering through litigation an imperfect compensation system outweigh considerations of fair compensation to injured consumers? At the same time, this retreat may (and should) herald renewed interest and inquiry into two closely related problems for the future: (1) the extent to which a more efficient and fair compensation system for product accidents can be developed through the legislative and administrative processes; and (2) the extent to which more effective accident prevention systems—systems concerned with more than simple product failure—can be developed. Surely these questions transcend in importance the current rattle in the courts and the literature over the legal standard for defect in design cases. For if *any* engine mounting on a DC-10 or nuclear reactor system or chemical storage container fails, the one-shot cost to life, property, psychological well being, and economic relationships obliterates every assumption made about strict liability as a compensation system and makes accident prevention (safety) the most important consideration for private industry and government regulators. Let's face it. The common-law string in products cases barely holds its own weight and is in danger of breaking. The future lies in surrounding and perhaps supplanting this string with more vigorous accident prevention and compensation systems. It surely is a challenge worth tackling head on at an early stage in one's legal studies.[28]

LAW, INTELLECT, AND EDUCATION. By Francis A. Allen. Ann Arbor, Mich.: The University of Michigan Press, 1979. Pp. viii, 123. $12.00 cloth, $5.95 paper.

*Reviewed by Gene R. Shreve**

This small book by a former dean of the University of Michigan Law School is the most confident statement of the nature and purpose of American legal education to appear since questioning and serious criticism gathered force in the 1970s. Coming after a period

28. As this review is completed, another "casebook" on products liability by Professor Marshall S. Shapo has been announced for publication in the spring of 1980. The liability book will be accompanied by a separate paperback by Shapo entitled "Public Regulation of Product Hazards."

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of relative disillusionment, *Law, Intellect, and Education* is valuable for some of the claims it makes in support of legal education. While I find myself in disagreement with many of the author's points, I think the book generally represents an important contribution to the literature on legal education[1] because it represents the philosophical position of the powerful law school traditionalists, who seldom reduce their views to writing.[2] This forthright book says more about the feelings which justify traditional law school processes than the speculations of twenty critics, thereby providing important new material for the continuing dialogue on law school reform.

Over the past thirty years, Dean Allen has written numerous essays on law and legal education which have been edited, revised, and combined into this volume. The collection is intended to represent the values and observations of an influential figure in American law school circles, and to honor Dean Allen's service to the Association of American Law Schools.[3] The book can most easily be seen as a work on law schools, although the author prefers the broader concept of "the university law school."[4]

The author's insistence on viewing the law school as part of a greater university community serves as a basis for some valuable observations about trends and needs in legal education. Dean Allen addresses the impact of other disciplines on law teaching and scholarship, noting that

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1. For an overview of the considerable body of literature which has been produced on the subject of legal education, see Barry & Connelly, *Research on Law Students: An Annotated Bibliography,* 1978 AM. B. FOUNDATION RESEARCH J. 751.

2. *Id. See also* Griswold, *Legal Education 1878-1978,* 64 A.B.A.J. 1051 (1978). Writings critical of learning opportunities in law school have appeared in far greater number. *E.g.,* Kennedy, *How the Law School Fails: A Polemic,* 1970 YALE REV. L. & SOC. ACT. 71; Mohr & Rodgers, *Legal Education: Some Student Reflections,* 25 J. LEGAL EDUC. 403 (1973); Patton, *The Student, the Situation and Performance During the First Year of Law School,* 21 J. LEGAL EDUC. 10 (1968); Reich, *Toward the Humanistic Study of Law,* 74 YALE L.J. 1402 (1965). While perspectives of the authors differ, these works have in common a concern that greater learning and growth in law school requires recognition of individual human needs and motivations of law students. This is sometimes described as the "humanistic" view of legal education. One of the most forceful and extensively developed statements of the humanistic view can be found in T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977). *See also* Shreve, Book Roview, 52 S. CAL. L. REV. 259 (1978) (reviewing T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977)). In many respects this book provides an interesting counterpoint to *Law, Intellect, and Education.*

3. The idea for the book came from those with whom Dean Allen served on the AALS Executive Committee. F. ALLEN, LAW, INTELLECT, AND EDUCATION vii (1979).

4. *Id.* at 65. The concept would seem to be particularly relevant in light of the current controversy over the place of practical skills training in the law school curriculum. *See* notes 15 & 16 *infra*; McGowan, *The University Law School and Practical Education,* 65 A.B.A.J. 374 (1979).

> there are few competent and conscientious law teachers or scholars who today would question the penetrating power of economic analysis in the consideration of some legal questions, the utility of techniques of social research developed outside the law schools, or the insights gained from viewing contemporary problems from the broad perspective of historical sequences.[5]

At the same time, Dean Allen justly criticizes the frequent failure of legal scholars to borrow and apply techniques of empirical research to their own work.[6] The need to develop strategies for collecting and evaluating factual data is great. He writes that "in many vital areas of legal policy . . . we literally do not know what we are doing, and we are not sufficiently committed to finding out."[7] Suspicion of the methods of empirical research long accepted in other academic disciplines has been a tradition among legal scholars[8] and will die hard. This book will hasten its demise, particularly in light of the reinforcement Dean Allen gives to law faculty members seeking to broaden their interdisciplinary horizons.

Advanced degree work in the humanities or social sciences is rarely a prerequisite for law school faculty appointment. Faculty members who are drawn directly from law school or practice probably are often intimidated by both the knowledge and research methodologies of related university fields. Yet Dean Allen writes of "the remarkable task of self-education that law faculty members, particularly young ones, have undertaken in the past generation."[9] The author performs a genuine service in encouraging law professors to explore material from related university disciplines and integrate it into their teaching and scholarship, although they may always lack the certification of a doctoral or master's degree in other fields.

Dean Allen writes in the preface that all essays in *Law, Intellect, and Education* express his concern that legal education "is under attack in the twentieth-century world, and that, if it is to survive, it must today, as in the past, be contended for."[10] The author undertakes to defend legal education from what he sees to be the potentially corrosive effect of developments beyond the borders of the university community. The external threats cited by Dean Allen change according to the time each essay was written. They include "intellectual obscurantism" in the years immediately

5. F. ALLEN, *supra* note 3, at 57.

6. *Id.* at 88.

7. *Id.* at 89.

8. For example, Thomas Reed Powell, a professor at Columbia University School of Law, used to speak with disdain of some social studies where "counters don't think, and thinkers don't count." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15 (1973).

9. F. ALLEN, *supra* note 3, at 56. Dean Allen argues strongly for the need of legal educators to educate themselves. *Id.* at 44.

10. *Id.* at vii.

following the Second World War,[11] Vietnam,[12] rapid technological change,[13] Watergate,[14] and bar association attempts to shape law school curriculums.[15]

It is regrettable that Dean Allen has chosen to cast the purpose of his collection of essays in such epic terms. While the book works well at a musing, epigrammatic level,[16] it is an inadequate vehicle for the author's larger purpose of defending essential values of legal education. Why and how the external forces identified by Dean Allen threaten legal education is never fully explained. More basically, the book devotes little specific attention to what the processes of American legal education are or should be. The reader needs a clearer indication of the purposes and methods of student learning and growth in law school in order to understand and evaluate positions taken by Dean Allen.

Nowhere is this weakness more apparent than in the author's discussion of student based criticism of legal education. Dean Allen sees the dissatisfaction of law students with the quality of their classroom experiences as a "contribution of modern student attitudes to the new anti-intellectualism in American legal education."[17] The substance of student criticism is never really presented, but the author appears to see in it a rejection of his vision of an "intellectually based and humanistically motivated"[18] law school. Dean Allen deplores the reluctance of some, perhaps many, law students to undertake the intellectual exertion and self-discipline for "clear and responsible thought"[19] in their legal studies. The author finds two sources for what he perceives as student anti-intellectualism. The first is Vietnam disillusionment. Dean

11. *Id.* at 17 (note).
12. *Id.* at 72.
13. *Id.* at 40-41.
14. *Id.* at 11 (note).
15. *Id.* at 51-52.
16. For example, Dean Allen, referring to the practical skills controversy, states:
> If ever the law schools and the practicing profession are in perfect accord, it will be because one or the other has capitulated and abdicated its proper functions. In this sinful world, when the lion and the lamb lie down together the lamb is usually in the interior of the lion.

Id. at 57.
17. *Id.* at 71.
18. *Id.* at vii. Dean Allen uses variations of this phrase throughout the book. He apparently sees law school learning as a fusion of the reasoning process (intellect) with the critical study of values which have their source in other university disciplines (humanism). *E.g., id.* at 24-25, 68. Dean Allen's repeated use of the term "humanistic"—"humanistically motivated law training," *id.* at 62, "humanistic ends of law teaching," *id.* at 67, "humanistically based legal education," *id.* at 69—may confuse readers who associate the term with a school of thought more critical of legal education. *See* note 2 *supra*.
19. *Id.* at 68.

Allen argues that students have less faith in, hence less interest in, political and social institutions.[20] The second source is what Dean Allen calls the "hedonism of modern life."[21] The author suggests that learning in law school is hard work and inevitably painful, yet many students feel that they "possess a kind of natural right not to experience pain."[22] Dean Allen sees in student criticism a desire for an easy, anti-intellectual classroom alternative. The author urges law teachers to resist student pressures to make the tensions and demands of the classroom less rigorous.[23]

Dean Allen's reports of the dissatisfaction of many students with their law school experiences would seem accurate. Interest in law school begins to decline during the first year,[24] and the problem worsens during the second and third years.[25] Professors often become discouraged at declines in class attendance or preparation and student preoccupation with practice opportunities, either part time during law school or full time thereafter. While this all may be true, I think the author is wrong in concluding that student dissatisfaction with the law school experience represents an unhealthy trend in legal education. What can be observed during the decade of the 1970s is an increasing willingness of students to react to long-standing issues of relevance and quality in legal education. Students have become far less willing to accept uncritically the character, sequence, and duration of law school programs on the sole authority of law school faculties and administrators.

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20. *Id.* at 62. In Dean Allen's view, they are "impatient with any educational activity that does not promise an immediate and discernable payoff in private law practice." *Id.*

21. *Id.* at 73.

22. *Id.*

23. He attempts to bolster flagging faculty spirits and adds notes both optimistic and dire:

> Resistance creates dissonance in their relations with some students, and dissonance is particularly distressing to conscientious teachers who have always relied on a sympathetic bond with their students as an avenue of communication and as a means for mutual learning. Happily, there are indications that the dissonance is lessening. In any event, the only alternative available to the instructor is default and capitulation.

Id. at 74-75.

24. *See* Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes and Personality Traits Among First-Year Students*, 1979 AM. B. FOUNDATION RESEARCH J. 791, 838-39.

25. The behavior of many second and third year law students is characterized by "cycles of extended periods of lethargy followed by bouts of cramming. During the second and third years of study, student effort declines and disbelief in the value of the standard techniques of legal education increases." TASK FORCE OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS 17 (1979) [hereinafter cited as LAWYER COMPETENCY]. For a thoughtful and detailed examination of the problem of declining student interest in law school, see Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 652-59 (1973).

Traditional law school authority figures are losing their hold on students for many reasons. Vietnam and Watergate have played their part. Students are still aware that their knowledge of institutional and professional models is inferior to that of their professors, but because the models are less sacred, students are less intimidated by their lack of knowledge and less willing to suppress or postpone[26] criticism of their surroundings. The admission of larger numbers of women to law schools is also a factor. Legal education is no longer the male ritual or rite of passage that it used to be.

On one basic and important point I believe I am in agreement with Dean Allen. When students reject the structure and content of law school experiences offered them, their opportunities for learning are greatly diminished. Law students simply lack the capacity to design and implement an alternative program of learning entirely on their own. I am as disturbed as I perceive the author to be that not enough learning is happening in law school. The essence of my disagreement with the author involves two related assumptions which are at the core of the book. First, I am not persuaded that student criticism of legal education is essentially irrelevant or that it has its stimulus in larger and essentially unproductive trends of hedonism or social disillusionment. Second, I cannot accept Dean Allen's positive and essentially protective assessment of the sufficiency of learning opportunities in law school.[27]

Learning in law school comes as a result of the totality of student experiences in the law school community—what has been called the law school "climate."[28] It is nonetheless fair to say that most learning comes about as a result of the efforts of law teachers. Unlike academic functions of scholarship and administrative contribution, law teaching exists and can be evaluated almost exclusively in terms of the quantity and quality of student learning.[29]

The essential preoccupation of the book with analytic learning as the purpose of legal education[30] can be faulted. While there is

26. It may be significant that the willingness of law graduates to look back critically on the law school experience substantially predates student based criticism. *See, e.g.*, Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952); Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

27. *E.g.*, F. ALLEN, *supra* note 3, at 57 ("Our mission, as it has been for the past eight hundred years in the universities of the Western world, is the study of law and the institutions of the law.").

28. T. SHAFFER & R. REDMOUNT, *supra* note 2, at 193.

29. It seems to me that the most reliable measure of learning in law school is the extent to which it influences or shapes the professional behavior of students who go into law fields as lawyers, legislators, judges, and law teachers. One might begin with the qualities one hopes to find in such professionals and relate these qualities back to the learning experiences of law school.

30. *See* notes 19 and 27 *supra*.

perhaps unanimous agreement that analytic learning is an essential goal, one may ask whether systematic examination, integration and growth of nonanalytic skills (such as writing, interviewing, and negotiating abilities) should not also be primary goals sought in legal education.[31] Yet even if the purpose of legal education could be confined to analytic learning, the book fails to indicate what good teaching in realization of that goal might be, or whether, or to what extent law teachers are accountable if students fail to progress in analytic learning.[32] A consideration of the nature of and essential preconditions for analytic learning makes it more difficult to accept Dean Allen's dismissal of student dissatisfaction with their classroom experiences.

It may be helpful at this point to offer some observations on the nature of analytic learning and related strategies of casebook teaching. Common to all roles in the law is the need for analytical competence in legal problem solving. Needed is the capacity both to explain and influence the legal processes by which controversies are resolved, and by which the lives of members of our society are authoritatively arranged. This can be done only through the utilization of three highly integrated functions. First, educated lawyers have *knowledge* of particular legal rules. Second, these rules are matched against the facts of the particular situation derived from *observation*. Finally, decisions are made about the possible legal significance of the facts through the process of *reasoning*.

"Knowledge" can be knowledge about rules reflecting social values (substantive law) or knowledge about the rules which compose the process making social values authoritative (procedural law). The selective packaging and distribution of knowledge is a

31. LAWYER COMPETENCY, *supra* note 25, at 3. Neglect of nonadversarial skills associated with client counseling is particularly distressing. Shaffer, *Lawyers, Counselors, and Counselors at Law*, 61 A.B.A.J. 854 (1975).

32. Dean Allen's references to the nature of law teaching are obscure. Of great teaching he says simply: "One who has had the good fortune to study at the feet of great teachers whose careers have been given over to the life of the mind will know that he has undergone a profound ethical experience." F. ALLEN, *supra* note 3, at 85. This tells us what makes teaching successful or even great only if we make two assumptions in evaluating law teaching which I believe represent the traditional view. First, the greatest (perhaps only) requirement for law teaching is that the professor be knowledgeable and brilliant; "[l]aw teachers have as their special pride and exaltation a conceptualistic brilliance that boggles the mind. The teacher's intellect serves the power of the law, and that is what learning the law is made to seem all about." T. SHAFFER & R. REDMOUNT, *supra* note 2, at 11. Best evidence of such prowess is more likely to come through the professor's scholarly contributions than through his students' classroom evaluations. Second, if a law student fails to learn from such a professor, he or she—not the professor—is responsible. Quoting the late Professor Lon Fuller, Dean Allen writes "through the subtle pressure [the student] exerts on his instructors to teach him what he thinks he ought to be taught, he exerts an influence on legal education." F. ALLEN, *supra* note 3, at 71 (quoting L. FULLER, THE LAW IN QUEST OF ITSELF 14-15 (1940)).

central law school function. Students learn some of the knowledge they will need through legal problem solving and they learn research skills sufficient to acquire the remainder. If this were the only learning goal in law school, teaching materials would be black letter texts. Instead, students most frequently use casebooks, which are certainly inefficient vehicles for the transmittal of knowledge. Students must extrapolate and apply knowledge (the rules) from the cases. This forces them to deal with and develop skills of observation and reasoning in order to acquire knowledge and to associate the three in the exercise of critical skills of analysis in legal problem solving.

Analytic learning is most frequently associated with casebooks and case method teaching. The presence of an analytic learning component, however, is probably a *sine qua non* for the adoption of any course into the law school curriculum. Such analytic learning involves the student in the sacred process of learning to "think like a lawyer." Venerated are "skills and values . . . of reading, writing, reasoning, a strong repugnance to the abuse of rhetoric, and a dedication to the arts of reasoned articulation."[33]

Two things are required of law teachers in order to facilitate growth in analytic learning among their students. First, the professor must possess requisite knowledge of the field covered by the course. Second, the professor must be able to engage and involve his or her class in the process of learning. Knowledge of the field is, of course, essential. The teacher must be capable of arranging, presenting, and, as appropriate, clarifying casebook or other course material. The teacher must be sufficiently well informed and thoughtful about the material that he or she can, when appropriate, serve as a model for the kind of critical thinking desired in the course. But however thoughtful and authoritative the teacher's grasp of the material may be, mere presentation of that expertise to students will not greatly advance analytic learning. Students cannot develop skills of observation and reasoning and relate them to the acquisition of knowledge if they are passive in class. The need of the teacher to provide opportunities for student participation and to develop strategies for drawing students from a passive to an active learning state is the central issue in law school teaching. A student cannot learn without strong individual involvement. In the ideal classroom, the student has read the assigned material and come to certain tentative critical judgements about it when the class starts. He or she then listens carefully to the critical judgments of class-

33. F. ALLEN, *supra* note 3, at 25.

mates and the professor; speaks out to probe, criticize, or defend issues which emerge; and, by the end of the class, revises or expands his or her judgment if the experience of the class has persuaded him or her to do so. The process of testing and revision of critical commitments continues until the end of the course.

Dean Allen is correct in concluding that the process of analytic learning[34] is painful. Learning involves discovering and growing from one's mistakes; that is emotionally uncomfortable and at times degrading, even under the best of circumstances.[35] But to suggest that students have no choice but to bear uncritically the pain of learning[36] ignores sound learning theory.[37] The suggestion also ignores the facts of modern student life. Students can no longer be forced to accept approaches to teaching of which they disapprove. Since most Fs are now given out through the admissions process, grades are no longer the threat they probably once were. Moreover, few law school professors presently try to bring about student participation in class through force or intimidation.[38] Sadly, most law school classes are taught primarily in a mode which involves and engages students not at all—lecture.[39] It is small wonder that students are often bored and dissatisfied with law school teaching.[40]

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34. *See* note 33 *supra* and accompanying text.

35. Naturally, the impact of law school experiences will vary with individual students. Hedegard, *supra* note 24, at 838. Most, however, find it a trying experience. *See, e.g.*, Note, *Anxiety and the First Semester of Law School,* 1968 WIS. L. REV. 1201.

36. *See* note 22 *supra* and accompanying text. Dean Allen comes close to romanticising painful elements in the process of learning. He quotes Samuel Johnson on learning Latin: "My master whipped me very well. Without that, Sir, I should have done nothing." F. ALLEN, *supra* note 3, at 74 (quoting J. WAIN, SAMUEL JOHNSON 24 (1974)). Quoting Ivan Illich, he writes "Man's consciously lived fragility, individuality, and relatedness make the experience of pain, sickness, and even death an integral part of his life." *Id.* at 78 n.27 (quoting I. ILLICH, TOWARD A HISTORY OF NEEDS 109 (1978)). Dean Allen disavows the more sado-masochistic implications of this line of thought. *Id.* at 68. He argues, however, that profound learning requires a pressure-charged environment. *Id.* at 73-74. Finally, he suggests that professors must steel themselves against inevitable indications of student distress if they are "to serve their important function" in legal education. *Id.* at 74; *see* note 23 *supra*.

37. Contrary to Dean Allen's conception of the intrepid student who makes his or her own educational experience, *see* note 32 *supra*, his attitudes on pain and learning (which came as close to anything in the book to learning theory) create a kind of approach to teaching where student feeling and involvement in the learning processes is most likely to be excluded. For reasons I shall state, this approach seems to me to be incomplete and unsound.

38. T. SHAFFER & R. REDMOUNT, *supra* note 2, at 9.

39. "[S]ixty to ninety percent of a typical large law class (and most are large) is lecture." *Id.* Primary utilization of lecture in law school teaching is widely, if not universally, deplored. *See, e.g.*, Strong, *The Pedagogic Training of Law Faculty,* 25 J. LEGAL EDUC. 226 (1973). Professors who feel guilt about the amount of lecturing time do try to mask their work with "questions and answers as mileposts in what is essentially a lecture." T. SHAFFER & R. REDMOUNT, *supra* note 2, at 176.

40. It is encouraging that a recent, broadly based study on American legal education has addressed improvement in the quality of teaching. LAWYER COMPETENCY, *supra* note 25, at 4.

Learning and growth are painful processes for law teachers too,[41] and I am afraid that Dean Allen's book will encourage professors to rationalize important issues of their own individual growth and to blame students for the pain they feel when aspects of their teaching appear to fail. Erection or reinforcement of attitude barriers between teacher and student will deprive most law teachers of any real opportunity to advance learning.

Except in the classes of an occasional Professor Kingsfield,[42] a working respect between teacher and students is essential for student participation. The teacher's function of dispersing information, or knowledge, seems to carry with it the highest degree of acceptance and approval. Particularly after the first year, it often becomes more difficult to get students to accept a teaching strategy based on student discussion. Students seem to feel that their powers of observation and reasoning have been fully developed and that they simply need knowledge which will be useful in passing the bar and practicing law. Under these circumstances the teacher may surrender and lecture (more common is the lecture punctuated by a few questions).[43] For the professor to overcome this problem of student attitude it is necessary for the professor to achieve acceptance for demands made to take students out of their passivity. This acceptance is most likely to come if students feel they can take the psychological risks of classroom interaction. If the teacher, by example and direction, establishes an atmosphere where the more intimate aspects of the students' personalities—their feelings, values, and commitments about the learning materials—will be respected, then free discussion important to the development of analytic learning will occur.[44] The problems are how to maintain this atmosphere while also maintaining a level of correctness or analytic probity about the material which the teacher feels is warranted, and how to maintain this atmosphere while also covering the particular

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There is still too great a tendency, however, to associate improvements in the quality of teaching with alternatives to the case method. *Id.* at 26. Because alternatives (variously termed problem method, simulation or clinical education) carry financial and other limitations, it is unlikely that case method teaching will ever be replaced on a wide scale. *See* Shreve, *Classroom Litigation in the First Semester of Law School—An Approach to Teaching Legal Method at Harvard,* 29 J. LEGAL EDUC. 95, 104-05 (1977); LAWYER COMPETENCY, *supra* note 25, at 22. As a basic matter, effective learning is more a matter of teaching attitude than pedagogical engineering.

41. *See* Redmount, *A Clinical View of Law Teaching,* 48 S. CAL. L. REV. 705, 717 (1975).

42. Kingsfield was a tyrannical law professor in John Osborn's *The Paper Chase,* a fictionalized narrative of student life at Harvard Law School. Kingsfields, however, are a dying breed. *See* text accompanying note 38 *supra.*

43. *See* note 39 *supra.*

44. Shreve, *supra* note 2, at 267.

agenda of topics and ideas which the teacher feels is important. Failure in the realization of these latter objectives will dissatisfy the teacher and many of the students as well.

Solutions to these problems come with difficulty and only through trial and error.[45] Student criticisms are inevitable and will often be insensitive and unduly harsh, for few students seem to realize their teachers are also undergoing a painful learning process. Yet, if one wishes to view legal education in Dean Allen's epic terms, these issues may actually represent "the greatest challenge facing American law schools."[46] We cannot afford to wait, perhaps forever, for the occurrence of favorable events outside the law school which will somehow increase student enthusiasm for learning. Dean Allen is right to urge renewed commitment to legal education, but it is the enthusiasm, involvement, and learning of law students that must "be contended for"[47] by law teachers.

How will improvements come about? Dean Allen has provided the answer in another context. The admirable capacity of many law professors to assimilate knowledge from other disciplines related to their fields of interest, what Dean Allen describes as "self-education,"[48] has significance for educational reform. Most law professors begin their teaching careers at least as ignorant of learning theory as they do of history, sociology, or economics. They can use the same capacity for self-education truly to become teachers.

Part of this self-education can come from consulting the wealth of findings and theories on learning in general[49] and learning as a law school phenomenon.[50] But for self-education to be a sufficiently congruent experience to provide real growth, each law teacher must address the particular strengths and needs of his or her own person-

45. Naturally, solutions will differ. Law teachers cannot be required to teach the same way or toward the same specific goals. What should be required is an informed and thoughtful agenda for growth in teaching. Self-examination is particularly warranted for those using the case method. Each teacher should think through the inevitable balances which must be struck in casebook teaching—for example, structure and control versus spontaneity; covering a great deal of ground versus covering a smaller amount in greater depth. Each teacher's standards must exceed his teaching product. Functions of course material selection, the planning and conducting of classes, and the preparation of examinations should be performed subject to a series of goals worked out by the teacher with sufficient thought and self-awareness that they can be articulated to others. These goals should themselves be subject to periodic revision by the teacher.

46. F. ALLEN, *supra* note 3, at 75.

47. *Id.* at vii.

48. *Id.* at 56.

49. For a review of the contributions of several important learning theorists which relates their work to law school processes, see T. SHAFFER & R. REDMOUNT, *supra* note 2, at 28-33.

50. *See* note 1 *supra*.

ality and working environment. Law student reactions provide important information for teacher self-evaluation. If, as Dean Allen suggests, the present era of unparalleled student candor about effects felt from the law school experience may be passing, we must utilize this considerable source of data while we can.